Prosecutorial Negligence and Negligent Police Investigation: An Analysis of recent Canadian and South African Case Law (1)

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Abstract

That the State could be held liable for the negligent performance of prosecutorial duties has been well established in contemporary South African law since Carmichele v Minister of Safety and Security *2001 (4) SA 938 (CC). In contrast, in the Canadian jurisdiction the element of malice, not mere negligence, has been the prerequisite for prosecutorial liability since* Proulx v Quebec (Attorney General) *(2001) 206 DLR (4th) 1 (SCC). While, however, the South African Constitutional Court, as discussed in part one of this article, opened the door for the simultaneous development of the law of prosecutorial and police negligence, the Supreme Court of Canada appeared to have closed such door partly by rejecting the concept of prosecutorial negligence, the subject matter of part two of this article. However, as the discussion in part three in this series shows, the Supreme Court of Canada has ushered in the tort of negligent police investigation in modern Canadian public authority liability law. Even so, the courts in both jurisdictions had to jettison the public interest immunity principle of the English common law whereby the police is immune from liability in their investigative duties. The South African development is traceable to a combination of three factors: the influence of the Bill of Rights; the constitutional mandate to the courts to develop the common law to accord with the spirit, purport and objects of the Bill of Rights; and the adjudicative dynamism of the courts towards the interpretation and application of the provisions of the Constitution. The recent decisions bear witness to the proposition that South African courts ensure, at all times, that the law affords the individual the protection the Bill of Rights was designed to provide such that the only exception to liability known to the courts in this regard is the immunity of judicial officers from negligent performance of judicial duties.*

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1 INTRODUCTION

While South African and Canadian courts have both been able to shirk off the burden of public interest immunity principle from their respective adjudicative terrains as shown below, their laws of prosecutorial negligence and police liability have not developed along similar lines. As it is clear from this first part of the series dealing with the South African experience, no distinction is maintained between prosecutorial negligence and police liability. The judgment of the Constitutional Court (CC) in *Carmichele v Minister of Safety and Security*[1] to the effect that the State is liable for the negligent acts and omissions of the police in carrying out their investigative duties and the prosecutor in respect of prosecutorial functions bears witness to this assertion. The prosecutorial immunity that exists in South Africa is that provided for in the National Prosecuting Authority Act 32 of 1998 (NPA Act). Rather than provide immunity, the Constitution of South Africa imposes a duty on the State and all its organs not to perform any act that will infringe the rights entrenched in the Bill of Rights such as the right to life, human dignity and freedom and security of the person[2] – those rights that are more frequently infringed in the circumstances under investigation. The non-separation of prosecutorial and police negligence has been the state of the South African common-law since the judgments of the CC in *Carmichele 1;* the Supreme Court of Appeal (SCA) in *Carmichele v Minister of Safety and Security 2*,[3] and the subsequent cases[4] developed pursuant to their constitutional mandate to develop the common-law so as to promote the spirit, purport and objects of the Bill of Rights.[5] With the overwhelming predominance of the Bill of Rights in all aspects of South African law, it is not surprising that the recent attempts by prosecutors to claim immunity from liability in the performance of their prosecutorial duties has been rejected in at least four occasions.[6] But, it is important also to mention, albeit briefly, the traditional role of the prosecutor in the criminal justice system as seen from the lenses of the South African, Canadian and Commonwealth Courts.[7]

The Constitution of South Africa imposes a duty on the State and all its organs not to perform any act that will infringe the rights entrenched in the Bill of Rights such as the right to life, human dignity and freedom and security of the person.[8] So, unlike in Canada,[9] there is no

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

2 *Woji v Minister of Police* 2005 1 SA 409 (SCA) para 28.

3 2004 3 SA 305 (SCA) (*Carmichele 2).*

4 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Carmichele 2*; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA); *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 490 (SCA). See Okpaluba "The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective" 2006 *Acta Juridica* 117 140–155; Okpaluba and Osode, *Government Liability: South Africa and the Commonwealth* (2010) para 5.5.

5 Constitution of the Republic of South Africa 1996, s 39(2).

6 See e.g. *Van Heerden v Minister van Veiligheid en Sekuriteit* 2014 2 SACR 346 (NCK); *Minister of Justice and Constitutional Development v X* 2015 1 SA 187 (SCA); *Minister of Safety and Security NO v Schubach* 2014 ZASCA 216 (1 December 2014); *Minister of Safety and Security v Van der Walt* 2015 2 SACR 1 (SCA).

7 A brief overview of the reviewability of prosecutorial discretions focussing on common law courts has been undertaken in Okpaluba "Judicial Review of Executive Power: Legality, Rationality and Reasonableness (2)" 2015 30 2 *SAPL* 380 para 5.6.

8 *Woji v Minister of Police* 2005 1 SA 409 (SCA) para 28.

9 The distinction between prosecutors and the police derive from the *Royal Commission on the Donald Marshall Jr., Prosecution, Vol. 1: Findings and Recommendations* (1989) which had investigated the miscarriage of justice whereby innocent persons had been sent to jail. The *Marshall Report* pages 227–228 was cited in *R v Regan* 2002 1 SCR 297 para 66 while emphasising the need for separation between the police and Crown functions: "In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterised as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition." The report (p 232) went on to emphasise that this role must remain distinct while cooperation with the police must be maintained because: "We recognise that cooperative and effective consultation between the police and the Crown is essential to the proper administration of justice. But under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice." See also *R v Atout* 2013 ONSC 1312 (CanLII) para 56 where, when considering whether the police or the Attorney General was responsible for editing sealed search warrant materials, Campbell J considered what he described as the unique dual role of the agents of the Attorney General – the police and the Crown – as being "mutually independent." In *R v Riley* 2008 CanLII 36775 (ONSC) paras 56 and 147, Dambrot J similarly described the relationship as one of "mutual independence." The trial judge held in this case that treating legal advice by Crown counsel as part of the decision-making process in a police investigation puts at risk the maintenance of the distinct line between investigative and prosecutorial functions that is essential to the proper

demarcation between prosecutorial negligence and police liability as enunciated by the CC judgment in *Carmichele 1*[10] both the prosecutor and the police were held liable for bungling their respective duties and functions in that case.[11] Since that judgment,[12] the South African courts have not looked back but had marched forward holding the police liable where it was negligent in the course of investigating a murder charge;[13] where the police was involved in a wrongful arrest and the prosecutor engaged in malicious prosecution;[14] where the prosecutor failed to present relevant information in a bail hearing;[15] and where the arresting police officer and prosecutor operated on false information in a trial.[16]

The foregoing does mean a total absence of immunity from liability of both the prosecutor and the police in South Africa. Such immunity that exists does not derive from the Constitution nor the common-law, rather, it originates from section 42 of the NPA Act which provides that: "No person shall be liable in respect of anything done in good faith under this Act." Incidentally, none of the four cases where immunity was recently claimed was successful. In the first case, the police failed to thoroughly investigate certain allegations before, during and after the arrest of the plaintiff. His arrest was held to be arbitrary, irrational and not made in good faith.[17] In the second case, there was no question of good faith where there was *animus iniuriandi*, that is, where the prosecutor intended to harm the accused person's dignity or to prejudice him financially or foresaw that his actions could result in harm and realised or foresaw that the action was unlawful as there was no reasonable and probable cause for it.[18] It was held in the third case that section 42 does not protect officials of the NPA from civil liability when, in the performance of their duties under the Act, they act maliciously. The section relates to a *bona fide* mistake not as in this case where the Director of Public Prosecution's (DPP's) decision to prosecute the respondent on some charges was malicious, which conduct by its very nature negates *bona fides.*[19] In the fourth case, the police investigator and the prosecutor failed to place all relevant information before the magistrate which caused the latter to refuse to grant the accused persons bail.[20]

Notwithstanding the wide scope of the subject matter, or the ebb and flow that has been the faith of the English jurisprudence on the issue of prosecutorial and police liability, it is not intended to reopen the discussion or, for that matter, revisit the inquiry conducted around the law of malicious prosecution from where prosecutorial negligence often emerges. The present investigation is confined to negligent prosecutorial conduct and negligent police

administration of justice. Faced with the forgoing and other judicial authorities on the relationship between the two organs of State in *Smith v The Queen* 2016 ONSC 7222 (CanLII) paras 169 and 173, where the police alleged negligent legal advice against the Crown, Matheson J posed a number of questions: "how would the availability of a tort for negligent legal advice interfere with the relationship between the two important parts of the criminal justice system? Why is it inconsistent with independence? The provision of competent independent legal advice to the police would, it seems to me, serve the administration of justice. How would legal responsibility for negligent advice interfere? Criminal defence counsel must also exercise independent judgment, yet they are exposed to claims for negligent legal advice." After an analysis of the *Anns-Cooper* two-way test for determining the duty of care in Canada, the trial judge held that there was need to extend the duty of care to the novel circumstances and that there was no duty of care owed by Crown Attorneys to the police in regard to negligent legal advice in this case.

10 2001 (4) SA 938 (CC).

11 *Carmichele v Minister of Safety and Security (2)* 2004 3 SA 305 (SCA).

12 Apart from police liability in its investigative duties, the development of police liability generally has been influenced by the *Carmichele 1* and *Carmichele 2* judgments starting with the *Van Duivenboden* and *Van Eeden* and other cases. More recently, the SCA has held on the premise that considerations of public or legal policy, consistent with the constitutional norms would demand the imposition of a legal duty where the police authority were negligent in taking steps to investigate and withdraw firearms issued to three different police officers in three separate cases at different occasions where, to the knowledge of the authority, the officers in question had had one problem or the other with the handling of firearms; they caused injuries with the firearms and it was clear that their omission to act led to the shootings and injuries caused thereby – *Minister of Safety and Security v Madbiyi* 2010 2 SA 356 (SCA); *Minister of Safety and Security v Hlomza* 2015 1 SACR 1 (SCA); *Dlanjwa v Minister of Safety and Security* 2015 ZASCA 147 (01 October 2015). See also per Makgoka J in *Ramushi v Minister of Safety and Security* 2012 ZAGPPHC 175 (18 August 2012).

13 *Bishini and Others v Minister of Safety and Security* [2008] ZAECHC 64 (ECD).

14 *Woji v Minister of Police* 2015 1 SACR 409 (SCA).

15 *Minister of Justice and Constitutional Development v X* 2015 1 SA 187 (SCA).

16 *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA).

17 *Van Heerden v Minister van Veiligheid en Sekuriteit* 2014 2 SACR 346 (NCK).

18 *Minister of Justice and Constitutional Development v X* 2015 1 SA 187 (SCA).

19 *Minister of Safety and Security NO v Schubach* 2014 ZASCA 216 (1 December 2014).

20 *Minister of Safety and Security v Van der Walt* 2015 2 SACR 1 (SCA).

investigation in both Canada and South Africa; the distinction drawn between the two by Canadian courts; and their relationship with malicious prosecution whenever such comparison arises. Canada is one jurisdiction among the English, Australian and New Zealand jurisdictions of the old Commonwealth, where the law of negligent police investigation flourishes. This is because, as already observed, Canadian courts have jettisoned the English concept of public interest immunity of the police from their investigative duties in the last decade – a principle that has been embraced by courts in Australia,[21] but meets with mixed reaction by courts in New Zealand.[22]

It has been established,[23] affirmed[24] and reiterated[25] in a number of Supreme Court judgments that the element of malice, not mere negligence, not even gross negligence is a prerequisite for prosecutorial liability in Canada. Without necessarily shifting from that posture, and while insisting on the need to protect public interest by not interfering with prosecutorial discretion, the Canadian Supreme Court has, however allowed the claim in *Henry v British Columbia*[26] to proceed against the prosecutor for Charter damages for non-disclosure of relevant information before, during and after a trial. Understandably, unlike the decision to initiate or continue prosecution, the duty of the prosecutor to disclose all facts material in any prosecution is a Charter obligation and thus not within the core of prosecutorial discretion, hence not covered by prosecutorial immunity. In addition to analysing the Supreme Court judgment in *Henry,* part two of this article critically discusses the recent judgment of the Supreme Court of British Columbia on the finding of prosecutorial liability for Charter damages for non-disclosure in *Henry v British Columbia*.[27] With this judgment, the scope of the application of Charter damages claims in Canada has thus been extended.

For manageability sake, the approach of the South African courts form the subject of the first part in this series while the exercise of prosecutorial discretion and liability thereof of the prosecutor and negligent police investigation in Canada dominate the second and third parts, respectively. In part three, however, the discussion centres on negligent police investigation which is naturally restricted to its Canadian origin and, even then, only recent developments that highlight the application of the decade-old tort to different fact-situations are investigated in the present context. The interesting dynamic that plays itself out in this study is that although in both jurisdictions the courts cherish and jealously guard the Bill of Rights and the Charter of Rights and Freedoms respectively, the Canadian courts still cling to the common law of prosecutorial immunity. Nonetheless, it seems that the recent judgments of the Supreme Court in *Henry v The Queen (Attorney General)*[28] and *Hinse v Canada (Attorney General)*[29] are early indications that sooner than later, the Supreme Court of Canada may change its current direction and may find that the protection of the individual's Charter right is a more pragmatic approach to adopt than holding on to the immunity of the State from liability in negligence in the performance of prosecutorial functions.

2 JUDICIAL APPROACH TO THE EXERCISE OF PROSECUTORIAL DISCRETION

It is worthwhile in the present context to state, even at the risk of repetition,[30] that the question whether prosecutorial discretion to institute, not to institute, to continue or discontinue prosecution is subject to judicial review is one that has troubled common-law courts over the years. The constitutional requirement[31] that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice,[32] makes the courts hesitant to

21 *Stuart v Kirkland-Veenstra* 2009 254 ALR 432 (HCA); *NSW v Bujdoso* 2005 227 CLR 1 (HCA); *Sullivan v Moody* 2001 207 CLR 562 (HCA); *Thomson v Vincent* 2005 NSWCA 219; *Cran v State of NSW* 2004 NSWLR 95.
22 See *Simpson v AG (Baigent's Case)* 1994 3 NZLR 667 (CA); *Whithair v Attorney General* 1996 2 NZLR 45 (HC).
23 *Nelles v Ontario* 1989 2 SCR 170.
24 *Proulx v Quebec (Attorney General)* 2001 206 DLR (4th) 1 (SCC).
25 *Miazga v Kvello Estate* 2009 SCR 339 (SCC).
26 [2015] 2 SCR 214.
27 2016 BCSC 1038 (CanLII).
28 2015 383 DLR (4th) 383 (SCC).
29 2015 SCC 35 (SCC).
30 See Okpaluba, "Judicial Review of Executive Power: Legality, Rationality and Reasonableness (2)" 2015 30 2 *SAPL* 380.
31 Constitution 1996, s 179(4).
32 The SAPS Act 1995 was successfully challenged in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) for establishing a crime-busting body without safeguarding its independence and impartiality.

interfere with prosecutorial discretions.[33] Accordingly, the court will only interfere where the prosecutor has acted patently illegally or irrationally[34] such as where he or she acted *mala fide*[35] or for ulterior purposes.[36] It means that the prosecutor is like every public functionary subject to the tests of legality and rationality.[37]

In *Sharma v DDPP Trinidad and Tobago*[38] the Chief Justice of Trinidad and Tobago challenged the decision to charge him in a judicial-review proceeding which failed before the Judicial Committee of the Privy Council. It was held[39] that, although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with a prosecutor's judgment,[40] such relief is a highly exceptional remedy; "rare in the extreme";[41] "sparingly exercised";[42] "very rare indeed";[43] "very rarely";[44] and "only in highly exceptional cases"[45] will the court grant a relief, and, even so "very hesitantly"[46] disturb the decisions of an independent prosecutor and investigator. The court must be satisfied that the claim had a realistic prospect of success. Decisions have been successfully challenged where the decision is not to prosecute;[47] in such a case the aggrieved person could not raise his or her complaint in the criminal trial or on appeal and judicial review would afford the only possible remedy.[48] Otherwise, as an American judge once put it, the decision to prosecute is "particularly ill-suited to judicial review."[49] It was further held that, since all the issues could best be investigated and resolved in a single set of criminal proceedings, permission for judicial review ought not to have been granted and had rightly been set aside.

There are policy reasons why the common law courts are reluctant to subject the decision to prosecute or not to prosecute to judicial review or why they very sparingly, grant judicial review or set aside the decision to prosecute.[50] The rationale for the courts' attitude was summarised by Lords Bingham and Walker in *Sharma* as follows:[51]

- "The great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."[52]
- "The wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account."[53]

33 See Du Toit "Recent Cases, Criminal Procedure" 2015 28 1 *SACJ* 85 87.
34 *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order* 1994 1 SA 387 (C); *Booysen v Acting NDPP* 2014 2 SACR 556 (KZD) paras 34–36.
35 *Mitchell v Attorney General, Natal* 1992 2 SACR 68 (N).
36 *NDPP v Zuma* 2009 2 SA 277 (SCA) para 38. Although the recent decision of the SCA in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA) paras 41–43 and 48 did not concern the exercise of prosecutorial discretion, it illustrates the exercise of statutory powers for ulterior purpose. The MEC had sacked members of the Gambling Board and it was clear that she had done so because they had refused to accommodate a company, the African Romance, at the behest of the MEC. It was held that in doing so, she had failed to consider the confines of the statutory provisions on which she relied or the consequences on the fiscus and on transparent and accountable governance. In other words, she had acted beyond her legal powers and contrary to the principle of legality hence, her decision to dissolve the Board was set aside.
37 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) paras 78–81; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) paras 48–49.
38 2007 1 WLR 780 (PC).
39 Para 5.
40 *Matalulu v DPP* 2003 4 LRC 712 (Fiji SC) 735–736; *Mohit v DPP, Mauritius* 2006 UKPC 20 paras 17 and 21.
41 *R v Inland Revenue Commissioners, Ex parte Mead* 1993 1 All ER 772 782.
42 *R v DPP, Ex parte C* 1995 1 Cr App R 136 140.
43 *R (Pepushi) v Crown Prosecution Service* 2004 EWHC 798 para 49.
44 *R (Bermingham) v Director of the Serious Fraud Office* 2006 3 All ER 239 para 63.
45 Per Lord Bingham, *R (Corner House Research) v Director of Serious fraud Office* 2008 4 All ER 927 (HL) paras 30–31.
46 *Kostuch v Attorney General of Alberta* 1995 128 DLR (4th) 440 449.
47 2006 UKPC 20 para 18.
48 *R (Pretty) v DPP* 2002 1 AC 800 (HL) para 67; *Matalulu v DPP* 2003 4 LRC 712 736.
49 Per Powell J, *Wayte v US* 470 US 598 607 1985.
50 *In re Smalley* 1995 AC 623 642–643; *DPP v Crown Court, Manchester* 1994 1 AC 9 17.
51 2007 1 WLR 780 (PC) para 5.
52 *Matalulu v DPP* 2003 4 LRC 712 735; *Mohit v DPP* 2006 UKPC 20 para 17.
53 *Mohit v DPP* para 18.

- The delay inevitably caused to the criminal trial if it proceeds.[54]
- "The desirability of all challenges taking place in the criminal trial or on appeal."[55] In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself.[56]
- The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts.[57]
- The powers are entrusted to the officers themselves and no one else.
- The powers are conferred in very broad and un-prescriptive terms.[58]

3 SHIRKING OFF THE PUBLIC-INTEREST IMMUNITY PRINCIPLE

In April 1994 when the Constitution of South Africa 1993 came into effect, the said English common-law concept of public interest immunity that exempted the police from liability from acts or omissions which might occasion harm to a suspect or member of the public in the exercise of their investigative duties[59] was in operation. The *Hill* immunity principle, previously rejected by the House of Lords,[60] was enunciated by that same House in *Hill v Chief Constable of West Yorkshire*.[61] Rationalised on a number of public policy grounds,[62] the public interest immunity was applied in *Brooks v Commissioner of Police for the Metropolis*,[63] where their lordships apparently demonstrated that, sometimes, adherence to principle might be more important than the injustice inherent in it. Given the clear manifestation of injustice meted out to the plaintiffs in *Brooks,* Lord Bingham attempted to introduce the "liability principle" to mellow down the rigours of the immunity principle. His efforts came to nought as the other Law Lords, who persisted in the obstructive principle in the more recent case of *Smith v Chief Constable of Sussex Police*,[64] rejected his proposal outright. In another seemingly perceptible attempt to narrow down the reach of the *Hill* immunity principle, the majority sought to carve out the so-called "core principle" after the chopping off exercise involving aspects of the doctrine. Led by Lord Phillips, the majority ushered in the triumph of the "core principle" in place of the "liability principle." Rather than do away with the immunity principle in the face of the difficulties it had caused claimants, the United Kingdom Supreme Court (the successor of the House of Lords) compounded it in its more recent decision in *Michael (FC) v Chief Constable of South Wales Police*.[65] Speaking in that case, Lord Toulson advocated a move away from the language of "immunity", which he said was an "unfortunate" expression that gives rise to "misunderstanding, not least at Strasbourg", in preference to the reasoning that due to "policy" reasons, no duty of care is imposed on the police at common law.[66] Once more, the "broad" and "narrow" liability principle introduced by Lord Kerr in this case was relegated to a minority judgment.

What has further compounded the absence of a remedy in an instance where a claimant alleges police negligence is the apparent reluctance of the courts in England to impose liability

54 *R v DPP, ex parte Kebeline and Others* 2000 2 AC 326 (QB) 371; *Pretty* 2002 1 AC 800 (HL) para 77.
55 *Ex parte Kebeline* ibid 371; *Pepushi* 2004 EWHC 798 para 44.
56 *R v Horseferry Road Magistrates' Court, Ex parte Bennett* 1994 1 AC 42 (HL). *Cf* per Lord Lane CJ, *Attorney General's Reference (No 1 of 1990)* 1992 QB 630 642: "We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for stay."
57 *DPP v Humphreys* 1977 AC 1 (HL) 24, 26, 46 and 53; *Imperial Tobacco Ltd v Attorney General* 1981 AC 718 (HL) 733 and 742; *Kostuch* 1995 128 DLR (4th) 440 449–450*; Pretty* 2002 1 AC 800 (HL) para 121.
58 Per Lord Bingham, *R (Corner House Research) v Director of Serious fraud Office* 2008 4 All ER 927 (HL) paras 30–31.
59 *Minister of Law and Order v Kadir* 1995 1 SA 303 (A); *Knop v Johannesburg City Council* 1995 2 SA 1 (A).
60 *Home Office v Dorset Yacht Co Ltd* 1970 1 AC 1004 (HL).
61 [1989] 1 AC 53 (HL). See generally, Okpaluba "Public Interest Immunity for Negligent Performance of Police Investigative Duties: Recent Commonwealth Case Law (1) and (2)" 2008 71 1 and 2 *THRHR* 67 and 210, respectively.
62 See especially, Okpaluba 2008 71 1 *THRHR* 67 para 2.1.
63 2005 1 WLR 1495 (HL).
64 2008 3 WLR 593 (HL).
65 2015 2 All ER 635 (UKSC).
66 *Michael (FC)* para 44.

whenever an alternative claim is made under the Human Rights Act 1998. The *locus classicus* of this is the litigation in *Van Colle v Chief Constable of Hertfordshire*[67] which had made its round through the English courts and, finally, culminated in the recent judgment of the European Court of Human Rights at Strasbourg.[68] In the end, the claimant went away without a remedy. To what extent this new-found "policy" terminology of Lord Toulson will change the legal fortunes of plaintiffs in this unyielding aspect of English common-law is far from certain. It is not at all clear as to whether Lord Toulson's new formula will enhance the development of this unproductive principle of English public law. Judging, however, from the history of this aspect of English law, suffice it to say at the present moment, that their Lordships' decision in *Michael (FC)* had demonstrated that the problem of recovering damages for police negligence in that jurisdiction is likely to persist for some time to come. After all, the philosophy underlying the public-interest immunity principle from cradle was built around what public policy demanded against what it abhorred.[69] It is, therefore, doubtful whether the change in semantics from "immunity" to "policy" will make any meaningful difference in the short term.

However, the public interest immunity or "policy" is not the subject of the present inquiry. That development is mentioned merely to provide the background to the approach of the English common law as it were in 1994 when the overarching Bill of Rights was introduced and its development subsequently thereafter. The objective is to show what the South African and Canadian courts had to overcome in order to launch the law of bureaucratic negligence in general and police liability in particular. Canada, like South Africa, has a Charter of Rights and Freedoms 1982 which invests in the courts enormous powers of granting appropriate relief that will vindicate any breach of a fundamental right[70] or, any constitutional right[71] for that matter. Suffice it to reiterate that the development of the law of public authority liability in South Africa and Canada "has been influenced radically by an interplay of constitutional dynamics and the private law." Thus making it difficult for "the public interest immunity as a concept … to blossom" in the respective constitutional environments of these two common-law countries.[72] The courts in both jurisdictions have left nothing to chance; they have gone further in expressly rejecting the "three unreliable assumptions"[73] advanced by their Lordships of the House of Lords as the basis for formulating that concept in the first instance. The CC of South Africa has held that a public interest immunity excusing the police from liability in circumstances where they might be held liable would be inconsistent with the Constitution and its values.[74] Neither could such a principle avail in the face of the constitutional principle of legality in modern South African public law.[75]

Whereas the Canadian Supreme Court was more pre-occupied in *Hill v Hamilton-Wentworth Police Services Board*[76] with laying down the law of negligent police investigation, the Ontario Court of Appeal spent quality time and space in trashing the public interest immunity doctrine in order to make it clear that it was in-applicable to the Canadian jurisdiction. In his judgment for the Court of Appeal, MacPherson JA rejected the same "three unreliable assumptions" or policy rationales as not sufficiently compelling for the court to deny the existence of a duty of care owed by the police in the context of how they conduct their criminal investigations.[77] Instead, the Justice of Appeal advanced three reasons to support the court's conclusion that the police need no immunity from liability in negligence for their investigative duties. First, there was no concrete proof that imposing liability would change the way the police perform their duties.[78] Second, there were impressive local precedents in Canadian courts where the police were held liable for negligently performing their investigative duties.[79] Third, the need to balance the Charter liberty rights of suspects and victims of crimes with

67 2008 3 WLR 593 (HL).
68 *Van Colle v Chief Constable of Hertfordshire* 2013 56 EHRR 23.
69 See Okpaluba 2008 71 1 *THRHR* para 2.
70 Canadian Charter 1982, s 24; Constitution of South Africa 1996, s 38.
71 Constitution of South Africa 1996, ss 38 and 172(1)*(b)*.
72 Okpaluba 2008 *THRHR* para 5.
73 Namely: (a) the absence of sufficient proximity; (b) the dictate of public policy; and (c) the chilling effect of floodgates of litigation. See Okpaluba 2008 *THRHR* para 2.
74 *Carmichele 1* para 49.
75 *Van Eeden* para 20. See also *Van Duivenboden*.
76 2008 285 DLR (4th) 620 (SCC).
77 Per MacPherson JA, *Hill v Hamilton-Wentworth Police Services Board* 2006 259 DLR (4th) 676 (Ont.CA) para 62.
78 *Ibid* para 63.
79 *Ibid* para 66.

the important duties of the police hence the existence of a duty of care on the police in the context of criminal investigation will be developed with an eye on section 7 of the Charter.[80]

4 THE MODERN SOUTH AFRICAN APPROACH TO PROSECUTORIAL AND POLICE NEGLIGENCE

4 1 *Carmichele 1* in a Nutshell

The historical background to the judgment of the CC in *Carmichele 1* and those cases decided subsequently, have previously been analysed in another context.[81] To that extent, the present discussion is in the form of introduction to enable the contextualisation of the overall discussion in this article. In principle, the CC found no reason why a prosecutor, who had reliable information that an accused person was violent, had a grudge against the complainant and had threatened to harm her, should not be held liable for the consequences of a negligent failure to bring such information to the attention of the court. If such negligence resulted in the release of an accused person who then proceeds to implement the threats, a strong case could be made out for holding the prosecutor liable for the damage suffered by the complainant.[82] By so holding, the court launched what became the revolutionary trend which set the pace in this branch of the law in the Commonwealth, and gave impetus to the development of the modern law of bureaucratic negligence in South Africa. The judgment of the CC in that case can be summarised thus:

- The CC expressly approved the opinion of Hefer JA that the determination whether there was a legal duty on the police officers to act would involve striking a balance between the interests of the parties and the conflicting interests of the community.[83] And that this was in accord with the proportionality exercise with liability depending upon the interplay of several factors.[84]

- This exercise must now be carried out in obedience to the mandate of section 39(2) of the Constitution whereby the spirit, purport and objects of the Bill of Rights "must be weighed in the context of a constitutional state founded on dignity, equality and freedom in which government has positive duties to promote and uphold such values."[85]

- Since the Constitution was not merely a formal document regulating public power but one embodying "an objective normative value system" and, since the influence of fundamental constitutional values on the common law was obligatory in terms of section 39(2), it was "within the matrix of this objective normative value system that the common law must be developed."[86]

- The question which the courts below had to consider was whether, given the facts of this case and the constitutional provisions, the police investigator's advice to the prosecutor that the rapist be released on bail on his own recognisance had been unlawful. Similarly, they had to consider whether the prosecutor had a duty to place

80 *Ibid* para 69.
81 See Okpaluba "The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective" 2006 *Acta Juridica* 117-157; also published in Hugh Corder (ed.), *Comparing Administrative Justice across the Commonwealth* (2006) 117-157; Okpaluba and Osode, *Government Liability* para 2.2–2.3.
82 *Carmichele 1* para 74.
83 *Carmichele 1* para 42, referring to *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 318E-H where Hefer JA adopted extra-judicially, per Corbett CJ "Aspects of the Role of Policy in the Evolution of the Common Law" 1987 *SALJ* 52 67. See also per Vivier JA, *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) para 7.
84 *Carmichele 1* para 43. For current discussion of this holding see per Tshiki J, *Botha v Minister of Safety and Security* 2012 1 SACR 305 (ECP) paras 17–18; per Victor J, *Lapane v Minister of Police* 2015 2 SACR 138 (LT) para 25.
85 *Carmichele 1* para 43.
86 *Carmichele 1* para 54.

before the magistrate information relevant to the exercise of discretion to grant or not to grant bail. Although bail is pre-eminently a matter for the judicial officer,[87] the information furnished to the judicial officer can but come from the prosecutor.[88]

- Having not done so in this case, was that failure wrongful? Was it negligent and did it cause the damage? With these questions unanswered, the trial judge was wrong to have dismissed the action at the instance.[89] Accordingly, the court ordered that the matter be referred back to the High Court (HC) for it to proceed with the trial.[90]

The crucial issues for determination at the subsequent SCA deliberations in the second round of the *Carmichele* litigation,[91] which were along the traditional delictual liability line of investigation included whether:

(a) the police and prosecutors owed a legal duty to the plaintiff to protect her by opposing the bail application of the accused person who subsequently raped her, and by taking steps to have him kept in custody;

(b) the police and prosecutors had acted in breach of such duty;

(c) they acted negligently; and

(d) There was a causal connection between such negligent breach of duty and the damage suffered by the plaintiff.

Answering these questions in the affirmative as the trial court did,[92] the SCA held that the answer to the question whether the state owed a legal duty to the plaintiff lay in the recognition of the general norm of accountability – the State was liable for the failure to perform the duties imposed upon it by the Constitution unless it could be shown that there was compelling reason to deviate from that norm. Such a deviation might be warranted where it would not be in the public interest to inhibit the police (and by parity of reasoning the prosecutor) in the proper performance of their duty.[93] On the facts of this case, however, there was no reason to depart from the general principle that the state would be liable for its failure to comply with its constitutional duty to protect a person such as the plaintiff. On the contrary, the plaintiff was pre-eminently a person who required the State's protection.[94] A reasonable police officer and a reasonable control prosecutor in the circumstances of the two involved in this case would have recommended to the court, with the information at their disposal, that the accused person should not be released on bail – they should have opposed bail.[95] It was more probable than not that the magistrate would have refused bail if all relevant information were brought to his attention and, there is no doubt that the failure in this case sufficiently or directly caused the plaintiff's injury.[96]

4 2 Negligent Police Investigation of Murder Charge

The plaintiffs in *Bishini and Others v Minister of Safety and Security*[97] were arrested by members of the South African Police Services in connection with an alleged murder of one Mzwandile and were detained at Walmer police station. They were taken to court and the matter was postponed on a number of occasions. By the time the charges against the plaintiffs were withdrawn on 2 October 2002, they had spent 24 days in detention.

87 See also *S v Dladla; S v Joubert; S v Schietekat* 1999 4 SA 623 (CC) para 11.
88 *Carmichele 1* para 72. See also *Botha* para 32.
89 The SCA judgment in *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) affirmed the trial court's dismissal of the claim.
90 The judgments of the HC in *Carmichele v Minister of Safety and Security* 2002 10 BCLR 1100 (C); and the SCA in *Carmichele 2* were the results of that further deliberation.
91 *Carmichele 2*.
92 *Carmichele v Minister of Safety and Security* 2002 10 BCLR 1100 (C).
93 *Carmichele 2* paras 37 and 43.
94 *Carmichele 2* para 44.
95 *Carmichele 2* para 53.
96 *Carmichele 2* paras 71-72.
97 [2008] ZAECHC 64 (EC).

The plaintiffs were released because it was established that the so-called deceased in the murder charge had, in fact not died. This raised the question whether the police officer had failed the preliminary test of having acted upon entertaining a reasonable suspicion.[98] It is not in doubt that this requirement is the primary criterion for the police to arrest far less detain anyone for having committed or about to commit a crime.[99] Then, there arises the issue of the reasonableness of the suspicion that should entail, among other things, ascertaining whether a crime has been committed. That was not done in the case in hand where the main evidence of the defendant's witness was hearsay; it was never verified. In any event, the said statement was taken after the arrest of the plaintiffs. This process therefore went contrary to the reasonable suspicion test which, the Judge President held, must have been supported by evidence capable of being objectively sustainable.[100] This was the first pitfall in the case of the defence in this action.

Somyalo JP saw a close parallel between the case of the plaintiffs and those of the victims in *Carmichele 1*[101] on the one hand and, the awaiting-trial prisoner in *Zealand*,[102] on the other. In the latter case where the Court Registrar had negligently failed to issue a warrant for his release or otherwise to inform the correctional centre at which he was held that his appeal had been successful. This meant that he ceased to be an awaiting trial prisoner as he was now being held as a sentenced prisoner with stringent conditions.

First, in the *Bishini* case, the police failed to bring to the attention of the court, as they were duty bound to do, all the information available to them. Although the investigating police officer had clear indications from the protestations of two principal witnesses of the plaintiffs as to the innocence of the three accused persons, he did nothing to investigate whether an offence has been committed "notwithstanding the clear messages saying to him and indicating that there may well be no reasonable cause for detaining the plaintiffs."[103]

Equally perturbing was that even after obtaining information that the person alleged to have been killed by the accused was alive and well, the detective police inspector nonetheless continued with the charge, the detention and the prosecution. The second is the failure of the investigating police officer to investigate the allegation of assault on, and the death of Mzwandile who was indeed alive and well. Had this information and all that was available to the investigator been transmitted to the prosecutor, the plaintiffs would never have been kept in custody for as long as the 24 days they were held.[104]

4 3 Unlawful Arrest and Malicious Prosecution

The plaintiff in *Woji v Minister of Police*[105] alleged that his arrest and detention by the defendant's employees were unlawful and his prosecution malicious. The first issue to determine was whether in arresting the plaintiff, the arresting officer entertained a reasonable suspicion that W had committed a Schedule 1 offence: robbery. In order to so decide, the information available to the officer who arrested W must be examined from an objective standpoint in order to ascertain whether the suspicion he harboured on the accused person's involvement in the robbery was reasonable. The only direct evidence available to the investigating officer as to the identity of the robbers was video footage. When the investigating inspector viewed the footage, he recognised the identity of two of the robbers. The face of the third was familiar, but the fourth robber (whom he subsequently suspected was W) was unknown to him. Although the Inspector was satisfied that the person in the footage was the fourth robber, it was obvious that the facial features of the fourth robber was not clearly seen. However, when all the information available to the Inspector were put together, the court held that it cumulatively resulted in the Inspector's suspicion being adjudged as objectively reasonable, hence the minister had discharged the onus of justifying the arrest of W. Such information included: (a)

98 See also *Charles v Minister of Safety and Security* 2007 2 SACR 137 (WLD).
99 See s 40(1)*(b),* Criminal Procedure Act 51 of 1977. See also *Duncan v Minister of Law and Order* 1986 2 SA 805 at 818G per Van Heerden JA; *Ralekwa v Minister of Safety and Security* 2004 1 SACR 136 (TPD) para 13 *per* De Vos J.
100 *Bishini* para 25. See also *per* Jones J, *Mabona and Another v Minister of Law and Order* 1988 2 SA 654 (SE) 658 E–G.
101 *Carmichele 1.*
102 *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC) paras 42–43.
103 *Bishini* para 43.
104 *Bishini* paras 43–44.
105 2015 1 SACR 409 (SCA).

that his name was Vig; (b) that he came from Brighton and had a gold tooth as described by one of the co-accused; and (c) the extremely suspicious circumstances under which he was discovered, together with the broadly similar bodily appearance to the fourth suspect in the video possessed by W.[106] Here, unlike in the case of *Tyokwana*,[107] there was no evidence of twisted facts or brutally obtaining evidence through bodily assaults.

In his claim for unlawful detention, W had argued that in refusing to grant him bail, the magistrate acted upon information supplied by the Inspector. Thus, the Inspector owed a duty to W to properly investigate the crime and to bring relevant information to the attention of the prosecutor and the magistrate at the bail hearing and, that the Inspector had failed in discharging that duty which resulted in the magistrate ordering W's continuous detention. The Minister admitted that the Inspector had such a legal duty, but denied that he failed to discharge it.[108] In this regard, the Inspector failed in the duty which the Constitution imposed on the State on whose behalf he acted not to perform his duties in such a manner as to infringe the right to life, human dignity and security of the person.[109]

The Inspector had a public duty not to violate W's right to freedom, either by opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public duty is an infringement of the arrested person's right not to be detained unlawfully, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability that the State is liable for the failure to perform duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from that norm. W was no doubt entitled to have his right to freedom protected by the State. Accordingly, the omission by the Inspector to perform his public duty was wrongful in private law.[110]

Swain JA held that as W was not clearly depicted in the video, the Inspector should not have opposed his application for bail, or should at least have told the magistrate that W was not clearly depicted in the video. Should a reasonable officer possessing the information of the Inspector have opposed bail? Should such an officer not have foreseen the reasonable possibility that his evidence would lead to refusal of bail? The magistrate refused bail based on the assurance of what the Inspector saw in the video.[111] In spite of the detention of W being a result of the order granted by the magistrate, it has to be determined whether the conduct of the Inspector was a *sine qua non* and thus the factual cause of W's detention. This determination has to be based on "what the relevant magistrate on the probabilities would have done" had the application for bail not been opposed, or had the Inspector revealed that W was not clearly depicted on the video.[112] Because the video was the only evidence ostensibly linking W to the crime, the magistrate more probably than not would have released him on bail. It is also clear that the Inspector's wrongful conduct was sufficiently closely connected to the loss for liability to follow, hence it also[113] constituted the legal cause of that loss. The court *a quo* therefore erred in dismissing the appellant's claim for unlawful detention.[114] The question whether the facts of this case would support a claim for malicious prosecution was answered in the negative because although the Inspector was negligent, or for that matter, grossly negligent in identifying W and not disclosing those facts, that did not establish an essential element of the claim for malicious prosecution. Negligence could not be a substitute for malice or an improper purpose.[115]

106 *Woji v Minister of Police* paras 17–18.
107 *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA).
108 *Woji v Minister of Police* para 29.
109 *Carmichele 1* para 44.
110 *Woji* para 28; applying the test enunciated in *Carmichele 2* paras 34–38 and 43.
111 *Woji* paras 30–31.
112 *Carmichele 2* para 60.
113 *Carmichele 2* para 71.
114 *Woji* para 32.
115 *Woji* para 37. Cf in *Lapane v Minister of Police* 2015 2 SACR 138 (LT) paras 45, 49 and 54 where Victor J of the Limpopo Local Division, Thohoyandou, found the prosecutor liable in damages for wrongful arrest, unlawful detention and malicious prosecution on two grounds. The plaintiff was detained for two years and 13 days without being granted bail before the charges were withdrawn against him without going to trial. First, the prosecutor's reliance on the alleged presence of housebreaking implements near the plaintiff was not a justifiable reason to prosecute the plaintiff and to refuse him bail. This was not simply an error of judgment because the prosecutor's conduct and those who took over from her were activated by *mala fides*. They

The information available to the officer in *Minister of Safety and Security v Linda*[116] was that of a woman shot at the scene of the murder and attempted murder. The injured woman had told the police officer that she recognised the man who shot and killed the deceased (her boyfriend) as well as raped her at gunpoint. And that the accused was someone with whom she also had an intimate relationship.

Based on this information, the investigating officer arrested and charged the respondent. The full bench of the North Gauteng Division found it difficult to understand how the trial court could conclude that the suspicion arising from those facts was not sufficiently reasonable and that the arrest of the respondent was unlawful on that account. Any reasonable police officer faced with the statements obtained by the investigating officer in this case would have been derelict in his duties had he not effected an arrest. The trial court accordingly erred in finding that there were no reasonable grounds for the suspicion and that the arrest was unlawful. The appeal was upheld on the claim for unlawful arrest.

4 4 Recent Cases of Prosecutorial and Police Negligence

4 4 1 Where the Prosecutor Failed to Present Relevant Information in a Bail Hearing

In *Minister of Justice and Constitutional Development v X*,[117] the HC found the minister liable for the negligent conduct of a public prosecutor who failed to put all relevant information before the court in a bail application. The said relevant information were the accused person's previous convictions which included one of rape and a number for assault; that his victim and her mother were against his release on bail; that he had no fixed abode and was considered a flight risk; and that the investigating officer and the community were opposed to bail. Furthermore, the prosecutor did not call the investigating officer or the respondent (X), to whom the child had made a report. The result of this failure was that the accused, one S, who was appearing on a charge of raping his 12-year-old daughter on four occasions, was released, and proceeded to abduct and rape X's 5-year-old daughter. The HC awarded damages to X in her capacity as her daughter's guardian and in her personal capacity. The Minister tendered no explanation for the prosecutor's inaction. In an appeal to the SCA the Minister argued: (a) that the prosecutor was not negligent; and (b) relied on a new defence based on the immunity in section 42 of the NPA Act 32 of 1998 as discussed below.

As to whether the prosecutor committed a delict, the SCA held that all the elements of delictual liability were present. There was wrongfulness[118] to the extent that the prosecutor failed in his duty to take reasonable steps to prevent the release of a convicted rapist who was being accused of the rape of a child and who would probably rape others if released. In the circumstances where the accused person had a history of sexual violence, the legal convictions of the community would certainly demand the imposition of a legal duty requiring the prosecutor to do everything in his power to prevent S's release, by placing all available information to the magistrate in the exercise of his or her discretion with regard to the grant or refusal of bail.[119] The failure to have taken such preventive steps tantamount to negligence[120] because a reasonable prosecutor could have foreseen that should this potentially violent convicted rapist accused of raping his 12 year old daughter four times were set free, he would probably be inclined to rape others, particularly young girls to whom he may have access.

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must have known that without the proof of the presence of housebreaking implements, as well as a failure to follow up on the plaintiff's explanation about his presence at the tavern, their conduct would amount to *mala fides*. Second, by the prosecutor and the relevant prosecutors seeking the many postponements, they were responsible for the unfortunate and lengthy incarceration of the plaintiff . None of the prosecutors had applied their mind to the case facing the plaintiff, rather they simply rubber-stamped the request by the police. In the circumstances, the employees of both the Police Minister and the DPP failed to exercise their powers in a *bona fide* manner such that the Minister was liable to the plaintiff for the unlawful arrest and detention while the DPP was liable for the prosecution and continued withholding of bail.

116 2014 2 SACR 464 (GP) paras 11–12 and 38.

117 2015 1 SA 187 (SCA).

118 *Minister of Justice and Constitutional Development v X* paras 13–18. See also: *Van Duivenboden* para 20; *Van Eeden* paras 11–14; *Carmichele 2* paras 36–37; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) para 12; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 490 (SCA) paras 18–19.

119 *Minister of Justice v X* para 33.

120 *Minister of Justice v X* paras 19–21. See the applicable test for negligence in *Kruger v Coetzee* 1996 2 SA 428 (A) 430 E–F; *Sea Harvest Corporation v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21; *Carmichele 2* para 45.

The respondent and, in particular, her younger daughter, were members of the public to whom this legal duty was owed to protect their right to be free from violence perpetrated on them by S.[121] It follows that in the circumstances a reasonable prosecutor would have taken steps to place all relevant information before the magistrate to prevent S from being released from custody. The prosecutor failed dismally in his duty to take such steps during and subsequent to the bail application. The prosecutor's conduct therefore fell far short of the standard of the reasonable person and it was therefore, negligent.[122] There was no doubt that had the prosecutor placed all relevant and available information before the court at the original bail hearing, or at a subsequent re-hearing, the magistrate would not have ordered S's release and the subsequent abduction and rape of the respondent's minor daughter would not have taken place. In the circumstances, the requirements for the establishment of both factual and legal causation have been met.[123] In other words, had the prosecutor taken the reasonable steps, he would have prevented the harm that befell X and her daughter because the magistrate would not have released S.[124]

4 4 2 Where the Arrestor and Prosecutor Operated on False Information

The recent SCA case of *Minister of Safety and Security v Tyokwana*[125] presents an interesting scenario in that the case of the arresting police officer coupled with that of the officer who investigated an alleged theft of the arresting officer's official firearm, were riddled with falsehoods at every turn. The arresting officer (Kani) was aware at all material times, that the accused and the two witnesses who were with him at the time the offence was allegedly committed, were subjected to assaults in order to obtain their cooperation to provide statements, falsely implicating the respondent. He was also aware that any admission or pointing-out by the respondent was only brought about by the continuous brutal assaults perpetrated on him by the arresting officer and members of the Kenton-On-Sea police station. He was further aware that the information and affidavits initially obtained from the two witnesses blaming the respondent of the theft of the firearm, were extracted from them by forceful means by himself (Kani) and his fellow police officers. The court *a quo* correctly concluded that the appellant had failed to establish that the arresting officer did, at the time of the arrest of the respondent, entertain a suspicion based on reasonable grounds that the respondent had committed a Schedule 1 offence.[126]

Fourie AJA did not only hold that the arrest was unlawful, but that in instigating the prosecution of the respondent, the arresting officer was fully aware of the absence of any credible evidence linking the respondent to the theft of the firearm. Yet, he submitted a false statement denying any assault and duress on the respondent while failing to inform the presiding magistrate that the respondent had been subjected to brutal and sustained assault by the police and that his visible injuries were in consequence of that assault. In fact, it was he, the arresting officer, who persuaded the respondent to provide a false version as to the origin of his injuries to the magistrate. In these circumstances, the arresting officer was not only aware of the absence of reasonable grounds for the prosecution, but could not have had an honest belief that the respondent was guilty. Nevertheless, he persisted with, and actively encouraged the prosecution of the respondent, reckless as to the consequences of his conduct.[127] Furthermore:

> In the court *a quo*, Kani conceded that, when Hansie and Bokisa deposed to their later affidavits on 9 October 2007, it was clear that, their initial statements, implicating the respondent, were false. He conceded that they were the only two witnesses who could implicate the respondent in the criminal case against him for theft of the firearm, yet he took no steps to advise the prosecutor that, in the circumstances, there was no point in pursuing the prosecution against the respondent. In view thereof, his instigation of the respondent's prosecution and his

121 *Minister of Justice v X* para 34.
122 *Ibid* para 36.
123 *Ibid* para 37.
124 *Ibid* paras 22–23, applying the principles enunciated in *Carmichele 2* para 61; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700I.
125 2015 1 SACR 597 (SCA).
126 *Tyokwana* paras 27–28.
127 *Ibid* para 29.

perpetuation thereof, was malicious.[128]

The court then considered whether the arrest and detention were wrongful and unlawful. Since the arrest was made without a warrant, its lawfulness would depend on whether the arresting officer had a reasonable suspicion that the respondent had committed a Schedule 1 offence in terms of section 40(1)*(b)* of the Criminal Procedure Act 51 of 1977. It has already been stated that the arresting officer was aware of the falsity of the evidence available to him and that it was obtained by duress. The investigating officer was similarly aware that the two witnesses recanted their initial statements and had laid a charge of assault against the arresting officer and yet, failed to bring that information to the attention of the prosecutor or the magistrate. These two law enforcement officers recommended that bail be opposed by stating material untruths in the bail information form with the result that both the prosecutor and the magistrate were not given the opportunity to apply their minds to the question whether the respondent should be remanded in custody or be granted bail. Had the relevant facts been properly brought to the attention of the prosecutor and the magistrate, it would have been inconceivable that the prosecutor would have permitted the prosecution to proceed, or that the magistrate would have refused bail. Accordingly, the prosecution of the respondent and its perpetuation at the instance of the arresting officer was malicious and constituted a wrongful and improper use of the court process to deprive the respondent of his liberty.[129]

4 4 3 Similarity with *Carmichele 2*

It is well established as a principle of the law that the duty of a police officer who has arrested a person for the purpose of having him or her prosecuted, must give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute.[130] It was also established by the CC in *Carmichele (1)*[131] that the police had a clear duty to bring to the attention of the prosecutor any factors known to him or her to be relevant to the exercise by the magistrate of his or her discretion to admit a detainee to bail. Then consider the circumstances of *Tyokwana*, where both the arresting and the investigating officers failed dismally to give a fair and honest statement of the relevant facts to the prosecutor and to bring all the relevant circumstances to the attention of the magistrate. Instead, their distortions and falsehood secured the continued incarceration of the accused without bail from the date of arrest on 2 October 2007 until his acquittal and release on 20 July 2009.[132] Fourie AJA was satisfied that the respondent had successfully established that the circumstances in which the police officers instigated and persisted with the prosecution amounted to an unjustifiable breach of the respondent's right to his liberty as guaranteed in section 12(1)*(a)* of the Constitution so as to entitle him to delictual damages for the full period of his detention.[133]

Similarly, the facts of *Minister of Justice and Constitutional Development v X* by and large replicates those of *Carmichele 1*[134] where the plaintiff had been viciously assaulted by one Coetzee, who had a history of assault but had been granted bail on a charge of rape. Interested parties had warned the investigating police officer and the senior control prosecutor that Coetzee should not be released on bail or a warning pending the rape trial, given his antecedents. The present action was as a consequence of the injury the plaintiff had sustained as a result of the failure of the officers of the law to have seriously taken into account the information passed on to them by those interested parties. Considering the defect of the common law in that the police were not held liable on account of the *Hill* immunity principle which the SCA had applied in its earlier decision in the first leg of the Carmichele litigation,[135] the CC urged the courts in the new South African constitutional state to develop the common law.

128 *Ibid* para 30.
129 *Ibid* para 39.
130 See e.g. *Minister of Justice and Constitutional Affairs v Moleko* 2009 2 SACR 585 (SCA) para 11.
131 2001 4 SA 938 (CC) para 63.
132 *Tyokwana* paras 40–41.
133 *Ibid* para 44. To this effect also see *Zealand* para 52.
134 *Carmichele 1*.
135 *Ibid*.

Furthermore, there was no reason in principle why a prosecutor should not be held liable for the consequences of a negligent failure to bring reliable information that an accused person who was violent, had a grudge against the complainant, and who had threatened to do violence to her if released on bail, to the attention of the court. "If such negligence results in the release of the accused on bail who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for damages suffered by the complainant."[136] The court had held that although the consideration of bail was pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer often comes from the prosecutor. A prosecutor has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal to grant bail and, if granted, any appropriate conditions attaching to it. Accordingly, a failure to discharge this duty by a prosecutor constitutes wrongful conduct for the purposes of the law of delict.[137]

4 5 Claims for Prosecutorial Immunity in South Africa

There are, at least, four recently reported cases where prosecutors have sought immunity from liability under section 42 of the NPA Act which provides that "[n]o person shall be liable in respect of anything done in good faith under this Act." In the first case, *Van Heerden v Minister van Veiligheid en Sekuriteit*,[138] the plaintiff (a police captain and station commander) instituted action alleging unlawful arrest and malicious prosecution in circumstances where the police had failed to thoroughly investigate certain allegations before, during and after his arrest. The court held that the decision to bring the plaintiff before the court by way of an arrest, which resulted in the embarrassment of the plaintiff as a well-known police officer and leader, was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. That decision to arrest the plaintiff was held to have been arbitrary, irrational and not made in good faith. It was common cause that, normally, when police officials were charged with less serious offences, they were brought before the court by way of summons. The defendant was therefore held liable in damages arising from the arrest.[139]

Olivier J of the North West HC held that the police docket lacked an affidavit that would have been crucial to a successful prosecution of the plaintiff or made it clear that there was no reasonable and probable cause to prosecute him. Regarding the claim for immunity of the prosecutor, the court held that the concept, "in good faith" in section 42, that granted the exemption from liability for prosecutors, necessarily embraced a subjective element. The attitude and intention with which the relevant act was committed were important in determining the question whether the relevant prosecutor had acted in good faith. There could be no question of good faith where there was *animus iniuriandi*, in other words, where the prosecutor intended thereby to harm the person's dignity or to prejudice him financially or foresaw that his actions could result in that, and realised or foresaw that the action was unlawful as there was no reasonable and probable cause for it. The court found no justification for reading into section 42 a strong presumption of good faith on the part of the prosecutor that could not easily be rebutted.[140]

136 *Ibid* para 74.

137 *Ibid* para 72. In the recent case of *W v Minister of Police* 2016 ZAGPPHC 172 (11 November 2016) the relevant investigating police officers and prosecutors were implicated as in *Carmichele 2* on account of their negligent conduct in not ensuring that a well-known rapist was kept behind bars because he posed a clear threat to the public and should not have been let out on bail. At the time he committed the rape, assault and robbery in question, he had several previous convictions, including a number of rape convictions. The plaintiff, then a 22-year-old University student and a virgin, was attacked by one Msiza at her home at night. She was stabbed countless times and raped. At the time the present litigation came before the court a settlement had been reached in terms of which the defendants, jointly and severally, accepted liability for payment of the plaintiff's proved and/or agreed damages sustained as a result of the attack on her.

138 2014 2 SACR 346 (NCK).

139 *Van Heerden* paras 201–220.

140 *Ibid* paras 116–121.

As much as the foregoing finding of liability would have foreclosed the defence of prosecutorial immunity, which was raised by the appellant in the second case, *Minister of Justice and Constitutional Development v X*,[141] based on section 42 of the NPA Act, the court nonetheless considered it and rejected the same. It was held that section 42 introduced a defence aimed at wrongfulness so that otherwise actionable conduct was rendered lawful because it consisted in the legitimate exercise of a statutory power.[142] Fourie AJA, however observed that if a person failed to exercise the power in question with due care to avoid (or minimise) injury to others, that would render the conduct of the repository of the statutory power unlawful.[143] Reference in the section to anything done under the authority of the Act necessarily implicates reference to section 20 which vests the statutory power on the prosecutor to institute and conduct criminal proceedings and matters incidental thereto on behalf of the State. Thus, a prosecutor exercising this power and wishing to avail him or herself of the immunity afforded by the section, must show that he or she acted within the authority conferred by the power in question, which, in turn, requires him or her to take all reasonable precautions to avoid or minimise injury to others.[144] Hence the prosecutor's negligent failure to exercise due care to avoid or minimise injury to X and her daughter by not placing all relevant information before the magistrate precluded the Minister from relying on the justification created by section 42.[145] In any event, if the Minister failed to plead and prove the section 42 defence, it would be grossly unfair to the respondent to allow him to raise it for the first time on appeal, and for this reason alone the Minister's reliance on section 42 failed.[146]

The principle garnered from the above judgment of the SCA is embedded in the *ratio decidendi*, which states that a prosecutor exercising any power under the 1998 Act and willing to avail him or herself of the immunity afforded by section 42 is required to show that he or she acted within the authority conferred by the provisions in question, which inevitably requires him or her to have taken all reasonable precautions to avoid or minimise injury to others.[147] If the immunity enshrined in section 42 does not avail the negligent prosecutor, it is thus not surprising that the malicious prosecutor could fare no better. Indeed, that was the finding of the SCA in the third illustration – *Minister of Safety and Security NO v Schubach*[148] – where the DPP relied on section 42 for denying that the prosecution of the respondent was malicious. It was argued that since the Senior Public Prosecutor acted in good faith in prosecuting the respondent, he could not be liable for the damages suffered thereby.[149] It was held that section 42 does not protect officials of the NPA from civil liability when, in the performance of their duties under the Act, they do so maliciously. Rather, section 42 relates to a *bona fide* mistake not as in this case where the DPP's decision to prosecute the respondent on some charges was malicious, which conduct by its very nature negates *bona fides*. It has not been established that the prosecutor involved in the present case had taken all reasonable precautions to avoid or minimise injury to the appellant. The DPP's defence based on section 42 was accordingly dismissed.[150]

4 5 1 The Peculiar Case of Two Former Police Captains

Aggrieved by their arrest and detention from 26 May 2004 until their release on bail on 1 June 2004, the respondents in *Minister of Safety and Security v Van der Walt*[151] instituted the present action against their accusers: the Minister of Safety and Security, the Minister of Justice and Constitutional Development and the police inspector investigating the matter in his personal capacity. They argued that the investigating police officer had a legal duty to place all relevant information before the magistrate but had failed to do so.

141 2015 1 SA 187 (SCA).
142 *Minister of Justice v X* para 41.
143 *Ibid* para 47.
144 Per Fourie AJA, *Minister of Justice v X* para 52.
145 *Ibid* para 53.
146 *Ibid* paras 42 and 44.
147 *Ibid* para 52.
148 2014 ZASCA 216 (1 December 2014).
149 *Schubach* para 19.
150 *Ibid* para 20.
151 2015 2 SACR 1 (SCA).

As a result of that failure, the magistrate refused to grant the respondents bail during their first and subsequent appearances in court. The Minister of Safety and Security was sued based on being vicariously liable for the wrongful conduct of the police investigator. The Minister of Justice and Constitutional Development was alleged to be vicariously liable for the wrongful conduct of the prosecutor who, like the investigator, failed to place all relevant information before the magistrate and also did nothing after that appearance to clarify to the magistrate that there was no basis for the charge of armed robbery. The original docket which the respondents saw read that they were charged for theft and pointing a firearm but were later informed by the magistrate that there was an additional charge of robbery. It was this additional charge, of which appearance in the docket they were unaware, that caused the denial for bail. However, if the investigating officer or the prosecutor had explained to the magistrate that the addition of the robbery charge was a mistake or maliciously inserted, the respondents would probably have been released on bail sooner than was the case. In any event, the respondents alleged that the magistrate had made the amendments in annexure "A" and that, in doing so, acted maliciously. They alleged that the magistrate failed negligently to apply her mind to the error when they drew her attention to it. Despite the allegation that the magistrate was malicious, she was not sued in her personal capacity but the respondents sought to hold the Minister of Justice liable for the magistrate's alleged malicious, or alternatively, negligent conduct.[152]

Before the SCA the issues for determination were: (i) whether the HC's decision that the detention was unlawful was correct; (ii) whether the trial judge's finding that the Minister of Safety and Security was liable for the investigating police officer's negligent conduct should be upheld; and (iii) whether the Minister of Justice was vicariously liable for the wrongful conduct of the magistrate committed while discharging judicial function.[153] Tshiqi JA held, for the unanimous SCA, that there was no conceivable reason for the magistrate's refusal to release the respondents on bail. They remained in custody due to the groundless charge of armed robbery inserted in annexure "A" and the collective negligence of the investigating police officer, the prosecutor and the magistrate. The respondents' detention for the whole period was therefore unlawful.[154] It could be inferred that the investigating officer who heard the magistrate announce the additional charge of robbery should have ensured that the correct information was placed before her and that there was no basis for the additional charge. A reasonable investigating officer should have done the right thing[155] by following up immediately after the first court appearance, and thereafter done whatever was reasonably necessary to rectify the situation. On that ground, the investigating officer was negligent and his negligence caused the prolonged detention of the respondents such that the trial court's finding of liability against the Minister of Safety and Security must be upheld.[156] Since there was no appeal against the finding that the Minister of Justice could not be held liable for the negligent conduct of the prosecutor, the next question for the SCA was the liability of the same Minister for the magistrate's refusal to release the respondents on bail.[157]

Whether the conduct of the magistrate was wrongful was to be viewed from two

152 *Van der Walt* paras 9–10.

153 *Ibid* para 12. Since this article is about the liability of prosecutors and investigating officers, not much is said with regard to the liability of judicial officers. Suffice it to observe that the SCA judgment in the present case [paras 20–25] confirms the principle that courts do not impose liability on the state for negligent or wrongful acts of judicial officers owing to reasons of public and legal policy, including the concept of judicial independence in the discharge of their judicial functions. This is in line with the jurisprudence of the English common law where it is well-established that judges of superior courts are absolutely immune from liability for damages arising from their judicial conduct – *Floyd v Barker* 1607 77 ER 1305 at 1307; *Sirros v Moore* 1975 1 QB 118 136; *McC v Mullan* 1984 3 All ER 908 (HL). Recent authorities support the principle of judicial immunity from personal or vicarious liability – *Telematrix (Pty) Ltd v Advertising Standards Authority of SA* 2006 1 SA 461 (SCA) para 14; *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC); and the Botswana case of *Water Engineering v Attorney General* [2005] BWCA 7. See generally, Okpaluba "Adjudicator's Immunity from Liability in Negligence: The Case of Advertising Standards Authority in South Africa" 2007 17 1 *Lesotho Law Journal* 41-69; Okpaluba "Constitutional and Delictual Damages for Judicial Acts and Omissions: A Review of *Claassen* and other Common Law Decisions" 2011-12 19 2 *Lesotho Law Journal* 1-36.

154 *Van der Walt* para 14.

155 *Ibid* para 15, citing 2004 3 SA 305 (SCA) paras 49–50.

156 *Ibid* para 15.

157 *Ibid* para 16.

angles. First, was malice on the part of the magistrate proved?[158] The allegation of malice and the submission of the respondents that it was the magistrate who inserted annexure "A" after conferring with the prosecutor during the adjournment was unsubstantiated. For that reason and for the fact that there was no other source to ascertain the truth or to corroborate that assertion, the trial judge could not have correctly inferred that the magistrate was the one who maliciously altered the charge to include robbery.[159] On the other hand, the SCA found that the magistrate was negligent and that the negligence stemmed from the fact that when the error was raised, she simply ignored it. When the respondents raised the issue, the magistrate should have asked the prosecutor to respond. Alternatively, she could have adjourned and requested the senior prosecutor to appear in court to explain the error. The SCA thus held that by ignoring the respondents and their attorney, the magistrate was grossly negligent and it was as a result of her failure to pay attention to the concerns raised with her that led her to order the continued detention of the respondents.[160] Since the magistrate was not found to have acted maliciously, the court found it unnecessary to deal with the issue of whether the Minister was vicariously liable for the malicious conduct of the magistrate.[161]

4 6 Is there a South African Parallel to the Canadian Charter Claims?

The constitutional cause of action in damages for breach of the human rights provisions entrenched in the Constitution is open to any litigant in South Africa who alleges that any of those fundamental rights have been infringed. There is, however, no South African equivalent in constitutional damages' claims,[162] which can strictly be matched to the Canadian cases on Charter damages involving negligent performance of prosecutorial discretion or police negligence in the sense discussed in part two of this contribution. Indeed, there are, in the South African Law Reports, a scanty number of cases that has reached the courts by way of the constitutional cause of action where constitutional damages were awarded in vindication of the breaches of constitutionally entrenched rights.[163] However, as it has been observed, all the South African cases discussed in this series, are delict claims albeit based essentially on alleged breaches of constitutionally entrenched rights. These delictual claims are so intertwined with the constitutional rights that a body of constitutional delict is gradually developing in the South African jurisprudence. For instance, cases that were brought to court and adjudicated as delictual claims (*Carmichele v Minister of Safety and Security (1)*;[164] *Minister of Safety and Security v Carmichele (2)*,[165] *Zealand v Minister of Justice and Constitutional Development*)[166] and several others discussed in the present context, as well as those dealing purely with bureaucratic negligence,[167] could easily have been brought as claims under section

158 Immunity applies to acts of negligence, inadvertence or incompetence hence malice or bad faith need to be proved in order to succeed in such a claim against a magistrate – *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC) or an arbitrator – *Telematrix (Pty) Ltd v Advertising Standards Authority of SA* 2006 1 SA 461 (SCA).

159 *Van der Walt* para 18.

160 *Ibid* para 19.

161 *Ibid* para 25.

162 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 42.

163 The most notable is the CC judgment in *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) where constitutional damages were awarded for unconstitutional invasion of the land owner's right to his property. See also *MEC, Department of Welfare, EC v Kate* 2006 4 SA 478 (SCA). Contra in *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) where it was held that constitutional damages would not be awarded for a lost bargain arising from the tender process. The SCA set aside the constitutional damages award for loss of support made by the trial judge in *Mboweni v Minister of Police* 2014 6 SA 256 (SCA) paras 6, 8, 11–12, 15, 18–19, 22 and 25 because: (a) the trial judge failed to properly analyse the right; (b) facts proving loss of parental care were not placed before court; (c) the trial court failed to consider whether the right claimed applied to the police officers, that is, s 8(2) of the Constitution. It also failed to consider whether they owed a legal duty to the children to prevent an infringement of the right; (d) the court did not consider whether damages for loss of support was, on its own, an adequate remedy; and (e) parties with an interest in the decision were not given an opportunity to intervene.

164 2001 4 SA 938 (CC).

165 2004 3 SA 305 (SCA).

166 2008 4 SA 458 (CC) (*Zealand*).

167 The plaintiff in *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) had alleged that the prison authorities failed to take adequate precautions to protect him against contracting TB; that he contracted the illness in consequence of their omission; and that the omission violated his right to protection of his physical integrity under the common law, the Correctional Services Act 8 of 1959 and the Constitution. The plaintiff had contracted TB while he was detained in prison for four years pending trial for certain offences.

38 of the Constitution and damages could have been recovered as "appropriate relief" for breach of any of those rights. Perhaps, the question is why, and why do the litigants seem to prefer the delictual cause of action in ventilation of their Bill of Rights breaches instead of the constitutional cause of action? The reason is due principally to the fact that litigants in this jurisdiction tend to pursue their breach of rights through the law of delict following the optimism expressed by Ackermann J in *Fose v Minister of Safety and Security* [168] that the law of delict was broad enough to accommodate the civil liability aspects of fundamental rights breaches. It is important to bear in mind that the constitutional cause of action is separate and distinct from the delictual action.[169] Furthermore, by enunciating the constitutional damages cause of action in *Maharaj v Attorney General of Trinidad & Tobago (2)*,[170] Lord Diplock made it clear that it was not an action in damages in tort but a public law redress for a violation of a fundamental right for which the State was liable directly, not vicariously.[171] That was why the plaintiff in that case could recover damages in the face of the common-law principle of the immunity of the judge from liability where the constitutional infringement was committed in adjudication.[172]

The Constitution of South Africa is the link between the Bill of Rights and the development of the common law, which includes the law of delict. The Constitution does not only embody an enforceable Bill of Rights; it enjoins the State in terms of section 7(2), to respect, protect, promote and fulfil the rights in the Bill of Rights.[173] Section 10 of the Constitution guarantees everyone the inherent dignity and the right to have their dignity respected and protected.[174] Again, section 12 guarantees freedom and security of the person, and that includes the right not to be deprived of freedom arbitrarily or without just cause and the right not be treated or punished in a cruel, inhuman or degrading manner. Section 35(2)*(e)* protects every detained person and sentenced prisoner to be held in conditions that are consistent with human dignity, "including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material[175] and medical treatment."

He claimed damages against the prison authorities for failing to take adequate steps to protect him from the risk of that infection. Once he was diagnosed with TB, the authorities failed to provide him with adequate medical treatment and medication to cure or prevent further spread neither did they adhere to his numerous requests for adequate treatment for the infection. The rights alleged to have been violated included: (a) his right to respect for and protection of his physical integrity under the common law; (b) the Bill of Rights: the invasion of the rights to human dignity under s 10; right to life under s 11; freedom and security of the person under s 12(1); and the right to be detained in conditions that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, medical treatment under s 35(2)(e); and s 2(a) and (b) of s 12 of the Correctional Services Act 8 of 1959 and its regulations. In spite of all the fundamental rights implicated, the plaintiff nonetheless filed his action in delict and it was adjudicated along those lines.

168 1997 3 SA 786 (CC) para 58(*b*).

169 This point was made recently by the Supreme Court of Namibia in *Minister of Safety and Security v Kabotana* 2014 2 NR 305 paras 15–19 where the appellant had instituted a claim for unlawful detention and sought compensation alleging that he was not brought before a magistrate within 48 hours of his arrest as required by art 11(3) of the Namibian Constitution 1990 and s 50 of the Criminal Procedure Act 51 of 1977. Shivute CJ held that in determining the object of the sub-article, and what is meant by the expression "reasonably practicable", sight must not be lost of the fact that art 11(3) is an aspect of the constitutional right to liberty guaranteed in the Constitution by art 7 such that it is not appropriate to apply the private law standard of negligence as counsel urged upon the court. The issues involved concerned the infringement of a fundamental right as opposed to a delictual wrong because constitutional infringements are different from ordinary delicts. See also *Sheehama v Minister of Safety and Security* 2001 2 NR 294 (HC) para 5; *S v Mbahapa* 1991 NR 274 (HC) 280D-G; *Dendy v University of the Witwatersrand* 2005 5 SA 357 (W) para 23.

170 1978 2 All ER 670 (PC).

171 At 679*j*. See also *Simpson v Attorney General [Baigent's case]* 1994 3 NZLR 667 (CA); *AUW Rights Centre Inc. v Attorney General* 1994 3 NZLR 720 (CA); *Taunoa v Attorney-General* 2008 1 NZLR 429; Okpaluba "The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court" 2012 23 1 *Stellenbosch Law Review* 55 57–58.

172 Contra *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa* 2006 1 SA 461 (SCA); *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC); *Attorney General v Chapman* 2011 NZSC 110 (16 September 2011).

173 *F v Minister of Safety and Security* 2012 1 SA 536 (CC) paras 1–2 and 33.

174 See generally, Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (2012) paras 3.1–3.3.

175 Does the use of the internet fit into the "provision" of reading material? See *Thukwane v Minister of Correctional Services* 2003 1 SA 51 (T).

The culmination of the linkage between the Constitution and the law of delict can be found in the unique provision that distinguishes the South African Constitution from the Constitutions of other Commonwealth countries. The Constitution mandates the courts, in interpreting the Bill of Rights, not only to promote the values of human dignity, equality and freedom but also the spirit, purport and objects of the Bill of Rights when interpreting any legislation or in developing the common law.[176] This constitutional injunction has had a tremendous impact not only on the enforcement of the individual rights but also on the law of delictual liability of the State and its servants.[177] The development of the prevailing constitutional/delict jurisprudence owes its origin to this constitutional mandate and the CC judgment in *Carmichele (1)* which removed the erstwhile common law obstacles that had rendered delictual damages for negligent acts and omissions of the government and other public authorities practically unrealisable.[178] The CC then directed the courts to develop the common law by virtue of the constitutional injunction. Thereafter, the burden shifted to the HC and the SCA to carry out the constitutional mandate of developing the common law having regard to the values and norms of the constitutional order.[179] As Professor Neethling points out, these fundamental values could, and have indeed been implemented by the courts to good effect to fashion "important policy considerations in the determination of wrongfulness, legal causation and negligence."[180]

A good illustration of the marriage between the Constitution of South Africa and the law of delict (since *Carmichele (1)*) through which route a plaintiff/prisoner can claim private law damages, although this might turn out to be a circuitous way of establishing liability, is the CC decision in *Zealand v Minister of Justice and Constitutional Development*.[181] The appellant who was erroneously treated as a sentenced prisoner was remanded in maximum-security prison when he had no conviction of any serious criminal offence. The only possible legal basis on which to justify any deprivation of the applicant's freedom was that he was awaiting trial in the first case. This additional encroachment on his liberty was undoubtedly greater than was necessary to secure his attendance at trial. Moreover, other awaiting trial prisoners of his class were not subjected to similar treatment, which amounted to "punishment".[182] In allowing Zealand's leave to appeal, the CC unanimously held that his detention was unlawful for the entire period. In his judgment, Langa CJ emphasised the distinction between an awaiting trial prisoner and a convicted prisoner, something the majority of the SCA thought was not within the ambit of what they were called upon to decide, but which formed the basis for Poonan JA's dissent.[183] Langa CJ held that the detention of Zealand, an awaiting trial detainee, in a maximum-security facility together with sentenced and convicted prisoners amounted to a deprivation of his freedom. It was arbitrary, without just cause[184] and in violation of section 12(1)*(a)* of the Constitution.[185] The breach was sufficient in the circumstances to render the applicant's detention unlawful for the purposes of a claim for delictual damages.[186] Like in

176 S 39(1) and (2).

177 In addition to *Carmichele (1)* and the subsequent cases, the common law of vicarious liability was another beneficiary of the development of the constitutional-delict jurisprudence. In *K v Minister of Safety and Security* 2005 6 SA 419 (CC), the CC reformulated the common-law test for imposing liability on the employer to incorporate the deliberate or criminal conduct of the employee insofar as it has sufficient link with the business of the employer. The reformulated test was recently applied in *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

178 Okpaluba and Osode, *Government Liability* para 1.6.2.

179 *Ibid* para 5.5.1; Carpenter "The Carmichele Legacy – Enhanced Curial Protection of the Right to Physical Safety: A Note on *Carmichele v Minister of Safety and Security; Minister of Safety and Security v Van Duivenboden; and Van Eeden v Minister of Safety and Security*" 2003 *SAPL* 252.

180 Neethling "Delictual Protection of the Right to Bodily Integrity and Security of the Person Against Omissions by the State"' 2005 *SALJ* 572 574.

181 2008 4 SA 458 (CC).

182 Per Innes JA, *Whittaker & Morant v Roos & Bateman* 1912 AD 92 at 121.

183 2007 2 SACR 401 (SCA) para 28.

184 *Cf* per O'Regan J, *S v Coetzee* 1997 3 SA 527 (CC) para 159. See also *De Lange v Smut NO* 1998 3 SA 785 (CC) para 18.

185 *Cf* Art 10(2), International Covenant on Civil and Political Rights (ICCPR). See also ss 82 and 83, Correctional Services Act 8 of 1959 applicable to the present case; now replaced by Chs 4 and 5, Correctional Services Act 111 of 1998 which commenced on 31 July 2004. All these laws draw significant distinctions between the two classes of prisoners in terms of privileges and restrictions necessary for the maintenance of security and good order in the prison.

186 *Zealand* paras 52 and 53. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 2 SA 359 (CC) where Langa CJ applied similar principles in arriving at the conclusion that there may

Carmichele (1), the fundamental rights breaches in *Zealand* form the basis for wrongfulness and breach so that the court determining delictual liability would then investigate the factors of damage, contributory fault and causation. Similarly, where the wrongful conduct comprises a breach of an entrenched constitutional right, clearly, the policy consideration as to whether liability should attach becomes academic as the court determining the matter would not have the luxury of exercising such discretion. By entrenching the right, the community must have pre-determined the value it places on the right and the courts cannot be seen to upset what is already settled as the legal convictions of the community.[187]

The following main topics discussed in parts two and three of this article are: prosecutorial misconduct and public authority liability; Charter damages for prosecutorial misconduct in criminal proceedings; and the modern law of negligent police investigation in Canada.

be instances where delictual relief may be the appropriate relief for the infringement of constitutional rights hence the conduct of the defendants in not taking responsibility for the safety of rail commuters constituted wrongfulness as could give rise to a delictual action in damages.

187 The facts of *Alves v LOM Business Solutions (Pty) Ltd* 2012 1 SA 399 (GSJ) literally replicated those of *Zealand* and was decided accordingly.