

- Final Research Report -

**THE SOUTH AFRICAN POSITION REGARDING WHEN A LEGAL
DUTY MAY BE PLACED UPON A PERSON**

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1.1 INTRODUCTION

1.1.1 Introduction to the topic

This study will focus on whether persons within the Republic of South Africa would be obliged to act positively to prevent harm/damage from falling onto another person within the context of wrongfulness in delict.

According to Neethling and Potgieter,¹ a positive act is where a person fails to take precautions against the occurrence of damages, and this failure to act is not an integral aspect of positive conduct. Examples of a positive act include: a homeowner who does not exercise control of a fire which has broken out in their home without the person's doing; a police officer who fails to protect someone who is being assaulted by a third party; the police who fail to stop an inmate from escaping and that inmate then assaults an innocent third party. With respect to the concept of a legal duty, Van der Merwe and Oliver,² outlines the concept of a legal duty as it pertains to the infringement of a subjective right, which correlates with a legal duty imposed on another person to not infringe upon that subjective right.

Concepts such as legal duty and positive performance will be broken down in detail to understand what these terms entail, and how they are utilised by South African courts when making decisions. These are two concepts which fall within the law of delict which is a sphere within private law and protects against the infringement of private interests.

¹ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

² Cf Van der Merwe and Oliver; Neethling, J and Potgieter, JM *Neethling-Potgieter-Visser Law of Personality* (2016).

1.2 BACKGROUND AND SIGNIFICANCE

The significance of this study is to breakdown the instances where a person would need to act positively to prevent harm. The study outlines the instances where a legal duty is placed, so readers of the study are more conscious of situations where a legal duty is created. This will serve as a guideline that may assist in preventing damages from occurring, but also assisting citizens within South Africa in avoiding possible claims for damages should they fail to act when it is legally required of them to do so. The study assesses the ramifications of imposing such a duty on the public and whether it is appropriate or whether such a duty imposes a heavy burden on people to act positively.

1.3 RESEARCH OBJECTIVES/AIMS

- 1.3.1** Analysing if the position of a legal duty exists within South Africa;
- 1.3.2** Which instances it would be reasonable to impose a legal duty upon a person to act;
- 1.3.3** The requirements for imposing a legal duty upon a person to act;
- 1.3.4** Criticisms of imposing a legal duty;
- 1.3.5** Degree of liability for failing to perform a legal duty;

1.4 RESEARCH QUESTION(S)

1.4.1 Primary research question:

- 1.4.1.1 In the context of determining wrongfulness in South Africa, when would a legal duty be placed upon a person to act positively to prevent harm from falling onto another person?

1.4.2 Secondary research questions:

- 1.4.2.1 Can a person be held liable for failing to perform positive acts?
- 1.4.2.2 Would a person be liable for damages caused by not performing a positive act that would prevent harm from falling on to another person?
- 1.4.2.3 If a legal duty can be placed upon a person, what are the requirements for this?
- 1.4.2.4 To what extent may a person be held liable?

1.5 PROBLEM STATEMENT

The issue with imposing a general legal duty is that it places a heavy burden on individuals in the community to act positively, this would mean society at large would always be at risk of causing harm on others even if they are not responsible for creating the danger.

1.6 RESEARCH METHODOLOGY

This study will use the doctrinal legal research methodology to gather and analyse the relevant information. According to Jerome Hall Law Library,³ the doctrinal legal research methodology, referred to as the "black letter" methodology, concentrates on the letter of the law as opposed to the law in action. In this method, a researcher creates a descriptive and comprehensive investigation of legal rules found in primary sources (cases, statutes, or regulations). The drive of this method is to gather, organize, and describe the law; provide observations on the sources used; and identify and describe the primary theme or system and how each source of law is connected.

In this method, the researcher conducts a critical, qualitative analysis of legal materials to support a theory.⁴ The researcher categorises legal rules, then deliberate the legal connotation of the rule, its primary principles, and decision-making under the rule (whether cases rendering the rule fit together in a comprehensible system or not). The researcher must also identify uncertainties and disapprovals of the law and offer resolutions. Sources of data include the rule itself, cases produced under the rule, legislative history, and comments on the rule.

This approach is useful by offering a solid structure for creating a thesis, organizing the paper, and aiding a thorough definition and explanation of the rule. The downsides of this approach are that it may be too formalistic and may lead to oversimplifying the legal doctrine. This method was chosen over other methods of research as it focuses on the letter of the law and other doctrines which is more effective when researching the contents of this study. In South Africa, the concept of a legal duty is untested with limited cases to look at, hence the letter of the law can be used to paint a picture of how this concept is dealt with in South Africa.

³ Jerome Hall Law Library "Legal Dissertation: Research and Writing Guide" undated.

⁴ Jerome Hall Law Library "Legal Dissertation: Research and Writing Guide" undated.

1.7 ASSUMPTIONS OF THE STUDY

Delineations

The coverage of this study focuses on a legal duty and how it is dealt with in the law of delict. The focus is on private law and the instances in which the failure to act positively infringes upon private interests. The scope also includes wrongfulness and conduct and how these factors play a part in determining when a legal duty is placed upon a person.

Case law will also be looked at in determining how such a duty is imposed and dealt with in practical scenarios. This will give a better understanding to readers of this study of how South African courts deal with imposing a legal duty to act positively.

Delimitations

The study is limited to private law and does not extend to public law, therefore, only the infringement of private interests is focused on in this study. Another limitation is that the position regarding legal duties is still fairly limited in South Africa so cases pertaining to a legal duty is limited. There are very few scholars who have actively written about wrongfulness of a legal duty, so the scope and variety of such information is limited.

1.8 CHAPTER OUTLINE

1.8.1 Chapter 1

This chapter will focus on the background of the study and the significance of the research.

The chapter also discusses the objectives that the study wishes to meet, the problem statement and the research questions which need to be answered which serves as a guideline for conducting research for this study.

This chapter is designed to give the reader an introduction to the topic at hand.

1.8.2 Chapter 2

This chapter is the literature review which discusses in brief detail the list of sources and how they are relevant to this study. Each source will be discussed, and an opinion will be formed as to how the sources contribute to the concepts of positive performances pertaining to a legal duty.

Each source provides a different view and insight into how these concepts may affect everyday life and will also assess the impact and ramifications of these concepts to society at large.

Therefore, this chapter gives a reader some context as to the relevance of each source in a detailed manner to show how the sources contribute to the topic at hand.

1.8.3 Chapter 3

Chapter 3 will build the basis for this study by relying on legislation to assist in explaining the concepts relevant to this study which aims to simplify the topic. This chapter will outline examples of legislation which impose a legal duty to act positively to prevent harm.

1.8.4 Chapter 4

This chapter will focus on case law and how South African courts have dealt with the position of a legal duty. This provides a better understanding of how the concepts outlined in other chapters are dealt with by courts.

This chapter will discuss the South African position regarding legal duty as it is dealt in case law. This chapter will refer to the following cases: *Minister van Polisie v Ewels*,⁵ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust)*,⁶ *Langley Fox Building Partnership (Pty) Ltd v De Valence*,⁷ *De Beer v Sargent*,⁸ *Macadamia Finance Ltd v De Wet*,⁹ and other cases.

1.8.5 Chapter 5

This chapter will analyse the legislation and case law outlined in chapter 3 and for which set out the legal position of a legal duty of positive performance in South Africa. The sources outlined will be assessed and conclusions will be drawn from them to get an understanding of how legal duties for positive performance is dealt with by South African courts.

1.8.6 Chapter 6

This chapter will conclude the study by commenting on the overall position of a legal duty to act positively in South Africa. This chapter considers the authorities outlined and summarises the key concepts pertaining to a legal duty. This chapter describes the position of a legal duty as it is dealt with by authors, legislation as well as courts after assessing the relationship between them.

⁵ 1975 3 SA 590 (A) 597.

⁶ 2003 1 SA 1 389 (SCA) 400.

⁷ 1991 1 SA (A).

⁸ 1976 1 SA 246 (T).

⁹ 1991 4 SA 273 (T).

2 CHAPTER 2

With respect to the law of delict, the concept of a legal duty may be imposed upon parties to act in a positive manner to prevent harm falling onto another. As stated previously, a positive act is where a person fails to take precautions against the occurrence of damages, and this failure to act is not an integral aspect of positive conduct.

To better understand the concept of a legal duty, this study has compiled sources of law, scholarly writing, and case law to unpack what a legal duty is, and when it may be imposed. The purpose of this literature review is to assess whether there is evidence which supports the concept of a legal duty in South Africa, and if so, how such a duty is imposed and how cases are dealt with by the courts if the duty is not adhered to.

The following aspects became apparent when conducting research for this study: the first aspect was finding a fitting definition for 'positive performance.' The second question to be answered is 'what is the relationship between wrongfulness and a legal duty?' These concepts at surface level appear very similar but are distinct from each other. The third issue was finding the circumstances when such a duty could be imposed, if imposed too readily, this poses a heavy burden on society, but if imposed more sparingly, this may lead to people creating a scenario of harm and not disposing of it, thus the third question to answer was 'how does a legal duty affect the community?' Answering these questions before delving deeper into the technical and practical aspect of a legal duty gives clarity on uncertain and sometimes overlapping concepts.

The scope of this review is limited. There are few scholars who have pursued the concept of a legal duty, and at times, it is the same authors who write papers, articles etc. which means that the concept of a legal duty is limited as there is limited opinions being written about it. Even though this review does assess the views of other scholars in law, they largely supplement one another, as opposed to adding to each other. Lastly, in terms of case law, the concept of a legal duty is not explicitly stated which makes it harder to readily ascertain cases which pertain to the topic at hand. This may make it harder for people to become aware of how such a duty is imposed, and how a court may deal with such a case. Examples have been included in this study of cases where a legal duty is dealt to provide some insight into how the courts deal with this issue.

The concept of a legal duty

The first step in understanding what a legal duty is to provide some context in the way it is looked at through the lenses of the law of delict. The sources consulted assist with breaking down the concept of a legal duty.

The following sources will be discussed in chapter 3:

Boberg,¹⁰ discusses the breach of a legal duty (the responsibility to others to act according to the law) as it pertains to the *boni mores* or general convictions of the community.¹¹ Boberg believes that the position of legal duty deals with the converse of a subjective right, so the test for wrongfulness where a duty is breached is essentially the same as asking whether a

¹⁰ Boberg, P *The Law of Delict: Aquilian liability Volume 1 of The Law of Delict*, P. Q. R. Boberg (1984) Juta.

¹¹ Boberg, P *The Law of Delict: Aquilian liability Volume 1 of The Law of Delict*, P. Q. R. Boberg (1984) Juta.

subjective right has been infringed. This source is relevant as it simplifies the rationale of a legal duty.

Loubser and Midgley,¹² discuss the obligation of a legal duty to perform certain acts, the authors also provide an example pertaining to how this obligation are determined.

Neethling and Potgieter,¹³ outline positions regarding the concept of a legal duty and the common law position regarding it is discussed in this source. The legislation discussed by the authors outline instances in which a legal duty to act positively is imposed upon a person. The followings legislation will be discussed: Police Act,¹⁴ the South African Police Service Act,¹⁵ the previous Weapons and Ammunition Act¹⁶ which is now the Firearms Control Act,¹⁷ the Regulations of Gatherings Act,¹⁸ the Domestic Violence Act,¹⁹ constitutional provisions as well as other legal provisions.

The common theme amongst the sources relied upon is that there must first be a subjective right of a person, and that subjective right is then infringed upon by another party who had a reciprocal duty to respect the first person's right.²⁰ The sources relied upon illustrate examples of the test to determine wrongfulness in delict, and examples of legislation which have imposed a legal duty to act positively.²¹

The concept of a legal duty with respect to positive performance and how courts have dealt with the issue

The following sources will be discussed in chapter 4:

Neethling and Potgieter,²² outline key factors taken from various sources which may be used as a guideline for when to impose a legal duty upon a natural person. The authors gather various sources and compile a list of factors that should be considered which may point towards a legal duty imposed. This source is relevant as it outlines factors to consider that may indicate when a legal duty may be placed on a person. With using this source of evidence, a better understanding is created when imposing a legal duty. The circumstances in which a legal duty may be imposed to create more clarity and serves as a guideline for what to assess when testing for a legal duty.

The following cases will be discussed to illustrate how courts dealt with legal duties pertaining to positive performance: *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk*,²³ *Minister van Polisie v Ewels*,²⁴ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust)*,²⁵ *Langley Fox Building Partnership (Pty) Ltd v De Valence*,²⁶ *De Beer v Sargent*,²⁷ and *Macadamia Finance Ltd v De Wet*.²⁸

¹² Loubser and Midgley "The Law of Delict: Aquilian liability Volume 1 of The Law of Delict".

¹³ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

¹⁴ 7 of 1958.

¹⁵ 68 of 1995.

¹⁶ 75 of 1969.

¹⁷ 60 of 2000.

¹⁸ 205 of 1993.

¹⁹ 116 of 1998.

²⁰ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

²¹ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

²² Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

²³ 2010 6 SA 342 (GNP) 347-348.

²⁴ 1975 3 SA 590 (A) 597.

²⁵ 2003 1 SA 1 389 (SCA) 400.

²⁶ 1991 1 SA (A).

Practical examples of a legal duty in case law

The following sources will also be discussed in chapter 4:

The method in which legal duties is applied to people in positions of power serves as accountability for their actions. This is a practical illustration of how people in positions of power also have a legal duty when exercising their power as the rights of citizens may be infringed should they not act in accordance with their duty. This is a practical example of how legal duties are imposed and enforced.

Costa and du Toit,²⁹ focus on the impact the law of delict has on placing delictual liability on public bodies. The article focuses on a Constitutional Court decision which gives guidance regarding wrongfulness and the existence of an actionable legal duty which is placed on public bodies. The article gives an insight into how this judgement will impact public bodies who are subject to statutory duties.³⁰

Wessels,³¹ discusses state liability for harm arising from a crime, and how the law of delict may develop because of this. The article makes mention of case law which shows how legal duties may be placed upon a person to prevent crimes from occurring. The concept of a legal duty is outlined in detail and depicts how a legal duty is placed upon public officials to fulfil a legal duty to reasonably prevent harm from falling onto a person. This source is relevant to the dissertation as it discusses the principals of a legal duty on public officials which depicts a different viewpoint from that of an average citizen and legal duties placed upon them.

Ramdeen, S,³² discusses wrongfulness as it pertains to delict. The article focuses on a ruling passed by the Supreme Court of Appeal which deals with the ramifications of a dog attack. When assessing the case, the article points out that for there to be delictual liability, the requirements of delict must first be met, only then can the elements of wrongfulness be assessed. The article goes on to discuss the reasoning of the decision as it pertains to wrongfulness and omissions which sheds light on the placing of a legal duty when necessary. This source contributes to the research being conducted as it provides a practical example of how the concepts such as: wrongfulness, liability, omission, legal duty and delict, all relate to each other when looking to impose a legal duty and the ramifications that would follow if such a duty is not upheld. This source gives readers added context as to how this aspect of law is put into effect as well as providing a case which serves as a practical example of how courts deal with issues of damages arising in delict.

Neethling and Potgieter,³³ discuss the case of *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*³⁴ which dealt with the concept of delictual liability which arises due to an omission. The authors discuss the detail regarding the implications of a legal duty.³⁵ This

²⁷ 1976 1 SA 246 (T).

²⁸ 1991 4 SA 273 (T).

²⁹ Costa, A and du Tiot, C "South Africa: Wrongfulness, the "chilling effect" and establishing delictual liability on the part of public bodies" 2021 September.

³⁰ Costa, A and du Tiot, C "South Africa: Wrongfulness, the "chilling effect" and establishing delictual liability on the part of public bodies" 2021 September.

³¹ Journals Collection, Juta's/Stellenbosch Law Review (2000 to date)/Stellenbosch Law Review / Regstrydskrif/2019: Volume 30/Part 3: 317 478/Articles \Artikels/Reconsidering the state's liability for harm arising from crime: The potential development of the law of delict.

³² Ramdeen, S "Wrongfulness and Legal Duty" 2020 October.

³³ Neethling, J and Potgieter JM "Foreseeability: Wrongfulness and negligence of omissions in delict – the debate goes on MTO Forestry (Pty) Ltd v Swart NO 2017 5 SA 76 (SCA)" (2018) Journal for Juridical Science.

³⁴ *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 4 SA 814 (SCA).

³⁵ Neethling, J and Potgieter JM "Foreseeability: Wrongfulness and negligence of omissions in delict – the debate goes on MTO Forestry (Pty) Ltd v Swart NO 2017 5 SA 76 (SCA)" (2018) Journal for Juridical Science.

source outlines how a court would address the concept of a legal duty and when it may be placed upon a person.

These sources are relied upon to show how South African courts deal with legal duties and the requirement of positive performance. These are all necessary to better understand how legal duties are dealt with by the authorities and serve as a guide when assessing when such a duty should be imposed.

Conclusions

The research gathered contains information regarding legal duties, positive performance and they are dealt with according to the law of delict. The case law gathered outline how courts deal with the concept of a legal duty for positive performance. The state of legal duties as applied to people in positions of power is also touched upon to show how a legal duty impacts society at a higher level. The research and evidence gathered confirms that the concept of legal duty and positive performance exists in South Africa and is put into effect by courts. A definition can be given to both key concepts, 'legal duty' and 'positive performance', which provides clarity when forming an opinion for this study.

The evidence gathered also shows the limitations of the study as there is a limited number of scholars who are actively seeking to develop the knowledge pertaining to the concept legal duties and positive performance. Some scholars have gone on to write multiple journal articles, textbook extracts etc. but these are all along the same thinking process. A difference of opinion is needed to develop this aspect of law in greater detail so a better understanding of these concepts may be achieved overall. However, the information gathered provides sufficient information for this study to form an opinion regarding a legal duty pertaining to positive performance.

3 CHAPTER 3

This chapter discusses the instances in which legislation in South Africa imposes a duty on a person to act in a positive manner to prevent harm from falling onto another person. The legislation will be outlined and discussed, with mention of how courts interpreted the legislation and sought to impose such a duty onto parties in a given situation.

Boberg,³⁶ states that there is no general duty to prevent loss to others by positive conduct. Imposing such a duty would impose a heavy burden on society.³⁷ Thus, it must be determined whether there is a legal duty to act positively. In these cases, it is appropriate to use a breach of a legal duty opposed to an infringement of a subjective right to establish wrongfulness in delict. If it is found that the defendant had a legal duty, a breach of that duty, wherein a ground of justification is absent, is deemed unreasonable, *contra bonos mores*, and wrongful. Due to a legal duty constitutes the converse of a subjective right, the test for wrongfulness where a breach of a legal duty is involved is the same as a question of whether a subjective right has been infringed.

According to Loubser and Midgley,³⁸ the law, common law, or statute, imposes a duty on individuals to perform a certain act. An example of legislation placing a legal duty is the National Veld and Fire Act,³⁹ in terms of section 12, owners of surrounding land in a location who ignite controlled fires on their property and are required to obey statutory precepts.⁴⁰ Therefore, in accordance with this Act, if the neighbour is to suffer any damages due to the failure to perform this duty (which is to take control of the fire so it does not cause damage to surround property), if they fail to perform this duty, then their conduct is *prima facie*⁴¹ wrongful.

A statutory provision may grant delictual action by itself, or it may justify the decision that a legal duty exists.⁴² The entire statute, along with its goals and provisions, how it came into existence, and the unfairness it looked to prevent, must all be considered.⁴³ It must also be queried regarding if it is equitable and reasonable to give the plaintiff a claim for damages in light of non-compliance with a legal provision. If the conduct is wrongful, not because of non-compliance with a statutory legal duty, but due to it being reasonable in the situation to compensate the plaintiff for the infringement of his right. The legal convictions of the community and legal policy is the test to determine reasonableness.

According to Neethling and Potgieter,⁴⁴ a statutory provision by itself is not enough to impose a legal duty, it is considered along with other factors when determining wrongfulness or omission. Therefore, courts have considered provisions of the Police Act,⁴⁵ the South African Police Service Act,⁴⁶ the previous Weapons and Ammunition Act⁴⁷ which is now the Firearms Control Act,⁴⁸ the Regulations of Gatherings Act,⁴⁹ the Domestic Violence Act,⁵⁰ constitutional provisions as well as

³⁶ Boberg, P *The Law of Delict: Aquilian liability Volume 1 of The Law of Delict*, P. Q. R. Boberg (1984) Juta.

³⁷ *Telamatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA) 468.

³⁸ Loubser and Midgley "The Law of Delict: Aquilian liability Volume 1 of The Law of Delict".

³⁹ 101 of 1998.

⁴⁰ National Veld and Forest Fire Act 101 of 1998.

⁴¹ Latin for "at first sight." *Prima facie* may be used as an adjective meaning "sufficient to establish a fact or raise a presumption unless disproved or rebutted."

⁴² *Olitzki Property Holding v State Tender Board* 2001 3 SA 1247 (SCA) 1257.

⁴³ *Olitzki Property Holding v State Tender Board* 2001 3 SA 1247 (SCA) 1257.

⁴⁴ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

⁴⁵ 7 of 1958.

⁴⁶ 68 of 1995.

⁴⁷ 75 of 1969.

⁴⁸ 60 of 2000.

⁴⁹ 205 of 1993.

other legal provisions. These all play a role in determining whether a legal duty is placed on the police or state institutions to prevent harm falling onto citizens, thus, the question is whether delictual wrongfulness was prevalent or not.

In terms of the South African Police Service Act, it was outlined in *Dersley v Minister van Veiligheid en Sekurheid*.⁵¹ The court considered section 13 of the South African Police Service Act and section 205(3) of the Constitution.⁵² The court stated that statutory duties was a factor that needed to be considered for determining if the police had a legal duty. The court ruled that the police did have a legal duty to provide the correct information to the plaintiff.⁵³

According to Neethling and Potgieter,⁵⁴ the Weapons and Ammunitions Act requires the police to take necessary steps under their statutory duty in terms of section 11 of the Act⁵⁵ to deny a person who is incompetent of using a firearm. A legal duty is placed on the police by the Act to prevent an incompetent person from having a firearm in their possession and making use of it. If an incompetent person is allowed to use a firearm after the police had negligently failed to take the necessary steps to deprive such use, the police would be held liable for any subsequent damage caused by that incompetent party. This is due to a legal duty being imposed by the Act on the police to prevent such use by an incompetent person from occurring. The case between *Minister of Safety and Security v Van Duivenboden*,⁵⁶ confirms this position.

According to Neethling and Potgieter,⁵⁷ in terms of the Regulation of Gatherings Act, section 9(1)(f) of the Act places a duty on the police to take the necessary steps to protect people and property whilst a demonstration or meeting is going on. This is another example of how legislation places a duty on a party or entity to act in a positive manner in order to prevent harm from occurring to another. This position was confirmed in *Mpogwana v Minister of Safety and Security*.⁵⁸

According to Neethling and Potgieter,⁵⁹ the Domestic Violence Act is another piece of legislation that imposes a legal duty to act positively to prevent harm. The Act consists of various rights and remedies which is to be made available to people who have experienced domestic violence which is taken from the constitutional duty imposed on the State by section 12(1) of the Constitution to protect the right of everyone to be free from private or domestic violence. A legal duty is imposed on the police which is owed to victims of domestic abuse. This Act requires the police to advise victims of their rights and to help them asserting these rights where required. Parliament have also presented procedures to guarantee that the State (this includes the SAPS) give full effect to the provisions of this Act. This position was confirmed in *Minister of Safety and Security v Venter and Others*.⁶⁰

There are various pieces of legislation that deal with a legal duty so it can be confirmed that the concept of a legal duty exists in South Africa. Outlined above is various pieces of legislation that impose such a duty on a person to act in a positive manner to prevent harm. The next chapter will outline how the courts look to impose a duty will breakdown the various requirements or factors that may indicate a legal duty being placed upon a person or entity. Case law will be looked at to

⁵⁰ 116 of 1998.

⁵¹ 2001 1 SA 1047 (T).

⁵² Constitution of the Republic of South Africa Act 108 of 1996.

⁵³ 2001 1 SA 1047 (T).

⁵⁴ Neethling, J and Potgieter JM (2016) Neethling-Potgieter-Visser *Law of Delict* 7th ed. Durban: LexisNexis.

⁵⁵ Weapons and Ammunition Act 75 of 1969.

⁵⁶ 2002 6 SA 431 (SCA).

⁵⁷ Neethling, J and Potgieter JM (2016) Neethling-Potgieter-Visser *Law of Delict* 7th ed. Durban: LexisNexis.

⁵⁸ 1999 2 SA 794 (C) 804.

⁵⁹ Neethling, J and Potgieter JM (2016) Neethling-Potgieter-Visser *Law of Delict* 7th ed. Durban: LexisNexis.

⁶⁰ [2011] ZASCA 42; 2011 (2) SACR 67 (SCA) (29 March 2011).

outline the factors which may indicate a legal duty being placed upon a person to act in a positive manner to prevent harm from falling onto another person.

4 CHAPTER 4

This chapter looks at indicators produced by case law which outlines the circumstances in which a legal duty is imposed. There is a variety of case law which shows how courts deal with the concept of a legal duty. These factors may be assessed when determining whether an omission was wrongful and whether the party onto whom a legal duty was placed may be held liable for damages that subsequently occurred due to their failure to act positively to prevent the damages caused to another person.

According to Van der Merwe and Oliver,⁶¹ an objective test is used to determine whether an omission went against the convictions of the community.⁶² Even though it is impossible to provide a list of factors which plays a part in this aspect, certain factors reoccur over the years which may be used as an indicator of a legal duty to act positively to prevent harm. These factors must be applied in accordance with the 'spirit, purport, and objects of the Bill of Rights'.⁶³

The following case law hints at a legal duty being placed on a person or body to act positively to prevent harm being caused to another:

I. Prior conduct

In *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk*⁶⁴ it was stated that a person is deemed to act wrongfully when they create a new source of danger via a positive act (*commissio*) and they fail to eliminate that danger (*omission*) which leads to harm falling onto another person.⁶⁵ Prior conduct in the form of a positive act which creates a situation where there is danger of harm can be considered a strong indication that a legal duty rested upon the defendant to take steps to prevent the damage from occurring.

In *Minister van Polisie v Ewels*,⁶⁶ it was accepted that wrongfulness is to be determined by legal convictions of the community and is applicable to omissions. Factors such as prior conduct or control over a dangerous object (to be discussed below) may influence the convictions of the community that there was a legal duty on the defendant to act positively to prevent harm in the circumstances. The defendant acts wrongfully if they do not perform their duty and damages ensue.

II. Control of a dangerous object

According to Neethling and Potgieter,⁶⁷ control over a dangerous object or individual is a factor when determining whether a legal duty is placed on a person to prevent harm from falling onto another.⁶⁸

In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust)*,⁶⁹ Vivier JA ruled that a legal duty was placed on the police to prevent a convict from fleeing and raping the plaintiff. The appellant was sexually assaulted, raped, and robbed by a known dangerous criminal and serial rapist who escaped police custody. The appellant claimed that members of

⁶¹ Cf Van der Merwe and Oliver; Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Personality*.

⁶² *Moses v Minister of Safety and Security* 2002 3 SA 106 (C) 113.

⁶³ Cf *Carmichele v Minister of Safety and Security (Centre of Applied Legal Studies Intervening)* 2001 2 SA 938 (CC) 957.

⁶⁴ 2010 6 SA 342 (GNP) 347-348.

⁶⁵ *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk* 2010 6 SA 342 (GNP) 347-348.

⁶⁶ 1975 3 SA 590 (A) 597.

⁶⁷ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

⁶⁸ Cf *Administrator, Transvaal v Van der Merwe* 1994 4 SA 814 (SCA) 820.

⁶⁹ 2003 1 SA 1 389 (SCA) 400.

the police owed her a legal duty to take reasonable steps to prevent the convict from escaping and causing harm, but the police failed to comply with their legal duty. The judge stated that due to the police being in control of the convict who was a dangerous criminal and likely to commit a sexual offence against women should he escape. Therefore, the police were under a legal duty to take adequate control over the convict.

III. Knowledge and foresight of possible harm

According to Neethling and Potgieter,⁷⁰ if a person had foresight or knowledge that their omission would result in damages, this is a sign of unreasonableness and wrongfulness of their conduct. In cases whether an individual is conscious of a dangerous position, this is another factor to determine whether the person was required to take control over the danger and whether a legal duty was placed on him/her to take steps to prevent the damage.

In *Langley Fox Building Partnership (Pty) Ltd v De Valence*,⁷¹ a builder (A) was doing construction on a building. The builder hired a subcontractor (B) to attach a ceiling on a part of the building that hung over a public pavement. The plaintiff bumped her head against a beam which caused injuries. B was responsible for placing the beam and did not put any warning signs to make passers-by aware of the danger. The court found that A had a duty to avert the danger as a reasonable person in the same position would have taken such steps. A was held liable. However, Botha JA disagreed, according to his viewpoint, the question was whether A was aware of the dangerous situation. If A was aware, then a legal duty would have been placed on him to avert the danger. If A had been unaware of the danger, then a legal duty to act was not placed. This approach is supported as it was first recognised if a legal duty to act was placed on A (the query pertains to wrongfulness), thereafter the query of his negligence (reasonable person test) was brought up.⁷²

IV. A special relationship between parties

Loubser and Midgley,⁷³ discuss the special relationship that exists between parties may point towards one party having a legal duty to the other party to prevent harm. A legal duty may be indicated if a contractual agreement exists.⁷⁴ Examples of a special relationship include the relationship between cop and a civilian,⁷⁵ or a warden and inmate.⁷⁶ A parent and child may qualify as a special relationship as depicted in the case between *De Beer v Sargent*,⁷⁷ the court held that due to the parent-child relationship, a parent is placed under a legal duty to prevent their child from committing an offence in certain circumstances.

V. A particular office

According to Neethling and Potgieter,⁷⁸ a person's profession or position they hold may place a legal duty upon them to act in a specified manner with respect to the public or individuals. This factor is mentioned in *Macadamia Finance Ltd v De Wet*,⁷⁹ liquidators who were the defendants did not ensure the assets of the first plaintiff, a company they controlled. According to the court,

⁷⁰ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

⁷¹ 1991 1 SA (A) at 2.

⁷² *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA (A) at 43-45.

⁷³ Loubser and Midgley "The Law of Delict: Aquilian liability Volume 1 of The Law of Delict".

⁷⁴ Cf *Cathkin Park Hotel v JD Makes Architects* 1993 2 SA 98 (W) 100.

⁷⁵ *Minister van Polisie v Ewels* 1975 3 SA 590 (A).

⁷⁶ *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) 170-171.

⁷⁷ 1976 1 SA 246 (T).

⁷⁸ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict* 7th ed. Durban: LexisNexis.

⁷⁹ 1991 4 SA 273 (T).

the office held by a person occasionally places upon them a legal duty to act in a particular manner towards the public or designated persons. The court ruled that the defendants' had a duty and breached that duty which made them liable for the losses suffered by the first plaintiff.

The case law and factors outlined above are all considerations that serve as an indicator of a legal duty to perform a positive act. However, the above factors outlined are not the only factors a court may look for when determining a legal duty. Below other cases are discussed in more detail to illustrate how courts deal with issues of legal duties.

4.2.1 Legal duty on public bodies

According to Costa and du Toit,⁸⁰ the Constitutional Court (CC) made a judgement in *BE obo JE v Member of the Executive Council for Social Development, Western Cape*⁸¹ which provides a guideline in determining wrongfulness and the existence of a legal duty on public bodies such as state entities.

The issue was whether the Provincial Minister of the Western Cape Department of Social Development could be held delictually liable for damages suffered by a child when she fell off a swing at a play school. The child suffered injuries and eventually was rendered permanently disable.

The CC was tasked with determining the delictual element of wrongfulness and if the Minister had a legal duty to take reasonable steps to prevent harm to children in establishments that resemble a school.

The CC accepted that the Children's Care Act⁸² (The CC Act) and Regulation 30(4) (The Regulation) did place a legal duty on the Provincial Minister. However, the CC emphasised what the ramifications of imposing such liability and the 'chilling effect' it would have on the administrative or statutory function of the Minister. The CC stated that the CC Act and Regulation function at broad level, so to impose such a duty in all provinces in thousands of schools and similar establishments would be a monumental obligation on the Minister and would disrupt the function of support and oversight of the operation of these amenities by third parties.⁸³

Consequently, it was held that the regulatory duties of the Minister did not amount to a legal duty to prevent harm caused to a minor child that can be litigated in delict.

4.2.2 Dog attack

According to Ramdeen,⁸⁴ the case between *City of Cape Town v Carelse and Others*,⁸⁵ dealt with a dog attack. The defendant is the City of Cape Town who controlled the Day Camp which was a public facility. The Claimant was a female who had arranged an outing at the Day Camp and was accompanied by their dog. However, the Day Camp had a prominent sign at the entrance which prohibited dogs from entering. The claimant was walking towards the tidal pools when the dog attacked her.

⁸⁰ Costa, A and du Tiot, C "South Africa: Wrongfulness, the "chilling effect" and establishing delictual liability on the part of public bodies" 2021 September.

⁸¹ 2021 ZACC 23

⁸² 74 of 1983.

⁸³ *BE obo JE v Member of the Executive Council for Social Development, Western Cape* 1976 1 SA 246 (T) at para 24-25.

⁸⁴ Ramdeen, S "Wrongfulness and Legal Duty" 2020 October.

⁸⁵ [2020] ZASCA 117 (1 October 2020).

The dog entered the premises with its handler by an unfenced area. The handler stated that he had seen other dogs on the premises on previous occasions, but he was aware that dogs were not allowed on the premises.⁸⁶

The Court held that the owner and the Municipality were liable and were ordered to contribute 50% of the damages.

According to Ramdeen,⁸⁷ the Court pointed out that firstly the five elements of a delict should be outlined which is: conduct, wrongfulness; fault; causation and damage.

In this case, the court stated the City's liability on the part of third parties called for clarity and pronouncement by the court, this met the requirement in terms of section 17(1)(a)(ii) of the Superior Courts Act which compels reasoning for the appeal to be heard.

It was held that the City was negligent as no reasonable steps were taken to prevent the dog attack on the claimant by the dog which is deemed an omission. With respect to positive acts that cause harm, it is deemed to be unlawful. But in cases of omission, it will only be unlawful if, in the circumstances, the law deems it adequate to impose a legal duty to prevent causing harm in a negligent manner, which was in this case.⁸⁸

The owner was partially liable as a joint wrongdoer along with the Municipality based on *actio de pauperie*,⁸⁹ the handler was not held liable.⁹⁰

4.2.3 Liability for omission

This article shows that the concept of a legal duty is not the only test used to determine wrongfulness for an omission. There are other tests which may be used; however, the legal duty test remains of paramount importance when establishing wrongfulness and is engrained in the law of delict.

Neethling and Potgieter,⁹¹ discuss the importance of the legal duty test to determine wrongfulness by referring to various cases.

It is common in South African law that a legal duty is placed on the owner, occupier, or controller of the land to control fire that breaks out on said land.⁹² This position was confirmed *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*.⁹³

“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 ...”

⁸⁶ *City of Cape Town v Carelse and Others* [2020] ZASCA 117 (1 October 2020) para 1.

⁸⁷ Ramdeen, S “*Wrongfulness and Legal Duty*” 2020 October.

⁸⁸ *City of Cape Town v Carelse and Others* [2020] ZASCA 117 (1 October 2020) para 42.

⁸⁹ *Actio de pauperie* is the remedy applied by a plaintiff against the defendants due to the damages caused by domestic his animal. The defendant is held liable if he or she is the owner of the domestic animal.

⁹⁰ *City of Cape Town v Carelse and Others* [2020] ZASCA 117 (1 October 2020) para 43.

⁹¹ Neethling, J and Potgieter JM “*Foreseeability: Wrongfulness and negligence of omissions in delict – the debate goes on MTO Forestry (Pty) Ltd v Swart NO 2017 5 SA 76 (SCA)*” (2018) Journal for Juridical Science.

⁹² *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A).

⁹³ *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 4 SA 814 (SCA) para 14.

Additionally, the concept of a legal duty is embedded in positive law so courts and academic writers may not readily renounce it.⁹⁴ High Court decisions continue to use the concept of a legal duty to determine wrongfulness of an omission. In *Minister of Justice and Constitutional Development v X*⁹⁵ Fourie AJA stated that wrongfulness will only be apparent in a negligent omission if the appellant is under a legal duty to prevent harm suffered by the respondent.

4.2.4 State liability

According to Wessels,⁹⁶ in *Minister of Safety and Security v Van Duivenboden*⁹⁷ the SCA had to determine whether the negligent failure of a few policemen to neutralise a perpetrator of a violent crime was wrongful. The issue for Nugent JA was whether a legal duty was owed to the plaintiff to prevent his harm. The test used was the one created in *Minister van Polisie v Ewels*⁹⁸ which is 'the legal convictions of the community'. The legal convictions of the community test must be informed by the norms and values of society which is embodied in the Constitution, 1996.

Nugent JA stated that policy concerns would negate imposing delictual liability in cases where policemen fail to stop a crime. However, they are outweighed by constitutional considerations like a state's positive duty to protect, promote and fulfil the Bill of Rights. Constitutional rights which are relevant in the circumstances are the right to safety and security of the person, life and human dignity. Considerable weight is attached to section 41(1) of the Constitution also required the government to be held accountable. Accountability and its application persuaded the court in this case to impose delictual liability on the policemen as well as holding the state liable vicariously. This increased the state's delictual liability for harm in cases where employees failed in preventing harm in a negligent and wrongful manner.

In conclusion, there are various principles which may point towards a legal duty being imposed. This is by no means a closed list, rather, the factors outlined above serve as a guideline provided over time by South African courts which makes it easier when determining the existence of legal duty and whether non-performance of that duty would result in liability. However, placing a legal duty must also be reasonable and practical in the circumstances as discussed by Costa and du Toit.⁹⁹ Imposing a legal duty is done on a case-by-case basis with the relevant factors to be considered before a decision can be made. Additionally, the legal duty test is not the only test that may be used to determine wrongfulness of an omission, however, the test is prevalent in our law so it must be respected by courts and scholars.

⁹⁴ Neethling, J and Potgieter JM "Foreseeability: Wrongfulness and negligence of omissions in delict – the debate goes on MTO Forestry (Pty) Ltd v Swart NO 2017 5 SA 76 (SCA)" (2018) Journal for Juridical Science at 147.

⁹⁵ 2015 1 SA 25 (SCA).

⁹⁶ Journals Collection, Juta's/Stellenbosch Law Review (2000 to date)/Stellenbosch Law Review / Regstydskrif/2019: Volume 30/Part 3: 317 478/Articles Artikels/Reconsidering the state's liability for harm arising from crime: The potential development of the law of delict. [Accessed at 19 April 2022].

⁹⁷ 2002 (6) SA 431 (SCA).

⁹⁸ 1975 3 SA 590 (A) 596-597.

⁹⁹ Act 75 of 1969.

5 CHAPTER 5

This chapter will analyse the authoritative sources in chapters 3 and 4 which set out the legal position of a legal duty in South Africa. The legislation and case law discussed above will be examined and conclusions will be drawn to better understand how the concept of a legal duty is dealt with by South African law.

5.1 Findings on the analysis of applicable legislation

5.1.1 As outlined by Neethling and Potgieter,¹⁰⁰ there are various instances where legislation or statutes impose a legal duty on a person to act in a positive manner to prevent harm from falling onto another. Acts will usually outline who is required to perform a specific duty. In many cases, there are duties that legislation impose on the State and the police.

5.1.2 Section 12 of the National Veld and Fire Act,¹⁰¹ imposes a legal duty on owners of land to prevent a fire from spreading to their neighbour's property. Should the owner fail to perform this duty, then they would be liable for damages caused to their neighbour. People who ignite controlled fires must control the direction that the fire spreads. If they perform their duty adequately, it is unlikely that any harm would be caused to their neighbours. Thus, fires cannot be left to spread wildly, inevitably, as damages would be caused.

5.1.3 Statutory provisions must be supplemented by other factors when courts determine wrongfulness for an omission. Courts will consider a variety of factors, such as circumstances of the case, not just legislation or statute when imposing a legal duty. So even though legislation may impose a legal duty, this is not the only determining factor.

5.1.4 In the South African Police Service Act,¹⁰² when courts looked at imposing a legal duty on policemen in terms of section 13, the court looked at the statutory duties which are placed on the police when they act in their capacity as policemen. The law places a duty on the police to act with care when performing their duties, should they fail in this, a legal duty may have been infringed and any damages caused would see that the police be held liable.

5.1.5 The Weapons and Ammunition Act¹⁰³ places a duty to the police to do a thorough assessment of applicants when they apply for their firearm license in terms of section 11. If this duty is not followed, or is performed in a negligent manner, the policemen involved open themselves up to being held liable if the person was not competent. Thus, the police must do a thorough background check on all applicants. If this is done properly the police involved would have acted in accordance with their legal duty and any subsequent liability for damages would not be placed on them.

5.1.6 The Regulations of Gatherings Act,¹⁰⁴ requires that the police offer protection to people and property when a demonstration¹⁰⁵ or meeting is going on in terms of section 9(1)(f). Should any form of violence breakout, the police are required to subdue the violence, so no harm is caused

¹⁰⁰ Neethling, J and Potgieter JM (2016) Neethling-Potgieter-Visser *Law of Delict* 7th ed. Durban: LexisNexis.

¹⁰¹ 101 of 1998.

¹⁰² 68 of 1995.

¹⁰³ 75 of 1969.

¹⁰⁴ 205 of 1993.

¹⁰⁵ "Demonstration" includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.

to people who are in attendance of the demonstration or meeting. The police must take active steps so that no form of violence breaks out in the first place, these steps include negotiations with relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property, whether or not they are participating in the gathering or demonstration. If the peace is not kept and people are injured or property is damaged, it is the police who will be held liable for their failure to perform their legal duty.

5.1.7 The Domestic Violence Act¹⁰⁶ is another piece of legislation that imposes a legal duty on the police. This Act is supplemented by the Constitution and additionally placed a legal duty on the State as well. Victims of domestic abuse must be assisted in an adequate manner by the police once their incident has been reported. The police are then required to assist the victims with their issues pertaining to their domestic violence. Victims would require information on how to move forward after they have experienced domestic abuse.

5.2 Findings on the analysis of applicable case law

5.2.1

In terms of case law, there are factors which courts have referenced which may be used as an indicator of a legal duty being imposed. These factors are to be considered by Courts when determining if a legal duty was imposed. From this it can be derived that our courts have outlined specific factors to look for when determining a legal duty. If these factors exist then it is likely that a legal duty exists, but if these factors are not present then it is unlikely that a legal duty was imposed so liability for damages would not be incurred. These factors will be discussed below.

5.2.2 Prior conduct

Minister van Polisie v Ewels,¹⁰⁷ confirmed that prior conduct occurs when a person creates a new source of danger and fails to eliminate the danger, as per the case mentioned, the new source of danger was an escaped convict who was in the custody of the police. Liability would be imposed if damages occur due to the danger not being eliminated. Should there already been an existing threat of danger when the person performs their actions, they would not be held liable as the danger already existed. Therefore, only a new source of danger that a person creates must be dealt with by that person. This position seems reasonable as a person should be held responsible for their actions.

5.2.3 Control of a dangerous object

Courts will assess whether a person has effective control of a dangerous object. Control can be deduced from the fact that the defendant actually had control over a dangerous situation, or the defendant is the owner of the dangerous object. If there is no effective control and should damage occur, then that person would be held liable. The nature of the object is important in this regard, the courts would be required to determine what is deemed a dangerous object.

In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust)*,¹⁰⁸ it was held that dangerous convicts who are in the custody of the police must be controlled. In this case, the escaped convict was the dangerous object that needed to be controlled by the police. The convict has the capacity to inflict harm on another, so the threat of it must be subdued by

¹⁰⁶ 116 of 1998.

¹⁰⁷ 1975 3 SA 590 (A) 597.

¹⁰⁸ 2003 1 SA 1 389 (SCA) 400.

taking the necessary precautions. If adequate control is not maintained and should damages ensue, the person who had the initial control would be held liable.

5.2.4 Knowledge and foresight of possible harm

This factor deals with a person being aware that harm may occur and they fail to prevent such harm. By them being aware of the potential danger that may be caused is a factor that indicates a legal duty would be imposed. The key element is that the person is aware of the danger but does not act to prevent it. If the person is unaware, then a legal duty cannot be imposed.

*Langley Fox Building Partnership (Pty) Ltd v De Valence*¹⁰⁹ confirms this stance, stating that a person must be aware of the danger. A person cannot be held liable if they were unaware of the dangerous situation. If a person was unaware of the danger, it must be reasonable, otherwise it may be deemed as negligence. The reasonable person test is used to determine this. Thus, the criterion of reasonableness is used as the test to determine wrongfulness.¹¹⁰ So, it must first be determined whether a person was aware of the danger or not. If a person was unaware, it must then be determined if the person should have been reasonably aware. If the answer to both is no, then a legal duty is not placed. However, if the person was unaware, but a reasonable person in the same position would have been aware of the danger, then a legal duty would be placed.

5.2.5 A special relationship between parties

A special relationship is another factor that points towards an existence of a legal duty. If there is no link between the parties, then a legal duty would not be placed. There is no specified relationship that needs to exist, but there must be a link between the parties in their capacities.

De Beer v Sargent,¹¹¹ points out such an instance between parents and their children. Parents are considered the legal guardians of their children, so they are responsible for their child's actions. This is due to a child's capacity as a minor and a parent's duty of care owed to their child. Thus, parents are tasked with ensuring their children do not cause harm to others. Should their child cause harm, it is the parents who would be held liable. A legal duty in this case did not merely arise due to a special relationship between the parties, but also due to the circumstances present, so courts will consider surrounding factors when imposing a legal duty for positive performance. Parents are also tasked with keeping their children safe, so harm does not befall them. They are responsible for their children's well-being, so they are tasked with ensuring the child's safety.

5.2.6 A particular office

Certain positions within a business or state requires an individual to perform certain duties when acting in their professional capacity. Should the individual fail to perform their duties required of them, they would be held liable for damages that are caused. This position was confirmed in *Macadamia Finance Ltd v De Wet*.¹¹² The judge held that the office a person holds may impose a legal duty on them to perform certain acts.¹¹³ From this it can be derived that the office must be specific when imposing such a duty, the person must be aware that they are under a legal duty to perform certain acts. When this duty is placed, the public who accrue damages may claim from the office holder.

¹⁰⁹ 1991 1 SA (A).

¹¹⁰ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict 7th ed.* Durban: LexisNexis.

¹¹¹ 1976 1 SA 246 (T).

¹¹² 1991 4 SA 273 (T).

¹¹³ *Macadamia Finance Ltd v De Wet* 1991 4 SA 273 (T) at 278.

5.2.7 Legal duty on public bodies

*BE obo JE v Member of the Executive Council for Social Development, Western Cape*¹¹⁴ outlined the position regarding imposing a legal duty on public bodies, this could be corporations or state organs. This case outlined the consequences of placing a legal duty in a broad manner on to public bodies. If a legal duty is placed at a broad level, it may set unrealistic standards for people to act in accordance with. This case outlined why this would be an issue that should be avoided. Requiring public bodies to act positively to prevent harm would not be feasible and difficult to enforce.

5.2.8 Dog attack

City of Cape Town v Carelse and Others,¹¹⁵ this case is an illustration of how courts deal with dangerous objects, in this case, it was a dog. However, in this case there were extenuating circumstances as the incident occurred on private premises which prohibited dogs from entering. When determining wrongfulness due to this omission, the five elements of a delict must first be established.¹¹⁶ Liability was imposed on the City of Cape Town (The City) and the owner of the dog.

The Court held that the City was negligent as no reasonable steps were taken to prevent the dog attack. The City should have ensured that stricter measures were in place to prevent dogs from entering the premises, this could have been done by having secure entrances, or having security guards who monitored the premises. The City was responsible for the premises and other dogs were allowed onto the premises, thus they failed to take control of the dangerous situation which eventually led to an attack occurring. If control is assumed in a negligent manner, liability would also be imposed.¹¹⁷

5.2.9 Liability for omission

This source outlined that there are other methods of determining wrongfulness of an omission, however, the legal duty test is integral to establishing wrongfulness. The legal duty test and its importance was dealt in *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*.¹¹⁸ This is another case which dealt with a fire breaking out on one's property. The 'prior conduct' factor was examined in this case where a fire is caused due to a person actually causing a fire. On the other hand, the 'failure to take control' factor would occur in instances where no proper control was maintained in terms of the fire. Both are factors which need to be considered to identify which is the relevant factor to look at.

The legal duty test is exhibited in various cases to determine wrongfulness, with the outlined factors above serving as guidelines.

5.2.10 State liability

*Minister of Safety and Security v Van Duivenboden*¹¹⁹ is a case that dealt with controlling a dangerous object. In this case it was the policemen who were tasked with controlling a dangerous convict who eventually caused harm to a third party. The judge had to determine whether a legal duty was owed to the plaintiff to prevent the harm. Statutory duty is another factor that may point towards the police having a legal duty to protect the public. However, courts should be weary of imposing legal duties at a broad level on the police as it would be

¹¹⁴ 2021 ZACC 23

¹¹⁵ [2020] ZASCA 117 (1 October 2020).

¹¹⁶ Neethling, J and Potgieter JM (2016) *Neethling-Potgieter-Visser Law of Delict 7th ed.* Durban: LexisNexis.

¹¹⁷ [2020] ZASCA 117 (1 October 2020).

¹¹⁸ *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001 4 SA 814 (SCA) para 14.

¹¹⁹ 2002 (6) SA 431 (SCA).

difficult to ensure the safety of the public at all times, so this may set an unreasonable standard.

The Constitution also imposes a legal duty on the state to act positively to protect, promote and fulfil the Bill of Rights in terms of section 41(1) of the Constitution.¹²⁰ This point makes it clear that the state must proactively seek to safeguard its citizens and ensure that they are safe and secure. This makes it clear that the state is required to act positively due to the legal duty imposed on it. Thus, the state would also be responsible for the actions of the police should the police be at fault or are negligent when protecting the public this is in accordance with section 11 of the Weapons and Ammunition Act.¹²¹

In conclusion, there are various instances evidenced in legislation and case law which outlines that the concept of positive performance and a legal duty is prevalent in South African law and is catered for by the courts. The legislation outlined are certain instances in which the law places a legal duty for positive performance. While the case law outlined shows the factors which courts have identified as being an indicator of a legal duty being imposed.

¹²⁰ Constitution of the Republic of South Africa Act 108 of 1996.

¹²¹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 22.

6 CHAPTER 6

This chapter is the conclusion of the dissertation and will analyse the findings of the evidence provided. This chapter will assess whether the legal questions raised have been answered adequately.

In light of the research questions, considering legislation and case law, it is clear that legal duties may be imposed on a person to act positively to prevent harm falling onto another person. There are various instances where legislation places a legal duty to act positively, examples of such legislation was outlined in chapter 3. The case law outlined in chapter 4 states the common factors that may indicate that a legal duty was placed upon a person. There is no definitive answer to this question as courts will consider legislation supplemented by other factors and facts surrounding the case when determining whether a legal duty should be imposed.

After considering the relevant legislation and case law, in light of the secondary research questions, if a court rules that a person should have a legal duty to positively perform and should that person fail to perform their legal duty, then a court would rule that a person may be held liable for their omission provided it was wrongful and negligent. If a person fails to perform their legal duty and a court deems that the person should have acted positively, then damages which are caused due to that person's non-performance would render the person liable for damages caused. In terms of the requirements for placing a legal duty for positive performance, there is no definitive answer to the exact requirements that need to be met when courts impose a legal duty. However, there are examples of legislation which requires a person to act positively to prevent harm caused to another. The examples of legislation which impose are outlined in chapter 3 above. Courts impose a legal duty on a case-by-case basis and consider the facts of the case when making their decisions. Additionally, as outlined by the various scholars in chapter 4, there is case law which provides guidelines as to what to look for when determining whether a legal duty exists. These factors serve as a guideline which makes it easier to identify the existence of a legal duty.

After conducting research into legal duties and how courts deal with this issue, it is clear that there is no 'one size fits all' as courts ordinarily look at the circumstances of the case and supplementary evidence when making their decisions. The information gathered makes it clear that this is a complex issue which requires as much information as possible to make definitive decisions. Imposing a legal duty too readily onto the public would be difficult to manage and enforce, however, it is important for citizens to be aware of when they would be required to act so that damages and liability can be avoided. This sets the standard so that people are responsible for their omissions. This is particularly the case with state entities such as the police who are required to ensure the safety of the South African citizens. If they fail at performing their legal duty, then inevitably damages would ensue. After considering all the above, it is clear that a legal duty for positive performance to prevent harm is a key concept in ensuring a prosperous society.

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