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Foreseeability: Wrongfulness and negligence of omissions in delict – the debate goes on

MTO Forestry (Pty) Ltd v Swart NO 2017 5 SA 76 (SCA)

Abstract

The case under discussion involved delictual liability for an omission. The appellant sued the respondent for damages, alleging that the respondent's negligent omissions had caused or allowed a fire to spread to a plantation, of which the appellant was the beneficial owner. Relief was refused in the High Court and the appeal to the Supreme Court of Appeal was unsuccessful, Leach JA finding that negligence was not proved by the appellant. The most important aspect of Leach JA's decision was his pronouncement that it is potentially confusing to take foreseeability into account as a factor determining both wrongfulness and negligence. Such confusion could lead to the conflation of these two delictual elements, resulting in wrongfulness losing its important attribute as a measure of control over liability. Accordingly, foreseeability of harm should not be considered in establishing wrongfulness; its role should be confined to the rubrics of negligence and causation. This aspect of the judgment can be supported because it accords with the *ex post facto* evaluation of wrongfulness, which excludes the utilisation of the *ex ante* reasonable foreseeability of harm. Be that as it may, until the Constitutional Court confirms Leach JA's approach to foreseeability and wrongfulness, the question remains as to whether our law will not be impoverished by restricting foreseeability to negligence and legal causation, whilst, in doing so, also disregarding the numerous authoritative judgements acknowledging the role of foreseeability with regard to wrongfulness. Notwithstanding Leach JA's rejection of the legal duty approach to the wrongfulness of an omission, this approach, which has become engrained in our law of delict, remains very important in establishing wrongfulness in the present field. As a matter of fact, Leach JA himself relied on previous decisions that applied the legal duty approach and also acknowledged the legal duty of a landowner to control or extinguish a fire on its land. However, the judge's apparent use of negligence in limiting the absoluteness of the legal duty, may cause confusion between wrongfulness and negligence. Leach JA clearly favours the new test for wrongfulness (the reasonableness of holding the defendant liable) in the present context, despite criticism of this test and the fact that it is merely a recent formulation of one variation of the test for wrongfulness. However, there is no indication that the judge specifically applied the new test in establishing the wrongfulness of the respondent's conduct. Therefore, if the judge endeavoured to set aside the traditional legal duty approach to establish the wrongfulness of an omission, his attempt was unsuccessful. Leach

JA's averment that the importance of the distinction between wrongfulness and fault is criticised by certain academics does not hold water. Finally, it should be borne in mind that foreseeability plays a different role with regard to negligence, on the one hand, and causation, on the other. Whereas, with reference to negligence, harm of a general kind should be foreseeable, foreseeability of the actual harm that has ensued is relevant as regards legal causation.

1. Introduction

This case involved delictual liability for an omission. Interestingly enough, several recent decisions of the Supreme Court of Appeal and the Constitutional Court have also dealt with this kind of liability, but the approach in each case, especially as to the element of wrongfulness, differed: see *Minister of Justice and Constitutional Development v X*;¹ *South African Hang and Paragliding Association v Bewick*;² *Za v Smith*;³ *Oppelt v Department of Health, Western Cape*;⁴ *Mashongwa v Passenger Rail Agency of South Africa*.⁵ This topic has also been discussed comprehensively by Neethling and Potgieter.⁶ In the case under discussion, the appellant company, which ran a forestry business, was the beneficial owner of a plantation called Witelsbos, in the district of Humansdorp, in the sense that it had the right to harvest the trees and enjoy the income from the forest's production. A fire had started on the respondent's immediately adjacent farm in an area packed with dense thickets of highly flammable alien plants ("warbos"). A strong wind caused the fire to spread onto Witelsbos, where it burned for several days and destroyed some 1,300 hectares of forest. The appellant suffered considerable loss, despite the efforts of teams of firefighters to halt the spread. The appellant sued the respondent in the Cape Town High Court for damages of over R23 million, alleging that its negligent omissions had caused or allowed the fire to spread onto Witelsbos. As relief was refused in the High Court, the appellant approached the Supreme Court of Appeal.

2. The judgment

2.1 Legal duty and wrongfulness

In commencing his enquiry into the liability of the respondent, Leach JA stated the elements of a claim founded in delict, namely conduct, wrongfulness, fault, harm, and causation.⁷ He pointed out that the appellant

1 *Minister of Justice and Constitutional Development v X* 2015 1 SA 25 (SCA). Neethling & Potgieter 2015b:856ff.

2 *South African Hang and Paragliding Association v Bewick* 2015 3 SA 449 (SCA). Neethling 2015a:810ff.

3 *Za v Smith* 2015 4 SA 574 (SCA). Neethling & Potgieter 2016:491-501.

4 *Oppelt v Department of Health, Western Cape* 2016 1 SA 325 (CC).

5 *Mashongwa v Passenger Rail Agency of South Africa* 2016 3 SA 528 (CC):534-535.

6 Neethling & Potgieter 2017:97-110.

7 *MTO Forestry (Pty) Ltd v Swart NO*:par. 12.

sought to hold the respondent liable, not for starting the fire on the day in question, but for its alleged negligent omission to take preventative steps, which allowed or caused the fire to spread onto Witelsbos, and that it could not be doubted that such a negligent omission, if established, could found liability. It is indeed trite law that a legal duty may rest on the owner, occupier or controller of property to control a fire on the property.⁸ This view was also confirmed as follows in *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*,⁹ to which Leach JA referred:¹⁰

Conduct ... can take the form of a *commissio*, for example where the fire causing the loss was started by the defendant ... or an *omissio*, for example the failure to exercise proper control over a fire of which he was legally in charge ... or the failure to contain a fire when, in the absence of countervailing considerations adduced by him, he was under the legal duty, by virtue of his ownership or control of the property, to prevent it from escaping onto a neighbouring property thereby causing loss to others ...

Leach JA¹¹ continued by stating that terms such as ‘duty’ or ‘legal duty’ have, with justification, been criticised as not really contributing to the determination of whether a defendant’s conduct should be regarded as wrongful and that it may lead to confusion with the concept of duty of care in English law, which straddles both wrongfulness and negligence.¹² Accordingly, Leach JA supported Brand’s¹³ comment that concepts such as “a legal duty” had been “no more than an attempt at formulating some kind of practical yardstick as to when policy considerations will require the imposition of legal liability”.

These statements are subject to criticism.¹⁴ First, the concept of a legal duty stands central in the inquiry into the wrongfulness of an omission.¹⁵ Secondly, notwithstanding possible confusion, which should be guarded against, the legal duty concept is so ingrained in positive law that the courts and academic writers will not, and should not, readily renounce it. Even recent decisions of our highest courts continue to employ the duty concept to ascertain the wrongfulness of an omission. In, for example, *Minister of Justice and Constitutional Development v X*,¹⁶ Fourie AJA said

8 *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A); *Minister of Water Affairs v Durr* [2007] 1 All SA 337 (SCA):paras. 18-19; *Lubbe v Louw* [2006] 4 All SA 341 (SCA):paras. 13-17; *Steenberg v De Kaap Timber (Pty) Ltd* 1992 2 SA 169 (A); *Dews v Simon’s Town Municipality* 1991 4 SA 479 (C):485. See also Neethling & Potgieter 2015a:64.

9 *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 4 SA 814 (SCA):par. 14.

10 *MTO Forestry (Pty) Ltd v Swart NO*:par. 13.

11 *MTO Forestry (Pty) Ltd v Swart NO*:par. 14.

12 See *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA):222.

13 Brand 2014:455.

14 Neethling 2015b:188ff.

15 See, generally, Neethling & Potgieter 2015a:58-59.

16 *Minister of Justice and Constitutional Development v X*:par. 13.

that a negligent omission will be wrongful only if the appellant is under a legal duty to act positively to prevent the harm suffered by the respondent. The omission will be regarded as wrongful when the legal convictions of the community impose a legal – as opposed to a mere moral – duty to avoid harm to others by positive action. The duty issue was also paramount in the Constitutional Court’s decisions in *Mashongwa*¹⁷ and *Oppelt*.¹⁸ This approach is supported by academic writers on the law of delict.¹⁹ Van der Walt & Midgley²⁰ state as follows:

The breach of a legal duty is therefore an independent criterion for determining wrongfulness and plays a vital practical role in founding liability in cases where no infringement of a right is evident [such as in cases of omission].

At this stage of the development of our law, it is unlikely that the legal duty concept with regard to wrongfulness will still be confused with the English law duty of care doctrine. Suffice it to say that the Supreme Court of Appeal and academic writers have sufficiently clarified the distinction between these concepts and have rejected the duty of care approach in our law.²¹ Furthermore, since the legal duty concept has been embedded firmly in our law to ascertain wrongfulness, it is not acceptable to shrug it off as at most “an attempt at formulating some kind of practical yardstick” for the imposition of legal liability.

2.2 Wrongfulness and fault

Leach JA then turned to the distinction between wrongfulness and fault (negligence),²² beginning with the following quotation from Brand:²³

Wrongfulness – sometimes also referred to as unlawfulness – is one of the elements of delictual liability. The other elements are conduct, fault, causation and harm. Without the convergence of all these elements delictual liability will not ensue ... In modern South African law, wrongfulness has become the most interesting of these elements. Under this rubric the law determines whether the defendant should be held legally liable for the harm suffered by the

17 *Mashongwa v Passenger Rail Agency of South Africa*:par. 16-30.

18 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*:paras. 51-54.

19 Van der Walt & Midgley 2016:115-116; Loubser & Midgley (eds.) 2017:186; Neethling & Potgieter 2015a:58ff.

20 Van der Walt & Midgley 2016:115.

21 *McIntosh v Premier, KwaZulu-Natal* 2008 6 SA 1 (SCA):8-9. See also *Chartaprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA):279; *Knop v Johannesburg City Council* 1995 2 SA 1 (A):27; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 515 (SCA):522; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA):468; Neethling & Potgieter 2015a:159 fn. 200. For a number of earlier SCA cases that still appear to confuse these concepts, see Neethling & Potgieter 2015a:160.

22 *MTO Forestry (Pty) Ltd v Swart NO*:par. 15ff.

23 Brand 2014:451.

plaintiff that resulted from the defendant's blameworthy conduct. If the law determines that there will be no liability, the defendant is afforded immunity from the consequences of the wrongful conduct; the defendant is not liable despite the presence of all the other elements of delictual liability.

As has often been stated by Brand JA,²⁴ the criterion for wrongfulness, in his view, is the reasonableness of holding the defendant liable. Since this is the case, his statement that, if the law determines that there will be no liability, the defendant is afforded immunity from the consequences of the wrongful conduct, does not make sense because, if, in terms of the new criterion for wrongfulness, the law determines that there will be no liability, wrongfulness should have been absent, with the result that there could also be no consequences of "wrongful conduct".

As far as wrongfulness is concerned, Leach JA endorsed the development in the Supreme Court of Appeal and the Constitutional Court²⁵ over the past decade or so that wrongfulness is determined in accordance with the criterion that it depends on the reasonableness of imposing liability.²⁶ However, for liability to ensue, wrongfulness needs to be accompanied by fault.²⁷ According to the judge, this is confirmed in *Minister of Safety and Security v Van Duivenboden*,²⁸ where Nugent JA stated as follows:

A negligent omission is [wrongful] only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. 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*, 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.

Leach JA²⁹ emphasised that wrongfulness and negligence are indeed separate elements of a delict. He appears to believe that this view has been

24 See *Le Roux v Dey* 2011 3 SA 274 (CC):315; see also, for example, *Country Cloud Trading CC v MEC, Department of Infrastructure Development*:222-223; *Roux v Hattingh* 2012 6 SA 428 (SCA):439; *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA):193.

25 *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC):par. 53; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC):paras. 20-21.

26 *MTO Forestry (Pty) Ltd v Swart NO*:par. 16.

27 *MTO Forestry (Pty) Ltd v Swart NO*:par.16.

28 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA):par. 12.

29 *MTO Forestry (Pty) Ltd v Swart NO*:par. 17.

questioned in academic circles,³⁰ referring to Neethling's³¹ view that certain factors such as foreseeability and preventability of harm are relevant for the determination of both wrongfulness and negligence, so that a degree of conflation of these two elements is inevitable, and that, if a degree of overlap can be accepted "without negating the distinctive functions of wrongfulness and negligence as separate elements of delict", it would not be a bad thing. Neethling based his observation that certain factors are relevant to both wrongfulness and negligence on a number of decisions of the Supreme Court of Appeal.³² Nevertheless, Neethling emphasised throughout that, where it is appropriate (realistic, practical and convenient), a certain extent of overlap should be accepted provided that this can be done without negating the distinctive functions of wrongfulness and negligence as separate elements of a delict – in the case of wrongfulness, to indicate that a legally protected interest has been infringed in an unreasonable manner, and in the case of negligence, to indicate the blameworthiness of the alleged wrongdoer for such infringement – are not violated.³³ To deny this reality would amount to placing the various factors relevant to the establishment of wrongfulness, on the one hand, and negligence, on the other, into watertight compartments, where no particular factor may be applied with regard to more than one of these elements. Ultimately, as far as we know, there is no evidence from academic circles (apart from, perhaps, Milo³⁴) questioning the separate and discrete existence of wrongfulness and negligence in our law. There is, therefore, no debate in this regard. Leach JA's comment that the debate regarding the separate existence of wrongfulness and negligence has become sterile is, therefore, beside the point. Brand JA's remark that the debate has become "sterile"³⁵ (and on which Leach JA based his comment) is clearly concerned with the debate on the acceptability or not of the new test for wrongfulness,

30 See also Leach JA's similar remark in *Pauw v Du Preez* (2019/2014) [2015] ZASCA 80 (28 May 2015);par. 7.

31 Neethling 2006:204ff. For a response to Neethling's view, see Nugent 2006:557ff. See also Brand 2014:451ff.

32 As regards foreseeability as such a factor, see, for example, *Hirschowitz Flionis v Bartlett* 2006 3 SA 575 (SCA):589; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*:468; *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA):418; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA):159-160; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA):324; *Stewart v Botha* 2008 6 SA 310 (SCA):314; *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA):1203; *Crown Chickens (Pty) Ltd v Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA):123; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A):361-362; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 1 SA 389 (SCA):400.

33 Neethling 2006:209-210, 214. See also Neethling & Potgieter 2015a:163-164, fns 222, 223.

34 Milo 2005:28, 38-39 argues that courts in South Africa should refrain from making a distinction between wrongfulness and negligence (in the field of media defamation law) and simply apply a test of reasonableness for both elements. For criticism, see Neethling 2006:214.

35 Brand 2014:451, 458.

as formulated by Brand JA in *Le Roux v Dey*.³⁶ By the way, the so-called sterility of this debate can be addressed if our highest courts engage with the criticism levelled against the new test for wrongfulness, instead of simply echoing Brand JA's formulation thereof, without more ado.³⁷ An attempt to engage our criticism of the new test was proffered by Brand,³⁸ to which we reacted,³⁹ but did not receive a response.

At this stage, it is important to emphasise that the new test for wrongfulness is not regarded by all courts as the only test for the determination of wrongfulness but, according to Nugent JA in *Crown Chickens*,⁴⁰ merely a recent formulation of one variation of the test for wrongfulness in our law. In the result, the traditional test for wrongfulness for an omission may still be applied. As mentioned, this entails whether, according to the *boni mores* or reasonableness criterion (where legal policy considerations, including constitutional norms, play an important part), there was a legal duty on the defendant to act positively to prevent harm to the plaintiff.⁴¹

Initially, Brand JA was very critical of the traditional test for wrongfulness,⁴² but, in the *Bewick* case,⁴³ he was willing to reconcile the traditional *boni mores* test with the new test for wrongfulness, stating:

As has by now become well established, negligent conduct manifesting itself in the form of a positive act which causes physical injury raises a presumption of wrongfulness. By contrast, in relation to liability for omission and pure economic loss, wrongfulness is not presumed and depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination according to criteria of public and legal policy consistent with constitutional norms ... On occasion the same principles had been formulated somewhat differently, namely that wrongfulness depends on whether or not it would be reasonable, having regard to considerations of public and legal policy, to impose delictual liability on the defendant for the loss resulting from the specific omission.

36 *Le Roux v Dey*:315.

37 For criticism of this test, see, *inter alia*, Neethling & Potgieter 2015a:80-85; Knobel 2008:652; Scott 2015:433; Marx 2015:329-330; Loubser 2008:122; Potgieter 2017a:813ff.

38 Brand 2013:57-69.

39 Neethling & Potgieter 2014:116-124.

40 *Crown Chickens (Pty) Ltd v Rocklands Poultry v Rieck*:122.

41 See, for example, *Minister of Justice and Constitutional Development v X:28*; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA):395; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC):138; *Harrington v Transnet Ltd t/a Metrorail* 2010 2 SA 479 (SCA):485; *RH v DE* 2015 5 SA 83 (CC):101. See also Neethling & Potgieter 2015a:38-39; Loubser & Midgley (eds.) 2017:263-265; Van der Walt & Midgley 2016:122-123.

42 See *Country Cloud Trading CC v MEC, Department of Infrastructure Development*:par. 19.

43 *South African Hang and Paragliding Association v Bewick*:452-453. See also Neethling 2015a:813-815.

This reconciliatory approach is also evident from decisions of the Constitutional Court in, for example, the *Oppelt* case,⁴⁴ where the court proposed the *boni mores*, the legal duty to prevent damage and the reasonableness of holding the defendant liable as a potpourri for the determination of wrongfulness:

The next enquiry is whether the '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*'. In *Loureiro*, Van der Westhuizen J explained that the wrongfulness enquiry is based on *the duty not to cause harm*, and that in the case of negligent omissions, the focus is on the *reasonableness of imposing liability*. An enquiry into wrongfulness is determined by weighing competing norms and interests. The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be *reasonable to impose liability on a defendant* for the damages flowing from specific conduct. Whether conduct is wrongful is tested against *the legal convictions of the community* which are, 'by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution' (italics added).

Since both the traditional and the new test place the emphasis on considerations of policy, they would, closely examined, ultimately produce the same result.⁴⁵ But this does not mean that the objections to the new test would also disappear. In this regard, it is submitted that a court, notwithstanding which test is applied, should first exercise a value judgement embracing all relevant considerations of policy. If these considerations justify the court in doing so, it should thereafter declare the conduct wrongful and, consequently, render the defendant liable for the loss, provided, of course, that all other delictual requirements have also been met.⁴⁶ The decision to hold a person liable is, therefore, the consequence of the fact that a delict has been committed and not the result of the application of the test for wrongfulness.

44 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*:343-344. See also *H v Fetal Assessment Centre* 2015 2 SA 193 (CC):216; *Loureiro and Others v Imvula Quality Protection (Pty) Ltd*:410.

45 See also *TS v Life Healthcare Group (Pty) Ltd* 2017 4 SA 580 (KZD):585-586, where the court stated that the test for wrongfulness in our law is trite, and thereafter described the *boni mores* legal duty test followed by the new test as if there are no differences between the two tests.

46 See *Country Cloud Trading CC v MEC, Department of Infrastructure Development*:222. See also *Minister van Polisie v Ewels* 1975 3 590 (A):597; *Local Transitional Council of Delmas v Boshoff*:522; Neethling & Potgieter 2015a:81-82.

2.3 Wrongfulness and foreseeability

Turning to the question as to the applicability of foreseeability as a factor in determining wrongfulness, Leach JA came to the conclusion that it should not play a role at all in this regard.⁴⁷ He explained as follows:

It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, I think the time has now come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.

Historically, however, (reasonable) foreseeability has indeed played a role in determining wrongfulness (see the SCA cases cited above). In *Gouda Boerdery BK v Transnet*,⁴⁸ Scott JA explained this as follows:

The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry [preventability], the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness.

For this reason, declared Harms JA in *Steenkamp*,⁴⁹ the role of foreseeability differs depending upon whether it is considered in the context of wrongfulness or negligence:

The role of foreseeability in the context of wrongfulness must be seen in its correct perspective. It might, depending on the circumstances, be a factor that can be taken into account but it is not a requirement of wrongfulness and it can never be decisive of the issue. Otherwise there would not have been any reason to distinguish between wrongfulness and negligence and since foreseeability also plays a role in determining legal causation, it would lead to the temptation to make liability dependent on the foreseeability of harm without anything more, which would be undesirable.

In similar vein, Loubser and Midgley⁵⁰ conclude that foreseeability is seen as a factor that may be relevant in the wrongfulness enquiry, and as one of two core factors one *must* consider in determining negligence (the other being preventability). Foreseeability of harm is thus a requirement for negligence. Although it may add weight to the wrongfulness decision, it might not be

47 *MTO Forestry (Pty) Ltd v Swart NO*:par. 18ff.

48 *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA):499.

49 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA):159-160.

50 Loubser & Midgley (eds.) 2017:189-190.

decisive in the latter regard, and factors might override it. Van der Walt and Midgley⁵¹ add that, in line with the objective reasonableness approach to wrongfulness, which takes into account all relevant aspects, and, even though it is also a component of negligence and causation assessments, the foreseeability of harm is a factor that may be considered in determining (in the words of the new wrongfulness test) whether liability ought to be imposed in a particular case.⁵² In light of the foregoing, it should be emphasised that, although foreseeability may be a factor in determining wrongfulness, care should be taken not to elevate it to the determining factor for wrongfulness, as this will confuse wrongfulness with negligence and “lead to the absorption of the English law tort of negligence into our law, thereby distorting it”.⁵³ An example of such an unfortunate application of foreseeability is the judgment of the Appeal Court in *Government of the Republic of South Africa v Basdeo*.⁵⁴ Contrary to this position, where foreseeability has been recognised as a factor in determining wrongfulness, the Supreme Court of Appeal has now emphatically stated in the case under discussion⁵⁵ that foreseeability of harm should not at all be taken into account in the determination of wrongfulness, and that its role should be confined to negligence and causation.⁵⁶

Leach JA’s decision can be supported as far as reasonable foreseeability is concerned, not only because of the possible confusion between wrongfulness and negligence that could result from the use of reasonable foreseeability in determining both these elements, but also because, and this is very important, this viewpoint tallies with the traditional test for wrongfulness. In *Waldis v Von Ulmenstein*,⁵⁷ Davis J put it as follows with regard to defamation:

The general test for wrongfulness is based upon the boni mores or the legal convictions of the community. This means that the infringement of the complainant’s reputation should not only have taken place but be objectively unreasonable. See Neethling et al *Neethling’s Law of Personality* 2 ed (2005) at 135. The application of the boni mores test

51 Van der Walt & Midgley 2016:107.

52 See also Loubser & Midgley (eds.) 2017:187-190.

53 See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA:468.

54 *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A). See Neethling 1996:682ff.; Neethling & Potgieter 2007:123-124.

55 *MTO Forestry (Pty) Ltd v Swart* NO:par 18.

56 See also Brand JA’s remark in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA):163 that “the issue of foreseeability should more appropriately be considered under the rubric of legal causation and not as part of determining wrongfulness” and his categorical statement in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*:197-198 that “foreseeability ... [does] not play a role in establishing wrongfulness”. See also his judgment in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*:225. See, however, *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC):par. 34.

57 *Waldis v Von Ulmenstein* 2017 4 SA 503 (WCC):509.

involves an *ex post facto* balancing of the interests of the plaintiff and the defendant in the specific circumstances of this case in order to determine whether the infringement of the former's interests was reasonable.

The defendant's conduct is determined diagnostically (*ex post facto*, by looking back), by taking into account all the relevant facts and circumstances that are actually present and all the consequences that actually ensued. Naturally the prognostic (*ex ante*, by looking forward) reasonable foreseeability of harm plays no part in this instance, but is a core requirement of negligence.⁵⁸ However, this does not mean that subjective foreseeability (the defendant's subjective foresight or knowledge) should not play a role with regard to wrongfulness. Clearly, adjudged *ex post facto*, the defendant's knowledge is also a relevant fact that is actually present and should be considered in determining wrongfulness. This approach is already established practice in case law.⁵⁹ Unfortunately, Leach JA opined that the fact that the respondent *in casu* had been aware or had knowledge of the fire risk created by the "warbos", this (subjective) foreseeability of the fire hazard was a factor relevant to the determination of negligence, rather than wrongfulness.⁶⁰

Although, according to Leach JA, foreseeability does not play a role in determining wrongfulness, it may still be relevant to the rubrics of negligence and causation. In this regard, it should be borne in mind that foreseeability does not play the same role with reference to negligence, on the one hand, and causation, on the other.⁶¹ Whereas, with reference to negligence, harm of a general kind should be foreseeable,⁶² foreseeability of the actual harm is relevant as regards legal causation.⁶³ In this regard, if the distinctive functions of negligence and causation are borne in mind,

58 See Neethling & Potgieter 2015a:164-165.

59 For further references, see Loubser & Midgley (eds.) 2017:267; Neethling & Potgieter 2015a:65-66, 309.

60 The viewpoint that foreseeability should play no role at all with regard to wrongfulness is strongly supported by Knobel 2015:229-243, 239-242, fns. 54, 74. According to him, any subjective factor such as the foreseeability, knowledge of harm and motive should co-determine fault, not wrongfulness.

61 See, in general, Neethling & Potgieter 2015a:211-213, 214-216.

62 See, for example, *Imvula Quality Protection (Pty) Ltd v Loureiro*:416; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA):839; *Mukheiber v Raath* 1999 3 SA 1065 (SCA):1077; *Jafta v Honourable Minister of Correctional Services* [2012] 2 All SA 286 (OKP):paras. 22-23; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A):768.

63 *Premier of the Western Cape Province v Loots NO* [2011] JOL 27067 (SCA):par. 23. In passing, it should be noted that, in terms of the flexible approach to legal causation (see Neethling & Potgieter 2015a:200-203), there may be cases where a result may be imputed to the defendant, despite the fact that the specific result was not reasonably foreseeable, should considerations of reasonableness, justice and fairness dictate that the defendant should be held liable for the harm suffered by the plaintiff (see Potgieter 2017b:984, 987-988).

there need not be any concern that the application of foreseeability in regard to both may lead to confusion between, or even the conflation of the two elements.

2.4 Negligence and preventability

With regard to negligence, the court, after dealing with a dispute between the parties in this regard,⁶⁴ proceeded on the assumption that, in terms of sec. 34(1) of the *National Veld and Forest Fire Act 101 of 1998*, there was indeed a presumption that the respondent, being the owner of the land on which the fire started, had been negligent in relation to the fire, and that sec. 34(1) placed an onus on the respondent to show that the fire spread to Witelsbos without negligence on its part.⁶⁵ In terms of sec. 34(2) of the *Act*, the presumption of negligence does not exempt the plaintiff from the onus of proving that any act or omission by the respondent was wrongful.⁶⁶ The court then dealt with the alleged negligent omissions advanced by the appellant.⁶⁷ Leach JA stated:⁶⁸

A reasonable landowner in the respondent's position was ... not obliged to ensure that in all circumstances a fire on its property would not spread beyond its boundaries. All the respondent was obliged to do was to take steps that were reasonable in the circumstances to guard against such an event occurring. If it took such steps and a fire spread nevertheless, it cannot be held liable for negligence just because further steps could have been taken.

The court found that the respondent more than fulfilled its obligation to take reasonable steps and that it was, therefore, not negligent.⁶⁹

We return to Leach JA's remarks about the appellant's allegations that the respondent acted wrongfully because the respondent had been aware or had knowledge of the fire risk created by the "warbos". In this regard, the judge stated that "the allegation of wrongfulness was, thus, the foreseeability of the fire hazard caused by the 'warbos' but, for reasons already mentioned, that is a factor relevant to the determination of negligence rather than wrongfulness". He concluded that the dispute ultimately turned on whether the respondent was negligent in failing to remove the "warbos", rather than on whether its failure was wrongful.⁷⁰ He continued:⁷¹

As was mentioned by this court in [*Minister of Water Affairs and Forestry v Durr* 2006 6 SA 587 (SCA):par. 19], a landowner is under

64 *MTO Forestry (Pty) Ltd v Swart NO*:paras. 20-25.

65 *MTO Forestry (Pty) Ltd v Swart NO*:par. 25.

66 *MTO Forestry (Pty) Ltd v Swart NO*:par. 20.

67 *MTO Forestry (Pty) Ltd v Swart NO*:paras. 26ff.

68 *MTO Forestry (Pty) Ltd v Swart NO*:par. 47.

69 *MTO Forestry (Pty) Ltd v Swart NO*:par. 48.

70 *MTO Forestry (Pty) Ltd v Swart NO*:par. 44.

71 *MTO Forestry (Pty) Ltd v Swart NO*:par. 45.

a “duty” to control or extinguish a fire burning on its land. But, as Nienaber JA stressed in [*H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 4 SA 814 (SCA):par. 21], whilst landowners may be saddled with the primary responsibility of ensuring that fires on their land do not escape the boundaries, this falls short of being an absolute duty.

It is trite law that there is a legal duty on a landowner or a person in control of land to prevent fire from spreading from such land to a neighbouring property and that this duty clearly relates to the wrongfulness issue.⁷² Failure by the owner or person in control to prevent such spreading, is clearly wrongful. Perhaps Leach JA could have expressed it more clearly that the “duty” *in casu* was concerned with wrongfulness. The judge’s failure to do so may perhaps be ascribed to the fact that he,⁷³ following Brand JA, indicated that the legal duty approach may well be replaced by the reasonableness of holding the defendant liable as criterion for wrongfulness. Nevertheless, Leach JA, in establishing wrongfulness, as required by sec. 34(2) of Act 101 of 1998, did not apply this criterion *in casu*.

It should be emphasised that the fact that a person acted wrongfully does not necessarily mean that he would be delictually liable, as negligence still has to be established.⁷⁴ As explained earlier,⁷⁵ an omission is unreasonable and thus wrongful where, according to the *boni mores* test, a legal duty rested on the defendant to act positively in order to prevent harm and he neglected to comply (fully) with such a duty. However, where a defendant did attempt (albeit unsuccessfully) to comply with such a duty and his attempt coincided with what the reasonable person would have done, his (unreasonable) wrongful act is not accompanied by (unreasonable) negligent conduct (damage could not reasonably be prevented), and he will escape liability. *Minister of Forestry v Quathlamba (Pty) Ltd*⁷⁶ may be cited as an example. Fire broke out on X’s land without any fault on his part. Despite his attempts to extinguish the fire, it spread to Y’s land and caused damage. The court held that there is a legal duty on a landowner to control a fire on land under his control. Because the fire caused damage to Y, it may be said that X did not fully comply with his duty and his conduct (omission) was thus wrongful (unreasonable). The court nevertheless correctly held that X acted in accordance with the standard of the reasonable person in attempting to extinguish the fire and that he was thus not liable.⁷⁷ Despite the wrongfulness of his conduct in not complying fully with his legal duty, he escaped liability because of

72 Van der Walt & Midgley 2016:125; Loubser & Midgley (eds.) 2017:265-266; Neethling & Potgieter 2015a:64, and the case law cited there.

73 *MTO Forestry (Pty) Ltd v Swart NO*:par. 14.

74 See, for example, the *dictum* in *Minister of Safety and Security v Van Duivenboden*:par. 12, quoted by Leach JA:par. 16.

75 See, for example, Neethling 2016:798-806, 805; Neethling & Potgieter 2017:97-110, 106; Neethling & Potgieter 2015a:166-167.

76 *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A).

77 *Minister of Forestry v Quathlamba (Pty) Ltd*:88-89.

the absence of negligence.⁷⁸ It is submitted that this explanation of the relationship between wrongfulness and negligence is preferable to the view expressed by Leach JA that the duty concerned is not absolute and, by implication, therefore, limited by negligence.

In conclusion, Leach JA found that the steps taken by the respondent to avoid a fire on its property spreading to its neighbours were reasonable in the circumstances. Therefore, for lack of negligence, the appellant failed to prove its case and the claim was dismissed.⁷⁹

3. Summary and conclusions

The most important aspect of the decision is that Leach JA ruled conclusively on the relevance of foreseeability in the determination of wrongfulness, an area of some controversy in the law of delict. The court held that it was potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion would have the effect that the two elements will be conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, foreseeability of harm should not be considered in respect of the determination of wrongfulness, and its role should be confined to the rubrics of negligence and causation. This aspect of the judgment can be supported because it tallies with the *ex post facto* evaluation of wrongfulness, which excludes any utilisation of the *ex ante* reasonable foreseeability of harm; (subject to the Constitutional Court possibly deciding otherwise) it also brings about certainty as to the role of foreseeability.

This approach seemingly also applies to subjective foreseeability (awareness or knowledge), which, according to the court, should rather be utilised as a factor in determining negligence. But, as has been pointed out, it is established law that subjective foreseeability may indeed play a role in determining wrongfulness *ex post facto*.

Be that as it may, until the Constitutional Court confirms Leach JA's approach to foreseeability and wrongfulness, the final word in this regard has not been spoken. In the meantime, the question may be asked as to whether our law will not be unduly impoverished by restricting foreseeability to the watertight compartments of negligence and legal causation, while disregarding the numerous authoritative judgments on the role of foreseeability with regard to wrongfulness in the past. Moreover, if one bears in mind the distinctly different roles that reasonable foreseeability plays as regards wrongfulness in comparison with negligence, the possibility of confusion between these two elements is probably small, with the result that this objection against the use of foreseeability with regard to both wrongfulness and negligence may fall by the wayside. Granted,

⁷⁸ See also Neethling & Potgieter 2015a:167.

⁷⁹ *MTO Forestry (Pty) Ltd v Swart NO*:paras. 50-51.

this viewpoint cannot be reconciled with the *ex post facto* determination of wrongfulness.

Other aspects of the court's decision worth mentioning are the following. First, notwithstanding Leach JA's rejection of the legal duty approach to the wrongfulness of an omission, this approach remains of paramount importance in establishing wrongfulness in the present field and, for this purpose, has become engrained in our law of delict. Interestingly enough, Leach JA himself relied on decisions such as *H L & H Timbers*⁸⁰ and *Van Duivenboden*,⁸¹ where the legal duty approach was applied, whilst also recognising the legal duty of a landowner to control or extinguish a fire burning on its land. However, the judge's approach to seemingly utilise negligence in limiting the absoluteness of the legal duty may cause confusion between wrongfulness and negligence.

Secondly, notwithstanding criticism of the new test for wrongfulness as the reasonableness of holding the defendant liable, and the fact that this test is merely a recent formulation of one variation of the test for wrongfulness in our law, Leach JA is clearly in favour of this test as the only test for wrongfulness in the present context. In this way, he attempted to set aside the traditional legal duty approach to establish the wrongfulness of an omission, but, as indicated, without success. Be that as it may, there does not appear to be any indication of the judge applying the new test for wrongfulness in establishing the wrongfulness of the respondent's conduct.

Thirdly, when dealing with the importance of the distinction between wrongfulness and fault, Leach JA's averment that this distinction is criticised by certain academics does not hold water.

Finally, concerning Leach JA's view that foreseeability may be relevant with regard to both negligence and causation, it should be borne in mind that foreseeability does not play the same role with reference to negligence, on the one hand, and causation, on the other.⁸² Whereas, with reference to negligence, harm of a general kind should be foreseeable,⁸³ foreseeability of the actual harm that has ensued, is relevant as regards legal causation.⁸⁴

80 *H L & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd.*

81 *Minister of Safety and Security v Van Duivenboden.*

82 See, in general, Neethling & Potgieter 2015a:211-213, 214-216.

83 See, for example, *Imvula Quality Protection (Pty) Ltd v Loureiro*:416; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*:839; *Mukheiber v Raath*:1077; *Jaftha v Honourable Minister of Correctional Services*:paras. 22-23; *Standard Chartered Bank of Canada v Nedperm Bank Ltd*:768.

84 *Premier of the Western Cape Province v Loots NO*:par. 23. In passing, it should be noted that in terms of the flexible approach to legal causation (see Neethling & Potgieter 2015a:200-203), there may be cases where a result may be imputed to the defendant despite the fact that the specific result was not reasonably foreseeable, should considerations of reasonableness, justice and fairness dictate that the defendant should be held liable for the harm suffered by the plaintiff (see Potgieter 2017b:984, 987-988).

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