Justice Froneman and Transformative Delict

E Zitzke*

Online ISSN
1727-3781

P·E·R
Pioneer in peer-reviewed,
open access online law publications

Author

Emile Zitzke

Affiliation

University of Witwatersrand,
South Africa

Email

Emile.Zitzke@wits.ac.za

Date Submitted

19 September 2023

Date Revised

4 December 2023

Date Accepted

4 December 2023

Date Published

11 June 2024

Guest Editors

Prof E du Plessis
Prof K van Marle

Journal Editor

Prof C Rautenbach

How to cite this contribution

Zitzke E "Justice Froneman and Transformative Delict" *PER / PELJ* 2024(27) - DOI http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16888

DOI
http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16888

Abstract

In this article the Constitutional Court judgments of Justice Johan Froneman are analysed with the aim of assessing his contribution to the South African law of delict. It is argued that traditional delict scholarship in South Africa is common-law centric in the sense that the common-law rules and principles that regulate the discipline are regarded as "delict proper" while constitutional considerations, statutes, and the customary law of injuries are effectively side-lined as "delict improper". Justice Froneman's approach to adjudicating delictual (or delict adjacent) matters has the effect of de-centring the common law's hegemony in our discipline. Instead, Froneman encourages those who work with delict to: Infuse it with constitutional spirit continuously; respect the legislature's important democratic role that should not be forced into common-law categories of thinking; take up the challenge of Africanising the common law through a healthy exchange with customary law; and see delict as a discipline that has restorative-justice potential. In this contribution, it is argued that these common law de-centring principles in Justice Froneman's delictual jurisprudence is transformative and critical in nature. As such, those seeking to merge the basic tenets of transformative constitutionalism, South African critical legal studies, and legal practice, may find great value in Froneman's delictual jurisprudence.

Keywords

Justice Johan Froneman; delict; transformative constitutionalism; critical jurisprudence.

.....

1 Introduction

Justice Johan Froneman has not met me in person before, but it certainly feels as if I have met him through reading his judgements, and his delict judgments in particular. In this contribution to one of his commemoratives, I intend to pay tribute to Justice Froneman as legal thinker by reflecting on some of his Constitutional Court judgments that relate in some way to the South African law of delict.

My thesis is that Justice Froneman provides delict scholars with a map of sorts to forge a "transformative constitutional" and "critical" path through our discipline. Roughly, by this I mean that his jurisprudential approach challenges traditional beliefs about delict — delict's legal culture, if you will — through historically self-conscious applications of the *Constitution of the Republic of South Africa*, 1996.[1]

To prove this thesis to be valid, I start by unpacking the problem that I call the "common-law centric approach" to the study of the discipline currently known as the law of delict. This will be followed by what I will call four "de-centring principles" that I think we can extract from Justice Froneman's delict judgments in the Constitutional Court. Those four principles are de-centring in the sense that they disrupt the common law's centricity in delict through creative applications of constitutional principles. My argument will thus be that the de-centring principles are transformative and critical in nature.

2 The common-law centric problem

Justice Froneman has told us before that every legal system has a "vision" or "legal culture" that informs it.[2] The vision or culture describes how we as lawyers (and perhaps the public) perceive the law: What the law is, why it exists, how it comes into existence, and what we do with it, are all questions whose answers give us an idea of the prevailing legal culture.[3] Karl Klare similarly describes legal culture as the

> professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and

* Emile Zitzke. LLB LLD (UP). Associate Professor of Law, University of the Witwatersrand, Johannesburg, South Africa. Email: Emile.Zitzke@wits.ac.za. ORCiD: https://orcid.org/0000-0001-5288-8679.

1 This line of reasoning is informed by a joint reading of Klare 1998 *SAJHR*; Van Marle 2009 *Stell LR*; Zitzke 2014 *Acta Academica*.

2 Froneman 2005 *Stell LR* 3-4.

3 Froneman 2005 *Stell LR* 4.

> ethical commitments influence professional discourse? What understandings of and assumptions about politics, social life and justice? What 'inarticulate premises, [are] culturally and historically ingrained' in the professional discourse and outlook? A defining property of legal cultures, particularly relatively homogeneous and stable legal cultures, is that its participants tend to accept its intellectual sensibilities as normal.[4]

I would argue that legal culture, in the senses used by Justice Froneman and Klare, can operate at both macro and micro levels. Macro legal culture tells the story about our vision for law broadly understood. Micro legal culture might zoom in on the specific inarticulate premises within a particular legal discourse, for example, the law of delict. In this more specific micro context, we might ask questions like: What is delict? Why does it exist? What ought we do with it? How do we argue within the discipline, especially among the intellectual custodians of delict? To recast Klare, if delict's legal culture is "relatively homogenous and stable" then delict scholars would "tend to accept its intellectual sensibilities as normal".

Against this backdrop, let us turn to consider how influential scholars generally tend to define the law of delict in South Africa and what that means for the "normal" understanding of the law of delict.

A delict, properly so-called, some canonical writers would say, involves culpable and wrongful conduct that causes harm to another.[5] These famous five elements have predominantly been influenced by Continental European thinking about the subject matter where generalised principles win the day.[6] Other South African delict thinkers, often writing under the influence of English law throughout the years, have defined delict more broadly to involve either a "breach of a duty imposed by law, independent of the will of the party bound"[7] or the "infringement of another's interest".[8] A via media has also been proposed which recognises the generality of delicts being "civil wrongs" while simultaneously recognising the specific prominence of the five general elements.[9]

What these authoritative voices on the South African law of delict have in common is the belief that the law of delict is a discipline that is exhaustively captured in the common law. In many traditional delict texts, constitutional rights, statutes, and customary law have, at best, a minor auxiliary role to play (if at all) in the law of delict. The implication of this understanding of

---

4 Klare 1998 *SAJHR* 166-167 (footnotes omitted).
5 This definition is strongly endorsed by Neethling and Potgieter *Law of Delict* 4; Van der Merwe and Olivier *Die Onregmatige Daad* 1.
6 Neethling and Potgieter *Law of Delict* 4.
7 McKerron *Law of Delict* 5.
8 Boberg *Law of Delict, Vol 1: Aquilian Liability* 16.
9 Midgley and Van der Walt *Principles of Delict* para 2.

delict has resulted in a relegation of other sources to the backburner or, in more extreme cases, the other sources being put in midst of the stove's fire.

Regarding the *Constitution* and its infiltration into the law of delict, it is noteworthy that some delict scholars initially resisted the introduction of human rights into the South African legal system in the 1980s and 1990s.[10] Despite quasi-religious oppositional vigour against the *Constitution*, these delict scholars eventually realised that the potential correlation between subjective rights and constitutional rights was not going to destroy the foundations of private law (and specifically the law of delict) as it was known at the time.[11] As such, the canonical writers argued that the role of the *Constitution* in the then-new democracy would be to affirm everything that the common law of delict had already said about rights. Of course, in cases where the *Constitution* was used to chastise the ANC government, those scholars welcomed the "Satanic" Bill of Rights that they had condemned to hell just a few years earlier.[12] But they were and still are more reluctant to accept that the *Constitution* might reach into realm of interpersonal relationships among non-state actors inter se.[13] Orthodox voices in delict have also been incredibly passive in terms of thinking futuristically about specific rules, values, principles, or issues where the *Constitution* might be invoked to change the law (and by extension, perhaps, the world) as we know it.[14] This has sometimes resulted in perhaps too strong a focus in getting the common law right (read: "pure"), at the expense of thinking whether the *Constitution* has any role to play at all.[15]

On the front of statutes and their interaction with the law of delict, the only delict book to date that acknowledges that there are statutory delicts is the most recent edition of *The Law of Delict in South Africa*, where Wessels excellently canvasses the *Road Accident Fund Act*[16] and the *Compensation for Occupational Injuries and Diseases Act*[17] as examples where "the law of delict has been developed by legislation".[18] Other delict scholars, who have historically been concerned with cordoning off the parameters of "delict proper", have either expressly or implicitly pushed aside statutory liability schemes. It is imaginable that at least one reason for not treating the statutory schemes as "delict proper" is because the five general elements do not always find comfortable expression in those statutes. With that said though, Klopper's authoritative work on the Road Accident Fund, for

10 Zitzke 2017 *Fundamina* 208ff.
11 Zitzke 2017 *Fundamina* 212.
12 Zitzke 2017 *Fundamina* 212.
13 Zitzke 2017 *Fundamina* 213-214.
14 For a critique of this position see Davis 2015 *Acta Juridica* 182ff.
15 Zitzke 2017 *Fundamina* 215.
16 *Road Accident Fund Act* 56 of 1996.
17 *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.
18 Loubser and Midgley *Law of Delict* para 36.1.

example, relies heavily on the delict canon.[19] This indicates that the divergence between the common law and the statutory law of delict is not gargantuan. One is left wondering to what extent the welfare spirit of socialism and redistributive justice that often underlies legislative delictual schemes could be the true reason for the refusal to accept the existence of a statutory law of delict.[20] The uncertainty of the underlying reasons aside, statutes are certainly not regarded as forming part of "delict proper" in South African legal scholarship.

The role of customary law in traditional delict scholarship has been even more neglected than the *Constitution* and statutes. While most of the canon acknowledges constitutional application in a delictual context, customary law largely goes unnoticed. Loubser and Midgley at least have a paragraph dedicated to customary-law delicts and the value of ubuntu in customary law, but readers are ultimately directed to the established customary law works for further details.[21] The law of delict canon's reluctant embrace of customary law as a foundational source of law in the discipline is a strange state of affairs especially when compared to how, for example, family law and succession scholars have risen to the occasion of integrating customary law principles alongside common law ideas. One reason for that might of course be the fact that statutes have largely codified the law on customary marriages and succession.[22] However, uncodified customary law (including recent court decisions) is by no means less important than its statutory versions.[23] In fact, Osman cautions us that codified customary law may in some cases involve common-law centric distortions of what the true African law involves.[24] While the reasons for the poor reception of customary law in delict scholarship are unrecorded, the tragic reality is that customary law is not regarded as "delict proper" in the South African canon.

In summary, "delict proper" is simply the common law of delict. Everything else is peripheral and subsidiary to the discipline. Now the question may arise as to why this matters. I am of the view that there are jurisprudential and practical reasons why we should resist, at all costs, the view that our discipline is and should be fully common-law centric.

In terms of jurisprudence, we know that the *Constitution* reigns supreme in our legal system (per section 2) and requires an ongoing process of implementation through legal re-imagination.[25] At its core, this is what

19 Klopper *The Law of Third Party Compensation*.
20 See Millard *Loss of Earning Capacity* 179-187.
21 Loubser and Midgley *Law of Delict* para 3.3.
22 See the *Recognition of Customary Marriages Act* 120 of 1998 and the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.
23 See Rautenbach 2019 *PELJ* 1.
24 See Osman 2019 *PELJ* 1.
25 See Klare 1998 *SAJHR* 150.

applied transformative constitutionalism is about. Davis and Klare explain it as follows:

> By a "transformative methodology" we mean an approach to legal problems informed by the values and aspirations of the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundations of a just, democratic, and egalitarian social order. Transformative legal methodology brings these values to bear on a context-sensitive view of the case seen in the light of all pertinent ethical and socio-economic considerations, as best these can be determined. Transformative methodology is attentive to the values of stability, predictability, and administrability. At the same time, the solutions it generates are not eternal; its results are always understood to be "provisional", that is, as always being open to reconsideration and contestation as experience progresses, understanding deepens, and/or circumstances change.[26]

We know that statutes carry special weight in that, in terms of the doctrine of adjudicative subsidiarity, legislation may give effect to constitutional rights and ought to apply to the exclusion of the common or customary law in certain cases (per section 8(3)).[27] We also know that customary law ought to be taken much more seriously than during formal colonial apartheid (per section 211(3)).[28] The overall picture sketched is that our constitutional jurisprudence requires us to approach the diverse sources of law in our legal system more holistically. This is surely true if we take seriously the famous dictum from *Pharmaceutical Manufacturers* instructing us that we have one legal system in South Africa today and that is law under the *Constitution*, because every other source of law derives its power from and has its proper place dictated by the *Constitution*.[29]

Practically, the common-law centric approach is not how the courts are dealing with delict at the moment. Notably, I will soon show, it is not how the Froneman Court dealt with delict, ever. So, from a realist perspective, we are not teaching students or practitioners what is really being done by the apex courts with delict. I am further of the view that, in terms of legal education, we are setting up lawyers to fail to have complex critical thinking skills where an integrated understanding of the law is often required to struggle through legal issues. I think that the apex courts get it right when they look at delict problems through a complex lens of a variety of different legal sources that interact with one another in symbiotic ways, because this is when the single-system-of-law principle thrives.

---

26 Davis and Klare 2010 *SAJHR* 412.

27 See Visser 2022 *De Jure* 128ff.

28 Rautenbach 2019 *PELJ* 10 puts it like this: "both common law and customary law are, at least theoretically, treated the same – they are both sources of South African law. Customary law is an independent source of South African law, just as common law is".

29 *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

Thankfully, all hope is not lost. In part, thanks to Justice Froneman's critically transformative delict judgements. His judgments are "transformative" in the sense explained by Davis and Klare above. His judgments are "critical" in the sense that they challenge us to think beyond the status quo. His judgments are "critically transformative" in the sense that the *Constitution* is the main vehicle for rethinking our approach to the law as we have come to know it.

I will now argue that Justice Froneman's judgments contain some keys that may help us unlock the riddle as to what an "un-common" law of delict might look like. In the next part, I turn to elaborate on four de-centring principles that work to disrupt the common law's centricity in popular delict scholarship, as derived from Justice Froneman's delict work. An exercise like this is necessarily selective and not exhaustive of every single delict judgment that Justice Froneman has ever penned down. I will consider both sole authored and co-authored judgments.

3 Justice Froneman's de-centring principles

3.1 The Constitution cannot be ignored in delictual cases

The first de-centring principle that Justice Froneman has repeatedly emphasised in his delict judgments is that the *Constitution* must necessarily play a transformative role in all delictual matters. I will consider two pertinent cases in this regard: *H v Fetal Assessment Centre*[30] and *Masstores v Pick n Pay*.[31]

In *H*, a mother was never informed by her medical team that her foetus was likely to be born with Down's Syndrome. The child's contention was that the mother would have aborted the pregnancy if she was properly informed. H claimed damages from the Fetal Assessment Centre for his medical expenses and pain and suffering. The essence of the claim is that the child would have been better off if never born. This was a contentious claim. The South African courts, up to that point, had been unwilling to recognise a claim of this nature, sometimes dubbed a claim for "wrongful life". In contrast, our courts have been willing to recognise a claim brought by the pregnant woman who was not properly informed of the risk of her child being born with a disability (and would have terminated had she known), because she has increased maintenance costs once the child is in fact born.[32]

In *Steward v Botha*,[33] a unanimous Supreme Court of Appeal famously concluded:

30 *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) (hereafter *H*).
31 *Masstores v Pick n Pay* 2017 1 SA 613 (CC) (hereafter *Masstores*).
32 *Friedman v Glicksman* 1996 1 SA 1134 (W).
33 *Steward v Botha* 2008 6 SA 310 (SCA) (hereafter *Steward*).

> I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law. For that reason in my view this court should not recognise an action of this kind.[34]

On a holistic reading of *Steward*, it is clear that there are a variety of competing value considerations at play in this conundrum. It seems that the Supreme Court of Appeal was equally swayed in both ways and thus, caught in the middle, did not want to take a firm stand in either direction.[35] The truth is of course that in the adjudicative process, making no decision inevitably favours one value position over another.

Given the finding in *Steward*, the High Court in *H* upheld the Fetal Assessment Centre's exception to H's claim.[36] H appealed to the Constitutional Court, where Justice Froneman penned the unanimous majority judgment.

After clarifying that cases involving substantial common-law development should ideally not be decided on exception,[37] Justice Froneman continued with the substance of the appeal. While being mindful of the conceptual difficulties in proving all the elements of the common law of delict in a case like this that requires a court to weigh up the child's existence with the child's non-existence (raising doubt about the presence of the element of harm), Justice Froneman cautioned that a pure formalistic reading of the existing law could obfuscate important value choices that ought to be made.[38] About this value choice he says:

> And it is a choice that judges under our Constitution need to acknowledge openly and defend squarely when they make it. Not to do so says that there are areas of life and law where the values of the Constitution may be ignored. That is not the kind of choice that our Constitution allows judges to make. They must ensure that the values of the Constitution underlie all law, not that some part of the law can exist beyond the reach of constitutional values.[39]

This is surely a correct angle of approach to the problem. The question of what it means to be human (problematised in *Steward*) has always been central to the law on legal subjectivity and has not usually been avoided in the law of persons simply because of its philosophical difficulty. So much

34 *H* para 28 (footnotes omitted).
35 *H* para 15.
36 *H* paras 3-5.
37 *H* para 14.
38 *H* para 22.
39 *H* paras 22-23.

the more in a time of constitutional supremacy where every part of the law must be subject to constitutional testing.[40]

Substantively, in this case, Justice Froneman reminds us that the common law must always square up with the *Constitution*'s values, including "equality, dignity and the right of children to have their best interests considered of paramount importance in every matter concerning the child".[41] Reflecting on *Steward*, Justice Froneman was concerned about the fact that the constitutional best-interests-of-the-child standard did not receive the prominent attention that was required.[42] He construes a hypothetical scenario where a child is born with a disability and have parents who are for some reason unable to pursue their own claim against the negligent doctor. In such a case, it is practically odd to suggest that the parents would have been able to succeed with the claim, but the child could not. In fact, it seems to run contrary to the best-interests principle that applies to children.[43] If the common law's structure is inherently incapable of accommodating such a claim, a pure constitutional remedy, like constitutional damages might be appropriate and should be considered by the courts.[44]

In the end, the matter was sent back to the High Court for substantive engagement with the possibility of granting leave to amend the pleadings.[45] The take-home messages of this judgment are nonetheless profound for how we approach delictual matters (and probably all legal matters). Even if the common law appears to be cast in stone and even if it poses serious hurdles to a victim's claim, we are challenged by Justice Froneman to be open to re-imagining the law of delict as we know it; to disenchant it from a

40 While classical liberals might object to Justice Froneman's contention that all areas of life and law are subject to constitutional scrutiny, I do not think that Justice Froneman's point is that there is no space for individual liberty. What I do think Justice Froneman is saying is that even our most private realms are demarcated in significant ways by law under the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*). After all, we have a demarcated private realm thanks to the constitutional right to privacy. How that private realm is demarcated is often determined with reference to other constitutional rights, for example, the best interests of children, as we see in child abuse and child pornography cases.

41 *H* para 49.

42 *H* para 52.

43 *H* paras 62-65.

44 *H* para 66.

45 *H* paras 78-79. Academic commentaries on the future of wrongful life claims in South Africa after the case of H are divided. For an overview of future possibilities see Chürr 2015 *Obiter* 760-761; Mahery 2016 *SAMJ* 348-349. Some support the Constitutional Court's nudging to recognise such claims: Neethling and Potgieter 2015 *LitNet Akademies* 372-373; Boezaart 2015 *Stell LR* 422. Other are more sceptical about the future of the claim: Van Loggerenberg 2017 *SALJ* 183; Rabie 2016 *LitNet Akademies* 521-522. Resolving this issue is not the main business of this article and I take it no further here.

formalist noose that smothers important constitutional value-based reasoning. Indeed, we are challenged to accept that even the banal, formerly straight-forward doctrinal questions might require constitutional re-invigoration because the *Constitution* is always speaking.

A similar sentiment about constitutional supremacy and its relationship to delict is expressed in *Masstores*, where Justice Froneman wrote the majority judgment.[46] The short version of that case is that Pick n Pay leased mall space subject to the proviso that no other supermarket would trade in the mall. A supermarket owned by Masstores subsequently also leased space for a store in the same mall. Pick n Pay sought an interdict to prevent Masstores from trading in the same mall, alleging that a wrongful contractual interference took place in terms of the established rules of Aquilian liability.

Dealing with jurisdiction, Justice Froneman reasons, in part:

> This court has jurisdiction to deal with these issues. They involve the assessment of wrongfulness in delict. This assessment raises matters of policy, infused by constitutional values. This court has on a number of occasions held that this is sufficient to found constitutional jurisdiction.[47]

Through this statement, he indirectly affirmed that the *Constitution* cannot be ignored in cases related to the common law of delict. Of course, this is not a brand-new principle in our law because, since *Carmichele v Minister of Safety and Security*,[48] the interplay of wrongfulness and constitutional rights, duties, and values is firmly established in our law. But what makes this case interesting is that this is not the type of case where constitutional rights traditionally make headline appearances. It is a case related to pure economic loss where we do not traditionally find much constitutional spice. Pure economic loss cases are usually dealt with from the starting point that causing such harm is not wrongful and that it will sometimes take satisfying exceptional conditions before a finding of wrongfulness will be made.[49] There is a long history of a spirit of pure economic loss reluctance in our courts.[50]

In this regard, an interesting argument has recently been made by Bhana and Visser.[51] They argue that a connection exists (or at least ought to exist) between the way in which patrimonial harm is defined in Aquilian liability (roughly: the reduction of a person's net worth, extending well beyond mere

---

46 While I do not go into the legal minutiae of this case, it should be noted that Neethling and Potgieter 2017 *LitNet Akademies* 388 are of the view that the Court got the substance right.

47 *Masstores* para 13.

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

49 See Burchell 2000 *Acta Juridica* 131-132.

50 See Wessels 2020 *THRHR* 152ff; Fagan 2014 *SALJ* 290ff.

51 Bhana and Visser 2019 *SAJHR*.

tangible property harm)[52] and the way in which the constitutional concept of property found in section 25 is rather flexibly understood.[53] They effectively contend that we ought to be open to the possibility of making it easier for victims of pure economic loss to succeed with their claims (especially for their purposes in cases where contract and delict appear to overlap) because, after all, it is the victim's constitutional right to property that is at stake.[54]

Building on Bhana and Visser's views, I would suggest making an even bolder claim about the relationship between constitutional rights and delict. My argument is that, all things considered, delict in its entirety strives to bring about corrective justice for rights infringements. There are some English scholars who have made similar claims. The version that I am partial to is that of Gardner.[55] Gardner argues that once a right has been infringed like property, bodily integrity, and so forth, that right violation continues to exist until there is some intervening action that remedies it. This is known as the "continuity thesis".[56] Tort law, and I would say delict as well, disrupts this continuity of harm and provides imperfect corrective justice (what Gardner calls "next best satisfaction").[57] If this is what delict (in its entirety) is for, then we cannot only invoke the *Constitution* when we speak about wrongfulness. In truth, the *Constitution* is already speaking when we identify the harm that it at stake and, the normative questions about whether delict is doing a good job, must be tested against the entire discipline's structure in vindicating rights.

The relationship between the constitutional rights to dignity, privacy, bodily integrity and so forth, and the rules that we have developed from the *actio iniuriarum* and the Germanic action for pain and suffering, should be clear enough. Given that we really start reasoning through a delictual problem by identifying the harm, it is already at that stage that the *Constitution* ought to be our framing device for the matter. From there, every other element's role ought to be to give effect to corrective justice for a right infringement. To the extent that any element's current content fails to live up to this constitutional function, it probably requires development and re-imagining. To be clear, I am not saying that each of the five elements should now be established simply by asking whether a right has been infringed. That would be a type of constitutional over-excitement that is best avoided on account of being un-transformative.[58] I am simply saying that the current law of delict must

52 Bhana and Visser 2019 *SAJHR* 111.
53 Bhana and Visser 2019 *SAJHR* 111-112.
54 Bhana and Visser 2019 *SAJHR* 119-120.
55 Gardner 2011 *Law and Philosophy*.
56 Gardner 2011 *Law and Philosophy* 33.
57 Gardner 2011 *Law and Philosophy* 33.
58 That is the gist of Zitzke 2020 *TSAR*.

be fit for purpose. And that purpose is the protection of constitutional rights, whether enforceable vertically or horizontally.[59]

Overall, I certainly agree with Justice Froneman that delict basically always raises a constitutional issue, which requires us to be open to new re-imagined possibilities. This is a hefty principle that has the potential to send the South African law of delict in a new, constitutionally transformative direction. This is especially so if it is combined with the transformative point of *H*, which is to treat even settled doctrine with an open mind and creative imagination.

3.2 New democratic statutes must not be forced into a common-law delictual mould

The second de-centring principle from Justice Froneman's pen relates to the statute/common law interface in the context of delict. The key case here is *Zuma Stole Your Money*.[60] There the issue was whether the DA violated section 89(2)(c) of the *Electoral Act*.[61] The section reads: "No person may publish any false information with the intention of influencing the conduct or outcome of an election". The DA had sent an SMS to voters that the Public Protector's report on Nkandla showed that former President Jacob Zuma stole public funds (R264 million) to beautify his private residence, encouraging voters to draw their crosses for the DA to stomp out corruption. The ANC alleged that the Nkandla report did not unequivocally say that Zuma stole the money and thus that the SMS statement was false. The DA's version was that the SMS contained an opinion and not a fact, which falls outside of the ambit of section 89(2)(c).

Justice Froneman teamed up with Justice Cameron and Justice Khampepe to pen the majority judgment in which Moseneke DCJ and Nkabinde J concurred. Their first line on the crux of the matter reads: "What is at stake here is an issue of statutory interpretation. It is not a defamation case."[62]

While this may seem strikingly obvious, this was a necessary caution given the minority's lengthy treatment of defamation law. The minority accepted that the DA's defence was essentially one of "protected comment" which is a common-law defamation construct in our law. That defence allows an alleged wrongdoer to succeed with a defence against wrongfulness in situations where a defamatory statement has been made about the plaintiff, but where (i) an opinion has been expressed, (ii) without malice, (iii) based

---

59 Section 8 of the *Constitution* makes it clear that both vertical and horizontal constitutional application are allowed.

60 *Democratic Alliance v African National Congress* 2015 2 SA 232 (CC) (hereafter *Zuma Stole Your Money*).

61 *Electoral Act* 73 of 1998.

62 *Zuma Stole Your Money* para 119.

on facts that are true, and (iv) the public interest is served by the comment made.[63] Even though the minority doubted that fair comment was a defence available under the Act, it was nonetheless assumed that the defence was competent,[64] and so proceeded to explore its principles at length,[65] concluding that the SMS "constituted a statement of fact and not a comment or opinion".[66]

While the minority in this case basically addressed the issue as if it was a common-law defamation issue, the majority made it clear that the *Electoral Act* cannot be forced into the common law mould. The Act was geared towards weighing up freedom of expression (section 16 of the *Constitution*) against the right to free and fair elections (section 19 of the *Constitution*). The common law of defamation, in contrast, involves a balancing exercise of freedom of expression and the right to external dignity or reputation (section 10 of the *Constitution*).[67] For this reason, the statute should not be forced to follow the common law.

Instead of regarding the common law of defamation as the starting point for understanding the *Electoral Act*, Justice Froneman and company used as a point of departure the constitutional rights and values that were at stake, including free speech, its relationship to elections and democracy, and the political rights in the *Constitution*.[68] From here, the court proceeded to contextualise section 89(2)(c) of the Act so that proper meaning could be given to "false information". Read against its surrounding provisions, the majority determined that "false information" did not include disagreeable opinions in its ambit.[69] The court noted that opinions are usually not described as being "false" though they may be called "unfair or unreasonable".[70] This was particularly strongly bolstered with the fact that elections require robust and even harsh debate between political rivals. Applied to the facts here, the majority emphasises that the SMS said that the Nkandla report "shows how" Zuma stole the money, indicating that it is opinion based on a factual report.[71] It seems like it would have been a different story if the SMS simply said that Zuma stole the money (interestingly, in that regard the court did refer to the common-law cases on protected comment).[72] As such, the majority did not find it necessary to determine whether the SMS was false. However, even if it was wrong on its

63 *The Citizen 1978 v McBride* 2011 4 SA 191 (CC) para 80.
64 *Zuma Stole Your Money* para 69.
65 *Zuma Stole Your Money* paras 70-109.
66 *Zuma Stole Your Money* para 110.
67 *Zuma Stole Your Money* para 119.
68 *Zuma Stole Your Money* para 121.
69 *Zuma Stole Your Money* para 144.
70 *Zuma Stole Your Money* para 145.
71 *Zuma Stole Your Money* paras 146-147.
72 *Zuma Stole Your Money* paras 149-150.

finding that it was an opinion, the SMS was potentially not false: Even though the Nkandla report did not explicitly use the term "stole", it did say that Zuma's expenditure was "unconscionable, excessive and caused a misappropriation of public funds" which implies dishonest taking for personal gain — roughly, stealing.[73]

The transformative constitutional principle in this case that Justice Froneman and company brought to the fore was that democratic statutes ought not be pushed into our common-law taxonomy. Instead, first and foremost, those statutes ought to be read through a constitutional lens. That does not mean that the common law can never be usefully invoked to understand a term in a statute. After all, some degree of consistency in principle would promote the single-system-of-law rule explained earlier. All that it means is that, in the hierarchy of sources, the *Constitution* is right at the top, followed by statutes, and only then comes customary and common law. This is partly what adjudicative subsidiarity, a transformative constitutional source-management strategy, is about.[74]

The question may be asked why this transformative approach to dealing with statutes matters. In *Zuma Stole Your Money*, to the DA it mattered in terms of outcome. Reading the statute through the strict lens of the common law on protected comment, the minority would have found the DA guilty of breaching the Act. Contrariwise, reading the statute through the lens of the *Constitution* and the text of the statute itself, with the common-law only acting as a subsidiary tool in legal reasoning, the DA wrangled itself out of liability. In a jurisprudential sense, Du Plessis would support this line of transformative legal reasoning because it recognises (i) that statutes have an important democratic role to play in our society where deliberations by elected officials have taken place, and (ii) that the *Constitution* would be speaking indirectly through that legislation.[75]

3.3 The customary law could subvert the common law of delict

The third de-centring principle that Justice Froneman has provided to delict thinkers is that our European legal heritage (common law) might learn some lessons from our distinctly African legal heritage (customary law). This point was made most prominently by Justice Froneman in the case of *MEC for Health and Social Development, Gauteng v DZ obo WZ*.[76]

---

73 *Zuma Stole Your Money* para 161.

74 For an elaboration on these principles applied to the delictual context, see Visser 2022 *De Jure*; Zitzke 2015 *CCR* 285ff.

75 Du Plessis 2011 *PELJ* 94, 97.

76 *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) (hereafter *DZ*).

In that case, a child suffered harm on account of medical negligence at a state hospital. The state admitted the elements of liability but simply disputed the appropriate remedy. In terms of the established common law of delict, the victim was surely correct in instituting a claim for damages, praying for a lumpsum award of damages (the "lumpsum rule"), sounding in money (the "money rule"), for past and future losses in a single lawsuit (the "once-and-for-all rule").[77]

The state's principal argument was however that "reparations in kind" is or ought to be a competent remedy for delictual liability in contrast to a monetary claim for damages.[78] Practically, this translates into the state offering to provide the future medical care for the victim instead of paying the future medical costs provided by private practitioners. Alternatively, the state argued that the once-and-for-all rule and the lumpsum rule were not (or should not be) rigidly enforced principles.[79] Practically, this translates into the state offering to make periodic payments to the victim as the need arises, not completely dissimilar to a medical aid scheme of sorts.

Justice Froneman, for the majority, took on the view that the existing law of delict firmly supported the money, lumpsum, and once-and-for-all rules.[80] Thus, the need arose to consider a development of the common law along the lines proposed by the state. Inspired by the *Constitution's* development clauses, Justice Froneman suggests that our first principles on common-law damages have historically been subject to incremental development over the centuries and nothing impenetrably stands in the way of such development today. (This position is clearly consistent with his earlier de-centring principles laid down about constitutional supremacy and re-imagination of the common law in *H* and *Masstores* discussed above.)

At this point, Justice Froneman makes (what I read as) a radical proposition regarding the common/customary law interface. He remembers the case of *Mhlongo v Mhlongo* where two brothers were involved in a dispute about a loan for money.[81] Reading the appeal of *Mhlongo*, it is clear that customary law traditionally only recognised contracts of loan involving lending things like cows.[82] The lesson to be learned from this case, according to Justice Froneman is that "different cultural and legal traditions may offer valuable insights on the kind of compensation that may be sufficient to redress wrongs".[83] He continues:

77 *DZ* paras 14-16.
78 *DZ* para 12.
79 *DZ* para 12.
80 *DZ* para 13.
81 *Mhlongo v Mhlongo* 1937 NAC (N&T) 124.
82 *Mhlongo v Mhlongo* 1938 (1) PH R29.
83 *DZ* para 40.

> The free spirit of our third Grace [customary law] has an important role to play in giving content to the normative value system of our Constitution and thereby shaping the development of our common law. Of course, customary law will also continue to play its independent role under the Constitution as a pluralist choice of law to govern aspects of legal life. It is, however, also necessary to start giving serious attention to how African conceptions of our constitutional values should be used in the development of the common law in accordance with those values.[84]

Thus, just because strands of our European legal tradition have historically insisted that money is the measure of all things, that does not mean that the common law may never change. Indeed, the common law may learn valuable lessons from the first principles of customary law. Perhaps turning to scholarly works on the "customary law of delict" (if such a thing exists) would make the point even clearer than the deductive reliance on *Mhlongo*. This official customary law makes it clear that reparations in kind is often a competent remedy for a variety of injuries. At the most basic level, if a wrongdoer kills the bull of the victim, a replacement bull must be provided,[85] even though it is imaginable that money may be payable in some communities today instead of a replacement bull.

In the end, Justice Froneman decided that the state did not present a convincing argument regarding why development was necessary in this case, while being clear about the fact that the door is not closed on future developments in this regard.[86] This ultimate finding aside, the case of *DZ* breaks new ground in that it opens the door for delict thinkers to investigate how first principles of the customary law on injuries and reparations could drive common-law development.

In my view, this de-centring principle of Justice Froneman in *DZ* has the potential to bring about a substantive type of equality between common and customary law. It has recently been argued that a decolonial approach to comparative law might involve, among other things, using customary law in ways to disrupt the hegemony of the common law in South Africa.[87] The result of *DZ* could very well be a form of "active subversive hybridity" where the common law becomes truly common to all.[88] Even though the *Constitution* does not demand this re-imaginative exercise along these lines, its call for the achievement of equality is certainly in line with the third

---

84 *DZ* para 41.

85 Rautenbach *Introduction to Legal Pluralism* 173.

86 *DZ* paras 57-58. Pauw 2018 *TSAR* 181-182, for one, appears to be optimistic about the vindicatory potential of the suggestions made by Justice Froneman in *DZ*. Pauw 2019 *TSAR* 95-96 is particularly committed to seeing the flourishing of the reparations in kind that Justice Froneman proposed.

87 Zitzke 2022 *RabelsZ* 189.

88 Zitzke 2022 *RabelsZ* 213-218.

de-centring principle obtained from *DZ*. Though not relying on *DZ* to make this point, Rautenbach writes:

> Insisting that South African law is a unity made up of a diversity of "independent sources", all linked together by a supreme Constitution, is in line with the preamble's aspirations of creating a country that is "united in our diversity".[89]

As such, I would suggest that, even though transformative constitutionalism and decolonial legal theory are certainly not synonyms, active subversive hybridity (in the sense derived from *DZ*) might be a method in common to both of these critical legal endeavours. And its origin, I must emphasise, is from the mind and hand of Justice Froneman.

3.4 Delict and restorative justice go hand-in-hand

The fourth de-centring principle that Justice Froneman has laid down in his judgments is that delict has the potential to fulfil a restorative justice function. Specifically in this regard, I think about his judgment, co-authored with Justice Cameron, in the case of *Le Roux v Dey*.[90] That is the famous defamation matter where schoolboys amateurishly photoshopped the heads of their school principals onto a picture of two naked men sitting next to one another. The principal felt insulted by being depicted as a gay man and/or that he was a promiscuous individual.

While their minority judgment is best known for its affirmation that neither defamation victims nor wrongdoers are legally entitled to be homophobes in the so-called "private sphere" (supporting the first de-centring principle identified above),[91] it was also Justices Froneman and Cameron who penned the authoritative principles on apologies.[92] Strangely, even though this was a minority judgment, the entire court signed onto the apology principles.[93]

The Justices indicated in their minority judgment that the common law of delict at that time did not recognise an apology as a competent remedy for defamation.[94] But, things could be different. If the law allowed apologies as competent remedies, a genuine apology had the potential to give the aggrieved victim "the personal satisfaction of assuaged feelings" and "would

89 Rautenbach 2019 *PELJ* 10.
90 *Le Roux v Dey* 2011 3 SA 274 (CC) (hereafter *Dey*) paras 153-206.
91 See however the critique of the majority's view in Barnard-Naude and De Vos 2011 *SALJ* 407.
92 *Dey* paras 195-203.
93 *Dey* para 9.
94 *Dey* para 195. Cf Neethling and Potgieter 2011 *Obiter* 728-730 who are of the view that apologies were not as novel as the Constitutional Court thought.

have contributed to the restoration of mutual respect between them".[95] As such, Justice Froneman and Justice Cameron thought that it was

> time for our Roman Dutch common law to recognise the value of this kind of restorative justice. Moreover, we think it can be done in a manner which, at the same time, recognises the shared values of fairness that underlie both our common law and customary law, and which form the basis of the values and norms that our constitutional project enjoins us to strive for.[96]

This quote contains a sharp reflection of the third de-centring principle discussed above on the common/customary law interface.[97] But it also contains a plea that the law of delict ought to fulfil a (at least partially) restorative function.

The restorative-justice justification is poetically explained as follows:

> Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.[98]

Against this backdrop, the court ordered the wrongdoing boys in *Dey* to tender an apology to their offended principal, in addition to the compensation payable to him.[99]

In my discussion of the *Constitution's* centrality in delictual disputes, I already indicated that delict's main business is ensuring corrective justice: a right has been infringed and the victim ought to receive the next best available correction in order to balance the scales of justice, lest the injustice continue into perpetuity. I do not read Justice Froneman and Justice Cameron's invocation of restorative justice as something in conflict with the basic function of delict. Instead, I would suggest that it is possible to think about corrective and restorative justice as interrelated concepts.

Perhaps it is useful to think about restorative justice as a form of corrective justice. In some cases, like the defamation issue in *Dey*, I think it is reasonable to argue that the wrong is best corrected, not only through a

---

95 *Dey* para 197.
96 *Dey* para 197.
97 See in this regard also Van Niekerk 2013 *Fundamina* 397.
98 *Dey* para 202.
99 *Dey* para 203.

court order that affirms the victim's rights (an award for damages), but also through an order that seeks to vindicate dignity in a collective sense. In other words, my feelings are best restored to order when there can be notional peace between us.

While the law on apologies is now a fairly settled legal position in the context of defamation, thanks to the certainty provided in *Dey*, it is not all that clear whether apologies might make their way into other delictual contexts as well. In this regard I am thinking specifically about the *Komape* tragedy.[100] In that case a five-year old boy fell into a poorly maintained pit latrine at school and drowned. His family claimed damages for their psychiatric harm and sought a declaratory order showing that the state breached its constitutional obligations owed to the affected parties. The Supreme Court of Appeal did not see the utility in granting such an order.[101] Perhaps in future, an alternative remedy to a declarator would be to seek an apology from the state officials concerned in addition to the damages claimed, if the victims desire this. The purposes for this include a recognition of the wrong (and the concurrent recognition of the importance of the victim's rights) and potentially, encouraging the restoration of the relationship between the government and its people.

With that said, corrective justice does not always have to pivot on saving a broken relationship — we can think about how, in a delictual case of rape, the victim and wrongdoer are definitely not legally required to restore the broken human interconnection. There the compensation paid is (correctly) primarily geared towards vindicating the right of the victim and legally affirming that the victim's rights matter.

Overall, a more careful reflection on fusing restorative justice into our understanding of delict may lead to transformative results. It would be transformative in the sense that the *Constitution's* underlying spirit of reconciliation and relationship building would make its way into our law of delict.[102] This leads us towards a humane understanding of delict's corrective justice and perhaps leaves clues about what a transformative reimagination of the law of delict might involve. We should certainly not think that apologies should only be confined to the sphere of defamation law.

4 Conclusion

In the face of common-law centrism in the law of delict today, Justice Froneman taught us through his judgments that (1) the *Constitution* is always speaking in the law of delict; (2) the common law does not set the pace for the rest of the legal system but the *Constitution* does; (3) the

100 *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) (hereafter *Komape*).
101 *Komape* paras 64-67.
102 I also take this to be the gist of Skelton 2013 *Restorative Justice* 122.

common law could learn a few things from customary law; and (4) delict probably has a lot more to do with restoring broken relationships than thinkers of old might have believed. These are four breadcrumbs that lead us in a direction of a critically reimagined, perhaps un-common, law of delict along transformative constitutional lines. The law of delict, as we know it, might be thought of as consisting only of five general elements, as dominantly sung by the common law. However, as Justice Froneman's delict jurisprudence shows, delict must surely incorporate space for statutory liability schemes, the customary law on this topic, and a much stronger constitutional awareness. For these critically transformative insights into the law of delict, we owe a great debt to Justice Froneman.

Bibliography

Literature

Barnard-Naude and De Vos 2011 *SALJ*
Barnard-Naude J and De Vos P "The Heteronormative Observer: The Constitutional Court's Decision in Le Roux v Dey" 2011 *SALJ* 407-419

Bhana and Visser 2019 *SAJHR*
Bhana D and Visser CJ "The Concurrence of Breach of Contract and Delict in a Constitutional Context" 2019 *SAJHR* 94-120

Boberg *Law of Delict, Vol 1: Aquilian Liability*
Boberg PQR *The Law of Delict, Vol 1: Aquilian Liability* (Juta Cape Town 1984)

Boezaart 2015 *Stell LR*
Boezaart T "'Wrongful Life' – The Constitutional Court Paved the Way for Law Reform" 2015 *Stell LR* 399-423

Burchell 2000 *Acta Juridica*
Burchell J "The Odyssey of Pure Economic Loss" 2000 *Acta Juridica* 99-132

Chürr 2015 *Obiter*
Chürr C "Wrongful Life Claims under South African Law: An Overview of the Legal Framework" 2015 *Obiter* 745-761

Davis 2015 *Acta Juridica*
Davis D "Legal Transformation and Legal Education: Congruence or Conflict?" 2015 *Acta Juridica* 172-188

Davis and Klare 2010 *SAJHR*
Davis D and Klare K "Transformative Constitutionalism and the Common and Customary Law" 2010 *SAJHR* 403-509

Du Plessis 2011 *PELJ*
Du Plessis L "The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Exploratory Observations" 2011 *PELJ* 92-102

Fagan 2014 *SALJ*
Fagan A "Aquilian Liability for Negligently Caused Pure Economic Loss: Its History and Doctrinal Accommodation" 2014 *SALJ* 288-327

Froneman 2005 *Stell LR*
Froneman JC "Legal Reasoning and Legal Culture: Our 'Vision' of Law" 2005 *Stell LR* 3-20

Gardner 2011 *Law and Philosophy*
Gardner J "What is Tort Law for? Part 1. The Place of Corrective Justice" 2011 *Law and Philosophy* 1-50

Klare 1998 *SAJHR*
Klare KE "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188

Klopper *Law of Third Party Compensation*
Klopper HB *The Law of Third Party Compensation: In terms of the Road Accident Fund Act 56 of 1996* 4th ed (LexisNexis Durban 2020)

Loubser and Midgley *Law of Delict*
Loubser M and Midgley R (eds) *The Law of Delict in South Africa* 3rd ed (Oxford University Press Cape Town 2017)

Mahery 2016 *SAMJ*
Mahery P "A Child's Potential Claim for Negligent Misdiagnosis: The Case of *H v Fetal Assessment Centre*" 2016 *SAMJ* 348-349

McKerron *Law of Delict*
McKerron RG *The Law of Delict* 7th ed (Juta Cape Town 1971)

Midgley and Van der Walt *Principles of Delict*
Midgley JR and Van der Walt JC *Principles of Delict* (LexisNexis Durban 2016)

Millard *Loss of Earning Capacity*
Millard D *Loss of Earning Capacity: It's Nature and Place in South African Law* (LLD-thesis University of Johannesburg 2005)

Neethling and Potgieter *Law of Delict*
Neethling J and Potgieter JM *Law of Delict* 8th ed (LexisNexis Durban 2020)

Neethling and Potgieter 2011 *Obiter*
Neethling J and Potgieter JM "Defamation of School Teachers by Learners: *Le Roux v Dey* 2011 3 SA 274 (CC)" 2011 *Obiter* 721-730

Neethling and Potgieter 2015 *LitNet Akademies*
Neethling J and Potgieter JM "Aksie weens Onregmatige Lyding vanweë Gestremdheid (Wrongful Life)" 2015 *LitNet Akademies* 364-373

Neethling and Potgieter 2017 *LitNet Akademies*
Neethling J and Potgieter JM "Bemoeiing met 'n Uitsluitende Kontraktuele Verhouding Getroef deur Vryemededinging" 2017 *LitNet Akademies* 374-388

Osman 2019 *PELJ*
Osman F "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage" 2019 *PELJ* 1-24

Pauw 2018 *TSAR*
Pauw P "Alternative Relief in Delictual Claims: A Step in the Right Direction" 2018 *TSAR* 176-182

Pauw 2019 *TSAR*
Pauw P "Alternative Relief in Medical Malpractice Claims: Further Developments" 2019 *TSAR* 91-97

Rabie 2016 *LitNet Akademies*
Rabie M "Die Eis om Onregmatige Lewe: Bestaanbaar in die Deliktereg of word die Gemenereg buite sy Perke Gestrek?" 2016 *LitNet Akademies* 502-531

Rautenbach *Introduction to Legal Pluralism*
Rautenbach C *Introduction to Legal Pluralism in South Africa* 5th ed (LexisNexis Durban 2018

Rautenbach 2019 *PELJ*
Rautenbach C "Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?" 2019 *PELJ* 1-20

Skelton 2013 *Restorative Justice*
Skelton A "The South African Constitutional Court's Restorative Justice Jurisprudence" 2013 *Restorative Justice* 122-145

Van der Merwe and Olivier *Die Onregmatige Daad*
Van der Merwe NJ and Olivier PJJ *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6th ed (JP van der Walt Pretoria 1989)

Van Loggerenberg 2017 *SALJ*
Van Loggerenberg A "The Tenability of the Constitutional Court's Arguments in Support of the Possible Recognition of Wrongful-Life Claims in South Africa" 2017 *SALJ* 162-183

Van Marle 2009 *Stell LR*
Van Marle K "Transformative Constitutionalism as/and Critique" 2009 *Stell LR* 286-301

Van Niekerk 2013 *Fundamina*
Van Niekerk GJ "*Amende Honorable* and *Ubuntu*: An Intersection of *Ars Boni et Aequi* in African and Roman-Dutch Jurisprudence?" 2013 *Fundamina* 397-412

Visser 2022 *De Jure*
Visser CJ "Adjudicative Subsidiarity, the 'Horizontality Simpliciter' Approach and Personality Rights: Outlining an Integrated and Constitutional Reading Strategy to the Law of Personality" 2022 *De Jure* 124-142

Wessels 2020 *THRHR*
Wessels AB "Wrongfulness in Pure Economic Loss Cases: The 'Traditional Approach' and the 'New Approach'" 2020 *THRHR* 151-169

Zitzke 2014 *Acta Academica*
Zitzke E "Stop the Illusory Nonsense! Teaching Transformative Delict" 2014 *Acta Academica* 52-76

Zitzke 2015 *CCR*
Zitzke E "Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development" 2015 *CCR* 259-290

Zitzke 2017 *Fundamina*
Zitzke E "The History and Politics of Contemporary Common-Law Purism" 2017 *Fundamina* 185-230

Zitzke 2020 *TSAR*
Zitzke E "The Life Esidimeni Arbitration: Towards Transformative Constitutional Damages?" 2020 *TSAR* 419-440

Zitzke 2022 *RabelsZ*
Zitzke E "Decolonial Comparative Law: Thoughts from South Africa" 2022 *RabelsZ* 189-225

Case law

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

Democratic Alliance v African National Congress 2015 2 SA 232 (CC)

Friedman v Glicksman 1996 1 SA 1134 (W)

H v Fetal Assessment Centre 2015 2 SA 193 (CC)

Komape v Minister of Basic Education 2020 2 SA 347 (SCA)

Le Roux v Dey 2011 3 SA 274 (CC)

Masstores v Pick n Pay 2017 1 SA 613 (CC)

MEC for Health and Social Development, Gauteng v DZ obo WZ 2018 1 SA 335 (CC)

Mhlongo v Mhlongo 1937 NAC (N&T) 124

Mhlongo v Mhlongo 1938 (1) PH R29

Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa 2000 2 SA 674 (CC)

Steward v Botha 2008 6 SA 310 (SCA)

The Citizen 1978 v McBride 2011 4 SA 191 (CC)

Legislation

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa, 1996

Electoral Act 73 of 1998

Recognition of Customary Marriages Act 120 of 1998

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

Road Accident Fund Act 56 of 1996

List of Abbreviations

ANC	African National Congress
CCR	Constitutional Court Review
DA	Democratic Alliance
PELJ	Potchefstroom Electronic Law Journal
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAMJ	South African Medical Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Heedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg