Carmichele v Minister of Safety and Security (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/00

ALIX JEAN CARMICHELE Applicant

versus

THE MINISTER OF SAFETY AND SECURITY First Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

Heard on : 20 March 2001

Decided on : 16 August 2001

JUDGMENT

ACKERMANN and GOLDSTONE JJ:

The Background

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

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

[3] In the High Court, the issue of the liability of the respondents was separated from that of damages. At the close of the applicant's case, Chetty J found that there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongfully. He granted an order of absolution from the instance in favour of the respondents with costs. With the leave of the High Court, the applicant appealed to the Supreme Court of Appeal (the SCA). The appeal was dismissed with costs.[1]

[4] [The applicant now seeks special leave to appeal to this Court from the order of the SCA. In considering the application, we also heard argument on the merits of the appeal. The jurisdiction of this Court to entertain such an application and the requirements for the grant of special leave were considered in S v Boesak.[2] It was pointed out by Langa DP, with reference to section 167(3)(b) of the Constitution, that the issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters.[3] It must in addition be in the interests of justice that the appeal should be heard and in that regard the prospects of success constitute an important factor.[4] The Deputy President stated, inter alia, that:

"Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So, too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights."[5]

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

The Facts

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

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

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

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

[9] Less than six months later, on 4 March 1995, Coetzee attempted to rape and murder Eurona Terblanche (Eurona).[6] Coetzee and Eurona were school friends. She was then 17 years old. After a dance at the Hornlee Hotel, Knysna, Coetzee offered to walk Eurona home. She accepted his offer. Along the way he persuaded her to take a detour along a footpath. At a deserted spot he attempted to kiss her and, when she resisted, he threw her to the ground and repeatedly punched and kicked her. He dragged her into tall grass and ripped off her clothes. He forcibly held her down by sitting on her while he repeatedly punched her in the face, throttled her and bit her. He threatened to kill her. She eventually lost consciousness. At his subsequent trial, Coetzee admitted he had wanted to rape Eurona but denied that he had done so. Whether in fact he did rape Eurona after she lost consciousness was not established. He left her for dead and ran back to the Hornlee Hotel.

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

[11] Eurona regained consciousness, gathered her clothes and walked to the house of a neighbour and friend. She arrived there at about 4 am. She reported the attack to her friend and shortly thereafter to her

own mother (Mrs Terblanche) who summoned the police. Eurona was taken to hospital where the examining doctor noted the extensive injuries inflicted on her.

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

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

[14] After his release, Coetzee returned to Noetzie where he was living with his mother. A day or two later, Mrs Terblanche called on Gosling, who is a friend of the applicant. Mrs Coetzee worked for Gosling both as a domestic worker and as a general assistant in her business in Knysna. The purpose of Mrs Terblanche's visit was to inform Gosling of the attack on Eurona and of Coetzee's previous conviction. In evidence in the High Court, Gosling stated that she was distressed at the news because she thought:

"that he would obviously commit this crime again and I felt very scared to be anywhere where he was."

She added that she felt:

"that he shouldn't maintain a presence in society because my knowledge as a nursing sister and just in life is that a man that has committed two similar crimes is going to do it again."

[15] Because of her concern, Gosling went to speak to Captain Lawrence Oliver (Oliver), a police officer at the Knysna police station. She told him she did not think that Coetzee "should be out on the street" and asked whether he could not be detained pending his trial. Oliver advised her to discuss the matter with the senior prosecutor at Knysna, Ms Dian Louw (Louw). Gosling went to Louw whom she knew well. Her office was in the same building as the Knysna police station. She told Louw that she:

"was afraid that Francois would hurt one of my friends or me and that I really thought he would commit this crime again."

Louw informed her that there was no law to protect them and that the authorities' hands were tied unless Coetzee committed another offence.

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

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

attempted suicide. Grootboom took him to hospital where he was treated. After his discharge, he again returned home to his mother.

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

[19] As a result of this interview, Louw decided that Coetzee should be referred for psychiatric observation. He was brought before the court on 15 March 1995. At the request of the prosecutor and with his consent, Coetzee was referred in custody to Valkenberg Hospital in Cape Town for 30 days observation in terms of section 77(1) of the Criminal Procedure Act.[7] The purpose of a referral under that provision is to ascertain whether an accused person is by reason of mental illness or mental defect incapable of understanding trial proceedings so as to make a proper defence. On the same day Louw prepared a report for the hospital authorities in which she included the details of the attack on Eurona, a reference to his previous conviction, a description of the events thereafter and a rendition of her interview with Coetzee.

[20] On 18 April 1995, on his return from Valkenberg Hospital, Coetzee again appeared in the Knysna magistrate's court. The prosecutor was again Olivier and the presiding magistrate a Mr Goosen. According to the report from Valkenberg Hospital Coetzee was found to be mentally capable of understanding the proceedings and able to make a proper defence, and was also found to have been mentally capable at the time of his attack on Eurona.[8] The criminal charges were put to Coetzee and he pleaded not guilty. He gave as his reason his doubt as to whether he had raped the complainant. The case was postponed to 2 May 1995 pending the attorney-general's decision whether to proceed in the High Court. There is no reference in the record to the question of bail having been raised. Coetzee was warned to appear on 2 May 1995. On that date the trial was further postponed.

[21] The applicant frequently stayed at Gosling's home in Noetzie. On one such occasion towards the end of June 1995, Gosling left for work in the morning. Shortly after she had left, the applicant noticed Coetzee snooping around the house, looking in at a window and trying to open it. The applicant called to him and asked what he was doing there. He replied that he was looking for Gosling. He then left. The applicant telephoned Gosling and reported the incident. Gosling informed the applicant that Coetzee's excuse was false as he must have seen her driving away in her motor vehicle.
[22] At the request of the applicant, Gosling again went to the Knysna police station and reported the incident to Captain Oliver who again referred her to Louw. According to Gosling's evidence

"I said Dian you've got to do something about this guy, there must be some law to protect society, not necessarily me or people at Noetzie and she said to me that there was nothing she could do."

On 2 August 1995 both the applicant and Gosling again broached the matter with Louw when she visited them at Gosling's business premises. Again, according to Gosling, Louw claimed she was powerless to do anything about Coetzee.

[23] On Sunday, 6 August 1995 the applicant went to Gosling's home where they had arranged to meet. Gosling had not yet arrived. The applicant went into the house and was confronted by Coetzee who had apparently broken in. He immediately attacked her with a pick handle. His blows were directed at her head and face. When she lifted her arm to protect herself, one of the blows struck and broke her arm. He threatened her and dragged her around the house. He repeatedly ordered her to turn around. She refused to do so. He discarded the pick handle and lunged at her with a knife. He stabbed her left breast and the blade

of the knife buckled as it hit her breastbone. He lunged at her again and she kicked him. He lost his balance and she managed to escape through a door. She ran along the beach where someone came to her assistance. Coetzee was charged on a number of counts including one of attempting to murder the applicant.

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

The Applicant's Cause of Action

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

(a) Klein or the prosecutors respectively owed a legal duty to the applicant to protect her;
(b) Klein or the prosecutors respectively acted in breach of such a duty and did so negligently;
(c) there was a causal connection between such negligent breach of the duty and the damage suffered by the applicant.

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

The Test for an Order of Absolution from the Instance

[26] Both the trial judge and SCA applied the appropriate test for the grant of absolution from the instance at the close of the plaintiff's case, viz. whether a court, applying its mind reasonably to the evidence, could or might (not should or ought to) find that the police or prosecutors at Knysna owed a legal duty to the applicant to protect her.[9]

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

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

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

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

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

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

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

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

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

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

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

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

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

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

. . . .

13. Privacy.—Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."

Counsel relied further on the provisions of section 215 of the IC, which read:

"The powers and functions of the Service shall be–

(a) the prevention of crime;
(b) the investigation of any offence or alleged offence;
(c) the maintenance of law and order; and
(d) the preservation of the internal security of the Republic."

More specifically, so the submission ran, the IC imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular. The Court was referred to the following statement of the SCA in S v Chapman:1[0]

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution [in a footnote there is reference, inter alia, to sections 10, 11 and 13 of the IC] and to any defensible civilisation.

Women in this country are entitled to the protection of these rights."

[30] It was submitted further that the police and prosecution services are among the primary agencies of the state responsible for the discharge of its constitutional duty to protect the public in general and women in particular against violent crime. It was conceded by counsel for the applicant that it does not follow that

any such failure in that duty entitles the victim to damages in delict. It was contended, however, that on the facts of this case, the applicant is entitled to such damages.

[31] Despite the failure by the applicant to rely directly upon the provisions of either section 35(3) of the IC or section 39(2) of the Constitution in the High Court and SCA, counsel for the respondent did not object to this issue being raised in this Court. If covered by the pleadings, and in the absence of unfairness, parties are ordinarily not precluded from raising new legal arguments on appeal.1[1] In constitutional matters, however, courts have an interest in a constitutional issue being raised timeously. The relevance of this omission in the present case is dealt with later in this judgment.1[2]

[32] Neither the trial court nor the SCA had regard to these provisions of the Bill of Rights in the IC or the Constitution. They also did not to have regard to section 39(2) of the Constitution, which requires all our courts to develop the common law with due regard to the "spirit, purport and objects" of the Bill of Rights.1[3]

The Obligation to Develop the Common Law

[33] The Constitution is the supreme law. The Bill of Rights, under the IC, applied to all law.1[4] Item 2 of schedule 6 to the Constitution provides that "all law" that was in force when the Constitution took effect, "continues in force subject to . . consistency with the Constitution."1[5] Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice.1[6] In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.1[7] It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.

[34] Under the IC the circumstances in which the common law could be developed by this Court was a complex issue.1[8] However, under the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.

[35] In this case the High Court and the SCA were requested to develop the common law, not on a constitutional basis, but in the light of the unusual nature of the applicant's cause of action. The common law, especially in the field of delictual liability, has constantly required development.1[9] Where a court develops the common law, the provisions of section 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the Bill of Rights.

[36] In exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in R v Salituro,2[0] which was cited by Kentridge AJ in Du Plessis v De Klerk:2[1]

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

Under our Constitution the duty cast upon judges is different in degree to that which the Canadian Charter of Rights cast upon Canadian judges. In South Africa, the IC brought into operation, in one fell swoop, a completely new and different set of legal norms.2[2] In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects

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

[37] The proceedings in the High Court and the SCA took place after 4 February 1997 when the Constitution became operative. It follows that both the High Court and the SCA were obliged to have regard to the provisions of section 39(2) of the Constitution when developing the common law.2[3] However, both courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied. In our respectful opinion, they overlooked the demands of section 39(2).

[38] In the High Court and the SCA the applicant relied only on the common law understanding of wrongfulness which has been developed by our courts over many years. Save in one respect referred to in the applicant's heads of argument in the SCA, no reliance was placed on the provisions of the IC or the Constitution as having in any way affected the common law duty to act owed by police officers or prosecutors to members of the public. With regard to the "interests of the community" imposing a legal liability on the authorities, it was submitted by the applicant's counsel that it would "encourage the police and prosecuting authorities to act positively to prevent violent attacks on women." In support of that submission counsel referred to authorities in this Court and the SCA devoted to patterns of discrimination against women.2[4] It does not appear to have been suggested that there was any obligation on the High Court or the SCA to develop the common law of delict in terms of section 39(2) of the Constitution.2[5]

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

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

[41] There is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible. In the result this Court has not had the benefit of any assistance from either court on either stage of the inquiry referred to above. We consider later what this Court should do in these circumstances. But first it is necessary to deal with the reasons of the SCA for dismissing the appeal.

[42] The SCA, as the High Court had done, had regard and referred to wrongfulness as it has been developed in our common law prior to the operation of the IC. Vivier JA stated the following in his judgment:

"The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of this Court such as Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 597A–C; Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 317C–318I; Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27G–I and Government of the Republic of South Africa v Basdeo and Another 1996 (1) 355 (A) at 367E–H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on

the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court.

In Minister of Law and Order v Kadir (supra) Hefer JA stated the nature of the enquiry thus at 318E–H:

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

Hefer JA also stressed the difference between morally reprehensible and legally actionable omissions and warned that a legal duty is not determined by the mere recognition of social attitudes and public and legal policy (at 320A–B). The question must always be whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm (Prof J C van der Walt in Joubert (ed) The Law of South Africa vol 8 1st re-issue part 1 para 56)."2[6]

[43] [As pointed out in the quotation above, in determining whether there was a legal duty on the police officers to act, Hefer JA in Minister of Law and Order v Kadir2[7] referred to weighing and the striking of a balance between the interests of parties and the conflicting interests of the community. This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the "spirit, purport and objects of the Bill of Rights" and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

[44] Under both the IC and the Constitution, the Bill of Rights entrenches the rights to life,2[8] human dignity2[9] and freedom and security of the person.3[0] The Bill of Rights binds the state and all of its organs. Section 7(1) of the IC provided:

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

Section 8(1) of the Constitution provides:

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

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

[45] In the United States, a distinction is drawn between "action" and "inaction" in relation to the "due process" clause of their Constitution, (the 14th Amendment). In DeShaney v Winnebago County Department of Social Services,3[1] the majority declined to hold a government authority liable for a failure to take positive action to prevent harm. As stated in the dissent of Brennan J:

"The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights."3[2]

The provisions of our Constitution, however, point in the opposite direction. So too do the provisions of the European Convention on Human Rights (Convention). Article 2(1) of the Convention provides that "Everyone's right to life shall be protected by law." This corresponds with our Constitution's entrenchment of the right to life. We would adopt the following statement in Osman v United Kingdom:3[3]

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

[46] Counsel for the respondents referred us to decisions of the English courts in which public authorities such as the police and local authorities have been granted what amounts to an immunity against claims in delict by members of the public.3[4] However, in a recent decision of the House of Lords a more flexible approach to delictual claims against public authorities has emerged. In Barrett v Enfield London Borough Council3[5] the decision to strike out a claim against a local authority for the negligent failure to safeguard the welfare of a minor was reversed. The reasoning of Lord Browne-Wilkinson is as follows:

"(1) Although the word 'immunity' is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence. (2) In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the defendant's primary functions for the benefit of society as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence. In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. (3) In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case."3[6]

[47] In two cases the European Court of Human Rights has found against the "immunity approach" of the English courts. We have already referred to the decision in Osman.3[7] There it was stated:

"In their alternative submission the applicants asserted that even if it could be said that the immunity pursued a legitimate aim or aims, its operation offended against the principle of proportionality. They reasoned in this respect that the immunity was complete and as such did not distinguish between cases where the merits were strong and those where they were weak. In the instant case, involving the protection of a child and the right to life and where the damage caused was grave, the requirements of public policy could not dictate that the police should be immune from liability. Furthermore, the combined effect of the strict tests of proximity and foreseeability provided limitation enough to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious loss through truly negligent actions."3[8]

[48] The second case, Z and Others v United Kingdom,3[9] was the appeal to the European Court of Human Rights from the decision of the House of Lords in the case of X and Others v Bedfordshire County Council.4[0] The European Court held that the immunity approach effectively precluded the plaintiffs from having

". . . available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damages suffered thereby."4[1]

This was found to contravene the provisions of Article 13 of the Convention,4[2] and the Court consequently made an award of damages to the appellants.

[49] Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials. A public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values. Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents.

The Development of the Common Law Under Section 39(2)
[50] This Court has consistently, and in various contexts, confirmed the importance of judgments on constitutional issues by the high courts and the Supreme Court of Appeal in cases to be considered by this Court. This is a weighty consideration, for example, when considering whether to grant direct access4[3] or to allow an appeal directly to this Court.4[4] In Bequinot's case4[5] the following was said on behalf of a unanimous Court:

". . . this Court would have . . . to decide the issue without the benefit of the wisdom of the Court below. It has been said before but needs to be restated that this Court is placed at a grave disadvantage if it is required to deal with difficult questions of law, constitutional or otherwise, and has to perform the balancing exercise demanded by s 33(1) of the Constitution virtually as a court of first instance."4[6] (emphasis supplied).

[51] [There are other public and judicial policy considerations, such as fairness to the losing litigant, which underpin such an approach as was recognised in Bruce v Fleecytex4[7] where the following was stated by this Court:

"It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."4[8]

[52] [In Christian Education South Africa v Minister of Education4[9] Langa DP, writing for another unanimous Court, dismissed as having "no merit" an argument that the aforementioned principle was less significant where the issue involved a value judgment and therefore assumed less importance for the interests of justice. He stated that:

". . . the exclusion of the other courts from the exercise of a jurisdiction given to them by the Constitution would clearly not be in the general interests of justice and the development of our jurisprudence."5[0]

[53] The above principles become singularly compelling when the issue is whether or how the common law is to be developed under section 39(2) of the Constitution, particularly when this Court has not previously been required to do so. As this Court stated in Amod's case:5[1]

"When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance."

This passage was quoted with approval in the De Freitas case.5[2]

[54] Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

"The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary."5[3]

The same is true of our Constitution.5[4] The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

[55] This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform.5[5] The proper development of the common law under section 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal5[6] which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm.

[56] There are notionally different ways to develop the common-law under section 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law.5[7] Before the advent of the IC, the refashioning of the common law in this area entailed "policy decisions and value judgments"5[8] which had to "reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people."5[9] A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what "the [c]ourt conceives to be society's notions of what justice demands."6[0] Under section 39(2) of the Constitution concepts such as "policy decisions and value judgments" reflecting "the wishes . . . and the perceptions . . . of the people" and "society's notions of what justice demands" might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

[57] Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected. However, it is by no means clear how these constitutional obligations on the state translate into private law duties towards individuals. A consequence of such an approach might be:

(a) to accentuate the objective nature of unlawfulness as one of the elements of delictual liability, particularly in the context of a bail hearing where the roles and general duties of investigating officers and prosecutors are more clearly defined than would normally be the case;
(b) to define it more broadly; and
(c) to allow the elements of fault and remoteness of damage to play the greater role in limiting liability.

[58] As against this there must be other ways of applying section 39(2) in shaping the common law generally and in determining specifically the wrongfulness element of delictual liability for an omission. Our common law of delict spans many centuries and the debate regarding delictual liability, its elements and their relationship to one another, remains lively. Without the benefit of a fully considered judgment from either the SCA or the High Court as to whether, from the perspective of the common law, one solution would be better than any other, this Court is at a "grave disadvantage" in the sense indicated in Bequinot's case.6[1]

[59] The litigants are also disadvantaged because they have not had the opportunity of reconsidering or refining their respective arguments in the light of a prior judgment of the SCA.6[2] This in itself impacts negatively on the Court's ability to make wise and prudent choices. Moreover, the issue in this case can hardly be described as an insignificant one, lying at an exotic periphery of the law of delict. On the contrary, the case raises issues of considerable importance to the development of the common law consistently with values of our Constitution.

[60] In our view the High Court, possibly because of the way the case was argued before it, misdirected itself in relation to the constitutional requirements of section 39(2). In the ordinary course a court on appeal would, where the trial court has so misdirected itself, make the order which that court ought to have made. In the present case, for the reasons that follow, this can be done without pre-empting decisions of the High Court or the SCA as to whether the circumstances of the present case are such to call for the law of delict to be developed, and if so, how this should be done. To that end we proceed to consider the issues relevant to legal liability in the context of the evidence given at the trial and the provisions of the Constitution.

Should Absolution From the Instance Have Been Granted in the Circumstances of the Present Case?
[61] Section 215 of the IC provides that:

"The powers and functions of the Service shall be -

(a) the prevention of crime;
(b) the investigation of any offence or alleged offence;
(c) the maintenance of law and order; and
(d) (the preservation of the internal security of the Republic."6[3]

The detailed duties of the South African Police Service at the time relevant to this matter were to be found in the Police Act.6[4] Section 5 read as follows:

"The functions of the South African Police shall be, inter alia—

(a) the preservation of the internal security of the Republic;
(b) the maintenance of law and order;
(c) the investigation of any offence or alleged offence; and
(d) the prevention of crime."

[62] Thus one finds positive obligations on members of the police force both in the IC and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things

can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the amicus curiae:6[5]

"Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."

She referred in that context to the following statement by the SCA in the Chapman case:6[6]

"The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.6[7] The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

[63] In the present case the complaint against Klein (the investigating officer in Eurona's case) is not that he was guilty of a mere omission. Coetzee was in custody and Klein had a clear duty to bring to the attention of the prosecutor any factors known to him relevant to the exercise by the magistrate of his discretion to admit Coetzee to bail. He made a positive recommendation that Coetzee should be released on warning in the clear knowledge that the prosecutor would act on such recommendation.

[64] When Klein informed the prosecutor that Coetzee should be released on warning he had interviewed both Eurona and Coetzee. He was aware of the allegation (exaggerated as it may have been) that Coetzee had a previous conviction for rape. On the day after the attack on Eurona, Klein took a statement from Coetzee. It is not clear from the record of the proceedings in the High Court what information was given to him by Coetzee. It was submitted on behalf of the applicant that there was a probability that Coetzee would have given Klein the information he later gave to Louw. For the purpose of an application for absolution from the instance we consider that a reasonable court might be prepared to make that assumption in favour of the applicant.

[65] There appears to be no question that at all times after the attack on Eurona, Coetzee admitted that he was the perpetrator of a violent sexual attack on her. That, too, was a relevant consideration. Coetzee already had a suspended sentence hanging over him for a sexual assault. In the circumstances, and in the light of his admission, less weight than is normally given would have been attached to the presumption of innocence and to the right to freedom and security of the person in determining where the interests of justice lay as far as bail was concerned.

[66] Klein was aware that if released Coetzee would return to his mother's home in the secluded setting of Noetzie. If there was a risk of a repeat attack on a woman, those living in the vicinity of the Coetzee home would be most vulnerable if Coetzee was released. According to Gosling and the applicant they certainly perceived themselves to be in such a position. It was also known to Klein that the previous attacks by Coetzee had been committed against women who knew him. The issue here is whether, given these facts and the constitutional protection to which the applicant was entitled, Klein's advice to the prosecutor that Coetzee be released on his own recognisances was unlawful.

[67] The SCA did not consider the conduct of Klein on 5 March 1995 and dealt with the case on the basis only of the failure by the prosecutor to oppose bail on 18 April 1995 after Coetzee's return from Valkenberg. But once Coetzee was released on warning in March, the pattern was set. When he returned from Valkenberg that release order was likely to remain in place unless there were grounds on which he could be denied bail at that stage.

[68] When Coetzee was returned in custody from Valkenberg and appeared before the magistrate on 18 April 1995, Louw (the senior prosecutor) was aware of the material facts relating to Coetzee's history of criminal conduct. She had indeed noted them at the time of the referral of Coetzee to Valkenberg. Those facts disclosed that Coetzee had on two occasions perpetrated crimes of a sexual nature on women who were known to him. The second one was accompanied by brutal violence. Furthermore, Coetzee acknowledged that he had great difficulty in controlling his sexual impulses. This is borne out by the fact that his victims were known to him and his apprehension was inevitable. Louw was also aware that there were very few women living in the seclusion of Noetzie and that they were concerned for their safety and had strong feelings that Coetzee should not have been allowed back into their community.

[69] With his consent, Coetzee was committed to Valkenberg on 15 March 1995 and for that purpose was taken into custody. A committal order was made under the provisions of section 77 of the Criminal Procedure Act.6[8] It was necessary, therefore, at the end of the period of observation at Valkenberg, for Coetzee again to appear in the magistrate's court. Olivier, the prosecutor on that occasion, apparently did not apply for him to be kept in custody and he was again released on his own recognisance.

[70] The SCA dealt with the matter on the basis that the magistrate had the power to withdraw the earlier order releasing Coetzee on his own recognisance and reconsider the question of bail. Vivier JA said the following:

"In view of the fact that Coetzee was taken into custody after his first release on 6 March 1995 and that he was then again released on 18 April 1995 the court proceedings on 6 March 1995 are irrelevant and need not be considered. The essential enquiry is, first, whether the alleged legal duty was owed by the police and prosecutors with regard to Coetzee's release on 18 April 1995 and, secondly, whether the prosecutors owed the appellant a legal duty to secure his rearrest following the complaints on 20 June 1995 and 2 August 1995.

With regard to Coetzee's release on 18 April 1995 it was obviously the magistrate's decision whether to release him or not, so that the legal duty contended for must be confined to a duty, on the part of the police, to provide the prosecutor with full information and a duty, on the part of the prosecutor, to oppose bail and to give the court full information relevant to Coetzee being remanded in custody or released."6[9]

[71] This conclusion that the magistrate could at that hearing have withdrawn the previous order releasing Coetzee on warning was not challenged in this Court and for the purposes of this judgment we consider it prudent to deal with the matter on the basis that the SCA did.7[0]

The Case Against the Prosecutors

[72] The IC did not contain any provisions dealing with prosecutors. Section 108(1) provided only that the authority to institute criminal prosecutions on behalf of the state vested in attorneys-general. Under section 108(2) the powers, duties and functions of attorneys-general were to be prescribed by law.7[1] However, prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.7[2] Although the consideration of bail is pre-eminently a matter for the presiding judicial officer,7[3] the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.

[73] In considering the legal duty owed by a prosecutor either to the public generally or to a particular member thereof, a court should take into account the pressures under which prosecutors work, especially in the magistrates' courts. Care should be taken not to use hindsight as a basis for unfair criticism. To err in this regard might well have a chilling effect on the exercise by prosecutors of their judgment in favour of the liberty of the individual. There are far too many persons awaiting trial in our prisons either because bail has been refused or because bail has been set in an amount which cannot be paid. We can do no better in this regard than refer to the following passage which appears in the United Nations Guidelines on the Role of Prosecutors:7[4]

"In the performance of their duties, prosecutors shall:

(a) . . .
(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; . . ."

[74] That said, each case must ultimately depend on its own facts. There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail 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 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 the damages suffered by the complainant.

Causation
[75] Counsel for the respondents submitted that at the relevant time in 1995, magistrates interpreted the provisions of the IC as requiring them to grant bail unless the state could establish that the interests of justice required the accused to be kept in custody.7[5] He relied on the evidence of the magistrate, Mr K J Von Bratt, in support of the submission that even if Klein's information had been placed before him, he would in any event have released Coetzee. Mr Von Bratt was called as a witness by the applicant. He stated that had he been informed of Coetzee's previous conviction in the light of the charge involving Eurona, he would have held an inquiry into the question of bail. He was not asked to take that any further. Under cross-examination he stated that at that time in 1995:

". . . there was very much a renewed emphasis on personal freedom at that stage, which did play a role . . ."

He added that in consequence people were allowed out on their own recognisances more readily than prior to the coming into operation of the IC and that this also related to persons accused of serious offences such as murder and rape and that the state would have had to have produced substantial grounds for keeping an accused in prison. In re-examination he said that bail would have been refused if he had been of the view that Coetzee's previous conviction had been a serious one and that there was a risk of his committing a further offence.

[76] It may well be that in deciding whether a magistrate could or might have refused to release Coetzee on bail an objective test must be applied, and that the evidence of the magistrate who happened to have been seized with the matter is neither relevant nor admissible. On this approach the court would have regard to the law as it should have been applied by a reasonable magistrate on the facts given to him by the prosecutor. The question of causation, in the event of the conduct of either the police or the prosecutors being unlawful, was not considered by the High Court or the SCA. This too is a complex issue that may ultimately depend on the facts as they emerge at the end of the case.

[77] Not having the benefit of the views of the High Court or the SCA, or argument from counsel in this Court on the admissibility of Von Bratt's evidence, it is not desirable that this Court should express a firm view as to either the proper test to be applied in determining this issue or on the application of the correct test to the facts established on the applicant's evidence. Nor in the light of the decision to which we have come, is it necessary for us to do so. The evidence is in our view sufficient to justify a conclusion that if bail had been opposed and if all relevant information pertaining to Coetzee's background and sexual problems had been placed before the magistrate, bail might have been refused. That is sufficient to put the respondents on their defence in relation to this issue.

What Should this Court do in these Circumstances?

[78] The issue confronting this Court is whether, in the special circumstances of this case, it should itself decide if the law of delict should be developed to afford the applicant a right to claim damages if the police or the prosecutor were negligent, or whether this should be left to the High Court or the SCA to determine.

[79] An order for absolution from the instance is an appropriate order to make at the end of the plaintiff's case where a court, applying its mind reasonably to the evidence, could not or might not find for the plaintiff.7[6] The underlying reason is that it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances.7[7] A determination of what is in the interests of justice necessarily involves the exercise of a discretion.7[8]

[80] In Minister of Law and Order v Kadir,7[9] Hefer JA made the following comment, with which we are in respectful agreement, concerning the approach to be adopted by courts when they are asked to develop the common law:

Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and every other relevant factor. This would seem to indicate that the present matter should rather go to trial and not be disposed of on exception. On the other hand, it must be assumed - since the plaintiff will be debarred from presenting a stronger case to the trial Court than the one pleaded - that the facts alleged in support of the alleged legal duty represent a high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not prima facie support the legal duty contended for, there is no reason why the exception should not succeed.8[0]

This is relevant to applications for absolution from the instance in trials where the court is asked to develop the common law in terms of section 39(2) of the Constitution. There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors. This has the merit of avoiding the determination of issues on the basis of what might prove to be hypothetical facts. It also ensures that there is a full and complete record on which te dispute can be determined with finality not only by the trial court, but by an appeal court required to deal with the matter. This may curtail rather than prolong litigation.

[81] We are satisfied that the case for the appellant has sufficient merit to require careful consideration to be given to the complex legal issues that it raises. If this Court were to decide these issues it would have to do so in circumstances where for all practical purposes it would be acting as a court of first instance in relation to issues of fundamental importance concerning the development of the common law of delict. For the reasons that have already been given that is not desirable. Moreover, even if the applicant were to be successful that would not put an end to the litigation. The facts would still have to be determined and they might prove to be materially different from those evaluated at the absolution stage. It is not desirable that a case as complex as this should be dealt with on the basis of what the facts might be rather than what they are.

[82] This matter has already passed through three courts and it is desirable that it be brought to a head without further unnecessary delay. The High Court will deal with the matter on the basis of the facts as determined by it.

[83] The appropriate order is to uphold the appeal, to set aside the orders of the High Court and the SCA and to refer the matter back to the High Court for it to continue with the trial. That is likely to lead to a final determination of the issues with the least delay. The application for leave to appeal must consequently be granted and the appeal must succeed.

The Order

[84] The following order is made:

1. The application for special leave to appeal is granted with costs.
2. The appeal is upheld with costs.
3. The order of the Supreme Court of Appeal is set aside and the following order is substituted for that of the High Court:

"The application for absolution from the instance is dismissed with costs."

4. The matter is referred back to the High Court so that the trial may continue.
5. The costs orders referred to in 1 and 2 above are to include those of two counsel.

Chaskalson P, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ and Somyalo AJ concur in the judgment of Ackermann and Goldstone JJ.

For the applicants: W Trengove SC and AM Breitenbach instructed by Buchan Mosdel and Pama, Knysna and Bowman Gilfillan Inc. Sandton.

For the respondents : JA Le Roux SC and R Jaga instructed by the State Attorney, Cape Town and the State Attorney, Johannesburg.

For the amicus curiae: J Kentridge instructed by the Wits Law Clinic, Johannesburg.

[1] The judgment of the SCA is reported as Carmichele v Minister of Safety and Security and Another 2001 (1) SA 489 (SCA).

[2] 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-15.

[3] Id at para 11.

[4] Id at para 12.

[5] Id at para 14. Section 39(2) of the Constitution provides that:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

The corresponding provision of the Interim Constitution (IC) (Act 200 of 1993), section 35(3), provided:

"In the interpretation of any law and the application development of the common law or customary law, a court, shall have due regard to the spirit, purport and objects of this Chapter."

[6] Eurona Terblanche is referred to by her first name to avoid confusion with her mother to whom reference is made later in this judgment.

[7] Act 51 of 1977.

[8] Although the referral was only in terms of section 77(1) of the Criminal Procedure Act, which relates to whether the accused is capable of understanding the proceedings in question so as to make a proper defence, it appears from the record that Valkenberg treated the enquiry as also having been made under section 78(2), which relates to whether the accused "is by reason of mental illness or mental defect not criminally responsible for the offence charged."

[9] Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA) at 92E-93A.

1[0] 1997 (3) SA 341 (A) at 344J-45B, per Mohamed CJ, and Van Heerden and Olivier JJA.

[1]1 Cole v Government of the Union of S.A. 1910 AD 263 at 272-73; Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 23B-24G.

1[2] See paras 41, 50 et seq and 78 et seq.

1[3] Above n 5.
1[4] Section 7(2) of the IC provided that:

"This Chapter shall apply to all law in force . . . during the period of the operation of this Constitution."

1[5] Since the Bill of Rights applies to all law, and there is no material difference between section 35(3) of the IC and section 39(2) of the Constitution, it is unnecessary to consider in this case whether the principle of non-retrospectivity applies. See Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paras 15-24.
1[6] Section 173 provides:

"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

1[7] As emerges from the provisions of section 35(3) of the IC and section 39(2) of the Constitution, the development of the common law will not be different whether we "have regard to" or "promote" the "spirit, purport and objects" of the respective Bills of Rights.

1[8] Du Plessis v De Klerk, above n 15 at paras 65-66; Gardener v Whitaker 1996 (4) SA 337; 1996 (6) BCLR 775 (CC) at paras 16-18.

1[9] See Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 596G-97H. See also Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 828H-29B; Marais v Richard En 'n Ander 1981 (1) SA 1157 (A) at 1166H-67A; Pakendorf En Andere v De Flamingh 1982 (3) SA 146 (A) at 157E-58G; and Schultz v Butt 1986 (3) SA 667 (A) at 681D-83I.

2[0] (1992) 8 CRR (2d) 173.

2[1] Above n 15 at para 61.

[2]2 See S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262 per Mahomed J.

2[3] Amod v Multilateral Motor Vehicle Accidents Fund 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 22.

2[4] Brink v Kitshoff NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC); S v Chapman, above n 10.

2[5] Above n 5.

2[6] Above n 1 at para 7.

2[7] 1995 (1) SA 303 (A) at 318E-H.

2[8] Section 9 of the IC; Section 11of the Constitution.

2[9] Section 10 of the IC and the Constitution.

3[0] Section 11 of the IC; Section 12 of the Constitution.

3[1] 489 US 189 (1988).

3[2] Id at 204.

[3]3 29 EHHR 245 at 305, para 115.
3[4] In the case of Hill v Chief Constable of West Yorkshire [1989] 1 AC 53 (HL) the House of Lords found it necessary to protect the police from delictual claims on the view that the interests of the community as a whole are best served by a police force that is not diverted and prejudiced by being diverted from its primary duties by the exposure to such liability.

"The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime."

Per Lord Keith of Kinkel at 63G. Similar considerations led the House of Lords to deny claims against local authorities for negligence in respect of the discharge of their functions concerning the welfare of children in X and Others v Bedfordshire County Council [1995] 2 AC 633 (HL) per Staughton LJ at 674H-75G, and per Peter Gibson LJ at 681G-H.

3[5] [1999] 3 All ER 193.

3[6] Id at 199d-j.

3[7] Above n 33.

3[8] Id at 314, para 142.

3[9] Application no 29392/95, 10 May 2001, as yet unreported.

4[0] Above n 34.

4[1] Id at para 111.
4[2] Article 13 provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

4[3] See, for example, Transvaal Agricultural Union v Minister of Land Affairs and Another 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 18; S v Bequinot 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 15; Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8; Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at paras 8 and 12; and Dormehl v Minister of Justice and Others 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at para 5.

[4]4 See, for example, Amod v Multilateral Motor Vehicle Accidents Fund, above n 23 at para 33; Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at paras 31-32; and De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening) 1998 (11) BCLR 1345 (CC) at paras 20-21.

4[5] Above n 43.

4[6] Id at para 15 citation omitted.

4[7] Above n 43.

4[8] Id at para 8.

4[9] Above n 43.

5[0] Id at para 9.

5[1] Above n 44 at para 33.

5[2] Above n 44 at para 21.

5[3] BVerfGE 39, 1at 41 and Du Plessis and Others v De Klerk and Another, above n 15 at para 94.

5[4] Compare also the remarks of Mahomed AJ in S v Acheson 1991 (2) SA 805 (NmHC) at 813B.

[5]5 Above para 36.

5[6] It is unnecessary for purposes of this case to consider the position of the magistrates' and other courts.

5[7] The way English law approaches the development of the common law in this context is illustrated by, for example, the decisions in Home Office v Dorset Yacht Co. Ltd [1970] AC 1004 (HL); Hill v Chief Constable of West Yorkshire above n 34; Barrett v Enfield London Borough Council above n 35; and Lancashire County Council and another v A (a child) [2000] AC 147 (HL). By contrast the development of the private law in Germany in the present context is through the indirect horizontal operation of the German Basic Law on private legal relationships. This so-called "radiating effect" of the Basic Law operates through the "general clauses" of the German Civil Code, such as clauses which refer to "good morals," "justified," "wrongful," "contra bonos mores," "good faith" and so forth; and could even operate in respect of private law rules which are unclear (see Du Plessis and Others v De Klerk and Another, above n 15 at paras 39-40; 93-94; 103-05 and the authorities referred to therein).

5[8] Minister of Law and Order v Kadir, above n 27 at 318E.

5[9] Id at 318F, quoting with approval from Corbett "Aspects of the Role of Policy in the Evolution of our Common Law" (1987) 104 SALJ 52 at 67.

6[0] Minister of Law and Order v Kadir, above n 27 at 318G. The phrases quoted in the paragraph of text following this footnote are all from the longer quotation cited at n 27 above.

6[1] In the passage quoted therefrom in para 50 of this judgment.

6[2] See Bruce v Fleecytex, above n 44 at para 8.

6[3] The provisions of the Constitution are more explicit. Section 7(2) provides that:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

Section 41(1)(b) further provides that:

> "All spheres of government and all organs of state within each sphere must:
> . . .
> (b) secure the well-being of the people of the Republic;"

Chapter 11 makes provision for Security Services. Section 198(a) provides that:

". . . National security must reflect the resolve of South Africans, as individuals and as a nation, . . .to be free from fear. . ."

And, section 205(3) reads as follows:

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

6[4] Act 7 of 1958 which was replaced by the South African Police Service Act 68 of 1995 which commenced on 15 October 1995.

6[5] The Centre for Applied Legal Studies (CALS), an organisation based at the University of the Witwatersrand, which conducts research and engages in advocacy, litigation and training for the promotion and protection of human rights in South Africa. CALS has a Gender Research Project which focuses specifically on questions of women's human rights and sex and gender equality, with particular reference to the promotion of equality for disadvantaged groups of women.

[6]6 Above n 10 at 345C-D.
6[7] The Convention on the Elimination of All Forms of Discrimination Against Women, commonly known by its acronym CEDAW, was adopted in General Assembly Resolution 34/180 on 18 December 1979. See articles 1, 2, 3, 6, 11,12 and 16. The Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995. The United Nations Committee on the Elimination of Discrimination Against Women, which was established under the Convention, recommended in 1992 that:

" . . .States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."

See General Recommendation 19, U.N. GAOR, Committee on the Elimination of Discrimination Against Women, 11th sess. (1992). See generally a helpful article by Heléne Combrinck, "Positive State Duties to Protect Women from Violence: Recent South African Developments" (1998) 20 Human Rights Quarterly 666-690. And see S v Baloyi, above n 24 at para 13.

6[8] Above n 7.

6[9] Above n 1 at paras 14-15.

7[0] Whether, as the Criminal Procedure Act then read, it was open to the magistrate in the circumstances of the present case to review or reconsider the release of Coetzee, is a matter on which we do not express an opinion.
7[1] Under the Constitution section 179 deals more explicitly with the "prosecuting authority." It is provided, inter alia, in section 179(4) that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The national legislation is to be found in the National Prosecuting Authority Act 32 of 1998. Section 32(1) of the Act reads as follows:

"(a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.
(b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

7[2] See R v Riekert 1954 (4) SA 254 (SWA) at 261D-E; S v Jija and Others 1991 (2) SA 52 (E) at 67J-68A, and S v Van Huyssteen [2000] 3 All SA 439 (C) at para 11. Australia: Lawless v R (1979) 26 ALR 161 at 176-77; R v Hall (1979) 28 ALR 107 at 112. Canada: Boucher v The Queen, (1954) 110 CCC 263 at

270;Bain v The Queen (1992) 87 DLR (4th) 449 at 463-65. England: R v Brown [1997] 3 All ER 769 (HL) at 778. India: S.B. Shahane v State of Maharashtra AIR 1995 SC 1628 at 1629-31. United States: Imbler v Pachtman, District Attorney 424 US 409, 423 (1976).

7[3] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 41-43; Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling 1994 (4) SA 835 (W) at 849E-F.

7[4] Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba from 17 August - 7 September 1990. These guidelines have been incorporated by reference in our law by section 22(4)(f) of the National Prosecuting Authority Act 32 of 1998, which requires the National Director to bring them to the attention of Directors and prosecutors and promote their respect for and compliance with those principles.

7[5] See Du Toit et al Commentary on the Criminal Procedure Act (Juta, Cape Town 1987, revision service update 24, 2000) at 9-7; and Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling, above n 73 at 846H-J.

7[6] Above para 26.

[7]7 Mazibuko v Santam Insurance Co Ld and Another 1982 (3) SA 125 (A) at 134E-35A; Putter v Provincial Insurance Co Ltd. and Another 1963 (4) SA 771 (W) at 772F-G; Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd and Others 1978 (3) SA 1073 (N) at 1076G-77C.

7[8] Ardecor, id at 1077C-F. Compare Young v Rank and Others [1950] 2 KB 510 at 511-13.

7[9] Above n 27.

8[0] Id at 318G-J.