

CAUGHT IN THE CROSSFIRE – THE INNOCENT BYSTANDER

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1 INTRODUCTION

Crime, much of it violent, has become a way of life in South Africa. Newspapers report many incidents every day of rape, murder, robbery and hijacking and people have become immune to random reports of these incidents, unless they are personally affected or know the victims. This discussion relates to an attempted car-jacking, a crime which has seen an increase of 5%, from 9540 incidents in 2012 to 9988 incidents in 2013.¹

Recently the Constitutional Court per Van der Westhuizen J described the South African context as follows:²

“Yet, there is a disturbingly dark side to the often-stated miracle of our constitutional democracy. South Africa is plagued by crime – often viciously violent, sometimes sophisticated and organised, often ridiculously random, but always audacious and contemptuous of the values we are supposed to believe in and the human rights enshrined in our Constitution – perhaps not unlike other young democracies.”

Apart from having recourse to private security companies, people may also feel the need to carry firearms to protect themselves. An online news article (see par 2) recently reported an incident of someone trying to stave off a potential car-jacking by firing two shots, resulting in a bystander being injured. In this situation the question arises as to who can be held responsible for compensating the harm suffered by such an innocent bystander. This case is unique in that the shooter was not the police officer or a criminal, but another crime victim trying to protect herself from an

¹ See <http://www.crimestatssa.com/national.php>.

² *Loureiro v Invula Quality Protection (Pty) Ltd* (CCT 40/13) [2014] ZACC 4 (20 March 2014) par 2.

impending car-jacking. It is submitted that, in a country with high crime and many people wanting to protect themselves, this question will become more relevant as time passes.

This article will address the possible liability of three parties, the shooter, the Minister of Police and the Road Accident Fund, to compensate the victim (bystander) for harm suffered as a result of the shooting.

2 FACTUAL SCENARIO

This scenario was taken from the news website, News24.com.³ In January 2014 at approximately 17:00, in Pinetown, Durban, two hijackers accosted a woman, Mrs H, at an intersection. They attempted to take her car and she fired shots at them. It is not clear from the article whether they had been armed or not. In the process one of the bullets struck a passenger who was travelling in a passing minibus taxi in both arms. She was rushed to hospital. It appears from the article that the intersection in question, as well as other intersections in the area, was notorious for car-jacking and robbery. Mrs H had been the victim of an armed robbery on a previous occasion and it appears that this is the reason why she carried a firearm.

The news article neither describes the nature nor the extent of the injuries of the victim, but one can assume that there would be medical and hospital costs involved and also that the victim suffered non-patrimonial loss such as pain, suffering and emotional shock. The article does not mention what type of employment the victim had so it is not clear whether she was entitled to sick leave, or, in the absence of sick leave, whether she would forfeit any remuneration while unable to work. Such losses could potentially also give rise to a claim for loss of earnings. Depending on her work and the seriousness of the injury, she could further potentially be permanently incapacitated and thus also could suffer loss of future earnings. In addition to the patrimonial loss, she could also have suffered non-patrimonial loss in the form of pain and suffering, emotional shock and, depending on the seriousness of the injury, loss of amenities of life.

³ <http://www.news24.com/SouthAfrica/News/Woman-fires-shots-at-hijackers-20140116>.

3 POTENTIAL DEFENDANTS

The question in this case is who the passenger in the taxi can sue to recover damages for her injuries? There are three possible defendants, namely the shooter, the Minister of Police (for failing to do enough to curb violent crime) or the Road Accident Fund (because she was a passenger in a taxi at the time of the high-jacking). In the case of all of these potential defendants the element of legal causation is particularly problematic. Furthermore, in both the case of actions against the woman who fired the shot and of actions against the Minister, one also has to consider elements of wrongfulness and fault.

Should the Road Accident Fund be liable, no common law claims will lie, and therefore the victim will not be able to recover anything, including the balance of her damages, from either the Minister or the shooter (even if elements of delict are proven).⁴

3 1 DEFENDANT 1 – THE PERSON WHO FIRED THE GUN

The shooter, if found delictually liable, could be held responsible for compensating the following:⁵

- 1) patrimonial loss (medical and hospital expenses, past and future loss of earnings) in terms of the *actio legis Aquiliae*; and
- 2) non-patrimonial loss (pain and suffering, emotional shock) in terms of the Germanic action for pain and suffering.

3 1 1 Wrongfulness

In considering the possible liability of the lady who fired the gun, one first has to consider the wrongfulness element. The test for wrongfulness is that of the *boni mores*, or legal convictions of the community.⁶ The test has been described as an objective, reasonableness test and looks at whether the harm was caused in a legally reprehensible way.⁷ Underpinning the *boni mores* are constitutional values.⁸ In

⁴ Section 21 of the Road Accident Fund Act 56 of 1996. See also the discussion in par 3.3 below).

⁵ Neethling & Potgieter *Neethling- Potgieter- Visser Law of Delict* 7th ed (2015) 5; Potgieter, Steynberg & Floyd *Visser & Potgieter Law of Damages* 3rd ed (2012) 6.

⁶ Neethling *et al* 36; see however *Country Cloud Trading CC v MEC Department of Infrastructure Development* 2014 2 SA 214 (SCA), where the court argued instead that the test was based on public policy.

⁷ Neethling *et al* 6 and further.

*Steenkamp NO v Provincial Tender Board of the Eastern Cape*⁹ the Constitutional Court confirmed the nature of the *boni mores* test and its relationship to the Constitution:¹⁰

“Therefore shortly stated, the enquiry into wrongfulness, is an after the fact, objective assessment of whether conduct which may not be *prima facie* wrongful should be regarded as attracting legal sanction. In *Knop v Johannesburg City Council* the test for wrongfulness was said to involve objective reasonableness and whether the *boni mores* required that “the conduct be regarded as wrongful”. The *boni mores* is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy. Both of which now derive from the values of the Constitution.”

In this particular instance the perpetrator could potentially rely on the ground of justification of necessity to exclude wrongfulness.¹¹ This is not a case of private defence *vis-à-vis* the victim, because private defence will lie where the perpetrator infringed the interests of someone who acted wrongfully and who posed an imminent or real threat towards him or her, in order to protect her own interests or those of a third party.¹² In the present circumstances the victim was an innocent bystander and posed no threat to the perpetrator.

Neethling *et al* mention the following guidelines to determine whether the ground of justification of necessity is present:¹³

- (a) Whether or not a state of necessity exists has to be determined objectively. Putative necessity, that is, the fact that the defendant subjectively experiences fear, will not constitute this defence if, objectively speaking, there was no necessity.¹⁴
- (b) The state of necessity must have commenced, or be imminent. A future emergency will not suffice.

⁸ *Loureiro v Invula Quality Protection (Pty) Ltd supra* 34; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

⁹ 2007 3 SA 121 (CC).

¹⁰ Par 41.

¹¹ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA). See also Mukheibir “A judicial niche for necessity - is it really necessary? - *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* [2006] SCA 127 (RSA)” 2007 *Obiter* 154; Neethling *et al* 93.

¹² *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck supra* par 10; Neethling *et al* 93.

¹³ Neethling *et al* 99 – 103.

¹⁴ See par 3.1.2 below.

- (c) The interest sacrificed may in general not be more than the interest protected; the principle of commensurability is applicable, unlike in the case of private defence.
- (d) The act of necessity must be the only reasonable possible means to protect the right that is being threatened.

Under the present circumstances whether there was a state of necessity would therefore depend on the circumstances. Mrs H was threatened with a car-jacking, which had commenced. It is not clear from the facts whether the perpetrators were armed. This could be important to determine whether, objectively speaking, there was a threat to Mrs H. While Mrs H was not infringing an interest greater than the one she was trying to protect, it is not clear whether under the circumstances this was the only reasonable way she could protect herself. Was it possible to take another route, given the fact that the area was notorious for crime? Was it necessary to fire shots? Could she not have frightened off the criminals by brandishing the fire-arm? Could she have been more careful with regard to the direction in which she was shooting? These are just a few questions that need to be answered to decide whether Mrs H's conduct was objectively reasonable under the circumstances, and therefore to decide whether it was wrongful or not.¹⁵ What is clear, though, is that the fact that Mrs H's subjective belief that she was acting in necessity will not be sufficient.¹⁶

It is well-established that whether particular conduct falls within that category is to be determined objectively. That the actor believed that he was justified in acting as he did is not sufficient.

3 1 2 Fault

Even if wrongfulness is established, liability will not necessarily follow because wrongfulness in itself is not sufficient to establish liability.¹⁷ It is also necessary to

¹⁵ Neethling *et al* state the following on p 87: "In reality grounds of justification are nothing more than practical expressions of the *boni mores* or reasonableness criterion with reference to typical factual circumstances that occur regularly in practice.

¹⁶ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck supra* par 10

¹⁷ The perennial question about whether one tests for fault before or after wrongfulness is not addressed here. For discussions in this regard see Neethling *et al* 129 as well as footnote 7 on the same page and all the sources cited there.

establish legal blameworthiness or fault in the form of either negligence or intention.¹⁸

Negligence

For the purposes of both the *actio legis Aquiliae* and the action for pain and suffering establishing negligence will be sufficient.¹⁹ Applying the reasonable person test formulated in *Kruger v Coetzee*²⁰ one would have to ask the following:²¹

- (a) whether the reasonable person in the position of Mrs H would have foreseen the possibility of the conduct injuring another and causing loss;
- (b) whether the reasonable person would have taken steps to guard against this loss; and
- (c) whether Mrs H acted like the reasonable person in the circumstances.

Driving with a loaded firearm may at first seem negligent, but given the facts of the case and the high level of crime in South Africa, particularly hijacking, it could be that the reasonable person, who is not expected to be exceptionally brave, may have wanted to protect herself. In particular it seems that the place where Mrs H was travelling was dangerous and that a number of similar attacks had taken place in the past. On the other hand, it is reasonably foreseeable that if one fires shots in a busy intersection an innocent bystander could be struck. The question then would be what could reasonably have been done to avoid this harm. Could Mrs H have taken another route to reach her destination? Again, the circumstances of the case will indicate whether the harm inflicted by Mrs H was reasonably foreseeable and whether it was reasonably possible to prevent that harm from ensuing.

Intention

The factual scenario seems to indicate that the perpetrator may have been negligent and, for both the purposes of the *actio legis Aquiliae* and the action for pain and suffering, negligence is sufficient.²² It could also be possible, however, to establish intention in the form of *dolus eventualis*. In order to establish intention it is necessary

¹⁸ Neethling *et al* 129.

¹⁹ Neethling *et al* 5.

²⁰ 1966 2 SA 428 (A).

²¹ 430.

²² Neethling *et al* 130.

to prove both direction of the will and knowledge of wrongfulness.²³ In the case of *dolus eventualis* direction of the will is established if one can prove that the perpetrator, while not necessarily desiring a harmful consequence, nevertheless foresaw the possibility of that consequence arising and subjectively reconciling herself with it.²⁴

Fault excluding grounds

Under these circumstances there could be two potential defences available to exclude fault, namely putative necessity and the doctrine of sudden emergency.

(a) Putative necessity

If the conduct on the part of Mrs H was not reasonable, that is if shooting the robber, under the circumstances was not objectively reasonable, it would still be possible to avoid liability. In order to do this she would have to show that she acted in putative necessity without negligence.²⁵

Putative necessity would become relevant where the defendant acted, for instance in a state of terror and in a perceived situation of necessity while, objectively, there was no necessity.²⁶ Under these circumstances it could be possible that, in terms of the test for negligence, the defendant subjectively acted as a reasonable person would have acted and would thus escape liability because she would not be found to have been negligent.²⁷ The court in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*²⁸ recognised that there are differing opinions as to whether necessity *per se* excludes fault or wrongfulness but the court left this question open.²⁹

(b) Sudden emergency

²³ Neethling *et al* 133.

²⁴ *Rudolph v Minister of Safety and Security* 2009 5 SA 94 (SCA) par 18 : “The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*).” See also Neethling 133 – 135.

²⁵ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck supra*. See also Neethling *et al* 95.

²⁶ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* par 10.

²⁷ See also Neethling *et al* 98.

²⁸ *Supra*.

²⁹ Paras 11 and 12. See also Mukheibir “A judicial niche for necessity - is it really necessary? - *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* [2006] SCA 127 (RSA)” 2007 *Obiter* 154.

Fault may also be excluded in terms of the doctrine of sudden emergency.³⁰ If it is found that the shooter acted in a situation of sudden emergency and that there was insufficient opportunity to consider all the consequences of her actions, the imminent peril must be taken into account in deciding whether she was negligent.³¹ In *Road Accident Fund v Grobler*³² Hancke AJA held as follows:³³

“When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances.”

To be successful with this defence the following requirements have to be met:³⁴

- that there was imminent peril;
- that Mrs H did not cause the perilous situation herself; and
- that Mrs H did not act grossly unreasonably.

From the dictum in *Road Accident Fund v Grobler*³⁵ it appears that the reasonable person will be placed in the situation of sudden emergency in which the victim finds herself, and the question is then how the reasonable person would have acted under those circumstances.

3 1 3 Causation

It is trite that to establish causation it is not only necessary to establish factual causation, but also legal or juridical causation. In *International Shipping (Pty) Ltd v Bentley*³⁶ the then Appellate Division held as follows:³⁷

As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is

³⁰ *Road Accident Fund v Grobler* 2007 6 SA 230 (SCA). See also Neethling *et al* 155.

³¹ *Road Accident Fund v Grobler* 2007 *supra*. See also Neethling *et al* 155.

³² *Supra* footnote 27.

³³ Par 12.

³⁴ *Road Accident Fund v Grobler supra* par 10; *Ntsala and Others v Mutual & Federal Insurance Company Ltd* 1996 2 SA 184 (T) 192F-H. See also Neethling *et al* 187.

³⁵ *Supra* footnote 30.

³⁶ 1990 1 SA 680 (A).

³⁷ At 700E.

designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question ... The second enquiry then arises, whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".

In order to establish factual causation one has to find a link between the shooter's conduct and the harm suffered by the passenger in the taxi. In terms of the usual test, namely the *conditio sine qua non* test, one would think away the conduct and should the harmful consequence fall away, there would be factual causation.³⁸ The shooting is therefore clearly a *sine qua non* of the harm suffered and hence factual causation can easily be established.

Once factual causation is established the second "leg" of the test for causation requires one to establish "whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote".³⁹ This is basically a juridical problem in the solution of which considerations of policy may play a part. The test for legal causation is an elastic, flexible test in terms of which legal causation is assessed based on considerations of fairness, justice and reasonableness.⁴⁰ In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*⁴¹ the court held as follows:⁴²

"In the final analysis, the issue of remoteness is again determined by considerations of policy. Broadly speaking, wrongfulness – in the case of omissions and pure economic loss – on the one hand, and remoteness on the other, perform the same function. They are both measures of control. They both serve as a 'longstop' where most right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability."

It is submitted that the harm is not too remote and if wrongfulness and negligence can be established, the shooter could be liable for both patrimonial and non-patrimonial

³⁸ *International Shipping Company (Pty) Ltd v Bentley supra* 700E.

³⁹ *International Shipping Company (Pty) Ltd v Bentley supra* 700E.

⁴⁰ Formulated in *S v Mokgethi* 1990 1 SA 32 (A) and then adopted for purposes of the law of delict in *International Shipping (Pty) Ltd v Bentley supra* 700E.

⁴¹ 2009 2 SA 150 (SCA).

⁴² Par 31.

loss in terms of, respectively, the *actio legis Aquiliae* and the action for pain and suffering.

3 2 DEFENDANT 2 – THE MINISTER OF POLICE

If the shooter successfully raises any of the defences discussed above, the victim will have no recourse against the shooter. The question is then whether the victim can pursue a claim against the Minister of Police.

As the shooter was not an employee of the Minister, there is no question here of vicarious liability.⁴³ Instead, if the victim wishes to sue the Minister, she would have to do so on the basis of a wrongful and blameworthy omission on the part of the Minister to prevent the high levels of dangerous crime in the country. In *F v Minister of Safety and Security*⁴⁴ Froneman J in his minority judgment made an argument for holding the Minister directly liable for an omission on the part of the Minister. In that case the majority per Mogoeng J held the Minister vicariously liable for the rape of a woman by a plain-clothes policeman.⁴⁵ Froneman J, however argued that vicarious liability was conceptually problematic.⁴⁶ He argued instead for the imposition of direct liability:⁴⁷

“We should recognise that state delictual liability in circumstances where the state has a general constitutional and statutory duty to protect people from crime is usually ‘direct’, and not ‘vicarious’ in the sense traditionally understood by that term. This is because the state invariably acts through the instrument of its organs – state officials performing public duties. The difficult normative issue of when the state is liable in delict for their conduct should in my view no longer be dealt with as an aspect of vicarious liability but rather as part of the normal direct enquiry into whether the elements of our law of delict are present when instruments of the state act.”

⁴³ One of the requirements for vicarious liability is a relationship between parties, such as an employer or an employee and in this case there is no such relationship. See generally *Chartaprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA); *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA).

⁴⁴ 2012 1 SA 536 (CC)

⁴⁵ Par 86.

⁴⁶ Par 89.

⁴⁷ Par 89.

The notion of direct liability is not new – in *Media 24 Ltd v Grobler*⁴⁸ the Supreme Court of Appeal decided to hold an employer directly liable for failing to prevent the sexual harassment of an employee, despite the fact that the court a quo had decided that the employer was vicariously liable. It is, therefore, submitted that the State could be held liable for a damage-causing omission in an instance like this, provided that it can be established that its failure to ensure the safety and security of its citizens is wrongful and culpable and that this failure was the factual and legal cause of the harm suffered by the victim.

If the elements of delict can be established, the victim can claim damages in terms of both the *actio legis Aquiliae* (for patrimonial loss) and the Germanic action for pain and suffering (for non-patrimonial loss).

3 2 1 Wrongfulness

In order to establish wrongfulness in the case of an omission, it will be necessary to prove that there is a legal duty on the State (Minister of Police) to act positively to prevent harm to its citizens, and in this case, to ensure that its citizens are safe. The question of state liability for harm arising out of an omission on the part of the state to prevent certain criminal conduct was discussed at length in *Carmichele v Minister of Safety and Security*.⁴⁹ In this case the court had to decide whether the Minister could be held liable for the omissions of the police and prosecutors that resulted in the plaintiff being assaulted by a known criminal. This case has become a locus classicus for omissions of government departments.

This case was significant in two respects namely:

- 1) recognising the constitutional imperative to develop the common law where it did not promote the “spirit, purport and objects”⁵⁰ of the Bill of Rights;⁵¹ and
- 2) the development of the common law test of wrongfulness of an omission.⁵²

⁴⁸ 2005 (6) SA 328 (SCA).

⁴⁹ 2001 4 SA 938 (CC).

⁵⁰ Section 39(2), Constitution of the Republic of South Africa, 1996.

⁵¹ Par 33 and further.

⁵² Par 37 and further.

In this case the Constitutional Court held the Minister of Safety and Security liable for failure on the part of the police and prosecutors to ensure that a known criminal was not released on bail.⁵³ The court recognised the fact that the court a quo had applied the “pre-constitutional test” for wrongfulness and in thus doing had overlooked the requirements of section 39(2). The Constitutional Court overturned the decision of absolution of the instance of both the courts a quo and held that the matter had to be referred back to the High Court.⁵⁴

In *Loureiro v Invula Quality Protection (Pty) Ltd*, the Constitutional Court, in deciding whether to hold a security company liable for the negligent conduct of one of its officers, considered public policy considerations such as the constitutional rights to personal safety and protection from theft of or damage to one’s property.⁵⁵

3 2 2 Negligence

In *F v Minister of Safety and Security*⁵⁶ Froneman J held as follows regarding the finding of negligence in instances where police omissions result in harm:⁵⁷

“Wrongfulness is determined on the assumption of negligent state conduct on the part of the official directly involved in the breach of a public duty. When one turns to the actual determination of negligence this assumption obviously falls away. The facts might show that there was no negligent conduct on the part of this official. It is also conceivable that evidence could be presented by the state that it took reasonable steps, through the instrumentality of other state officials, to prevent the wrongful and negligent conduct of the state official directly involved, and that accordingly an ultimate finding of negligence is not warranted.”

If it can be shown that there is no negligence on the part of the state, and that it took reasonable steps to prevent harm, there will be no liability. Ultimately the question that needs to be answered is whether the harm was reasonably foreseeable and whether reasonably it could have been prevented.⁵⁸ In the light of the test for negligence discussed above⁵⁹ it can be argued that the Minister of Safety and Security

⁵³ See also Froneman’s minority judgement in *F v Minister of Safety and Security* (*supra*).

⁵⁴ Par 83.

⁵⁵ (CCT 40/13) [2014] ZACC 4 (20 March 2014).

⁵⁶ *Supra* 44.

⁵⁷ Par 125.

⁵⁸ See the discussion at 3 1 2 above.

⁵⁹ Par 3.1.2.

should have foreseen and should have taken steps to prevent harm in the present scenario by for instance, providing more visible policing in known dangerous areas.⁶⁰

3 2 3 Causation

Assuming wrongfulness and fault are established one would have to establish that the conduct both factually and legally caused the harm.

Nkabinde J dealt extensively with the application of the *conditio sine qua non* test to an omission in the recent Constitutional Court Decision of *Lee v Minister of Correctional Services*.⁶¹ In this case the plaintiff claimed damages after having contracted tuberculosis while in prison. The High Court held that the defendant was liable,⁶² but the Supreme Court of Appeal overturned the decision on the basis that factual causation had not been established.⁶³ Nkabinde J held that in testing for factual causation, particularly in the case of an omission, the test remains flexible and that it is not necessary for the plaintiff to prove anything more than that the defendant's conduct was probably the cause of the harm.⁶⁴

Nevertheless it is submitted that, even if it were possible to establish wrongfulness and fault, legal causation would be problematic in the present case.

3 2 4 Liability or not?

Whether or not the State could be held liable in such a question would depend if the elements are proven. A factor that could militate against imposing liability on the State in instances such as this, is the age-old fear of limitless liability.⁶⁵ In this regard Van der Westhuizen J held as follows:⁶⁶

“Although there are ample public-policy reasons in favour of imposing liability in this type of case and although the constitutional rights to personal safety and protection from theft of or damage to one's property are compelling normative considerations, our courts are reluctant to impose liability that can “open the floodgates of litigation” or that could

⁶⁰ See *Kruger v Coetzee* (supra) and *F v Minister of Safety and Security* (supra).

⁶¹ 2013 2 SA 144 (CC).

⁶² *Lee v Minister of Correctional Services* 2011 6 SA 564 (WCC) par 270.

⁶³ *Minister of Correctional Services v Lee* 2012 3 SA 617 (SCA) paras 63 and 70.

⁶⁴ Paras 47 and further.

⁶⁵ *Country Cloud Trading cc v MEC: Department of Infrastructure Development* 2014 2 SA 214 (SCA); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A).

⁶⁶ Par 56.

result in liability without limits or impose a too heavy burden on the state”.

Of course it has been said many times that the correct application of the elements of delict, in particular wrongfulness and legal causation, could ensure that liability is limited.⁶⁷ The fear of limitless liability in itself should not be a reason for denying victims compensation and allowing perpetrators to escape liability.

3 3 DEFENDANT 3 – THE ROAD ACCIDENT FUND

At first blush it may seem like a stretch of the imagination to hold the Road Accident Fund liable for harm arising from crime. It is submitted, however, that car-jacking and truck-jacking are by their nature associated with “driving” and may be regarded as “arising from the driving of a motor vehicle”.⁶⁸ This submission is borne out by an analogous decision in *General Accident Insurance Company South Africa Ltd v Xhego*⁶⁹ and other decisions which will be discussed below.⁷⁰ Whether or not the causal link is sufficiently close with “driving” will depend on the courts’ interpretation of “arising from”.

If the incident could be brought within the ambit of the Road Accident Fund Act, the victim will not be able to claim compensation at common law; not even to the extent that the claims exceed the amounts awarded in terms of the Road Accident Fund Act. Furthermore, she will, in order to be entitled for compensation for non-patrimonial loss, have to prove that her injury was “serious”.⁷¹

3 3 1 No liability at common law

Section 21 provides as follows:

“(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—
(a) against the owner or driver of a motor vehicle; or

⁶⁷ *Bayer South Africa (Pty) Ltd. v Frost* 1991 4 SA 559 (AD); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); See also the discussion in 3 2 2 above and particularly the dictum of Froneman J cited in that paragraph.

⁶⁸ See the discussions below on sections 21 and 17 of the Road Accident Fund Act.

⁶⁹ 1992 1 SA 580 (AD).

⁷⁰ In par 3 3 2.

⁷¹ Section 17(1).

(b) against the employer of the driver.”

If the incident should fall within the ambit of section 17(1), not only can no claim be instituted against the wrongdoer; the shortfall can also not be recovered from the wrongdoer.⁷² The constitutionality of this provision was challenged by the Law Society of South Africa and others but was confirmed by the Constitutional Court in the decision of *Law Society of South Africa v Minister for Transport*.⁷³

3 3 2 Section 17(1)

In terms of section 17(1) of the Road Accident Fund Act the Fund will be liable to compensate a victim under certain circumstances:

“1) The Fund or an agent shall—
....be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee. “

The requirements for liability in essence are the following:

- (a) loss or damage has to be the result of bodily injury or death;
- (b) driving of a motor vehicle;
- (c) “caused by or arising from the driving” i.e. a causal link between the loss or damage and “driving”; and
- (d) negligence or other wrongful act on the part of the owner, the driver or employee of the owner or driver (the employee acting in the course and scope of his or her duty).

In this instance it is clear that the first requirement is met. What is problematic is requirement (b), namely “driving of a motor vehicle”, and (c), namely the causation requirement. Even though harm may not have been “caused by...the driving of a motor vehicle” it could have “arise(n) from the driving of a motor vehicle.” The

⁷² This was the case prior to the 2005 amendment of the Road Accident Fund Act when such shortfall could be recovered.

⁷³ 2011 1 SA 400 (CC).

decision of the Appellate Division in *General Accident Insurance Company South Africa Ltd v Xhego*⁷⁴, (*Xhego*) and other cases in which the principles laid down in *Xhego* were discussed and applied, may be useful in this regard. The unanimous decision of a full bench of the Appellate Division in *Xhego* was reported in 1992 and was referred to and applied in later decisions in spite of criticism by academics such as Klopper.⁷⁵ The accident in *Xhego* took place in 1986 against the background of political unrest in the townships. In this instance two firebombs were thrown at a traveling passenger bus in Nyanga, Cape Town. A number of passengers on the bus sustained injuries and instituted claims for the damage that they had sustained in terms of the Motor Vehicle Accidents Act,⁷⁶ a predecessor of the Road Accident Fund Act. The injuries resulted from burn wounds, and in the case of one passenger, a fracture to her left leg when she jumped from the bus.

The court a quo found that these injuries “arose from” the “driving” of a motor vehicle.⁷⁷ The Motor Vehicle Accident Fund (the predecessor of the Road Accident Fund) appealed on the basis that the harm was neither caused by, nor did it arise out of, the driving of a motor vehicle. The Fund further contended that there was no negligence.

On appeal Van Coller AJA referring to the well-known dictum of Corbett J in *Wells v Shield Insurance Company Ltd*⁷⁸ noted the following:⁷⁹

“[T]he words “caused by” referred to the direct cause of the injury whereas the words “arising out of” referred to the case where the injury, though not directly caused by the driving, is nevertheless causally connected with the driving and the driving is a sine qua non thereof. Corbett J, however, pointed out ...that an uncontrolled application of the *causa sine qua non* concept could bring about consequences never contemplated or intended by the Legislature. Some limitation must therefore be placed on the application of this concept. The Court should be guided by a consideration of the object and scope of the Act, and by notions of common sense.”

Van Coller AJA quoted the following passage from the *Wells* case:⁸⁰

⁷⁴ 1992 1 SA 580 (AD).

⁷⁵ Klopper *Law of Third Party Compensation* 3rd ed (2012) 66.

⁷⁶ Act No. 84 of 1986.

⁷⁷ *General Accident Insurance Company South Africa Ltd v Xhego supra* 583A.

⁷⁸ 1965 2 SA 865 (C).

⁷⁹ 870 A-B.

⁸⁰ *Wells* 870 D – F, quoted in *Xhego* par 13.

“Where the direct cause is some antecedent or ancillary act, then it could “not normally be said that the death or injury was 'caused by' the driving; but it might be found to arise out of the driving. **Whether this would be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the causal connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving.** I do not think that it is either possible or advisable to state the position more precisely than this, save to emphasise that, generally speaking, the mere fact that the motor vehicle was being driven at the time death was caused or the injury inflicted or that it had been driven shortly prior to this would not, of itself, provide sufficient causal connection.” (own emphasis).

Applying the test as formulated in the *Wells* case, Van Coller AJA held that the harm indeed arose from the driving of the bus. The only question that remained in that instance was that of negligence. Van Coller AJA noted that the bus company, the owner of the bus, had been aware that the area was dangerous and that there had been unrest in the past two years. The road on which the bus had been traveling had been closed and even after it was opened again, there were still incidents of violence. According to Van Coller, there was clearly negligence on the part of the owner of the bus.

In 1996 the principles laid down in *Xhego* were applied in *Grobler v Santam Versekering*.⁸¹ In this case Stafford J held that the actions of a driver in not ensuring that a horse that he had collided with and killed was removed from the road, arose out of the driving of his vehicle. A subsequent collision of the vehicle of the plaintiff with the dead horse and the resultant damage to the plaintiff fell, according to the court, within the ambit of “arising out of the driving”. The court specifically mentioned that negligence of the driver with regard to the killing of the horse was not relevant to the proceedings.⁸²

In *Khumalo v Multilateral Motor Vehicle Accidents Fund*⁸³ the court referred to the facts of *Xhego* and decided that injuries to the plaintiff who was shot by the passenger in a pursuing vehicle arose out of the driving of the pursuing vehicle:⁸⁴

⁸¹ 1996 2 SA 643 (T).

⁸² Per Broome D JP 649 C.

⁸³ 1997 4 SA 384 (N).

⁸⁴ 388 G-I.

“Reverting to the present case, the Cressida had to be driven behind and alongside the taxi to enable the gunmen to fire into it and at its occupants. The chase and the shooting took place over a substantial distance and lasted an appreciable time. On any reckoning there was a causal connection between the driving of the Cressida and the injury to the taxi driver. Furthermore the driver was acting in concert with and deliberately facilitating the gunmen’s objective. I am satisfied that the injury to the plaintiff arose out of the driving of the Cressida and were due to the negligence or other unlawful act of its driver.”

In both *Swartz v Groter Johannesburgse Oorgangs Metropolitaanse Raad*⁸⁵ en *Groter Johannesburgse Metropolitaanse Raad v Swartz*⁸⁶ the principles laid down in *Xhego* and *Grobler* were referred to and applied. In this case a pedestrian was injured after a collision with a bus. The court *a quo* found that the municipality, as owner of the bus, acted unreasonably by creating a bus lane which ran in the opposite direction from the normal traffic flow without informing the public sufficiently that busses would travel in that direction and opposite to direction of the normal flow of traffic. It was thus foreseeable that pedestrians could be injured. The municipality was held to be the owner of the bus and the injury arising out of the driving. On 1021 Du Plessis R noted:⁸⁷

“Die onderhawige saak verskil in beginsel nie van die Xhego-saak nie; die eiser beweer dat die eienaar nalatig was deur die bus te laat ry in ‘n baan wat voorsienbaar ‘n botsing en beserings kon veroorsaak.”

(“The current case does not differ in principle from the Xhego case; the plaintiff alleges that the owner was negligent by allowing the bus to be driven in a lane where it was foreseeable that a collision and injuries could result.” (own translation).

The decision was confirmed on appeal. Mynhardt R found, with reference to *Xhego* and *Wells* that the injuries caused to the plaintiff arose from the driving of the bus and were caused by the negligence of the municipality.

In *Minister of Safety and Security v Road Accident Fund*⁸⁸ the cause of a collision between the vehicle of the plaintiff and another vehicle was that the driver of the defendant’s truck allowed diesel to spill onto the road surface from a fuel tank of the

⁸⁵ 2001 2 SA 1014 (T).

⁸⁶ 2002 5 SA 584 (T).

⁸⁷ 1021 D-E.

⁸⁸ 2001 4 SA 979 (N).

defendant's truck. It was common cause that the truck was not being driven at the time of the collision. After referring to the difference between the terms "caused by" and "arising out of", Combrinck J states:⁸⁹

"The words 'caused by or arising out of driving' have been the subject-matter of a number of decisions over the years. In some cases the words have been narrowly interpreted and in others there have been a wide meaning given to them."

He then declares that he considered himself bound by the interpretation of the Judges in *Xhego* and, consequently finds that there was a sufficiently close link between the injuries and death suffered and the driving of the defendant's truck. The death and injuries and subsequent damage thus arose from the driving of the truck.

In *Laas v Road Accident Fund* ⁹⁰ reported in 2012, the plaintiff was injured while driving his vehicle at high speed in order to escape from robbers who chased and continuously fired at him. With reference, amongst others to *Xhego* and *Khumalo*, Pretorius J found that the causal relationship between the driving of the robbers' vehicle, enabling its occupants to shoot at the vehicle of the plaintiff was negligent and contributed to the plaintiff's injuries. ⁹¹

The cases shortly discussed above indicate that, as was mentioned in the *Minister of Safety and Security*-case,⁹² the courts have interpreted the words "caused by or arising out of the driving" sometimes in a narrow and sometimes in a wide sense. Currently it seems that the wide interpretation, as applied by the Appellate Division in *Xhego* and followed in cases such as *Grobler* and *Groter Johannesburg*, seems to prevail.

Klopper, criticises this line of decisions. According to him the distinction between negligent driving and an "other unlawful act" connected to or concerning a motor vehicle was not recognised or applied in *Xhego*. ⁹³ In his

⁸⁹ 984 F-G.

⁹⁰ 2012 1 SA 610 (GNP).

⁹¹ 614 E.

⁹² See quotation above.

⁹³ 65.

view the throwing of the petrol bomb in *Xhego* was a clear *novus actus interveniens* and the injuries were not caused by an “other unlawful act” connected to the motor vehicle. “... (T)he legislator never intended that the liability of a statutorily created fund should be extended to create all claims, including those who only remotely involve a motor vehicle.”⁹⁴ He then further criticises the other decisions discussed above.⁹⁵ Whether one agrees with Klopper or not,⁹⁶ the current legal position is still that expressed in *Xhego* and, until the Supreme Court of Appeal decides otherwise, one must at least consider the possibility that, in the case under discussion, the Road Accident Fund may incur liability.

In the present case one can assume that the harm is a *sine qua non* of the driving of a vehicle. Car-jacking is an activity associated with driving and the shooting resulted from the fact that the passenger wanted to defend herself against the car-jacking. However, “arising from” requires more than a *sine qua non*, and one would have to apply common sense standards to establish that the causal connection between the injury and the driving was sufficiently real and close in order to establish causation for the purposes of the Act.

It would also be necessary to establish negligence on the part of the owner or the driver of the motor vehicle. The question of the driver’s fault was discussed under 2.1. If the driver knew that there were hijackings in the area and took the gun to defend herself in the event of such an incident, one could ask whether she reasonably could have foreseen harm to innocent third parties and could have taken reasonable steps to prevent such harm arising. The facts of the case as they appear from the news report do not indicate whether it was possible to take an alternative route, or whether some other steps could have been taken to prevent the harm. In order for the Road Accident Fund to be liable, it will be necessary to establish some form of negligence on the part of the owner or driver of the vehicle in question – *in casu* it appears that they are one

⁹⁴ 65. For his detail criticism and discussion of the other cases in this regard, see Klopper 65-69.

⁹⁵ For his detail criticism and discussion of the other cases in this regard, see Klopper 65-69.

⁹⁶ In *Groter Johannesburgse Oorgangs Metropolitaanse Raad v Schwartz (supra)* at 594 I -595 J, Mynhardt J, for instance, discusses Klopper’s view that “... it would appear that the legislator intentionally distinguishes the driving of a motor vehicle by a driver on the one hand and other unlawful acts committed by the driver or other persons on the other” (Klopper 64). The Court then states that in its view Klopper’s approach is incorrect (595 I-J).

and the same person. In *General Accident Insurance Company South Africa Ltd v Xhego*⁹⁷ the court left open the question of the driver's negligence but found that the owner was negligent because the bus was travelling in an area which was known to be dangerous.⁹⁸ In the factual scenario under discussion it appears as if the driver of the vehicle was aware of the fact that the area was dangerous, hence the fact that she drove with a firearm. One could thus draw the conclusion that harm to innocent third parties was foreseeable.

3 4 WHO SHOULD BE LIABLE?

In *Loureiro v Invula Quality Protection (Pty) Ltd*⁹⁹ the court acknowledged the reality of violent crime in South Africa, and furthermore the fact that this has to be taken into consideration when considering questions of wrongfulness and negligence. In the case of individual citizens who are protecting themselves, such as the shooter in the example above, defences such as necessity (real or putative) or sudden emergency could exclude wrongfulness or fault and the victim who was caught in the crossfire may not be able to hold the shooter liable for her damages.

When one considers the analogy with the *Xhego* case, holding the Road Accident Fund liable does not seem quite as far-fetched. However, this option remains somewhat tenuous, particularly around the requirements of "caused by or arising from" and "driving".

Ultimately the State has a duty to ensure the safety and security of its citizens. This duty is recognised in the Bill of Rights in section 12 which provides that "[e]veryone has the right to freedom and security of person which includes the right to be free of all forms of violence from public or private sources." This was recognised by the Constitutional Court in *Carmichele*.¹⁰⁰

4 CONCLUSION

Living in South Africa where violent crime is a fact of life, it is not surprising that people see the need to carry firearms and to protect themselves. Car hijackings in

⁹⁷ *Supra* footnote 71.

⁹⁸ 587B-D.

⁹⁹ (CCT 40/13) [2014] ZACC 4 (20 March 2014).

¹⁰⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

particular are frequent occurrences and motorists are extremely vulnerable in these situations. If they should choose to protect themselves there is the strong possibility that other road users could get caught in the cross fire, as happened in this particular incident. These innocent bystanders will want to claim compensation from someone and the question arises who should be responsible. The fact that South Africa has had very high crime statistics for the past number of decades is in itself a *sine qua non* to situations of this kind and one would like to hold the Government responsible. Unfortunately the taxpayer has become the Government's *de facto* liability insurer, because ultimately it is the taxpayer who pays the salaries of Government officials as well as footing the bill for the damages claims paid out by the Government and the Road Accident Fund.

A more important question than the issue of liability which arises from this particular set of facts is that as people increasingly feel the need to protect themselves because of perceptions that the Government is "doing nothing" about the high crime rates, in particular the high rates of violent crime, other people are bound to get caught in the cross fire. The question is who will be held responsible for the harm that ensues in these cases. The people protecting themselves may rely on necessity to exclude wrongfulness or at least lack of negligence. Legal causation may also be problematic.

It seems that the injured passenger is not only caught and injured in the crossfire between criminals and victims, but that she may also be caught in the crossfire between different possible remedies that may ultimately fail compensate her for her loss.