expressed that the interpretation afforded to the *contra naturam* requirement in this judgment will not be followed in later judgments. Proceeding in a rather formal fashion from the precepts of the stare decisis system obtaining in South Africa, one could argue that, as it is a judgment of the South Eastern Cape Local Division, it will probably have little formal effect in the rest of South Africa. However, in view of very recent developments in the sphere of our system of precedent flowing from a growing propriety of our courts to acts as "courts of equity" it becomes increasingly difficult to predict the effect of the process of applying the *stare decisis* doctrine.

Finally, a remark falls to be made in respect of the comparison, strongly formulated by Van der Walt and Midgley, between the "human" delictual elements of wrongfulness and fault (negligence) and the "domestic animal" requirements of actions *contra naturam sui generis* and *sui sponte feriatur commo" for an owner's liability in terms of the actio de pauperie. Although the relationship has been commended above, one should constantly keep the time-honoured adage that comparisons are odious in mind. The comparison highlights the difference in objectivity of the two "domestic animal" tests. Where the domestic animal in question did not act from inward excitement or vice (the more subjective test), its actions are excused. However, this has a further effect: the *prima facie* inference that the animal in question acted *contra naturam sui generis* is thus rebutted, and, objectively speaking, the *contra naturam* label of the animal's behaviour thus falls away. It is therefore logically impossible to conclude that an animal acted *contra naturam sui generis*, but was not stimulated by inward excitement or vice. On the other hand, it is trite that the presence of a ground excluding the element of fault does not have the effect of ruling out the element of wrongfulness on the part of the wrongdoer. As has been pointed out above, the spectre of a reasonable person acting wrongfully is no strange occurrence in terms of the South African law of delict. In spite of this difference, it is suggested that the comparison provides a positive strategem to approach the complicated decision concerning the reasonableness of a domestic animal's actions for reasons of determining its owner's possible liability for damage inflicted by it.

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133 See *Limnax CC v. Hammersley and Another* 2008 3 SA 283 (SCA) at 292F where Heber JAdeclares (after a survey of foreign legal sources): "I am persuaded that the interests of justice do indeed require a change in our established law on the subject." The established law in question, regarding a principle of the law of servitudes, rested upon "unassailable (299G) authority in the form of a judgment of the Appellate Division itself (*Gardens Estate Ltd v Lewis* 1920 AD 144).

134 See the discussion at 3 2 2 above.

135 Ibid; see also *Neebbling, Pongeza & Visser op cit* at 143 in fine.
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description is so broad that it can only be taken as a general reference to the concept of delictual liability. Unlawfulness is closely linked to the central idea of tort law, as formulated by Prosser: "So far as one central idea, it is only this, that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others." 3

In English tort law, there is no neat catalogue of protected rights and interests, and both the required standard of conduct and the scope of protection are integrated into the concept of a duty of care. This was also the approach of South African courts in earlier cases, as will be shown below. It has been said that a broad idea of wrongfulness is reconcilable with the English law of tort, at the highest level of abstraction, if only because there are situations where the causing of damage is not actionable. 4 The mechanism to control the ambit of tort liability is normally the duty of care. However, the foreseeability-based duty of care (as famously formulated by Lord Atkin in Donoghue v Stevenson) is not a conclusive test of liability, because it does not take account of instances where liability based on foreseeability is sometimes excluded or restricted, including cases of economic loss, cases of justification on grounds such as defence or consent, and cases of omission (the law does not recognize a general duty to act positively to ward off foreseeable danger from another person). 5 In these instances, the courts employ, in addition to foreseeability, the notions of "proximity", "neighbourhood", "fairness", "assumption of responsibility", "reliance" and "special relationship" to control the scope of liability for negligence. 6 These concepts have been described as "little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope." 7 The courts have shown an increased willingness to bring policy questions into the open and, even if it is found that injury was a foreseen result of the defendant's negligence, the existence of a duty of care may be denied on the basis that policy considerations necessitate a restrictive approach in determining the ambit of "neighbourhood" for purposes of the duty of care. 8

1 See Anton Fagan "Rethinking wrongfulness in the law of delict" 2005 SALJ 90; 1 Notchling "The confusion of wrongfulness and negligence: Is it always such a bad thing for the law of delict?" 2006 SALJ 204; RW Nugent "Yes, it is always a bad thing for the law: A reply to Professor Notchling" 2006 SALJ 557-560; J Notchling & JM Potgieter "Wrongfulness and Negligence in the Law of Delict: A Babylonian Confusion?" 2007 TIBIR 120.
3 European Group at 28; WV Horton Rogers "Wrongfulness under English tort law" in Unification of Tort Law: Wrongfulness Helmut Koziol (ed) (1998) at 39: "But from another point of view the concept is almost meaningless since 'wrong't'wrongfulness' may be regarded as merely a shorthand description of the situations in which tort liability is imposed." The same can be said of the following comment, made in the context of a discussion of protected interests in European systems of tort law: "It all boils down to the fact that negligent conduct must be legally wrong or that damage needs to be legally relevant" see Cees van Dam European Tort Law (2006) at 141 para 301-1.
4 Cited by Horton Rogers at 40.
6 Horton Rogers at 40.
7 [1932] AC 562.
9 See Tony Weir Tort Law (2002) at 54-54.
10 Lord Bridge in Caparo Industries v Dickman [1990] I All ER 560 574.
In German law the concept of unlawfulness (Rechtswidrigkeit) is somewhat contentious. Unlawfulness for the purposes of §823 1 of the BGB essentially turns on the infringement of the interests that are specifically protected by that section, such as life, physical integrity, health, property and other similar rights (not including pure economic loss). These are said to be “absolutely protected interests” and the notion of unlawfulness to be “outcome-related” in an approach to unlawfulness is known as Erfolgsmurechtslehre. However, in cases of indirect infringement of rights and omission, the notion of unlawfulness is said to involve an evaluation of conduct in terms of certain societal norms. This approach to unlawfulness is known as Verhaltensunrechtslehre. Where an act infringes one of the protected interests only indirectly, there is no unlawfulness in terms of this approach, unless it can be shown that the defendant has failed to satisfy the standard of care demanded by society. This duty-oriented approach is even more necessary in the case of liability for omissions. One of the most fertile sources of this development in German law was the idea that a preceding dangerous or potentially dangerous activity or state of affairs gives rise to a duty of care. From this idea the courts developed the Verkehrssicherungspflichten, or societal duties. The purpose of these duties is to delineate the range of relationships that will be protected against careless interference as well as the range of persons who could be held liable for a harmful result, and also the precise content of the duty, if it is found to exist. All this is decided as a matter of judicial policy, and involves the consideration of factors such as the gravity of the harm, probability of occurrence, the cost of prevention, and the social utility of the activity in question, as developed by the courts in an extensive body of case law. There is some uncertainty as to whether these duties relate to conduct, unlawfulness or negligence, but it appears not to make an appreciable difference to the final practical result.

The existence of the Verkehrssicherungspflichten indicates that the law of delict requires a value (or policy) judgment on the existence of a legal duty not to cause or to prevent harm, concerning the range of relationships and interests that will be protected against careless interference and the range of persons who could be held liable for a harmful result. Whether this value judgment is made in the context of unlawfulness or negligence is a matter of structure. The specific content of the duty, and whether there has been a breach of the duty would mostly be dealt with in the context of negligence.

The draftsmen of the Principles of European Tort Law could not find sufficient common ground among the legal systems of Europe to formulate a unitary concept of unlawfulness or wrongfulness, and it has been said that they have “essentially dodged the thorny issue of “wrongfulness””. The proposed common principles provide that damage may be attributed to the person “whose conduct constituting fault has caused it”, and that damage requires harm to a legally protected interest. The concept of “protected interests” includes life, bodily integrity and mental integrity as interests enjoying the most extensive protection, followed by property rights. For protection of pure economic interests or contractual relationship, the extent of protection depends on factors such as proximity and awareness.

3 FUNCTION OF UNLAWFULNESS IN SOUTH AFRICAN LAW
In the South African law of delict, unlawfulness or wrongfulness is a requirement for delictual liability that is supplementary to: (a) conduct (that must be voluntary); (b) factual causation (often said to imply that the defendant’s conduct is a condition sine qua non for the plaintiff’s harm); (c) legal causation requiring a sufficiently close relationship between conduct and harm to make it just and reasonable to impose liability; often determined by foreseeability; (d) compensable damage or harm (determined with reference to the plaintiff’s position had the delict not been committed), and (e) fault (presupposing accountability; consisting in either intent, with regard to the factual result and the wrongfulness of causing it, or negligence, based on reasonable foreseeability, preventability of the harm). Unlawfulness supplements the enquiry into liability in respect of the following matters:

- The requirement of voluntary conduct says little about the circumstances which liability will be imposed for an omission. This question involves an enquiry into the existence of a duty not to cause harm. In essence, the question is whether the harm that was caused fell within the actor’s scope of responsibility.
- The requirement of harm or damage deals with the effects of infringement of a right or interest, but does not explain which interests will be protected, or to what extent interests will be protected (physical integrity and tangible property are generally recognized as fully protected interests and the infringement of such an interest by positive conduct can be said to be prima facie unlawful, but in the case of pure financial loss, privacy, reputation and mental distress, the extent of protection is often regarded as a question of unlawfulness).
- The requirements of conduct, causation, damage and fault do not adequately deal with the balancing of conflicting rights or interests (reputation versus free speech, enjoyment of property versus harm to a neighbour, freedom of competition versus harm to trading goodwill, freedom of action versus a duty to protect).
- The conclusion that the defendant’s conduct culpably caused the plaintiff’s damage is not sufficient for imposing liability. The causation of damage that
would otherwise be unlawful can be justified, for instance, on the basis of defence, necessity, consent or statutory authority.

- The requirement of fault generally deals with the blameworthiness of the actor’s conduct, but not with the weight to be given to intent or to a reprehensible motive on the part of the actor. It also does not deal comprehensively with the effects of mistake on the part of the actor, for instance in cases of putative justification. Intent, awareness of the possibility of harm, a reprehensible motive and conscious negligence (recklessness) can be indicators of unlawfulness.

- The requirements of conduct, causation, damage and fault do not explicitly leave scope for policy considerations relating, inter alia, to guarding against indeterminate liability, guarding against the hampering or disrupting of public administration, the availability of an alternative remedy, or the maintenance of free competition. Rights and duties in delict are legal constructs that reflect the scope of protection afforded by the law. The ‘right’ to such protection is not absolute. The duty of the actor to refrain from causing the loss, but the content of both reflect a value judgment on the appropriate extent of protection, as judicially determined.

- Under a fault-based system, the requirement of either negligence or intent acts as an important filter in the evaluative process to decide whether liability should be imposed. Where liability is strict, the elimination of the fault requirement does not mean that all risk of harm is indiscriminately transferred to the defendant who caused the harm. Strict liability does not mean absolute liability, and the requirement of absolute reasonableness and policy, remains in place.

In South African law, as in the case of the other legal systems referred to above, unlawfulness in the broadest sense deals with the question of whether the law of delict should intervene, or whether the burden of harm should be shifted to the defendant, or whether it is reasonable to impose liability on the defendant. However, this general formulation of unlawfulness is not very helpful, because it is hardly distinguishable from the general concept of delictual liability.

When is the issue of unlawfulness likely to arise? Unlawfulness is mostly not contentious in cases involving positive conduct causing bodily injury or damage to property. It is settled law that all harm to persons or property caused by a positive act is prima facie unlawful. Unlawfulness is mostly contentious in cases involving omission, pure economic loss and a conflict of rights. In these cases, the concept of unlawfulness generally indicates the infringement of an interest that is deemed worthy of legal protection, and that the harm caused fell within the actor’s scope of responsibility. In cases involving a conflict of rights, the determination of unlawfulness requires a value judgment on the question of which right should yield to the other. In all these contentious cases, unlawfulness involves the application of wide and general evaluative criteria. The general criteria or standards for determining unlawfulness are reasonableness (sometimes referred to as ‘general reasonableness’), the legal convictions prevailing in the

22 Mullebeke v Raut 1999 (3) SA 1055 (SCA) at para 25; and see generally Annel van Aweren “Policy considerations in the law of delict” 1993 THHR 171 180 (and footnotes 26 and 27).

23 Mullebeke v Raut 1999 (3) SA 1055 (SCA) at para 25.

24 See David M Walker The Law of Delict in Scotland 2nd (1981) at 33. See also at 36: “... the fact that conduct can be said to be legal or lawful in the sense of not being prohibited or punishable goes no distance at all in a delict case to exonerate a defendant. A great deal of delictual conduct is undoubtedly lawful, and does not become unlawful for any purpose of the civil law merely because it causes harm.”

25 Fagan 2005 SALJ 90-91 refers to this view as the “standard academic view” (which he disparages) in his textbooks on delict where this view is propounded.

26 Oliitzi Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) at para 12; Steenkamp NO v The Provincial Tender Board of the Eastern Cape [2006] JOL 18564 (CC) at para 37.
7 THE GENERAL CRITERIA FOR DETERMINING UNLAWFULNESS: PATHWAYS TO POLICY

It is generally accepted that the application of the general criteria or standards for determining unlawfulness ("general reasonableness", "the legal convictions prevailing in the community", and "the honi more") in the final instance involves public policy and a value judgment. A number of judges expressly acknowledge that the decision was determined or influenced by policy considerations.

The general criteria or standards for determining unlawfulness are of a legal rather than a social, moral, ethical or religious nature, but they do reflect societal values. In applying the concept of the legal convictions of the community, the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as unlawful for the purposes of delimiting the usefulness of the legal convictions of the community must be taken as the legal convictions of the legal policy makers of the community, such as the legislature and judges.

There is constant interplay between the legal concept of unlawfulness and the fundamental values of society.

The inquiry into unlawfulness can focus either on the infringements of a right or on the breach of a legal duty, but, in the final analysis, it involves an assessment of reasonableness and public policy. The court must weigh up the interests of the persons involved, and also take into account the interests and convictions of the community at large. The personal views of the judge or the parties or a segment of the community are not the measure of what should be regarded as lawful or unlawful.

The meaning of "general reasonableness", 'honi more", and "the legal convictions of the community" is shaped by the norms and values of society as embodied in the Constitution of the Republic of South Africa, 1996, as illustrated by cases such as Du Plessis v Road Accident Fund (the right to support of one partner in a same-sex relationship can form the basis of a claim for loss of support against the person who negligently caused the death of the other partner),

and in cases where the liability was imposed on the State for the failure of the

34 Mulder v Roux 1999 (3) SA 1065 (SCA) at para 25; and see generally Annel van Awezen 1960 (5) at pointers 26 and 27.


36 Minister of Safety and Security v Hamilton 2004 (2) SA 215 (SCA) at para 16.

37 See Schuts v Both 1968 (3) SA 667 (A) at 670; BOF Bank v Rais 2002 (2) SA 39 (SCA) at para 13 and Minister of Safety and Security v Van Duijenboden 2002 (6) SA 431 (SCA) at para 16.

38 Clarke v Hurst 1992 (4) SA 630 (D) at 652.

39 The court will take account of the views of the beneficiaries within the community public policy and a value judgment. A number of judges expressly acknowledge that the decision was determined or influenced by policy considerations.

40 2004 (1) SA 359 (SCA).
police or other officials to carry out their duties, such as Carmichele v Minister of Safety and Security and Another [Centre for Applied Legal Studies Intervention] (release of a person with a prior conviction for violence on his own recognisances, while awaiting trial on a new charge), Minister of Safety and Security v Van der Westhuizen (failure to procure the safe keeping of a firearm licence by a person who is convicted of a crime), and Hamill v Minister of Safety and Security (allowing the escape of a prisoner who has a history of violent crime).

The concepts of "the legal convictions of the community" and "boni mores" purport to be objective, normative standards for determining unlawfulness, but conclusions reached on the basis of these standards alone would be unverifiable, and may be circular to analysis. The courts do not hear evidence on the content of the legal convictions of the community or the boni mores. These are general guidelines for the value judgment required of a court when assessing unlawfulness. It has been said that these general criteria provide the courts with "a legal standard firm enough to afford guidance to the Court, yet flexible enough to allow for the influence of an inherent sense of fair play". This standard is based on "the general sense of justice of the community, the boni mores, manifested in public opinion".

Unlawfulness thus requires a value judgment, but the court is not absolved from the need for an open and structured process of reasoning, with reference, inter alia, to the specific rights and interests involved, the relationship between the parties, relevant provisions of the Constitution of South Africa, and relevant policy considerations.

8 UNLAWFULNESS AND THE INFRINGEMENT OF A RIGHT

It is generally accepted that the enquiry into unlawfulness can focus either on the infringement of a right, or on the breach of a duty. In many cases, the courts accept unlawfulness without referring to the general criteria of reasonableness, boni mores, the legal convictions of the community, or concomitant policy considerations, because it is settled law that all harm to persons or property caused by a positive act is prima facie unlawful. In the absence of some form of justification, self-defence or necessity, the infringement of a recognized right is unlawful.

The rights-based approach to unlawfulness mostly involves settled categories of rights: real rights in respect of movable or immovable property; personal rights in respect of an act or performance required from another person, such as payment of a debt; personality rights in respect of aspects of human personality such as bodily integrity, dignity or reputation, and immaterial property rights in respect of intangible things of the human mind such as patents, trademarks or copyright. There is no closed list of protected rights, however, and to these settled categories may also be added sub-categories or new categories of rights, such as personal immaterial property rights in the form of the right to earn money or personal goodwill, the right to information, and rights to privacy, identity, goodwill and trade secrets.

Infringement of a right involves disturbing or curtailing the ability or opportunity of the holder of the right to enjoy, use or dispose of the interest that is the object of the right. This occurs, for instance, by damaging or appropriating property belonging to another, by inducing breach of contract so that a debt owed to another person is not paid, by causing a breach of privacy or damage to reputation, or by appropriating a patented process or a trademark. Factual disturbance or curtailment is not enough; the infringement must be unreasonable in circumstances generally, and in the circumstances of the particular case. Thus, the law distinguishes between the right as such and any particular instance of it, and between its general and particular aspects.

With that which according to the community is proper in the community (hetgeen algemeen ongeschreven recht in het maatschappelijk verkeer bekend), 48


49 See Universitas Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T) at 381; Lilliweg, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 448 (A) at 471.

50 See Universitas Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T) at 381; Clarke v Hurst 1992 (4) SA 630 (D) at 651; Muhlebein v Raath 1999 (3) SA 1065 (SCA) at para 22.

51 See Hawker v Life Offices Association of South Africa 1987 (3) SA 777 (C), where the infringement of the right to earning capacity was in issue, and J Neethling "Die Reëg op die Verdroogingsprobleem" in Die Wetenskaplike en Industriële Regte 1990 TBIR 101. In Schulte v But 1996 (3) SA 667 (A), for example, it was held that competitive conduct might fall within "a category of clearly recognized illegality", as in the case of trade in contraventions of an express statutory prohibition, fraud, misrepresentation concerning one's own product, passing off one's product as that of a competitor and injurious falsehood concerning a competitor's product. However, unlawfulness in competition may fall into different categories, and can also be determined by criteria such as fairness and honesty in competition (1978). In this case, the question was whether it could be considered unlawful to copy a design that is in the public domain, and not protected by copyright, patent or design legislation. In the application of the criteria of fairness and honesty, the court considered on the one hand that the design was in the public domain and that imitation is the life blood of competition, but on the other hand that it may be intolerable to allow one manufacturer to appropriate the product of another's investment and development without license or compensation.

interests, the scope of responsibility to act, and policy considerations relating to the question of whether the law of delict should intervene.

The courts approach the assessment of unlawfulness from the duty side in cases of liability for pure economic loss, omissions, and breach of a statutory duty, as indicated in the following sections. However, the approach of the courts to the 'duty' enquiry has not been a uniform one.

In some earlier cases, the courts dealt with questions relating to unlawfulness by following the 'duty of care' approach of English law. They maintained that harm is not actionable unless the defendant has a duty of care not to cause it, and that the duty of care is essentially based on foreseeability. This was a contentious approach, which, in one commentator's view, 'brought trouble and strife', and which attracted criticism on the basis that the concept of a 'duty of care' is an unnecessary and misleading import from English law which confuses negligence and unlawfulness. In answer to criticism of the 'duty of care' approach, Schreiner JA in Union Government v Ocean Accident & Guarantee Corporation Ltd, refusing an employer's claim for economic loss resulting from the negligent injury of its employee by the defendant, found 'the duty of care' concept ineffective. For its conclusion 'the device of reasoning' to control the scope of liability. (The expression 'duty of care' has sometimes been criticised as introducing an unnecessary complication into the law of negligence, but, apart from the fact that it is endorsed by considerable authority in this Court, it is so convenient a way of saying that it is the plaintiff himself and no other, whose right must have been invaded by the careless defendant, that the complication seems rather to be introduced by the effort to avoid its use. The duty of care is in our case law rested upon foreseeability and this gives rise to a measure of artificiality. But this is really unavoidable for, if there is to be control over the range of persons who may sue, the test must be that of the reasonable man; what he would have foreseen and what action he would have taken may not be calculable according to the actual weighing of probabilities, but the device of reasoning on these lines helps to avoid the impression of delivering an unreasonable moral judgment ex cathedra as to how the innocent could have behaved. The duty of care fits conveniently into the reasoning process and even if it is no more than a manner of speaking it is a very useful one.

The 'duty of care' approach as set out in the Union Government case is explicitly based on the test of the reasonable person and asks if harm was reasonably foreseeable and what action a reasonable person would have taken to prevent harm. This enquiry into 'duty' is inextricably linked to the test for negligence, and largely utilises the flexible concept of foreseeability, which, although it 'may not be calculable according to the actual weighing of probabilities, nevertheless enables the court to avoid the appearance of "an unreasonable moral judgment ex cathedra." Evidently this approach confuses unlawfulness and negligence, and utilises the flexible concept of foreseeability to cover value judgments and policy considerations that often remain unexpressed.

In a series of subsequent cases, the courts have moved away from applying the concept of a 'duty of care' in the context of unlawfulness, focusing the enquiry instead on the existence of a 'legal duty'. This development was summarized by

53 See Better v Cotter 1982 (3) SA 864 (O) at 879, where it is stated that the factual infringement of a subjective right to personal dignity, even though it causes a measure of harm, will not necessarily be regarded as unreasonable, and will therefore not necessarily be unlawful.
54 See Mulder v Raath 1999 (3) SA 1065 (SCA) at para 27, where it was held that the assessment of unlawfulness in the context of misrepresentation required one to ask the question: "was there in the particular circumstances an invasion of the rights of the claimant as a consequence of the misrepresentation? Conversely, was there a legal duty upon the defendant before making the representation, to take reasonable steps to ensure that it was correct?"
55 See Morris v Richard 1981 (1) SA 1157 (A) at 1168; Minister van Politie v Ewels 1975 (3) SA 590 (A) at 596-597; Administrateur, Natal v Trust Bank v Afrika Rkp 1979 (5) SA 824 (A) at 833-834; Lillcrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 448 (A) at 498.
57 1956 (1) SA 577 (A) at 583B-D.
Brand JA in Trustee, Two Oceans Aquarium Trust v Kasteley & Tempelhof (Pty) Ltd.}

Likewise, the 'legal duty' referred to in this context must not be confused with the 'duty of care' in English law which straddles both elements of wrongfulfulness and negligence (see eg Knopf v Johannesburg City Council 1995 (2) SA 1 (A) at 27B-FC; Local Traditional Council of Delmas v Beamish 2005 (5) SA 514 (SCA) in para [20]). In fact, with hindsight, even the reference to 'a legal duty' in the context of wrongfulfulness was somewhat unfortunate. As was pointed out by Harmar JA in Telematrics (Pty) Ltd v Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) in para [14], reference to a 'legal duty' as a criterion for wrongfulfulness can lead the unwary astray. To illustrate, he gave the following example:

'(There is obviously a duty — even a legal duty — on a judicial officer to adjudicate cases correctly and not negligently. That does not mean that the judicial officer who fails in the duty, because of negligence, acted wrongfully.' (See also Knopf v Johannesburg City Council (supra) at 330-E.)

The courts now mostly refer to a 'legal duty' instead of a "duty of care" when dealing with wrongfulfulness, but this fairly consistent current terminology has not produced a uniform approach to wrongfulfulness. In some cases, the courts accept that the question of foreseeability of harm forms part of the enquiry into wrongfulfulness. This approach is challenging to analysis, because it utilises the concept that is central to negligence, namely foreseeability, but nevertheless diverts the confusion of wrongfulfulness and negligence. The resurgent support for a foreseeability-based concept of legal duty in the context of wrongfulfulness appears to owe much to the often cited work of Millner on negligence. The

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58 2006 (3) SA 138 (SCA) at para 11.
59 References to "duty of care" in the context of wrongfulfulness still occur. See the judgment of Mosoek DCJ in Steenkamp NO v The Provincial Tender Board of the Eastern Cape 2007 (3) BCLR 300 (CC) at para 36-37.
60 Negligence in Modern Law (1967). The following passages at pages 25 and 26 have often been cited by the courts:

"The law lays down two tests for ascertaining the existence of a duty of care; firstly, that the injury was such as a reasonable man would have foreseen and guarded against; secondly, that the nature of the interest infringed was one which the law protects against negligent conduct. These two elements must occur to give rise to a duty of care. Now it is plain that the first test is in no way different from the test applied in order to decide the negligence issue", that is, in order to answer the question: was the defendant's conduct negligent? It restates the identical abstract standard of reasonable care. If a reasonable man, placed in the circumstances of the defendant, would have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests, then the defendant is deemed to have been under a legal duty towards such others to exercise appropriate care. [25]

"The duty concept, on the contrary, shows abounding vitality. The key to this paradox is the utility of this concept as a device of judicial control over the area of reasonable negligence in grounds of policy. Under the ascertainment of liability is linked to the second consideration of the two elements of duty of care referred to above. This second element is not at all concerned with reasonable foreseeability; it is to do with the range of interests which the law sees fit to protect against negligent violation. It is only when this policy function of the duty of care concept is ignored and the matter examined exclusively in terms of reasonable foreseeability, that the conclusion that the duty concept is redundant, 'an unnecessary fifth wheel on the coach', is insurmountable. Even so, the concept serves in practice as a mode of addressing that part of the negligence issue which is concerned with the risk to the

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judgment of Lewis JA in Premier, Western Cape v Faircape Property Developers (Pty) Ltd' is an example of this approach:

[42] The foreseeability of harm to the plaintiff is also "a relevant consideration in the determination of wrongfulfulness" (per Hefer JA in Government of the Republic of South Africa v Bassie).

Accordingly, even if it were to be found that the Minister's conduct had been negligent, this would not entail, necessarily, a finding that it was also wrongful. One must ask whether it was wrongful... In answering that question one must consider also, therefore, whether the Minister should have foreseen that his conduct could cause prejudice or loss to persons like Faircape, whose applications are granted.

[46] One of the enquiries, then, for determining whether the Minister was under a legal duty to prevent harm to Faircape is whether the Minister should have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests? A similar question is inevitably repeated when one is determining the issue of negligence. In the context of determining wrongfulfulness, the question relates only to whether there should be a legal duty imposed on the Minister not to infringe a legal interest of an applicant. And it is but one of several enquiries that must be pursued in order to determine whether, as a matter of legal policy, an official or member of government should be visited with liability for damages. Would a reasonable Minister have foreseen that an applicant for the removal of restrictions would be prejudiced or would suffer loss if the application were granted? Again, the answer must be no. [Footnotes omitted]

According to this passage, the question of foreseeability is "invariably repeated" in the course of the enquiries into unlawfulfulness and negligence. For the purposes of unlawfulfulness, "it is but one of several enquiries that must be pursued" to determine whether, as a matter of legal policy, liability for damages should be imposed. It is not explained why foreseeability must be determined twice whether it is in effect the same question that is asked twice or a "similar question"; and how unlawfulfulness can properly perform the function of indicating in which cases of negligently-caused-harm liability should be imposed, if it shares a central attribute with negligence. [62]
Another example of the foreseeability-based approach to unlawfulness is the following passage in the judgment of Scott JA in Gouda Boerderij BK v Transnet Ltd.:

[12] ... Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, prudence, or a duty to act reasonably. In some judgments and academic comment, it is said that the legal duty, breach whereof renders the negligent causing of harm unlawful, is a duty to act without negligence. However, to say that "the legal duty, breach whereof renders negligent conduct wrongful, is a duty to act without negligence" is to confute negligence and unlawfulness (wrongfulness). The statement is in any event challenging to analysis, because breach of a duty not to be negligent is nothing more or less than negligence, and the statement in effect says that negligence renders negligent conduct wrongful.

While it is true that liability based on negligence is dependent upon a duty not to be negligent, duty is an indicator of unlawfulness in its fullest sense, and is not confined to negligence. If liability for negligence is in issue, the "legal duty owed by the defendant to the plaintiff to act without negligence" in effect means a legal duty "to avoid negligently causing the plaintiff harm." Unlawfulness presupposes that all the other requirements for liability have either been met, or will be met, and the legal duty required for unlawfulness in its full sense seems to be best described as the legal duty not to cause damage negligently or intentionally by voluntary action or inaction.

The inquiry into the existence of a legal duty for purposes of unlawfulness is broadly based on "the legal convictions of the community, general reasonableness, or boni mores." Judicial reasoning in the application of these wide and 63 2005 (5) SA 490 (SCA).
64 2005 (1) SA 461 (SCA) at para 12.

liability. If it is argued that the causing of reasonably foreseeable harm in some cases does not attract liability because the foreseeability of harm is outweighed by policy factors, then it remains uncertain what mere foreseeability of harm adds to the unlawfulness enquiry. Foreseeability should be (and is in the great majority of cases) left in the domain of negligence, where it is a well defined, concept, extensively developed in case law.

What is it that should be done or not be done in terms of the legal duty? The formulation of the concept of legal duty in case law is not uniform, and the duty has been variously described as a duty not to or to prevent harm, or a duty to act reasonably. In some judgments and academic comment, it is said that the legal duty, breach whereof renders the negligent causing of harm unlawful, is a duty to act without negligence. However, to say that "the legal duty, breach whereof renders negligent conduct wrongful, is a duty to act without negligence" is to confute negligence and unlawfulness (wrongfulness). The statement is in any event challenging to analysis, because breach of a duty not to be negligent is nothing more or less than negligence, and the statement in effect says that negligence renders negligent conduct wrongful.

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The policy considerations indicating whether the law of delict should intervene in respect of a particular type of harm-causing include the following: the social or economic consequences of imposing liability - in particular potential indemnification of liability ('opening the floodgates?'); the availability of alternative remedies (a contractual remedy, for instance); the need for accountability of public bodies or officials; and also taking into account the potential hampering of persons or bodies in the exercise of functions in the public interest, as in the case of tenancy boards? or administrative tribunals. 71

71 See also RPSA Petroleum Refineries (Pty) Ltd v Osborne Panama SA 1990 (3) SA 657 (D), in which the court was unwilling to recognize a legal duty towards the charterer of an oil tanker as one of an indeterminable number of similarly placed potential claimants.

72 In Liliacp, Wamser and Partners v Pilgrims Brothers SA (Pty) Ltd 1985 (1) SA 448 (A), the Appellate Division held that a legal duty in delict did not fit comfortably into the setting of a detailed business contract for professional services, inter alia, because recognition of an action in delict could entail the circumvention of contractual terms and could create "a trap for the unwary" within the contractual arrangement. See, however, Pineho v Nesta Securities (Pty) Ltd and another 2002 (2) SA 510 (C), where it was held that the existence of a contract between an asset management company and its client did not preclude imposition of a legal duty in delict on the part of the company's employee towards the client, and Holdhausen v ABSA Bank Ltd case no 2803/04, judgment delivered 17 September 2004 (SCA), where it was held that an action is unsuitable in delict for a negligent misstatement causing pure pecuniary loss even if a concurrent action is available in contract. The denial of an action in delict in Liliacp, Wamser and Partners v Pilgrims Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) was regarded as being limited to the case where the alleged negligence consists in the breach of terms of a contract. In Trustees, Two Oceans Aquarium Trust v Kamny & Templer (Pty) Ltd 2006 (3) SA 126 (SCA), it was held that public policy does not require extension of the Aquamin action to require a plaintiff who was in position to avoid risk of harm by contractual means but failed to do so.

73 In Skeneskap NV v The Provincial Tender Board of the Eastern Cape 2006 (1) 18364 (CC) at para 42, the court refused to recognize a legal duty on the part of a tender board towards a successful tenderer, whose tender award was later set aside on account of negligence in the process of awarding the tender. The court took into account, inter alia, whether an imposition of liability for damages would be likely to have a "chilling effect" on performance of administrative or statutory functions by members of the board. See also, for non-recognition of the claim of an unsuccessful tenderer, Otterby Property Holdings v State Tender Board and Another 2001 (1) SA 1247 (SCA). The result is likely to be different where there is fraud in the process of awarding a tender. In Minister of Finance and others v Gore 2007 (1) SA 311 (SCA), the court held that a tender board, causing pure economic loss was wrongful only if, as a matter of legal and public policy, there existed a legal duty (para 82 at 1380-H), and that there were no considerations of policy or legal policy which indicated that the State should not be liable for the provincial officials' fraudulent conduct in the course of a public tender process.

74 In Telmornics (Pty) Ltd v Mainie Vehicle Tracking v Advertising Standards Authority 2006 (1) SA 461 (SCA) at para 12, it was held that the Advertising Standards Authority (the ASA) should not be held liable for advertising in a newspaper in South Africa (the ASA) did not have a legal duty for purposes of delictual liability towards an advertiser who suffered a loss because of an incorrect decision by one of the ASA organs. The relevant policy consideration is the prevention of the independence of persons or bodies entrusted with an adjudicative function that serves the public interest and that imposes on them a duty to act impartially. Such persons or bodies (including the judiciary, arbitrators and other administrative tribunals) should be entitled to adjudicate fearlessly. The threat of an action for damages could unduly hamper the expeditious consideration and disposal of litigation and disputes. Although both the person harmed and damage suffered as a result of an incorrect decision are foreseeable, the negligent causing of harm is not considered unlawful.

75 Carmichael v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (5) SA 938 (CC) (release of a person with a prior conviction for violence on his own recognisances, while awaiting trial on a new charge); Minister of Safety and Security v Hanover 2004 (2) SA 216 (SCA) (failing to ensure into the psychological fitness of the applicant for a firearm licence) and Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae) 2003 (1) SA 389 (SCA) (allowing the escape of a prisoner with a history of violent crime).

76 1994 (4) SA 347 (A) at 361H/1-362A/3 (SCA).

77 The question was whether provincial authorities had a duty in respect of a minor road to make firebreaks, or to take other precautionary measures against fires breaking out and spreading to adjoining land. The court held that to determine whether a positive act or an omission is such that it can be branded as unlawful, the different interests of the parties, their relationship with one another and the social consequences of imposing liability must be assessed. In the kind of case in question, inter alia, should be weighed. Factors which play an important role in that process are, inter alia, the probable or possible extent of the prejudice to others, the degree of risk of such prejudice existing, the interests which the defendant and the community (or both) have in the act or omission in issue, whether there were reasonably precautionary measures available to the defendant to avoid the prejudice, what the chances were of the measures being successful, and whether the cost involved in taking such measures was reasonably proportional to the damage which the plaintiff could suffer. Affordability, a cause of potential damage and the potential cost of prevention should be brought into account in deciding the question of unlawfulness. Application of this proportionality test, the court found that the control and supervision of the Administrator exercised control and supervision over public roads did not in itself create a duty for purposes of delictual liability. In the absence of a positive damage creating act, the mere control of property and the failure to exercise such control with resultant prejudice to
The nature of the defendant’s conduct is taken into account: harm-causing by positive conduct is generally more readily considered to be unlawful than harm-causing by omission, and the context in which the conduct occurred will be taken into account. In Boes Bank Ltd v Ries, for example, the Supreme Court of Appeal refused to recognise a legal duty on the part of an insurance broker towards an intended beneficiary under a life insurance policy, where the broker had failed to ensure that the policy-holder sign the necessary form to nominate the beneficiary. The court took into account that the conduct of the broker did not appear to the assumption of any professional responsibility regarding the signing of the form: he became involved in the process in passing, by doing a favour for a colleague and in effect acting as a messenger, without undertaking any professional responsibility. Although it was foreseeable that the intended beneficiary would obtain no benefit from the policy if the broker failed to sign the necessary nomination form before his death, foreseeability of loss was not in itself enough to indicate a legal duty.

The nature of the interest sought to be protected is taken into account: it is clear that a duty in respect of physical injury and damage to property is more readily recognized than a duty in respect of pure economic loss.

The nature of the defendant’s fault and state of mind (motive) is taken into account: intentional harm-causing is more readily considered to be unlawful than negligent harm-causing, and a motive to cause harm will indicate unlawfulness. These matters are dealt with in the following section of unlawfulness and fault.

10 UNLAWFULNESS, FAULT, AND REASONABleness OF CONDUCT

The relationship between unlawfulness and fault also involves the issues of whether the enquiry into unlawfulness involves a strict ex post facto perspective and excludes an ex ante or actor-oriented perspective, and whether taking into account such factors would “make wrongdoing depend, in part at least, on fault” and would “reverse the ordering of wrongdoing and fault” that sees wrongdoing or unlawfulness as logically anterior to fault.

The determination of both unlawfulness and fault is necessarily done ex post facto. The events have already occurred, and the requirements for both those elements of the delict are determined with the perspective of hindsight, but with a different focus. The focus of unlawfulness is wide and includes within its ambit all the other elements of liability (conduct, causation, affected interest, harm and fault), and involves policy considerations and a value judgment, as shown above.

Fault is essentially concerned with the blameworthiness of the conduct of the actor: was the conduct at the time of acting directed to the causing of harm with knowledge of unlawfulness (intent), or was harm at that point, from the perspective of the actor, reasonably foreseeable and preventable (negligence)? In so far as fault is relevant to the enquiry into unlawfulness, as set out below, the enquiry into unlawfulness includes an ex ante perspective, while the final value judgment on whether the affected interest of the plaintiff deserves protection from the defendant’s action or lack thereof is reached by the court with an overall ex post facto perspective, taking policy considerations into account.

Nothing turns on which of unlawfulness or fault is determined first. The courts are entitled to deal with negligence first, and a finding that the action was not negligent obviates the inquiry into unlawfulness. 103 This ordering of the enquiry does not mean that either unlawfulness or fault logically precedes the other. Fault can be determined after proof of, or on the assumption that there is an unlawful causing of harm. If this assumption proves to be unfounded, either because the actor did not in fact cause the harm, or because it is not reasonable or in accordance with ‘the legal convictions prevailing in the community’ or the boni mores to impose liability, the “fault” is simply irrelevant or “legally neutral” 104. Likewise, unlawfulness can be determined on the assumption that there is fault, simply because the court finds it convenient to deal with the unlawfulness issue first. If fault is a requirement for liability and it turns out there is no fault, the assessment of unlawfulness then becomes irrelevant. In Local Transitional Council of Delmas and another v Boshoff, the court said the following on the order and manner of enquiry into the elements of unlawfulness and fault:

Depending on the circumstances it may be appropriate to enquire first into the question of wrongdoing, in which event it may be convenient to assume negligence for the purpose of the inquiry (see eg Van Duivenboden at 442A-B (SA)). On the other hand, it may be convenient to assume wrongdoing and then enquire into the question of negligence (see Gouda Boerderij BK v Transnet (Para 12)). The nature of the fault that is proved or assumed (in particular intent or conscious negligence) and fault-related factors (in particular awareness of the risk of harm or motive to cause harm) may be relevant to unlawfulness. Intentional causing of harm will mostly be devoid of social utility and therefore unlawful. The unlawfulness of harm-causing misrepresentation, for example, can depend on whether this occurred intentionally or negligently. In Minister of Finance and others v Gore NO, the court said the following in this regard:

100 [86] … We do not think that it can be stated as a general rule that, in the context of delictual liability, state of mind has nothing to do with wrongdoing. Clear instances of the contrary are those cases where intent, as opposed to mere negligence, is itself an essential element of wrongdoing. These include intentional interference with contractual rights (see eg Dansie Investment Holdings (Pty) Ltd v Brenner and Others NNO) and unlawful competition (see eg Geyser & Son (Pty) Ltd v Gore). [Footnotes omitted.]

89 Mostert v Cape Town Municipality 2001 (1) SA 105 (SCA) at para 43; Local Transitional Council of Delmas and another v Boshoff 2005 (3) SA 514 (SCA).
90 Gouda Boerderij BK v Transnet 2005 (5) SA 490 (SCA) at para 12.
91 See Nugent 2006 SALJ 559.
93 2007 (1) SA 111 (SCA) at para 86.
94 See also para 83: "In the language of the more recent formulations of the criterion for wrongfulness in cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss occurring from the conduct at issue. Thus understood, it is hard to think of any case, why the fact that the loss was caused by dishonesty (as opposed to bona fide negligent) conduct, should be ignored in deciding the question. We do not say that dishonesty conduct continued on next page
Intentional causing of harm to others will not always be unlawful, for instance where justified criticism harms the reputation of another, or fair competition causes financial loss to a trade competitor. If all other things are equal, a court might accept that there is unlawfulness only if harm was caused intentionally, because intent is more blameworthy. However, everything will depend on the circumstances, and intent will not conclusively indicate unlawfulness. The passenger on the bus who knowingly offers bad investment advice to other passengers, who are complete strangers to him, will probably not be liable if his bad advice is followed, because, in the area of investment advice, he owes no duty towards his fellow-passengers.

A motive to cause harm to another in itself does not necessarily make the causing of harm unlawful, but motive may be taken into account by the court, together with other circumstances, in the assessment of unlawfulness. For instance, where a land owner exercises his rights of ownership in a manner calculated to cause extensive harm to a neighbour, with little benefit to himself, his motive to harm may influence the court to decide that the harm was caused unlawfully. The area of unlawful competition, a motive to harm rather than to compete will also be taken into account to determine unlawfulness.

A court that is undecided on the question of unlawfulness after weighing up conflicting interests and taking policy considerations into account, may, therefore, consider the blameworthiness of the actor's conduct. Intact, motive to harm, or awareness of the possibility of harm indicates an enhanced degree of blameworthiness, bringing fault or fault-related factors into the unlawfulness enquiry, which may tip the scale to the side of unlawfulness and resultant liability.

Where the blameworthiness of the actor's conduct (reasonableness or lack thereof) is taken into account in the context of unlawfulness, this is (or should be) judged from the perspective of the actor (the ex ante point of view). This happens, as shown above, mainly in cases where there is an enhanced degree of blameworthiness on the part of the actor. However, there are also some instances where the courts consider the absence of blameworthiness on the part of the actor (reasonableness of conduct) as a form of justification, indicating that harm was not caused unlawfully.

In cases of putative defence, the courts have, on occasion, taken the reasonableness of the actor's belief into account. For example, a woman shoots her neighbour because she mistakenly and reasonably believes him to be an intruder (a reasonable person in her position would also have believed that the victim posed a threat). In this case, the lack of blameworthiness of the actor (the reasonableness of her belief that her conduct is justified) excludes fault, both in the form of negligence, because a reasonable person in her position would also have caused the injury, and in the form of intent, because she lacked knowledge of unlawfulness. However, in these cases the courts effectuate unlawfulness and fault. The foundations of this reasonableness-of-conduct approach to unlawfulness were laid at the same time the concept of unlawfulness in the law of delict was poorly developed, if at all. There is a convincing dissent from this confounding approach in Kupeleng v Minister of Safety and Security. However, in Magwena and another v Minister of Safety and Security, the Supreme Court of Appeal also applied the test of a reasonable person in the context of unlawfulness to determine whether the causing of injury was justified by defence. The two approaches will almost invariably produce the same result, but the Kupeleng approach seems preferable, because it takes account of the reasonableness of the belief in the threat with reference to the well-defined concepts of intent and negligence. The court said the following:

The defendants may yet escape liability on the basis that the second defendant's bona fide (although erroneous) belief that his conduct was justified, excluded consciousness of wrongfulness and thus fault in the form of dolus - on his part, and provided a reasonable man would not have reacted differently to the way in which the second defendant reacted under the circumstances - thereby excluding fault in the form of culpa.

In defamation cases, the reasonableness of conduct has been recognised as a defence. The Supreme Court of Appeal has recognised that the publication of a false and defamatory statement will be lawful if "upon consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time" (the so-called Bonda defence). The courts have also upheld the defence of qualified privilege if a reasonable person in the position of the person who made the statement would have believed that a duty or interest existed which entitled him to make the defamatory statement. In these cases, the approach of the courts is to allow freedom of speech in circumstances where the person who made the statement did so reasonably. The reasonableness or lack of blameworthiness of conduct indicates that the defence is closely related to the basic concerns of fault. In effect, it is indistinguishable from a defence excluding fault, based on absence of intent (because there is no consciousness of wrongfulness), or on absence of negligence (because the defendant's conduct is reasonable). The defence of qualified privilege has its origins in English law, where a distinction between fault and unlawfulness is not recognized. It should be dealt with in modern South African law as a defence excluding unlawfulness, but it is apparently regarded as a defence excluding fault. It illustrates an area of the law on defamation where unlawfulness and fault overlap.

The Bogoshi case illustrates a similar phenomenon. Reasonableness of the publication, equated with absence of negligence, was held to exclude unlawful.

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90 See Denzant Investment Holdings (Pty) Ltd v Brenner 1989 (1) SA 390 (A) at 396–397.
91 2003 (4) SA 854 (WA).
92 2004 (4) SA 150 (SCA) at 158–159.
93 865–866, para 16.
ness. The judgment is certainly not a model of structured analysis of the roles of unlawfulness and negligence in law of defamation. It is arguable that the court intended to deal with two defences, both turning on the reasonableness of the defendant's conduct: the one negating unlawfulness, and the other negating negligence.96 This is how the Supreme Court of Appeal interpreted the Bogoshi judgment in the later case of Mthembu-Mahone v Mail & Guardian Ltd,97 albeit, arguably, that the Court failed to clarify the basis of the distinction between the two defences.98 As in the case of qualified privilege, the consideration of reasonableness or blameworthiness of conduct that is at the heart of the Bogoshi defence indicates that this defence is closely related to the basic concerns of fault. It is barely distinguishable from a defence excluding negligence based on the reasonableness of the defendant's conduct. In so far as it is dealt with as a defence excluding unlawfulness, it overlaps with fault. The lack of clarity around the Bogoshi defence is at least partly the result of the radical change of course by the Supreme Court of Appeal on the fault requirement for defamation involving media. The Court justified the earlier no-fault liability without specifying what is to replace it. On the basis of the judgment in the Mthembu-Mahone case, it is now clear that the Supreme Court of Appeal intends to recognize the reasonableness of a publication as a defence that could exclude either unlawfulness or negligence, confirming the possibility of overlap between these two elements of defect.

The discussion and examples above indicate that an enhanced degree of blameworthiness of conduct (absence of reasonableness) is relevant to unlawfulness, and that the courts have also occasion taken account of the reasonableness of conduct (absence of blameworthiness), as judged from the perspective of the actor (ex ante), in the unlawfulness enquiry. Arguably, however, reasonableness of the actor's conduct is more accurately dealt with in the domain of fault, where both intent and negligence take account of reasonableness in terms of established and well-defined principles. Cases involving liability for negligent failure to prevent harm also illustrate that the issues of unlawfulness and negligence are often closely related. If the question is whether a local authority is liable for harm caused by, or related to, public property (such as a pedestrian's injury resulting from a hole in a pavement),99 or a child's injury on a broken merry-go-round,100 or a shop-owners' loss from flooding from a burst pipe,101 or a land owner's losses resulting from the establishment of an informal settlement adjacent to his land,102 the unlawfulness and negligence issues both involve consideration of the extent of the risk and of the possible harm, the cost of repair or prevention, and the resources available to the local authority. If the pavement, merry-go-round, pipe or settlement was under the control of the local authority, with concomitant responsibility to maintain or administer it, the existence of a legal duty not to cause harm (unlawfulness) would generally not be contentious. However, liability will not be imposed

96 Fagan 2005 SALJ 102 refers to, but does not agree with, such arguments.
97 2004 (6) SA 329 (SCA) at para 45-47.
98 Fagan 2005 SALJ 105-106.
99 Cape Town Municipality v Bakkersdor 2000 (3) SA 1049 (SCA).
100 Cape Town Municipality v April 1982 (1) SA 259 (C).
101 Mostert v Cape Town City Council 2001 (1) SA 105 (SCA).
102 Local Transnational Council of Delmas and another v Bethof 2005 (5) SA 514 (SCA).

11 CONCLUSIONS

It is trite that unlawfulness is a matter of law. The courts do not hear evidence on the issue of unlawfulness as such, but the onus is on the plaintiff to make factual allegations and eventually present evidence that justifies the inference of unlawfulness, which is a matter for judicial determination.

It is generally accepted that the application of the general criteria or standards for determining unlawfulness ("general reasonableness", "the legal convictions prevailing in the community", and the bonti mores) involves public policy and a value judgment. The application of these wide and evaluative criteria thus involves the exercise of judicial discretion. It is suggested that judicial discretion in the application of these criteria is rendered more manageable by the following factors, which are often inter-related: (a) policy considerations indicating whether the law of delict should intervene in respect of the type of harm-causing (inter alia the social or economic consequences of imposing liability, in particular potential indemnify the availability of alternative remedies, and the need for accountability of public bodies or officials); (b) consideration of relevant constitutional or other statutory rights and duties (inter alia, the right to freedom and security of the person, the right to privacy, the right to freedom of

103 See Administrateur Transvaal v Van der Merwe 1994 (4) SA 347 (A) at 349, where it was held that, in the absence of a positive danger-creating act, a provincial authority did not have a legal duty to control a fire that started alongside a minor road. In Local Transnational Council of Delmas and another v Bethof 2005 (5) SA 514 (SCA), the court accepted that a local authority with control over an informal settlement adjacent to the plaintiff's land had a legal duty to help stop the blaze, and could not claim immunity from liability for its losses, but the nature and extent of the preventive steps required of the local authority was a question of negligence.
104 Fagan 2005 SALJ 127.
expression); (c) a typology of factual circumstances that indicate a duty not to cause or to prevent harm, particularly in the situation (inter alia, the proportionality of the risk of harm and the cost of prevention, control over a dangerous object or situation, awareness of danger, prior conduct creating danger, and a relationship imposing responsibility, professional knowledge); (d) the nature of the defendant's conduct (harm-causing by positive conduct is generally more readily considered to be unlawful than harm-causing by omission, and physical harm-causing is generally more readily considered to be unlawful than harm-causing by speech); (e) the nature of the defendant's fault and state of mind (intentional harm-causing is generally more readily considered to be unlawful than negligent harm-causing, and a motive to harm is indicative of unlawfulness); and (f) the nature of the interest sought to be protected (the causing of physical injury and damage to property is considered to be prima facie unlawful, while the causing of pure economic loss or emotional distress is not; and in the case of certain forms of harm such as nuisance and damage to reputation unlawfulness is often judged by balancing conflicting interests).

The prevailing modern view is that unlawfulness is not an attribute of conduct alone, but characterizes the outcome of a causal sequence involving conduct and the causation of harm.

The reasonableness of the actor's conduct is mostly an issue that belongs in the domain of fault, but history and the vagaries of case-to-case legal development have, on occasion, made this an unlawfulness issue (for instance, in the case of qualified privilege as a defence to a defamation claim, reasonable publication of a falsity for the purposes of a defamation claim, and some cases of putative defence). It is suggested that the reasonableness of conduct is essentially a matter of blameworthiness and logically best left to the domain of negligence, where it is a well defined concept, extensively developed in case law.

It is generally accepted that the enquiry into unlawfulness can focus either on the infringement of a right, or on the breach of a duty. This is a matter of approach or methodology, and whatever approach is followed, the conclusion often involves public policy and a value judgment. Breach of a legal duty to another also involves infringement of the right of the other person not to be harmed, because to every obligation there is a right and a duty side, and a legal duty is the converse of a right. The legal duty inducing unlawfulness in its full sense seems to be best described as the legal duty not to cause damage negligently or intentionally by voluntary action or inaction.

Although the unlawfulness terminology has changed from the negligence-related "duty of care" to "legal duty", the courts still, on occasion, regard reasonable foresight as a requirement for existence of a legal duty, and thus for unlawfulness. This also seems to be the intended result if the duty is regarded as a "duty not to be negligent". If reasonable foresight is a shared attribute of unlawfulness and negligence, these two elements are at least partly conflated. Such conflation is mostly disavowed in judgments, where it is said that unlawfulness and negligence are two distinct elements, although they are intertwined. The extent of the independence of these two elements is therefore left uncertain, which is bad for both the logic and the practice of the law. It is suggested that foreseeability should be (and is in the general majority of cases) left to the domain of negligence, where it is a well defined concept, extensively developed in case law.

Nothing turns on which of unlawfulness or fault is determined first. The courts occasionally deal with negligence first, and a finding that the defendant was not negligent obviates the inquiry into unlawfulness. This ordering of the enquiry does not mean that either unlawfulness or fault logically precedes the other. Fault can be determined after proof of, or on the assumption that there is an unlawful causing of harm. Likewise, unlawfulness can be determined on the assumption that there is fault, simply because the court finds it convenient to deal with the unlawfulness issue first.

Unlawfulness supplements and over-arches the other elements of delict, adding a further value- or policy-based dimension to the enquiry into liability and requiring the exercise of judicial discretion. With all the other elements of liability (conduct, causation, harm and fault) proved or assumed to be present, unlawfulness involves a value judgment on whether the affected interest of the plaintiff should prevail over a conflicting interest of the defendant, or deserves protection from the defendant's action or lack thereof, so that the burden of damage should be shifted from plaintiff to defendant. Unlawfulness is thus essentially concerned with the scope of protection afforded to various rights and interests, the scope of responsibility to act, and overall policy considerations relating to the question of whether the law of delict should intervene.