VICARIOUS AND DIRECT LIABILITY OF AN EMPLOYER FOR SEXUAL HARASSMENT AT WORK

By

RYAN LAWLOR

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Supervisor: PROF JA VAN DER WALT

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SUMMARY

Sexual harassment is an ever increasing drain on the resources of the modern employer, as well as serving to take up much time in terms of legal battles and court cases. The concept of sexual harassment has undergone much revision over the past decades, and South Africa is now firmly committed to the eradication of this problem.

The Constitution protects and enshrines important rights like dignity, equality and the right to fair labour practices. These are further defined and protected through the application of various statutes, including the LRA, EEA, PEPUDA and the revised Code of Good Practice. In terms of statutory liability, the employer will be liable for the harassment of its employees, unless it takes a proactive stance and implements comprehensive sexual harassment policies. In this way it will escape liability.

The common law vicarious liability of the employer cannot be escaped as easily. The entire concept of the law of delict is to remedy harm suffered. In terms of the common law, employers will be held vicariously liable for the harassment of their employees if it can be shown that the harassment occurred within a valid working relationship, if the harassment actually occurred through a delict, and if the act occurred within the course and scope of employment.

The best way for employers to minimize their liability for sexual harassment is the implementation of training and educational policies that serve to make employees aware of what is permissible in the workplace. This will aid the employer in showing that it has done everything possible to reduce the risk of harassment, which will in turn serve to reduce the employer’s liability. To protect against the risk of expensive litigation, many employers are now investigating the matter of liability insurance – they would rather pay increased premiums than suffer alone when their employees take legal action against them.
Sexual harassment is a problem that can only be solved through a concerted effort on the part of the legislature, judiciary, employers and employees. Together, these parties must ensure that all of those involved in the world of work are aware of the problem of harassment, as well as taking steps to educate and train employees so as to prevent it. Only in this way will we be able to take action to reduce this terrible problem in our country.
CHAPTER 1 - GENERAL INTRODUCTION

1.1 Aim of treatise

The concept of sexual harassment is one that is quite familiar to most people these days. The implementation of practical methods of dealing with this pervasive and distressing problem has been the focus of some debate in legal and business circles in the past few years. However, while we have come some way in defining the steps that lead to the problem, and have also set out tentative methods to minimise harassment, the notion of liability remains troubling. It is indeed something that is perfectly understandable – at the end of the day, we want to know who pays the bill. The concept of liability is one that lies at the heart of a great many problems. Who pays? It is certainly fair to say that, all matters of justice and morality aside, liability influences the course of many cases around the world.

In this treatise I have sought to clarify the notion of liability for sexual harassment as it relates to the employer. The different avenues open to a harassed victim are, in essence, related to the practical considerations of where that victim is most likely to obtain the relief necessary to assuage the physical and psychological stresses brought about by the harassment. The concepts of direct and vicarious liability are examined from statutory and common law perspectives, taking into account the relevant case law. The end result will be a concise outline of the law as it presently obtains to employer liability.

1.2 Sexual harassment in society

Sexual harassment is controversial topic. It is prevalent in every country around the world, and seems to be occurring more frequently here in South Africa with every passing year. As we struggle to overcome previously entrenched social and cultural mores and practices, the incidence of sexual harassment is becoming ever more apparent. Whether this represents an increase in the occurrence of the harassment itself, or merely a
rise in the number of reported cases, the problem represents a growing threat to South African employees.

In turn, this presents the South African employer with a proportionately even greater risk. After all the employer is the one who will, at the end of the day, most likely be liable for paying the heavy financial costs of dealing with the problem.

The incidence of sexual harassment also seems to be increasing in South Africa. Finnemore and Van Rensburg describe a survey carried out in 1995/1996 by the Financial Mail, which states that 76% of career women in South Africa had been harassed in one or another form in the workplace.¹ This is a truly alarming statistic, especially since it seems safe to assume that many women would feel unable to report harassment for fear of victimization.

Sexual harassment is indeed a complex matter. This is not surprising, since it occurs in the stressful environment of sexual interaction. It is therefore not unexpected that the definitions, explanations and proposed solutions to this issue should be as varied as the people who experience sexual harassment in workplaces around the country.

1.3 Definition of sexual harassment

What is sexual harassment? This question plays a vital role in determining how the problem is perceived and managed by the relevant authorities. Unfortunately, a concise definition acceptable and understandable by all is difficult to find. Cultural, economic and other factors all combine to ensure that almost every person trying to define harassment has a different view than their peers. In certain cultures where bodily contact is an integral and accepted part of everyday life, kissing and touching is the norm. How to contrast this behaviour with other cultures, where the idea of personal space and integrity are nearly sacrosanct, is a worthy problem. When this problem is brought into the already

stressful arena of the modern working environment, it is perfectly understandable why sexual harassment is difficult to define and understand with the sought-after certainty.

The erstwhile Industrial Court in *J v M Ltd*\(^2\) relied on the definition of Mowatt, who defines sexual harassment as follows:

“[I]n its narrowest form sexual harassment occurs when a woman (or man) is expected to engage in sexual activity in order to obtain or keep employment, or obtain promotion or other favourable working conditions. In its wider view … it is any unwanted sexual behaviour or comment which has a negative effect on the recipient.”\(^3\)

Considering harassment from the viewpoint that it is usually a woman in a vulnerable position being harassed by a male with power over her, Mowatt states that sexual harassment occurs when a women’s sex role overshadows her work role in the eyes of a male, whether it be a supervisor, co-worker, client or customer.\(^4\)

The nature of sexual harassment is both objective and subjective – one of the reasons that it is often difficult to prove that harassment has occurred. The law has had difficulty in deciding whether an objective or subjective test for sexual harassment would be preferred. Initially an objective test was considered – did the victim feel harassed. This was as opposed to a subjective test – should the perpetrator know or reasonably know that his or her conduct constituted harassment. Problems inevitably arose in that a purely subjective test made it difficult to distinguish between the genuinely distressed individual, and a person who is merely out for revenge, or incapable of determining friendliness from harassment. In contrast, the purely objective test entails a reliance on the underlying cultural mores – “how it’s always been”. This is undesirable, in that some

\(^2\) 1989 10 ILJ 755 (IC) 757.

\(^3\) Mowatt “Sexual Harassment – New Remedy for an Old Wrong” 1986 *ILJ* 637 638.

\(^4\) Mowatt 1986 *ILJ* 637 638.
of the behaviour that is traditional - male domination of the workplace and associated
demeaning stereotyping of women in business - is inappropriate in the modern context.\(^5\)

A reasonable person test is regarded as being more balanced and fair. Since woman are
still by far the more vulnerable gender with regards to sexual harassment, a “reasonable
woman test”, which focuses on the victim has been regarded as the most appropriate test
to utilize. However, even this test is not without difficulties – subjectivity arises again in
that victims will react differently based on their own cultural, economic and social
backgrounds, as well as based on the area where the harassment took place. An example
in this regard would be the difference between a poor woman from a rural Limpopo area
(where the cultural bias slants strongly towards physical interaction) who is harassed on a
farm; and an upper class, educated woman from Cape Town (raised in a culture that
emphasizes personal space and integrity) who is harassed while working at a large
multinational corporation. Obviously, these women would have different reactions to
sexual harassment, making a definitive all-encompassing test for such harassment
difficult to achieve.

Dupper and Garbers have argued that sexual harassment can be examined from three
perspectives.\(^6\) Firstly, that one can identify the many types of conduct that may constitute
harassment. They then proceed to set out the varying forms of harassment as described in
item four of the 1998 Code of Good Practice on the Handling of Sexual Harassment
Cases namely: physical conduct; verbal conduct; and non-verbal conduct. Next, they
point out that sexual harassment can be defined by looking at the underlying effects of
harassment. To illustrate this particular point, they set out three types of harassment: \textit{quid
pro quo} harassment; hostile environment harassment; and sexual favouritism.

Dupper and Garbers contend that analyzing sexual harassment in these ways serves to tell
us much about harassment, but does little to explain about when the conduct is serious

enough to constitute harassment. They maintain further that this is closely related to the issue of the perspective from which conduct should be analysed so as to determine whether it genuinely constitutes harassment. They discuss the merits of applying a subjective test, an objective test as well as the “reasonable victim” test, as has already been discussed above.

7 Dupper & Garbers “Employment Equity Act” CC1-69.
CHAPTER 2 – STATUTORY LIABILITY

2.1 Nature of statutory liability

The employer may be liable for sexual harassment in terms of either the common law doctrine of vicarious liability for the delicts of its employees, or in terms of the statutory liability sections as set out in the Employment Equity Act (hereafter referred to as the EEA), the Labour Relations Act (hereafter the LRA) and the Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter PEPUDA). All of the above mentioned Acts are of course interpreted in terms of the Constitution, and reference is also made to the National Economic Development and Labour Council 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (hereafter the 1998 NEDLAC Code), as well as the National Economic Development and Labour Council’s 2005 Draft Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (hereafter the 2005 Draft Code).

2.2 Legislation regulating liability

2.2.1 The Constitution

The Constitution protects certain fundamental rights that are regarded as being essential to the maintenance of our society. In the context of sexual harassment, the section 9 right to equality, and the section 23 right to fair labour practices are most important. Section 9(3), the right not to be unfairly discriminated against, lists grounds of sex and gender that strongly imply that, while sexual harassment is not listed as a distinct ground, it should none the less be regarded as constituting a form of sex discrimination and should

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8 55 of 1998.
10 4 of 2000.
11 Act 108 of 1996.
thus be prohibited. This is confirmed by the EEA, in that it provides in section 6(3) that sexual harassment constitutes a form of unfair discrimination. Cooper notes that harassment is discriminatory in that it raises an arbitrary barrier to the full and equal enjoyment of a person’s rights in the workplace.\textsuperscript{12}

The right to equality has been regarded as one of the most important and fundamental rights underlying our democracy. This is why the protection of this right is taken so seriously. Indeed, this view of the importance of protecting the right to equality was expressed by the Constitutional Court itself in the case of \textit{President of the Republic of South Africa v Hugo}\textsuperscript{13} as follows:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply engrained past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”

The EEA gives effect to the right to equality within the workplace, while PEPUDA protects against cases of unfair discrimination that occur outside the workplace. The test for unfair discrimination was formulated in the well known case of \textit{Harksen v Lane}\textsuperscript{14} and is set out in three steps: Firstly, it must be determined whether the conduct amounts to differentiation, and if such differentiation in turn amounts to discrimination. Secondly, it must be determined whether or not the discrimination is unfair. Lastly, if the discrimination is held to be unfair, it must be determined whether or not such unfair discrimination can yet be justified in terms of section 36(1) of the Constitution, the general limitations section. Since limitations can only

\textsuperscript{12} Cooper “Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination” 2002 \textit{ILJ} 11.

\textsuperscript{13} 1997 \textit{1 SACR} 567 (CC) 568.

\textsuperscript{14} 1998 \textit{1 SA} 300 (CC) 325.
occur by means of laws of general application, not the individual conduct or policies of companies, employers will be prevented from relying on section 36(1) to uphold unconstitutional conduct or policies.

2 2 2 The LRA

The LRA is of course the cornerstone of legal matters dealing with the workplace and its innumerable problems. Sexual harassment in the context of the LRA occurs in the arena of unfair dismissals and unfair labour practices.

If the employee was dismissed for any of the reasons set out in section 187 of the LRA, such a dismissal is deemed to be automatically unfair. As has been stated above, sexual harassment is set out as a form of unfair discrimination in the EEA, even though it is not specifically listed as a prohibited ground in section 187 of the LRA. When dealing with cases of dismissal involving sexual harassment, two scenarios are most likely to arise according to Le Roux et al. In the first instance, the matter will be one where the perpetrator – the employee accused of harassing someone – is dismissed for misconduct. The second instance will arise in the case of the purported constructive dismissal. In these cases the employee-victim - the complainant who suffered harassment - will feel that she has no option but to resign due to a failure of the employer to adequately address the issue of harassment i.e trivializing the matter, or refusing to clamp down on the problem. The case of Nisabo v Real Security CC is relevant here, as the applicant in the matter was a victim of a constructive dismissal when her employer failed to deal with the harassment.

Unfair labour practices are dealt with in section 186(2)(b) of the LRA and includes the unfair suspension of an employee, or any other disciplinary action short of dismissal. This means that if an employee holds that they have been either unfairly suspended or

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16 2003 24 ILJ 2341 (LC).
17 This case will be discussed in 2 3.
unfairly disciplined – without dismissal – after either reporting sexual harassment, or being charged in a disciplinary enquiry with harassment, an unfair labour practice will have occurred. In such instances, the employee can follow the established dispute resolution procedures as set out in the LRA by referring a grievance to the CCMA or relevant bargaining council.

223 PEPUDA

PEPUDA is a relatively recent Act promulgated to ensure that effect is given to the constitutional rights protecting citizens from discrimination. It came into operation on 1 September 2000.

Section 11 of this Act prohibits harassment, and as is pointed out by Le Roux et al\textsuperscript{18} Section 1(1) of PEPUDA gives a wide-ranging definition of harassment: harassment is defined as unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to sex, gender or sexual orientation, or a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group. Important to note is that in terms of section 15 of PEPUDA, harassment does not have to be unfair in order to qualify as discrimination.

PEPUDA is not the primary method that harassed employees would use to resolve their grievances however, as section 5(3) of the Act states that it is inapplicable to persons to whom the EEA applies. The EEA remains the primary legislation regulating sexual harassment in the workplace, as PEPUDA does not contain any provisions relating to the employer’s liability for the harassment of its employees. The EEA does contain such provisions – section 60(3) – and these will be discussed further below.

\textsuperscript{18} Le Roux et al 20.
224 The Code of Good Practice on the Handling of Sexual Harassment Cases

The original Code of Good Practice was published in order to aid employers in the management and prevention of sexual harassment. The Code also encourages employers to develop and implement policies on sexual harassment that will serve as a guideline for the conduct of all employees. It was useful, in that it served to supplement the EEA by providing a definition of harassment, something that the EEA lacked. The Code is not legislation, but must be given heed to when interpreting the EEA, according to section 3 of the EEA itself. Published in terms of section 203(2) of the LRA, the Code met with some limited success in outlining problems and suggesting methods to combat harassment. However, the original Code was criticized as it was unclear on the discriminatory nature of sexual harassment.

The NEDLAC 2005 Draft Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, which will replace the 1998 Code, will be published in terms of the EEA. This revised Code attempts to deal with the unclear nature (subjective or objective) of the test for sexual harassment by restructuring the previous clumsy definition in the original Code as follows:

“Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

1.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
1.2 whether the sexual conduct was unwelcome;
1.3 the nature and extent of the sexual conduct; and
1.4 the impact of the sexual conduct on the employee.”

19 Finnmore & Van Rensburg 428.
This amendment, according to Le Roux et al\textsuperscript{20}, has resulted in the new test being one that takes the subjective feelings of the individual in that particular workplace into account, while using objective elements to assure the reasonableness of the test.

\section*{2 2 5 The EEA}

As has been already stated, the EEA is the primary piece of legislation regulating the relationship between employers and employees where discrimination and harassment are present. Section 5 of the EEA states that every employer is bound to ensure that steps are taken to advance equal opportunity through the eradication of unfair discrimination manifested in any of its policies. Section 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice on one or more grounds in section 6(1). This list of grounds, which is not exhaustive, includes race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth. For purposes relevant to sexual harassment, the grounds of sex and gender are applicable.

Section 6(3) holds that harassment of an employee constitutes unfair discrimination and is prohibited on any one, or a combination of the grounds of unfair discrimination listed in section 6(1) above. The result of this is that once the employee-victim has shown that any form of harassment based on the prohibited grounds has occurred, such harassment is judged unfair. While this may seem inconsistent with section 9 of the Constitution (the EEA’s listed grounds are not the same, and there is no limitation clause such as section 36(1) of the Constitution), it has been accepted that the Courts have favoured a substantive approach that illustrates the impact on the harassed employee, not the viewpoint of the alleged harasser\textsuperscript{21}.

\begin{footnotesize}
\textsuperscript{20} Le Roux et al 39.
\end{footnotesize}
The EEA seeks to regulate harassment, but the Act can only deal with relationships where the employer has harassed one of its employees, or where the employer is assigned liability through the application of section 60(3). For the purposes of section 6 of the EEA, applicants for employment are, in terms of section 9 of the Act, regarded as employees.

2.3 Ntsabo v Real Security CC and Employer’s liability in terms of the EEA

2.3.1 Section 60 of the EEA

As has already been discussed, the purpose of the EEA is to regulate the relationship between employers and employees so as to prevent and manage issues of harassment and victimization. In order to give effect to this worthy goal, section 60 of the EEA extends the liability of the employer. In essence, whereas normally the employer would only be liable for direct harassment of the employee by the employer itself, section 60 holds the employer liable for the harassment of its employees by other employees, if the requirements of the section are met. This allows the harassed employee to proceed with a claim in terms of the EEA, rather than forcing the employee to proceed with a delictual action in the civil courts, or an action in the equality courts through PEPUDA.

Thus section 60 ensures that employers will do all in their power to prevent sexual harassment so as to escape liability. The manner in which the employer will escape liability will be discussed further below. Liability in terms of section 60 is differentiated from common law vicarious liability in that the EEA serves to chastise the employer who has neglected to put procedures in place to advance equity in the workplace. By contrast, common law vicarious liability serves to remedy delictual harm. As Le Roux et al states, it is more appropriate to regard the type of liability set out in the EEA section 60

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22 Cooper 2002 ILJ 25.
23 Le Roux et al 94.
as a form of direct liability rather than statutory vicarious liability. Since it is an acknowledged aim of the EEA to promote the advancement of equity in the workplace, section 60 also rewards employers who have done so by making provision for such employers to escape liability for harassment.

2 3 2  Ntsabo v Real Security CC

The case of *Ntsabo v Real Security CC* 24 is regarded as a landmark case in the development of the law relating to employer liability for sexual harassment. This case will be discussed in detail, before its relevance in terms of section 60 is set out.

2 3 2 1  The facts of the case

In this case the applicant, Bongiwe (Beauty) Ntsabo, who was born in 1970, was employed in September 1999 by the respondent, Real Security CC as a security guard. For the greater part of her employment she was stationed at the Khayelitsha Day Hospital in Cape Town, where she generally worked a twelve-hour shift. She continued in this position up until the 19th of January 2000 when she resigned, and she earned approximately R1 000 per month at the time of her resignation.

Once she had resigned from her job, the applicant decided to take her grievance to court. The essence of her allegations was that from the beginning of December 1999 Mr Dlomo, (who served as her immediate supervisor), had regularly harassed her sexually and that he even eventually assaulted her. Ms Ntsabo testified that on different occasions Mr Dlomo had touched her breasts, thighs, buttocks and genitals. The final insult occurred when her supervisor simulated a sexual act on her, resulting in him ejaculating on her skirt. Mr Dlomo had also made sexual proposals to her.

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Owing to the continued harassment the applicant stated that she had became very uneasy in her work environment. In an attempt to remedy the matter, she informed one Mrs Fisher of the alleged harassment. Mrs Fisher was a manager in the employ of the respondent. Furthermore, she alleged that she and her brother, Mr Ntsabo, had informed the respondent of the continued unwanted actions of Mr Dlomo. Her brother had also laid a complaint at the head office about the alleged incident involving simulated sexual intercourse.

Ms Ntsabo alleged that the respondent had done nothing to alleviate the problem, and that she had been unable to continue working in such intolerable conditions, prompting her to resign. The applicant also alleged that her original letter of resignation had been destroyed by Mrs Fisher and that a second letter of resignation which Mrs Fisher had dictated to her was accepted on file. The original letter held that the sexual harassment was the reason for her resignation. The second letter made no reference to harassment, but only referred to the applicant’s personal circumstances, mentioning the poor health of her mother.

Real Security CC denied that any harassment had occurred, and held in the alternative that if such harassment had taken place, that it had not been reported to the employer in terms of the required reporting procedure as set out by the EEA.

2322 The judgement

The respondent failed to impress the court with the veracity of their witnesses. Indeed, the court found Mr Dlomo to be an untruthful, argumentative and disagreeable witness who contradicted himself on a number of occasions and even lied to the court.25 By contrast, the testimony of the applicant was clear and concise, and she satisfied the court

25 Ntsabo 2360C-D.
with her account of the events. The court found that, based on the applicant’s testimony, sexual harassment had occurred.

The alternative defence revolved around the notion of reporting of the incidents of harassment. The respondent held that Miss Ntsabo had failed to do so in the prompt manner required by section 60 of the EEA. The Court here held that prompt reporting does not always mean “immediate” reporting. The Court held that the individual circumstances had to be examined in each case, including the cultural backgrounds of the people involved:

“The requirement that the reporting procedure be reported immediately cannot be construed to mean with minutes of the incident complained of. There are circumstances of which one is reminded in such considerations. It is trite that such a requirement is regarded as being complied with when it has been done within a reasonable time in the circumstances. That it has been done in ‘reasonable time’ will of course differ from case to case and [be] determined by the relevant circumstances which prevail. It must also be remembered that this requirement is underpinned by the notion of giving the recipient of the notice an[d] opportunity to deal with the complaint without any prejudice. To expect her to have dropped everything in the condition she was in, is an unreasonable expectation.”

The court then made the following order:

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26 *Ntsabo* 2368G-H.

27 *Ntsabo* 2374B.

28 *Ntsabo* 2374B-G.
The applicant’s dismissal was declared an unfair dismissal in terms of the LRA. The court ordered that the respondent pay the applicant the maximum allowable compensation for an unfair dismissal - twelve months salary, an amount of R 12 000, 00. In terms of the EEA, the respondent was ordered to pay damages to the applicant for: (a) future medical costs of R 20 000,00 and (b) general damages including contumelia of R50 000, 00. The respondent was also ordered to pay the costs of the application.

2 3 2 3 Reasons for the judgement

The applicant proceeded with her claim in two ways. Firstly, she claimed unfair dismissal in terms of the LRA. Secondly she claimed patrimonial and non-patrimonial damages in terms of the EEA.

With regards to the unfair dismissal, the applicant succeeded in terms of section 186(1)(e) of the LRA. The court held that the failure of the employer to deal with an intolerable situation could be just as much a problem as the prohibited proactive conduct envisaged in section 186(1)(e) of the Labour Relations Act. The court found that the applicant had informed the respondent of the initial incident early in December 1999. During the six week period between that notification and her resignation, matters had become steadily worse and the respondent had done nothing to rectify the situation. The court held that the respondent’s failure to act had had a negative effect on Miss Ntsabo, undermining her credibility and her feelings of self-worth. Most importantly, this created a hostile work environment, making continued employment intolerable for the applicant. The court held that the respondent should reasonably have foreseen the development of such an environment and taken steps to remedy it. That the respondent chose instead to deny that any notification of harassment had ever taken place meant that it could not in turn prove that the dismissal was fair. The court itself found the following:
“For the purpose of the EEA, failure of the respondent to attend to the problem brings the whole issue within the bounds of discrimination. The nub of the complainant laid with the respondent involved sexual harassment. Its failure to attend to the matter is by definition as envisaged by section 6(3) read with section 6(1) of the EEA, discrimination based on sexual harassment.”

The dismissal was thus held to conform to section 186(1)(e) of the LRA, and the court elected to impose the maximum compensation allowed by section 194(1), namely twelve months salary.

As regards the claim for patrimonial and non-patrimonial damages in terms of the EEA, the applicant succeeded due to the following factors. Firstly, the respondent had no sexual harassment prevention programme in place to manage or educate its staff. Of course, since such a programme was not required by law (the Code serves only as instructional guidelines), the court could not penalize the respondent for lacking such a programme.

However, the Labour Court has the power to award compensation as well as damages in terms of section 50(2) of the Employment Equity Act, for conduct constituting unfair discrimination. The applicant had claimed in terms of (a) contumelia and (b) pain, suffering, emotional or psychological trauma, shock and loss of amenities of life. The court held that since all of the claims arose from the same incident, it would be both equitable and expedient to make one award in respect of the two claims. The Court also stated that it should be remembered that the EEA imposed a duty on employers to protect their employees from offensive conduct, and failure to do so is a disregard for the law. Since the respondent had not followed this path, and since its support for Mr Dlomo over

29 Ntsabo 2378G-H.

30 This was important, as the existence of the 1998 Code meant that detailed recommendations were easily available, leaving the respondent no excuse for lacking policies in this regard.
a lengthy period could not be condoned, the Court held that adding punitive measures in the form of financial compensation was appropriate.

In my view, the Court was correct in the stance it took towards the respondent. The respondent had so blatantly failed to perform its basic duty of care towards its employees, that the punitive measures awarded by the court are entirely appropriate under the circumstances. Only by hitting employers where it hurts most – their pocketbooks – can there be any possibility that such employers will do everything in their power to prevent sexual harassment. It is a sad fact of life that the stick usually works better that the carrot when money is at stake.

2.3.3 Employer liability in terms of section 60

Section 60(1) of the Act reads as follows:

“If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.”

Section 60(1) states that the unwanted conduct should be reported to the employer immediately. The court held that “immediately does not mean within minutes of the incident”. As has been discussed above, the employee-victim does not have to report the harassment immediately, as long as the report is made within a reasonable time (which of course varies according to individual circumstances). Also important to note is that the harassed employee does not have to deliver the report herself. A family member, friend or other interested person may do so. In Ntsabo, the harassed employee’s brother made the complaint to the employer.

31 Ntsabo 2374D.
Also important to understand is the concept “while at work”. It is submitted that this differs substantially from the requirement used for common law vicarious liability, namely that the incident must occur “within the course and scope of employment”. It is submitted that in terms of the EEA, the concept should be interpreted widely and should mean “at the workplace, or while the employed parties are engaged in activities relating or connecting to work”.

\[32\] Cooper 2002 *ILJ* 41.

### 2.3.4 Avoiding liability in terms of section 60

The employer can avoid liability by taking the necessary precautions, as set out in section 60(2) of the EEA:

> “The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.”

This means that the committed and proactive employer can escape liability by putting comprehensive sexual harassment management policies into effect in the workplace. The employer can easily find information on this subject by investigating the Code of Good Practice on the Handling of Sexual Harassment Cases. If the respondent in the *Ntsabo* case had had such policies in place, the outcome of the case might have differed substantially.
Section 60(3) of the EEA states as follows:

“If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.”

This means that if the employer does nothing to rectify matters once informed of harassment (as occurred in Ntsabo, where the employer ignored the victim’s reports), liability will be attributed to the employer.

Finally, section 60(4) of the EEA states as follows:

“Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.”

This section has the effect that employers can escape liability even if harassment does occur, as long as the employer can show that it did everything in its power to prevent harassment from occurring. The employer in Ntsabo was unable to show that it had done everything possible to prevent the harassment. In order to achieve this goal, the employer would most likely have to give evidence of its comprehensive sexual harassment policies, including training, staff education and workshops. The employer would have to present evidence that it had followed the guidelines set out by the 2005 Draft Code. The educational policies that an employer has in place (which are probably the most important part of any preventative programme) must be shown to apply to all employees.
equally, without any possibility of favouritism. There should be feedback mechanisms in place so that the employees can express their views, and point out methods of improving the system. Reporting incidents of harassment is vitally important. Confidentiality and efficiency of the reporting system are absolutely essential. The situation in Ntsabo was totally ineffective, with the management giving little to no aid to the applicant. The respondent employer could not utilise section 60(4) in any manner, since there was no harassment education policy at all in place. The situation with the employer in Ntsabo is a perfect example of the consequences of not following the policies and guidelines set out in the EEA.
CHAPTER 3 - COMMON LAW LIABILITY

3 1 The nature of common law liability

The nature of common law liability for sexual harassment has undergone much development and revision, both in South Africa, and in other jurisdictions worldwide. The increasing incidence of harassment has led judges to reevaluate the laws relating to liability in light of public policy considerations and, in South Africa, constitutional imperatives.

In order to hold an employer liable for the sexual harassment of its employees, the law of delict must be applied. In terms of this law, the employer may be held either vicariously or directly liable for the harassment. In order to succeed with such a claim, the harassed employee will have to prove all of the elements of delict and (in the case of vicarious liability) the requirements for vicarious liability.

3 2 Vicarious liability

3 2 1 History and application of vicarious liability

When examining the rationale for vicarious liability, one must understand that the concept of vicarious liability is one that is primarily based on policy considerations. Neethling, Potgieter and Visser state that vicarious liability is recognized in South African law as an instance of liability without fault\footnote{Neethling, Potgieter & Visser. \textit{Law of Delict.} (2002) 4\textsuperscript{th} ed 373.}. These writers state that
“[V]icarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter.”

As it now stands, any person wishing to claim from an employer for harassment based on vicarious liability will have to prove the following:

- there must have been an employment relationship;
- the employee must have committed a delict; and
- the act must have taken place within the scope and course of employment.

The test for vicarious liability (whether an employee committed a delict within the course and scope of employment) must be examined in light of the various cases that have dealt with this matter both locally and overseas.

3211 The existence of an employment relationship

The employer will only be vicariously liable if there is a valid employment relationship in place, with independent contractors excluded from the definition of employee, as set out in both the LRA (section 2) and the Basic Conditions of Employment Act (section 3). Initially, the control that the employer exercised over the supposed employee was regarded as important – independent contractors perform their required functions outside of the employer’s supervision and control. The courts have dealt with a number of cases examining the development of the test for the employment relationship, but the most recent and relevant is that of Midway Two Engineering & Construction Services v

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34 Neethling et al 373.
35 Neethling et al 373.
36 75 of 1997.
Transnet Bpk\textsuperscript{37}, which set out the so-called multi-faceted test. In terms of this approach to employment, all relevant factors should be taken into account (not merely the issue of extent of control), to determine whether or not an employment relationship was present or not. According to Le Roux \textit{et al}\textsuperscript{38}, in cases where there is doubt as to the presence or absence of an employment relationship, all other factors being equal, the court will most likely decide in favour of such a relationship, based on the policy considerations underlying the concept of vicarious liability.

3 2 1 2 The employee must have committed a delict

For this requirement to be proven, the employee must have first fulfilled all of the elements of a delict: an act, wrongfulness, fault, harm and causation. Unless all of the elements are present, there will be no question of liability as a delict will not have been committed.

3 2 1 3 The act must have occurred within the scope and course of employment

This third requirement is without a doubt the most troublesome and difficult to formulate. It has been the subject of much litigation, both locally and overseas, and it remains a concept open to revision and change. We will examine the various tests (developed to determine whether the act committed occurred within the course and scope of employment) and their impact on the employer’s liability.

The “standard test” was first set out in the case of \textit{Minister of Police v Rabie}\textsuperscript{39}. This case dealt with an instance whereby an off-duty employee of the SAPS assaulted and arrested someone against whom he had a personal vendetta. He identified himself as a police officer during the arrest. The court held that the SAPS was vicariously liable for the

\textsuperscript{37} 1998 3 SA 17 (SCA).
\textsuperscript{38} Le Roux \textit{et al} 82.
\textsuperscript{39} 1986 1 SA 117 (A).
assault, because the acts of the policeman fell within the risk created by the state - that it’s employees would act improperly while carrying out their duties. The test that the court set out was whether or not the employee subjectively acted in a manner that promoted his own interests, while at the same time his actions objectively dissociated him from the normal scope of his duties. The court held that such an action should be regarded as a “frolic and detour”. The court held that is important to note however, that even if the employee commits acts that have been expressly forbidden by the employer, the employer could still be held liable if the acts were closely connected with authorized actions. This is based on the international test first developed in English law by Salmond, which holds the master (employer) liable for wrongful acts authorized by him, as well as holding that

``[a] master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them. . . . On the other hand if the unauthorized and wrongful act is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it”\(^{40}\).

A second South African case that favoured the standard test was that of Kern v Minister of Safety and Security\(^{41}\). In this case, a young woman had been stranded without a lift home. Three on-duty policemen, all of whom were in uniform, offered to give her a lift home in a police vehicle. Instead of aiding her, they raped and assaulted her. The applicant sought to claim damages for vicarious liability from the Minister of Safety and Security. The court a quo dismissed the claim, holding that the policemen were acting outside of the scope and course of their employment, focused entirely on their own self-


\(^{41}\) 2005 6 SA 41 (CC).
gratification and not on their duty to the public. On appeal however, her claim succeeded. The Constitutional Court held that the court *a quo* had erred in not taking the standard test set out in Minister of Police *v* Rabie42 into account. It was held that the so-called standard test was the most appropriate in the circumstances, taking into account that it was similar to the tests developed and used abroad.

Indeed, the English case of *Lister and others v Hesley Hall*43 serves to illustrate the foreign courts approval of the standard test. In this case, a school warden was responsible for the care of disturbed children, requiring him to handle all of the domestic duties of a parent. The warden abused his charges, and the applicant sought to hold the warden’s employer vicariously liable for the sexual harassment. The House of Lords held that the traditional test (based on the rule set out by Salmond) was still the most relevant to sexual harassment cases. The Lords held that if the employee performs an act authorized by the employer, even if he performs the act in a wrongful manner, the employer will be held vicariously liable unless the employer can show that the employee’s actions were completely dissociated with his legitimate duties. The warden was required to perform intimate duties with the children, including bathing them and putting them to bed. His actions therefore rendered his employer vicariously liable in that his abuse was a wrongful extension of his legitimate duties, not a complete abandonment of them.

The South African case of *Costa da Oura Restaurant (Pty)Ltd t/a Umdloti Bush Tavern v Reddy*44 also dealt with a case of an employee acting outside of the scope of his employment. Here however, the employer escaped liability. In this case, the patron (Reddy) made numerous scornful remarks about the barman’s (Goldie’s) inefficiency, before tipping another barman excessively in front of Goldie. Goldie followed Reddy outside of the restaurant and attacked him there. Reddy instituted a claim for damages against the restaurant based on vicarious liability. The Supreme Court of Appeal held that

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42 *Supra.*
43 (2001) UKHL 22 (UK).
44 2003 4 SA 34 (SCA).
in this instance, the employer escaped liability due to the absolute abandonment by the barman of his duties - personal vindictiveness does not render the employer liable. The court held that the barman’s actions were a personal act of vengeance, outside of the employer’s instructions, interests and authority. The court partly based its decision on the reasoning of an Australian case which had occurred in similar circumstances. In this case, Deatons Pty v Flew\(^{45}\), a waitress asked a drunk patron to leave the bar. He hit her in the face and she retaliated by throwing the mug of beer she was holding in his face. It slipped out of her hand and struck him, costing him an eye. The Australian court held that it was a spontaneous act of retributive justice motivated by passion and resentment, outside of the employer’s authorization, interests and control. The employer escaped the vicarious liability charge.

Another test that has developed in our law is that of the “dual capacity” approach. According to Le Roux et al\(^{46}\) this test recognizes that some conduct can be held to be both within and outside the scope of employment. An important case here is that of Bezuidenhout NO v Eskom\(^{47}\). In this case, an Eskom employee picked up a hitchhiker, contrary to company policy prohibiting drivers from transporting passengers. The car overturned due to the employee’s negligent driving and the hitchhiker was injured. The applicant instituted a claim for damages against Eskom based on vicarious liability. In this instance the employee was acting both within the scope of his employment – driving the car on company business – and outside the scope of his employment – transporting a passenger in contravention of company policy. The court held that the employee was subjectively acting outside of his employment and that objectively, no close connection between hitchhiking and his duties could be found. Eskom therefore escaped liability.

The next test was the so-called “supervisor test” developed in the United States. This test was developed in two US cases that were delivered on the same day. In the first case, that of Faragher v City of Boca Raton\(^{48}\), two male lifeguards who were in a supervisory  

\(^{45}\) (1949) 17 CLR.  
\(^{46}\) Le Roux et al 85.  
\(^{47}\) 2003  24 ILJ 1084 (SCA).  
position harassed two female lifeguards who were their juniors. The court held that since the harassment was committed by those in a supervisory position, the employer should be liable for their conduct, as it could be regarded as a legitimate business risk. The second case of *Burlington Industries Inc v Ellerth*\(^49\), when read with the decision in *Faragher*, set out a structure for the liability of employers in sexual harassment cases. According to Calitz\(^50\), the court drew a distinction between two types of cases: firstly, cases where the harassment resulted in a tangible employment action such as dismissal, demotion, etc. In these circumstances, the employer would be strictly liable. In cases where no tangible employment action resulted and the supervisor merely created a hostile environment, the employer could escape liability by proving that it took reasonable care to prevent and correct harassment. The second factor necessary for the employer to escape liability would be where the employer would have to show that the victim unreasonably failed to take advantage of corrective opportunities made available to her by the employer.

An article in the Employment Law Journal held that these United States judgements were unclear on whether or not supervisory capacity was a good criterion on which to base liability:

> “Should liability be vicariously extended to the employer for the wrongs of all employees, or should such extension be restricted only to the wrongs of employees who exercise power on its behalf over others – ie supervisors and managers? As is suggested by the *Faragher* case, if the work environment is used as the test, there is in principle little difference whether the employee who seeks to exploit that environment is a supervisor or an ordinary employee. Employees are placed in proximity for the employer’s convenience; social interactions take place and are shaped by the specific environment; power can be exercised in


\(^50\) Calitz 2005 3 *TSAR* 226.
various ways by individuals, whatever their formal relationship may be.”  

A criticism of the supervisor test was set out by Le Roux et al., whereby they held that the two above judgements were based not on the common law vicarious liability, but on the provisions of Title VII of the Civil Rights Act, 1964. The primary goal of Title VII is the eradication of unfair discrimination in the workplace, while the aim of the common law is to remedy harm suffered. In terms of Title VII, if the employer does all that is reasonable to prevent unfair discrimination, it will escape liability for the harassment. This is analogous to the statutory provisions of section 60 of the EEA, meaning that liability for sexual harassment in terms of Title VII is more a form of direct liability than vicarious liability.

Another test that was developed was the “risk of enterprise test”, as set out in the Canadian case of Bazley v Curry. This case dealt with the sexual harassment of a child who was a resident of a facility for emotionally disturbed children. Curry, who was employed to care for the children, was required to act as a parent figure in that he had to perform all of the duties of a parent i.e. to bath, dress and put them to bed. He took advantage of his position and abused one of the children under his care. The court here held that Curry’s employer could be held vicariously liable, even though it was not at fault. It based its reasoning on the following factors: the court held that the policy considerations underlying the concept of vicarious liability should be given much more weight than phrases like “scope of employment”. The court described the risk of enterprise approach as follows:

“The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair

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52 Le Roux et al 87.
53 1999 2 SCR 534.
54 Bazley par 26.
that the person or organization that creates the enterprise and hence the risk should bear the loss. Fairness in this context depends not on foreseeability of risks from specific conduct, but . . . foreseeability of the broad risks incident to a whole enterprise.”\textsuperscript{55}

The court examined the old Salmond test and decided that this test was not useful in dealing with intentional wrongdoing. In terms of Salmond, the court looked at whether sexual abuse could be held to be an improper mode of Curry’s duties – if this was the case the employer would be vicariously liable. The court stated that it is difficult to distinguish between an unauthorised mode of performing an authorised act that attracts liability and an independent act that does not, since the Salmond test does not provide any criterion on which to make the distinction\textsuperscript{56}. It was also held by the court that certain principles were relevant in determining whether or not the employer should be held vicariously liable in terms of the risk of enterprise test:

(1) \textasciitilde They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of ‘scope of employment’ and ‘mode of conduct’.
(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues there from . . . . Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections like time and place will not suffice. Once engaged in a particular business it is fair that an employer be made to pay the generally foreseeable costs

\textsuperscript{55} Bazley par 31.
\textsuperscript{56} Bazley par 11.
of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of subsidiary factors may be considered:
(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
(b) the extent to which the wrongful act may have furthered the employer's aims;
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
(d) the extent of power conferred on the employee in relation to the victim;
(e) the vulnerability of potential victims.\(^57\)

When examining the situation, the court held that there should be a close link between the abuse and the services that the harasser is required to perform in terms of his employment. Since the situation in this instance did in fact fall under the above considerations – Curry took the requirement of intimacy with his charges too far - the court held that Curry’s employer should be held vicariously liable.

The second case dealing with the risk of enterprise test was another Canadian case, *Jacobi v Griffiths*\(^58\). This case also dealt with the sexual abuse of minor children, but in this instance the employer was held not to be vicariously liable for the abuse. The employer ran a day facility that aimed at promoting the well-being of children through recreation and sport. Griffiths was the director of the facility. He took advantage of his position and abused the children, this abuse taking place at his home, not at the facility itself. The court found that the facts of this case did not fall within the grounds of the test

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\(^{57}\) Bazley par 41.
\(^{58}\) 1999 2 SCR 570.
set out in *Bazley*, which was handed down on the same day. The court stated that the close connection between the requirements of the job and the harm suffered was not present in this instance: Griffiths’ abuse took place off of the employer’s property, outside of working hours. The court stated that he merely took advantage of the rapport built up with the children during work.

The four different tests for whether or not the delict occurred within the course and scope of employment will be referred to again below.

3 2 2 *Grobler v Naspers Bpk en ‘n ander*

The case of *Grobler v Naspers Bpk en ‘n ander* was a landmark ruling, and is probably the most relevant and topical case dealing with liability for sexual harassment yet heard in South Africa.

3 2 2 1 The facts of the case

Sonia Grobler was employed as a secretary by Naspers Tydskrifte in 1996. She was appointed to serve as the secretary for Gasant Samuels, a manager-in-training. The harassment allegedly began relatively innocently, with Samuels declaring his love for the applicant. However, matters soon became far worse, with Samuels refusing to accept Grobler’s pleas that she was not interested in pursuing a romantic relationship with him.

Grobler testified that aside from a general tense and threatening manner which was always apparent, there were five main incidents of clear-cut harassment that had occurred. These included him trying to force a kiss on her in a lift; him hugging her; an incident where she had to throw a mug of coffee at him to escape; and another where she bit his finger as he attempted to force her to declare her love for him. The fifth and most

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59 2004 (4) SA 220 (C).
serious incident occurred when Samuels – upon learning that Grobler was attempting to lease out her flat – showed up and propositioned her directly. When that failed he threatened her with a firearm. Informing her that he only required one night with her, that he would “set the rules” for their encounter, he stated that he would give her instructions on where they were to meet. The next day he handed her a note containing a hotel reservation for their proposed tryst.  

Grobler had attempted to inform management about the harassment, but had not received any support from the company. Evidence presented in court showed that Samuels was seen as a favourite of the section manager, probably prompting the lack of assistance for Grobler. After she obtained advice from a labour consultant, the applicant instructed Naspers’ social worker to institute disciplinary proceedings against Samuels. Three other female employees laid similar charges of harassment against Samuels as soon as the proceedings became known. Samuels was dismissed, all the while protesting his innocence of any wrongdoing.

Grobler instituted an action in the High Court claiming damages from Naspers and Samuels for loss of earnings, medical expenses (she claimed she was suffering from Post Traumatic Stress Syndrome) and general damages. She claimed that the horror of the situation, and the humiliation she had endured had resulted in her being unable to work.

### 3 2 2 2 The judgement

The court held that the applicant had succeeded in proving on a balance of probabilities that the sexual harassment had occurred. The court also found that Naspers should be held vicariously liable for the harassment. The court therefore awarded Grobler total damages in the amount of R776 814,00. These damages included patrimonial loss based on the *lex Aquilia*, as well as non-patrimonial loss in the amount of R150 000,00.

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60 Grobler par 238C.
61 Grobler par 239A-B.
3223 Reasons for the judgement

The court had to examine and decide on the following important issues:

- Whether the alleged sexual harassment had indeed occurred.
- Whether the applicant’s mental and physical problems had been caused by the harassment.
- If Naspers could be held vicariously liable for Samuels’s actions.
- Was there merit in Naspers’ alternative defence that Grobler should only be able to claim damages in terms of COIDA.

Regarding the first point, the court had little difficulty in deciding on a balance of probabilities that the sexual harassment had occurred. The fact the Samuels was known to have a reputation for bothering female colleagues, as well as the witnesses that Grobler had produced, all aided her in showing proof of sexual harassment.

The second point, regarding the underlying cause of the applicant’s emotional problems was also examined. The court held that the evidence showed that Grobler had prior to her position with Samuels been a friendly, outgoing person. Based on the evidence presented by the various medical practitioners, the court held that there was no other reason, aside from the sexual harassment, that could have occasioned the severe emotional, mental and physical hardships that she now suffered under.62

The third point to be discussed involved the most intensive examination of the law. This was the issue of whether or not Naspers could be held vicariously liable for the sexual harassment that Grobler had suffered. Since the action had been launched in the high court on the basis of the common law of delict, the section 60 of the EEA (statutory liability) did not apply. The court went to great effort to trace the development of the law of vicarious liability both locally and abroad. The examination included the United States,

62 Grobler par 272G-H.
the United Kingdom, Australia and New Zealand. According to Smit and Van der Nest, the court’s examination of foreign law came to the following conclusions:

- “the rule of vicarious liability had its origins in a primitive stage of the English law;
- the scope of application of the rule was adapted through the ages in order to keep up with changing social and economic circumstances;
- the rule was adapted by the rulings of judges because of principles of fairness and not because of principles of law;
- when a new problem like sexual harassment occurs, the nature of the specific relationship must be analysed in comparison with other relationships. It must then be decided whether the law should bring the misbehaviour within the scope of vicarious liability because the misbehaviour is closely related to and falls within the risk that was created by that relationship.”

The court examined the development of the concept of vicarious liability in light of many of the cases discussed above in 3 2 1 3. It held that the situation in Naspers would result in the employer’s liability if the case was heard in the United States. This is based on the decisions of *Faragher* and *Ellerth* that were discussed above. The mere fact that Samuels was the victim’s supervisor would have been enough. Grobler sought aid from a number of people at Naspers to no avail, based in part on the belief in the company that Samuels was a favourite of the management. This would have satisfied the requirement that a hostile working environment was prevalent, with no effort made by management to ameliorate the wrong suffered by the victim-employee.

The court held that if the “supervisor test” could not be applied for some reason, the “risk of enterprise test” was still relevant. The application of this test, developed in the cases of *Bazley* and *Jacobi*, would be based on the fact that the relationship between secretary and manager created or enhanced the risk of harassment. The fact that harassment did take

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63 Smit & Van der Nest “When sisters are doing it for themselves: sexual harassment claims in the workplace” 2004 3 TSAR 531.
place within this vulnerable working relationship was important. The court applied the factors set out in the case of Bazley to determine whether the connection between the created risk and the harassment suffered was sufficiently close. The court answered this question in the affirmative – the intense and personal relationship between manager and secretary created an inherent risk of harassment\(^\text{64}\), and Samuels’ actions therefore fell within the risk created. This meant that it would serve the interests of justice (in line with policy considerations) if Naspers were held vicariously liable for the sexual harassment.\(^\text{65}\)

The court held that even if the circumstances of the case prevented the application of the above two tests (due to an inability to stretch the doctrine of vicarious liability to fit sexual harassment in the workplace), the development of the law would still necessitate the adaptation of the rules relating to vicarious liability so as to make them applicable to sexual harassment. The court held that it was bound in terms of section 173 of the Constitution, which grants inherent power to courts to develop the common law, taking into account the interests of justice\(^\text{66}\). This would also mean that the development of the common law should serve to protect and advance section 10 of the Constitution, which upholds the inherent dignity of all people, as well as protecting section 12 of the Constitution, which upholds the right to freedom and security of the person.

The court held that the previous rules relating to vicarious liability – those based on Salmond – requiring the action to be within the course and scope of employment were not in line with the policy considerations protecting the victims of harassment. It was held that the development of the common law could best be effected by using a test that combines a close connection between risk and wrongful act, and also takes into account the foreseeability of possible harm by the employer. The court therefore favoured the use of the concept of “risk”, as described in the case of *Minister of Police v Rabie*, being utilized when formulating a new test for vicarious liability. The test should be one that is amenable to change, the court held, since the circumstances of harassment will never be exactly the same.

\(^{64}\) Grobler par 513F.
\(^{65}\) Grobler par 514B.
\(^{66}\) Grobler 298.
The fourth point that the court had to discuss was whether or not Naspers could succeed with its alternative defence that Grobler should claim damages for her sexual harassment in terms of COIDA. Naspers asserted that section 22, 35 and 36 of the Compensation for Occupational Injuries and Diseases Act 131 of 1993 were applicable in this instance, since Grobler’s psychological and mental condition was the result of incidents in the workplace. Section 22(1) states the following:

“If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.”

Section 35 stipulates that an employee will not have an action for compensation against the employer for any occupational injury, disease or death except for the action in terms of COIDA. This would mean that if the court agreed that the sexual harassment fell within the definition of an occupational injury, Naspers would escape liability. In considering the section 36 provisions, if an occupational injury is sustained at work and the liability is claimed from a third party other than the employer (in this case it would be Samuels), the victim-employee may claim damages from COIDA as well as instituting action in court against the relevant third party. The court examined these sections in light of the facts of the case, and came to the conclusion that COIDA was not applicable in this instance. The reason for this is that the court could not agree that sexual harassment fell within the definition of the term “accident”, as it was not a once-off occurrence like a fall or cut, but rather a long-term, continuing series of psychological traumas causing the harm.67

67 Grobler par 299D.
3 2 3 A new test for vicarious liability

The case of Grobler v Naspers Bpk did much to extend the application of the law relating to vicarious liability for sexual harassment. However, not all of the tests and structures set out by the court in this case are universally approved of. Le Roux et al\textsuperscript{68} hold that the development of the common law is the right approach to take, but question the steps set out in Grobler. They state that the notion that sexual harassment falls outside of the scope and course of employment is backward thinking, in that it does not take into account the modern field of employment. Rather than stretching overly complex tests to fit the circumstances, the courts should simply develop the “standard test” enunciated in Rabie by taking into account factors like closeness of the connection between the harassment and the employment, the general employment environment, and the relationship between the harasser and the victim.

The concept of vicarious liability for harassment should be interpreted in as wide a manner as is necessary in terms of the requirements of rationality and justice. Though such a wide interpretation does not afford the proactive employer much relief, Le Roux et al\textsuperscript{69} point out that such is not the point of vicarious liability\textsuperscript{69}. Vicarious liability aims to redress harm suffered.

\textsuperscript{68} Le Roux et al 91.
\textsuperscript{69} Le Roux et al 93.
3.3 Direct liability

3.3.1 The nature of direct liability

The nature of direct liability for sexual harassment based on the common law is examined in terms of the law of delict. The liability will usually arise in terms of the employer’s omission to perform a vital task. This is illustrated in the case of Media24 v Grobler\(^70\), which will be discussed further below. The element of delict in question is usually that of wrongfulness, where the employer fails to act as it should in terms of a legal duty of care to keep harm from occurring.

3.3.2 Media24 v Grobler

3.3.2.1 The facts of the case

This case concerned the appeal of Media24 (the first appellant) against the decision by the Cape High Court to hold it vicariously liable for the sexual harassment at work of Sonia Grobler (the respondent) by Gasant Samuels (the second appellant). The respondent employee had been awarded damages of R 776 814,00. The respondent’s cause of action had been based on her assertion that the first appellant had breached its legal duty to its employees in terms of which it was required to maintain a working environment that protected and respected the dignity and mental well-being of its employees. This would include taking all necessary steps to prevent, or end sexual harassment. The court a quo had found the second appellant guilty of sexually harassing the respondent, and had then held the first appellant vicariously liable for the harassment.

\(^70\) 2005 6 SA 328 (SCA).
Before the Supreme Court of Appeal, the first appellant argued the following:

- That the Cape High Court had erred in extending the principles of vicarious liability beyond those recognized in South African law, since the harassment had not occurred within the course and scope of the second appellant’s employment.
- That the first appellant had not breached its legal duty to maintain a safe working environment, since the respondent had failed to prove that the first appellant had a duty to take positive measures to prevent harm. The first appellant argued that there was no legal basis for such a duty to be imposed, but alternatively, if there was such a duty, that the first appellant had discharged it by implementing a sexual harassment policy and grievance procedure in 1997. The first appellant contended that any legal duty on the first appellant arose from the contract of employment between the parties.
- Thirdly, the first appellant argued that the high court had not had jurisdiction to hear the matter, since it was an issue that fell within the exclusive jurisdiction of the Labour Court.

The respondent contended as follows:

- That the trial court had acted correctly in holding the first appellant vicariously liable for the sexual harassment.
- In the alternative, that even if vicarious liability could not be extended to the first appellant, a legal duty to ensure a safe working environment existed. The respondent argued that the first appellant had breached this duty by not taking any steps to halt the sexual harassment from occurring.

3 3 2 2 Judgement and reasoning

The court in this instance felt that it was not necessary to examine the matter of vicarious liability, since it held that the respondent had satisfactorily proven that the first appellant
could be held directly liable for the sexual harassment. The court made reference to the cases of *Van Deventer v Workman’s Compensation Commissioner*\(^{71}\) and *Vigario v Afrox Ltd*\(^{72}\) when reasoning this judgement. In terms of these cases, the court found that our law recognized that an employer owes its employees a common law duty of care. The court held that this duty of care extended not only to the employee’s physical harm, but was also applicable to hold the employer liable for not preventing psychological harm from occurring\(^{73}\).

The common law legal duty of care is grounded in the convictions of the community, and the court found that this duty of care was applicable to the matter in spite of the existence of the statutory remedy for sexual harassment in terms of section 60 of the EEA. The court further held that the mere fact that a contractual relationship existed between the first appellant and the respondent did not preclude the application of the common law of delict to the matter\(^{74}\).

The third issue in dispute, the matter of jurisdiction was also dealt with by the court. The court held that the matter was not within the exclusive jurisdiction of the Labour Court. The reasons for this were based on the court examining section 7(6) of the NEDLAC Code of Good Practice on the Handling of Sexual Harassment in the Workplace. This reads as follows:

> “A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator and the legal rights of the victim are in no way limited by this code.”\(^{75}\)

The court found that the meaning of “sexual assault” could be extended to that of sexual harassment, and that this meant that a “civil charge” could be taken to mean a civil action for damages – as the action of the respondent was a civil action for damages. The court

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\(^{71}\) 1962 (4) SA 28 (T).
\(^{72}\) 1996 (3) SA 450 (W).
\(^{73}\) Media24 par 65.
\(^{74}\) Media24 par 68-69.
\(^{75}\) Media24 par 75.
also held that since the matter dealt with the wrongfulness of the first appellant’s conduct, the application of the judgement in the case of *Fedlife Assurance Ltd v Wolfaardt*\(^76\) was relevant here. In terms of this judgement, the matter is not solely reserved for the jurisdiction of the Labour Court, since the unlawfulness of the employer’s conduct (in this instance the first appellant) would not be a matter requiring the exclusive jurisdiction of the Labour Court as set out in section 157(1) of the LRA\(^77\).

The court finally examined the respondent’s contention that the first appellant had breached the duty of care it owed its employees to provide a safe working environment. The court held that it was clear that the first appellant had not fulfilled this duty, since the management of the employer, despite being informed of the situation and requested to intervene, did nothing to prevent the harassment from occurring. The court held that this failure on the part of management established the breach of the legal duty of care by the first appellant\(^78\).

The court accordingly held that the first appellant was liable for the sexual harassment of the respondent. The appeals of both appellants were thus dismissed with costs.

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\(^76\) 2002 1 SA 49 (SCA).
\(^77\) *Fedlife Assurance Ltd v Wolfaardt* par 26-27.
\(^78\) *Media24* par 71.
CHAPTER 4 - REDUCING THE RISK OF EMPLOYER LIABILITY

4.1 Developing a policy

It is to be expected that the proactive employer, desperate to avoid expensive litigation, will do everything in its power to reduce its liability in terms of sexual harassment. The best way to achieve this goal is to implement a comprehensive policy to deal with sexual harassment. Only in this manner will all managers and employees be made completely aware that sexual harassment is not only forbidden, but that established procedures are in place to deal with this problem as and when it arises.

4.2 A model of procedures to be followed

The development of a comprehensive policy, according to Erasmus et al, should start with an intensive investigation of the cultural and social background of the employees of the company. This should be followed by drafting a precise definition of sexual harassment that takes into account the social factors ascertained. This will prevent employees from simply ignoring the policy due to inherent conflicts with their beliefs.

The formulation of a sexual harassment policy should now occur. This will comprise a number of important elements. Erasmus et al sets out a ten-step process that will result in a comprehensive sexual harassment policy:

- Firstly, there should be an imperative “zero tolerance statement” emphasized.

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80 Erasmus et al 2003 12(1) Management Dynamics 40-41.
• Next, the definition of sexual harassment should be set out to explain the basis of harassment, including both “quid quo pro” harassment, and harassment based on the establishment of a hostile working environment.

• Thirdly, specific actions that are prohibited should be outlined in detail.

• The fourth step should emphasize that all employees have a responsibility not only to refrain from harassment, but to report harassment of other employees to the necessary authority.

• Fifthly, the policy should emphasize that no retaliatory action will be taken against any party who reports incidents of sexual harassment.

• The sixth step states that a well-drafted complaints procedure is necessary for an effective policy. The procedure should be easy to understand, have direct access to senior management and should eliminate obstacles to communication.

• Step seven deals with an effective investigation procedure – this must clearly advise employees of what will occur once a complaint is lodged. It must also set out the persons responsible for the investigation, the expected length of the procedure and the mechanisms that will be employed to uncover the truth.

• The eighth step concerns corrective action. This stage should set out a comprehensive series of events, including various disciplinary options. These should range from warnings and counseling for minor offences, to dismissal for serious matters. Corrective action also includes aiding the victim-employee through counseling and therapy.

• Step nine concerns confidentiality. This must be protected and advanced as far as is reasonably possible, otherwise many employees will not make use of these procedures for fear of public ridicule.

• The last step concerns training. This is one of the most important procedures, and must be very comprehensive, including discussions, company policy and ethos, personal responsibility, corrective procedures and even self-defence methods.
4.3 Diagrammatical representation

Erasmus et al have set out a comprehensive diagrammatical representation of a means of managing sexual harassment. This is included as Annexure A.

4.4 Liability insurance

Another manner of limiting the employer’s liability may be through the use of liability insurance. If the current trend of litigation increases, as seems likely, employers are going to have to either take out liability insurance, or renegotiate existing policies to include sexual harassment. According to Reinecke et al, liability insurance may be defined as follows:

“Liability insurance is concerned with negative elements (liabilities) which come into being as part of the insured’s patrimony, for example insurance against medical expenses or against the contractual liability of an insurer in terms of a reinsurance contract. Most often this type of insurance covers the delictual liability of an insured towards a third party, for example liability as a result of the driving of the insured’s motor vehicle.”

It is thus possible that employer’s would make use of such a policy in order to reduce or limit their liability for harassment. This is not as easy to implement as it would seem however. The nature of the risk would be difficult to ascertain, since the profiles of the employees themselves would determine this – an employer that only employs males will obviously have a lower risk of harassment than an employer that employs staff of both

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81 Erasmus et al 2003 12(1) Management Dynamics 39.
Likewise, there will no doubt be an attempt by insurers to limit their own liability by working out a limitation on claims payouts per year – if too many incidences of harassment occurred, the employer could still find itself having to pay out to make up the shortfall. Erasmus et al state that more problems could arise in regard to reporting and quantification of damages – employers may not report incidents timeously, or the claim may be difficult to finalize due to the fact that harassment is not usually a once-off incident, but a process that may occur over a length of time.

The last issue here is that of cost. Many employers are already heavily burdened by having to contribute to the Compensation Fund in terms of COIDA. Having to alter their insurance policies to include harassment may place severe financial strain on the employer’s resources. However, Erasmus et al contend that many employers will shoulder such a burden rather than risk a court case where they could be held liable for exorbitant claims for damages.

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83 Supra 541.
84 Supra 541.
85 Supra 542.
86 Supra 542.
CHAPTER 5 – CONCLUSION

Sexual harassment is truly an ever-growing problem in South Africa. While it is comforting to believe that employers are taking the problem to heart, the growing number of reported incidences of harassment clearly shows that not enough is being done.

In this treatise, I have provided an exposition of the current situation pertaining to sexual harassment liability in South Africa. The statutory liability provisions (primarily section 60 of the EEA) are, I feel, most useful in situations where the large-scale employer has to deal with the interaction of large numbers of employees. Section 60 gives both employee and employer means to manage potential harassment problems. The employee has a structured method of seeking redress, and the employer can escape liability by showing sufficient effort was made to eliminate harassment. By contrast, the common law direct and vicarious liability is perhaps best utilized by the employee who has no recourse in terms of statutory provisions. It may be more difficult to establish liability based on the employer’s vicarious liability, but the positive aspect is that the employer cannot escape liability due to its efforts in reducing harassment. If all of the elements of liability are proven, the employer will have to pay. This is also a positive factor, as it gives harassed employees a safety net, as it were – if they cannot succeed in one way, the other will most likely avail them. In light of this, it is my opinion that a harassed employee seeking redress should first search to establish the employer’s liability through statutory provisions. If this cannot be done, the common law is available to remedy the harm suffered.

The concept of liability has undergone much revision and change, both here in South Africa, and in countries abroad. This trend is cause for quiet celebration, as the continuing development and expansion of legal principles is always necessary if the judiciary and legislature are truly intent on solving a pernicious problem like harassment. Statutory liability is now well structured, in light of the updated NEDLAC Code of Good practice and the provisions of the EEA and PEPUDA. Vicarious liability is also undergoing rapid development and definition. This represents the start of what is most
likely to be an accelerating trend, as the law attempts to keep up with the upswing in harassment.

The proactive employer has much to gain from a comprehensive sexual harassment policy, one that includes grievance and follow-up procedures as well as educational and training programmes. The aggrieved Sonia Grobler cost the Media24 group more than three quarters of a million rand in damages, excluding the substantial legal fees. It would be ill-advised if employers did not realize the likelihood of such litigation crippling both their financial status as well as their corporate image – something worth a fortune in terms of both employee morale and customer loyalty. The employer should rather spend sufficient money to ensure the best possible sexual harassment policy. As Collier states, it has been calculated that the financial cost of training is 34 times less expensive than the consequences of ignoring the problem.\(^{87}\)

All issues of financial consideration aside, the measures enacted to combat harassment serve an important social purpose. We in South Africa are fortunate to benefit from a Constitution that enshrines and protects rights like equality and dignity. Sexual harassment is a continuing threat to the full expression of these rights. Sexual harassment serves to present society with a true crisis – whether insidious and subtle advantages are taken, or blatant manipulation and physical harassment occurs, people are often irretrievably scarred.

This is the true test of both our society and our legal system – whether we can overcome entrenched cultural mores and practices, in order to effect meaningful change in the vital interactions that characterize the modern working environment. It is sincerely hoped that we are all capable of change, in order to recognize the essential worth and value of all of our people, and the necessity of protecting and supporting them as they struggle through the morass of the competitive and stressful world of work.

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