

# LIABILITY OF THE STATE AND PUBLIC AUTHORITIES IN ISRAEL AND SOUTH AFRICA

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## I. INTRODUCTION

Both the Israeli and the South African legal systems are classified as mixed legal systems, or mixed jurisdictions. In Israel, tort law was originally pure English common law, adopted by legislation and later developed judicially. In South Africa, the law of delict (tort) was originally Roman–Dutch but was later strongly influenced by the English common law. Under both systems, tort law is characterized by open-ended norms allowing extensive judicial development. This paper traces and compares the structural basis, methodology, policy, and trends of the judicial development of state and public-authority liability in the Israeli and South African jurisdictions.

The Israeli Civil Wrongs Ordinance (New Version) (CWO),<sup>1</sup> which is primarily a restatement of English common law rules, sets out a closed list of “civil wrongs.” The CWO includes two general torts—breach of statutory duty, and negligence—that serve as a basis for judicial development in accordance with societal needs and trends. In addition, more specific forms of liability are specified as well, forming specific torts reminiscent of the ancient writs of English law. Due to an explicit reference in the CWO, as well as the Anglo-American background of most Israeli judges and the English law orientation of academic syllabi, tort law in its formative years was mainly interpreted according to the principles of English law.<sup>2</sup> As in other common law systems, Israeli tort law serves not only as a source of remedies

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1. 5712–1968, 10 LSI 266 (Isr.) [hereinafter CWO]. This is a newer version of the British Mandatory Civil Wrong Ordinance, 1944, P.G. Supp. I No. 1380 p. 93 (Isr.) [hereinafter British Mandatory Civil Wrong Ordinance].

2. See Tamar Gidron, *Israel*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon V. Palmer ed., 2d ed. forthcoming 2012).

but also as a source of rights and interests.<sup>3</sup> Israel has no written constitution, but the enactment of a set of basic laws protecting certain fundamental rights in the early 1990s<sup>4</sup> has yielded significant impact on private law in general and tort law in particular.<sup>5</sup>

In South Africa, the law of delict is a product of Roman law that was incorporated into Dutch law and then transplanted to South Africa in the seventeenth century as Roman–Dutch law, which is essentially the common law of South Africa.<sup>6</sup> British rule, commencing in 1795, was interrupted in 1803 by a three-year period of Dutch rule and resumed in 1806. It introduced the heritage of the common law, which was imported through legislation and case law that increasingly followed English law.<sup>7</sup> The growing influence of English law stemmed from the appointment of English-speaking judges, the British legal education of both judges and lawyers, and the subservience to the Privy Council.<sup>8</sup> Hence, sources of liability are primarily the negligence-based Aquilian Action and the *actio iniuriarum*, which imposes liability for intentional impairment of personality rights.

More recently, the “Bill of Rights” chapter in the South African Constitution of 1996<sup>9</sup> provided an important impetus to develop tort law. As in Israel, the protection of fundamental rights has affected state and public liability not so much by giving rise to direct constitutional causes of action, but rather indirectly, resulting in an expanded protection of human rights within the

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3. GAD TEDESCHI, THE LAW OF CIVIL WRONGS 12-116 (Aharon Barak, Mishael Cheshin, & Izhak Englard eds., 1969).

4. The first and most important one is the Basic Law: Human Dignity and Liberty, 5752–1992, 1391 LSI 150 (1991–1992) (Isr.).

5. Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9 (1992) (Isr.).

6. See Reinhard Zimmermann & Daniel Visser, *Introduction: South African Law as a Mixed Legal System*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 9-12 (Reinhard Zimmermann & Daniel Visser eds., 1996); and Annél van Aswegen, *Aquilian Liability I (Nineteenth Century)*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 559-564 (Reinhard Zimmermann & Daniel Visser eds., 1996).

7. See Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 46-51 (Reinhard Zimmermann & Daniel Visser eds., 1996).

8. See Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 57 (Reinhard Zimmermann & Daniel Visser eds., 1996).

9. See CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ch. II.

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common law framework of tort liability.

The tort of negligence in Israeli law and the Aquilian action in South Africa both provide a broad basis for negligence-based liability and considerable flexibility for development of the law. This paper examines the specific factors that impact the development of state- and public-authority liability. We demonstrate that in both systems, this development was strongly influenced by (1) constitutional values, (2) the courts' recognition of the need for expanded protection of fundamental human rights, (3) the multicultural nature of the societies, (4) problems of crime and security, and (5) economic considerations. The analysis highlights the activist role of the courts in both countries in developing tort law. In both countries, the courts demonstrate a strong tendency to expand the liability of the state and public authorities for negligent behavior. However, despite shared characteristics, important differences in outcomes exist reflecting social, cultural, and economic differences between the two societies.

The development of state and public-authority liability in both jurisdictions has also been influenced by certain worldwide trends. In most countries, the range of public services has widened considerably, and the culture has also changed, contributing to a more frequent view of members of the public as "clients" or "customers" whose needs must be met.<sup>10</sup> Disappointed customers of a public service feel justified in complaining if the service provided or procured by the state on their behalf is deficient and readily claim compensation for injury or loss. The liability of the state or a public authority requires that the courts strike a balance between protecting the interests of the citizen and preserving the ability of the administration to function in the public interest. Generally the trend has been toward what Basil Markesinis has called a "consumerist vision of public liability" under which "compensating the damages suffered by citizens because of administrative activities can never be a wrong use of public money."<sup>11</sup>

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10. See TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE xvii (Duncan Fairgriew, Mads Andenas, & John Bell eds., British Inst. of Int'l & Comp. Law 2002).

11. See *id.* at xviii.

## II. ISRAEL

### A. THE MAIN FEATURES OF ISRAELI TORT LAW

The Israeli legal system has been classified as a mixed jurisdiction.<sup>12</sup> It reflects a unique mixture of civil law and common law, legislation and case law, British heritage, continental legal concepts, and fresh interpretations by the Israeli Supreme Court. As a combination of old and new, of global and national, it is indeed a mixed legal system both in methodology and context.<sup>13</sup> This background highlights the unique nature of Israeli tort law. Tort remains the only branch of Israeli private law that, over the years, has retained any of the vestiges of its original English common law origin. However, in contemporary Israel, tort law has taken its own turn. Although the basic principles underlying most of Israeli tort law are still based in English common law—as incorporated into Israeli legislation—the interpretation and implementation is purely Israeli, and the differences in outcomes are thus quite significant.

Israeli tort law is statutory law. The British Mandatory legislator copied the English common law and framed it in a statutory form, the Civil Wrongs Ordinance of 1947, which was later reformulated in a more modern fashion, becoming the CWO.<sup>14</sup> Over the years, the Israeli Legislator, influenced by society's moral values and current economic and social conditions, has introduced changes into the original English set of rules, both through new acts and through the addition of totally new sources of liability. The tort regime in Israel is, therefore, a "law of torts" rather than a regime of "tort law." It is comprised primarily of statutory law that is heavily promoted and advanced by a very active judiciary, and it reflects a trend of ever-growing liability. The codification of Israeli private law, which has now reached its final stages,<sup>15</sup> will amend the current Israeli tort law and will help to integrate the English common law-based tort law with the other branches of private law, most of which are based on civil law traditions and rules. Thus, the codification should introduce

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12. *Gidron, supra* note 2.

13. Israel Gilead, *Israel, in* INTERNATIONAL ENCYCLOPEDIA OF LAWS: TORT 19–21 (2003).

14. TEDESCHI, *supra* note 3, at 33–44; GAD TEDESCHI & ABRAHAM ROSENTHAL, CIVIL WRONGS ORDINANCE: IN THE LIGHT OF THE HISTORY OF ITS PREPARATION AND AMENDMENTS (Magnes Press 1960) (Isr.).

15. Draft Bill Civil Codex, 2011 HH 595.

uniformity and consistency to Israeli private law.<sup>16</sup>

### **B. STATE AND STATUTORY AUTHORITIES LIABILITY IN TORT: STATUTORY FRAMEWORK**

The former Chief Justice of the Israeli Supreme Court once declared the following: “The finest hour of Israeli law was when the special immunity of the State was abolished.”<sup>17</sup> The original Civil Wrongs Ordinance reflected the general principle that “the king can do no wrong.”<sup>18</sup> However, the principle was rescinded by special legislation in the Civil Wrongs (Liability of the State) Law of 1952, which stated explicitly that state liability in tort is equivalent to the liability of any other corporate body.<sup>19</sup> The only exceptions relate to liability for damage caused by operations in war<sup>20</sup> and damage caused by a non-negligent act within the scope of lawful authority.<sup>21</sup> The equality rule, set by the Liability of the State Statute, also applies to public authorities, such as municipalities and local councils, as well as corporations serving government functions originally within the power of the state.

In addition to the explicit immunities granted by the State Liability Law, the CWO, following a long academic debate, was amended during the last decade. It now grants immunity, with only a few exceptions, to civil servants, including state organs, for acts performed in the course of government duty and in a public capacity.<sup>22</sup> This immunity, however, does not apply to the state itself.<sup>23</sup> In special cases, when the civil servant gravely deviates from the proper public norms, the state or public authority is entitled to indemnification.<sup>24</sup> The CWO also grants general immunity from liability for an act performed within the scope of lawful authority, unless the act constitutes negligence.<sup>25</sup> It also grants judicial immunity,<sup>26</sup> which has sparked intense debate

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16. Gilead, *supra* note 13, at 24–28.

17. *See* former Chief Justice Barak holding in CA 243/83 Municipality of Jerusalem v. Gordon, [1985] 39(1) PD 113, 134 (Isr.).

18. § 4 British Mandatory Civil Wrong Ordinance, *supra* note 1.

19. § 2 Civil Wrongs (Liability of the State) Law, 1968, SH No. 109 p. 339 [hereinafter Liability of the State Statute].

20. *See id.* § 5.

21. *See id.* § 3.

22. *See* § 7A-7C British Mandatory Civil Wrong Ordinance, *supra* note 1.

23. *See id.* § 7A(b).

24. *See id.* § 7F.

25. *See id.* § 6.

26. *See id.* § 8.

during the last decade regarding the propriety of holding the state liable for the negligence of its justices. The various opinions on this delicate issue will be discussed later. The Liability of the State Statute also moved to abolish the highly contentious immunity of the state from liability in defamation cases and the restricted vicarious liability in assault and unlawful imprisonment.

### C. EXPANDING NEGLIGENCE LIABILITY—FRIENDLY STATUTES AND EAGER JUDICIARY

#### 1. THE STATUTORY TORT OF NEGLIGENCE

##### a. History and Origin

Negligence, the most popular source of liability in Israeli tort law, was imported into the CWO<sup>27</sup> straight from the British House of Lords. Its wording faithfully reflects Lord Aitkin's opinion in the monumental judgment in *Donoghue*.<sup>28</sup> Since its reception into the CWO and over the past four decades, negligence as a concept has developed tremendously in Israel. Initially, Israeli judges were careful to follow the House of Lords' example,<sup>29</sup> sometimes even ignoring the significant, explicit changes the Mandatory legislator made in the Israeli "local version" of the British common law, to avoid problems that were left unresolved by the House of Lords in England.

Subsequently, when the bond with English tort law was broken,<sup>30</sup> the courts, in a very unique and inventive Israeli way, quickly adapted to their new independence. They demonstrated fresh interpretative reasoning, which led to increased detachment from English tradition and case law. This independent Israeli transition, which subsequently led to the almost strict liability of the state in negligence, is extremely noteworthy considering that the language, form, style, and other characteristics of the original English common law tort of negligence, as phrased by the British legislature, have never been changed, refined, or "modernized"

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27. See §§ 35-36 British Mandatory Civil Wrong Ordinance, *supra* note 1.

28. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

29. The CWO explicitly provided that the Ordinance should be interpreted and developed in line with English law.

30. *Foundations of Law, 5740-1980*, S.H. No. 978 p. 163 (Isr.) [hereinafter *Foundations of Law*].

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since they were introduced into the original CWO.<sup>31</sup> Even with the transformation into the new version in Hebrew, the Israeli legislature never touched the core of this major source of liability. Hence, the current situation and image of the Israeli tort of negligence is solely the product of the Israeli courts' interpretation.

**b. The Open-Ended Elements of Liability in Negligence**

Negligence liability under the CWO, as interpreted by the courts, is based on three elements: (1) conduct that falls below a reasonable standard; (2) a duty of care; and (3) a factual and legal causal connection between the negligent act and the loss.<sup>32</sup> Given the broad nature of these elements, especially with regard to the duty of care, negligence has become the primary source for the development of Israeli tort law, through an increasing recognition of new rights and new types of damage.<sup>33</sup> The mechanisms adopted by Israeli case law for resolving the problem posed by the open-ended nature of the liability tests reflect a delicate balancing analysis aimed at optimally harmonizing the need for progress, on the one hand, and the need to control the undesirable expansion of negligence liability, on the other.

The "duty of care" requirement is the primary "gatekeeper" in negligence actions, in general, and in actions against the state and public authorities, in particular. The gates are opened and closed based on policy considerations. These policy considerations, employed by most common law-based tort regimes, operate in Israel through two case law models, both anchored in well-known English precedents: *Anns*<sup>34</sup> and *Caparo*.<sup>35</sup> The gist of the two cases, according to their combined implementation in Israeli negligence law, is quite similar: assuming the defendant *could have* foreseen the damage, the

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31. §§ 35-36 British Mandatory Civil Wrong Ordinance, *supra* note 1 as compared to the original version §§ 50(1) & 50 (2) British Mandatory Civil Wrong Ordinance 1944 (amended 1947).

32. 1 ISRAEL GILEAD, TORT LAW—THE LIMITS OF LIABILITY 417–24 (Nevo 2012). CA 2625/02 Nachum v. Dorenbaum, [2004] 58(3) PD 385 (Isr.).

33. See primarily the judgments in CA 243/83 Jerusalem v. Gordon, [1985] 39(1) PD 113 (Isr.). See also CA 2781/93 Daaka v. Carmel Med. Ctr., [1999] 53(4) PD 526 (Isr.) (recognizing a patient's right to informed consent (when no casual connection between the lack of informed consent and the bodily injury incurred was established) as a basis for granting compensation in negligence).

34. *Anns v. Merton London Borough Council*, [1978] A.C. 72 (Eng.).

35. *Caparo Indus. Plc. v. Dickman*, [1990] 2 A.C. 605 (Eng.).

court, using the *Anns* model, will ask itself whether, indeed, he *should have* foreseen this risk and avoided it. This “should have” test<sup>36</sup> thus examines normative foreseeability and is based on physical–technical foreseeability, which examines the preceding “could have” test. Normative foreseeability is, of course, narrower than technical foreseeability and is aimed at limiting liability in negligence by ruling out recognition of the duty of care.<sup>37</sup>

The second formula used by the courts in addressing the duty of care is based on the well-known English *Caparo* case,<sup>38</sup> which employs a three-stage test: (1) foreseeability; (2) proximity (“neighborhood”); and (3) “fair, just, and reasonable” considerations.<sup>39</sup> In both models, the courts in Israel consider theoretical and practical tort law considerations including the type of relationship, the type of harm, and the identity of the parties, along with much wider considerations that are not necessarily typical of tort law, such as the well-known “floodgate” and “slippery-slope” consequences.

This nutshell survey clearly shows that in regards to liability of the state and public officials, the public identity of the tortfeasor dictates special considerations, and the decision regarding whether a duty of care exists depends on finding an optimal balance between the various considerations implicated.

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36. The test consists of two sub-tests. First, the court asks itself whether the class of defendants to which the specific *defendant* belongs owes a duty of care to the class of *plaintiffs* to which the specific plaintiff belongs for damages of the type incurred in the specific circumstances of the case. The focus here is on generalization. If the answer is affirmative, then the court asks these same four questions again but now the focus is on the *specific* defendant and the *specific* plaintiff, in the *specific* circumstances regarding the *specific* loss. This is the duty-in-fact, which again narrows the boundaries of liability. See CA 243/83 Jerusalem v. Gordon, [1985] 39(1) PD 113, 134 (Isr.); 1 GILEAD, *supra* note 32, at 440–49.

37. CA 145/80 Vaknin v. Beit Shemesh Local Council, [1980] 37(1) PD 113 (Isr.). The main problem with this model—which mostly concerns new factual situations—is the question of where the border lies between the two duties and how the court formulates, in each case, the notional duty when, from a conceptual perspective, its decision binds courts in the future in every case with similar factual circumstances.

38. *Caparo Indus. Plc.*, [1990] 2 A.C. 605.

39. CA 915/91 State of Israel v. Levi, [1994] 48(3) PD 45 (Isr.). The *Levi* holding has been criticized in Israel, primarily for its distinction between tort and non-tort considerations, on the one hand, and the mixture of general tort tests in questioning the proximity between the parties, on the other hand. See Tamar Gidron, *Liability of the Supervisor of Insurance Companies to the collapse of an insurance company*, 3 HAMISHPAT L. REV. 133 (1996) (Isr.); 1 GILEAD, *supra* note 32, at 682–692.

## 2. THE ROLE OF THE COURTS IN EXPANDING LIABILITY IN NEGLIGENCE LAW UNDER ISRAELI COMMON LAW

Although tort law was historically the first branch of Israeli private law to be codified, and although tort law is still basically statutory law and liability in tort is always accommodated in one of the (now many) tort statutes, one cannot exaggerate the role of the courts in formatting, promoting, developing, and advancing Israeli tort law. Thus, Israeli tort law is a unique example of the interplay between statutory law, which was British in origin, more modern Israeli legislation, and judicial precedents, which also stemmed from Britain but later became Israeli in content and nature, due to an explicit change of the law.<sup>40</sup> Indeed, the subject matter of this paper, public liability in negligence, aptly exemplifies these unique phenomena. While the British conservative, narrow approach typically represents the dominant feature of decisions in the second half of the twentieth century, the current approach of the leading Israeli Supreme Court decisions may be featured as much more liberal, outreaching, and plaintiff friendly, as we shall shortly illustrate.

As the Israeli legal system has adopted the common law *stare decisis* principle<sup>41</sup> and “judicial precedents” are specifically recognized as a source of Israeli law immediately following statutory law,<sup>42</sup> courts’ decisions, especially those of the Israeli Supreme Court, are the real vehicle by which liability in negligence in Israel is being shaped and (over)grown.<sup>43</sup> Israeli judges use both common and civil law methods to “interpret” and “create” the law. With regard to public liability, this interpretation and creation has seemingly gone too far.

### D. CONSTITUTIONAL IMPACT ON TORT LAW

Although Israel lacks a formal constitution, Israeli law has

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40. Foundations of Law, *supra* note 30.

41. § 20 Basic Law: The Judiciary, 1984, S.H. 1110.

42. § 1 Foundations of Law, *supra* note 30.

43. On the extensive use of comparative law, see Yoram Shachar, Ron Harris & Miron Gross, *Citation Practices of the Supreme Court: Quantitative Analyses*, 27 MISHPATIM 119 (1996) (Isr.). The research is based on data gathered by the authors between 1984 and 1994. See also Justice Rubinstein’s holding in LCA 4693/05, Carmel Med. Cent. v. Malul (Aug. 29, 2010), Nevo Legal Database (by subscription) (Isr.). AHARON BARAK, INTERPRETATION IN LAW: THE GENERAL THEORY 491–92 (1992) (Isr.). LCA 1272/05, Carmi v. Sabag (Dec. 2, 2007), Nevo Legal Database (by subscription) (Isr.) on the priority of English law in Israeli tort law.

always sought to protect human rights, even prior to the enactment in the early 1990s of the Basic Law: Human Dignity and Liberty, and the other subsequent Basic Laws. Following intense academic discussion, and notwithstanding the diverse opinions regarding the effect of the Basic Laws on private law in general and on tort law in particular, the accepted wisdom is that the Basic Laws do not constitute a new source of tort liability, through constitutional claims or the tort of breach of statutory duty. The Basic Laws simply do not apply directly to private litigants. Their constitutional impact mostly speaks to a higher hierarchical standing given to constitutionally protected interests when balanced with competing interests. Moreover, the Basic Laws provide private law with values and concepts such as “reasonableness,” “good faith,” and “public interest,” which the courts apply not only to contracts and property claims but also to tort claims, especially in negligence. The patient’s right to be fully informed regarding his medical situation and treatment,<sup>44</sup> which was recognized through the tort of negligence, the consumer’s right to drink milk free of additives unknown to him,<sup>45</sup> and the right of a business corporation to full and fair information regarding its right to obtain a business license were all part of the winds of change created by the Basic Laws.<sup>46</sup>

The impact of the Basic Laws on the liability of the state and public authorities may be traced mainly with regard to the issue of balancing between private interests protected by the Basic Laws and conflicting duties and interests of public authorities. The Israeli Supreme Court had stated more than once that by protecting public interests, the interests of the individuals that comprise the “public” are being protected as well. Thus, the constitutionally affected balancing process when applied on public authorities’ liability in negligence should take into account

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44. CA 2781/93 Daaka v. Carmel Med. Ctr., [1999] 53(4) PD 526 (Isr.).

45. CA 1338/97 Tnuva-Cent. Corp. for the Mktg. of Agric. Prod. in State of Israel v. Tufik, [2003] 57(4) PD 673 (Isr.). 43 CA 1081/00 Avnaal Distribution Ltd. v. State of Israel, [2005] 59(5) PD 193 (Isr.).

46. On Basic Laws and private law and Basic Laws and tort law see Gidron, *supra* note 2. Frances Raday, *Privatizing Human Rights and the Abuse of Power*, 13 CAN J. L. & JURIS 103 (2000). Chief Justice Barak holding in CA 294/91 Chevra Kadisha Kastenbun v. Kastenbaum Chevra Kadisha, [1992] 46(2) PD 464 (Isr.). Daphne B. Erez & Israel Gilead, *Human Rights in the Laws of Contract and Tort: The Silent Revolution*, 8 KIRYAT HAMISHPAT 11 (2009) (Isr.); Israel Gilead, *Tort Law in Aharon Barak’s Adjudication*, in THE JUDICIAL LEGACY OF AHARON BARAK 487 (Celia W. Fassberg, Barak Medina & Eyal Zamir eds., 2009) (Isr.).

both the constitutionally protected rights of the individuals as such and the (usually opposing) collective private interests.<sup>47</sup> Interestingly enough, these questions have not received proper treatment in Israeli case law, a fact that may be attributed to the overall trend of expansion of liability in negligence, as will be detailed below.

### E. DUTY OF CARE—POLICY CONSIDERATIONS

The special considerations applied by the Israeli courts in addressing the duty of care of public defendants<sup>48</sup> are similar to those customarily found in other legal systems<sup>49</sup> and, thus, will be only briefly reviewed here. The first set of considerations focuses on the fear of a floodgate effect that, if it materializes, will affect the ability of both the legal system and the public administration to function and might cause a general increase in monetary liability.

A second set of considerations focuses on the potentially destructive influence of imposing liability on public authorities, particularly in relation to their function as governmental authorities responsible for broad planning and budgetary measures. The principal concern here is to avoid substitution of professional authorities' considerations by an unprofessional criticism of the judiciary. An additional concern is that such judicial overruling may cause distortion of the public authorities' discretion in the future. This group of considerations, in essence, reflects a general concern over the intermixing of powers, with a consequent blurring of the boundaries between the responsibilities of state authorities.

A third group of considerations, derived from the previous one, relates to the manner in which negligence liability may have

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47. Gilead, *supra* note 13, at 24–25, 94,106.

48. Israel Gilead, *Tort Liability of Public Authorities and Public Officials (Part I)*, 2 MISHPAT UMIMSHAL 339 (1995) (Isr.); Israel Gilead, *Tort Liability of Public Authorities and Public Officials (Part II)*, 3 MISHPAT UMIMSHAL 55 (1995) (Isr.); CA 10078/03 Shatil v. Mekorot Water Co. Ltd. (Mar. 19, 2007), Nevo Legal Database (by subscription) (Isr.); CA 915/91 State of Israel v. Levi, [1994] 48(3) PD 45 (Isr.); CA 2906/01 Haifa v. Menora Ins. Co. (May 25, 2006), Nevo Legal Database (by subscription) (Isr.).

49. Robert Rebhahn, *Public Liability in Comparison—England, France, Germany*, in EUROPEAN TORT LAW 2005 68 (Helmut Koziol & Barbara C. Steininger eds., 2006). See also CHERIE BOOTH & DANIEL SQUIRES, *THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES* (Oxford Univ. Press 2006).

a negative impact not on the public authority, but on its employees, the public servants themselves.<sup>50</sup> Principally, the concern is that public officials, who in the course of exercising their duties must select between alternative professional choices, will prefer options that might not be optimal purely on the basis of the relative risk of tort liability associated with each alternative should their decision be deemed negligent. In addition, concerns have been raised that the threat of negligence liability may decrease public officials' work motivation and deter competent people from taking up public office.<sup>51</sup> Of course, the importance of these considerations varies according to the liability regime applicable to the legal system within which they operate: in a legal regime in which public officials are directly liable for their negligence, along with their employers, the strength of these considerations is much greater than in a legal regime in which it is only the state employer that is vicariously liable for its employees' negligence.

Additional reasons for denying liability relate to the existence of an alternative remedy, be it administrative or constitutional (such as appeals to the High Court of Justice), that is usually available to the plaintiff. Moreover, some very important ethical considerations (sometimes combined with economic considerations) exist for denying such liability and the value choice it may reflect.<sup>52</sup> When dealing with liability of specific public servants, such as members of the judiciary, further unique considerations apply.<sup>53</sup> Broadly speaking, the more complex and delicate the public "administrations" range of tasks and areas of authority, the greater the need to adapt individual consideration for each public institution and its sub-areas of activity.

In response to this set of considerations favoring a lenient approach, Israeli courts have adopted strong counter-considerations leading to imposition of liability. First and foremost among these is the inability to trace a logical distinction between a plaintiff whose loss was the outcome of an individual tortfeasor's negligence and a plaintiff whose loss was caused by a "public" tortfeasor. This relates, of course, to the equally well-

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50. 2 GILEAD, *supra* note 32, at 1052-54.

51. *Id.* at 1049-52.

52. Gilead, *supra* note 13, at 95.

53. DAPHNA AVNIELI, IMMUNITY OF PUBLIC OFFICIALS (2001) (Isr.).

known and commonly applied commitment to uniformity and equality. Both of these considerations are general rather than specific to the unique nature of the public tortfeasors under examination.

Apart from these, particularly noteworthy is a consideration of the size, complexity of activities, and the potential for human error associated with public entities whose operations entail some measure of risk. Based on this consideration, the general public, which benefits from the public service while bearing the costs of its ongoing activities, must bear both the normal costs of this public system *and* the cost of any injurious errors that it generates. It would certainly be unjust to impose the price of error on the victim.

Ultimately, in assessing negligence liability in the public service, Israeli courts also confront broader policy considerations, such as public versus private obligations, individual as opposed to collective justice, and corrective as opposed to distributive justice. To these special considerations, which focus on the unique nature of public defendants, we must add further complexities stemming from the form and nature of public defendants' typical actions and activities. The public servants' negligence often takes the form of an omission, rather than a commission. The harm caused is indirect, sometimes relational, rather than direct; and in the bulk of cases, the negligent act involves a lack of supervision and oversight over others and the *failure to prevent* negligence on the part of others rather than the commission of a direct negligent act.

The types of loss often caused by public defendants in negligence present an additional dilemma. Beyond the obvious losses such as physical loss to person and property, a significant number of negligence cases produce what has come to be known as pure economic loss, a type of loss disfavored by many legal systems. Pure (non-parasitic) psychological harm, breach of the right to autonomy, and other forms of insubstantial loss are typical as well. Together, all these distinctive features and considerations make the liability of public authorities in negligence a particularly complex issue.

#### **F. CURRENT CASE LAW: EXPANDED LIABILITY IN STATE AND PUBLIC AUTHORITIES' NEGLIGENCE**

As mentioned above, the "duty of care" element in Israeli

negligence law is construed in a liberal and flexible manner that, in most cases, leads to expanded liability, subject, of course, to the immunities granted in both the CWO and the Liability of the State Statute.<sup>54</sup> This is the case especially when the defendant has caused physical harm to person and property. In such cases, when the court opts to refrain from imposing liability, it seldom declares that “no duty of care has been established.”<sup>55</sup> It is much easier and more elegant to hold either that the specific defendant was not negligent (since the standard of care may be lowered as the court sees fit) or that the causal connection is problematic, rather than to find that there is “no duty of care” in the circumstances of the case. Case law does not reveal any special rules or different norms in this regard when dealing with public defendants charged with harm of a physical nature. The special policy considerations that dictate a different hierarchy of norms and preferences are not usually called into action in such cases. The “equality rule,” laid by the Liability of the State Statute, is seen here at its best.<sup>56</sup>

The same holds true in cases where public negligence occurs in situations that do not reflect governmental capacity. In such cases, when the public authorities’ actions are the equivalent of private action, courts hold the public authorities liable. In fact, this is the default rule under such circumstances. Thus, Israeli courts impose liability in cases involving medical negligence in a public medical facility,<sup>57</sup> public schools,<sup>58</sup> road accidents,<sup>59</sup>

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54. Legislation has constantly expanded the immunity granted to the state for acts of war. See Amendments to § 2 Liability of the State Statute, *supra* note 19.

55. See, e.g., LCA 5277/08 Estate of Amir Alichshvilli v. State of Israel (July 28, 2009), Nevo Legal Database (by subscription) (Isr.). The Israeli Supreme Court decided that there was no negligence on the part of the police. Thus the State was not liable for the death of the child that was killed by his father. See also CA 9656/08 State of Israel v. Saidi (Dec. 15, 2011), Nevo Legal Database (by subscription) (Isr.). The State was not negligent in issuing working permits to the plaintiffs.

56. For a typical action against the police for failing to prevent a father from killing his own child in the presence of police officers, see LCA 5277/08 The Estate of Amir Alichshvilli v. State of Israel (July 28, 2009), Nevo Legal Database (by subscription) (Isr.). Compare to CC (Jer.) 7191/05 Boxer Beer Israel Ltd. v. Ministry of Trade, Industry & Labor (Jan. 14, 2009), Nevo Legal Database (by subscription) (Isr.). There, the court decided that the State had not acted negligently. *Id.*

57. CA 9063/03 John Doe v. Hadassah Med. Org. 60(1) PD 556 [2005] (Isr.).

58. CA 3699-10-09 State of Israel v. Shoval (Feb. 20, 2011), Nevo Legal Database (by subscription) (Isr.) (a child jumped over a school fence); CC 5828/06 Amasha v. Isifya Local Council (Jan. 25, 2011), Nevo Legal Database (by subscription) (Isr.) (the plaintiff was burned as a result of a fire started on the defendant’s premises).

59. CC (TA) 1714/04 The Estate of Naim v. Izhar (Nov. 18, 2009), Nevo Legal

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possession of property,<sup>60</sup> and unsafe workplaces.<sup>61</sup> The constant “meager” definition of “war action,” which provides statutory immunity from liability in negligence,<sup>62</sup> can also be explained along these lines and almost routinely leads to imposing liability.

On the other end of the spectrum, when a public authority exercises statutory powers where there is no corresponding private activity, Israeli case law is less decisive and is mostly characterized by pendulum-like shifts. In the *Gordon*<sup>63</sup> case, a cornerstone of negligence law in Israel, the Israeli Supreme Court, without hesitation, imposed liability on the Jerusalem Municipality for damage caused by its negligent recording of the defendant’s car registration details, which caused the owner to be detained by the police for unpaid traffic fines and suffer a harm that the court defined as “pure harassment.” In so doing, the Supreme Court both created a new tort, “negligent prosecution,”<sup>64</sup> within the so-called “closed” CWO list of torts and allowed compensation for what was at the time a very new type of loss. The decision clearly shows a very plaintiff-friendly tendency and an unambiguous preference for corrective justice. The proximity, or neighborhood, relationship between the public defendant and the plaintiff in *Gordon* was analyzed in the same manner that the Supreme Court analyzes the relationship between customers and the private suppliers of goods or services.

The drastic difference between the radical, expansive holding in the *Gordon* decision and the rhetoric, perception, hierarchy of policy considerations, and duty of care models in the *Levi*<sup>65</sup>

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Database (by subscription) (Isr.).

60. CA 862/80 Hadera Municipality v. Zohar, [1983] 37(3) PD 757 (Isr.); CA 324/82 Beni-Brak Municipality v. Rotberd, [1991] 45(4) PD 102 (Isr.); CA 343/74 Grovner v. Haifa Municipality, [1975] 30(1) PD 141 (Isr.).

61. CA 377/8 Naim v. State of Israel Ministry of Education, [1988] 42(1) PD 153 (Isr.); CA 684/76 Eyal v. Fuksman, [1977] 31 (3) PD 349 (Isr.).

62. CC (TA) 8589/06 Masabach v. State of Israel (May 3, 2011), Nevo Legal Database (by subscription) (Isr.); CA 8384/05 Salem v. State of Israel (Oct. 7, 2008), Nevo Legal Database (by subscription) (Isr.); CA 6970/99 Samara v. State of Israel, [2002] 56(6) PD 185 (Isr.) (the Court rejected the plaintiff negligence claim). For comparison see LCA 5203/08 State of Israel v. Agbaria (Sept. 24, 2009), Nevo Legal Database (by subscription) (Isr.) and CA 3889/00 Lerner v. State of Israel—The Ministry of Defense, [2002] 56(4) PD 304 (Isr.). In both cases the court held that the State was not negligent.

63. CA 243/83 Jerusalem v. Gordon, [1985] 39(1) PD 113, 134 (Isr.).

64. § 60 British Mandatory Civil Wrong Ordinance, *supra* note 1 (requiring malice).

65. CA 915/91 State of Israel v. Levi, [1994] 48(3) PD 45 (Isr.).

decision is notable. These two cases represent the two extreme sides of the scale on which the balancing point between the pro and con considerations regarding public authorities' liability in negligence is determined. In *Levi*, the Supreme Court, under the presidency of Chief Justice Shamgar, was asked to decide whether the Supervisor of Insurance Companies in Israel (public) was liable for economic loss caused to the holder of an insurance policy by the collapse of the insurance company.<sup>66</sup>

The Supreme Court adopted a completely opposite approach from the one adopted by the *Gordon* court under Chief Justice Barak, preferring a much more restrictive approach that culminated in the well-known "discretionary exclusionary" rule.<sup>67</sup> According to the discretionary rule, a public authority should be exempted from tort liability when the damage is caused by governmental activity characterized by broad discretion. Such actions and circumstances, which usually result "only" in pure economic loss, would necessitate balancing between various complex economic, political, and social considerations.<sup>68</sup> This complexity, coupled with the fact that these situations are so rare and unique that the court usually lacks the guidance of previous reference cases to help make a coherent and logical decision, led to Chief Justice Shamgar's exclusion of negligence in discretionary activities from tort liability. Such cases, *Levi* determined, are better left outside the realm of tort law. The professional public authority should be the sole decision-maker and should be relieved from the specter of liability.

Today, almost fifteen years after *Levi*, Israeli courts have set its ruling aside almost entirely and manifested a clear and unquestioned tendency to expand the liability of public defendants. Following the general trend of expanding the duty of care in negligence cases, in cases specifically involving public defendants, liability is imposed and a duty of care is affirmed no matter what form of activity is in question.<sup>69</sup> Negligent action, omission, policing, prosecution, taxation, licensing, inspection,

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66. CA 915/91 State of Israel v. Levi, [1994] 48(3) PD 45 (Isr.).

67. *Id.* In this case, liability was negated both in negligence as well as in breach of statutory duty, given the extent of discretion involved.

68. 2 GILEAD, *supra* note 32, at 1101–07.

69. See, e.g., CA 1068/05, Jerusalem v. Mimuni (Dec. 14, 2006), Nevo Legal Database (by subscription) (Isr.). The Jerusalem Municipality failed to license a ranch and was held liable for the plaintiff's losses caused while riding one of the ranch's horses. *Id.*

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issuance of an official opinion, and even judicial rulings have almost routinely given rise to liability.<sup>70</sup>

Moreover, as neither the CWO nor the State Liability Act include reservations regarding the type, form, and nature of the loss caused by negligent behavior, Israeli courts feel free to impose liability even in cases in which other legal systems question the legal wisdom of allowing liability, due to the type of loss involved. Thus, Israel recognizes duty of care in most cases of pure economic loss, although sometimes, mostly in cases of misrepresentation and misstatements, liability is subject to some restrictive tests<sup>71</sup> similar to those applied in England<sup>72</sup> and the United States.<sup>73</sup> The same is true in cases of a non-parasitic, non-pecuniary loss, especially purely mental and emotional loss.<sup>74</sup> Israeli courts set aside most reservations in other legal systems regarding pure economic loss. The only type of loss that Israeli tort law almost entirely rejects is pure relational economic loss, which is also rejected by most legal systems that refuse to compensate plaintiffs for pure economic loss. This overall Israeli trend is, of course, true in cases of public defendants as well.

In cases of misstatements or misrepresentations, or cases in which the loss was caused by a negligently issued license,<sup>75</sup> liability is subject to some restrictive tests designed to ascertain whether a special relationship existed between plaintiff and defendant, whether the plaintiff relied, and whether the defendant had a special reason to foresee the harm he caused.<sup>76</sup> In other pure economic loss cases—with the exception of cases involving pure relational economic loss as described above—the courts, following the lead of the Supreme Court, tend to impose liability, ignoring the problematic nature of the loss and instead focusing only on the “public identity” of the defendant.<sup>77</sup>

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70. For detailed examples, see 2 GILEAD, *supra* note 32, at 1113–37.

71. Motion 106/54 Weinstein v. Kadima Water Supply Coop. Soc’y Ltd., [1954] 8 PD 1317 (Isr.).

72. Hedley Byrne Co. v. Heller [1964] A.C. 465 (H.L.); *Caparo Indus. Plc.*, [1990] 2 A.C. 605.

73. *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931). See VERNON VALENTINE PALMER & MAURO BUSSANI, *PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW* (Routledge-Cavendish 2009).

74. LCA 444/87 Elsocha v. Estate of Dachan, [1990] 44(3) PD 397 (Isr.).

75. These cases mainly involve Planning and Construction Committees.

76. CA 119/86 Keny Houses Ltd. v. Netayna Municipality Local Planning & Constr. Comm., [1992] 46(5) PD 727 (Isr.).

77. CA 3464/05 Paz Oil Co. Ltd. v. State of Israel (July 12, 2006), Nevo Legal

The following discussion of the specific liability trends regarding particular state entities will demonstrate the current tendencies in Israeli case law.

### 1. JUDICIARY LIABILITY

Due to an ongoing judicial-academic debate focusing on judges' immunity on the one hand and the potential liability of the state on the other, the legal situation regarding the susceptibility of the judiciary and the state to courtroom negligence is far from clear. Originally, the legislature expressly affirmed the personal immunity of judges in the CWO. This immunity is still in force. It was initially interpreted as merely procedural in nature, exposing the state to vicarious liability in addition to potential direct liability.

In the past, the legal situation of judicial liability seemed settled and obvious. Hardly any attempts were made to commence negligence proceedings against justices or the state. Lately, however, the nature and scope of both the state's and its justices' liability has been questioned. A growing number of judgments have challenged the judiciary's full immunity and are now willing to impose personal liability when a judge is found to have acted in "gross negligence." Over the last few years, the willingness of the courts to impose such personal liability on the judiciary has attracted a growing number of claims against judges. This poses a growing danger for the state as well.<sup>78</sup>

Despite the lack of Supreme Court precedent, the increase in judiciary negligence cases, the explicit willingness of the courts to impose personal and vicarious liability in such cases, and the heated academic debate on an issue that, until lately, was regarded as almost taboo indicate a clear shift toward expanding the negligence liability of both judges and the state and ignoring

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Database (by subscription) (Isr.).

78. LA (Jer.) 2315/00 State of Israel v. Friedman (Mar. 12, 2001), Nevo Legal Database (by subscription) (Isr.). For a case law critique see CC (TA) 199207/02 Yair S. Mktg. Ltd. v. First Int'l Bank Ltd. (Sept. 14, 2005), Nevo Legal Database (by subscription) (Isr.); CA (TA) 11949/01 Jerusalem Bank Ltd. v. Zebgalov (Feb. 13, 2006), Nevo Legal Database (by subscription) (Isr.) (imposing liability on the state for 75% of the loss incurred by the plaintiff as a result of the negligence of ministry of justice's officials in charge of execution of judgments—who enjoy immunity identical to that of judges—for the nullification of a mortgage in the bank's favor based on a forged approval. On appeal, 25% of the liability of the attorney was voided and the full damage was imposed on the state).

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the possible negative effects—economic and social—of such an expansion.

## 2. POLICE LIABILITY

In most cases of physical damage caused by police negligence, the nature of the damage serves as the main criterion and leaves almost no room for hesitation. However, even in cases of non-physical damage, an unmistakable willingness to impose liability is emerging. This willingness sometimes invites criticism. The imposition of liability when public officials are negligent in failing to properly perform administrative acts that require a particularly low level of skills is understandable and justified.<sup>79</sup> Thus, if the public officials' negligence consists of failing to enforce a stay of exit order,<sup>80</sup> or failing to respond to a burglar alarm in a timely manner,<sup>81</sup> it is sensible for the court to impose liability. However, the Supreme Court's readiness to impose liability on the police when sued by a family whose neighbors verbally and physically harassed them for such an extended period of time that they eventually decided to move to a new apartment in a new neighborhood is less persuasive, even to those who accept that the police did not exercise their discretion reasonably.<sup>82</sup> In contrast with the latter decision the District Court in Jerusalem—although initially demonstrating a similar willingness to impose liability on the police—dismissed such negligence claimed in one of the most famous cases of the last decade<sup>83</sup> The circumstances involved the murder-suicide of a celebrated young Israeli model and her boyfriend. It was difficult to tell from the evidence found at the scene of the crime who committed the murder. In their original statement, the police placed the murder charge on the model. Only later did it become

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79. CA 337/81 Buskila v. State of Israel, [1983] 37(3) PD 337 (Isr.) (already in the early 1980s imposing liability on the police for the faulty handling of a dispute over agricultural produce).

80. See primarily the hesitation in establishing the notional duty in the first case of this type to reach the Supreme Court: CA 429/82 State of Israel v. Sohan, [1982] 42(3) PD 733 (Isr.).

81. See also CA 126/85 R.G.M. Mart Corp. v. State of Israel, [1990] 44(4) PD 272 (Isr.).

82. CA 1678/01 State of Israel v. Weiss, [2004] 58(5) PD 167 (Isr.) (distinguishing between the circumstances of this case and the celebrated Hill v. Chief Constable of West Yorkshire, [1989] A.C. 53 (H.L.) case, where no complaint had been made to the police).

83. Family Court (Jer.) 29170-05 Estate of Elimelech v. Estate of Apota (Feb. 20, 2011), Nevo Legal Database (by subscription) (Isr.).

clear that the boyfriend was the murderer and that his brother toyed with the evidence to mislead the police. Following a long discussion of the circumstances, the court decided that there was no negligence on the part of the police as the interference of the boyfriend's brothers, who toyed with the position of the murder weapon on the scene of the crime, could not have been foreseen by the police.<sup>84</sup>

### 3. TAXATION

An internal audit by the Land Tax Administration led to a delay in the issuance of a tax authorization. Due to a decrease in the exchange rate of the dollar, the plaintiff suffered a financial loss for which the state was held liable.<sup>85</sup> Under totally different circumstances, liability was imposed on the state following the negligent inspection by the taxation authority that failed to properly supervise the agents who were engaged in collecting taxes from the plaintiff company. Consequently, the monetary debt was not paid and the plaintiff suffered economic loss.<sup>86</sup>

### 4. PROSECUTION

In outstanding circumstances, the court was inclined to impose liability on the state for the negligence of the public prosecutor who submitted an indictment based on a complaint filed by the Israeli Electricity Company against one of its employees, the plaintiff, five years after the filing of a complaint, although all the evidence had been gathered in a timely manner. The indictment was later withdrawn by the prosecutor himself, who found the evidence against the plaintiff unreliable. The plaintiff sued his employer, the Israeli Electricity Company, for negligence in filing the complaint, and the latter filed a third party motion against the State, claiming that it was the public prosecutor's negligence that caused the plaintiff's harm.

The claim against the initial defendant, the Electricity Company, was rejected and the court decided that the complaint was not negligently filed; thus, the third party motion was

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84. Family Court (Jer.) 29170-05 Estate of Elimelech v. Estate of Apota (Aug. 8, 2011), Nevo Legal Database (by subscription) (Isr.).

85. CC (Rishon Lezion) 8388/04 Aharoni v. State of Israel (Jan. 15, 2009), Nevo Legal Database (by subscription) (Isr.).

86. CC 1906-08-07 Gonir Cartel Ltd. v. State of Israel (June 26, 2011), Nevo Legal Database (by subscription) (Isr.).

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rejected. Yet the court emphasized that had the plaintiff succeed in establishing negligence on the part of his employer, the court could have imposed liability on the State. The five-year delay constituted, *prima facie*, negligent administrative conduct by the prosecutor and the State, for which they have no immunity.<sup>87</sup> The court implemented this *obiter* and imposed liability on a municipality that filed a case based on a wrong statute, leading to a long and damaging legal proceeding.<sup>88</sup>

## 5. LICENSING

The state is in charge of statutory licensing and supervision of public businesses and services. Plaintiffs filing negligence claims in such circumstances sometimes face difficulties in establishing causation. However, once causation is established, courts have proven willing to impose liability on the state. This is not just in cases of physical loss, as in the case of the plaintiff who fell off a horse at a ranch licensed by the Jerusalem Municipality,<sup>89</sup> or the case of the municipality failing to supervise a private medical facility that treated the plaintiff's impotence in a peculiar manner, thus causing him serious, irrevocable harm.<sup>90</sup> It also applies in cases of a purely commercial nature, such as when the import-export licensing authority handled a shoe importing company's application negligently and failed to inform the company the real reason for the extended waiting period for the company's import license. Such conduct was held by the Supreme Court to violate proper administrative procedure, and since it entailed a denial of the company's rights of autonomy and

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87. CC (Rishon Lezion) 6664/04 Hovev v. Israel Electric Corp. (June 28, 2009), Nevo Legal Database (by subscription) (Isr.). *But see* CC (Netanya) 8387/02 Banyin v. State of Israel (May 1, 2005), Nevo Legal Database (by subscription) (Isr.) (dismissing a claim against the State, by a person whose business partner had embezzled the partnership's money, for having taken eight years to file an indictment that was eventually dismissed because of the miscarriage of justice caused to the accused. The magistrate's court held that there was no causation between the dismissal of the criminal proceeding and the damages of the theft incurred by the plaintiff.)

88. CC (TA) 11583/04, Sidis v. Givatayim Municipality (Sept. 1, 2005), Nevo Legal Database (by subscription) (Isr.). Also, an unregulated and unjustified complaint by the Postal Authority against one of its employees led to the imposition of liability. LCA 1808/03, Agsham v. Postal Auth. (Dec. 25, 2003), Nevo Legal Database (by subscription) (Isr.).

89. CA 1068/05, Jerusalem Municipality v. Mimuni (Dec. 14, 2006), Nevo Legal Database (by subscription) (Isr.).

90. CA (Jer.) 8526/96 John Doe v. State of Israel (June 23, 2005), Nevo Legal Database (by subscription) (Isr.).

hearing, the court imposed liability.<sup>91</sup> The court also imposed liability in an unusual claim by some Israeli farmers who suffered diminished income due to an insufficient labor force for their fields. The state negligently failed to issue licenses, which would have permitted the farmers to employ certain workers.<sup>92</sup>

## 6. INFRASTRUCTURE AND ROADS

In a much celebrated decision, the Supreme Court imposed liability on the Haifa Municipality for economic loss resulting from flood damage.<sup>93</sup> Along the same line, the Supreme Court held that negligence in road construction work, which led to reduction in the income of a local gas station, could give rise to state liability. Although the plaintiff in that case failed to establish any negligence on the part of the State, and, thus, the Court ultimately relieved the State of liability, the Court's clear and unequivocal rhetoric leaves no room for doubt regarding its broad, positive attitude toward imposing state liability in negligence. Even when this attitude—an *obiter dictum* in that case—is expressed in a short staccato, it remains clear.<sup>94</sup>

## 7. PLANNING AND CONSTRUCTION AUTHORITIES

As explained above, Israeli law is more inclined than other common law systems to impose liability in cases of pure economic loss. Indeed, as early as 1954, cases of professional misrepresentation became the first category of pure economic loss cases in which the Court imposed liability.<sup>95</sup> In *Weinstein v. Kadima*, the Israeli Supreme Court adopted the guiding principles set by Justice Cardozo in the United States in the famous *Ultramares* case<sup>96</sup> and recognized the potential liability of an expert engineer to a building constructor for a negligent construction plan, although there was no contract between them and the loss was pure economic loss. The Court emphasized that liability in this type of circumstances will be recognized only if

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91. CA 1081/00 Avnaal Distrib. Ltd. v. State of Israel, [2005] 59(5) PD 193 (Isr.).

92. CC 6525/04 Livni v. State of Israel (Sept. 12, 2011), Nevo Legal Database (by subscription) (Isr.).

93. CA 2906/01 Haifa v. Menora Ins. Co. (May 25, 2006), Nevo Legal Database (by subscription) (Isr.).

94. CA 3464/05 Paz Oil Co. Ltd. v. State of Israel (July 12, 2006), Nevo Legal Database (by subscription) (Isr.).

95. *Hedley Byrne Co. v. Heller* [1964] A.C. 465 (H.L.).

96. *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931).

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the plaintiff can establish that his reliance on the professional statement of the defendant, for which he did not pay, was highly foreseeable, that this reliance was foreseen by the defendant, and that the scope of the loss caused to him was also highly foreseen.

Similar considerations and similar restrictions on open-ended liability in negligence were later adopted by the House of Lords in *Hedley Byrne*.<sup>97</sup> Based on this positive approach to both seemingly problematic elements, pure economic loss and misstatements in expert opinions, the liability of planning and building authorities for erroneous building ratios, incorrect land evaluations, and unreasonable delays in planning and granting building licenses, among other things, have been recognized in Israel. Even the restrictive Supreme Court decision in the *Levi* case, establishing the discretionary exclusion rule that could have had at least *some* bearing on the reasoning of the courts in these type of cases, did not affect the stream of decisions in which liability was imposed, subject, of course, to the special guidelines of the monumental *Kadima* decision.<sup>98</sup>

## 8. MISCELLANEOUS

In recent years, a considerable number of negligence cases against the state and public authorities, in all fields of government activity, have concluded with the defendants incurring liability.<sup>99</sup> Thus, liability was imposed on the Postal Authority not just for the late delivery of mail,<sup>100</sup> but also for carelessness in investigating a complaint by one employee against another, which led to a baseless indictment.<sup>101</sup> Liability was

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97. Motion 106/54 Weinstein v. Kadima Water Supply Coop. Soc'y Ltd., [1954] 8 PD 1317 (Isr.).

98. CA 209/85 Kiryat Ata Municipality v. Alinko Ltd., [1991] 42(1) PD 190 (Isr.); CA 653/97 Baruch & Tzipporrah Ctr. Ltd. v. Tel Aviv Municipality, [1999] 53(5) PD 917 (Isr.); CA 10508/08 Dor Zahav Bldg. Constr. & Inv. v. Herzliya Municipality Local Planning & Constr. Comm. (Feb. 4, 2010), Nevo Legal Database (by subscription) (Isr.). *See also*, CA 9313/08 Ofenberg v. Tel Aviv Municipality Local Planning & Constr. Comm. (Sept. 7, 2011), Nevo Legal Database (by subscription) (Isr.). The Supreme Court summarizes the current position on the issue.

99. A different approach is spearheaded by Supreme Court Justice Amit. *See, e.g.*, CA (TA) 195/01 I. GIL Import Ltd. v. The State of Israel: Customs Auth. (Oct. 23, 2009), Nevo Legal Database (by subscription) (Isr.) decided by Justice Amit when he was still a district court judge. His decision was affirmed in the Supreme Court, based on different reasoning.

100. LCA 1808/03, Agsham v. Postal Auth. (Dec. 25, 2003), Nevo Legal Database (by subscription) (Isr.).

101. *Id.*

imposed on the Water Authority for the supply of over-saline water that harmed the plaintiff's flower farm and greatly decreased his future profits.<sup>102</sup> Liability was imposed on the Stock Exchange (a private corporation subject to rules of administrative public law) for heavy commercial losses the plaintiff's company incurred after the Stock Exchange's negligence led to a change in the terms of securities issued by the plaintiff and a delay in their implementation.<sup>103</sup> Liability was even imposed on the Israel Airports Authority and the State for losses that the residents of the Palestinian Authority incurred as a result of the Israel Airports Authority's failure to return agricultural product containers that were relied upon for repackaging.<sup>104</sup>

Liability was also imposed recently on the Adoption Authority under circumstances that present considerable difficulties. In that case, the plaintiff was one of two sisters adopted at birth. When one of the two sisters' relatives died, the adoption authorities only provided the name of one of the sisters as a potential heiress. She eventually received the entire inheritance. The other (empty-handed) sister sued the state for her half of the inheritance and won her claim. The operative result of the judgment was that both sisters, together, obtained 50% of their original inheritance at the expense of the public.<sup>105</sup>

The number of actions claiming negligent infringements of personal human rights is increasing significantly. In most of these actions, the defendants are state organs or other public defendants. The latest cases dealt with posthumous dignity. They involved post-mortem operations<sup>106</sup> and cemetery

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102. CA 10078/03 Shatiel v. Mekorot Water Co. (Mar. 19, 2007), Nevo Legal Database (by subscription) (Isr.) (although the nature of the loss here was questionable).

103. CA 1617/04 CHIM—NIR Flight Services v. Tel-Aviv Stock Exch. (June 29, 2008), Nevo Legal Database (by subscription) (Isr.).

104. CA 1617/04 Kim Nir Airport Servs. v. Securities Exch. (June 29, 2008), Nevo Legal Database (by subscription) (Isr.).

105. CA 2162/02 Jane Doe v. State of Israel (June 1, 2008), Nevo Legal Database (by subscription) (Isr.). This outcome is especially puzzling since it was clear to the court that the state would not take legal action for restitution against the sister who had obtained the whole inheritance. Liability was denied in CC 1113/04 (TA) SH. G. v. State of Israel—Ministry of Soc. Affairs and Soc. Servs. (Mar. 20, 2011), Nevo Legal Database (by subscription) (Isr.). No negligence and no causal connection existed, according to the court's findings. *Id.*

106. CA 4576/08 Ben Zvi v. Hiss (July 7, 2011), Nevo Legal Database (by

procedures,<sup>107</sup> as well as a shift in the personal status of an Israeli Defense Forces' soldier from "missing in battle" to "killed in action" and "buried in an unknown place," which denied the soldier's parents an opportunity to voice their objection.<sup>108</sup>

### G. SHIFTING THE BURDEN OF PROOF: A NEW MEANS OF EXPANDING PUBLIC DEFENDANTS' LIABILITY

Under Israeli tort law, if at the conclusion of the proceedings the court is inconclusive regarding *how* or *why* the loss occurred, a situation that is usually described as "evidential uncertainty," and the plaintiff can show that his inability to establish his cause of action was due to the defendant's faulty behavior, the burden of proof shifts to the defendant to rebut the plaintiff's description of the factual situation. The defendant bears the burden of convincing the court either that he did not act negligently or that his action was not the cause of the plaintiff's loss. This change of the normal rule of evidence shifts to the defendant the risk of being found liable for the plaintiff's loss should he not succeed in meeting this burden, even if the court ultimately does not know what factual state of affairs led to the plaintiff's damage. In such cases, the defendant is considered to have caused the plaintiff both the "original loss" caused by the defendant's negligent act and the "secondary loss" of impeding his evidential prospects.<sup>109</sup>

The evidential loss doctrine has been developed and applied, in particular, in cases of medical malpractice,<sup>110</sup> especially when a defendant medical institution has been negligent in maintaining

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subscription) (Isr.).

107. CC (Haifa) 6125/05 Shmailov v. Akko Religious Council (July 27, 2008), 08(3) 5402, Takdin Legal Database (by subscription) (Isr.).

108. CA (Jerusalem) 8036/06 Katz v. State of Israel (Sept. 14, 2009), Nevo Legal Database (by subscription) (Isr.).

109. Ariel Porat & Alex Stein, *The Evidential Damage Doctrine: A Positive Analysis of the Law*, 21 IYUNEI MISHPAT 191 (1998) (Isr.). For additional development, see ARIEL PORAT & ALEX STEIN, *TORT LIABILITY UNDER UNCERTAINTY* (Oxford Univ. Press 2001) (Isr.). In contrast to this well-accepted evidential aspect, the substantive aspect and outcome of the situation—recognition of the defendant's liability in negligence not just for the original damage incurred by him but also for worsening the evidential position and prospects of the plaintiff—has not yet achieved recognition in Israeli law.

110. *Compare* CA 8151/98 Sternberg v. Zajicek, [2001] 56(1) PD 539 (Isr.) (shifting the burden of proof to the defendant in a case of "drop foot" caused by an operation; medical records were missing) *with* CA 248/86 Estate of Chananshvili v. Rotem Ins. Co., [1991] 45(2) 529 (Isr.) (shifting the burden of proof to the defendant since his tortious act led to the loss of a right of action on the part of the injured party).

medical records or in documenting medical incidents, in which case it bears the burden of proving its lack of negligence. It should be noted that in these types of cases the damage caused by the defendant is twofold. The first consists of the (usual) physical loss caused by the defendant's malpractice, and immediately thereafter, the second element of damage consists of the defendant's acts or omissions that undermine the plaintiff's prospects of winning his case. This evidential injury is neither a physical injury, nor a pure economic loss injury.

Unsurprisingly, Israeli courts have wholeheartedly embraced this innovation and included it in their toolkit, applying the evidential loss doctrine to all types of negligence cases including, of course, cases of state and public authority negligence. Naturally, the public defendants in this type of circumstance are usually responsible for all sorts of evidence gathering (investigating accidents, crimes, or various types of terrorist incidents), which, through double negligence, cause both physical loss and evidential loss. Thus, the State was held liable for causing physical injury to a plaintiff who claimed that the defendant, a soldier in the Israel Defense Forces, negligently shot him. The court imposed liability due to negligence because the state was unable to rebut the presumption that it was, indeed, the soldier's bullet that caused the plaintiff's loss. The presumption resulted from the application of the evidential loss rule, which was applied after the state (police) neglected to conduct a proper ballistic test that could have proven the origins of the bullet that hit the plaintiff and, thus, could have been evidentially helpful both to the plaintiff and the defendant (state).<sup>111</sup> As a result of this evidential negligence, the police were held liable for the plaintiff's physical damages, although the court was not positively convinced that it was indeed the soldier's bullet that injured the plaintiff.

Despite calming rhetoric by the Supreme Court when this case came before it for an additional review,<sup>112</sup> it is clear that shifting the burden of proof onto the police in the case significantly expanded the potential liability of the state, just as it also expanded potential liability in other cases of negligent decisions on the part of state actors. For example, a negligently

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111. CA 361/00 Dahar v. Yoav, [2005] 59(4) PD 310 (Isr.).

112. CFH 1912/05 State of Israel v. Dahar (April 12, 2005), Nevo Legal Database (by subscription) (Isr.).

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conducted car accident investigation could lead to the reversal of a conviction, encouraging the defendant to claim that he would have been successful in proving his innocence in the first instance if the circumstances of the accident had been adequately investigated.<sup>113</sup> Along this line of reasoning, the Court held the State liable after it was sued for having seized land for which, in order to win compensation, the owners needed to prove that they had held possession of the land in the past and to provide details of such possession. They could not do so due to the negligent conduct of the State, the lack of clarity of aerial photographs of the area, and the fact that the region was planted with land mines in a manner that denied the plaintiffs alternative means of proof. In this case, the Supreme Court expanded the use of the evidentiary loss rule, holding it liable vis-à-vis the land owners despite the fact that, at the end of the day, some very important elements of the plaintiffs' cause of action were not established.<sup>114</sup>

The harsh consequences of the evidential loss rule have lately become even more problematic as the Supreme Court has, in the last few years, applied it to additional sets of circumstances in a manner that leads to unprecedented expansion of liability in negligence in general and public authorities' liability in particular. The following case, decided two years ago by the Israeli Supreme Court, may serve as a good example. The plaintiffs' father, Mr. Katz, drowned while swimming in one of Israel's public beaches. The local municipality had neglected to signpost the beach as "off limits" for swimmers. The district court expressed doubts regarding the causal connection between the municipality's negligence and the grave accident, yet ultimately decided that the plaintiffs established causation. The Supreme Court affirmed the decision.<sup>115</sup> However, Justice Rivlin explained that, had the plaintiffs failed to establish the requisite causal connection, the Court could have applied the evidential loss rule and shifted the burden of proof onto the municipality, which by failing to signpost the beach also caused the plaintiffs a grave evidential loss, reflected in their inability to prove their cause of

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113. CA (Jer.) 15203/01 Feldman v. State of Israel (Oct. 25, 2004), Nevo Legal Database (by subscription) (Isr.).

114. CA 8858/02 State of Israel v. Zehoveh (June 2, 2004), Nevo Legal Database (by subscription) (Isr.).

115. *Compare* CA 1457/07 Herzeliya Municipality v. Katz (Jan. 14, 2009), Nevo Legal Database (by subscription) (Isr.), *with* CA 9328/02 Meir v. Laor (April 22, 2004), Nevo Legal Database (by subscription) (Isr.) (which is also a case of a "built-in evidential loss").

action. According to this line of reasoning, the negligence of the municipality not only caused the physical loss, but also damaged the plaintiffs' chances of proving their case.

The circumstances of the *Katz* case are clearly different from the circumstances of the cases that led to the adoption of the evidential loss rule. In *Katz*, both types of loss are inherent in the initial, and only, act of negligence. The same action caused both of the losses: the physical loss *and* the evidential loss. It is a much broader category of cases than the type of cases that gave rise to the original evidential loss rule. The direct outcome—expansion of liability—is very broad, and the theoretical and practical consequences give rise to many legal questions. Over-deterrence, problematic causal connections, and disregard for corrective justice considerations are but a few of the problems that this type of “built-in evidential loss” might cause.<sup>116</sup>

Although the evidential loss rule is generally applied in Israeli negligence law across the board and is not specifically aimed at public authorities, the impact of the rule on public authorities' liability in negligence is crucial, especially since the ruling in the *Katz* case did not even mention the fact that the compensation to be paid to Katz's family came out of the public purse. The *Katz* court did not raise policy considerations relating to the defendant's identity and did not express any doubts regarding widening liability in negligence of public defendants. It remains to be seen how extensively the evidential loss rule is going to affect public authorities' liability in negligence at large and cause policy change in issues regarding accident insurance and budgetary allocations.

#### H. CONCLUSIONS: ISRAEL

One can well appreciate the long road that Israeli case law has traveled from the early decisions in which the main task the Supreme Court undertook was to trace the intent of English common law to the evolution of independent thought, an independent portrayal of Israeli norms and values and a mature choice of policy considerations. Although expansion of public authorities' liability in negligence has been the norm in Israel for quite a while, it is neither too late nor too soon to look back and

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116. Guy Shani, *Evidential Damage and its Punishment: Praising the Move from the Current Model (Shifting the Burden) to Models Based on Proportionality and Indicatives*, 41(2) MISHPATIM 315 (2011) (Isr.).

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try to reassess the forgotten considerations that most legal systems use, even today, to keep public defendants' liability under control.

It is obvious that the expanded liability of public authorities in Israel simply mirrors the overall trend in Israeli negligence law. By comparison to English law, it appears that the Israeli courts believe that many of the considerations advocating limited liability of public defendants may be offset by considerations in favor of expanding such liability, so that the scale clearly tilts in the direction of finding the state and its authorities negligent for (almost) every type of loss in (almost) every type of circumstance and for (almost) all types of acts and omissions. The approval voiced by Chief Justice Barak when blessing the 1952 burial of "the king can do no wrong" principle and welcoming the "equality rule" could hardly have been expected to lead to the extremity of the current trend in Israeli case law, which to date reflects an almost strict liability of state and public authorities in negligence. Even so, the Israeli Supreme Court, consisting of fourteen judges, accommodates heterogeneous voices. Hopefully, new opinions<sup>117</sup> and a fresh hierarchy of values will, at least, lead to a reconsideration of the issue at the Israeli Supreme Court level and motivate the Supreme Court to attend to the threat of the slippery slope whose initial warning signs can already be identified in contemporary Israeli rulings.

### III. SOUTH AFRICA

#### A. METHODOLOGY: A MIXED SYSTEM PROVIDING SCOPE FOR INNOVATION

As noted in the introduction, the South African law of delict (tort) is the product of a common law and civil law mix. The South African system of private law and delict (tort) is imbued with some remarkable syncretic features. In addition to drawing from both non-codified Roman–Dutch law (its civil law source) and English common law, since the advent of democracy in 1994, it has been shaped further by a Constitution with an extensive

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117. See, e.g., Justice Amit's opinion in CC (Haifa) 653/02 H. Yaakobi Constr. & Inv. v. Hadera Municipality (Oct. 31, 2005), Nevo Legal Database (by subscription) (Isr.). Justice Amit rendered this decision as a district court justice. Justice Amit has since been appointed to the Supreme Court. It is expected that his voice on the matter of public "authorities" liability will help in halting the erosion. See also 2 GILEAD, *supra* note 32, at 1137-1156.

## Bill of Rights.

Liability for patrimonial harm is mostly determined by the rules of the developed Aquilian action, which derived from Roman law and migrated into South Africa with pre-codification seventeenth century Dutch law.<sup>118</sup> Just as the tort of negligence dominates English tort law, the Aquilian action dominates liability for patrimonial harm in South Africa, just as it did in countries like the Netherlands, Germany, and France prior to codification, when the Roman *usus modernus* developed Aquilian liability into a de facto general form of tort liability (a de facto general clause, in codification terminology).<sup>119</sup> Aquilian liability, with its open-ended norms, has proved to be a flexible instrument for innovation.

During the nineteenth and twentieth centuries, English principles governing the tort liability of public bodies and the Crown came to displace the rather underdeveloped Roman–Dutch law on this topic.<sup>120</sup> As in England, liability of local authorities has been treated mostly as a form of direct liability, whereas state liability has mostly been treated as vicarious liability.<sup>121</sup> Local authorities' liability was, for most of the nineteenth and twentieth centuries, shaped on the common law model with remnants of the distinction between misfeasance and nonfeasance underlying the requirement of prior conduct introducing a new source of danger for liability of public, especially local, authorities.<sup>122</sup>

The potential liability of local authorities for omissions widened considerably when the courts discarded the so-called “prior conduct” doctrine, the view that liability of public authorities for an omission can only be imposed where the prior

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118. See, Annél van Aswegen, *Aquilian Liability I (Nineteenth Century)*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 559-64 (Reinhard Zimmermann & Daniel Visser eds., 1996).

119. Gerhard Wagner, *Comparative Tort Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1008 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

120. See, Francois du Bois, *State Liability in South Africa: A Constitutional Remix*, 25 TUL. EUR. & CIV. L.F. 139, 146 (2010).

121. *Id.* at 159.

122. See, Annél van Aswegen, *Aquilian Liability I (Nineteenth Century)*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 583-85 (Reinhard Zimmermann & Daniel Visser eds., 1996); Dale Hutchison, *Aquilian Liability II (Twentieth Century)*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 605-09 (Reinhard Zimmermann & Daniel Visser eds., 1996).

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conduct of the defendant had positively created a risk of harm or a new source of danger.<sup>123</sup> In the last quarter of the twentieth century, with the jettisoning of the requirement of prior conduct, came the development of a unitary concept of tort liability of the state and public authorities, for both commissions and omissions, built on the civilian-influenced concept of “wrongfulness.”<sup>124</sup>

**B. SOCIETAL FACTORS INFLUENCING JUDICIAL REASONING:  
WIDENING PUBLIC-AUTHORITY LIABILITY IN SOUTH AFRICA**

The development of public-authority liability in South Africa has also been influenced by certain local trends. High levels of crime, including corruption,<sup>125</sup> and the absence of a victim compensation scheme have led to a number of cases where the victims of crime have successfully claimed damages from the state based on the unlawful failure of the police to provide protection.<sup>126</sup> In the area of state liability for police actions or omissions, the Constitution has been an important innovating force. In a number of cases, victims of violent crime have instituted actions against the state for the failure, mostly by the police, to hold dangerous criminals in custody, to provide effective protection against crime, or to properly exercise their duties in respect of firearm licensing.

High levels of administrative incompetence in central, provincial, and local government have led to a number of cases where persons harmed by maladministration have sought to recover damages in delict on the basis of the constitutional guarantee of just administrative action,<sup>127</sup> which has been given detailed content in legislation.<sup>128</sup> Thus, negligent

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123. See, Dale Hutchison, *supra* note 11, at 624-29.

124. See *id.* See *infra* Part II.C.

125. South Africa could be losing as much as 20% of its total procurement budget to graft annually, translating to between R25bn and R30bn, according to an estimate in October 2011 by Willie Hofmeyr, head of both the Special Investigating Unit (SIU) and the Asset Forfeiture Unit, in response to a parliamentary question about the extent of government corruption. See *Govt Corruption: R30bn could be lost—SIU*, NEWS24 (Oct. 12, 2011), <http://www.news24.com/SouthAfrica/Politics/Govt-corruption-R30bn-could-be-lost-SIU-20111012#>.

126. See *Carmichele v. Minister of Safety & Sec.*, [2001] (4) SA 938 (CC) (Centre for Applied Legal Studies intervening); *Van Eeden v. Minister of Safety and Sec.*, [2002] (4) SA 346 (SCA); *Minister of Safety & Sec. v. Van Duivenboden*, [2002] (6) SA 431 (SCA); *Minister of Safety & Sec. v. Hamilton*, [2004] (2) SA 216 (SCA).

127. Act 108 of 1996, s.33.

128. Promotion of Administrative Justice Act, Act 2 of 2000.

maladministration has led to a large number of cases against public bodies at all levels of government. The Constitutional Court has affirmed that "(i)n our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty."<sup>129</sup> Such a breach might, but will not necessarily, give rise to delictual liability. A number of cases dealing with irregular conduct of tender procedures illustrate the development in this area of public liability.<sup>130</sup>

### C. WRONGFULNESS

The civilian-influenced concept of wrongfulness or unlawfulness in the South African law of delict has been an important basis for judicial reasoning toward wider liability of public authorities. Wrongfulness is an open-ended concept, turning on a broad policy judgment, which can take account of the special circumstances of public defendants and also the new wide-ranging duties imposed by the Constitution on the state and public bodies.<sup>131</sup> With all the other elements of liability (conduct, causation, harm, and fault) proved or assumed to be present, wrongfulness involves a further value judgment on whether the affected interest of the plaintiff deserves protection from the defendant's action or inaction, such that the burden of proof of damage should be shifted from plaintiff to defendant.<sup>132</sup> Wrongfulness is thus essentially concerned with the scope of protection afforded to various rights and interests, the scope of responsibility to act, and the overall policy considerations relating to the question whether the law of delict should intervene.<sup>133</sup>

In most systems of tort there are traces of the concept of wrongfulness but there is no uniformity in the use of the expression.<sup>134</sup> In a wide sense, the expression indicates a combination of reprehensible conduct and the infringement of an

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129. See *Steenkamp NO v. Provincial Tender Bd. of the E. Cape*, [2007] (3) SA 121 (CC) (judgment by Moseneke DCJ, ¶ 37).

130. *Steenkamp NO v. Provincial Tender Bd. of the E. Cape*, [2006] JOL 18364 (CC); *Olitzki Prop. Holdings v. State Tender Bd.*, [2001] (3) SA 1247 (SCA); *Minister of Finance v. Gore NO*, [2007] (1) SA 111 (SCA).

131. See *du Bois*, *supra* note 120, at 166-71.

132. See Max Loubser, *Unlawfulness in the South African law of delict: Focus areas in the debate*, in *VITA PERIT, LABOR NON MORITUR, LIBER MEMORIALIS: PJ VISSER 143* (Trynie Boezaart & Piet de Kock eds., 2008).

133. See *id.*

134. EUROPEAN GROUP ON TORT LAW, *PRINCIPLES OF EUROPEAN TORT LAW, TEXT AND COMMENTARY 28* (Springer-Verlag/Wien, 2005).

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interest that is deemed worthy of legal protection, but this description is so wide that it can be taken to refer to the concept of delictual liability generally.<sup>135</sup> Wrongfulness is closely linked to the central idea of tort law, as formulated by Prosser: "So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others."<sup>136</sup> The concept of wrongfulness in the South African law of delict has its roots in both English tort law and civil law.

In English tort law there is no neat catalogue of protected rights and interests, and in both the required standard of conduct and the scope of protection are integrated into the concept of a duty of care.<sup>137</sup> It has been said that a broad idea of wrongfulness is reconcilable with the English law of tort, at the highest level of abstraction, if only because there are situations where the causing of damage is not actionable.<sup>138</sup> The primary mechanism to control the ambit of tort liability is the duty of care. However, the foreseeability-based duty of care (as famously formulated by Lord Atkin in *Donaghue v. Stevenson*<sup>139</sup>) is not a conclusive test of liability, because it does not take account of instances where liability for foreseeable harm is sometimes excluded or restricted, including cases of pure economic loss, justification on grounds such as defense or consent, and omission in which the law does not recognize a general duty to act positively to ward off foreseeable danger from another person.<sup>140</sup>

In these instances, the courts employ, in addition to

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135. *Id.*; W.V. Horton Rogers, *Wrongfulness under English tort law*, in UNIFICATION OF TORT LAW: WRONGFULNESS 39 (Helmut Koziol ed., 1998) ("But from another point of view the concept is almost meaningless since 'wrong'/wrongfulness' may be regarded as merely a shorthand description of the situations in which tort liability is imposed"). The same can be said of the following comment, made in the context of a discussion of protected interests in European systems of tort law: "It all boils down to the fact that negligent conduct must be legally wrong or that damage needs to be legally relevant." CEES VAN DAM, EUROPEAN TORT LAW 141, ¶ 701-1 (Oxford Univ. Press, 2006).

136. Rogers, *supra* note 135, at 40.

137. Wagner, *supra* note 119, at 1013-14.

138. Rogers, *supra* note 135, at 40.

139. [1932] AC 562.

140. Rogers, *supra* note 135, at 41-42; *see also* F.H. LAWSON & B.S. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON AND THE CIVIL LAW 95 (Cambridge Univ. Press, 1982).

foreseeability, notions of “proximity,” “neighbourhood,” “fairness,” “assumption of responsibility,” “reliance,” and “special relationship” to control the scope of liability for negligence.<sup>141</sup> These concepts have been described as “little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope.”<sup>142</sup> The courts have shown an increased willingness to bring policy questions into the open and, even if it is found that injury was a foreseeable result of the defendant’s negligence, the existence of a duty of care may be denied on the basis that policy concerns necessitate a restrictive approach in determining the ambit of “neighbourhood” for purposes of the duty of care.<sup>143</sup>

The open-ended concept of wrongfulness in the South African law of delict, turning on reasonableness and societal norms, resembles aspects of the concept of wrongfulness (*Rechtswidrigkeit*) in German law. Wrongfulness for the purposes of § 823 I of the German Civil Code (BGB) essentially turns on the infringement of the interests that are specifically protected by that section, such as life, physical integrity, health, property, and other similar rights (not including pure economic loss). These interests are said to be “absolutely protected interests,” and the notion of wrongfulness is said to be “outcome-related,” an approach to wrongfulness known as *Erfolgsunrechtslehre*.<sup>144</sup> However, in cases of indirect infringement of rights and omission, the notion of wrongfulness is said to involve an evaluation of conduct in terms of certain societal norms, an approach to wrongfulness known as *Verhaltensunrechtslehre*.<sup>145</sup>

One of the most fertile sources of this development in German law was the idea that a preceding dangerous or potentially dangerous activity or state of affairs gives rise to a duty of care. From this idea, the courts developed the

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141. See TONY WEIR, *TORT LAW* 34-54 (Oxford Univ. Press, 2002).

142. *Caparo Indus. v. Dickman*, [1990] 1 All E.R. 568 574 (quote by Lord Bridge).

143. MARK LUNNEY & KEN OLIPHANT, *TORT LAW, TEXT AND MATERIALS* 119 (2d ed., 2003).

144. GERT BRÜGGEMEIER, *COMMON PRINCIPLES OF TORT LAW: A PRE-STATEMENT OF LAW* 77 (British Inst. of Int'l & Comp. L., 2004).

145. Helmut Koziol, *Conclusions*, in *UNIFICATION OF TORT LAW: WRONGFULNESS* 131 (Helmut Koziol ed., 1998).

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*Verkehrssicherungspflichten*, or societal duties.<sup>146</sup> These duties indicate that the law of delict requires a value or policy judgment on the existence of a legal duty not to cause or to prevent harm, concerning the range of relationships and interests that will be protected against careless interference and the range of persons who could be held liable for a harmful result. Whether this value judgment is made in the context of wrongfulness or negligence is a matter of structure.

In South African law, delictual liability requires not only negligence but also wrongfulness, which implies a duty not to cause or to prevent harm.<sup>147</sup> This duty is based on considerations of reasonableness and public policy, often involving a question of proportionality.<sup>148</sup> Typical factors regarded as indicating such a duty in particular situations include: proportionality of the risk of harm and the cost of prevention; control over a dangerous object or situation; awareness of danger; prior conduct creating danger; and a relationship imposing responsibility.<sup>149</sup>

The case of *Administrateur, Transvaal v. Van der Merwe*<sup>150</sup> is illustrative of the process or reasoning involved. Liability for an omission was in issue, and the court determined the existence of a legal duty to prevent harm by means of an enquiry into the proportionality of the risk of harm and the cost of prevention. The question was whether provincial authorities had a duty in respect of a minor road to make firebreaks or to take other precautionary measures against fires breaking out and spreading to adjoining land. The court held that to determine whether a positive act or an omission is such that it can be branded as unlawful, the different interests of the parties, their relationship with one another, and the social consequences of imposing liability in the kind of case in question, *inter alia*, should be weighed.

Factors that play an important role in that process are, *inter alia*, the probable or possible extent of the prejudice to others, the degree of risk of such prejudice eventuating, the interests that the defendant and the community, or both, have in the act or

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146. See BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE* 85-86 (4th ed., 2002).

147. See Loubser, *supra* note 132, at 128.

148. See Loubser, *supra* note 132, at 133-36.

149. See Loubser, *supra* note 132, at 133-36.

150. [1994] (4) SA 347 (A) 361H/I-362A/B; 363C.

omission in issue, whether there were reasonably practicable measures available to the defendant to avoid the prejudice, what the chances were of the measures being successful, and whether the cost involved in taking such measures was reasonably proportional to the damage which the plaintiff could suffer. Affordability and proportionality between the potential damage and the potential cost of prevention should be brought into account in deciding the question of wrongfulness.

On application of this proportionality test, the court found that the control and supervision of the Administrator over all public roads was only of a permissive nature and that the applicable legislation did not impose any obligations on the Administrator to make firebreaks or take other precautionary measures against veld fires breaking out and spreading to adjoining land. Given the nature of the road in question, the fact that it was seldom used, and the cost of preventative measures, the mere fact that the Administrator exercised control and supervision over all public roads did not in itself create a duty for purposes of delictual liability. In the absence of a positive danger-creating act, the mere control of property and the failure to exercise such control with resultant prejudice to another is not, per se, unlawful. The crucial issue is whether the precautionary measures that the controller should, according to the aggrieved party, have taken to prevent the prejudice could have been reasonably and practicably required in the circumstances. The underlying philosophy is that a consequence is only wrongful if, in the light of all the circumstances, the defendant can reasonably be expected to act.

In a line of cases prior to the decision of the Appellate Division in *Minister van Polisie v. Ewels*,<sup>151</sup> the courts adhered to the view that liability of public authorities for an omission can only be imposed where the prior conduct of the defendant had created a risk of harm or a new source of danger, and the defendant then failed to prevent the harm from occurring. The Appellate Division first adopted this view in 1912 in *Halliwell v. Johannesburg Municipality*.<sup>152</sup> The *Halliwell* case and similar subsequent cases dealt with the liability of a local authority for injury to a person using a public road or other amenity (hence the reference to these cases as “municipality cases”). The judgments

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151. [1975] (3) SA 590 (A).

152. [1912] AD 659.

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in these cases often involved subtle distinctions between situations where the defendant simply failed to prevent harm and where such failure was preceded by the creation of a risk of harm or the introduction of a new source of danger.

This “prior conduct” approach to liability for an omission held sway for more than four decades, in spite of criticism in certain judgments.<sup>153</sup> Eventually the Appellate Division broke away from this approach in the leading case of *Minister van Polisie v. Ewels*,<sup>154</sup> where it held that there can be liability in delict for a mere omission that was not preceded by conduct that created a risk of harm or introduced a new source of danger. In *Minister van Polisie*, the court imposed liability in a situation where the plaintiff was assaulted by an off-duty policeman in a police station in the presence of a more senior policeman who failed to prevent the assault.

The essential question is whether a legal duty existed to prevent harm to others, on the basis of reasonableness and public policy. In terms of the wide and evaluative criteria used by the courts in this regard, a legal duty will be recognized where the failure to prevent harm not only evokes moral indignation, but is regarded as so unreasonable, according to the *boni mores*, or legal convictions of the community, that it should be regarded as unlawful, so that liability should be imposed for the loss suffered.<sup>155</sup> In addition to these general criteria, the courts take into account policy considerations indicating whether the law of delict should intervene, including the social or economic consequences of imposing liability, the availability of alternative remedies, the need for accountability of public bodies or officials, relevant constitutional or other statutory rights and duties, and a typology of factual circumstances that indicate a duty not to cause or to prevent harm in the particular situation. The decision of the Appellate Division in the *Ewels* case has been of great significance, not only in respect of liability for omissions, but also in respect of the criteria for assessment of wrongfulness generally.<sup>156</sup>

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153. See *Silva's Fishing Corp. (Pry) v. Maweza*, [1957] (2) SA 256 (A) 264-5. See also *Regal v. Afr. Superslate (Pty)*, [1963] (1) SA 102 (A); and *Minister of Forestry v. Quathlamba (Pty)*, [1973] (3) SA 69 (A) 82.

154. [1975] (3) SA 590 (A).

155. See *Minister van Polisie v. Ewels*, [1975] (3) SA 590 (A) 597.

156. See *Van der Merwe Burger v. Munisipaliteit van Warrenton*, [1987] (1) SA 899 (C); *Rabie v. Kimberley Munisipaliteit*, [1991] (4) SA 243 (NC) 258; Cape Town

The “prior conduct” approach to liability of local authorities for omissions was finally discarded in *Cape Town Municipality v. Bakkerud*,<sup>157</sup> where the general criterion of reasonableness, involving the policy-based standard of *boni mores* was accepted. Specific content is given to this general criterion by taking account of a typology of factual considerations, such as the extent of the danger, the period of time for which it existed, the resources of the public authority, and prior warning. The municipality of Cape Town was held liable for failing to repair holes in a pavement that caused the plaintiff to fall and incur injury.

Wrongfulness thus requires a value judgment, but the court is not absolved from the need for an open and structured process of reasoning, with reference, among other things, to the specific rights and interests involved, the relationship between the parties, relevant provisions of the Constitution and of other legislation, and relevant policy considerations.<sup>158</sup> The reasoning of the courts in this regard is reducible to the following more specific and often interrelated factors: (1) policy considerations indicating whether the law of delict should intervene in respect of the type of harm-causing including, among other things, (a) the social or economic consequences of imposing liability, in particular, potential indeterminate liability (“opening the floodgates”), (b) the availability of alternative remedies, and (c) the need for accountability of public bodies or officials; (2) consideration of relevant constitutional or other statutory rights and duties, including, among other things, (a) the right to freedom and security of the person, (b) the right to privacy, (c) accountability of public officials, and (d) the right to just administrative action; (3) a typology of factual circumstances that indicate a duty not to cause or to prevent harm in the particular situation, including among other things, (a) the proportionality of the risk of harm and the cost of prevention, (b) control over a dangerous object or situation, (c) awareness of danger, (d) prior conduct creating danger, (e) a relationship imposing

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Municipality v. Butters, [1996] (1) SA 473 (C) 477, 479-80; Longueira v. Securitas of S. Afr. (Pty), [1998] (4) SA 258 (W), 262-63.

157. [2000] (3) SA 1049 (SCA).

158. See, e.g., Carmichele v. Minister of Safety & Sec., [2001] (1) SA 489, ¶ 7 (SCA); Cape Town Municipality v. Bakkerud, [2000] (3) SA 1049, ¶ 14-32 (SCA); Cape Metropolitan Council v. Graham, [2001] (1) SA 1197, ¶ 6 (SCA); Olitzki Prop. Holdings v. State Tender Bd., [2001] (3) SA 1247, ¶ 11, 31 (SCA); BOE Bank v. Ries, [2002] (2) SA 39 ¶ 13 (SCA).

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responsibility, and (f) professional knowledge; (4) the nature of the defendant's conduct, with harm-causing by positive conduct generally more likely to be considered unlawful than harm-causing by omission; (5) the nature of the defendant's fault with intentional harm-causing more likely to be considered unlawful than negligent harm-causing; and (6) the nature of the interest sought to be protected. In considering the nature of the interest sought to be protected, causing physical injury and damage to property is considered to be *prima facie* unlawful, whereas the wrongfulness of nuisance and damage to reputation, for example, is often judged in balance with a conflicting interest of the defendant.

Wrongfulness has been an important basis for judicial reasoning toward wider liability of public authorities. Considerations of reasonableness and policy have provided scope for considerable extension of state liability for omissions. The liability of local authorities for omissions was extended when the courts discarded the view that liability of public authorities for an omission can only be imposed where the prior conduct of the defendant had positively created a risk of harm or a new source of danger. The assessment of proportionality is often central to judicial reasoning on wrongfulness. Cases illustrating these trends, referred to above, deal almost exclusively with property damage, physical injury, or death.

#### D. IMPACT OF THE CONSTITUTION

The impact of the Constitution on private law in South Africa has facilitated judicial innovation in widening of liability of the state and public authorities.<sup>159</sup> The development of the generalized tort liability for both commissions and omissions, built around the civilian-influenced concept of wrongfulness, facilitated the impact of the Constitution on the law of delict in this area. This has been a much more extensive impact than the modest effects of the UK Human Rights Act in the same area.<sup>160</sup> The concept of wrongfulness has been prominent, as one of the "open-ended norms False . . . through which human rights may be filtered in legal development."<sup>161</sup>

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159. See generally, CHUKS OKPALUBA & PATRICK C. OSODE, *GOVERNMENT LIABILITY: SOUTH AFRICA AND THE COMMONWEALTH* 16-18 (Juta & Co., 2010).

160. See du Bois, *supra* note 120, at 140.

161. See Hector L. MacQueen, *Human rights and Private Law in Scotland: A Response to President Barack*, 78 TUL. L. REV. 363, 377 (2003).

The values encapsulated in the Constitution's Bill of Rights may be brought to bear indirectly in interpreting or filling out private law norms, a feature of South African constitutional law that shows the influence of contemporary civilian legal systems, notably that of Germany.<sup>162</sup> The application of the Bill of Rights in the law of delict, as in other areas of private law, has had an impact on the style of judicial reasoning, inasmuch as the courts more often engage with normative issues rather than relying on "authority reasons" in a formalistic way.<sup>163</sup>

The general or open-ended principles of law of delict, in particular the element of wrongfulness, are now informed by applicable constitutional values. The Bill of Rights in the South African Constitution obliges the courts to promote the spirit, purpose, and objects of the Bill of Rights when applying and, where necessary, developing the common law,<sup>164</sup> so as to give effect to the Bill of Rights.<sup>165</sup> The Constitution provides for the infusion into the common law of "the values that underlie an open and democratic society based on human dignity, equality and freedom,"<sup>166</sup> and this infusion assists in giving content to and shaping the general or open-ended principles of the law of delict.

Section 8(2) of the Constitution provides that certain constitutional rights apply directly to private persons or entities. According to this Section, a provision of the Bill of Rights—a right—"binds a natural or a juristic person," but only "if and to the extent that it is applicable" to a natural or juristic person, "taking into account the nature of the right and the nature of any duty imposed by the right." The courts will be required to decide in an *ad hoc* manner whether or not a particular constitutional right binds a private natural or juristic person. For example, the formulation of the provisions dealing with the right to just administrative action<sup>167</sup> and the rights of arrested persons<sup>168</sup> indicate that they can probably only apply against the state, whereas rights such as the right to security of the person,<sup>169</sup>

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162. See du Bois *supra* note 120, at 171.

163. See Alfred Cockrell, *Private Law and the Bill of Rights: A threshold issue of "horizontality,"* in BILL OF RIGHTS COMPENDIUM (LexisNexis 2004).

164. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA § 39(2).

165. *Id.* § 8(3).

166. *Id.* § 39(1)(a).

167. *Id.* § 33.

168. *Id.* § 35.

169. *Id.* § 12.

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equality,<sup>170</sup> and access to information<sup>171</sup> imply that obligations might be imposed on private persons.

Section 8(3) of the Constitution applies only where a court seeks to apply a provision of the Bill of Rights to a natural or juristic person in terms of § 8(2). Section 8(3) contains two directives to a court in such a case. First, to give effect to a constitutional right that binds a private person, a court is required to apply or, if necessary, develop the common law to the extent that legislation fails to give effect to that right. This provision is reinforced by § 39(2) of the Constitution, which provides that when a court develops the common law, it must “promote the spirit, purport and objects of the Bill of Rights.” Second, when a court applies a constitutional right to a private person in terms of § 8(2), it is empowered to develop rules of the common law so as to limit such a right, provided that the limitation is in accordance with § 36(1) of the Constitution. The effect of the impact of the Constitution on the law of delict in the area of state and public-authority liability is illustrated by a few prominent cases.

In *Carmichele v. Minister of Safety and Security*,<sup>172</sup> the plaintiff was the victim of a violent attack by a person with a prior conviction for violence and who was released on his own recognizance while awaiting trial on a new charge that also involved violence against women. The plaintiff alleged that the state, through the investigating police officers and the prosecutors, had a legal duty to protect her, which it unlawfully failed to do by not opposing the release of the accused at the bail hearing. The Constitutional Court held that in applying the pre-constitutional common-law test for wrongfulness for the purposes of delictual liability, the courts must give regard to the constitutional imperative to develop the common law if necessary, to give effect to constitutional rights, and to reflect the spirit, purport, and objects of the Bill of Rights.<sup>173</sup>

The Court relied on the German notion of a constitution as an objective, normative value system, suffusing all areas of

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170. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA § 9.

171. *Id.* § 32.

172. *Carmichele v. Minister of Safety & Sec.*, [2001] (4) SA 938 (CC) (Centre for Applied Legal Studies intervening).

173. *Id.* ¶ 32-37.

law.<sup>174</sup> In particular, the Court took into account the record of the accused, the knowledge that the police had of his threatening conduct, and the right of women and other vulnerable groups in particular to have their safety and security protected in terms of § 12(1)(c) of the Constitution, a section providing that everyone has right to freedom from violence. The Court in this case did not undertake the exercise of developing the common law itself, but indicated different ways of developing the common law to give effect to the constitutional rights and values, in particular through the concept of wrongfulness.<sup>175</sup> The Court held that the trial court should not have granted an order for absolution from the instance and remitted the case to the High Court for the trial to proceed.

Eventually, the Supreme Court of Appeal imposed liability on the state,<sup>176</sup> taking into account the following: (1) that the state had a positive obligation through the police and prosecutors to take preventive operational measures (by opposing bail for a previously convicted accused) to protect individuals against threats to life; (2) that the plaintiff was pre-eminently a person who required the State's protection; (3) that the circumstances of the threat posed by the accused person to the plaintiff were known to the police and prosecutors; and (4) that in terms of the constitutional norm of accountability, the State was liable for the failure to perform the duties imposed upon it by the Constitution, unless the State could show that there was compelling reason to deviate from that norm and that there was no suggestion that the recognition of a legal duty under the circumstances had the potential to disrupt the efficient functioning of the police or would necessarily require the provision of additional resources. On the contrary, the evidence suggested that recognition of a legal duty in such circumstances would enhance police and prosecutorial efficiency.

*Minister of Safety & Security v. Van Duivenboden*<sup>177</sup> provides another important example of the method of reasoning employed when the Constitution becomes the source of rights and duties in private law. The police failed to deprive a person of his firearms and licence, although they knew that he was prone to violence

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174. *Carmichele v. Minister of Safety & Sec.*, [2001] (4) SA 938 ¶ 54 (CC).

175. *Id.* ¶ 57.

176. *Carmichele v. Minister of Safety & Sec.*, [2004] (3) SA 311 (SCA).

177. *Minister of Safety & Sec. v. Van Duivenboden*, [2002] (6) SA 431 (SCA).

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when drunk, having been called out on previous occasions when he threatened his family while drunk. A neighbor, who was injured when attempting to assist the family of the drunken, gun-wielding aggressor (who then shot and killed his wife and daughter), successfully sued the state for damages. The police could have taken steps under firearm legislation to deprive the killer of his firearm. The reasoning of the court illustrates the impact of the Constitution on the concept of wrongfulness. The majority of the court emphasized<sup>178</sup> that the very existence of the State's constitutional duty to act in protection of the rights in the Bill of Rights necessarily implies the norm of public accountability and pointed out that § 41(1) of the Constitution expressly provides that all spheres of government and all organs of State within such sphere must provide government that is not only effective, transparent, and coherent, but also accountable. The court held<sup>179</sup> that this norm must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case and that police officers who were in possession of information that indicated the unfitness of a person to possess firearms owed a legal duty to members of the public to take reasonable steps to act on that information to prevent harm.

It is interesting to note that the Supreme Court later turned down a claim for loss of parental support (economic loss), based on the same facts. In *Brooks v. Minister of Safety & Security*,<sup>180</sup> the court refused to extend the action for loss of support to the situation where the breadwinner was rendered incapable of providing support to his son because he was imprisoned for the murder of his wife and daughter. The son alleged that the police had negligently and wrongfully failed to deprive his father of his firearms, despite their knowledge of repeated incidents where Brooks had threatened his family when under the influence of liquor. However, the court refused to extend the action for loss of support to the situation where the breadwinner was still alive and had rendered himself unable to provide support by committing murder and being sentenced to lengthy imprisonment.

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178. *Minister of Safety & Sec. v. Van Duivenboden*, [2002] (6) SA 431 ¶ 20 (SCA).

179. *Id.* ¶ 21.

180. *Brooks v. Minister of Safety & Sec.*, [2008] ZASCA 141, ¶ 6.

In *Van Eeden v. Minister of Safety & Security*,<sup>181</sup> the police allowed a prisoner who had a history of violent crime to escape from their custody, resulting in a further assault on the plaintiff. The court held that the general manner in which the police performed their functions relating to the detection of crime and the apprehension of criminals was not in issue. In respect to such matters, public policy may well require that police should have a wide discretion, with which the courts should not interfere. However, the court observed that the recognition of a legal duty in the case would neither disrupt the efficient functioning of the police, require additional resources, nor inhibit the proper performance by the police of their primary functions or lead to defensive policing. The court was also satisfied that the imposition of liability on the State in the case would not open the floodgates of litigation and result in limitless liability of public authorities and functionaries because the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.

It appears from the cases discussed above that the Constitution has provided considerable scope for judicial innovation in widening the liability of the state and public authorities. In essence, the Constitution conceptualizes the state as the bearer of special responsibilities and underscores the state's accountability, particularly in respect to the safety and security of persons. This constitutional state concept has enabled the courts to impose wider liability for systemic or organizational breaches of duty.

#### E. PURE ECONOMIC LOSS

The cases referred to above illustrate that the courts are willing to extend the liability of the state on constitutional grounds where the rights to life and security of the person are involved. The courts adopt a more conservative approach where pure economic loss is concerned. The focus of the inquiry in such cases is whether a duty on the part of the state to prevent economic loss is provided for or implied by a statutory provision.<sup>182</sup> The existence of such a statutory duty will be determined according to the normal rules of statutory

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181. *Van Eeden v. Minister of Safety & Sec.*, [2002] (4) SA 346 (SCA) (Women's Legal Centre Trust, as Amicus Curiae).

182. *See generally*, OKPALUBA & OSODE, *supra* note 148, at 146-48.

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interpretation, with regard to the intention of the legislature as it appears from the wording of the statutory provision.<sup>183</sup>

In *Minister of Law & Order v. Kadir*,<sup>184</sup> policemen investigated the scene of an accident caused by a package falling off of a delivery vehicle. The driver of the delivery vehicle drove off without stopping. The policemen failed to obtain the names and addresses of possible witnesses before the witnesses left the scene of the accident. The court held that the policemen did not have a legal duty toward the victim of the accident, who was later unable to institute a civil claim for damages against the unknown driver of the vehicle. The police had a statutory duty in terms of § 5 of the Police Act 7 of 1958 to deter crimes, track down criminals, and protect the public against crimes. However, Hefer JA remarked that “[v]iewing the matter objectively, society will take account of the fact that that the function of the police relate in terms of the Act to criminal matters and were not designed for the purpose of assisting civil litigants.”<sup>185</sup>

In *Knop v. Johannesburg City Council*,<sup>186</sup> a local authority granted an application for subdivision of a property in error and then later informed the applicant that the approval could not stand, because it was in conflict with an existing town planning scheme. The applicant claimed damages for losses incurred as a result of the delayed development of the property. The court held that the local authority charged with implementing zoning provisions did not have a duty to prevent economic loss to the plaintiff. The court explained that the legislative intention is to be ascertained with reference to the nature of the powers conferred, the nature of the duties involved in their exercise, the procedures prescribed for their exercise and for persons aggrieved to obtain redress, and the objects sought to be achieved by the legislature. The court also observed that the focus is on the content and purpose of the statutory duty and the implications of breach of the duty, rather than on the infringement of the plaintiff's rights. Moreover, the court observed that the mere fact

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183. See, e.g., *Knop v. Johannesburg City Council*, [1995] (2) SA 1 (A) (holding that a local authority charged with the implementation of zoning provisions did not have a duty to prevent economic loss to a person who incurred wasted costs when his application for permission to subdivide property was granted, but it then later appeared that the permission was in contravention of an existing zoning plan).

184. *Minister of Law & Order v. Kadir*, [1995] (1) SA 303 (A).

185. *Id.* at 321.

186. *Knop v. Johannesburg City Council*, [1995] (2) SA 1 (A), 28.

that the defendant acted in breach of a statutory duty is not conclusive in respect of wrongfulness for the purposes of delictual liability. The court found that where it is alleged that the breach of a statutory duty caused harm to the plaintiff, it must be determined, according to the rules of statutory interpretation and with regard to the intention of the legislature and the wording and purpose of the statutory provision, whether the breach of duty could give rise to a delictual remedy.<sup>187</sup>

The court in the *Knop* case took into account as a matter of policy that there was an administrative procedure for an aggrieved person to obtain redress in the event of refusal of his application and that potential liability in delict could unduly hamper the local authority in carrying out its statutory duty to consider and dispose of such applications expeditiously. The application in this case was defective because it did not comply with the existing town planning scheme, and it was for the applicant to ensure such compliance. In the circumstances, it would be contrary to the objective criterion of reasonableness to hold the local authority liable for damages and would also offend the legal convictions of the community.<sup>188</sup>

In a number of cases dealing with irregular tender procedures, the courts have been reluctant to impose liability for losses suffered by either unsuccessful or successful tenderers. In *Steenkamp NO v. The Provincial Tender Board of the Eastern Cape*,<sup>189</sup> the Constitutional Court refused to recognize a legal duty on the part of the tender board toward a successful tenderer whose tender award was later set aside because of negligence in the process of awarding the tender. The Court took into account, among other things, whether imposing liability for damages would have a “chilling effect” on the performance of administrative or statutory functions by members of the board. The factors relevant to the assessment of wrongfulness in tender cases were summarized as follows:

Our courts—*Faircape*, *Knop*, *Du Plessis* and *Duivenboden*—and courts in other common law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by

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187. See also *Kadir*, 1995 (1) SA 303 (A), 319; *Lascon Props. (Pty) v. Wadeville Inv. Co. (Pty)*, [1997] (4) SA 578 (W).

188. *Id.* at 33.

189. *Steenkamp NO v. Provincial Tender Bd. of E. Cape*, [2007] (3) SA 121 (CC).

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inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a “chilling effect” on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.<sup>190</sup>

In *Olitzki Property Holdings v. State Tender Board & Another*,<sup>191</sup> another unsuccessful tenderer’s claim also failed. The Supreme Court of Appeal held that liability for negligent breach of the State Tender Board Act 86 of 1968 must be interpreted in light of and subject to the (interim) Constitution of the Republic of South Africa Act 200 of 1993. The court explained that liability depends on whether the statute imposes a duty to prevent loss, which must be assessed by applying the criterion of reasonableness, based on considerations of morality and policy, and taking into account legal convictions of community and constitutional norms, values, and principles. It is a question of statutory interpretation, but the answer depends less on a formulaic approach than on a broad assessment of whether it is “just and reasonable” that damages be awarded. The question requires the application of broad considerations of public policy, determined, *inter alia*, in light of constitutional principles and impact upon them that granting or refusing the remedy will entail.

In the event of fraudulent breach of a statutory duty in awarding a tender, a court is to impose liability. In *Minister of*

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190. *Steenkamp NO v. The Provincial Tender Bd. of the E. Cape*, [2007] (3) SA 121 (CC) para [42].

191. *Olitzki Prop. Holdings v. State Tender Bd.*, [2001] (3) SA 1247 (SCA).

*Finance & Others v. Gore NO*,<sup>192</sup> the court reasoned as follows:

In the language of the more recent formulations of the criterion for wrongfulness: in cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss resulting from the conduct at issue. Thus understood, it is hard to think of any reason why the fact, that the loss was caused by dishonest (as opposed to bona fide negligent) conduct, should be ignored in deciding the question. We do not say that dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so.<sup>193</sup>

The reasoning of the courts when dealing with breach of a legal duty by a state or other public official typically involves the following questions:

- (1) Did a special relationship between the parties give rise to a legal duty to prevent economic loss to the plaintiff?<sup>194</sup> The courts are reluctant to acknowledge a general duty of this kind on the part of the state or a public authority.
- (2) What are the legal, social, and economic implications of imposing liability for the infringement? Are other public policy considerations relevant to the case? The courts shy away from imposing liability, for instance, where neither the economic loss nor the number of persons affected are finite and the recognition of liability raises the specter of indeterminate liability to an indeterminate class of persons.<sup>195</sup>

#### F. LIABILITY OF JUDICIAL OR QUASI-JUDICIAL TRIBUNALS

In *Telematrix (Pty) v. Advertising Standards Authority SA*,<sup>196</sup> the court held that the Advertising Standards Authority of SA (ASA) did not have a legal duty for purposes of delictual liability

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192. *Minister of Finance v. Gore NO*, [2007] (1) SA 111 (SCA).

193. *Id.* ¶ 87.

194. *See* *Franschhoekse Wynkelder (Ko-operatief) Bpk v. S. African Rys. & Harbours*, [1981] (3) SA 36 (C); *Mukheiber v. Raath*, [1999] (3) SA 1065, ¶ 28 (SCA).

195. *See* *Shell & BP SA Petroleum Refineries (Pty) v. Osborne Panama SA*, [1980] (3) SA 653 (D) 659-60; *Franschhoekse Wynkelder*, 1981 (3) SA 36 (C); *Mpongwana v. Minister of Safety & Sec.*, [1999] (2) SA 794 (CPD) 802-3; *Mukheiber*, [1999] (3) SA 1065, ¶ 28.

196. *Telematrix (Pty) v. Adver. Standards Auth. SA*, [2006] (1) SA 461 (SCA) ¶ 12.

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toward an advertiser who suffered a loss because of an incorrect decision by one of the ASA organs. The relevant policy consideration is the protection of the independence of persons or bodies entrusted with an adjudicative function that serves the public interest and that imposes on them a duty to act impartially. Such persons or bodies, including the judiciary, arbitrators, and other administrative tribunals, should be enabled to adjudicate fearlessly. The threat of an action for damages could unduly hamper the expeditious consideration and disposal of litigation and disputes. Although both the person harmed and damage suffered as a result of an incorrect decision are foreseeable, the negligent causing of harm is not considered wrongful.

### G. EXPANDING VICARIOUS LIABILITY

The vicarious liability of the state and other public authorities for actions or omissions of the police has been substantially extended by the courts over the last few decades through development of common law rules regarding the existence of a sufficiently close connection between the employee's conduct and the business of the employer and with reference to constitutional values.<sup>197</sup>

The "standard test" for determining whether an employee acted within the scope of his or her employment was set out in *Minister of Police v. Rabie*,<sup>198</sup> where the court held that the State may be liable where an off-duty policeman assaulted an innocent person, and the policeman acted solely in his own interest in a situation occasioned by his or her employment. The test is both subjective, in that the employee's intention is considered, and objective, in that the existence of a sufficiently close link between the employee's act for his or her own purposes and the business of his or her employer may render the employer vicariously liable. An employer is liable for acts that it did not authorize, provided such acts are so connected with acts that it did authorize that they may rightly be regarded as modes, although improper modes, of doing authorized acts. If the employee's act falls outside the work or particular class of work that he or she is employed to do, the employer is not liable.

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197. See generally, OKPALUBA & OSODE, *supra* note 148, at 39-46.

198. *Minister of Police v. Rabie*, [1986] (1) SA 117 (A) 134.

Whether a person can commit an intentional wrong in the course of employment, so as to render his employer liable, is a vexing question. In Salmond's often-cited formulation, vicarious liability arises when the employee has done "fraudulently that which he was authorized to do honestly," but not when the employee's conduct was insufficiently "connected with the authorized act as to be a mode of doing it."<sup>199</sup> This distinction hinges upon a close scrutiny of the employee's authorized functions, resolving often into a question of "degree."<sup>200</sup> Particular problems arise where employees perform professional services, work independently, and exercise discretion. In such cases, it is not always possible to delineate their exact duties. Nevertheless, the court often applies notion of fraudulent or improper performance of authorized duties.

Clearly intentional wrongdoing does not always remove the employee from the scope of his or her employment, as illustrated by cases on state liability for police transgressions.<sup>201</sup> The state, like other employers, can be liable for intentional misconduct of its employees in certain circumstances. In the case of policemen, the approach of the courts has been to establish whether there is some connection between their misconduct and the performance of police duties.<sup>202</sup>

In *K v. Minister of Safety & Security*,<sup>203</sup> the Constitutional Court held that the State should be liable for rape committed by on-duty policemen who raped a woman who approached them for assistance late at night. The Court held that both the principles of vicarious liability and their application must conform to the normative framework of the Constitution. On the issue of

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199. SALMOND & HEUSTON ON THE LAW OF TORTS 443 (R. F.V. Heuston & R.A. Buckley eds., 21st ed., 1996).

200. *Feldman (Pty) v. Mall*, 1945 AD 733, 756.

201. *Minister van Veiligheid en Sekuriteit v. Japmoco Bk*, [2002] (5) SA 649 (SCA); *Minister van Veiligheid en Sekuriteit v. Phoebus Apollo Aviation Bk*, [2002] (5) SA 475 (SCA).

202. *Minister of Police v Rabie*, 1986 (1) SA 117 (A); *Minister van Veiligheid en Sekuriteit v. Japmoco BK*, [2002] (5) SA 649 (SCA); *Minister van Veiligheid en Sekuriteit v. Phoebus Apollo Aviation BK*, [2002] (5) SA 475 (SCA); *Masuku v. Mdlalose*, [1998] (1) SA 1 (SCA); *Smit v. Minister van Polisie*, [1997] (4) SA 893 (T); *K v. Minister of Safety & Sec.*, [2005] (6) SA 419 (CC). In *Munengami v Minister of Def.*, [2007] (2) SA 320 (ZH), vicarious liability was not imposed where soldiers assaulted a civilian in pursuit of their own interests. The assault itself was not authorized and it did not constitute an unlawful execution of an authorized act. *Id.*

203. *K*, [2005] (6) SA 419 (CC).

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whether the State should be liable for police rape, the Court found the principles of vicarious liability to be consistent with constitutional norms regarding the duties of the State and the police and the right to personal security. The Court found that, subjectively viewed, the policemen acted in pursuit of their own objectives, but objectively, their conduct was sufficiently linked to their employment as policemen, who were required to protect people from crime, for the State to be held liable.

On breach of duty by the policemen, the Court's reasoning was essentially that the policemen failed in their constitutional duty to protect K from harm and that this was the link between their wrongdoing and their employment. The idea that a breach of a duty imposed by an employer upon its employee can forge a connection between wrongdoing by the employee in breach of that duty and his employment is questionable. What seems to follow from this argument is that the greater the breach by the employee, the closer the connection between the wrongdoing and the employment.<sup>204</sup>

In *Minister of Safety & Security v. Luiters*, both the Supreme Court of Appeal and the Constitutional Court decided that vicarious liability should be imposed on the State where an off-duty policeman pursued persons who had attempted to rob him and shot an innocent third party.<sup>205</sup> A two-stage test was applied: (1) whether employee's acts were committed solely for employee's purposes; and, if so, (2) whether there was a sufficiently close link between employee's acts and employer's purposes and business. It was held that in pursuing would-be robbers, the policeman had acted in both his own interests and those of the police service. He intended to perform police duties and had effectively placed himself on duty. The fact that the policeman did not adhere to the rules of criminal procedure or police standing orders did not bar liability.

In *Minister of Safety & Security v. F*,<sup>206</sup> the plaintiff, F, found herself stranded late at night, and an off-duty policeman offered to drive her home. Instead, he drove to a remote spot where he raped her. The distinction between this case and the case involving K is that on this occasion, the policeman was not on

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204. Anton Fagan, *The Confusions of K*, 126 S. AFR. L.J. 156, 195-96 (2009).

205. *Minister of Safety & Sec. v. Luiters*, [2006] (4) SA 160 (SCA); 2007 (2) SA 106 (CC).

206. *Minister of Safety & Sec. v. F*, [2011] ZASCA 3 (Feb. 22, 2011).

duty. The majority of the Supreme Court of Appeal held that this case fails the test for vicarious liability that was articulated in *K*. The finding of liability in *K* was based on the personal liability of the policemen concerned, and consequently, the vicarious liability of the State for omitting to fulfill their constitutional and statutory police duty. In this case, the policeman had no such police duty. He was not purporting to act as an instrument of the State at the time he committed the crime, and the State was not vicariously liable for his conduct.

Are the outcomes in *K* and *F* justifiable? The “close connection” test requires a value judgment on the degree of closeness, but this judgment must be capable of analysis and must be verifiable. The court is not absolved from the need for an open and structured process of reasoning, with reference to specific factors and policy considerations taken into account. There is a sufficiently close connection between the rape and the policemen’s employment in *K* because they were on duty, in uniform, and using a police vehicle. In these circumstances, *K* placed her trust in them to take her home safely, and therefore, a connection existed between their employment as policemen at that time and during the rape. The facts relevant to application of the “close connection” test were different in *F*, because the policeman was off-duty, not in uniform, and the car was not marked as a police car. Therefore, the result in that case is also justified.

#### H. CONCLUSIONS: SOUTH AFRICA

In South Africa the trend of widening liability of the state and public authorities has been facilitated by the adoption of a Constitution with an extensive Bill of Rights, which has opened the way toward an expanded concept of wrongfulness in the law of delict. High levels of crime and the absence of a victim compensation scheme have led to a number of cases where the victims of crime have successfully claimed damages from the state, based on the unlawful failure of the police to provide protection.

The Constitutional guarantee of just administrative action, given detailed content in legislation (the Promotion of Administrative Justice Act 2 of 2000), has widened the scope of liability of public bodies based on negligent failure of administrative justice. However, the courts will take into account, among other things, whether an imposition of liability

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for damages would likely have a “chilling effect” on performance of administrative or statutory functions by members of the board. The result will be different where there is fraud in the process of awarding a tender.

The potential liability of local authorities for omissions widened once the courts discarded the view that liability for an omission can only be imposed where the prior conduct of the defendant had positively created a risk of harm or a new source of danger.

Generally, the courts adopt a more conservative approach to liability of the state and public bodies for pure economic loss, as is evident from the cases involving liability of judicial or quasi-judicial bodies, tender boards, and liability for the economic effects of administrative negligence. Liability of the state and local authorities for patrimonial harm, resulting from property damage, injury, or death has widened considerably.

#### IV. GENERAL AND COMPARATIVE CONCLUSIONS

The answer to the question of why two basically similar starting points that voice similar policy considerations produce different practical conclusions is not clear. Different social backgrounds and conditions, different ways in which different societies perceive the obligations of public services to society, different levels of fear from deterring deserving people from public service, different magnitudes of constitutional effects, different levels of independence and courage amongst the judiciary, and different levels of activism on the Israeli Supreme Court and the South African Constitutional Court may all be only part of the explanation.

The mixed origins and open-ended norms of both the tort of negligence in Israeli law and the Aquilian action in South Africa provide considerable flexibility and scope for innovation in the development of tort law as it applies to the state and to public authorities. Both systems have felt the impact of certain worldwide trends toward the widening of liability of the state and public authorities. In both systems, the expansion of state and public-authority liability have been strongly influenced by constitutional values, essentially involving the concept of the state as the bearer of special responsibilities with concomitant accountability, particularly in respect of safety and security of persons. This concept of state accountability has enabled the

courts to impose wider liability for systemic or organizational breaches of duty. In both jurisdictions, the multicultural nature of the societies and problems of crime and security have created an increased awareness of the need for expanded protection of fundamental human rights and for state accountability.

The courts in both countries have shown themselves to be active and innovative in expanding liability of the state and public authorities for negligence, for both acts of commission and omission. However, within an essentially similar conceptual structure, the South African courts have been much more conservative in their approach to state liability for pure economic loss than their Israeli counterparts. This can perhaps be attributed to a sense of priorities. In a developing country with huge disparities in wealth, the courts would naturally be inclined to prioritize safety and security of persons above pure economic loss. The South African courts have been similarly more conservative in cases involving administrative negligence and evidential loss.

The development of the law on state and public-authority liability in Israel and South Africa is also the product of factors such as the levels of education, the effectiveness of the public service, and the history and pervasiveness of constitutional ordering. Despite important differences, the law in the two jurisdictions has developed from a broadly similar mixed background; the courts have adopted broadly similar methods and reasoning; and the outcomes show broadly similar trends.