**`IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE, MTHATHA**

**CASE NO. 1548/2007**

In the matter between:

**NTOMBENKOSI HLOMZA** **APPELLANT**

**and**

**THE MINISTER OF SAFETY**
**AND SECURITY** **FIRST RESPONDENT**

**THE STATION COMMISSIONER**
**OF THE CENTRAL POLICE**
**STATION, MTHATHA** **SECOND RESPONDENT**

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# FULL BENCH APPEAL JUDGMENT

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**D VAN ZYL J:**

[1] The appellant's late husband, Bongani Livingstone Hlomza (the deceased), was employed by the Minister of Safety and Security (the first respondent) as a police official holding the rank of inspector. He was stationed at the Madeira police station in Mthatha where he was placed under the control and supervision of the station commissioner of the Central police station in Mthatha

(the second respondent). Tragically, on 13 February 2005 at the police camp in Mthatha, the deceased used his service firearm issued to him by the second respondent to first shoot and injure the appellant, whereafter he committed suicide by shooting himself with the same firearm.

[2] The appellant thereafter instituted a claim against the respondents for damages in her personal and representative capacity as the "natural mother and guardian of the deceased's four minor children". Her claim was for payment by the first respondent in the sum of R5 080 000,00 (together with interest and costs), being damages suffered by her consequent upon the injuries she sustained (claim A) and the support she and the minor children lost upon the death of the deceased (claims B and C). The amount also included a claim for funeral expenses which were incurred by the appellant in attending to the burial of the deceased (claim D).

[3] In her summons the appellant alleged that her injuries and the deceased's suicide was due to the negligence of the second respondent and / or certain other police officials. To this extent it is alleged in summary that despite being aware of the fact that the deceased was ill tempered and unfit to possess a firearm, that he

assaulted and threatened the appellant with violence, including a threat to shoot her by pointing a firearm at her, and that the Magistrate of Mthatha had issued a protection order against the deceased, the respondents failed to enquire into the fitness of the deceased to continue to remain in possession of his service firearm, to institute disciplinary proceedings against him and to seize the firearm from his possession. Accordingly, the second respondent and other police officials should have foreseen the deceased's wrongful conduct and by failing to act in the manner alleged, they acted in breach of a legal duty owed to the appellant, the deceased and their minor children.

[4] At the trial, the first respondent admitted liability for the appellant's damages for the injuries sustained by her in the shooting incident. The trial accordingly, with the leave of the Court *a quo*, only proceeded on the question whether the respondents were liable for any damage or loss which the appellant and her minor children may have sustained as a result of the death of the deceased. Neither of the parties elected to present *vive voce* evidence. Counsel for the appellant contended that in light of the factual admissions which the respondents made in their plea, the appellant had established a *prima facie* case for the relief sought

and that there was an evidentiary burden on the respondents to lead evidence in rebuttal. Counsel for the respondents in turn held the view that there was no need to place any evidence before the Court, as the admissions which the appellant sought to place reliance on did not support her claims. It was argued that the appellant had consequently not made out a case for the relief sought, and failed to discharge the *onus* of proving the defendants are liable for any loss or damage she may have suffered as a consequence of the death of the deceased.

[5] The Court *a quo* was accordingly called upon, and proceeded to determine the issues before it, solely on the basis of the factual allegations in the appellant's particulars of claim that were admitted by the respondents in their plea. These admissions were the following:

(a) The deceased shot and injured the appellant whereafter he turned the firearm on himself and committed suicide.

(b) The deceased was issued with a service firearm for use in and outside official working hours and in the course and scope of his duties as a member of the South African Police

Services.

(c) The respondents had a legal duty to protect the appellant from being injured by the deceased and to take all reasonable steps to prevent the deceased from injuring the appellant.

(d) The appellant was injured as a result of the negligent conduct of the respondents and that such **"negligent conduct consisted in the commission of acts and / or omissions set out in sub – paragraphs 7.1, 7.3, 7.4, 7.5, 7.6, 7.7, 7.10, 7.11, 7.13, 7.16, 7.17, 7.18 and 7.19"** of the appellant's particulars of claim.

(e) The respondents ought to have foreseen the **"shooting of the plaintiff by the deceased"** and ought to have prevented it by seizing the firearm from the possession of the deceased.

[6] The relevant sub – paragraphs of paragraph 7 of the particulars of claim which were admitted read as follows:

**"7.1 they failed to seize the official firearm from possession of the deceased despite previous reports of violence made by the Plaintiff to them against the deceased;**

**7.2 ...........**

**7.3 they became aware that the deceased had threatened to shoot the Plaintiff and/or manifested threats of violence towards the Plaintiff but failed to take steps to seize the official firearm from possession of the decease;**

**7.4 they allowed the deceased to continue possession the official firearm well knowing that the deceased was unfit to possess it;**

**7.5 they failed to take measures to re-assess the fitness of the deceased to possess an official firearm after having received reports of the deceased's acts of violence from the Plaintiff;**

**7.6 they allowed the deceased to be in possession of an official firearm even after working hours well knowing that the deceased had previously threatened to shoot the Plaintiff;**

**7.7 they allowed the deceased to be in possession of an official firearm even after working hours well knowing that the deceased had adopted a violent attitude towards the Plaintiff and was ill-tempered;**

**7.8 .....................**

**7.9 .......................**

**7.10 they failed to institute a disciplinary inquiry against the deceased which would have rendered the deceased unfit to possess a firearm, especially when not on duty;**

**7.11 they failed to constitute a Firearms Committee in terms of the provisions of <u>Provincial Order 3/1998</u> upon receiving complaints of assault and pointing of a firearm from the Plaintiff and threats of violence by the deceased;**

**7.12 .........................**

**7.13 they failed to report the violent conduct of the deceased towards the Plaintiff to higher authorities in the South African Police Service;**

**7.14 ............................**

**7.15 ..............................**

**7.16 they failed to seize the official firearms from possession of the deceased well knowing that the Magistrate, Mthatha had granted a Protection Order against the deceased at the instance and in favour of the Plaintiff;**

**7.17 they authorized or allowed the deceased to possess the official firearm when not on duty;**

**7.17.1 without having first investigated whether the deceased was fit to possess a firearm; and**

**7.17.2 without investigating whether the deceased was having a stable family life or not;**

**7.18 they granted the deceased permission to possess the official firearm or allowed him to possess it when not on official duty without the prescribed official procedures having first been complied with;**

**7.19 they failed to take measures to protect the Plaintiff from being injured by the deceased when they had means and ability to do so;"**

[7] The respondents denied and placed in issue the following allegations in the appellant's particulars of claim:

(a) **"4.9 The Second Defendant and other policeman had a legal duty;**

**4.9.1 ........................**

**4.9.2 ........................**

**4.9.3 to prevent the deceased from killing himself, and**

**4.9.4 to take the reasonable steps to prevent the deceased from killing himself with an official firearm."**

**And that**

**(b) The death of the deceased was caused by the negligence of the respondents and that they should have foreseen that he would commit suicide and should have prevented him from doing so by seizing the firearm from him.**

[8] In deciding the issue of the respondents' liability for the appellant's claims in relation to her and the minor children's loss of support and the costs of the funeral expenses incurred by her, the Court *a quo* confined itself to the issue of causation. On a reading of its judgment, the Court's motivation for limiting its decision in the matter to causation, seems to be based on its view that the appellant's case effectively amounted to a contention that, once the respondents had acknowledged in their plea that they were negligent in failing to remove the deceased's firearm in circumstances where there was a legal duty to do so, it had to follow **". . . that each and every action the deceased thereafter committed with the firearm which caused harm to another, must *ipso facto* be laid at**

**the door of the dependants."** As this argument suggested limitless or boundless liability, something which the element of causation seeks to prevent, the Court saw it as determinative of the appellant's claims. It found that on the evidence the appellant had failed to discharge the onus of establishing that the respondents' negligence in failing to remove the deceased's service firearm from his possession was the cause of him being killed, and proceeded to make an order of absolution from the instance in respect of the appellant's claims B, C and D. It is against this order that the appellant was granted leave by the Court *a quo* to appeal to this Court.

[9] By way of introduction, it may be convenient to deal with two matters. The first relates to the necessity to draw a distinction between the nature and scope of the appellant's claim for damages for bodily injury on the one hand, and her claims for loss of support and funeral expenses, which form the subject matter of this appeal, on the other. This will serve to explain the issues raised in the matter and also why it is necessary to separately determine those issues despite the respondents' acknowledgement that they are liable for the appellants loss she suffered as a result of the injuries sustained by her. The appellant's claims for loss of support is what

is generally referred to as a dependant's claim, that is a claim for damages sustained as a result of the wrongful death of a person who is in law under a legal duty to provide for the maintenance and support of another. **"The remedy relates to material loss 'caused to the dependants of the deceased man by his death.' It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed."**[1]

[10] A dependant who has suffered patrimonial loss through the death of his or her breadwinner would be entitled to compensation, and the defendant would incur liability, if it is proved that the defendant wrongfully caused the death of the deceased breadwinner. To satisfy the requirement of wrongful death, the plaintiff is required to prove: (a) a wrongful act by the defendant; (b) the death of the breadwinner, and (c) a causal nexus between (a) and (b), and (d), concomitant *culpa (or dolus)* on the part of the defendant.[2]

[11] The right of dependants to claim compensation for loss of support

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1 Holmes JA in *Legal Insurance Company Ltd v Botes* 1963(1) SA 608(A) at 614 E – F.

2 **"A person is understood to kill wrongfully when it occurs by his deliberate act or his fault. And loss caused without wrongfulness is not condemned by any other *lex*, hence a person who causes some loss without fault or deliberate intent, but by accident, is not punished."** (G3.2.11. See also D9.2.5.1 and D47.10.1) See further *Evins v Shield Insurance Co. Ltd* 1980(2) SA 814(A) at 839A - C; *Santam Bpk v Henery* 1999(3) SA 421 (A) at 429 E - I and *Amod v Multilateral Vehicle Accidents Fund* 1999(4) SA 1319 (SCA) at 1324B - C.

is not derived from the deceased or his estate. **"They derive their rights from the fact that they have been injured by the death of the deceased, and that the defendant is in law responsible for it."**[3] The result is that, otherwise than in the Anglo – American jurisdictions,[4] defences which would have been available against the deceased had he lived and sued for personal loss or damage, such as waiver of action[5] or contributory negligence,[6] cannot be raised against the dependants.

[12] It also follows that despite the fact that, as in the instant matter, where both claims arise from the same negligent act or omission, the right of the appellant as a dependant to claim damages for loss of support arising out of the death of the deceased breadwinner, is a right distinct from her right to claim damages arising from the bodily injuries sustained by her. Accordingly, as opposed to a claim for bodily injury or damage to property, where the action lies against a wrongful act committed by the defendant in respect of the

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3 Innes CJ in *Union Government (Minister of Railways) v Lee* 1927 AD 202 at 222. See also *Jameson's Minors v Central South African Railways* 1908 TS 575 at 584; *Mankebe NO v AA Mutual Insurance Association Ltd* 1986(2) SA 196 (D&CLD) at 199C.

4 The claim is brought by the estate of the deceased person, and it is a condition for the existence of an action under what is commonly referred to as wrongful death statutes, that the circumstances of the death of the deceased would have been such that the deceased himself, had he been injured and not killed, would have been entitled to sue for his injury. The action is created by statute. (for example the Fatal Accidents Act of 1976 in the United Kingdom and The Fatal Accident Act of 1959 in Western Australia). The reason is the rule in *Baker v Bolton* (1908) 1 Camp 493, namely that **"In a civil court the death of a human being cannot be complained of as an injury."**

5 *Jameson's Minors v Central South African Railways* supra.

6 *Union Government v Lee* supra.

plaintiff's person or property, and with *culpa (or dolus) vis – à – vis* the plaintiff, the dependant's action requires a wrongful act *vis – à – vis* the deceased breadwinner causing his or her death[7] Similarly, it is the wrongful causing of the death of another that entitles a member of the deceased's family to be compensated for the expenses of the burial of the deceased breadwinner.[8]

[13] The second matter relates to the approach of the Court *a quo* to the evidence and more particularly the evidential value of the admissions made by the respondents in their plea. The Court *a quo* expressed the view that generally the Courts would be loath, in the absence of evidence, to extend such admissions and the inferences to be drawn therefrom, to form a basis for a finding that a fact denied by a defendant in his plea should be regarded as having been proved. It is not correct as was suggested at the hearing of this appeal by both Counsel for the appellant and the respondent, that the Court *a quo* approached the evidence on that basis. It rather, notwithstanding its expressed reservation, proceeded to decide the issues on the basis of the admissions made by the respondents in their plea. What it found was that the respondents'

7 *Evins v Shield Insurance Co Ltd* supra at 838B.
8 *Rondalia Assurance Corporation of South Africa Ltd v Britz* 1976(3) SA 243(T) at 246A.

admissions in their plea were insufficient to conclude that the appellant had proved the element of causation in the absence of evidence relating to: (a) whether the deceased may nonetheless, despite, the respondent's omission to remove his service pistol from his possession, have committed suicide: and (b) the state of mind of the deceased and the extent of his instability at the time when he shot the appellant, and then proceeded to commit suicide.

[14] There is in my view, in principle, no objection to the determination of an issue placed in dispute by a defendant in his plea on the basis of factual admissions made by him or her therein. The question in each case remains whether at the end of the trial, after both parties had an opportunity to present evidence and have closed their respective cases, there exists sufficient admissible evidence in the body of evidence before the trial court on which the issues in dispute may be determined. It matters not whether such evidence consists of admissions made in the pleadings, or is contained in other documentation which may have been placed into evidence, or of *viva voce* evidence relating to the matters in dispute. An admission of an allegation of fact in a plaintiff's particulars of claim or declaration is eliminated from the issues to be tried and

the plaintiff is as a result relieved of the duty to present evidence to establish it.[9]

[15] This statement is however subject to the *caveat* that an admission is not to be taken to extend to anything which cannot fairly be regarded as an inevitable consequence or a necessary implication thereof[10] This will require careful consideration of whether the admissions are in fact adverse to the maker thereof. To this extent one should have regard to the pleadings as a whole. The reason is that the content of the admission may be qualified, explained or even nullified by the context in which the admission was made. I may add that where a party seeks to draw inferences from an admission of fact, the admitted fact should be capable of supporting the inference sought to be drawn therefrom. In the absence thereof the method of inference fails and what is left is mere speculation or conjecture. It follows that a litigant who wishes to place reliance on the drawing of an inference from admitted facts in a defendant's plea, should be careful so as not to leave out the factual foundation necessary to draw the desired inference. This may in any particular case require the admitted

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9 Erasmus **Superior Court Practice** at B1 – 144J and the authorities referred to in footnote 1.

10 *AA Mutual Insurance Association Ltd v Biddulph and Another* 1976(1) SA 725(A) at 735 D – E and *Boompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990(1) SA 347(A) at 359 D.

facts to be supplemented by other evidence.

[16] Turning now to deal with the issues raised in the present matter, it is evident from a reading of the judgment of the Court *a quo* that the appellant contended that by reason of the decision in *Minister of Safety and Security and Another v Madyibi* [11] *(Madyibi),* the admitted facts in the respondents' plea were sufficient to hold the police liable to compensate the appellant for any loss of support she may have sustained as a consequence of the death of the deceased. The admitted facts in *Madyibi* were that the deceased, a police officer, shot himself with his service firearm after he had first shot and injured his wife. As in the present matter, she survived the shooting and proceeded to institute an action, both in her personal capacity and on behalf of her minor children born of her marriage with the deceased, for loss of support for herself and the children. The trial Court upheld her claims.

[17] On appeal the issues were limited to wrongfulness. It was held that a legal duty existed in circumstances where the police were in possession of information that the deceased had previously

11 2010(2) SA 356 (SCA).

threatened to shoot his wife; that their marriage relationship had significantly deteriorated; that his family life was unstable, and that the deceased had manifested suicide tendencies. It was found that the negligent failure of the police to dispossess the deceased from his service firearm was **". . . plainly wrongful and considerations of public or legal policy consistent with our constitutional norms would certainly demand the imposition of a legal duty in a matter such as this (See, for example, *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006(3) SA 138 (SCA) ([2007]) 1 All SA 240) at para 10; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007(3) SA 121 (CC) (2007(3) BCLR 300) at paras 39 and 41)."**[12]

[18] There are clearly similarities between the facts of the *Madyibi* case and those of the present matter. The main distinguishing factor is however that in *casu,* the respondents pertinently denied the allegation that the police **"knew that the deceased had suicidal tendencies"**[13] It was then also on this basis that the Court *a quo* held that *Madyibi* is to be distinguished. It found that in the absence of such knowledge on the part of the respondents, and in the absence of the evidence referred to earlier,[14] it cannot be concluded that their existed a casual *nexus* between the respondent's omission to

12 At para [9].
13 Paragraph 7.14 of the appellant's particulars of claim.
14 Paragraph [13] above.

remove the deceased's service firearm from his possession, and his death. By limiting itself to the element of causation, the Court *a quo* accordingly assumed for purposes of its judgment, that the issues relating to wrongfulness and negligence were established on the evidence. I do not however intend to limit this judgment to the issue of causation. The reason is that the elements of wrongfulness and fault remained in dispute on the pleadings as they stand. Further, and although wrongfulness, negligence and causation are separate elements with its own enquiry, each serving a different function,[15] they are naturally interrelated[16] and overlap in their content and on the issues raised thereby.[17] **"Broadly speaking, wrongfulness . . . on the one hand, and remoteness on the other, perform the same function. They are both measures of control. They both serve as a 'longstop' where most right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability."**[18]

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15 **"The wrongfulness enquiry focuses on whether or not the plaintiff's interest is entitled to protection from the defendant's conduct. The legal causation enquiry, in contrast, focuses on the limitation of loss flowing from the wrongful conduct. It is an enquiry into closeness or remoteness of the particular harm. Both elements function as control and balancing devices in order to establish a fair balance in fixing and limiting liability. Each has its unique and distinct character which aims to strike a fair balance between the interests of the plaintiff and the defendant."** Van der Walt and Midgley **Principles of Delict 3rd ed** at page 204.

16 See *First National Bank of South Africa Ltd v Duvenhage* 2006(5) SA 319 (SCA) at para [2].

17 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009(2) SA 150 (SCA) at para [32]. See also Neethling et al **Law of Delict 6th ed** at page 157 and 191.

18 Brand JA in *Fourway Haulage SA (Pty) Ltd v SA National Roads v Agency Ltd* supra at para [31]. See also *mCubed International (Pty) Ltd and Another v Singer NO* 2009(4) SA 471 (SCA) at para [27].

[19] Proceeding then to firstly deal with the element of lawfulness, the conduct which forms the subject matter of the appellant's complaint is the failure of the second respondent and other relevant police officials to investigate the fitness of the deceased to possess a firearm, and to remove it from his possession. The conduct of the first respondent's functionaries forming the basis of the appellant's cause of action is therefore an omission. A negligent omission is unlawful only if it occurs in circumstances that the law regard as sufficient to give rise to a legal duty to avoid harm to others. As stated by Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd:*[19]

**"Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss . . . In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms."**[20]

19 2006(3) SA 138 (SCA).
20 At para [10]. See further *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979(3) SA 824(A) at 833A; *Minister of Safety and Secutity v Van Duivenboden* 2002(6) SA 431 (SCA) at para [12]; *Gouda Boerdery BK v Transnet* 2005(5) SA 490 (SCA) at para [12] and *Van Eeden v Minister of Safety and Security* 2003(1) SA 389 (SCA) at para [9].

[20] The question whether a legal duty existed in a particular case is an after the fact objective assessment, in the sense that it is determined with reference to all the relevant facts and circumstances of the case, based on the flexible criterion of the legal convictions of the community and legal policy, both of which are now derived from the values of the Constitution, and taking into account the interplay of the many factors which may point to, or away from the existence of a legal duty.[21] According to Nugent JA in *Minister of Safety and Security v Van Duivenboden*[22], **"what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of indentifiable norms."**[23] The question whether a legal duty exists in a particular case is therefore a **"conclusion of law depending on a consideration of all the circumstances of the case and on an interplay or the many factors which have to be considered."** and **"An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and *mandamus* or interdict do not afford the victim of crime any relief at all.**

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21 *Minister of Safety and Security v Hamilton* 2004(2) SA 216 (SCA) at para [16]; *Van Eeden v Minister of Safety and Security* supra at para [9]; *Gouda Boerdery BK v Transnet* supra at para [12]; *Minister of Safety and Security v Rudman* 2005(2) SA 16 (SCA) at para [58] and *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* supra at para [10].

22 Supra.

23 At para [21]. See also *Delphisure Group Insurance Brokers Cape v Kotze* [2011] 1 All SA 109 (SCA) at para [24].

**The only effective remedy is a private law delictual action for damages."**[24]

[21] The question to be answered in the present matter is whether a police officials who, in the exercise of their duties on behalf of the State, are in possession of information that a member of the police force, over whom they have authority, is unfit to possess a firearm, are under an actionable duty, not only to members of his family, but to the police official himself, to take reasonable steps to act on that information in order to avoid death. The Court *a quo* regarded the absence of evidence that the deceased had displayed suicidal tendencies prior to his death to be determinative of the element of causation. It found that in the absence of such knowledge the death of the deceased was not reasonably foreseeable. As stated earlier[25], the factors that are to be taken into account in the enquiry in relation to the separate elements of wrongfulness, negligence and causation may overlap, and although ordinarily a standard of negligence, foreseeability is also relevant to both causation and to wrongfulness. **". . . forseeability of harm is another factor to be taken into account in determining unlawfulness. The greater the foreseeability, the greater the possibility of a legal duty to prevent harm"**[26] In

24 Vivier ADP in *Van Eeden v Minister of Safety and Security* supra at paras [9] and [19].
25 See paragraph [18] above.
26 Harms JA in *Minster of Safety and Security and Another v Carmichele* 2004(3) SA 305 (SCA) at para [44].

*Steenkamp NO v Provincial Tender Board, Eastern Cape*[27] Moseneke DCJ similarly said that **"It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant."**[28]

[22] In the circumstances of the present matter, the death of the deceased was in my view reasonably foreseeable and does not constitute an obstacle in finding that the respondents had a legal duty to act positively. I shall deal more fully with foreseeability under the heading of negligence.[29] However, foreseeability as a consideration in determining the existence of a legal duty does not stand alone. It may, in the circumstances of any particular case, be one of several factors which are to be balanced in making, what is, as stated, essentially a value judgment, based on considerations of public policy. In *Van Eeden v Minister of Safety and Security* [30]Vivier ADP explained it as follows: **" . . .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 the many factors which have to be considered."**[31] In

27 2007(3) SA 121(CC).
28 At para [42].
29 See paragraphs [28] to [34] below.
30 Supra.
31 At para [9].

*Delphisure Group Insurance Brokers Cape v Kotze* [32] Leach JA added that each case must be considered on its own merits and that **". . . there is no simple litmus test that can be applied to determine whether in all cases liability should follow"**[33]. The ultimate question is whether, on a conspectus of all the relevant facts, considerations of public policy and public interest favour a finding that a legal duty existed.[34]

[23] Other considerations which are relevant to the existence of a legal duty in the circumstances of the present case are in my view the following: The respondents occupy a public office where they perform a constitutional and statutory function, thereby introducing accountability as a relevant factor.[35] The first respondent was the employer of the deceased who was placed under the control and command of members of the police service. In that capacity the deceased was placed in possession of a State owned firearm, no doubt to be used in the exercise of his duties and functions as a police officer. The respondents exercised control over the deceased's possession of what is potentially a lethal weapon. A police official is not permitted to be in possession of a State owned

32 Supra.
33 At para [24].
34 *Steenkamp NO v Provincial Tender Board, Eastern Cape* supra at para [42].
35 See *Minister of Safety and Security v Van Duivenboden* supra at para [21].

firearm when he or she is not on duty. In terms of Provincial Order 3 of 1998, the provisions of which were admitted by the respondents in their plea, a member of the police services may apply, by following the prescribed procedure, to be given authorisation to remain in possession of his state owned firearm when not on duty if he or she believes that his or her work or personal situation justifies it.[36]

[24] In deciding whether or not to grant such an application by a member, an evaluation committee which is established at every station or unit exclusively for that purpose,[37] is tasked to consider a number of criteria. Relevant to the present enquiry is the stability of the official's family life,[38] whether he or she has a history of alcohol or substance abuse,[39] and whether he or she has **"a history of depression and anxiety"**.[40] From a reading of the stipulated criteria, it is evident that it does not only relate to a determination of whether

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36 **'1.1 Every individual member who believes that his or her work or personal situation justifies him or her to be in possession of a state owned firearm when not on duty must submit a written application in the form as per annexure "A" for permission to be in possession of a state owned firearm when not on duty to the evaluation committee as his or her station or unit. It is the applicant's duty to satisfy the committee as to the merits of the application taking the factors as per paragraph 7 hereof into account.'**

37 **'4.1 An evaluation committee to deal exclusively with applications to be in possession of state owned firearms by members of the particular station or unit, must be established at every station or unit.'**

38 **'7.1.12 Does the member enjoy a stable family or personal life? (Knowledge of family or personal strive must be taken into account).'**

39 **'7.1.15 Does the member have a history of alcohol or substance abuse for which he or she is receiving treatment (help) or for which treatment (help) is contemplated?'**

40 **Paragraph 7.1.16 of Provincial Order 3 of 1998**

there exists a need for the official concerned to perform police duties after work hours, or whether there exists a real threat to his personal safety and that of his family by virtue of his employment, but also whether his possession of his service firearm after hours may pose a threat to himself and his family. Paragraph 8.1 of Provincial Order 3 of 1998 authorises the Station Commissioner or Unit Commander of a police member to withdraw his permission to be in possession of his service firearm when off duty with immediate effect if such member makes himself guilty of serious misconduct.[41]

[25] It is evident from the aforegoing that the respondents were in a very close or proximate relationship with the deceased by virtue of his employment and the position occupied by him. Although the existence of a special relationship (proximity) is not essential for wrongfulness, **". . . if there is in fact some connecting factor between the plaintiff and the defendant, it is more likely that in the case where the defendant is an individual the breach of a duty might arise; and in the case where the defendant is the State it is less likely that there will be any**

41 **It reads as follows: "In the event of a member to whom permission to be in possession of a state owned firearm has been given making himself or herself guilty of serious misconduct, the permission can be withdrawn with immediate effect by the station commissioner or unit commander. The relevant area commissioner or the Provincial Commissioner can act likewise in the event of a member attached to the Area Commissioners office or Provincial Commissioners office makes himself or herself guilty of serious misconduct.**

**deviation from the norm of accountability that the Constitution imposes."**[42] This relationship required the respondents to exercise control over his fitness, and his continued fitness, to be in possession of a potentially lethal weapon. The provisions of Provincial Order 3 of 1998 required the respondents to assess the competence and desirability of the deceased to be in possession of his service firearm when off duty, with particular reference to his mental condition and his domestic circumstances. It is a function which they were required to perform before the deceased was granted authorisation, and thereafter, if he had made himself guilty of serious misconduct. It accordingly did not require the respondents to do anything outside of what was expected of them as part of their usual functions. The imposition of a legal duty in these circumstances would therefore not place an additional burden on the police, or have the potential to disrupt the functioning of the police, or require the provision of additional resources[43].

[26] Finally, the recognition of liability in the circumstances of the present matter would not, as a policy consideration, in my view

42 Harms JA in *Minister of Safety and Security and Another v Carmichele* supra at para [41]. See also para [44].

43 In the *Minister of Safety and Security v Van Duivenboden* supra at para [22] this was considered to be a relevant factor in deciding whether police officers who were in possession of information that reflects on the fitness of a person to possess firearms were under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm from occurring.

lead to a limitless number of claimants who are likely to bring a multiplicity of actions against the respondents.[44] As this was raised by the respondents as an objection in the context of the enquiry relating to legal causation, I shall deal more fully therewith under that heading.[45] To conclude, I am of the view that the imposition of a legal duty on the respondents in the circumstances of the present case would not offend against any legal or public policy considerations.

[27] The next question is whether the respondents were negligent. The question on the facts of the present matter is whether or not the second respondent and other relevant police officials, acting in their capacities as the servants of the first respondent, negligently breached the legal duty which rested upon them. The classic test for establishing the existence or otherwise of negligence, quoted with approval in numerous decisions, is that formulated by Holmes JA in *Kruger v Coetzee* [46]in the following terms:

**"'For the purposes of liability *culpa* arises if –**

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44 This was dealt with as a policy consideration by the Court in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* supra at paras [23] and [24] of the judgment.

45 See paragraph [44] below.

46 1966(2) SA 428(A). See also *Ngubane v South African Transport Services* 1991 1 SA 756(A) at 760B; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) at 213; *Minister of safety and Security v Rudman* supra; *Minister of Safety and Security v Hamilton* supra; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13(SCA) at 36; *Van Duivenboden* supra; *Carmichele* supra; *Kruger v Carlton Paper of SA (Pty) Ltd* 2002 2 SA 335 (SCA) at 341.

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.**[47]

Although this formulation is, as was stated in *Minister of Police v Skosana*,[48] rather directed to the position where the person injured suffered patrimonial loss, it is also applicable, with minor adjustments, to a claim by a dependant for a loss of support sustained as a result of the death of a breadwinner. Adjusted, the test is whether a reasonable person would in the circumstances have foreseen the reasonable possibility that his conduct may cause the death of the deceased breadwinner and would have taken steps to guard against it occurring.

[28] The test for negligence therefore rests on two legs, namely reasonable foreseeability and reasonable preventability of loss or

47 A 430 E – F.

48 1977(1) SA 31(A) at 33G.

harm. As stated earlier,[49] the Court *a quo* considered the issue of reasonable foreseeability in the context of determining legal causation. The question posed by the Court in deciding this issue was **"whether or not a reasonable person in the position of the police would have foreseen the likelihood of the deceased committing suicide using the firearm which they ought to have removed from him."[50]** It concluded that in the absence of evidence that the respondents had knowledge of the deceased's state of mind and the extent of his instability, his suicide was not reasonable foreseeable.

[29] There are no hard and fast rules for the determination of reasonable foreseeability. It is a flexible standard which is to be evaluated and adapted with reference to the circumstances of each case, and will, as a broad guideline, depend on the degree of the possibility or likelihood of the manifestation of harm, and the extent of the harmful consequences. **"The fundamental factor involved is the magnitude of the risk created by the actor's conduct. The magnitude of the risk comprises two elements: how strong the possibility or likelihood of harm is and the gravity or seriousness of the possible harmful consequences that are risked."[51]** In the present matter this is to be

49 See paragraph [18] above.
50 In paragraph [30] of the Court *a quo*'s judgment.
51 Van der Walt and Midgley *op cit* at page 177 to 178.

assessed with reference to the following facts: the deceased, stood in a very close relationship with the respondents by virtue of his employment as police officer.[52] In that capacity he was placed in possession of a potentially lethal weapon which he was allowed to remain in possession of even when he was not on duty. The respondents were in a position of authority over the deceased and were pertinently tasked with the duty to assess his fitness to be in possession of his service firearm when not on duty. This enquiry envisaged an investigation *inter alia* into his mental health and the stability of his domestic environment. The respondents were in possession of information which showed that the deceased was unfit to possess a firearm; that he found himself in a marriage relationship that had deteriorated to the extent that he had committed acts of violence towards his wife, threatened to shoot her with his service firearm, and it was necessary for her to obtain a restraining order against him in an attempt to secure her own safety.

[30] Although suicide may in general not be regarded as a usual occurrence, it is in the context of a troubled and fractured domestic relationship characterised by family violence, in my view not so

52 See paragraph [23] above.

uncommon and unpredictable to be outside the bounds of what may be reasonably foreseeable. In *Barnard v Santam Bpk* [53] and *Road Accident Fund v Sauls*[54] the Court quoted with approval a *dictum* of Mason J in *The Council of the Shire of Wyong v Shirt and Others*: **'A risk of injury which is quite unlikely to occur . . . may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.'**[55] As stated by Olivier J in *Road Accident Fund v Sauls*,[56] in the end the Court is required to evaluate all the relevant facts of the case in order to decide if the harm caused was foreseeable as a reasonable possibility, that is, a possibility which would not be too far-fetched or fanciful. In the present matter the respondents fairly admitted that the fact that the deceased carried out his threat to shoot the appellant was a foreseeable consequence of the failure of the police to enquire into his fitness to possess a firearm and to remove his service firearm from his possession.

53 Supra at 214 B.
54 2002(2) SA 55 (SCA) at para [9].
55 146 CLR 40 (HCA).
56 Supra at para [9].

That the deceased would then, as a consequence of having shot his own wife, turn the firearm on himself, was not, in my view, so unpredictable as not to fall within what can be said to have been reasonably foreseeable.

[31] The respondent's submission with regard to foreseeability was that where in the *Madyibi* case the police had admitted that they had knowledge that the deceased had displayed suicidal tendencies prior to his death, that is not the position in the present matter, and in the absence of such knowledge, the deceased's suicide cannot be said to have been reasonably foreseeable. By limiting the enquiry in relation to foreseeability to the presence or absence of suicidal tendencies or knowledge thereof as suggested, is to place an undue restriction thereon. The question whether a reasonable person in the position of the respondents would reasonably have foreseen the suicide of the deceased, is a question which must be considered and assessed with reference to it occurring as a likelihood (and not a probability), and is determined on <u>all</u> the facts and circumstances of the case.

[32] It may also rightfully be asked whether the question posed by the Court *a quo* in deciding the issue of reasonable foresseability was not too narrowly framed.[57] In other words, was it incumbent on the appellant to show that the suicide itself was foreseeable? Being a dependant's action, the appellant was simply required to show that the death of the deceased was foreseeable. It was not necessary for the appellant to show that the respondents ought to have foreseen the exact manner in which the deceased would meet his death. As stated in *Hughes v Lord Advocate,*[58] **"to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable."**[59] In *Kruger v Van der Merwe and Another*[60] it is said that foreseeability **". . . in relation to the remoteness of damage does not require foresight as to the exact nature and extent of the damage; cf. *American Restatement of the Law,* Torts (Negligence), para 435. It is sufficient if the person sought to be held liable therefor should reasonably have foreseen the general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct."**[61]

[33] Although applied in the context of determining the element of

57 See paragraph [28] above.
58 [1963] AC 837.
59 At 857.
60 1966(2) SA 266 (A).
61 At 272 F – G. See also *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 SA 747 (A) at 768G.

causation, the same principle applies to reasonable forseeability as a test for negligence. In *The Premier of the Western Cape Province v Loots NO*[62] Brandt JA explained it as follows: **". . . the relative approach does not require that the precise nature and extent of the actual harm which occurred was reasonably foreseeable. Nor does it require reasonable foreseeability of the exact manner in which the harm actually occurred. What it requires is that the general nature of the harm that occurred and the general manner in which it occurred was reasonably foreseeable. At some earlier stage there was a debate as to whether our courts should follow the relative approach as opposed to the so-called abstract or absolute approach to negligence. But it now appears to be widely accepted by academic writers, on good authority, that our courts have adopted the relative approach to negligence as a broad guideline, without applying that approach in all its ramifications."**[63] The continued possession by the deceased of his service firearm in the circumstances sketched, despite his admitted and obvious unfitness to be entrusted with such a weapon, created a risk not only to the safety of others, but to that of the deceased himself. That his death ensued as a result of a deliberate act, as opposed to his own negligence, is simply a variation of what was foreseeable, and falling within the risk created by the fact that a person who was unfit to possess a firearm was entrusted with the continued

62 (214/2010) [2011] ZASCA 32 (25 March 2011).
63 At para [13].

possession thereof.

[34] However, for the reasons stated earlier,[64] I am satisfied that the reasonable possibility of the deceased committing suicide was foreseeable. It follows that the respondents were accordingly obliged to take such precautions as were reasonable to guard against that eventuality. **"What those steps would have been depends on an examination of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These have been said to include: '(a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm'.**[65] On the facts of the present matter the first two considerations would have prompted a reasonable person to take steps to prevent the occurrence. A reasonable person in the position of the respondents would have acted on the information concerning the conduct of the deceased, caused an enquiry to be held into the fitness or otherwise of the deceased to be in a continued possession of his service firearm as envisaged by Provincial Order 3 of 1998, and to remove

64 Paragraph [29] to [30] above.

65 Scott JA in *Gouda Boerdery BK v Transnet* supra at para [14]. See also *Ngubane v South African Transport Services* 1991(1) SA 756 (A) at 776 F – G and *Minister of Safety and Security v Van Duivenboden* supra at para [23].

it from his possession. I accordingly conclude that on the admitted facts negligence has been established.

[35] The last aspect to be considered is whether the death of the deceased was too remote to be a cause of the respondents' negligence. Causation involves a consideration of two different questions, namely (a) whether any factual link exists between the defendant's conduct and the harm sustained by the plaintiff, and (b) whether the defendant should be held legally responsible for the consequences of his conduct. In *Minister of Police v Skosana*[66] this distinction is explained as follows:

> **"The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to (see *Silva's Fishing Corporation (Pty) Ltd v Maweza,* 1957(2) S.A. 256 (A.D.) at p 264; *Kakamas Bestuursraad v Louw,* 1960(2) S.A. 202 (A.D.) at p222) the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio.* If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote."**[67]

66 Supra.
67 At 34 F – G.

[36] The enquiry relating 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 applying this test the Court is required to **"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."**[68]

[37] Where, as in the present matter, the respondents' conduct consists of an omission, the determination of factual causation involves a retrospective analysis of what would probably have happened if they had acted positively. It requires one to substitute the respondents' omission with a lawful positive act. If the hypothetical positive conduct of the defendant would probably have prevented the particular consequence from occurring **". . . then the omission was a necessary condition and therefore a cause of the**

68 Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990(1) SA 680 at 700F – H.

**consequence. Conversely, if the consequence would probably still have occurred, then the omission was not a necessary condition and cause of the consequence."**[69] The onus is on the plaintiff to establish this proposition on a balance of probabilities.[70]

[38] Applied to the present matter, the question is whether the death of the deceased would have occurred if the respondents had enquired into, and determined his fitness to remain in possession of his service firearm. On the facts there can be little doubt that if an enquiry was conducted, and on the information that was known to the respondents, the deceased would have been found to be unfit to possess a firearm. I can also see no grounds upon which the deceased would have been permitted to remain in possession of his service firearm, considering the fact that he had threatened to shoot the appellant and acted in a violent manner towards her to the extent that it was necessary for her to obtain a restraining order. It is therefore not surprising that in these circumstances the obvious unfitness of the deceased to have remained in possession of a firearm was admitted by the respondents in their plea.

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69 Van der Walt and Midgley *op cit* at page 199.

70 (See *Meevis v Sheriff, Pretoria East* 1999(2) SA 389 (T) at 396H; *Minister of Police v Skosana* 1977(1) SA 31 (A) at 35 D – F and *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004(1) SA 515 (SCA) at para [33]).

[39] Accepting this to be the position, the Court *a quo* however found that notwithstanding the respondents' omission to remove the firearm from the possession of the deceased, it cannot be excluded, that in the absence of evidence of how the events relating to the shooting of the appellant and the death of the deceased unfolded, that the deceased would nonetheless have killed himself. He may, according the Court, have had access to another firearm, or, had he been bent on committing suicide, he could have done so without the use of a firearm. **"He could, for instance, have cut his wrists or jumped off a high-rise building . . ."**[71]

[40] The *onus* to establish a factual link between a defendant's conduct and the detrimental consequence in question does not, as stated by Van Heerden AJA in *Minister of Safety and Security v Halmilton*[72] require the plaintiff to prove the casual link with certainty, **". . . but simply to establish that the wrongful and negligent conduct complained of was probably a cause of the loss sustained."**[73] The enquiry according to Nugent JA in *Minister of Safety and Security v Van Duivenboden*[74] calls for **" . . . a sensible retrospective analysis of what would probably**

71 From the judgment of the Court *a quo*.
72 Supra.
73 At para [43].
74 Supra.

**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."**[75] To this may be added that it is **". . . usually sufficient for purposes of factual causation if a defendant's conduct has in any way contributed to the damage sustained by the plaintiff, for causation it is unnecessary that his conduct should be the only cause, or the main cause, or a direct cause.**"[76]

[41] What is accordingly required is to conduct a retrospective analysis of what probably would have happened if the respondents had removed the deceased's service firearm from his possession.[77] As this is a hypothetical enquiry, it is in most cases a matter of inference from experience of how things generally happen rather than being capable of direct proof.[78] The natural and most likely result of finding the deceased unfit to possess a firearm and removing his service firearm from his possession, is that it would have rendered him unable to carry out his threat to shoot the appellant, and to end his own life by shooting himself. The attempt on the appellant's life, which is on the facts correctly admitted to be casually linked to the failure of the respondents to disarm the

75 At paragraph [25].
76 Neethling *et al op cit* at page 187.
77 See Minister of Safety and Security v Van Duivenboden supra at para [25] and Minister of Safety. and Security v Carmichele supra at para [60].
78 Fleming **The Law of Torts 8th ed** at page 194 and 195.

deceased, and the latter's suicide, cannot be separated. As facts very seldom stand in isolation, but flow or arise from one another, a particular consequence may be the result of a sequence of events forming a factual causal chain that contributed to the production thereof. In other words, the question is whether the respondents' negligent omission is a necessary condition in a set of conditions jointly sufficient to produce the death of the deceased. On the facts of the present matter, human experience and common sense dictates that the probability is that the decision of the deceased to commit suicide was inspired or motivated by his attempt on the appellant's life. Stated differently, but for the attempt on his wife's life, he would in all probability not have committed suicide.

[42] The admitted facts in my view, therefore raise as a probability, that positive conduct on the part of the respondents would not only have prevented injury to the appellant, but would also have prevented the death of the deceased from occurring. On the available evidence there accordingly exists *prima facie* proof of factual causation. In the absence of evidence from the respondents in rebuttal, the only question that may rightfully be asked is whether the available evidence also admits to a conclusion that as a

probability, the death of the deceased would still have occurred. In my view it does not, and the suggestion that the deceased may have been bent on killing himself, or that he may unlawfully have acquired possession of another firearm, amounts, in the absence of an evidential basis therefor, to mere speculation.

[43] The next question is that of legal causation, namely whether the respondents' omission is linked sufficiently closely or directly to the death of the deceased for legal liability to arise, or whether as it is said, it is too remote. The test for legal causation is said to be **". . . a flexible one in which factors such as reasonable foreseeability, directness, the absence of or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice will play their part."**[79] In *Smith v Abrahams*[80] the Court emphasised that although comparisons between the facts of a particular case which has to be resolved and the facts of other cases in which a solution has already been found, or which might hypothetically arise, may be useful and even decisive, care should be taken not to lay down fixed or generally applicable rules or principles for the process of comparison. Accordingly, the argument that a plaintiff's claim should **"in**

79 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* supra at 765A. See also *Road Accident fund v Sauls* supra at para [12]; *Minister of Safety and Security v Hamilton* supra at para [42] and *Fourway Haulage SA (Pty) Ltd v S A National roads Agency Ltd* supra at para [33]

80 1994(4) SA 1 (A)

**principle"** be rejected, is misplaced. **"Daar is net een 'beginsel': om te bepaal of die eiser se skade te ver verwyderd is van die verweerder se handeling om laasgenoemde dit toe te reken, moet oorwegings van beleid, redelikheid, billikheid en regverdigheid toegepas word op die besondere feite van hierdie saak."**[81] (my emphasis).

[44] In the present matter reasonable foreseeability and policy were raised as considerations that may militate against a finding that the failure of the respondents to act upon the information in their possession, was causally closely or directly linked to the death of the deceased. As I have concluded earlier, the suicide of the deceased was in the circumstances of the present matter an occurrence which was reasonably foreseeable.[82] With regard to the consideration of public or legal policy, Counsel for the respondents in his heads of argument raised the concern that to hold the respondents liable for the death of the deceased would **"open the floodgates to persons using firearms with the hope of enriching their families,"** and extend a duty to the police that would go beyond their statutory and constitutional functions. The fear that a finding of liability in the present matter may result in the imposition of liability in a wide range of similar situations, or may give rise to a

81 At 18 E - G
82 Paragraph [30] above.

limitless number of claimants who are likely to bring a multiplicity of actions, is in my view not justified. This is not the type of case where liability cannot be imposed without it also extending to a number of other cases. Both the existence of a legal duty and legal causation in the present matter is largely fact and circumstance based. Establishing a predictable or uniform outcome in other cases falling within the same **"category"**, is for this reason not a real danger. If the broader social interest of the public at large is considered, the imposition of liability in the present matter would not, as stated earlier,[83] disrupt or place an undue burden on police resources. It is also highly unlikely that large numbers of breadwinners would now, as a result of a finding of liability in this case, proceed to take their own lives simply to benefit their dependants. Liability will in each case further be limited or controlled by the elements of wrongfulness and fault, particularly with reference to considerations such as foreseeability, proximity and control.[84]

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83 see paragraph [25] above

84 As stated by Lord Denning MR (albeit in the context of the English law of tort) in *Lamb v Camden London Borough Council* [1981] QB 625 (CA) at 636: **"The truth is that all these three – duty, remoteness and causation – are all devices by which the courts limit the range of liability for negligence or nuisance. As I said recently '. . . it is not every consequence of a wrongful act which is the subject of compensation. The law has to draw a line somewhere'. Sometimes it is done by limiting the range of the persons to whom duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote to be a head of damage. All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide."**

[45] To conclude, in my view an application of the considerations relevant to legal causation does not on the facts of the present case require a denial of the appellant's claims. From what has been said above, the suicide of the deceased was a reasonably foreseeable consequence of the respondents' failure to comply with their legal duty. It being foreseeable, it does not constitute a *novus actus interveniens* that broke the chain of events.[85] Furthermore, to hold the respondents liable for the death of the deceased, does not in my view militate against considerations of legal or public policy, reasonableness, fairness and justice.

[46] For these reasons I would allow the appeal and make the following order:

(a) The appeal is upheld with costs, such costs to include the costs occasioned by the employment of two Counsel; and

b) Paragraph 2 of the order of the Court *a quo* is set aside and is substituted with the following order:

**"The first defendant is liable for any proven damages the plaintiff may have suffered as a result of the death of the deceased, namely**

85 *Ebrahim v Minister of Law and Order* 1993 2 SA 559(T) at 566; *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) at 697; see also *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) at 474.

**Bongani Livingston Hlomza, as set out in claims B, C and D of her particulars of claim."**

**D VAN ZYL**

**JUDGE OF HIGH COURT**

I agree

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**L P PAKADE**

**ACTING DEPUTY JUDGE PRESIDENT**

I agree

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**M NOTUNUNU**

**ACTING JUDGE OF THE HIGH COURT**

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|---|---|
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