THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 209/2001

In the matter between :

MINISTER OF SAFETY AND SECURITY Appellant

and

DIRK VAN DUIVENBODEN Respondent

Before:	**Howie, Marais, Nugent JJA, Heher & Lewis AJJA**
Heard:	**17 MAY 2002**
Delivered:	**22 AUGUST 2002**
Summary:	**Delict – police – liability for omissions - failing to take steps to deprive a person of firearms.**

J U D G M E N T

NUGENT JA:

[1] Neil Brooks, who lived in Bothasig on the Cape peninsula with his wife, Dawn, and their two children, Nicole and Aaron, was fond of firearms. He owned a 9mm pistol and .38 revolver, both of which he was licensed to possess in terms of s 3(1) of the Arms and Ammunition Act 75 of 1969. Brooks was also fond of alcohol, which he habitually consumed in excess. When under its influence he was inclined to become aggressive and to abuse his family. On 21 October 1995 these various aspects of his life combined into tragedy. During the late afternoon, after Brooks had been drinking at the family home, a domestic squabble erupted. Brooks loaded both his firearms, placed a holster and more ammunition around his waist, and confronted Dawn, who was then in the garage with the children. Brooks pointed the cocked pistol at her, but she repeatedly pushed it away, and then he shot her. Although she was injured Dawn managed to escape from the garage with Aaron and they sought refuge across the road on the property of the respondent. Brooks then turned on eleven year old Nicole, who remained trapped in the garage, and he shot and killed her before following after Dawn. Meanwhile Aaron, who was in

possession of Dawn's revolver, had called on the respondent for assistance and had handed to him the revolver. The respondent and his father went into the street to investigate, where they encountered Brooks who began firing at them, and at other neighbours who had come to investigate, with both firearms. A bullet struck the respondent in the ankle as he attempted to flee and he collapsed on the ground. Brooks found Dawn hiding in the respondent's garage and he shot her repeatedly until she was dead. He then returned to where the respondent had collapsed and shot him in the shoulder before the respondent managed to ward him off by firing with Dawn's revolver. Ultimately the police arrived and Brooks was arrested. He is now serving a long term of imprisonment for the crimes he committed that day.

[2] No doubt the respondent's grievance lies primarily against Brooks but he chose instead to sue the state, represented by the appellant, for recovery of the damages that he sustained as a result of his injuries. The basis of his claim, put simply, is that the police were negligent in failing to take the steps that were available in law to deprive Brooks of his firearms before the tragedy occurred, notwithstanding that there were grounds for

doing so, and that their negligence was a cause of the respondent being shot. The action was tried in the High Court at Cape Town before Desai J who ordered, by agreement, that the question of liability should be decided separately from the question of damages. At the conclusion of the trial on that issue the respondent's claim was dismissed with costs but on appeal to the Full Court that decision was reversed (Davis and Louw JJ, Moosa J dissenting). This further appeal comes before us with the special leave of this Court.

[3] The police have the power, in certain circumstances, to deprive a person of firearms. That power is conferred upon the Commissioner of Police by s 11 of the Act and has been delegated by the Commissioner to other senior police officers. Because of the centrality of s 11 to the issues that arise in this appeal it is worth setting out its terms in full. With effect from 18 September 1992 (when the Arms and Ammunition Acts Amendment Act 117 of 1992 came into effect) the section provided as follows:

> (1) If the Commissioner is of the opinion that on the ground of information contained in a statement made under oath, other than such a statement made by the person against whom action in terms of this section is contemplated, there is reason to believe that any person is a person-

(a) .....

(b) who has threatened or expressed the intention to kill or injure himself or any other person by means of an arm; or

(c) whose possession of an arm is not in the interest of that person or any other person as a result of his mental condition, his inclination to violence, whether an arm was used in the violence or not, or his dependence on intoxicating liquor or a drug which has a narcotic effect; or

(d) who, while in lawful possession of an arm, failed to take reasonable steps for the safekeeping of such arm,

he may, by notice in writing delivered or tendered to such person by a policeman, call upon such person to appear before the Commissioner at such time and place as may be specified in the notice, in order to advance reasons why such person shall not be declared unfit to possess any arm on any ground aforesaid so specified.

(2) (a) The Commissioner may, if he has reason to believe that the person to whom the said notice has been addressed, has an arm in his possession, issue a warrant for the search and seizure thereof.

(b) The provisions of section 21 (2), (3) and (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall *mutatis mutandis* apply to a warrant issued under paragraph (a), and any arm seized in pursuance of such a warrant shall be handed over to the holder of an office in the South African Police as the Commissioner may designate.

(3) Any person appearing in pursuance of a notice issued under subsection (1) shall be entitled-

(a) to be represented by an advocate or an attorney;

(b) to request the Commissioner to call, in the manner referred to in subsection (1), upon any person who made a statement referred to in that subsection, also to appear before the Commissioner;

(c) to examine the person who has been called upon in terms of paragraph (b) to appear, under oath or affirmation taken by the Commissioner, or cause him to be so examined through any such advocate or attorney, to such extent as the Commissioner with a view to a fair and just investigation may allow.

(4) Upon proof that the notice referred to in subsection (1) was duly delivered or tendered to the person to whom it was addressed, the Commissioner may at any time subsequent to the time specified in the notice, whether or not such person complies with the notice,

declare such person to be unfit to possess any arm at any time or during a specified period of not less than two years, if the Commissioner, having regard to-

(a) any reasons, submissions or evidence advanced under oath by or on behalf of the said person; and

(b) any other sworn information or evidence at his disposal,

is satisfied that such person is a person contemplated in paragraph (b), (c) or (d) of subsection (1).

(5) .....

(5A) The Commissioner may in his discretion suspend the operation of the declaration referred to in subsection (4) for a period not exceeding two years on any condition which the Commissioner may deem fit.

(6) The Commissioner shall by notice in writing sent by post or delivered to him inform any person in respect of whom a declaration has been made under subsection (4), of the tenor of and reason for the declaration.

[4] Long before the respondent was shot various police officers were in possession of information that reflected upon Brooks's fitness to be in possession of firearms. In some cases that information emanated from Dawn but in other cases members of the police had direct knowledge of the facts as a result of two incidents.

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[5] The first incident occurred some years earlier at the premises of a business that Brooks and Dawn operated in Mowbray. Brooks was under the influence of alcohol when a heated argument took place. Brooks drew his pistol and started approaching

Dawn but desisted from doing anything further when she produced her own revolver from her purse. Dawn summoned the police and two officers from Mowbray police station arrived. The police officers confiscated both the firearms but allowed Brooks and Dawn to retrieve them the following day.

[6] The second incident occurred at the family home in Bothasig on 27 September 1994. During the course of the early evening Cecil Connor, the father of Dawn, received a distressed telephone call from his daughter. She reported to Connor that she and the children had fled to the house of a friend because Brooks had threatened to kill them. Connor went to investigate and found that Brooks had locked himself inside the house whereupon Connors left and telephoned the police. A reservist from the Milnerton police station responded to the call by going to the house in the company of a colleague. He approached the house and found a note propped against a window in which Brooks expressed the intention of taking his own life. Propped against another window was another note in which Brooks warned that he had firearms and ammunition and would shoot anyone who approached the house, including the police. When the reservist rapped

on the window and called out he heard a firearm being cocked within the house. He identified himself as a police officer whereupon Brooks called out that unless the reservist removed himself Brooks would shoot him. The reservist returned to the police vehicle and radioed for assistance and a more senior police officer arrived. After being told what had occurred she called in the assistance of a specialist team of police officers who were trained to defuse such situations and members of that team arrived. Amongst them was Superintendent Hefer. Members of the Internal Stability Unit also arrived and ultimately there must have been a dozen or so police officers on the scene.

[7] Meanwhile Connor and Dawn had returned and they approached the house in the company of a number of police officers. As they approached the bedroom window Brooks shouted from inside that he would shoot anyone who attempted to enter the house and they withdrew. In the course of the evening Hefer spoke to Dawn, who told Hefer that Brooks should not be in possession of firearms. Hefer explained the procedure envisaged by s 11 of the Act and offered to take a statement from Dawn to initiate an enquiry. Dawn declined to provide a statement just then but said that she would do so the

following day. Ultimately Dawn and her father left and at about midnight the police also left, apparently in the belief that by then Brooks had fallen asleep and no longer posed a threat.

[8] Connor and Dawn returned to the house the following day where they encountered two police officers talking to a contrite Brooks. The house was in a shambles – some of the contents were smashed and clothes were strewn around the house – and at least twenty boxes of ammunition were lined up along the wall of the passage between the lounge and the main bedroom. One of the police officers warned Brooks that if he molested his family in any way he would lock Brooks up and the police officers left. Later that day Dawn and Aaron went to the offices of the Child Protection Unit where they deposed to affidavits in support of a charge against Brooks for assaulting Aaron the previous evening. They alleged that Brooks, in a drunken state, had assaulted Aaron before taking out a hunting knife with which he carved up his jacket. Dawn alleged that Brooks then charged at her with the knife, threatening to kill her and the children. Three days later Dawn deposed to an affidavit in which she purported to

'withdraw all charges as well as all allegations made by me and my son' because, so she said, her family life was starting to fall apart and she hoped that by withdrawing the allegations she might save her marriage. She added that it was 'the first time something like this had happened' and that she didn't think it would happen again as 'my husband really shows regret.'

[9] Some time after that incident (the precise date is unknown) Dawn telephoned Sergeant Goldie, who administered matters relating to firearms at the Milnerton police station, and to whom she had been referred by Hefer. Dawn told Goldie that she had a problem with her husband's drinking and she asked what could be done about it. Goldie told her that he could do nothing about that but he asked her whether her husband had firearms and when she replied in the affirmative Goldie told her that if she felt threatened she should make a sworn statement and an enquiry would be held in terms of s 11 of the Act. Goldie said that Dawn's reaction was defensive and that she told him that she would resolve the matter herself.

[10] Dawn approached the police on a further occasion (again the date is unknown: it might even have been before September 1994) when she spoke to Sergeant Roos at the Bothasig Police station. She was in an emotional state and said that she was afraid of her husband because he was threatening to kill the family and she asked whether there was a means by which the police could deprive him of his firearms. Roos was not aware of the relevant procedures and he referred her to Warrant Officer Jenkins who was then in command of the police station. Jenkins told Dawn that she would need to prefer a charge against Brooks and that unless she did so the hands of the police were tied. Dawn told Jenkins that she was unwilling to prefer charges because to do so would jeopardize her marriage and there the matter was left.

[11] Simply from the events that occurred on 27 September 1994 it was known to a number of police officers, more than a year before the respondent was shot, that while he was in a drunken state Brooks had threatened to shoot himself, and any person who attempted to intervene, including the police. That by itself warranted Brooks being declared unfit to possess firearms for a period of not less than two years. All that was

required for the requisite procedure to be commenced was for any one of the police officers to reduce that information to writing under oath and to forward the statement to the person responsible for holding such enquiries. There was no proper explanation in the evidence for why that was never done. Hefer said that she did not do so because her knowledge of the threats that were made by Brooks was only hearsay. The provisions of the section do not preclude hearsay but if that was indeed Hefer's concern she could surely have obtained confirmatory evidence from other police officers with more direct knowledge of the facts. Why that was not done, and why none of those police officers took any steps themselves to initiate an enquiry, was not explained. It is that omission that lies at the heart of the respondent's claim.

[12] Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognizes as making it unlawful.[1] Where the negligence manifests itself in a positive act that

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[1] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) 568B-C; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 24D-F; *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) 837G; P.Q.R. Boberg *The Law of Delict* Vol 1 30-34.

causes physical harm it is presumed to be unlawful,[2] but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.[3] It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee,*[4] namely, whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised),[5] nevertheless, in order to avoid conflating these two separate elements of liability it might often be helpful to assume that the omission was

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2 *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 497B-C; *Knop v Johannesburg City Council*, *supra,* 26F.

3 Cases cited in fn. 1; Boberg, *op cit*, 210-214; Neethling, Potgieter and Visser: *The Law of Delict* 4th ed 57-58; McKerron: The Duty of Care in South African Law (1952) 69 *SALJ* 189 esp 195-6; LAWSA First Reissue Vol 8 *Delict* by JR Midgley para 54.

4 1966 (2) SA 428 (A) at 430E-F. The test set out in that case is discussed later in this judgment.

5 But see *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) fn. 5

negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.[6]

[13] In *Minister van Polisie v Ewels* [7] it was held by this Court that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the 'legal convictions of the community' require that it should be regarded as unlawful. Subsequent decisions have reiterated that the enquiry in that regard is a broad one in which all the relevant circumstances must be brought to account.[8] In *Knop v Johannesburg City Council* [9] Botha JA said that the following well-known passage from Fleming *The Law of Torts* 4th ed at 136 correctly set out the general nature of the enquiry:

> "In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of

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6 See, for example, Botha JA in *Knop v Johannesburg City Council*, *supra,* at 24H

7 1975 (3) SA 590 (A) at 597A-B.

8 *Administrateur, Natal v Trust Bank van Afrika Bpk*, *supra,* 833H-834C; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 361G-362C; *Cape Town Municiaplity v Bakkerud, supra,* at 1056G-H; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A).

9 *Supra* at 27G-I

> duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'

[14] English law, in which the concept of the duty of care embraces the element of unlawfulness, approaches the problem in a similarly broad manner. In *Anns and Others v London Borough of Merton* [10] Lord Wilberforce attempted to formulate a coherent principle that could be applied to new cases when he said the following:

> 'Through the trilogy of cases in this House – *Donoghue v Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. V Heller &Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004 *per* Lord Reid at p.1027.'

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Translated into the analytical form that is adopted in our law the effect of that test is that negligent conduct will be unlawful unless there are considerations that militate against it.

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10 [1977] 2 All ER 492 (HL) 498g-h; [1978] AC 728:

That approach evoked criticism in Australia,[11] and in subsequent cases in the House of Lords which retreated to a casuistic approach in *Caparo Industries plc v Dickman and Others,*[12] in which Lord Bridge of Harwich said the following: [13]

> 'But since the *Anns* case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasized the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210,239F-241C; *Yuen Kun Yeu v. Attorney- General of Hong Kong* [1988] A.C. 175, 190E-194F; *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501D-G; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, 60B-D. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorization of distinct and recognisable situations as guides to the existence of, the scope and the limits of the varied duties of care which the law imposes.'

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11 *Sutherland Shire Council v Heyman and Another* (1985) 60 ALR 1 at 43-44

12 [1990] 1 All ER 568; [1990] 2 AC 605 (HL). Subsequently in *Murphy v Brentwood District Council* [1990] 2 All ER 908; [1991] 1 AC 398 it was expressly held that *Anns* had been wrongly decided. See too *X and Others (minors) v Bedfordshire County Council et al* [1995] 3 All ER 353 [1995] 2 AC 633 (HL); *Barrett v Enfield London Borough Council* [1999] 3 All ER 193 (HL); *Stovin v Wise (Norfolk County Council, third party)* [1996] 3 All ER 801; [1996] AC 923 (HL). See too the discussion in *Street on Torts* 10th ed by Brazier and Murphy 174-179.

13 At 617G-618C:

[15] In New Zealand the courts have continued upon the course that was set by the decision in *Anns* [14] but it is significant that, even after *Anns* was expressly overruled the Privy Council endorsed the primacy of parochial norms in this field of the law.[15] In Canada the law has similarly continued to develop in accordance with the principles laid down in *Anns* [16] following the adoption of those principles by the Supreme Court in *City of Kamloops v. Nielsen et al* [17] and *Just v The Queen in right of British Columbia.*[18]

[16] The very generality in which the legal principles have been expressed in the various decisions to which I have referred is an emphatic reminder that, both in this country and abroad, the question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied. The application of those broad principles to particular cases in other jurisdictions will provide insight into the weight

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14 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA))

15 *Invercargill City Council v Hamlin* [1996] 1 All ER 756 (PC).

16 See: *Brown v The Queen in right of British Columbia; Attorney-General of Canada, Intervener* (1994) 112 D.L.R (4^{th}) 1.

17 (1984) 10 D.L.R. (4^{th}) 641

18 (1990) 64 D.L.R. (4^{th}) 689

that is attached by that society to various values and norms when they are balanced against one another but that can assist only partially in the resolution of cases in this country. The fact that there have been different outcomes in similar cases when those principles have been applied in various common law countries merely underscores that point. What is ultimately required is an assessment, in accordance with the prevailing norms of this country, of the circumstances in which it should be unlawful to culpably cause loss.

[17] In applying the test that was formulated in *Minister van Polisie v Ewels* the 'convictions of the community' must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity - which has the effect of making the Constitution a system of objective, normative values for legal purposes. In *Carmichele v Minister of Safety and*

Security and Another (Centre for Applied Legal Studies Intervening)[19] our Constitution was likened to the German Constitution, of which the German Federal Constitutional Court said the following:

> '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.'

[18] Although the events with which this case is concerned took place before the 1996 Constitution came into effect, it was pointed out in *Carmichele*[20] that when seized of a matter after that date courts are obliged to have regard to the provisions of s 39(2) when developing the common law. The principles embodied in the Constitution are in any event founded upon and consistent with the provisions and the constitutional principles that were embodied in the interim Constitution.[21]

[19] The reluctance to impose liability for omissions is often informed by a *laissez faire* concept of liberty that recognizes that individuals are entitled to 'mind their own

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19 2001 (4) SA 938 (CC) para 54
20 Para 37.
21 Constitution of the Republic of South Africa Act 200 of 1993

business' even when they might reasonably be expected to avert harm,[22] and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted.[23] The protection that is afforded by the Bill of Rights to equality,[24] and to personal freedom,[25] and to privacy,[26] might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to act to avert harm. The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently[27] and the spectre of limitless liability.[28] That last consideration ought not to be unduly exaggerated, however, bearing in mind that the requirements for establishing

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22 *Sea Harvest*, *supra,* at 837I; Boberg, *op cit*, 210; Fleming: *The Law of Torts* 9th ed 164.

23 *Per* Lord Hoffmann in *Stovin v Wise (Norfolk County Council, third party), supra,* 819b-d.

24 Section 9

25 Section 12

26 Section 14

27 See, for example, *Knop v Johannesburg City Council*, *supra,* at 33C-D; *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL); [1988] 2 All ER 238.

28 *Cape Town Municipality v Bakkerud*, *supra,* para 10.

negligence,[29] and a legally causative link,[30] provide considerable practical scope for harnessing liability within acceptable bounds.

[20 But while the utility of allowing public authorities the freedom to conduct their affairs without the threat of actions for negligence in the interest of enhancing effective government, ought not to be overlooked, it must also be kept in mind that in the constitutional dispensation of this country the state (acting through its appointed officials) is not always free to remain passive. The state is obliged by the terms of s 7 of the 1996 Constitution not only to respect but also to 'protect, promote and fulfill the rights in the Bill of Rights' and s 2 demands that the obligations imposed by the Constitution must be fulfilled. As pointed out in *Carmichele,*[31] our Constitution points in the opposite direction to the due process clause of the United States Constitution, which was held in

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[29] It was emphasized in *Kruger v Coetzee*, *supra,* at 430F-G that the reasonable foreseeability of harm, by itself, does not require action to be taken to avert it. Action to avert reasonably foreseeable harm is required only if, in the particular circumstances, the person concerned ought reasonably to have acted. When applied in relation to public authorities matters such as the extent of their available resources and the ordering of their priorities will need to be taken account of in determining whether the failure to act was negligent.

[30] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700I-701F; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 764I-765B.

[31] At para 45.

De Shaney v Winnibago County Department of Social Services [32] not to impose affirmative duties upon the state.[33] While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat,[34] and while there might be no similar constitutional imperatives in other jurisdictions, in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability and s 41(1) furthermore provides expressly that all spheres of government and all organs of state within such sphere must provide government that is not only effective, transparent and coherent, but also government that is accountable (which was one of the principles that was drawn from the Interim Constitution). In *Olitzki Property Holdings v State Tender Board and Another*[35] Cameron JA said the following:

> 'The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realizing our constitutional vision of open, uncorrupt and responsive government.'

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[32] (1988) 489 US 189

[33] Cf *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[34] The extent to which private citizens might be entitled to remain passive is not in issue in this appeal and I make no finding in that regard.

[35] 2001 (3) SA 1247 (SCA) para 31, citing with approval the remarks of Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 45 (C).

[21] When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account. Where the conduct in issue relates to questions of state policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting.[36] No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiates

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[36] *Minister of Health and others v Treatment Action Campaign and others* (unreported Case CCT 8/02 5 July 2002) at para 99-113.

between matters of policy and matters that fall within what is called the 'operational' sphere of government [37] though the distinction is not always clear. There are also cases in which non-judicial remedies,[38] or remedies by way of review and *mandamus* or interdict, allow for accountability in an appropriate form[39] and that might also provide proper grounds upon which to deny an action for damages. However where the state's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. For as pointed out by Ackermann J in *Fose v Minister of Safety and Security*[40] in relation to the Interim Constitution (but it applies equally to the 1996 Constitution):

> "… without effective remedies for breach [of rights entrenched in the Constitution], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve that goal."

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37 *City of Kamloops v. Nielsen et al, supra*; *Just v The Queen in right of British Columbia*; *Brown v The Queen in right of British Columbia, supra.*

38 Cf *Knop v Johannesburg City Council*, *supra,* at 33B-E

39 Cf *Olitski Property Holdings*, *supra,* par 31 and 40

40 1997 (3) SA 786 (CC) para 69

[22] Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity,[41] to life,[42] and to security of the person,[43] are all placed in peril and the state, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed, as there were found to be in *Knop v Johannesburg City Council,*[44] and in *Hill v Chief Constable of Yorkshire,*[45] but I can see none that do so in the present circumstances. We are not concerned in this case with the duties of the police generally in the investigation of crime. I accept (without deciding) that there might be particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence,[46] but it does not follow that an action should be denied where those considerations do not

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41 Section 10
42 Section 11
43 Section 12
44 *Supra*, esp at 33C-D
45 *Supra*, esp at 243f-244 (All ER) ; 63 (AC).
46 *Hill v Chief Constable for West Yorkshire, supra; Osman and Another v Ferguson and Another* [1993] 4 All ER 344 (CA), but see *Osman v United Kingdom* (2000) 29 EHHR 245; cf *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto et al* (1990) 72 D.L.R. (4th) 580 (Ont CA)

arise. In this case we are concerned only with whether police officers who, in the exercise of duties on behalf of the state, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring. There was no suggestion by the appellant that the recognition of a legal duty in such circumstances would have the potential to disrupt the efficient functioning of the police, or would necessarily require the provision of additional resources, and I see no reason why it should otherwise impede the efficient functioning of the police – on the contrary the evidence in the present case suggests that it would only enhance it. There is no effective way to hold the state to account in the present case other than by way of an action for damages, and in the absence of any norm or consideration of public policy that outweighs it the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the state is vicariously liable for the consequences of any such negligence. The next question, then, is whether the police officers concerned were negligent.

[23] The classic test for negligence as set out in *Kruger v Coetzee* [47] has since been quoted with approval in countless decisions of this Court: whether a person is required to act at all so as to avoid reasonably foreseeable harm, and if so what that person is required to do, will depend upon what can reasonably be expected in the circumstances of the particular case. That enquiry offers considerable scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably. In the present case it was reasonably foreseeable that harm might ensue if Brooks's fitness to be in possession of firearms was not enquired into in terms of s 11 and in my view a reasonable police officer would have taken the initiative to cause such an enquiry to be held. The police officers who had knowledge of what had ocurred on 27 September 1994 were thus clearly called upon to do so and in the absence of an explanation their failure to do so was negligent.

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[47] *Supra,* at 430E-F.

[24] What remains to be considered is whether that negligence was a cause of the respondent being shot. In *International Shipping Co (Pty) Ltd v Bentley* [48] it was pointed out by Corbett JA that causation involves two distinct enquiries. The first enquiry is whether the wrongful conduct was a factual cause of the loss. The second is whether in law it ought to be regarded as a cause. Regarding the first enquiry he said the following:

> 'The enquiry as to factual causation is generally conducted by applying the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; *aliter,* if it would not have ensued."

[25] There are conceptual hurdles to be crossed when reasoning along those lines for once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation which can only broaden as the distance between the wrongful conduct and its alleged effect

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48 *Supra,* at 700E-701F

increases. No doubt a stage will be reached at which the distance between cause and effect is so great that the connection will become altogether too tenuous but in my view that should not be permitted to be unduly exaggerated. A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.

[26] There can be little doubt that if the information that was known to the various police officers had been attested to under oath and furnished to the relevant person an enquiry would have followed within a reasonable time, and in my view it must be assumed that the police officer who conducted the enquiry would have considered the matter rationally in the performance of the duties imposed by the statute.[49] Not only is there no reason to assume that a senior police officer would not have done so but that

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[49] Cf. *Carmichele v Minister of Safety and Security*, *supra,* para 76.

would also have accorded with what was required by law.[50] Brooks' conduct on the night in question fell squarely within the terms of s 11(1)(b) and there can be little doubt that he would have been declared unfit to possess firearms for there was simply no proper basis upon which to avoid doing so. In terms of s 11(4) that declaration would have operated for not less than two years but the enquiring officer would have had a discretion in terms of s 11(5A) to suspend the operation of the declaration for a period not exceeding two years.

[27] I am mindful of the fact that even a discretion that has been rationally exercised might produce varying results but in my view it is nevertheless probable that the declaration of unfitness would not have been suspended in the circumstances of the present case. Licences to possess firearms are not issued to enable the holders to shoot themselves, or to shoot innocent persons who happen to be in the way, and least of all to enable them to shoot the police, nor do firearms belong in the hands of drunks. I have little doubt that responsible police officers share that view and I can see no grounds upon

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[50] *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 90.

which Brooks would have been permitted to remain in possession of firearms when he had made threats of that nature and in the circumstances in which he did. It was submitted, however, that that presents only one side of the picture and that Brooks might have been able to advance other mitigating facts. There is no evidence to suggest what those mitigating facts might have been and I see no reason why we should speculate in the absence of any evidence advanced by the appellant in that regard. Moreover such evidence as there is suggests that any enquiry into Brooks's background and predisposition would only have exacerbated his position. It would have revealed that he was an habitual drunk who became aggressive when under the influence of alcohol and assaulted his family, that on one occasion he had threatened to kill his family with a hunting knife, that on an earlier occasion he had drawn his firearm to intimidate his wife in the course of a domestic squabble, and that his wife lived in fear of the firearms that were in his possession. I can thus see no grounds on the evidence why the enquiring officer might have exercised his discretion in favour of Brooks. But there is a further, and in my view decisive, reason for concluding that the declaration would not have been suspended. Standing instructions as to the manner in which such enquiries were to be

conducted on behalf of the Commissioner dealt specifically with the manner in which s 11(5A) was to be applied. The relevant instruction provided expressly, and with emphasis added, that the suspension of a declaration was not appropriate where the possession of a firearm posed a potential danger for other persons, which was clearly so in this case.

[28] It was submitted that even if Brooks had been declared unfit to possess firearms the respondent might nevertheless have been shot because Brooks might have acquired possession of a firearm unlawfully, or he might have taken possession of Dawn's revolver on the day in question. That is indeed possible but it is likely that neither of those possibilities would have occurred. Brooks was a person who was accustomed to carry both his firearms openly and there is nothing to suggest that he was of the disposition to possess a firearm unlawfully and secretly. It is also unlikely that he could have done so without the knowledge of his wife and even more unlikely that she would have co-operated by remaining discreet. As to the suggestion that Brooks might have acquired possession of Dawn's revolver, with the result that the respondent might have been shot in any event, Dawn usually kept her revolver in her purse and it is apparent

from what happened on the day in question that she was alive to the danger of it falling into Brooks's possession. I have pointed out that she handed her revolver to Aaron when Brooks became aggressive with instructions that he was to keep it hidden and in due course Aaron handed it to the respondent. There is no reason to believe that Dawn would not have been at least that cautious if Brooks had not been in possession of firearms of his own.

[29] It must be borne in mind that it was because Brooks confidently and openly possessed two firearms and piles of ammunition that he was able to kill members of his family and to shoot the respondent with such ease. If he had been deprived of the right to possess firearms the respondent certainly would not have been shot in the circumstances that occurred. While it is possible that Brooks might have acquired a firearm in some other way the pattern of events would necessarily have followed a different course if that had occurred. Whether that would have arisen at all, and if so, whether the altered circumstances would have resulted in the respondent being shot, are in my view questions that are so speculative that they should be discounted from the enquiry.

[30] In my view there is a direct and probable chain of causation between the failure of the police to initiate an enquiry into the fitness of Brooks to possess firearms following the incident that occurred on 27 September 1994 and the shooting of the respondent. It was not suggested that the respondent's loss was too remote or that there is any other reason for not giving legal recognition to the chain of causation.[51] The negligent and wrongful conduct of the police having been a cause of the respondent's injuries the court *a quo* correctly upheld the claim.

The appeal is dismissed with costs.

R NUGENT
JUDGE OF APPEAL

HOWIE JA)
HEHER AJA)
LEWIS AJA) concur

[51] *International Shipping Co (Pty) Ltd v Bentley, supra*, at 700I-701F.

MARAIS JA/

[1] Subject to what follows I concur in the judgment of Nugent JA. I am satisfied that the police were duty-bound in law to act, that they were negligent in failing to do so, and that their negligent omission was a sufficiently potent cause of the harm and attendant loss which respondent suffered.

[2] I reach that conclusion by applying the tests set forth in *Minister van Polisie v Ewels*[52] and *Kruger v Coetzee*[53] and regard it as unnecessary to bolster it by reference to either the Interim Constitution or the Constitution. For all their momentous and enormous historic, symbolic, legal and emotional significance and status as the supreme

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52 1975 (3) SA 590 (A)
53 1966 (2) SA 428 (A)

law, in my view, their existence has little bearing upon this particular case.

[3] Prior to their advent it was the law that assault is unlawful, that the police are under a positive duty in law to protect citizens from assault when in a position to do so, and that, if they negligently fail to do so, the State will be liable in damages. I hesitate to accept unreservedly that the listing in the Bill of Rights of a right (whether it be a newly accorded right or a longstanding one) necessarily gives rise to the existence of a legal duty to act where none existed previously. For example, consider the right to life. It can hardly be suggested that an omission by an ordinary citizen to rescue someone in peril or to come to the defence of someone under attack which would not have been regarded as a breach of legal duty prior to the

Constitution, will now have to be so regarded. Indeed, Nugent JA appears to recognise that.[54]

[4] As I understand my learned brother Nugent, it is not the inclusion in the Bill of Rights of the right to human dignity, to life, and to security of person alone which is decisive (with which I would agree) but, in the case of the State, the additional factor of constitutionally required accountability. I doubt that the accountability of which s 41 (1) (c) of the Constitution speaks ("All spheres of government and all organs of State within each sphere must --- provide effective, transparent, accountable and coherent government for the Republic as a whole ---") can be regarded as prima facie synonymous with liability under the *lex Aquilia* for damages for omissions to act.

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[54] Footnote 34 of his judgment

[5] I accept that in a given case the accountability requirement **may** prompt a finding that there is liability for a negligent omission to act but I would prefer not to elevate accountability to the status of a factor giving rise to something akin to a rebuttable presumption of liability to pay damages under the *lex Aquilia*. Generalisations of that kind may result in consequences which were never intended when applied to other situations. The circumstances of this case do not call for generalisation sourced in either of the Constitutions and, for my part, I shall avoid it.

[6] As I see the position, whether or not the particular right which has been assailed or infringed as a consequence of an omission to act is one included in the Bill of Rights, the test set forth in *Ewel's* case will have to be applied. If the right does happen to be one of those listed in

the Bill of Rights that will of course put an end to any argument that might otherwise have arisen as to whether it is a right to which society attaches great significance. But the ultimate question will remain: is an omission to act which is out of kilter with the value society assigns to the right and which results in loss to be actionable? That question has to be answered by applying the test laid down in *Ewel's* case.[55]

[7] In answering it, it will also be necessary to bear in mind, as Nugent JA has, that it is usually the omissions of individual functionaries of the State which render it potentially liable. If one is minded to hold the State liable, one will at the same time be holding the individual functionary liable. That he or she may never be called upon to pay is not a good reason for ignoring the concomitant personal

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[55] 1975 (3) SA 590 (A)

liability which will be inherent in finding the State liable. That does not mean of course that the spectre of personal liability should be allowed to paralyse a court when it is considering whether to recognise that a legal duty to act exists. It is simply a reminder that more is at stake than imposing liability upon an amorphous entity such as the State.

[8] With respect, I regret that I am obliged to dissent from the suggestion made in par 12 of the judgment of Nugent JA that, in order to avoid conflating two separate elements of liability, it might be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable. In my opinion, that does conflate them and, more importantly, loads the dice emotionally in favour of a positive answer

to the conceptually separate question of whether there is a legal duty to act at all.

[9] I, too, would dismiss the appeal with costs.

R M MARAIS
JUDGE OF APPEAL