

Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development

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I INTRODUCTION

In this piece I take issue with two seemingly contradictory ways of approaching the South African common law. On the one hand I problematise the trend of 'constitutional avoidance' (the specific brand of constitutional avoidance that I address here will be called 'constitutional heedlessness') reflected in recent case law relating to the development or application of the common law of delict.¹ On the other hand I also caution against, what I will call, 'constitutional over-excitement'

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¹ I acknowledge that 'avoidance' has received much attention in South African scholarship. See, eg, the famous piece by I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138 (Critiques the Constitutional Court's decisional minimalism). In this article, I do not delve into the history of avoidance as a broad principle. Instead, I direct my attention to a specific manifestation of avoidance, as it applies to common-law cases, that I call 'constitutional heedlessness', for reasons that I hope will become clear in the course of developing my argument. Constitutional heedlessness is not an unnecessary neologism or synonym for avoidance. There are other manifestations of avoidance too: there is also the more aggressive form of constitutional avoidance that I have called 'anti-constitutionalism' (see E Zitzke 'A Case of Anti-Constitutional Common-Law Development' (2015) 48 *De Jure* 467), and there is a softer version of constitutional avoidance that I have called a 'constitutionally wanting' approach to the common law's development (see E Zitzke 'Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of *Heroldt v Wills* 2013 2 SA 530 G5J' (2016) 69 *Journal of Contemporary Roman-Dutch Law* 103). Drawing the links between these different brands of avoidance is beyond the scope of this article that is focused on the 2014 term of the Constitutional Court. I leave that for a future endeavor.

which is the polar opposite approach to constitutional heedlessness.² To be clear from the start, by constitutional heedlessness I mean a substantive avoidance of the potential impact of the Constitution of the Republic of South Africa, 1996 on common-law matters that require constitutional infusion, while the courts or authors that employ this approach do not expressly reject the Constitution's potential impact on the matter. In essence, constitutional heedlessness is a 'business-as-usual' approach to the common law – a silent circumvention of the Constitution.³ By constitutional over-excitement I mean a relegation of established common-law rules that are ultimately replaced by a pure application of constitutional principles.

In Part II, I unpack the problem of constitutional heedlessness. Firstly, I explain why constitutional heedlessness is an undesirable paradigm for common-law enquiries. Secondly, I discuss the decisions in *iMvula Quality Protection (Pty) Ltd v Loureiro and Others*,⁴ *H v Kingsbury Foetal Assessment Centre (Pty) Ltd*,⁵ and *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,⁶ as recent manifestations of constitutional heedlessness. *Loureiro SCA* and *Foetal Assessment Centre HC* serve as examples where constitutional heedlessness was remedied in the respective appeals to the Constitutional Court,⁷ while *Country Cloud SCA* serves as an example where, for the purposes of conceptual clarity, a more complete analysis of the relevant issues would have involved a recognition of the constitutional value of state accountability (and the common-law rules that have been developed in light of this norm), even though such recognition did not have an effective impact on Country Cloud's appeal to the Constitutional Court.⁸ In Part III, I turn to the competing approach of constitutional over-excitement portrayed in the way in which the wrongfulness enquiry was addressed in *Loureiro CC*. Finally, in Part IV, I develop the argument that even though it may be desirable to take the Constitution seriously so that it militates against common-law veneration and its ideological stagnation, the Constitution should not be monumentalised to such an extent that we become uncritical of it. I further contend that the doctrine of adjudicative subsidiarity may provide useful conceptual machinery to strike a balance between the two extreme approaches at issue in this discussion.

² Even though other scholars have critiqued courts for wrecking the common law in favour of constitutional principles in the past, I use the term 'constitutional over-excitement' as one that aims to unify recurrent critiques of this nature. I by no means suggest that I am the first person to criticise extreme zealotry in constitutional application to the common law. I mention relevant scholarship that has done similar work in delict in Part III below. For the purposes of developing a juxtaposed critique of two opposing problems, I find the new term (for an old problem) to be both useful and necessary.

³ D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 127–163 (Problematises the lack of constitutional imagination in private-law scholarship).

⁴ [2013] ZASCA 12, 2013 (3) SA 407 (SCA), [2013] 2 All SA 659 (SCA) ('*Loureiro SCA*').

⁵ [2014] ZAWCHC 61 ('*Foetal Assessment Centre HC*').

⁶ [2013] ZASCA 161, 2014 (2) SA 214 (SCA) ('*Country Cloud SCA*').

⁷ *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC) ('*Loureiro CC*'); *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) ('*Fetal Assessment Centre CC*').

⁸ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC) ('*Country Cloud CC*').

II CONSTITUTIONAL HEEDLESSNESS

A The Theoretical Problem

In the middle of Pretoria's Church Square stands a monument dedicated to the late President Paul Kruger, protected by four bronze guards. It is a monument dedicated to a man who once warned that the jurisprudential tradition of natural law was conceived in the womb of the devil.⁹ For Kruger and others, natural law broadly involves the recognition of a higher set of norms against which all laws can be tested. More specifically, for Kruger, the recognition of natural law involved a compromise of the supremacy of the legislature (then called the 'Volksraad') by affording judges a right to test legislation against a higher set of norms.¹⁰ By rejecting the notion of natural law, Kruger aimed to protect the pride of the Volksraad. Under the influence of Kruger's support for parliamentary sovereignty, coupled with the British influence of legal positivism in South African legal scholarship and practice,¹¹ as well as the maintenance of white supremacy and racialised capitalism,¹² the country was in a position to legalise the atrocity of apartheid where a higher set of norms protecting the rights to (among others) life, freedom and security of the person, equality and dignity were unknown to the majority of South Africans subject to oppressive legislation.¹³ If one accepts that the aforementioned rights are all relevant to the natural law tradition,¹⁴ apartheid law involved a clear disapproval of natural law.

At this point it is important to stress that Kruger's stance on natural law specifically related to its application to legislation. Despite the rejection of a natural law theory for statutory interpretation, it appears that many scholars have historically been (and still are) of the view that the rights relevant to the modern developments in the natural law tradition are implicit in the rules of Roman and Roman-Dutch law that form the basis of South African common law.¹⁵ Therefore, many would have regarded (and possibly still would regard) it difficult to attempt to eliminate the natural law tradition from the common law because the latter is inherently pervaded by principles of the former.

Since the eras of Kruger and apartheid a lot has changed in South African law. South Africa now has a supreme Constitution with a justiciable Bill of Rights that

⁹ J Dugard 'Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181, 184 (Shows how parliamentary sovereignty and legal positivism upheld apartheid in South Africa and suggests a realist-*cum*-natural law approach instead).

¹⁰ *Ibid.*

¹¹ *Ibid* at 184–185.

¹² S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 3–22.

¹³ For an overview, also see *ibid* at 297ff.

¹⁴ Dugard (note 9 above) at 197.

¹⁵ *Ibid* at 183. The influential Dutch jurist Hugo de Groot is regarded as the father of Dutch humanism and natural law, which influenced the Roman-Dutch law that was in turn imposed on South Africa. See in this regard DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 191–193; PhJ Thomas, CG van der Merwe & BC Stoop *Historical Foundations of South African Private Law* (2nd Edition, 2000) 57, 70, 72; and WB le Roux 'Natural Law Theories' in C Roederer & D Moellendorf *Jurisprudence* (2004) 40–41. The most recent work on the similarities between the South African common law and human rights is by G van Niekerk 'The Endurance of the Roman Tradition in South African Law' (2011) 4 *Studia Universitatis Babeş Bolyai Jurisprudentia* 20, 21ff (Demonstrates the compatibility of Roman legal principles and constitutional law).

has opened the door for the natural law tradition to thrive in South Africa on all fronts.¹⁶ Furthermore, it is widely accepted today that the Constitution may affect the development of the common law.¹⁷ However, the establishment of a supreme Constitution with a Bill of Rights and its potential impact on the common law was not unequivocally supported by private-law scholars from the start. At the time of democratic transition in South Africa there were some members of the legal academy (and interestingly for present purposes, delict scholars in particular) who took a clear stance against the introduction of a bill of rights or, as a minimum, a stance against the potential infiltration of constitutional rights into the esteemed common law.¹⁸

The rejection of constitutional rights in this context ultimately involved an implicit rejection of a specific brand of the natural law tradition.¹⁹ This is true because it is widely accepted that the institution of human rights is derived from modern developments in natural law theory.²⁰ Therefore, even though President

¹⁶ The formative document that solidified the democratic transition in South Africa, and the concomitant democratic legal reforms, is the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution'). The Interim Constitution has been repealed.

¹⁷ Since the Constitutional Court's decision in *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10, 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) ('*Du Plessis*') it has been South African law that the Constitution may have a 'radiating' effect on common law as s 35(3) of the Interim Constitution required that the spirit, purport and objects of the Bill of Rights had to be considered when applying or developing the common law. In *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*') the Court confirmed that common-law developments have to be congruent with the spirit, purport and objects of the Bill of Rights in terms of s 39(2) of the Constitution.

¹⁸ See JM Potgieter 'The Role of the Law in a Period of Political Transition: The Need for Objectivity' (1991) 54 *Journal of Contemporary Roman-Dutch Law* 800 (Raises concerns about the political nature of human rights); PJ Visser & JM Potgieter 'Some Critical Comments on South Africa's Bill of Fundamental Rights' (1994) 57 *Journal of Contemporary Roman-Dutch Law* 493 (Worries about the subjective nature of constitutional adjudication); J Neethling & JM Potgieter 'Laster: Die Bewyslas, Mediaprivilegie en die Invloed van die Nuwe Grondwet' (1994) 57 *Journal of Contemporary Roman-Dutch Law* 513 (Argues that the common law will and should remain largely unaffected by fundamental rights); and the critique of these views by H Botha 'Privatism, Authoritarianism and the Constitution: The Case of Neethling and Potgieter' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 496 (Shows why fundamental rights should have an impact on the common law). See also PJ Visser 'A Successful Constitutional Invasion of Private Law' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 745 (Argues that constitutional interpretation is arbitrary and the infiltration of fundamental rights into the 'empirical' common law will lead to chaos) and the denunciation of those views by G Carpenter & CJ Botha 'The "Constitutional Attack on Private Law": Are the Fears Well Founded?' (1996) 59 *Journal of Contemporary Roman-Dutch Law* 126 (Demonstrates that constitutional interpretation does not have to be arbitrary, vague and embarrassing like Visser alleges).

¹⁹ This is the implication of the critique levelled by Botha, *ibid* at 498.

²⁰ In South African literature, Van Zyl (note 15 above) at 194–195 links the work of De Groot with the thought of Hobbes and Locke (the latter being responsible for the conceptualisation of natural rights). Thomas, Van der Merwe & Stoop (note 15 above) at 111–115 as well as Le Roux (note 15 above) at 41–47 regard these modern developments of natural law theory as instrumental to the establishment of human rights. The link between the natural law tradition and the birth of human rights is largely recognised in works relating to the theory of human rights. See, for example, R McInery 'Natural Law and Human Rights' (1991) 36 *American Journal of Jurisprudence* 1 (Discusses the possibility and limits of a marriage of natural law and human rights); M Discher 'A New Natural Law Theory as a Ground for Human Rights?' (1999–2000) 9 *Kansas Journal of Law & Public Policy* 267 (Reflects on various justifications for the universality of human rights, one of those being its roots in natural law); C Perello 'On Supernatural Law: About the Origins of Human Rights and Natural Law in Antiquity' (2014) 20 *Fundamina* 15 (Links early natural law theory with the concept of human rights); and

Kruger had been dead for roughly 90 years at that stage, his cenotaphic warning against natural law was still being followed, albeit in slightly modified terms. Now natural law, in its human rights form, was to be rejected when it came to working with the South African common law.

The rejection of the infusion of human rights in South African common law is theoretically peculiar. As I have already shown above, the divorce of natural law and common law seems to be a difficult task if it is accepted that natural law is inextricably linked to the rules of common law. As a counter-argument, Hans Visser once favoured such a divorce, contending that the natural law found in Roman-Dutch law is distinct from and superior to the ‘backward’ and ‘savage’ hogwash of the ‘vague and ambiguous’ human rights intended for the South African democratic transformation.²¹ However, Visser eventually relaxed his concerns after he realised that he and similar thinkers had lost the battle against the introduction of fundamental rights in South Africa.²² Visser’s colleagues, Johann Neethling and Johan Potgieter, are now proponents of the school of thought that regards common law and human rights as reconcilable, probably because of the shared theoretical foundation of the two sets of rights.²³ If the Roman-Dutch conception of natural law (that underlies the common law) has theoretically developed into human rights and common law continues to be developed through the influence of natural law, then common law and human rights are not only reconcilable but it is also desirable to update the common law in light of human rights.

Beguilingly, the trepidation in delict scholarship regarding the merger of human rights and common law may have slowed down after the Constitution became operative but the anxiety did not come to a complete stop. Even after the widely celebrated pronouncement in *Carmichele* that set the blueprint for a constitutional infusion of common law,²⁴ there have been some delict commentators whose

A Sangiuliano ‘Towards a Natural Law Foundationalist Theory of Universal Human Rights’ (2014) 5 *Transnational Legal Theory* 218 (Presents a case of ‘natural law foundationalism’ as the justification for the universality of human rights).

²¹ Visser (note 18 above) at 748–749.

²² See PJ Visser ‘Geen Afsonderlike Eis om “Grondwetlike Skadevergoeding” Nie’ (1996) 59 *Journal of Contemporary Roman-Dutch Law* 695 (Emphasises that the common law affords a sufficient degree of protection to fundamental rights); and PJ Visser ‘Enkele Gedagtes oor die Moontlike Invloed van die Fundamentele Reg op Lewe in die Deliktereg’ (1997) 30 *De Jure* 135 (Reflects on various possibilities for positive developments to the common law in light of the Constitution). This turn in Visser’s thought is discussed more fully by A van der Walt ‘Transformative Constitutionalism and the Development of South African Property Law (Part 1)’ (2005) 4 *Journal of South African Law* 655, 661 (Compares the German and South African constitutional approaches to horizontality, specifically in the context of property law).

²³ J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7th Edition, 2015) 18.

²⁴ *Carmichele* (note 17 above). This decision is celebrated by N Botha ‘The Role of International Law in the Development of South African Common Law’ (2001) 26 *South African Yearbook of International Law* 253, 259; J Neethling & JM Potgieter ‘Toepassing van die Grondwet op die Deliktereg’ (2002) 65 *Journal of Contemporary Roman-Dutch Law* 265, 272; M Pieterse ‘The Right to be Free from Public or Private Violence after *Carmichele*’ (2002) 119 *South African Law Journal* 27, 39; JR Midgley & B Leinius ‘The Impact of the Constitution on the Law of Delict’ (2002) 119 *South African Law Journal* 17, 27; G Carpenter ‘The *Carmichele* Legacy – Enhanced Curial Protection of the Right to Physical Safety’ (2003) 18 *South African Public Law* 252, 266; J Neethling ‘Die *Carmichel-Sage* Kom tot ‘n Gelukkige Einde’ (2005) 2 *Journal of South African Law* 402, 409; and D Davis & K Klare ‘Transformative

work show moments of discomfort with the way in which the Constitution has been used to transform the common law. These commentators do not appear to be writing from a position of political panic about the democratisation of South Africa as Visser once was. Rather, they are concerned with the legal technicalities of whether the Constitution could and should add substance to the common law.

The clearest stance against a constitutional colonisation of the common law is found in the latest work by Johan van der Walt. Van der Walt, who once seemed enthusiastic about the potential of *Carmichele*,²⁵ later expressed the view that the common law could have been able to provide Ms Carmichele with the necessary relief against the state's negligence because the common law recognised the assortment of rights relating to bodily integrity.²⁶ Most recently, Van der Walt has taken a radical turn by rejecting the infiltration of constitutional reasoning in common-law matters except for certain exceptional circumstances where a counter-majoritarian difficulty arises.²⁷ Concisely, it is Van der Walt's stance that the common law can provide enough protection to the rights of parties without necessarily invoking the Constitution.²⁸ Even though Van der Walt's position is closer to an anti-constitutional strategy for the common law, he would certainly not be opposed to courts employing a constitutionally heedless approach when dealing with common law.

A less radical stance of constitutional reservation is reflected in Anton Fagan's philosophy of common-law development. Even though Fagan does not appear to be completely opposed to the essential idea of constitutional scrutiny of the common law,²⁹ he contends that both *Carmichele*³⁰ and *K v Minister of Safety and Security*³¹ were incorrectly decided as far as the interaction between the common law and the Constitution is concerned. Drawing from a joint reading of Fagan's critiques on the two judgments, I abstract the following three principles

Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403, 413, 462–467.

²⁵ J van der Walt 'A Special Relationship with Women' (2002) 65 *Journal of South African Law* 148, 156.

²⁶ J van der Walt 'Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga' (2003) 19 *South African Journal on Human Rights* 517, 524.

²⁷ See the introduction to J van der Walt *The Horizontal Effect Revolution and the Question of Sovereignty* (2014) 1–33.

²⁸ This also appears to be the view of the court in *RH v DE* [2014] ZASCA 133, 2014 (6) SA 436 (SCA). I critique this case in Zitzke 2015 (note 1 above). The stance of the SCA on common-law development expressed in *RH v DE* was overturned on appeal. See *DE v RH* [2015] ZACC 18 at paras 16–21.

²⁹ In A Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *South African Law Journal* 611, 621–622, he clearly indicates his support for the fact that the common law could be developed on constitutional grounds: either because a right in the Bill of Rights requires development (per s 8 of the Constitution), because the interests of justice so require (per s 173 of the Constitution) or because the common law requires the development (per s 39(2) of the Constitution). Furthermore, Fagan's view is that if the common law is to be developed on one of the above three grounds, s 39(2) of the Constitution should kick in and the spirit, purport and objects of the Bill of Rights must be promoted.

³⁰ *Carmichele* (note 17 above) is critiqued in A Fagan 'Reconsidering Carmichele' (2008) 125 *South African Law Journal* 659.

³¹ [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] 8 BLLR 749 (CC) (*K v Minister of Safety and Security*) is critiqued in A Fagan 'The Confusions of K' (2009) 126 *South African Law Journal* 159.

summarising his assessment as it is relevant for this discussion.³² Firstly, not all rules are developed whenever they are applied.³³ Secondly, the Constitution should only play a role in the developmental process and does not feature in the pure (non-developmental) application of the common law.³⁴ Thirdly, the Constitution does not impose duties on state functionaries – it only imposes duties on the state represented by the relevant Ministers – but even if the Constitution does impose duties on state functionaries, it would be unfair to hold state employees bound to constitutional obligations while non-state employees are not.³⁵ Abridging these summative points, Fagan is saying: the Constitution will be (and perhaps should be) an unnecessary consideration in most delictual matters. Being constitutionally heedless will, following Fagan, be the normal approach to dealing with delictual issues.

Johan Scott, even though celebratory of the Constitution's effect on cases relating to state negligence,³⁶ has recently critiqued (what he calls) the equitisation of the common law's development in cases where only non-state actors are involved.³⁷ His argument is that the Constitution has a devastating effect on private law as common-law development has the potential to disrupt a predictable set of rules that are necessary for purposes of legal certainty which in turn leads to effective commercial planning and strategising. Scott's claim is ultimately that the Constitution could be useful in delictual cases against the state but the invocation of the supreme law of South Africa could be problematic in all other cases. In cases involving non-state parties *inter se*, constitutional heedlessness would not be a bad thing in Scott's eyes.

As stated above, Neethling and Potgieter appear to form part of a more constitutionally optimistic paradigm. The duo indicates in their delict textbook that it should be accepted that the common law is in line with the Constitution unless the opposite is clearly apparent. They reason that there is a presumption in favour of constitutional compliance of the common law because the rights recognised in the Constitution are supported by the rights recognised at common law.³⁸ Even though this stance is significant, it is clear that the professors do not intend to complicate common-law reasoning with an approach that places constitutional scrutiny at the heart of every delictual dispute. Their approach is

³² This summary is inescapably incomplete as every line in Fagan's work contains a point of substance. However, for purposes of this piece the short condensation will have to do.

³³ Fagan (note 31 above) at 187, 190.

³⁴ See the subtext in Fagan (note 29 above) at 621ff and Fagan (note 31 above) at 178ff.

³⁵ Fagan (note 30 above) at 664–671 and Fagan (note 31 above) at 192. See also the similar argument made by S Wagner 'K v Minister of Safety and Security and the Increasingly Blurred Line Between Personal and Vicarious Liability' (2008) 125 *South African Law Journal* 673.

³⁶ See, eg, TJ Scott 'Vicarious Liability for Intentional Delicts – The Constitutional Factor Clinches Liability' (2013) 2 *Journal of South African Law* 348, 361; and TJ Scott 'Staatsaanspreeklikheid vir Opsetsdelikte van die Polisie – Die Hoogste Hof van Appél Kry Nogmaals Bloedneus' (2012) 3 *Journal of South African Law* 541, 557.

³⁷ TJ Scott 'Delictual Liability for Adultery: A Healthy Remedy's Road to Perdition' in JM Potgieter, J Knobel & RM Jansen (eds) *Essays in Honour of / Huldigingsbundel vir Johann Neethling* (2015) 421, 434. See also his concerns with regard to the equitisation of private property law in TJ Scott 'Effect of the Destruction of a Dwelling on the Personal Servitude of Habitatio' (2011) 74 *Journal of Contemporary Roman-Dutch Law* 155 especially at 168ff.

³⁸ Neethling & Potgieter (note 23 above).

to be welcomed insofar as they illuminate the theoretical compatibility of the common law and the Constitution. However, to the extent that they desire a business-as-usual approach, I distance myself from their line of enquiry because such an approach would amount to a failure to heed to the Constitution in most delictual disputes.³⁹

Also writing from a position of constitutional enthusiasm, Max Loubser and Rob Midgley dedicate a record 11 pages of their delict textbook to the interaction between delict and the Constitution.⁴⁰ What is interesting to note is that despite the fact that they would like to take the Constitution seriously, they do not provide much guidance as to when exactly the Constitution should ‘actively’ be considered in delictual disputes.⁴¹ It would appear that they favour a necessity test. When it would be necessary, is a question that is left to mystic, judicial intuition.⁴² Furthermore, the Constitution plays no apparent role in their ‘systematic approach to delictual problem solving’.⁴³ Again, the approach of these authors is not as constitutionally heedful as it perhaps could be.

Despite the intricacies of each scholar’s argument detailed above, the rudimentary common thread in their work is that the Constitution should not and/or will not have a substantive role to play in most delictual disputes, because, it seems, natural law in its human rights form is not all that important for the transformation of the common law, or the transformation of the common law is itself unnecessary. The implied support for constitutional heedlessness in all of these scholars’ work leaves one wondering to what extent the larger-than-life monument of President Kruger, with its ‘forceful presence’ and ‘air of steadfast resolution’ that ‘embodies the authority of ... political dominance’ is then still being visited with admiration today.⁴⁴

To summarise my contention thus far: the general trend of aggression towards natural law in South Africa stems from the early 20th century. It was originally directed against the application of natural law to legislation, and is today directed against its application to the common law. It should be clear that I regard the natural law tradition as being foundational to both the Roman-Dutch part of our common law and human rights. I further regard natural law in its human rights form as an important development that should transform common law to keep it alive – ‘keep alive’ not only in the sense of having legal validity, but social validity too.⁴⁵ The merger of common law and human rights is foundational to a transformative theory and methodology for the South African common law.

³⁹ Similar concerns are raised against Neethling and Potgieter’s stance by D Davis ‘Legal Transformation and Legal Education: Congruence of Conflict?’ (2015) *Acta Juridica* 172, 186ff.

⁴⁰ M Loubser & JR Midgley et al *The Law of Delict in South Africa* (2nd Edition, 2012) Chapter 2.

⁴¹ *Ibid* at 35.

⁴² I take note that these authors (at 34–35) rely on the case of *S v Thebus and Another* [2003] ZACC 12, 2003 (6) SA 505 (CC) at para 28 (Held that the criminal-law doctrine of ‘common purpose’ is constitutional) in forming their argument. See however the critique of judges being given the scope to consider the Constitution in whichever cases they like by Davis & Klare (note 24 above) at 464.

⁴³ Loubser & Midgley et al (note 40 above) at 23–26.

⁴⁴ The quoted phrases are derived from the description of the statue by P Labuschagne ‘Memorial Complexity and Political Change: Paul Kruger’s Statue’s Political Travels Through Space and Time’ (2011) 26 *South African Journal of Art History* 142, 145.

⁴⁵ C Douzinas & A Geary *Critical Jurisprudence* (2004) 18.

I turn to consider reasons that justify the application of a transformative theory and method for the development of the common law in general, and delictual disputes in particular. There are three such reasons, which also indicate why constitutional heedlessness is undesirable.

B Reasons Justifying a Rejection of Constitutional Heedlessness

1 Africanist Legitimacy

This first reason has two legs. First, the infiltration of an Africanist conception of human rights into the common law is important to ensure the legitimacy of the common law. Second, if the Africanist conception of rights is to be taken seriously, an extensive horizontal application of human rights must be fundamental to that enterprise. As to the first leg, the common law, fundamentally ‘white customary law’, was imposed on the South African legal system by conquest and has become the universal (ie ‘automatically applicable’) law in South Africa.⁴⁶ On the other hand, for any other type of customary law to be applied by a court, a whole host of requirements for its application need to be proven by litigants.⁴⁷ In a country where the majority of the population is not white, it is strange to imagine voluntary complicity in this state of affairs. I would speculate that issues of legal certainty and the closely related issues of national and transnational commercial stability probably played a key role in the decision taken during the negotiations for South Africa’s transition in the early 1990s to retain common law as a source of universal law insofar as it is consistent with the Constitution.⁴⁸ The inference that I draw from this negotiated position (which is a settlement somewhere in between a complete endorsement and rejection of the common law) is that the common law can remain legitimate in South Africa only if it is subject to a continuous constitutional audit so that a ‘new’ and ever-evolving South African common law can be established incrementally. Only this can justify the common law’s universal application.⁴⁹ If one accepts that the common law of South Africa fits quite comfortably in the classical liberal segment of natural legal thought, one might be tempted to argue that the reconciliation of constitutional rights and the common law is a superfluous endeavour because of the shared philosophical foundation between the two. However, the South African notion of

⁴⁶ Van Niekerk (note 15 above) at 21.

⁴⁷ Section 1 of the Law of Evidence Amendment Act 45 of 1988 allows courts to take judicial notice of customary law as long as it is readily ascertainable, sufficiently certain and not in conflict with the principles of public policy or natural justice. Evidence may be lead to prove the content of the customary law rule in question. The same caveats do not necessarily apply to the common law, which is assumed to be ascertainable and certain (even though a great deal of uncertainty still exists about the precise definitional components of the common law, see Van Niekers *ibid* at 21) and already imbued with the principles of public policy and natural justice as I have demonstrated earlier in this piece.

⁴⁸ Section 39(3) provides that ‘[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law ... to the extent that they are consistent with the Bill’. Item 2(1) of Schedule 6 to the Constitution provides that ‘[a]ll law that was in force when the new Constitution took effect continues in force subject to (a) amendment or repeal; and (b) consistency with the new Constitution’.

⁴⁹ Davis & Klare (note 24 above) at 426 stress that the mission of the development clauses in the Constitution is to carry out an ‘audit and re-invention of the common law’.

constitutional rights differs in some respects from the classical liberal paradigm and for that reason has been referred to as being ‘post-liberal’.⁵⁰ One of the most important differences is that the Africanist notion of human rights envisages a communitarian definition of human dignity.⁵¹ It is communitarian in the sense that the African Charter of Human and Peoples’ Rights (Banjul Charter) 1981 is the only regional human rights instrument that explicitly and actively imposes duties on individuals to respect and protect rights of other individuals,⁵² which manifests in the Constitution as ss 8 and 39(2). This horizontal application of the Constitution is a key feature of post-liberal constitutionalism. The imposition of duties on non-state actors is significant because it demonstrates a concern for the values of ‘cooperation, interdependence and collective responsibility’⁵³ as opposed to the individualistic ring to dominant Western notions of human dignity.⁵⁴ It may be that the concern with humane duties and mutual respect is a necessary check on the common law to ensure its legitimacy in ‘post’-apartheid South Africa that was and is in such desperate need of reconciliation. One of the core aims of the democratic transition was to prevent South Africans from continuously turning a blind eye towards both ‘privatised’ and ‘public’ injustices.

The sense of duty promoted in the Africanist notion of human rights gives rise to the second leg of the reason under discussion. That is that horizontally applicable human rights need to be properly appreciated in order for the Africanist version of human rights to be given manifested validity by upholding a spirit of solidarity, generosity, unity and cohesion in South African common law.⁵⁵

2 *Deconstructive Substantive Equality*

Another aspect of the Africanist conception of human rights that is post-liberal is the acknowledgement of substantive equality as a legally genuine virtue.⁵⁶ The horizontal application of the Bill of Rights is important for purposes of recognising substantive equality in the South African context because it opens up the possibility for courts and other people who work with law to address the racist, patriarchal and economically oppressive effects of colonialism, apartheid and neo-colonialism.⁵⁷ In other words, horizontality opens up the possibility to

⁵⁰ K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 151, 153–156 (Argues that the South African Constitution breaks free from the classical idea of liberal constitutionalism and is ‘post-liberal’ because of its concern with social rights, substantive equality, positive state duties, horizontality, multi-culturalism, historical self-consciousness, and participatory governance).

⁵¹ J Cobbah ‘African Values and the Human Rights Debate: An African Perspective’ (1987) 9 *Human Rights Quarterly* 309, 324.

⁵² Chapter II (articles 27–29) of the African Charter. See also M Mutua ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 *Virginia Journal of International Law* 339, 340, 359ff.

⁵³ Cobbah (note 51 above) at 320.

⁵⁴ Ibid at 324.

⁵⁵ D Chirwa ‘In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights’ (2008) 8 *African Human Rights Law Journal* 294, 303.

⁵⁶ Mutua (note 52 above) at 353.

⁵⁷ See J van der Walt ‘Blixen’s Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-Colonialism’ (2003) 2 *Journal of South African Law* 311.

‘deconstruct’ (or to ‘map and critique’) the law.⁵⁸ It allows for mapping the law in that the entire body of law can be carefully re-examined and re-imagined in accordance with a new vision of social justice.⁵⁹ Closely related to the issue of mapping, I have previously argued that the reluctance to engage with substantive constitutional provisions in the development of common law tends to create the false (evolutionary functionalist) impression that common law develops along an objective, politically neutral path. Instead, constitutional attentiveness in the development of common law could force judges to acknowledge the political and ideologically contestable nature of decisions whether and how to develop the law.⁶⁰ Horizontality also creates a ‘legal’ mouthpiece for critiquing the law because it minimises the public-private divide that Marxists, feminists, queer theorists and critical race theorists argue serves to maintain various power imbalances in society – power imbalances that the transformative Constitution aims to substantively equalise.⁶¹ Individuals need to respect each other in their ‘private’ dealings with one another and the law should accommodate that respect and sense of duty that stems from a transformed vision of legal morality.⁶² Deconstruction as mapping and critique in this context, at first glance, seems to be contrary to legal certainty in a way that causes discomfort to some scholars. However, Dennis Davis and Karl Klare have lamented that a transformative theory for common law is ‘attentive to the values of stability, predictability and administrability’ because there will be many cases where the common law is constitutionally fine as it stands for the particular facts of a particular case.⁶³ However, common-law solutions are not timeless. They should always be subject to ‘reconsideration and contestation as experience progresses, understanding deepens, and/or circumstances change’.⁶⁴ This is the crux of a transformative theory for common law.

3 *The Single System of Law*

This last reason is inspired by André van der Walt’s interpretation of the often quoted extract from *Pharmaceutical Manufacturers* to the effect that there is one system of law in the democratic South Africa:⁶⁵

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

⁵⁸ C Albertyn & D Davis ‘Legal Realism, Transformation and the Legacy of Dugard’ (2010) 26 *South African Journal on Human Rights* 118, 205.

⁵⁹ H Cheadle & D Davis ‘The Application of the 1996 Constitution in the Private Sphere’ (1997) 13 *South African Journal on Human Rights* 44.

⁶⁰ This is the argument I first made in Zitzke 2016 (note 1 above).

⁶¹ Cheadle & Davis (note 59 above) at 45 and Chirwa (note 55 above) at 300–302.

⁶² Davis & Klare (note 24 above) at 411.

⁶³ *Ibid* at 412.

⁶⁴ *Ibid*.

⁶⁵ Van der Walt has written extensively on this topic, but his theory on the single system of law features most prominently in his book *Property and Constitution* (2012) 19–112 where he quotes and analyses the implications of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674, 2000 (3) BCLR 241 para 44 (Held that the President’s decision to bring an Act of parliament into operation must be objectively rational).

In other words, common law (just like any other source of law) is not to be divorced from the Constitution. I argue that if the supremacy of the Constitution is to be taken seriously and judges are expected to properly justify their decisions whether to accept or alter prevailing common-law rules, then the Constitution should substantively feature in all common law disputes, whether it be to justify the prevailing rule or to develop it.⁶⁶ Davis and Klare similarly contend that a transformative method to common-law problems would not necessarily involve a complete rewrite of the common law in each case. All that should be required is for a lawyer to seriously and earnestly contemplate, at the start of each case, what potential constitutional provisions could influence the common law at stake in the dispute. Complimentarily, Van der Walt understands the single-system-of-law principle to mean that the common law needs to promote the spirit, purport and objects of the Bill of Rights in a way that advances both vested rights (whether derived from common law, legislation or the Bill of Rights) and the transformative goals of the Constitution.⁶⁷ If all law, including the common law, sings the same song (albeit sometimes in harmony and not in a monotone manner), the result is a single system of law.⁶⁸ From the discussion thus far, it should be clear that the single-system-of-law principle and its concern with realising substantive constitutional rights in the context of private common law can only be brought to fruition if a new transformative method is employed whereby all common-law disputes are constitutionally framed.⁶⁹

The implication of the above three reasons is that constitutional heedlessness is an approach that stifles the transformative project of, (a) affording legitimacy to common law through the incorporation of Africanist human rights jurisprudence into it; (b) deconstructing common law through mapping and critique; and (c) promoting the single-system-of-law principle that has been developed by the Constitutional Court to advance the supremacy of the Constitution. However, constitutional heedlessness still appears to be prevalent in various academic writings as I have detailed above. I now turn to demonstrate how constitutional heedlessness also features in recent judicial pronouncements.

C The Problem of Constitutional Heedlessness Manifested in Case Law

As explained in the introduction above, constitutional heedlessness involves a circumvention of the potential impact of the Constitution on the common law in a specific matter, even though the Constitution should play a role in that case. However, constitutional heedlessness does not involve an express rejection of the Constitution's potential impact. In other words, the Constitution is side-stepped by following a traditional, business-as-usual approach to dealing with the common law in a specific matter. At the same time, the court deciding a case or the commentator on a specific issue does not go out of their way to fight off the

⁶⁶ Zitzke 2015 (note 1 above) at 480.

⁶⁷ Van der Walt (note 65 above) at 20–21.

⁶⁸ Ibid at 26.

⁶⁹ Davis & Klare (note 24 above) at 412. See also the ideas developed by D Bhana 'The Role of Judicial Method in the Relinquishing of Constitutional Rights Through Contract' (2008) 24 *South African Journal on Human Rights* 300, 303 in the context of the common law of contract.

Constitution or explicitly push it aside. If the court or commentator did that, they would be employing an anti-constitutional approach.⁷⁰ What we are dealing with in cases of constitutional heedlessness is therefore simply neglecting to take the Constitution seriously in common-law matters. After reflecting on the decisions of *Loureiro SCA*, *Foetal Assessment Centre HC* and *Country Cloud SCA*, it could be argued that these cases all demonstrate the approach of constitutional heedlessness. In the following discussion, I intend to show that the Constitutional Court has on appeal responded to these cases in a way that resists the constitutionally heedless approach of the courts below.

1 *Loureiro SCA* & *CC*

In *Loureiro SCA*, the court had to determine whether a security company could be held contractually and/or delictually liable for the conduct of its security guard.⁷¹ The security guard had opened the Loureiro household's gate for a person who pretended to be a police officer while in reality the person was a robber. The robber then let his accomplices onto the property causing a great deal of financial and emotional harm to the Loureiro family and their employees.⁷² Writing for the majority, Mhlantla JA addressed the issue of the guard's negligence as well as the wrongfulness of his conduct.

On negligence, the court repeated the classical test articulated in *Kruger v Coetzee* that requires a court to determine whether 'a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps'.⁷³ Drawing from a variety of earlier cases, the court emphasised that the reasonable person is a normal, balanced individual,⁷⁴ and that the enquiry into reasonable foreseeability is an abstract enquiry where at least the general manner of the occurrence of harm should be anticipatable.⁷⁵ Furthermore, the reasonable person is not a prophet and therefore the determination of negligence should not be conducted 'wise after the event' – one must have regard to the specific circumstances that the guard found himself in.⁷⁶ Applying this test to the facts, the court held that the guard 'could not be faulted' for his assumption that the robber was a policeman because the robber arrived in a car with a blue flashing light and was dressed like a genuine police officer. There was no reason for the guard to have suspected the disguised persons of being robbers.⁷⁷ In a nutshell, the reasonable person in the guard's position 'would not have foreseen

⁷⁰ See Zitzke 2015 (note 1 above) at 470–472.

⁷¹ *Loureiro SCA* (note 4 above) at para 7. For purposes of this discussion, I will direct my attention to the delictual enquiry only.

⁷² *Ibid* at paras 4–6.

⁷³ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–G quoted in *Loureiro SCA* (note 4 above) at para 24.

⁷⁴ *Loureiro SCA* (note 4 above) at para 25.

⁷⁵ *Ibid* at para 26.

⁷⁶ *Ibid* at para 28.

⁷⁷ *Ibid* at paras 28–29.

that he was opening the gate to robbers and that he would be overpowered' and consequently the guard was not legally 'blameworthy'.⁷⁸

On wrongfulness the court held that it had to determine whether the guard breached a legal duty owed towards the Loureiro family. It found that the considerations applicable to determining negligence are the same considerations that apply in determining wrongfulness.⁷⁹ The equating of wrongfulness with negligence is peculiar because the court then proceeded to indicate that even if conduct is negligent it does not mean that it is wrongful.⁸⁰ The court then indicated that even though the determination of wrongfulness may involve taking the foreseeability of harm into account, wrongfulness primarily involves an enquiry into whether the legal convictions of the community require that the plaintiff be compensated for her/his losses caused by the negligence of the defendant.⁸¹ In this case the guard in question was under an obligation not to resist a policeman's entry to the property and, because he acted in good faith at all times believing that the robber was in fact a policeman, it cannot be said that the guard acted wrongfully.⁸² As a result, the security company was not held delictually liable for the guard's conduct because he acted neither negligently nor wrongfully.⁸³

On appeal, the Constitutional Court overturned the decision of the SCA partly because of the SCA's misunderstanding of the common law, partly because of a different reading of the facts and partly because of the SCA's failure to properly engage with the Constitution, or, as I like to formulate it, because of the SCA's constitutional heedlessness. Van der Westhuizen J, writing for a unanimous Court in *Loureiro CC*, framed the issue differently to the SCA. The judgment starts with a restatement that human dignity, the advancement of fundamental rights and the rule of law are the foundational values of the Constitution. It also found that the rights to life, freedom and security of the person, privacy and property were relevant to this case and needed to be protected.⁸⁴ On the basis of this transformative framework, the Court found that wrongfulness and negligence are two separate elements in the law of delict that should not be conflated. The SCA appeared to conflate the two elements and therefore its understanding of

⁷⁸ Ibid at paras 29–30.

⁷⁹ Ibid at para 31.

⁸⁰ Ibid at para 32.

⁸¹ Ibid at paras 32–33.

⁸² Ibid at paras 33–34.

⁸³ Ibid at para 35. The minority judgment portrays the opposite conclusion. Cloete JA held that the guard was negligent as he should have taken further steps to ascertain whether the robber truly was a police officer because the guard was a trained security professional (at para 49). Furthermore, the minority favoured a clearer separation of the elements of negligence and wrongfulness and stressed that the wrongfulness enquiry involves an engagement with constitutional norms that inform the legal convictions of the community to determine whether liability should be imposed on the defendant. The state of mind of the defendant is not relevant to the determination of wrongfulness (at paras 52–53). Because the guard's conduct is a positive act that infringed on the rights of the plaintiffs, it is well-established in the law of delict that wrongfulness is presumed in cases such as these. Therefore, Cloete JA would have held the security company delictually liable (at para 53).

⁸⁴ *Loureiro CC* (note 7 above) at para 1. Sections 12, 14 and 25 protect those respective rights. See also S Woolman & M Bishop 'Freedom and Security of the Person', D McQuoid-Mason 'Privacy', & T Roux 'Property' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008).

the common law was incorrect.⁸⁵ Wrongfulness zooms in on the conduct of the defendant and asks whether the legal convictions of the community, which are necessarily informed and shaped by the Constitution, regard the conduct as acceptable. Drawing from earlier judgments by the Constitutional Court and the SCA, Van der Westhuizen J noted that an analysis of wrongfulness should always involve constitutional contemplation. Failure to give due regard to the Constitution in determining wrongfulness could lead to a successful appeal on constitutional grounds.⁸⁶ It is clear that the SCA did not give proper consideration to constitutional imperatives in its decision on the wrongfulness of the guard's conduct. Furthermore, wrongfulness is based on three pillars: the duty to respect another's rights, the duty not to cause harm, and the reasonableness of imposing liability.⁸⁷ In the wrongfulness enquiry, the defendant's state of mind is not the focal point. The subjective state of mind of the defendant is the concern of the negligence enquiry that centres around the question whether the reasonable person *in the same situation* would have done the same.⁸⁸

Turning to the question of wrongfulness first, the Court held that the legal convictions of the community in this case was that security guards should not give criminals access to the properties that they are supposed to protect.⁸⁹ The test for wrongfulness is 'objective'⁹⁰ and thus the Court reasoned that liability should be imposed here because the constitutional rights to 'personal safety' and 'protection from theft or damage to property' deserve protection from security companies that are contracted to prevent the type of harm seen here.⁹¹ It appears that the infringement of constitutional rights justified a finding of wrongfulness without further ado. Thus, due to the fact that the Constitutional Court paid attention to the Constitution and the SCA did not, the SCA finding on wrongfulness was overturned. I will evaluate the Court's constitutionally enthusiastic approach to determining wrongfulness more thoroughly in Part III.

Moving on to the question of negligence, the Court repeated the test laid down in *Kruger v Coetzee* that the SCA also relied on.⁹² However, a different conclusion was reached on appeal to the Constitutional Court. Even though it is indicated that the test for negligence is partly normative and partly factual, it seems that the Court finds that the guard was negligent here on a different reading of the facts in the sense that certain facts that were not stressed in the SCA are emphasised here. The facts that indicate negligence are that the robbers arrived in an unmarked car, that the robber posing as a policeman wore a blazer (that

⁸⁵ *Loureiro CC* (note 7 above) at para 53.

⁸⁶ *Ibid* at para 34.

⁸⁷ *Ibid* at para 53.

⁸⁸ *Ibid* at para 53 (my emphasis). The negligence enquiry is partly subjective and partly objective: the test is objective insofar as we ask what the reasonable person would have done, but the test is subjectivised to suit the particular circumstances in which the defendant finds herself/himself.

⁸⁹ *Ibid* at para 55.

⁹⁰ Cf A Fagan 'Rethinking Wrongfulness in the Law of Delict' (2005) *South African Law Journal* 90, 92ff (Shows that the orthodox approach to wrongfulness, which defines it as an *ex post facto* (objective) enquiry, is not absolute because wrongfulness is sometimes determined with reference to *ex ante* considerations).

⁹¹ *Loureiro CC* (note 7 above) at para 56.

⁹² *Ibid* at para 58.

South African police officers do not wear while on duty), and that the policeman never announced the purpose for his visit and that he flashed his ‘identity card’ so quickly that the guard could make no proper evaluation of it.⁹³ The guard ought to have foreseen the possibility that robbers would want to gain access to the property by posing to be someone that they are not.⁹⁴ Answering the question of whether the reasonable person would have taken reasonable steps to prevent harm, the Court indicated that the extent of risk and consequences of the conduct was huge and that it would not have been disproportionately burdensome to have expected the guard to have taken reasonable steps to confirm the identity of the alleged policeman, to check that the policeman had lawful grounds to enter the property and, to attempt to make contact with his employer to obtain permission to allow the person onto the property.⁹⁵ The Court also underscored the fact that the guard in question was an A-grade security official. In cases where a person professes to have a certain level of skill, the ‘greater the general level of expected care and skill will be’.⁹⁶ Evidently, the difference in the way that the facts are described by the Court is the main reason why the finding of negligence was made in the affirmative on appeal. Even though the Court is not clear on this, it would further appear that the SCA’s failure to have due regard to the common-law rule of *imperitia culpa adnumeratur* (‘lack of skill equals negligence’) also contributed to its incorrect finding.⁹⁷ The failure to consider the *imperitia* rule has normative implications in that this rule promotes the notion that persons who are supposed to have better skills than others should be treated differently. This notion is consistent with the South African constitutional jurisprudence on the achievement of substantive equality that accentuates the need to treat different people with different characteristics differently to ensure that the playing field, even between private individuals *inter se*, is equalised.⁹⁸ In order for a court to take the constitutional audit of the common law seriously I argue that it should not just be open to constitutional redefinition of common-law rules, but it should also be open to justifying why extant common-law rules that do not need development are constitutionally compliant as they stand. If we do not openly justify why a common-rule is acceptable in its current form, it could lead to a type of constitutional heedlessness. In one sense, the SCA failed to consider a relevant common-law rule in its determination of negligence. In another sense, we could argue that the SCA’s reasoning was also constitutionally heedless because of its failure to reflect on the implications of substantive equality for the negligence enquiry.

For these factual, common-law technical and constitutional differences, the decision of the SCA was overturned and the security company was held delictually liable on these facts. Importantly, for this discussion, at least one of the reasons

⁹³ Ibid at para 59–60.

⁹⁴ Ibid at para 61.

⁹⁵ Ibid at para 63.

⁹⁶ Ibid at para 64.

⁹⁷ See the observation in this regard made in TJ Scott’s case note ‘*Loureiro and Others v iMvula Quality Protection (Pty) Ltd* 2014 3 SA (SCA) (2014) 47 *De Jure* 374, 390.

⁹⁸ Section 9 of the Constitution. See also C Albertyn & B Goldblatt ‘Equality’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 35.

why the SCA decision was wrong, was because of its constitutional heedlessness. Also important is the fact that in the Constitutional Court's judgment one can observe subtextual support for the single-system-of-law principle detailed earlier in this piece.

2 *Foetal Assessment Centre HC & CC*

In *Foetal Assessment Centre HC*, a mother represented her child who was born with Down syndrome, claiming damages suffered by the child due to the negligence of the Foetal Assessment Centre. The negligence was alleged to have been the failure of the Centre to have identified a high risk of abnormality in the foetus and to inform the mother of that risk which would have resulted in her terminating her pregnancy rather than letting the child be born.⁹⁹ The Centre took exception to the claim of the mother, alleging, among other reasons, that the claim is bad in law or contrary to public policy.¹⁰⁰ The question that Baartman J was confronted with was whether South African law could recognise a claim based on 'wrongful life'.¹⁰¹

A 'wrongful life' claim is brought by a child against a medical practitioner for the negligent misinformation communicated to the parents of the child about the risks of the pregnancy, resulting in the child being born (instead of being aborted) and suffering as a result of life with a disability. A claim of this nature should be distinguished from claims for 'wrongful pregnancy', that are brought by the parents of an unwanted but healthy child who would not have been born but for the medical practitioner's negligence (for example where a botched sterilisation is executed or where contraceptives are inadequately prescribed to parents who consult the medical practitioner with the aim of preventing pregnancy), as well as claims for 'wrongful birth' that are brought by the parents of a child born with certain congenital defects who would not have been born if the parents were properly informed of the risks involved with the pregnancy as they would have aborted the foetus. Claims for wrongful pregnancy and wrongful birth are recognised in South African law.¹⁰²

However, in the present matter, the court relied on the decisions in *Friedman v Glicksman*,¹⁰³ and *Stewart & Another v Botha & Another*,¹⁰⁴ to conclude that claims for wrongful life are not and should not be recognised in South African law. The cardinal reason for this decision and its predecessors is based on the concern that children with disabilities should not be told that their lives are 'wrongful'. This main concern can be expanded into four other closely related reasons. First, it would be contrary to the legal convictions of the community for a court to hold that children with disabilities would have been better off if they had

⁹⁹ *Foetal Assessment Centre HC* (note 5 above) at para 1.

¹⁰⁰ *Ibid* at para 4.

¹⁰¹ *Ibid* at para 5.

¹⁰² *Ibid* para 7.

¹⁰³ 1996 (1) SA 1134 (W) ('*Friedman*') 1142-1143 referred to in *Foetal Assessment Centre HC* (note 5 above) at para 9.

¹⁰⁴ [2008] ZASCA 84, 2008 (6) SA 310 (SCA), 2009 (4) All SA 487 (SCA) ('*Stewart*') at para 28 referred to in *Foetal Assessment Centre HC* (note 5 above) at para 20.

not been alive than to have ‘the unquantified blessing of life’.¹⁰⁵ Second, there can be no quantification of damage in comparing a position of existence and non-existence.¹⁰⁶ Third, a number of foreign jurisdictions have done away with claims for wrongful life and South Africa should follow this trend.¹⁰⁷ Fourth, the determination of wrongfulness in a case such as this questions whether it would have been better for the child not to have been born at all and that ‘goes so deeply to the heart of what it is to be human that it should not even be asked of the law’.¹⁰⁸ Even though counsel for the child in *Foetal Assessment Centre HC* contended that the constitutional rights of the child had not been considered in *Friedman* and *Stewart*, Baartman J concluded that there had not been a change in the legal convictions of the community since those decisions. This conclusion is finally backed up with the observation that many people with disabilities display great resilience and often overcome the odds of their condition, meaning that their lives cannot be ‘wrongful’ and therefore the exception was upheld.¹⁰⁹ I contend that the circumvention of the potential impact of the Constitution in the determination of wrongfulness in this case is reflective of constitutional heedlessness that I have been describing throughout this piece. This is so because even though it was argued that the Constitution was not taken seriously in earlier decisions on the topic of wrongful life, Baartman J was committed to approaching the common law as if it was business as usual, circumventing the issue of constitutional application and reimagination. Simply assuming that the common law on a specific topic and the Constitution are harmonious without deeper engagement is symptomatic of constitutional heedlessness.

On appeal to the Constitutional Court, Froneman J, writing for a unanimous Court, held that there were two problematic parts to the High Court decision. First, the exception was readily granted. There could potentially be a claim for the child based on the facts and the High Court was perhaps too quick to uphold the exception irrespective of the prevailing common law rules possibly needing development. Second, the High Court failed to properly contemplate whether its decision pertaining to the wrongfulness of the Centre was truly reconcilable with constitutional rights and values, including the best interests of the child standard that is guaranteed in s 28 of the Constitution.¹¹⁰ Despite these problematic aspects in the High Court decision, the Constitutional Court only provided a new framework within which the High Court would have to reconsider the matter.¹¹¹

With regard to the first challenge, Froneman J indicated that in order for an exception to succeed, there should be no possible reading of the facts that could give rise to a cause of action.¹¹² If the possibility for the development of common law arises, it may be best to refuse the granting of exceptions or orders for absolution from the instance. This is especially true where there are complex

¹⁰⁵ *Foetal Assessment Centre HC* (note 5 above) at para 9.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* at para 19.

¹⁰⁸ *Ibid* at para 20.

¹⁰⁹ *Ibid* at para 29.

¹¹⁰ *Fetal Assessment Centre CC* (note 7 above) at para 81.

¹¹¹ *Ibid* at para 81.

¹¹² *Ibid* at para 10.

factual matrices with uncertain legal positions accompanying those facts, even though this is not a hard and fast rule.¹¹³ In a case such as the present one where a common-law rule could be changed altogether, it would usually be wise to refuse the exception so that all of the evidence and arguments could be heard for an informed decision to be made about whether or not the relevant common-law rule should be developed.¹¹⁴ As indicated above, the reason why the Constitution should play a central role in all common-law matters is to promote the single-system-of-law principle. This important principle was missed in both problematic aspects of the High Court judgment. The *Fetal Assessment Centre CC* judgment highlights the single-system-of-law principle with great enthusiasm. Froneman J reiterated that the development clauses in the Constitution have the aim of ensuring that constitutional values permeate the common law.¹¹⁵ Thus, both in its failure to consider the possibility of development and constitutional compliance in general, the High Court fell short of its transformative mandate.

With regard to the second challenge, the Constitutional Court showed that the term ‘wrongful life’ is an incorrect reflection of what a claim of that nature really involves. A claim for ‘wrongful life’ does not truly involve labelling the life of the child as being wrongful. The claim involves determining whether ‘the law should allow a child to claim compensation for a life with a disability’.¹¹⁶ By framing the issue in that way, the enquiry focuses on the fact that the law cannot ignore the difficulties that a child born with a disability is faced with. The dictum that has historically been repeated by our courts, that the law should not determine an essential question that seeks to define what it means to be human, is not acceptable in a single system of law where the Constitution is supreme. By side-stepping this question, judges attempt to exempt themselves from making a difficult value choice. They only ‘attempt to’ circumvent the value choice, because deciding not to answer the question has practical implications that in themselves display a particular value choice that is disguised in a fictitious cloak of neutrality.¹¹⁷ Thus, the decision that the child in this case should have no claim has a practical, value-laden consequence: children with disabilities deserve no special treatment or legal protection, despite the difficulties that they may face. Moreover, there cannot be areas of life and law where the Constitution can simply be ignored. In other words, the question about whether a claim for so-called wrongful life should be recognised by our law must be answered in light of the Constitution. It is not an extra-legal issue.¹¹⁸ The question then arises: what should the influence of the Constitution be on this part of the law?

Foreign law may be useful in coming to an answer.¹¹⁹ Even though there are jurisdictions that do not recognise claims of this nature, there are jurisdictions that do. Different jurisdictions often have different answers to the same legal

¹¹³ Ibid at paras 11–12.

¹¹⁴ Ibid at para 24.

¹¹⁵ Ibid at para 14 referring to *K v Minister of Safety and Security* (note 31 above) at paras 16–17.

¹¹⁶ *Fetal Assessment Centre CC* (note 7 above) at para 19.

¹¹⁷ Ibid at para 22.

¹¹⁸ Ibid at para 23.

¹¹⁹ Ibid at para 28. Section 39(1)(c) of the Constitution provides that a court may consider foreign law when interpreting the Bill of Rights.

question because of differing socio-political circumstances and contexts. The task that a court faces therefore is to decide which jurisdictions have similar normative frameworks and material contexts to our own. Phrased differently, the exercise of employing a comparativist method involves questioning whether our objective, constitutional, normative framework could draw substance from the foreign jurisdiction in question.¹²⁰ In this matter, foreign jurisdictions that emphasise the best interests of children and the autonomy of parents would probably be compatible jurisdictions. This is a transformative approach to legal comparativism that compliments the single-system-of-law principle. The High Court's cursory reliance on foreign law is therefore an undesirable treatment of that source of law.

The Court identified the rights to equality, dignity and the best interests of children as relevant to the issue at hand.¹²¹ Even though common-law rules can often be easily interpreted to be harmonious with the Constitution, there are cases such as the present one where the rules do not, as they stand, optimally promote all of the relevant constitutional provisions. The current common-law model does not give due regard to the need to assist persons with disabilities to realise their right to be substantively equal to other people – especially not for children who have the right to have their best interests considered paramount in every case relating to them.¹²² This would especially be true in cases where parents do not pursue a claim for wrongful birth and the child is then left without a remedy.¹²³ Ultimately, the Court tacitly endorses the notion that the Constitution has an important, deconstructive role to play in ensuring substantive equality between non-state actors. Furthermore, the child's dignity is not optimised by denying their claim in the circumstances of this case. Even though the common-law position may appear to create the impression that life with a disability is equally worth living than life without a disability, awarding the child the right to claim in these circumstances would be more sensitive to the child's condition that may require extra resources to live comfortably.¹²⁴ In conclusion, the Constitutional Court held that the High Court erred insofar as it upheld the exception without appropriately considering whether the relevant common-law rule needed to be developed and the 'factual, legal and policy issues' that should have been established to play a decisive role in the court's decision.¹²⁵ Even though Froneman J did not make the final decision on whether the common law had to be developed in this case, it is clear that the constitutional heedlessness of the High Court was seriously questioned and is not to be repeated in similar matters in future.

¹²⁰ *Fetal Assessment Centre CC* (note 7 above) at paras 32 and 42.

¹²¹ *Ibid* at para 49. Sections 9, 10 and 28 of the Constitution guarantee those respective rights. On the right to equality, see Albertyn & Goldblatt (note 98 above). See also S Woolman 'Dignity' & A Friedman, A Pantazis & A Skelton 'Children's Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008).

¹²² *Fetal Assessment Centre CC* (note 7 above) at para 59.

¹²³ *Ibid* at paras 61–62.

¹²⁴ *Ibid* at para 72.

¹²⁵ *Ibid* at para 78.

3 *Country Cloud SCA & CC*

In both *Loureiro CC* and *Fetal Assessment Centre CC* the constitutional heedlessness employed by the courts below was held to be unfitting and inappropriate on appeal. In those appeals to the Constitutional Court, a transformative method was employed where the Constitution played a central role in the understanding of the common law that resulted in the appeals being upheld. *Loureiro CC* and *Fetal Assessment Centre CC* both implicitly give support to the ideas that the common law derives its legitimacy from strong horizontal constitutional application, that the common law often needs deconstruction, and that the single-system-of-law principle is important. Due to the lack of constitutional lustre in the SCA and High Court judgments, those decisions were found to be substantively incorrect. On the other hand, in the matter of *Country Cloud* the constitutional heedlessness of the SCA did not substantively have a practical effect on the outcome of the case, as the SCA's decision was confirmed on appeal to the Constitutional Court. However, a more complete and analytically rigorous approach by the SCA to the issue at hand would have involved constitutional considerations, as was done by the Constitutional Court on appeal.

In *Country Cloud SCA*, the Department of Infrastructure Development in the Gauteng province contracted with a construction company called Ilima Projects for the erection of a clinic in Soweto. The Department undertook to pay R480 million to Ilima for the completion of the work. Assisted by the Department, Ilima entered into a loan agreement with Country Cloud Trading for R12 million in order to embark on the project.¹²⁶ After the loan was made available and paid to Ilima, the Department cancelled the building contract leading to Country Cloud suffering damages on account of Ilima being liquidated and the principal debt (plus interest) consequently not being repaid.¹²⁷ The SCA held that a valid contract had been entered into and that the cancellation of that contract had not been unlawful.¹²⁸ The question that had to be answered was whether the Department wrongfully caused Country Cloud's pure economic loss on these facts.

After surveying the history of the common-law position on the causing of pure economic loss in the law of delict, Brand JA, writing for a unanimous SCA, explained that the element of wrongfulness in delict acts as a 'safety valve' to prevent limitless liability.¹²⁹ Wrongfulness is determined with reference to the legal convictions of the community and questions the reasonableness of imposing liability on the defendant in accordance with public policy.¹³⁰ There had been no case with similar facts that a court has had to decide in the past and thus the court had to resolve whether or not the common law had to be developed to allow Country Cloud's claim here.¹³¹ Brand JA held that, even though a blameworthy state of mind and foreseeability of harm are relevant policy considerations to the

¹²⁶ *Country Cloud SCA* (note 6 above) at paras 1 and 5.

¹²⁷ *Ibid* at para 2.

¹²⁸ *Ibid* at paras 15–16.

¹²⁹ *Ibid* at paras 17–18.

¹³⁰ *Ibid* at paras 19–20.

¹³¹ *Ibid* at para 26.

determination of wrongfulness in cases of pure economic loss, if the question here turned on whether the Department foresaw the possibility of harm and whether the Department intentionally proceeded in its harm-causing conduct, then the result would be indeterminate liability. This is so because a long list of third parties (including Ilima's employees and other creditors) would then be able to claim from the pure economic loss caused by the Department's cancellation of the contract.¹³² The court reasoned that that would be an undesirable state of affairs and that in determining who should bear the loss in cases such as these, the doctrine of 'vulnerability to risk' should be employed. That doctrine dictates that if a defendant could reasonably have protected themselves against the risk that materialised, then the defendant should bear the risk.¹³³ Applied to the facts of this case, Country Cloud could have either claimed repayment of the money that it lent to Ilima or it could have taken cession of Ilima's claim against the Department. Because no substantial reasons could be provided as to why Country Cloud did not take these steps to protect itself against the risk that materialised, the Department could not be said to have acted wrongfully towards Country Cloud and so there was no delictual liability in that case.¹³⁴ Even though there is ample authority that shows that the determination of wrongfulness should involve constitutional considerations, the SCA opted to circumvent constitutional considerations here. Constitutional heedlessness won again.

On appeal to the Constitutional Court, the only issue that had to be addressed was whether the Department acted wrongfully towards Country Cloud in cancelling the contract. Khampepe J, for a unanimous Court, reiterated the thorough overview on the law of wrongfulness that the SCA had provided with some variations and one key added ingredient: relying on its earlier decision in *Loureiro CC*,¹³⁵ the Court emphasised the fact that the legal convictions of the community, that shape the element of wrongfulness, had to be constitutionally understood.¹³⁶ Considerations relating to the blameworthy state of mind of the alleged wrongdoer, the prevention of indeterminate liability and the vulnerability to risk doctrine are indeed relevant policy considerations to determining wrongfulness.¹³⁷ In addition to these considerations the constitutional value of state accountability should, at least, be considered.¹³⁸

Section 1(d) of the Constitution affirms accountability as a founding value of the democratic state.¹³⁹ The value of state accountability could, but will not always, be translated into a private-law duty that finds delictual liability.¹⁴⁰ In previous

¹³² *Ibid* at para 28.

¹³³ *Ibid* at para 30.

¹³⁴ *Ibid* at paras 31–33.

¹³⁵ *Loureiro CC* (note 7 above) at para 53.

¹³⁶ *Country Cloud CC* (note 8 above) at para 21.

¹³⁷ *Ibid* at paras 39–43 and 51–61.

¹³⁸ I take cognisance of the fact that Country Cloud raised the argument based on state accountability in the Constitutional Court and that the Court did not raise this issue *mero motu*. For a sound overview of the different ways by which the value of state accountability can be realised see A Price 'State Liability and Accountability' (2015) *Acta Juridica* 313.

¹³⁹ See further T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008).

¹⁴⁰ *Country Cloud CC* (note 8 above) at para 45.

cases, state accountability translated into a private-law duty only where the state functionaries concerned acted maliciously for personal gain either through corrupt, fraudulent or otherwise criminal conduct.¹⁴¹ The state functionaries in this case did not act illicitly towards Country Cloud. The only wrong that the state committed here was against Ilima who could hold the state accountable by instituting a claim based on their contract.¹⁴² Upholding a claim in favour of Ilima based on contract and a claim in favour of Country Cloud based on delict would undermine the functioning of the Department concerned by depleting its resources. That is a relevant consideration in promoting state accountability because the state cannot be accountable to the public if courts undermine its functions.¹⁴³ For this and other reasons (that were slight variations on the same themes present in the SCA judgment) the appeal was dismissed.¹⁴⁴

III CONSTITUTIONAL OVER-EXCITEMENT

A The Problem of Constitutional Over-Excitement in *Loureiro CC*

In the previous part, I sought to make a case for the rejection of constitutional heedlessness as an approach to common-law issues. I demonstrated that there is no insurmountable conceptual or jurisprudential barrier that insulates common law from the influence of human rights. I argued that it is desirable for the common law to be infused with constitutional norms for the purposes of ensuring the common law's legitimacy in light of Africanist notions of human rights, that the much needed transformation of private law could be guided by the Constitution's development clauses that aim to map and critique the common law and, that the single-system-of-law principle developed by the Constitutional Court requires that the Constitution be taken seriously even in seemingly uncontroversial issues. The approach that I promote can be broadly referred to as a transformative theory for common law, even as applied between non-state actors. The vision for a transformed common law is presently supported neither in the delict scholarship nor the recent High Court and SCA judgments surveyed above. However, recent Constitutional Court jurisprudence rejects the approach of constitutional heedlessness as a legitimate private law method that certain academics and courts appear to support.

The question left to answer is to what extent the Constitution should take possession of the common law. On the one hand, one could argue that the Constitution should completely dispose of well-established common-law rules and that private law should be completely rewritten in every case. This approach

¹⁴¹ Ibid at paras 46–47.

¹⁴² Ibid at para 50.

¹⁴³ Ibid.

¹⁴⁴ Ibid at para 69.

I call ‘constitutional over-excitement’.¹⁴⁵ On the other hand, one could follow a moderate yet transformative approach that tries to solve tensions between various sources that may potentially apply to any given case. In this part, I show why it may be said that the wrongfulness enquiry in *Loureiro CC* might have bordered on constitutional over-excitement and why that is undesirable.

To recap, in *Loureiro CC*, the Court held that conduct is wrongful if the legal convictions of the community, constitutionally understood, regard it as unacceptable. ‘It is based on a duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.’¹⁴⁶ Here the Court determined wrongfulness with special attention given to the duty to respect rights. But not any rights: the constitutional rights to personal safety and property that should be protected by security companies and their guards who are contracted for that purpose.¹⁴⁷ Other than the condensed definition of wrongfulness, the fact that it should not be conflated with negligence and that wrongfulness should be determined before negligence, very little doctrinal discussion about wrongfulness is endeavoured and previous similar cases were not visited to fit this case into an interesting and complex pattern of the wrongfulness theme. Indeed, it seems that wrongfulness is simply (and outwardly uncontroversially) established whenever constitutional rights are infringed. Thus, it appears that wrongfulness can be established by investigating constitutional law alone, with no need to consider long-standing precedent. This is a point that Alistair Price takes issue with in his note on *Loureiro CC*.¹⁴⁸ Even though Price agrees with the outcome of the case, he takes issue with the reasoning of the Court.

First, Price argues that the Court emphasised the open-ended policy considerations and underemphasised the importance of ‘principled analogy from past or hypothetical cases where legal duties in delict have been or would be imposed or denied’.¹⁴⁹ This type of reasoning, Price contends, facilitates the ‘orderly and incremental development of the common law’ that ensures a greater degree of ‘coherence and predictability’.¹⁵⁰ Price is clear on the fact that by this he does not mean that the previous decisions and their principles provide unconditional demands, as analogical reasoning is also complemented by policy considerations.¹⁵¹ What he finds problematic, in a quasi-Dworkinian fashion, is that principles should not be replaced by constitutional policy considerations. It would appear that Price is in favour of finding a balance between and integration

¹⁴⁵ The fact that the Constitutional Court sometimes gets the common law of delict wrong and relies too strongly on the Constitution is not in itself a new idea. The phrase that I employ here aims to provide a generic term for a common problem. See, eg, Fagan on the *Carmichele* judgment (note 30 above), on *K v Minister of Safety and Security* (note 31 above) and most recently also in ‘Causation in the Constitutional Court: *Lee v Minister of Correctional Services*’ (2014) 5 *Constitutional Court Review* 104. Fagan’s enthusiasm about the Constitution’s potential for the law of delict has been curbed by these judgments.

¹⁴⁶ *Loureiro CC* (note 7 above) at para 53.

¹⁴⁷ Sections 12 and 25 of the Constitution guarantee these rights.

¹⁴⁸ A Price ‘The Contract/Delict Interface in the Constitutional Court’ (2014) 25 *Stellenbosch Law Review* 501.

¹⁴⁹ *Ibid* at 503–504.

¹⁵⁰ *Ibid* at 504.

¹⁵¹ *Ibid*.

of common-law principles and constitutional policy.¹⁵² Ultimately, for Price, the reasoning of the Court would have been more complete, more analytically rigorous and therefore more defensible if it referred more extensively to previous similar decisions.

Price draws our attention to the facts of *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk*¹⁵³ that are analogous to those in *Loureiro CC*, but the conclusions of the respective cases seem to be at odds.¹⁵⁴ In *Viv's Tippers* a security company was sued because its employee failed to prevent thieves, masquerading as mechanics, from stealing a vehicle. The legal snag was that the owner of the vehicle left it on the property of the party with whom the security company had a contract, but the owner did not have any agreement with the security company. In *Loureiro CC*, the plaintiff's family members who were harmed also did not have a contract with the security company. The SCA in *Viv's Tippers* held that the security company owed no duty grounded in delict towards the owner of the vehicles. In *Viv's Tippers* the SCA overturned *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*,¹⁵⁵ and doubted the correctness of *Longueira v Securitas of South Africa (Pty) Ltd*.¹⁵⁶ Price is concerned that these conflicting cases received no mention in *Loureiro CC* despite the facts in all these matters being consonant. Uncertainty therefore now exists with regard to whether *Viv's Tippers* is wrong and *Compass Motors* and *Longueira* are correct, or whether all of these cases are distinguishable from one another.¹⁵⁷ Thus, the Court failed to properly grapple with the common law and instead opted to decide the matter simply on the basis of a breach of constitutional rights. Thankfully Price provides us with useful insight into why *Viv's Tippers* and *Loureiro CC* are reconcilable. For Price, the two cases are distinguishable primarily because *Viv's Tippers* related to the situation where a security guard omitted to prevent theft while *Loureiro CC* related to a security guard who positively acted by opening a gate for robbers. The difference in the description of the conduct in each case is important, because wrongfulness is presumed where negligent positive conduct causes physical harm, while negligent omissions are *prima facie* lawful.¹⁵⁸ These nuances in the law of wrongfulness were not properly addressed in *Loureiro CC* and consequently it seems as though the Constitution has come to replace the technicalities of the common law. If the Court wrestled with analogous precedent in *Loureiro CC*, it would have contributed to establishing a more complete picture on the different scenarios that could play out where a security company commits (or does not commit) a delict.¹⁵⁹ Below I elaborate on why we might agree with Price's scepticism of the constitutional over-excitement in *Loureiro CC*.

¹⁵² Ibid at 505.

¹⁵³ [2010] ZASCA 26, 2010 (4) 455 (SCA) ('*Viv's Tippers*').

¹⁵⁴ Price (note 148 above) at 505.

¹⁵⁵ 1990 (2) SA 520 (W) ('*Compass Motors*').

¹⁵⁶ 1998 (4) SA 258 (W) ('*Longueira*').

¹⁵⁷ Price (note 148 above) at 506.

¹⁵⁸ Ibid at 507.

¹⁵⁹ Ibid at 510.

B Reasons Justifying a Rejection of Constitutional Over-Excitement

1 Transformation is not Revolution

The basic tenor of Price's view should be favoured. Principled reasoning in common-law matters is not necessarily untransformative.¹⁶⁰ The implication of *Carmichele* and similar matters is that courts do not only need a thorough knowledge of the Constitution in order for incremental developments to be effected to the common law – they also need a thorough knowledge of common law in order for its developmental exercise to be meaningful and well-reasoned.¹⁶¹ To state it differently, it is crucial to know what is inside of the box before rejecting the box off the cuff. Otherwise you cannot be sure that you are truly thinking outside of the box. In a similar vein, Klare is clear about the fact that transformative legal reasoning goes beyond visionless conservation and reform, but nevertheless falls short of a revolution.¹⁶² A complete displacement of common law rules, without properly knowing what they are, coupled with a sole reliance on the Constitution, sounds a lot more like a revolution than a transformation. Earlier I have said that the Constitution has an important role to play in securing the legitimacy of common law, the deconstruction of common law, and securing the realisation of the single-system-of-law principle. It is important to note that it is *common law* that needs to be legitimised and deconstructed – we actually have to work with the common law and take it seriously to do these things. If we throw the common law out completely, there is nothing to deconstruct or legitimise. Furthermore, the single-system-of-law principle can be secured by permeating common law with constitutional spirit. We do not have to throw the entire common law out and replace it with the Constitution to ensure a single legal system. Going to the extreme of ignoring the common law is, perhaps surprisingly to many people, just as untransformative as neglecting the Constitution in private-law disputes. It would certainly be revolutionary and possibly even decolonial to do away with the common law as a whole without further ado. But that is simply not what the Constitution requires.

2 The Constitution also has its Limits

Price's critique of the over-emphasis on constitutional principles is also valid because it guards against what Lourens du Plessis would refer to as a purely monumental reading of the Constitution whereby the Constitution is celebrated and regarded as the pinnacle of an already transformed society,¹⁶³ without the critical recognition that the Constitution as a source of law is inherently limited

¹⁶⁰ See, eg, T Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 20 *Stellenbosch Law Review* 258.

¹⁶¹ *Carmichele* (note 17 above) at para 40 implies that a thorough knowledge of the common law is necessary to determine whether the common law as it stands is consonant with the Constitution.

¹⁶² Klare (note 50 above) at 150.

¹⁶³ L du Plessis 'The South African Constitution as Monumental and Memorial and the Commemoration of the Dead' in B Pieroth & R Christensen (eds) *Rechtstheorie in Rechtspraktischer Absicht* (2008) 189, 192–193.

in its transformative capacity.¹⁶⁴ The Constitution should not be deified as a perfect source of law because it might not hold the answers and solutions to all of South Africa's questions and problems. For example, Sanele Sibanda contends that the Constitution has not solved the poverty and spatial justice problems in South Africa.¹⁶⁵ True social and economic transformation can only be realised if complimented by something in addition to the law and clever judgments, such as strong social movements and/or activist politics.¹⁶⁶ Pius Langa also says that one of the biggest barriers to social transformation relates to the failure on the part of the beneficiaries of colonialism and apartheid to create a climate suitable for reconciliation, which cannot truly be rectified by the creation of any law, including the Constitution. This does not necessarily mean that the beneficiaries must be punished severely for their privilege but that the beneficiaries must at least play an active role in the process of reconciliation by making contributions towards building a South Africa united in our diversity.¹⁶⁷ In short, the Constitution has its limits and constitutional over-excitement fails to take cognisance of those limits; constitutional over-excitement perhaps expects too much from the Constitution. To avoid the monumentalisation of the Constitution, Du Plessis argues for a simultaneous monumental and memorial reading of the Constitution that does not over-celebrate nor under-appreciate the significance of the supreme law. To put it in my terms, the approach called for should not be constitutionally heedless, nor over-excited. The midway between the two extremes is best achieved, with specific reference to dealing with the common law, through the doctrine of what Du Plessis calls 'adjudicative subsidiarity' that guards against constitutional absolutism while simultaneously having due respect for the Constitution's supremacy.¹⁶⁸

IV ADJUDICATIVE SUBSIDIARITY AS MIDWAY BETWEEN THE EXTREMES

Adjudicative subsidiarity refers to the 'reading strategy'¹⁶⁹ that the Constitutional Court has employed in the past to ensure that the Constitution would not be 'overused',¹⁷⁰ subject to the caveat that the supremacy of the Constitution must

¹⁶⁴ For a good overview on the South African literature regarding the inherent limitations of the Constitution's transformative aspirations, see D Brand *Courts, Socio-Economic Rights and Transformative Politics* (2009) (unpublished LL.D Thesis, Stellenbosch University) 3ff.

¹⁶⁵ S Sibanda 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482, 488ff. Cf F Michelman 'Liberal Constitutionalism, Property Rights, and the Assault on Poverty' (2011) 22 *Stellenbosch Law Review* 706 (Disagrees with Sibanda's contention that the Constitution is 'too liberal' to deal with poverty). See also Sibanda's reply to Michelman in S Sibanda 'Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman's "Liberal Constitutionalism, Property Rights and the Assault on Poverty"' (2013) 24 *Stellenbosch Law Review* 329.

¹⁶⁶ P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351, 358.

¹⁶⁷ *Ibid* at 359.

¹⁶⁸ Du Plessis (note 163 above) at 197. See also his other works on adjudicative subsidiarity: L du Plessis 'Subsidiarity: What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 *Stellenbosch Law Review* 207 ('Du Plessis on Subsidiarity') that formed the basis of L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 32, 150–158.

¹⁶⁹ Du Plessis on Subsidiarity (note 168 above) at 209.

¹⁷⁰ *Ibid* at 215.

be taken seriously.¹⁷¹ Van der Walt conceptualises subsidiarity as a reconciliation of the dictum in *S v Mhlungu and Others*, that it is ‘a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed’¹⁷² and the single-system-of-law principle enunciated in *Pharmaceutical Manufacturers*.¹⁷³ The fact that subsidiarity is a midway between two extreme approaches to constitutional application must be emphasised. On the one hand, subsidiarity is not a greenlight for constitutional heedlessness or a mechanism for purifying the common law from politics. (Due to the fact that subsidiarity is attentive to the Constitution’s call for a single system of law, it is ‘a politics confirming and -enhancing device that ensures interplay between constitutional principles and democratic laws, reformist initiatives and vested rights, change and stability’).¹⁷⁴ On the other hand, subsidiarity fights against constitutional over-excitement in that it requires lawyers to take legislation, common law and customary law seriously, in light of and subject to the Constitution, in a way that allows a multiplicity of legal sources to peacefully coexist without complete methodological chaos. In the context of property law, Van der Walt says that the main purpose of subsidiarity is to structure the ‘choice of the source of law’.¹⁷⁵ In other words, subsidiarity provides ‘guidelines that identify the source of law that primarily governs litigation’ related to rights infringements.¹⁷⁶ Practically, subsidiarity can be of use to the law of delict as well.

As a point of departure, it is helpful in all cases to start by identifying a constitutional right that has potentially been infringed by an alleged wrongdoer. From this point forward, Van der Walt provides us with two subsidiarity principles.

The first principle is derived from *South African National Defence Union v Minister of Defence and Others*.¹⁷⁷ In that case the Constitutional Court held that if a constitutional right is alleged to have been infringed, the dispute must be resolved in accordance with legislation that has specifically been promulgated to protect the right concerned. Thus, existing legislation cannot be thoughtlessly circumvented in favour of sole reliance on a constitutional right.¹⁷⁸ The rationale for this first principle seems to be that legislation of this kind gives content to a constitutional right and so there is no need to reinvent the wheel by placing sole reliance on the constitutional text. Legislation relevant to disputes relating to constitutional-right infringements that take on delictual form include, for example, the Road Accident Fund Act¹⁷⁹ and the Compensation for Occupational Injuries Act.¹⁸⁰ Both of these enactments protect the constitutional rights to dignity and bodily integrity.¹⁸¹ However, the fact that these enactments must be applied and taken

¹⁷¹ AJ van der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2008) 1 *Constitutional Court Review* 77, 90ff.

¹⁷² [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

¹⁷³ Van der Walt (note 171 above) at 100.

¹⁷⁴ *Ibid.*

¹⁷⁵ Van der Walt (note 65 above) at 35.

¹⁷⁶ *Ibid.*

¹⁷⁷ [2007] ZACC 10, 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) at paras 51-52.

¹⁷⁸ Van der Walt (note 65 above) at 36.

¹⁷⁹ Act 56 of 1996.

¹⁸⁰ Act 30 of 1993.

¹⁸¹ See, eg, HB Klopper *The Law of Third-Party Compensation* (3rd Edition, 2012) 10ff.

seriously in the disputes that they regulate does not mean that the Constitution becomes completely irrelevant. In the process of interpreting legislation, s 39(2) of the Constitution kicks in and the spirit, purport and objects of the Bill of Rights must be promoted. Alternatively, one could attack the legislation for constitutional invalidity following s 172 of the Constitution. Practically, we end up with an amalgamation of legislation and constitutional spirit instead of a complete circumvention of the Constitution (constitutional heedlessness) or a complete circumvention of legislation (constitutional over-excitement).

The second principle is derived from *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*.¹⁸² In that case the Constitutional Court held that if a constitutional right is alleged to have been infringed, the dispute must be resolved in accordance with legislation that has specifically been promulgated to protect the right concerned and existing legislation cannot be thoughtlessly circumvented in favour of sole reliance on common law.¹⁸³ Of course, this principle is subject to the proviso that if legislation does not cover the dispute in question, common and customary law act as legal safety nets to provide rules and principles to regulate the matter.¹⁸⁴ Davis and Klare are of the view that common and customary law are always being incrementally developed whenever those sources are used.¹⁸⁵ There certainly is critical merit to their argument. The consequence of Davis and Klare's view is that s 39(2) – which requires a court to promote the spirit, purport and objects of the Bill of Rights when the common or customary law is developed – is always relevant whenever the common or customary law is engaged. However, if we take a more sceptical view of Davis and Klare, like Fagan indirectly does,¹⁸⁶ common and customary law are not always being developed whenever those sources are adjudicated on. Sometimes, common or customary law is quite simply applied. In my view, that does not necessarily mean that the Constitution becomes irrelevant to cases where the common law is applied. Section 173 of the Constitution bestows on courts the power to develop the common law considering the interests of justice. That power could imply a choice between applying the law or developing it. The exercise of judicial power by making a choice between application and development should be properly justified in a transformative democracy to give effect to the rationality principle that is fundamental to the founding value of the rule of law.¹⁸⁷ The justification process must necessarily involve serious constitutional engagement because the common and customary law can only survive in our constitutional democracy if it is consonant with the Constitution, following ss 2, 39(3) and Item 2(1) of Schedule 6 to the Constitution. To be clear, I argue that even if a rule is to be applied with no substantive change, a sharp statement should be made as to

¹⁸² [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 25.

¹⁸³ Van der Walt (note 65 above) at 36.

¹⁸⁴ *Ibid.*

¹⁸⁵ Davis & Klare (note 24 above) at 423–424.

¹⁸⁶ Fagan (note 31 above) at 187, 190.

¹⁸⁷ Section 1(c) of the Constitution stipulates the rule of law as one of the founding values of the South African state. For more on the 'culture of justification' in 'post'-apartheid South Africa, see E Murenik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32.

why the rule is constitutionally compliant as it stands so that a court observes its justificatory mandate. Thus, the Constitution is always speaking in common and customary law matters, even if we accept that a difference exists between the application and development of those sources. Practically, we end up with an amalgamation of common or customary law and the Constitution, instead of a complete circumvention of the Constitution (constitutional heedlessness) or a complete circumvention of common law and legislation (constitutional over-excitement).

This scheme of working with various legal sources largely coincides with the methodology laid out in s 8(3) of the Constitution.¹⁸⁸

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

The method of s 8 also starts with an identification of a potentially relevant constitutional right, followed by a consideration of legislation that gives effect to that right. If no such legislation exists, the common law (and, following s 211(3), I would add ‘or customary law, if it is applicable’) is applied or developed to give effect to the relevant constitutional right. Yet, s 8 is only useful when non-state actors are engaged in a dispute. I argue that the two broad principles of subsidiarity advocated by Van der Walt, discussed above, provide us with a fallback for what to do when the state is an alleged wrongdoer and s 8 does not apply.

A problem with the method of s 8 and the broader principles of subsidiarity is that it does not provide a final shield against constitutional right infringements where no legislation, common or customary law are applicable. I venture to say that this is where s 38 of the Constitution provides a potential solution. That section grants the power to courts adjudicating Bill of Rights issues to provide ‘appropriate relief’ where rights are ‘infringed or threatened’.¹⁸⁹ On the front

¹⁸⁸ Woolman has for a long time been campaigning for a stronger reliance on s 8 or so-called ‘direct constitutional application’ that would lead to a more coherent and thorough constitutional rights jurisprudence. See, eg, S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Ch 31; and S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *South African Law Journal* 762. Many academics seem to have harked Woolman’s call: See, eg, D Bhana ‘The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution’ (2013) 29 *South African Journal on Human Rights* 351; D Davis ‘Where is the Map to Guide Common Law Development?’ (2014) 25 *Stellenbosch Law Review* 3; N Friedman ‘The South African Common Law and the Constitution: Revisiting Horizontality’ (2014) 30 *South African Journal on Human Rights* 63. Bhana, Davis and Friedman have in recent times also noted that s 8 of the Constitution should be the starting point for navigating constitutional application. In these works it seems that the distinction between direct and indirect constitutional application should be collapsed. The result is ultimately an endorsement of subsidiarity as I have described it here.

¹⁸⁹ See generally *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) (Held that s 19 of the Constitution can bind non-state actors without recourse being had to legislation or common law); M Dafeel ‘The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights’ (2015) 31 *South African Journal on Human Rights* 56; and P de Vos ‘It’s My Party (And I’ll Do What I Want To): Internal Party Democracy and Section 19 of the South African Constitution’ (2015) 31 *South African Journal on Human Rights* 30.

of the law of damages, the possibility exists for an aggrieved party to claim constitutional damages if a constitutional right has been infringed, but legislation, common and customary law leaves them remediless. In *Fose v Minister of Safety and Security* the Constitutional Court held that a litigant cannot claim constitutional damages in addition to common-law damages grounded in delict where they have been assaulted by employees of the state.¹⁹⁰ Hidden in *Fose* is a vote of support for the principle of subsidiarity. If a constitutional right has been infringed and there is no legislation, the common law is relied on. Only if the common law then fails to provide adequate relief will a litigant be able to claim constitutional damages. Only once a litigant has reached the end of the ‘sources rope’ can constitutional damages be claimed.¹⁹¹

The methodological approach to sources that subsidiarity provides can assist in finding a midway between constitutional heedlessness and over-excitement. However, it is not a foolproof method. Subsidiarity can very easily be abused if too much focus is placed on avoiding the Constitution in favour of other sources. In order for subsidiarity to have true transformative flair, the appliers of subsidiarity must always be conscious of the dual-purpose philosophy underpinning it. That is, we need a single system of law while simultaneously being cautious of placing too large a burden on the Constitution at the expense of an integrated reading of various applicable sources. In critical spirit, I must further highlight that subsidiarity might not be the only approach to moderate constitutional heedlessness and over-excitement. In fact, subsidiarity itself might have to be approached with circumspection so that it does not become crystallised, closed or venerated in itself. In order to be a truly critical approach to the issue of constitutional application it must be self-reflective, subject to change and, if necessary, be open to deconstruction and reconstruction. This is so because, as the prolific mystic philosopher Rumi teaches us, once we believe that we have mastered something, we should run from that false state of finality and accomplishment.¹⁹²

V CONCLUSION

Approaches such as those championed by Price, Du Plessis and Van der Walt aim to strike a balance between the two extremes of constitutional avoidance (in this discussion, constitutional heedlessness) and constitutional over-excitement deserve support. Constitutional heedlessness is undesirable as it stifles the

¹⁹⁰ [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) (*‘Fose’*) paras 19–54.

¹⁹¹ This principle indirectly also featured in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (Constitutional damages payable by the state were granted to a farm owner whose constitutional property right had been infringed by unlawful occupiers who could not be evicted without their constitutional right to housing being infringed) and directly featured in *Minister of Police v Mboweni and Another* [2014] ZASCA 107, 2014 (6) SA 256 (SCA), [2014] 4 All SA 452 (SCA) (Held that constitutional damages cannot be claimed in loss-of-breadwinner cases where the law of delict provides sufficient protection to the rights of children whose parents pass away).

¹⁹² J Rumi *Masnavi i Ma’navi – Book Five* (trans K Helminski & C Helminski, 2000) 564–565: ‘Know the true definition of yourself. That is essential. Then, when you know your own definition, flee from it.’

development of common law that is needed in order for it to maintain its legitimacy in the transformative South African legal era. Constitutional over-excitement also stifles the potential of forming a critical framework for evaluating the common law as it fails to realise that the Constitution should be approached unpretentiously regarding its limited transformative possibilities. Just as much as the Constitution is important, it is not a perfect tool to effect real and tangible change in the South African society. Such a humble recognition is crucial to monumentalise neither common law nor the Constitution.

Analogous to Paul Kruger's problematic metaphorical monument of legal reasoning, the emblematic monument of the Constitution might have a similar haunting effect on private common law reasoning. While these two monuments can be impressive and inspirational at first glance (and for a while after that), the modest recognition needs to be made that the required interplay between the common law and the Constitution was bargained and determined in a process of ideological negotiation and struggle where various parties to the discussion had to sacrifice certain beliefs regarding certain sources of law. Those sacrifices serve as a memorial to both the common law and the Constitution. Thus, a transformative method, inspired by the formation of the negotiated South African constitutional democracy, should be a sign of memorialising both sources of law. And perhaps, just perhaps, adjudicative subsidiarity may help us craft a unified memorial concurrently dedicated to the common law and the Constitution. With that said, the rise of decolonial theory might soon hit private law. When that happens, our memorial and everything that it represents could see itself covered in paint or it could even be on the brink of being completely dismantled from its pedestal.