THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 457/2002

In the matter between

THE MINISTER OF SAFETY AND SECURITY **APPELLANT**

and

IAN GORDON BRYN HAMILTON **RESPONDENT**

CORAM: Howie P, Mthiyane, Conradie, Heher JJA and Van Heerden AJA

HEARD: **28 AUGUST 2003**

DELIVERED: **26 SEPTEMBER 2003**

Subject: Delict – police – legal duty to exercise reasonable care in considering, investigating & recommending application for firearm licence – liability for shooting by unfit person to whom firearm licence issued

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JUDGMENT

VAN HEERDEN AJA

[**1**] This appeal primarily concerns the question whether the police authorities charged with considering, recommending and issuing firearm licences are under a legal duty (actionable by a claim for delictual damages) to investigate information furnished to them by the applicant, in order properly to assess such applicant's suitability and fitness to possess a firearm.

[2] On 29 September 1993 and at Stellenbosch Police Station, one Erna Lochiel McArdell (McArdell) applied in terms of s 3(1) of the Arms and Ammunition Act 75 of 1969 for a licence to possess a .38 Special Rossi revolver (the revolver). At the time of making the application, McArdell was a 45 year old unmarried B.Com graduate employed as an agricultural data metrician at Infruitec, Stellenbosch. The stated purpose for which she required the revolver was self-protection – she lived alone and frequently travelled to Cape Town to visit her elderly mother. The application was favourably considered by the relevant members of the South African Police Force and, on 14 October 1993, the Commissioner of Police (the Commissioner) issued the licence to McArdell.

[**3**] About 10 months later, on 6 August 1994, McArdell shot the respondent (a 22 year old student) in the back with the revolver. The shooting followed an altercation about a parking bay in which McArdell confronted the respondent and his then girlfriend, Tarryn Weber (Weber). The incident took place in the parking area of East Lynne Flats,

Stellenbosch, where both McArdell and Weber resided at that time. As a result of being shot, the respondent sustained a spinal injury and is now a tetraplegic and is permanently wheelchair-bound.

[**4**] In July 1997, the respondent instituted proceedings in the Cape of Good Hope High Court (the High Court), claiming delictual damages from the Minister of Safety and Security, the appellant. McArdell's psychologist at the time of the shooting, Dr Judora Spangenberg (Spangenberg), was initially joined as the second defendant, but the action against her was withdrawn. The basis of the respondent's claim against the appellant was that the police members who considered and then recommended McArdell's application for a licence to possess a firearm, as well as the Commissioner of Police who issued the licence to her, owed members of the public (including the respondent) a legal duty to exercise reasonable care in considering, investigating, recommending and ultimately granting McArdell's application for a firearm licence; that they negligently breached this duty; and that their negligence was a cause of the shooting and consequent injuries inflicted on the respondent. The respondent alleged, more particularly, that the relevant police members and the Commissioner were under a legal duty to take reasonable steps to investigate whether McArdell was competent and fit to possess a firearm and that they negligently failed to comply with this duty, *inter alia* by failing to investigate McArdell's 'antecedents, character, physical and temperamental fitness', as referred to in para 10 of form SAP286. The origin and significance of this form will be dealt with below.

[**5**] By agreement between the parties, the question of liability was separated from that of the *quantum* of damages and the trial court was asked to deal only with the former issue. In terms of a Rule 37 minute filed before the commencement of the trial, it was recorded that:

> 'In order to curtail the calling of witnesses the parties agree to the agreed facts annexed hereto contained in the document headed "Agreed Facts". No evidence will be required in proof thereof and no adverse inferences will be drawn from the failure of either party to call a witness or witnesses in regard to the subject matter referred to in the Agreed Facts. (In particular police officials Loubser, Groenewald and Defendant's servants in Pretoria are contemplated.)'

[**6**] The 'Agreed Facts' referred to above are as follows:

'1 On 29 September 1993 at Stellenbosch Police Station Erna Lochiel McArdell ("McArdell") submitted an application for a licence to possess a .38 Special Rossi revolver ("the revolver") with manufacturer's serial number AA193477 in terms of section 3(1) of the Arms and Ammunitions Act 75 of 1969 ("the Act").

2 McArdell handed in a form SAP271E, which form was prescribed by Regulation

2(1) of the Regulations promulgated in Government Notice R1 474 of Regulation *Gazette* No. 1486 of 27 August 1971.

3 A copy of the form SAP271E as it was completed is annexed hereto marked "A.1".

4 Two servants of the Defendant at the Stellenbosch Police Station, namely Warrant Officer Loubser and Lieutenant CJ Groenewald dealt with the application.

5 Sections A and B of the form SAP271E were completed by the previous owner of the firearm, viz Fruit Games CC trading as Cape Handgun Range, Groote Kerk Building, Adderley Street, who were (*sic*) in lawful possession of the revolver.

6 Section C of form SAP271E was completed by Warrant Officer EAS Loubser (of the SAP, Stellenbosch), who inserted the details in accordance with the information supplied by McArdell.

7 McArdell signed opposite the answer in paragraph C4 of the form SAP271E and at the bottom of the application, after her attention had been drawn to the note in paragraph C13 and she had confirmed that the information was true and correct as provided therein.

8 Warrant Officer Loubser and Lieutenant Groenewald thereafter completed a form SAP286 in accordance with paragraphs 9-14 hereafter. A copy of the completed form SAP286 is annexed hereto marked "A.2".

9 Warrant Officer Loubser completed paragraphs 1 to 12 thereof and inserted the address appearing at the foot of page 2.

10 Lieutenant Groenewald completed paragraph 13 thereof.

11 Warrant Officer Loubser and Lieutenant Groenewald made a recommendation as contained in paragraphs 12 and 13 respectively of the form SAP286.

12 When the application was considered for purposes of their recommendation at the Stellenbosch Police Station and

recommended by them, Warrant Officer Loubser and Lieutenant Groenewald relied upon the information contained in form SAP271E, form SAP286 and a supplement to form 271E, a notification headed “Kennisgewing” and a form SAP91A (a fingerprint enquiry).

13 The three lastmentioned documents are annexed hereto marked “A.3”, “A.4” and “A.5” respectively.

14 In addition to the information contained in the aforementioned documents Warrant Officer Loubser relied on her personal observations of the applicant during her interview at the stage of completion of the said forms.

15 When the Commissioner issued a licence to McArdell he relied on the contents of the documents referred to in annexures “A.1” to “A.5” and the result of a fingerprint enquiry pursuant to completion of form SAP91A.

16 In so far as information relating to McArdell’s mental stability was concerned, Warrant Officer Loubser, Lieutenant Groenewald, the Commissioner and every one of the Defendant’s servants involved in the process considered the reply given by McArdell pursuant to the reading of paragraph 10 on form SAP286 to McArdell during her interview with Warrant Officer Loubser.

16.1 Paragraph 10 reads:

“10 Opmerkings met betrekking tot die applicant se verlede, karakter, liggaamlike en temperamentele geskiktheid, kennis van

wapens, ensovoorts…

Remarks as to the applicant's antecedents, character, physical and temperamental fitness, knowledge of arms, *et cetera*. If the applicant is not a South African citizen, …"

16.2 McArdell's reply was to the effect that there was nothing that she could report in regard to her antecedents, character and temperamental fitness, knowledge of arms, *et cetera*, which could negatively affect her application. In the premises no further steps to test the veracity of the information and/or allegations were considered necessary by Loubser and Groenewald.

17 McArdell was requested by Warrant Officer Loubser, in accordance with paragraph C13 of form SAP271E to declare that the information furnished was true and correct, which she did. In addition she was informed that it would be an offence to knowingly make a false statement.

18 The only further steps that were taken by First Defendant's servants and/or the Commissioner to test the veracity of the representations and allegations made by McArdell in applying for a firearm licence were a fingerprint enquiry done at the Criminal Records Centre in Pretoria to establish whether she had any previous convictions according to their records.

19 Prior to recommending and issuing of the licence to McArdell and save as above, no further steps were taken to investigate:

(a) McArdell's antecedents;

(b) McArdell's character;

(c) McArdell's physical fitness;

(d) McArdell's temperamental fitness as stated in clause 10 of SAP286;

(e) whether McArdell had committed any unlawful act of violence;

(f) had threatened any unlawful act of violence;

(g) had abused liquor;

(h) had abused any other substance;

(i) had been or was incapable of committing any offence by reason of mental illness;

(j) had a personality order;

(k) suffered from psychotic illness;

(l) had a history of psychotic illness;

(m) had been hospitalised, arrested or detained for any of the reasons in (e), (f), (g), (h), (i), (j), (k) and (l) above.

20 No servant of the Defendant or any other State official involved in the application and issuing of the licence communicated with;

(a) McArdell's next of kin;

(b) McArdell's general practitioner;
(c) McArdell's employer;
(d) McArdell's neighbours;
(e) any servant of Defendant who was stationed at Stellenbosch Police Station.

21 On 14 October 1993 the Commissioner of Police issued a licence to McArdell to possess the firearm.

22 McArdell took possession of the firearm from Fruit Games CC.

23 The servants of Defendant and the Commissioner were acting in the course and scope of their employment by First Defendant at all times.

24 On 6 August 1994 at East Lynne Flats, Die Laan, Stellenbosch, McArdell shot the Plaintiff.

25 On 26 September 1994 Dr MB Magner, a senior specialist at Lentegeur Hospital, compiled a psychiatric report in respect of McArdell and concluded, after observations, that she suffered from paranoid psychosis, alcohol abuse and a personality disorder and that she was not capable of appreciating the wrongfulness of her actions at the time of the shooting.

26 On 27 September 1994 at the Magistrate's Court, Stellenbosch, the Additional Magistrate, SW Engelbrecht, acting in terms of section 77(6)(a) of the Criminal Procedure Act ordered McArdell to be detained in a psychiatric hospital, viz Lentegeur Hospital.

27 On 26 April 1995 (under Case No. 15219/94) McArdell was declared to be incapable of managing her affairs by this Honourable Court and a *curator bonis* was appointed.

28 Following an incident at Stellenbosch Hospital on 7 September 1992 in which McArdell, *inter alia*, smashed a window pane with her hands, McArdell was sedated and conveyed on a stretcher and by ambulance to Stikland Hospital on 8 September 1992.

29 McArdell was admitted to Stikland on 8 September 1992 where she remained until 2 October 1992 ("the first admission").

30 On 4 February 1993 McArdell was admitted to Stikland at her request, where she remained until 8 February 1993 ("the second admission").

31 During the first and second admissions she presented as per the Stikland records.

32 She left Stikland Hospital on 8 February 1993 without

being formally discharged.

33 On 9 February 1993 she returned for medication.

34 She visited Stikland Hospital as an out-patient on the following dates:

(a) 26 October 1992;

(b) 9 November 1992;
(c) 7 December 1992.

35 On 1 August 1994 she had telephonic contact with the hospital.

36 On 2 August 1994 she again had contact with the hospital telephonically.

36 On 24 September 1979 Standing Orders (Spesiale Magsorder (Algemeen) 19B, 1979, 24 September 1979) were issued by General MCW Geldenhuys, the Commissioner of the South African Police, Headquarters, Pretoria, in connection with the administration of the Weapons (*sic* Arms) and Ammunition Act 75 of 1969. A copy is annexed hereto marked "A.6".

38 On 22 April 1994 in Government Notice No. R787, the Defendant promulgated further regulations under the Arms and Ammunition Act with immediate effect.

39 In terms of section 2(1) thereof applications for licences in respect of the possession of the arm in question would thereafter be submitted to a policeman on duty at a police station on form SAP271 (set out in Schedule A). (A copy of the form SAP271 is annexed hereto marked "A.7.")

40 The parties agree to the correctness of the statistics in respect of applications for firearm licences received, approved, refused and re-issued as per annexure "A.8". The columns respectively are for applications received, approved and refused.

> The fourth column relates to the re-issue of licences which had been lost or instances where the applicants had obtained new identity documents.'

[7] During the course of the trial and after all the respondent's witnesses had testified, the parties agreed on certain additional facts, recorded in a document headed 'Further Agreed Facts' as follows:

'1 Between the time that McArdell shot the Plaintiff and Tarryn Weber at East Lynne and the time that she shot Judora Spangenberg and Hermann Spangenberg at 16 Kolbe Street on 6 August 1994:

(a) McArdell proceeded to the home of Suzette McKerron, at 74 Jonkershoek Road, Stellenbosch, where McArdell fired two shots into the front door glass and the frame;

(b) McArdell proceeded to the Department of Psychology at the University of Stellenbosch, where she fired four further bullets into the front door;

(c) At the scenes referred to in (a) and (b) McArdell used the .38 Special Rossi revolver AA 193477.

2 On 7 August 1994 at 00h30 the investigating officer, Detective Warrant Officer Bothma, visited the flat occupied by McArdell at the time, situated at 35 East Lynne, Die Laan, Stellenbosch. He found the inside of the flat to be dirty and sparsely furnished. There was dirty crockery in the kitchen. He found a portable safe, which is depicted on the photograph contained in the docket, annexed hereto marked "D". He also found numerous empty beer tins and dirty washing. In the bathroom cupboard he found numerous pill containers, of which one contained valium. His impression was of a person living alone in shabby conditions.'

[**8**] It was also conceded on behalf of the appellant during the course of the trial that the bullet that was removed from the respondent's body was fired from the .38 Special Rossi revolver licensed to McArdell.

[**9**] On 28 June 2002 the High Court gave judgment in the respondent's favour, declaring that the appellant was liable to the respondent for such damages as the latter suffered as a result of the attack on him by McArdell on 6 August 1994. The appellant was ordered to pay the respondent's costs up to that date.[1] With the leave of the court *a quo*, the appellant now appeals to this Court.

[**10**] Counsel for the appellant conceded before this Court that, on the evidence, McArdell was indeed unfit to possess a firearm at the relevant times, viz when she applied for a licence (on 29 September 1993), when the licence was issued to her (on 14 October 1993), and during the intervening period. In my view, this concession was a wise one. It is clear from the agreed facts and from the evidence placed before the trial court that, from at least 1990 onwards, McArdell had a history of psychological and emotional disturbance and was receiving counselling and therapy from several mental health professionals. She was hospitalised in 1990 by her then psychiatrist (a Dr Fitzgerald) for severe stress. From May 1990 until the end of 1990, and then again from July 1992 until 4 August 1994 (with a break between January and May 1994), McArdell was Spangenberg's patient. Spangenberg diagnosed her as having a paranoid personality disorder, manifesting itself in a pervasive and overwhelming tendency to be suspicious and to feel that everyone was 'against her'. She was particularly distrustful of her employers, expressing anger and aggression towards them. Although McArdell was never under the influence of alcohol during her sessions with Spangenberg, the latter was aware that she did abuse alcohol from time to time. Spangenberg also knew that certain psychiatric medications (such as valium) were prescribed for McArdell by various psychiatrists, but that she used these irregularly and incorrectly, sometimes taking too much of the medication, sometimes none at all, and sometimes using the drugs in a wrong combination with a potentially negative effect. According to Spangenberg, McArdell's tremor of the hands from time to time could be ascribed both to her general state of tension and anxiety and to

[1] The judgment of the court *a quo* (per Jooste AJ) is reported as *Hamilton v Minister of Safety and Security* [2003] 1 All SA 678 (C).

her unstable use of her prescribed medication.

[**11**] Having made little progress with McArdell by the end of 1990, Spangenberg referred her to a colleague, Suzette McKerron (also a psychologist), who treated McArdell for some 18 months before she returned to Spangenberg as a patient in about July 1992. McKerron diagnosed McArdell as suffering from a borderline personality disorder, with paranoid traits. She testified that McArdell displayed inappropriate 'tremendous anger' and lack of control of such anger, which manifested itself when, for example, McKerron wanted to go away on holiday or when McKerron would do 'something wrong in her [McArdell's] mind'. Like Spangenberg, McKerron never saw McArdell under the influence of alcohol, but the latter had told her of instances of alcohol abuse. After a disturbing confrontation with McArdell during a consultation in March 1992, when McArdell 'disassociated' and behaved in a completely irrational and very threatening manner, McKerron queried the diagnosis of paranoid personality disorder with Dr Venter, a psychiatrist to whom she had referred McArdell for treatment. Dr Venter confirmed the diagnosis. McKerron's conclusion was that the 'deeper structures of [McArdell's] personality' could not be changed and that she would only respond to 'supportive', rather than 'incisive', therapy.

[**12**] Dr Maria van Aswegen (Van Aswegen), a general practioner who had been consulted by McArdell from time to time during the period 1992 to 1994, noticed McArdell's personality disturbance when she first met her. She confirmed McArdell's deep distrust of 'the fascist system' and of psychotherapists, as well as McArdell's belief that everyone was possibly part of 'the system' and would reject her. She was also aware of McArdell's abuse of alcohol and of prescription drugs such as valium and diazepine. Van Aswegen was one of the two doctors who issued medical certificates in terms of ss 12 and 22 of the Mental Health Act 18 of 1973 in support of an urgent application for McArdell's reception in Stikland Hospital (a mental institution), made on 8 September 1992 by the superintendent of Stellenbosch Hospital. As set out in the agreed facts, this urgent application was necessitated by McArdell's violent and aggressive conduct at Stellenbosch Hospital on the night of 7 September 1992, when she had totally lost control of herself, smashing a thick glass window with her bare hands and ranting and raving. She had to be physically restrained by a number of people in order to be sedated intravenously and was clearly under the influence of alcohol. After consulting with Dr Harms, a psychiatrist, Van Aswegen diagnosed McArdell's mental condition on this

occasion as paranoid psychosis. Both Van Aswegen and Dr Rautenbach, the other doctor who issued a medical certificate in support of McArdell's reception in Stikland, indicated in their certificates that she had homicidal and suicidal tendencies, that she had no insight into or control over her emotions during her anger outbursts, and that she was potentially dangerous to herself and others. Van Aswegen prescribed oral fluanxol (an anti-psychotic drug) for McArdell in March 1993, at the latter's request. On 27 September 1993 (two days before making her application for a firearm licence), McArdell had consulted Van Aswegen, complaining of palpitations of the heart, severe stress and excessive use of alcohol and cigarettes.

[**13**] The evidence before the court *a quo* (including that of several of McArdell's work colleagues) and the contents of (*inter alia*) McArdell's Stikland file handed in at the commencement of the trial – which contents the parties agreed were true and correct save in so far as any party might object thereto – certainly bear out the conclusion of Jooste AJ that 'one can, objectively speaking, hardly think of a less suitable candidate for a firearm licence than McArdell'. Nevertheless, the appellant submitted (i) that there was no statutory or common law duty on the police officials involved in processing McArdell's application to go beyond a consideration of the information in the prescribed documents and an acceptance of the veracity of the applicant's declaration that such information was true and correct (and, more specifically, that such police officials were not duty-bound in law to investigate the personal circumstances of individual applicants for firearm licences in the absence of particular compelling reasons to do so); (ii) that the relevant police officials (acting in their capacity as the appellant's servants) did not negligently breach any statutory or common law duty to which they were subject; and (iii) that there was no causal relationship between the conduct of the police officials concerned and the harm suffered by the respondent through being shot by McArdell with her licensed revolver. It is to a consideration of these three propositions that I now turn.

Existence of legal duty (wrongfulness)

[**14**] This court has indicated on several recent occasions that the enquiry as to the existence or otherwise of a legal duty is conceptually anterior to the question of fault, viz that liability for negligence is conditional upon, and

presupposes, wrongfulness.[2] Although there are also recent judgments of this Court in which the question of negligence has been dealt with before the issue of wrongfulness[3] − and there may well be considerable merit in this approach − the view that I take of both issues (wrongfulness and negligence) in the circumstances of the present case renders it unnecessary to engage in this debate. I will therefore deal with these issues in the order in which they were presented by counsel.

[**15**] Counsel for the respondent submitted that the alleged negligent conduct of the appellant's functionaries forming the basis of the respondent's cause of action (viz the consideration and recommendation of McArdell's application and the issue of the licence to her) was a *positive* act causing physical harm and hence gave rise to a presumption of wrongfulness.[4] For the purposes of this judgment I will, however, assume in favour of the appellant that, as contended by the appellant's counsel, the allegedly negligent conduct complained of was the *failure* by the relevant police officials adequately (or at all) to investigate McArdell's fitness to possess a firearm (despite an alleged legal duty so to do) in the course of considering her application for a licence and before recommending and granting such application.

[**16**] The test for determining the wrongfulness or otherwise of an omission or failure to act in the context of an action for delictual damages was formulated as follows by this Court in *Van Eeden v Minister of Safety and*

[2] See, for example, *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 364G-H; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para [9] at 1054H-I; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [38] at 453B-C; *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA) para [49] at 481C.

[3] See, for example, *Sea Harvest Corporation Pty Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) para [19] at 837G–838B and at 838H-I; *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) para [18] at 1111F-G; *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another* 2000 (4) SA 1019 (SCA) para [7] at 1024F; *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) para [43] at 120I-121B; *Minister of Safety and Security v Van Duivenboden* above (n2) para [12] at 442A-B.

[4] See *Van Duivenboden* above (n2) para [12] at 441E-F.

Security (Women's Legal Centre Trust, as Amicus Curiae) :[5]

'[9] …An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of many factors which have to be considered. See the judgment of this court in *Carmichele* [2001 (1) SA 489 (SCA)] at para [7] and recent decisions of this court in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paras [14]-[17]; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para [6]; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) paras [11] and [31]; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para [13] and the unreported judgment of this court in *Minister of Safety and Security v Van Duivenboden,* case No 209/2001 delivered on 22 August 2002 [now reported at 2002 (6) SA 431 (SCA)], para [16].

[10] in applying the concept of the legal convictions of the community the Court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the Legislature and Judges.'

[**17]** In *Knop v Johannesburg City Council*[6] Botha JA stated that the general nature of the enquiry in this regard is correctly set out in the following well-known passage in Fleming *The Law of Torts* 4th ed at 136 (as quoted in *Administrateur, Natal v Trust Bank van Afrika Bpk*[7]):

[5] 2003(1) SA 389 (SCA) paras [9]-[10] at 395H-396E (per Vivier ADP).
[6] 1995 (2) SA 1 (A) at 27F-I.
[7] 1979 (3) SA 824 (A) at 833 *in fine*-834A (per Rumpff CJ).

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'[8]

[**18**] The test as formulated in the decisions referred to above is undeniably a broad and general one. However, it must be emphasised that −

'The very generality in which the legal principles have been expressed in the various decisions to which I have referred is an emphatic reminder that, both in this country and abroad, the question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied. The application of those broad principles to particular cases in other jurisdictions will provide insight into the weight that is attached by that society to various values and norms when they are balanced against one another but that can assist only partially in the resolution of cases in this country. The fact that there have been different outcomes in similar cases when those principles have been applied in various common-law countries merely underscores that point. What is ultimately required is an assessment, in accordance with the prevailing norms of this country, of the circumstances in which it should be unlawful to culpably cause loss.'[9]

[**19**] In this case, the 'plaintiff's invaded interest' is his right to bodily integrity and security of the person, a right long regarded in our law as 'one of an individual's absolute rights of personality'.[10] As is abundantly clear from the inclusion of this right in the Bill of Rights in both the 1993 and the 1996 Constitutions,[11] it is most certainly a right 'deemed worthy of legal

[8] See too *Van Duivenboden* above (n2) para [13] at 442C-E.

[9] *Van Duivenboden* above (n2) para [16] at 444B-E (per Nugent JA)

[10] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 at 145I-146C. In that case, Hoexter JA stated simply that '[t]he plain and fundamental rule is that every individual's person is inviolable' (at 153D-E).

[11] Constitution of the Republic of South Africa Act 200 of 1993 (date of commencement 27 April 1994) s 11, Constitution of the Republic of South Africa Act 108 of 1996 (date of commencement 4 February 1997) s 12.

protection'.[12]

[**20**] As was pointed out by counsel for the respondent, even prior to the advent of the 1993 and 1996 Constitutions, our law recognised that 'the police are under a positive duty in law to protect citizens from assault when in a position to do so and that, if they negligently fail to do so, the State will be liable in damages'.[13] In terms of s 5 of the Police Act 7 of 1958, the statute governing the organization and control of the South African Police at the time of the application for, and issue of, McArdell's firearm licence: [14]

> 'The functions of the South African Police shall be, *inter alia* –
>
> (*a*) the preservation of the internal security of the Republic;
>
> (*b*) the maintenance of law and order;
>
> (*c*) the investigation of any offence or alleged offence; and
>
> (*d*) the prevention of crime.'

In the words of Rumpff CJ in *Minister van Polisie v Ewels,*[15] '[w]at misdaad betref, is die polisieman nie net afskrikker of opspoorder nie, maar ook beskermer.'

[**21**] The statutory framework within which applications for licences to possess firearms are made and considered is provided by the Arms and Ammunition Act 75 of 1969 (the Act), the regulations promulgated under s 43 of the Act in Government Notice R1474 of Regulation *Gazette* No. 1486 (Government *Gazette* No. 3238) of 27 August 1971 (the Regulations), and the Special Force Order ('Spesiale Magsorder (Algemeen)' 19B, 1979) issued on 24 September 1979 by the then Commissioner of the South African Police 'in verband met die administrasie van die Wet op Wapens en Ammunisie 1969 (Wet 75 van 1979)' (the Special Force Order).

[12] See the quotation from Fleming *The Law of Torts* 4th ed at 136 in para [17] above.

[13] *Van Duivenboden* above (n2) para [33] at 451I; see too *Van Eeden* above (n5) para [18] at 399A-D.

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

[15] 1975 (3) SA 590 (A) at 597G.

[**22**] In terms of s 3(1) of the Act:

'On application in the prescribed manner and payment of the prescribed licence fee in the said manner by any person other than a person under the age of 16 years or a disqualified person,[16] the Commissioner may, in his discretion, but subject to the provisions of subsections (3), (4) and (6) and sections 7 and 33(2), issue to such person a licence to possess the arm described in such licence.'

[**23**] At the time McArdell applied for her firearm licence, regulation 2(1) of the Regulations provided that:

'An application for a licence to possess an arm under section 3 of the Act shall be made by the handing to the Commander of the police station of the area in which the applicant resides, of form SAP 271A (Afrikaans) or SAP271E (English), as set out in Annexure A, completed in so far as is applicable.'

[**24**] Section C of the printed form SAP271E, as utilised in McArdell's application for a firearm licence, required recordal of the applicant's personal particulars, provision being made for the verification of such particulars by the South African Criminal Bureau and the Department of Home Affairs. Details had to be furnished in respect of, *inter alia*, the following aspects: (i) the purpose for which the firearm was required; (ii) previous convictions of an offence or offences in consequence of which the applicant's fingerprints were taken; (iii) previous loss by the applicant of any firearm in his or her possession; (iv) whether the applicant had ever been declared unfit to possess a firearm; (v) whether a firearm in the possession of the applicant had ever been confiscated; and (vi) whether the

[16] A 'disqualified person' is a person who has been declared or is deemed to have been declared to be unfit to possess a firearm under Part II (ss 11-17) of the Act and is therefore prohibited from having a firearm in his or her possession: see definition of 'disqualified person' in subsec 1(1) of the Act, read together with subsec 15(2).

applicant had ever been refused a licence to possess a firearm.[17] At the end of the form, the applicant's attention was specifically drawn to the provisions of s 39(1)(*f*) of the Act, in terms of which any person who knowingly makes any false statement on the form is guilty of a criminal offence.

[**25**] In addition to the prescribed form SAP271E, McArdell was also required to sign a supplement to this form on which it was recorded (*inter alia*) that she owned a safe, as well as a document headed 'Kennisgewing'.

[**26**] As indicated above, on 24 September 1979, the then Commissioner of Police issued a very extensive and detailed special force order ('spesiale magsorder') concerning the administration of the Act. It was this Special Force Order that gave rise to form SAP286. In the case of McArdell, form SAP286 was completed in Afrikaans and the only version of the Special Force Order made available by the appellant and annexed to the 'Agreed Facts' is also in Afrikaans. Like the court below, therefore, I will refer to the Afrikaans version of both form SAP286 and the Special Force Order.

[**27**] Paragraph 14(1) of the Special Force Order stipulates that ''n verslag op vorm SAP286 moet in alle gevalle van aansoeke om lisensies om wapens te besit, voltooi word.' Paragraph 10 of form SAP286 requires the police member processing an application for a firearm licence to enter '[o]pmerkings met betrekking tot die applikant se verlede, karakter, liggaamlike en temperamentele geskiktheid, kennis van wapens, ensovoorts' and provides further that, '[i]ndien die applikant nie 'n Suid-Afrikaanse burger is nie moet TWEE getuigskrifte deur verantwoordelike persone dat die applikant van goeie karakter is, ingehandig word.' The latter requirement appears to reflect (albeit not accurately) the provisions of para 3(3) of the Special Force Order, in terms of which ─

'Iemand wat nie 'n Suid-Afrikaanse burger is nie *en tydelik in die Republiek is*, wat wens om 'n lisensie om 'n wapen te besit, te bekom, moet 'n geldige paspoort, 'n permit om in die Republiek te vertoef en twee getuigskrifte dat hy van goeie karakter is, voorlê.' (Emphasis added.)

I am in agreement with Jooste AJ's conclusion that the reason for the requirement of testimonials *only* in respect of non-South African citizens *who are temporarily in the Republic* 'seems obvious: South African citizens, and foreigners permanently resident in the Republic, would be known in the community and enquiries could easily be made regarding their

[17] Paragraphs 3 to 8 of Form SAP271E.

standing in the community, etc.'[18]

[**28**] Further pertinent requirements set in form SAP286 are a *motivated* recommendation by the police member processing the application (in this case, Warrant Officer Loubser), as well as comment by and the recommendation of the member in charge of the relevant police station (in this case, Lieutenant Groenewald).[19]

[**29**] The purpose of these requirements set by form SAP286 appears from the Special Force Order, the relevant paragraphs of which for present purposes read as follows:

"14. POLISIEVERSLAG OOR APPLIKANT

...

(4) Die bevelvoerder van die polisiestasie moet sy kommentaar en aanbeveling in die toepaslike ruimte op die verslagvorm aanbring en *toesien* dat die verslag in *alle opsigte volledig en korrek* voltooi is. Aanbevelings moet *behoorlik* gemotiveer word.

(5) Indien die bevelvoerder van 'n polisiestasie na die mening van sy distrikskommandant, nie oor die nodige ondervinding en goeie oordeel beskik om 'n aanbeveling te doen nie, moet gereël word dat aansoeke tesame met die bevelvoerder se aanbeveling aan die distrikskommandant gestuur word. Die distrikskommandant stuur dan die aansoek met sy kommentaar en aanbeveling aan Hoofkantoor.

15 FAKTORE WAT IN AANMERKING GENEEM MOET WORD WANNEER AANBEVELINGS GEDOEN WORD

(1) Geskiktheid van applikant

[18] See the reported judgment (n1) at 692c-d.

[19] Paragraphs 12 and 13 of form SAP286, respectively.

Streng beheer oor die uitreiking van lisensies om wapens te besit, is met die oog op landsveiligheid van die allergrootste belang en dit is *noodsaaklik* dat ‘n bevelvoerder wat ‘n aansoek om ‘n lisensie aanbeveel *tevrede* moet wees dat die applikant *in alle opsigte ‘n bevoegde en geskikte* persoon is om die wapen te besit. *Sonder uitsondering* moet die applikant aan twee basiese vereistes voldoen, te wete (i) hy moet ‘n geskikte en bevoegde persoon wees, en (ii) daar moet ‘n noodsaaklikheid bestaan om ‘n wapen te besit.

(a) By geskiktheid word bedoel dat die applikant *fisies en geestelik geskik* geag moet word om ‘n vuurwapen te kan besit; d.w.s., het hy vorige veroordelings en wat is die aard daarvan; kan hy en weet hy hoe en wanneer om ‘n vuurwapen te gebruik en mag gebruik (*sic*), en is hy *temperamenteel geskik* – is hy nie opvlieënd van geaardheid, geneig tot geweld of losbandig nie.

...

(5) Nie-Suid-Afrikaanse burgers moet aan *strenger toetse* onderwerp word, veral wat noodsaaklikheid betref...

(6) <u>Gesindheid van applikant teenoor die ander bevolkingsgroepe</u>

Dit is *vir die bevordering van landsveiligheid noodsaaklik* dat wapenlisensies nie aan persone wat vyandig gesind is teenoor ander bevolkingsgroepe en die land in die algemeen, uitgereik word nie. Bevelvoerders moet gevolglik in *alle gevalle* waar aansoeke om lisensies aanbeveel word hierdie aspek in gedagte hou.’ (Emphasis

added.)

[**30**] Counsel for the appellants went to considerable lengths to persuade this Court that the 'only relevant statutory provisions' were the abovementioned provisions of the Act and the Regulations, and that the Special Force Order was simply a collection of administrative directives, with no statutory force. I am not persuaded by this argument, however. It would appear that the Special Force Order was issued by the incumbent Commissioner of Police pursuant to the provisions of regulation 6 of the Regulations for the South African Police (1964).[20] In terms of regulation 6(1), the Commissioner controlled the Police Force by issuing orders and instructions which –

'(*a*) in terms of the Act or these regulations shall or may be prescribed by him;

(*b*) are not inconsistent with the Act or these regulations and which he deems necessary or expedient for efficient administration or the achievement of the objects of the Act or these regulations.'

Regulation 6(2) provided that orders and instructions 'of a permanent nature may be issued by the Commissioner as "Standing" or "Force Orders"', while regulation 6(4) stipulated that '[o]rders and instructions issued in terms of subregulations (1), (2) and (3) *shall be obeyed* by all members to whom such orders and instructions are applicable.'[21] (Again my emphasis.)

[**31**] In terms of s 10 of the Police Act of 1958, failure by a police member to comply with 'an order issued in terms of' the said Act amounted to misconduct, while such failure also constituted a criminal offence under s 9

[20] Made by the then State President under the powers vested in him at that time by s 33 of the Police Act 7 of 1958 and published in Government Notice R203 of Regulation *Gazette* No. 299 (Government *Gazette* No. 719) of 14 February 1964 (see, in particular, paras (*m*) and (*w*) of subsec 33(1) of the Police Act, read together with s 4 thereof).

[21] See further in this regard Joubert ed *The Law of South Africa* (*LAWSA*) Vol 20 (1984) para 240 at 277-8.

of the Act.

[**32**] To my mind, it is clear from the above that the Special Force Order was indeed at all times pertinent to this case a 'relevant statutory provision' for the purposes of considering and recommending applications for firearm licences, and that this Order imposed statutory duties on the police members involved in this process.[22] The language in which the abovementioned provisions of the Special Force Order (and the corresponding paragraphs of form SAP286), are couched leaves no room for any construction other than that contended for by the respondent, viz that the police members involved in processing an application for a firearm licence in terms of s 3(1) of the Act are, as a general rule, duty-bound in law to do more than simply take the applicant's fingerprints and mechanically complete the prescribed forms, relying solely on – and accepting the veracity of – the information given to them by the applicant and their personal observations of the applicant during the interview at the stage of making the application. It is both logical and reasonable that this should be so. As counsel for the appellant put it to a number of the respondent's witnesses during the course of the trial, even seriously mentally disturbed and potentially dangerous people can present themselves to the lay observer as perfectly normal. Thus, Professor Zabow, a psychiatrist who gave evidence as an expert on behalf of the respondent in

[22] See, in this regard, *Van Duivenboden* above 9 (n2) para [27] at 451F-G.

the court *a quo*, confirmed that a personality disorder, even one amounting to a serious mental illness (from which, in his expert opinion, McArdell suffered at all relevant times), is an 'extremely difficult thing to diagnose'. It is not something that is necessarily easily detectable in the ordinary course of daily activities. This being so, it follows that, subject to possible exceptional cases,[23] the relevant police members are under a legal duty to take proper measures to screen an application for a firearm licence by making such enquiries as are reasonable in the circumstances to corroborate the veracity of the information furnished to them by the applicant in relation to his or her physical, temperamental and psychological fitness to possess a (potentially lethal) firearm.

[**33**] This duty is particularly important in a country where high levels of violence are notorious and are fostered to a significant degree by access to firearms. Official statistics[24] reveal that the proportion of murders committed with a firearm increased from 42 per cent in 1994 to 49 per cent in 1998. It is obvious that, should firearm licences be issued to unfit persons, then the bodily integrity, safety and security, and even the lives, of members of the general public are potentially at risk. Thus, the imposition of such a legal duty on the relevant police members is, in my view, clearly reasonable and 'congruent with the court's appreciation of the sense of justice of the community'.[25]

[23] The stereotypical example of the applicant for a firearm licence being the local minister of religion, whom the police officers processing the application have known for many years, springs to mind here.

[24] See Kane-Berman *et al South Africa Survey: 2001/2* (SA Institute of Race Relations Official Yearbook) at 98. According to the same source, 3.5 million persons in South Africa between them have been given legal permission to possess some 4.2 million firearms, with a similar number of illegally possessed firearms being estimated to be in circulation.

[25] *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para [12] at 1257E-F (per Cameron JA).

[34] That 'unfit persons', in the interests of public safety and security, must *not* be legally permitted to possess firearms, is underscored by the provisions of Part II (ss 11 to 17) of the Act, dealing with the declaration of persons to be unfit to possess firearms. The evidence in this case shows conclusively that McArdell was, at the time of her application for a licence and the issue of such licence to her, a person 'whose possession of an arm is not in the interest of that person or any other person as a result of [her] mental condition, [her] inclination to violence, whether an arm was used in the violence or not, or [her] dependence on intoxicating liquor or a drug which has a narcotic effect'.[26] As was recently noted by this Court in dealing with the provisions of s 11 of the Act:

'Licences to possess firearms are not issued to enable the holders to shoot themselves or to shoot innocent persons who happen to be in the way… nor do firearms belong in the hands of drunks. I have little doubt that responsible police officers share that view…'.[27]

[**35**] The fact that the police are under a legal duty to take proper measures to screen applications for firearm licences, as discussed above, does not necessarily mean that a breach of such duty should found a private law action for damages. As indicated above, whether or not statutory duties translate into private law duties actionable by a claim for damages is a question of legal policy, to be determined 'not [by] an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms'.[28] *In casu*, the individual's right to life, bodily integrity and security of the person must be balanced against policy considerations such as the efficient functioning of the police, the availability of resources and the undoubted public importance of the effective control of firearms. To my mind, in the present case, as in *Van Duivenboden*,[29] it can be stated that one is *not* dealing with a situation involving 'particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence'. Here too, there 'is no effective way to hold the State to account… other than by way of an action for damages[30]. Moreover, the spectre of the opening of the 'floodgates of litigation' and the resultant 'chilling effect' of potential limitless liability on the efficient and proper performance by the police of their primary functions – relied on very heavily by the appellant as a ground for denying the existence of a legal duty on the relevant police members in the circumstances of the present case – is no

[26] Paragraph (*c*) of subsec 11(1) of the Act.

[27] *Van Duivenboden* above (n2) para [27] at 450B-C (per Nugent JA).

[28] *Van Duivenboden* above [n2] para [21] at 446 F-G

[29] *Op cit* para [22] at 448A-B

[30] *Op cit* para [22] at 448D-E.

more convincing here than it was in either *Van Duivenboden*[31] or *Van Eeden.*[32] In the words of Vivier ADP in the latter case:[33]

'…our Courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability'.[34]

[36] For the above reasons, I have reached the conclusion that there was indeed a legal duty on the relevant police members as contended for by the respondent. The source of this legal duty is both the common law and the statutory provisions analysed above. I have reached this conclusion without relying *directly* on the provisions of the Bill of Rights in either the 1993 or the 1996 Constitutions (both of which, as indicated above, came into operation *after* the dates relevant to the present matter and neither of which has retrospective operation), and without seeking to resolve the constitutional issue left open in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*,[35] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[36] and *Afrox Healthcare Bpk v Strydom*,[37] all of which cases were canvassed in considerable detail in

[31] *Op cit* para [19] at 445D-E and paras [22]-[23] at 448C-G.
[32] *Van Eeden v Minister of Safety and Security* above (n5) para [22] at 400C-E (per Vivier ADP).
[33] *Loc cit.*
[34] See too *Cape Town Municipality v Bakkerud* above (n2) para [31] at 1060J–1061A (per Marais JA).
[35] 1999 (4) SA 1319 (SCA) para [30] at 1332G-H (per Mahomed CJ).
[36] 2000 (2) SA 837 (CC) para [4] at 840A-C (per Yacoob J).
[37] 2002 (6) SA 21 (SCA) para [17] at 36J-37C (per Brand JA).

the appellant's heads of argument before this Court. I am, however, satisfied that the existence of a legal duty on the police in these circumstances is entirely consistent with the norms and values of South African society as embodied in both Constitutions.

Negligence

[**37**] The following question is whether or not the relevant police members (acting in their capacities as the servants of the appellant) negligently breached the said legal duty resting upon them. The classic test for establishing the existence or otherwise of negligence, quoted with approval in numerous decisions of this Court, is that formulated by Holmes JA in *Kruger v Coetzee*[38] in the following terms:

'For the purposes of liability *culpa* arises if –
(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps…

…Whether a *diligens paterfamilias* in the position of the person concerned would take any steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.'

[38] On the facts as admitted, agreed and proved, McArdell was at the relevant times certainly unfit to possess a firearm on the basis of personal

[38] 1966 (2) SA 428 (A) at 430E-G.

characteristics detailed in (*inter alia*) s 11(1)(*c*) of the Act and para 15(1) of the Special Force Order. Nevertheless, and without making even the most perfunctory of enquiries to verify the information furnished to them by McArdell, the relevant police members recommended her application for a firearm licence and thereafter, in reliance on this recommendation, the Commissioner issued such a licence to her. As the court below stated, '[o]ne clearly cannot expect the police to do an in-depth investigation into each and every person that applies for a firearm licence. This would be an impossible task, given the limitations on their manpower and resources.'[39] What would constitute proper measures to be taken by the police to comply with the legal duty imposed upon them in this regard will obviously depend on the particular circumstances of each application. However, as pointed out by Jooste AJ –[40]

'One would think that making two telephone calls, one to the applicant's next of kin or a close friend, and another to the applicant's employer, would suffice. *Only if anything in the reports of two such referees raises questions about the possible suitability of the applicant, would they have to investigate the matter further*.'[41] (Emphasis added.)

[**39**] In my view, a reasonable person in the position of the appellant's servants would have foreseen that, in the absence of any such corroborative enquiries, an applicant for a firearm licence who – like McArdell – was clearly unfit to possess a firearm, might have a firearm licence issued to him or her and that this might well result in harm being inflicted on a member of the general public such as the respondent. Furthermore, reasonable police officials in the position of Loubser and Groenewald would, to my mind, have questioned McArdell considerably more thoroughly in respect of her 'antecedents, character, physical and temperamental fitness, knowledge of arms etc';[42] would also have sought verification of the information furnished by McArdell from her mother and her employer; and would not have recommended McArdell's application to the Commissioner without having taken these basic steps.

[39] See the reported judgment (n1) at 693c.

[40] At 693c-d.

[41] In this regard, it is interesting to note that, in Section C of the 'new' form SAP271, which replaced the existing forms SAP271A (Afrikaans) and SAP271E (English) with effect from 22 April 1994 (see paras 38-39 of the 'Agreed Facts' set out above), provision is made for the recordal of the home and work telephone numbers of the applicant, while Section E poses questions relating to the applicant's receipt of medical treatment 'for a nervous or mental deviation' and, if so, whether the applicant takes 'any prescribed medication or by any other means (*sic*)'; requires details of any 'series of sedative-, tranquilizing-, narcotic drugs or medication for other reasons' taken by the applicant during the 5 years preceding the date of the application; and also queries the existence or otherwise of 'any circumstances with regard to your health which could influence this application'.

[42] See para 10 of form SAP286.

[**40**] I am in agreement with the conclusion of the court below[43] that, had Loubser and/or Groenewald taken the reasonable precaution of making enquiries as to McArdell's fitness to possess a firearm by telephoning McArdell's mother and her employer, they would have been alerted to the fact that

'... McArdell was a person with a history of mental instability and violent incidents. This would surely have set the red lights flickering and led to further investigation.'

[**41**] It is clear from the evidence before the court *a quo* (particularly that of McArdell's colleague, Marietjie Marais; that of Jacobus de Bruyn, the assistant-director of McArdell's employer and the responsible person in the event of any enquiry having been made; and the 'history' telephonically obtained from McArdell's mother by the staff at Stikland during McArdell's institutionalization there in September 1992) that, had Loubser and/or Groenewald spoken to McArdell's mother and her employer, they would probably have been alerted to her disrupted childhood and 'persecution complex' ('vervolgingswaan'), her psychological problems, her previous treatment and institutionalization, her aggression, her misuse of alcohol and/or prescription drugs and the strongly-held belief that she was unfit to possess a firearm. Once alerted to these characteristics, it is highly unlikely that these police members would have recommended to the Commissioner that McArdell have a firearm licence issued to her, and equally unlikely that the Commissioner would have issued such a licence.

[43] See the reported judgment (n1) at 693d-e.

Like the Court *a quo* –

'I ... have little difficulty in finding that the police officers at Stellenbosch, and especially Warrant Officer Loubser, acting in the course and scope of their employment with defendant, acted negligently in making the recommendation to the Commissioner to issue a firearm licence to McArdell ... Had they apprised themselves of the true facts and conveyed these to the Commissioner, the Commissioner would surely not have exercised his discretion in applicant's favour.'[44]

Causation

[**42**] The last aspect to be considered is whether the respondent discharged the onus of proving that the wrongful and negligent conduct of the police, as discussed above, was a cause of his being shot by McArdell and consequently injured. In the oft-quoted case of *International Shipping Co (Pty) Ltd v Bentley,* [45] Corbett CJ explained that ─

'As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquires. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter,* if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation" ...

Fleming *The Law of Torts* 7th ed at 173 sums up this second enquiry as follows:
"The second problem involves the question whether, or to what extent, the defendant

[44] See the reported judgment (n1) at 693g-h.
[45] 1990 (1) SA 680 (A) at 700E-701C.

should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default."'

[**43**] In regard to the first leg of the enquiry (factual causation), it must be remembered that a plaintiff is not required to prove the causal link with certainty, but simply to establish that the wrongful and negligent conduct complained of was probably a cause of the loss sustained. This enquiry –

'... calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'[46]

[**44**] As already stated, I am of the view that, had the relevant police members executed their legal duties properly, they would have come to the compelling conclusion that McArdell was not fit to possess a firearm. This information would have been conveyed by them to the Commissioner and the latter would not have issued the licence to her. There is no evidence to suggest that McArdell was likely to have acquired possession of a firearm unlawfully had her application for a licence been refused. The refusal of her application would not, of course, necessarily have prevented her from 'snapping' and losing control on 6 August 1994 (as she had done less than a year before at the Stellenbosch Hospital). However, in the words of the Court *a quo*:[47]

'The difference is that in 1992 McArdell, without a firearm licence and a firearm, broke

[46] *Van Duivenboden* above (n2) para [25] at 449E-F.

[47] See the reported judgment (n1) at 697e-f.

thick glass windows and equipment and injured herself, but caused no harm to other people. In 1994, having acquired a firearm pursuant to her having been granted the licence, McArdell shot [Dr Spangenberg,] Dr Spangenberg's husband, Ms Weber and more pertinently, plaintiff.'

[45] In light of the above, the respondent clearly established, on the requisite balance of probabilities, 'a direct and probable chain of causation' between the wrongful and negligent conduct of the relevant servants of the appellant and the shooting of the respondent on 6 August 1994. [48]

[**46**] As regards the second leg of the causation enquiry (legal causation or remoteness), it was not seriously argued by counsel for the appellant that, should all the other components of the respondent's cause of action be established, the loss suffered by the respondent was not linked sufficiently closely or directly to the negligence of the appellant's servants for legal liability to ensue. I can think of no considerations of reasonableness, fairness or legal policy which would justify a conclusion that the respondent's loss is, in the circumstances of the present case, too remote.
[**47**] In the result, the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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BJ VAN HEERDEN
Acting Judge of Appeal

Concur:

Howie P

Mthiyane JA
Conradie JA
Heher JA

[48] See too *Van Duivenboden* above (n2) paras [28]-[30] at 450H-451E.