EMPLOYERS' STATUTORY VICARIOUS LIABILITY IN TERMS OF THE PROTECTION OF PERSONAL INFORMATION ACT

by

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TABLE OF CONTENTS

Abbreviations

APA	Australian Privacy Act 119 of 1988 (as amended).
EEA	Employment Equity Act 55 of 1998 (as amended).
ILJ	Industrial Law Journal.
NZPA	New Zealand's Privacy Act 28 of 1993.
NZPC	New Zealand Privacy Commissioner.
OHSA	Occupational Health and Safety Act 85 of 1993 (as amended).
PER	Potchefstroom Electronic Law Journal.
SALJ	South African Law Journal.
SAPR/PL	SA Publiekreg/SA Public Law.
SAPS	South African Police Service.
SCA	Supreme Court of Appeal.
Stell LR	Stellenbosch Law Review.
TSAR	Tydskrif vir die Suid-Afrikaanse Reg.
UKDPA	United Kingdom's Data Protection Act of 1998.

Abstract

A person whose privacy has been infringed through the unlawful processing of his or her personal information has two remedies. The first is to sue the infringer's employer based on vicarious liability (provided that there was a delict) and the second is an action based on the Protection of Personal Information Act 4 of 2013 (POPI). Section 99(1) of POPI provides a person (the so-called data subject), whose privacy has been infringed, with the right to institute a civil action against the responsible party. POPI defines the responsible party as the person who determines the purpose of and means for processing of personal information of data subjects. Although POPI does not equate a responsible party to an employer, the term "responsible party" is undoubtedly a synonym for "employer" in this context. By holding an employer accountable for its employees' unlawful processing of a data subject's personal information, POPI creates a form of statutory vicarious liability. Since the defences available to an employer at common law, and developed by case law, differs from the statutory defences available to an employer in terms of POPI, it is necessary to compare the impact this new statute has on employers. From a risk perspective, employers need to be aware of the serious implications of POPI and the question that arises is whether the Act does not perhaps take matters too far. This dissertation therefore takes a critical look at the statutory defences available to an employer in vindication of a vicarious liability action brought by a data subject in terms of section 99(1) of POPI. A comparative analysis is made between the defences found in section 99(2) of POPI and the common-law defences available to an employer fending off a delictual claim founded on the doctrine of vicarious liability. To support the argument that the statutory vicarious liability created by POPI is patently insufficient, grossly inadequate, and too harsh, the defences contained in section 99(2) of POPI is further analogised with the defences available to an employer in terms of section 60(4) of the Employment Equity Act 55 of 1998 (EEA) and other comparable foreign data protection statutes.

CHAPTER 1

INTRODUCTION, OVERVIEW AND PROBLEM STATEMENT

No good deed goes unpunished.[1]

The common-law doctrine of vicarious liability, in terms of which an employer is held accountable for the wrongful acts or omissions committed by an employee, is a subject that has received abundant attention.[2] Likewise, an employer's vicarious liability, created in terms of legislation, is a subject that has received ample consideration.[3] Despite the comprehensive body of work on the subject of vicarious liability, one area which remains available for sensible dialogue and deliberation is the statutory vicarious liability created in terms of the Protection of Personal Information Act 4 of 2013 (POPI).[4]

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1 Simpson and Speake (eds) *Oxford Concise Dictionary of Proverbs* (2003) 142. See also Titelman *Dictionary of America's Popular Proverbs and Sayings* (2000). The author explains that this saying means that life is so unfair that one is more likely to get into some sort of trouble than be rewarded if one attempts a good deed. The saying was attributed to American financier John P. Grier, banker Andrew W. Mellon and writer Clare Boothe Luce, but its ultimate origin is unknown.

2 See for instance Lawlor *Vicarious and direct liability of an employer for sexual harassment at work* (2007 dissertation SA) 45; Le Roux "Sexual harassment in the workplace: Reflecting on *Grobler v Naspers*" 2004 25 *ILJ* 1897; Le Roux "Vicarious liability: Revisiting an old acquaintance" 2003 24 *ILJ* 1879-1883; Millard and Botha "The past, present and future of vicarious liability in South Africa" 2012 *De Jure* 225 227; Mischke and Beukes "Vicarious liability: When is the employer liable for the wrongful acts of employees?" 2002 *Contemporary Labour Law* 11 17; Murray *The extent of an employer's vicarious liability when an employee acts within the scope of employment* (2012 dissertation SA) 41; Neethling and Potgieter *Neethling, Potgieter and Visser Law of Delict* (2015) 389; Neethling "Vicarious liability of the state for rape by a police official" 2011 *TSAR* 186; Scott "Die hoogste hof van appèl smoor heilsame regsontwikkeling – *Minister of Safety and Security v F* 2011 3 SA 487 (HHA)" 2011 *TSAR* 773 786-787; Scott "Middellike aanspreeklikheid van die staat vir misdadige polisie-optrede: Die heilsame ontwikkeling duur voort" 2011 *TSAR* 135; Scott "Middellike staatsaanspreeklikheid – mistastings oor gevestigde regsbeginsels" *TSAR* 2015 623-640; Scott "Staatsaanspreeklikheid vir opsetsdelikte van die polisie – die hoogste hof van appèl kry nogmaals bloedneus" 2012 3 *TSAR* 541; and Smit and Van der Nest "When sisters are doing it for themselves: Sexual harassment claims in the workplace" 2004 *TSAR* 520-543.

3 See for instance Du Toit et al *Labour Relations Law* (2006) 622; Lawlor *Vicarious and direct liability of an employer for sexual harassment at work* (2007 dissertation SA) 45; Le Roux "Vicarious liability: Revisiting an old acquaintance" 2003 24 *ILJ* 1879-1883; Mischke and Beukes "Vicarious liability: When is the employer liable for the wrongful acts of employees?" 2002 *Contemporary Labour Law* 11 17; Murray *The extent of an employer's vicarious liability when an employee acts within the scope of employment* (2012 dissertation SA) 41; Neethling and Potgieter *Neethling, Potgieter and Visser Law of Delict* (2015) 389; Le Roux "Sexual harassment in the workplace: Reflecting on Grobler v Naspers" 2004 25 *ILJ* 1897; Smit and Van der Nest "When sisters are doing it for themselves: Sexual harassment claims in the workplace" 2004 *TSAR* 520-543; Van Niekerk et al *Law@Work* (2015) 87; and Whitcher "Two roads to an employer's vicarious liability for sexual harassment: *S Grobler v Naspers Bpk en 'n ander* and *Ntsabo v Real Security CC*" 2004 25 *ILJ* 1907.

4 Statutory vicarious liability is where a statute imposes strict liability on one party for the actions of another.

The purpose of POPI is, *inter alia*, to promote the protection of data subjects' personal information.[5] Moreover, POPI aims to provide data subjects with some degree of control over their personal information,[6] thereby giving effect to the constitutional right to privacy.[7] To ensure the safeguarding of data subjects' personal information held by so-called responsible parties, personal information must be processed in a *responsible* and *lawful* manner.[8] In addition, POPI provides data subjects with rights and remedies to protect their personal information from unlawful and irresponsible processing.[9] Where a responsible party fails to process personal information in a lawful manner (in other words, in accordance with POPI), it may face the sanctions created by POPI to promote compliance.[10]

Inevitably, in any organisation that consists of an employer and employees, the employer will be held liable for contraventions of POPI by its employees, because POPI regards the employer as the responsible party.[11] Therefore, where an aggrieved party would traditionally have sued the employer for infringement of privacy based on the common-law vicarious liability doctrine, there is now also the possibility to litigate based on the stipulations of POPI.[12] In terms of section 99(1) of POPI, the data subject may institute a civil action against

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5 "Personal information" means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to (*a*) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; (*b*) information relating to the education or the medical, financial, criminal or employment history of the person; (*c*) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person; (*d*) the biometric information of the person; (*e*) the personal opinions, views or preferences of the person; (*f*) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; (*g*) the views or opinions of another individual about the person; and (*h*) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

6 See for instance s 2, which provides that the purpose of the act is *inter alia* to regulate the manner in which personal information may be processed and to provide persons with rights and remedies to protect their personal information from unlawful processing. Also see s 5, which states that a data subject has the right to have his or her personal information processed in accordance with the conditions for lawful processing. S 5 provides the data subject with a host of rights including the right to object to the processing of his or her personal information. This right to privacy has to be balanced against other rights (particularly the right of access to information). Also see s 11 which deals with consent and the withdrawal thereof. These rights collectively provide data subjects with a degree of control over the flow of their personal information.

7 See s 14 of the Constitution of the Republic of South Africa, 1996, *cf* s 2 of POPI. See also De Stadler and Esselaar *A guide to the Protection of Personal Information Act* (2015) 1.

8 See s 4 of the POPI.

9 See s 2(c) of POPI. For an exposition of the offences, penalties and administrative fines contained in POPI, refer to chapter 11 (ss 100 to 109) thereof.

10 Sanctions created by POPI include enforcement notices (s 95), penalties (s 107), administrative fines (s 109) and civil remedies (s 99).

11 See the definition of responsible party in s 1 of POPI.

12 S 99 of the POPI provides for a data subject's right to institute a civil action for damages resulting from non-compliance with the act. The civil action for damages can be brought by a data subject or by the Information Regulator acting on behalf of the data subject. The employer's liability is strict because it does not matter

an employer as the responsible party. Section 99(2) in turn lists the very limited defences which an employer may raise against an action brought in terms of section 99(1).

From a risk perspective, an employer as the responsible party is extremely vulnerable and this dissertation argues that the defences envisaged by section 99(2) are too limited. In order to prove this point, this dissertation contrasts the defences listed in section 99(2) of POPI with the defences to vicarious liability claims in three other contexts, namely the common-law defences to vicarious liability, the defence created in terms of section 60(4) of the Employment Equity Act 55 of 1998 (EEA) and the defences provided for in foreign data protection statutes.[13] It is necessary to juxtapose the common-law defences to vicarious liability with the defences available to an employer in terms of POPI, because a data subject may elect to base his or her claim against an employer either on the common law or on POPI. The reason for the comparison with common-law defences to a claim based on vicarious liability is to show that the developments in the common-law doctrine of vicarious liability, and in particular the developments in respect of the defences available to an employer, could, in certain circumstances, enable an employer to escape liability for the delicts committed by its employee, while the limited defences available to an employer in terms of section 9(2) of POPI would make this task more difficult.

The dissertation compares section 99 of POPI to section 60 of the EEA because both sections provide for the statutory vicarious liability of employers and furthermore outline possible defences. There is, however, a significant difference between the two statutes insofar as the EEA contains a mechanism for the employer to escape liability, which is not found in POPI. This mechanism is contained in section 60(4) of the EEA, which determines that an employer will not be held vicariously liable for the conduct of its employees if the employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA. The fact that POPI does not contain a similar provision demonstrates that accountability of the employer is, in the case of POPI, too severe and too austere.

The comparative study casts light on foreign data protection statutes. The chosen statutes contain a defence akin to that found in the EEA. In terms of similar foreign data

whether the employer, or its employee, acted intentionally or negligently. When determining the quantum of the damages, a court will consider what is just and equitable and ponder compensation for loss (including patrimonial and non-patrimonial loss), aggravated damages, interest and costs of suit. See De Stadler and Esselaar *A guide to the Protection of Personal Information Act* (2015) 90.

13 In particular, POPI is compared with the United Kingdom's Data Protection Act of 1998; the New Zealand's Privacy Act 28 of 1993; and the Australian Privacy Act 119 of 1988 (as amended).

protection statutes an employer will be able to evade liability if the employer is able to show that it proactively took such steps as were necessary and practically achievable to prevent employees from contravening the law. When contrasted to its foreign counterparts in this respect, POPI surprises for the reason that it does not contain a similar defence, especially since POPI's provisions are to a large extent a replica of the provisions of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[14] This naturally begs the question whether the failure by the legislature to include a similar defence was intentional or simply a laxity.

This dissertation explains the research problem by using an illustrative case study to demonstrate how the defences available to the employer in terms of common law, the EEA and equivalent foreign statutes reveal POPI as wanting and that the legislature would be sagacious to augment the current defences by supplementing them with a similar retort. This dissertation therefore aims to ruminate whether it was actually the intention of the legislature to create boundless liability for an employer in civil actions brought by the data subject in respect of the unlawful deeds committed by employees, despite the employer's relentless campaigning for absolute compliance with POPI. A detailed exposition of the penalties and administrative fines provided for by POPI falls outside the scope and purpose of this dissertation.[15] Instead, the focus of this dissertation is limited to the civil remedy available to data subjects and the extent of the employer's liability in this regard.[16]

Overall, the abovementioned analysis seeks to prove that the liability of employers is too harsh in terms of POPI, and that the defences available to employers are inadequate and insufficient. This dissertation further contends that the defences listed in section 99(2) of POPI should be amplified with a defence akin to that contained in other data protections laws of Commonwealth countries, namely that the employer should be able to escape liability on the ground that the employer did everything reasonably possible to prevent and deter non-compliance by its employees with the Act.

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14 Magolego "Personal data on the internet – can POPI protect you?" 2014 *De Rebus* 20 24. See also EU Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of data.

15 For an exposition of the offences, penalties and administrative fines contained in POPI, refer to chapter 11 (ss 100 to 109) thereof.

16 See s 99 of POPI.

CHAPTER 2

THE CONCEPT OF PRIVACY

2.1 *Introduction*

The concept of privacy lies at the very heart of this discussion.[17] Privacy has been defined as the right to be forgotten,[18] the right to keep personal information private,[19] and the right to be free from intrusions and interference in one's personal life.[20] Neethling defines the concept of privacy as follows:

> "Privacy is a human (or corporate) sphere of seclusion from the public, embracing all those personal facts or information which the person concerned has excluded from the knowledge of others and with regard to which he has the will that they be kept private."[21]

Privacy evidently encompasses the right to determine the destiny of personal facts[22] and the right not to have personal facts disclosed unlawfully.[23] All persons have a fundamental need for some degree of privacy.[24] A lack of privacy, or an infringement of privacy, may have negative effects on a person, whether mentally or otherwise.[25] For this reason individuals have an interest in the protection of their privacy.[26]

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17 Neethling "The concept of privacy in South African Law" 2005 *SALJ* 18 18. The author contends that "it is generally accepted that the concept of privacy is difficult to define because it is vague and evanescent, or amorphous and elusive, often meaning strikingly different things to different people."

18 *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos (AEP) Mario Costeja Gonzales* (case no C-131/12, 13-5-2014).

19 *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271-272.

20 Woolman and Bishop *Constitutional Law of South Africa* (2d ed) ch 38 p 2.

21 Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 243.

22 *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271-272.

23 *Case v Minister of Safety and Security* 1996 3 SA 617 (CC), 1996 5 BCLR 609 (CC) at par 91.

24 Neethling "The concept of privacy in South African Law" 2005 *SALJ* 18 19. The author maintains that "[s]ince by nature a person has a fundamental interest in particular facets of his personality (such as his body, good name, privacy, dignity, et cetera), these interests exist autonomously de facto, independently of their formal recognition de iure." Neethling argues further that "the law does not create individual interests of personality, but recognizes and protects such interest in order to promote justice." See also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T).

25 Neethling *Law of Personality* (2005) 29.

26 *Ibid*.

2.2 *The common-law right to privacy*

In terms of the South African common law, privacy is protected by the common-law principles of the law of delict.[27] A traditional definition for this delict would be "an intentional and wrongful interference with another's right to seclusion in his [or her] private life".[28] In *O'Keeffe v Argus Printing and Publishing Co Ltd*[29] the court recognised the right to privacy as an independent right of personality worthy of being protected.[30] The essential question is therefore how to determine which information about a person is private in nature?[31] It has been accepted that it is up to each person to determine for himself or herself which information (or facts) about himself or herself is to be excluded from the knowledge of others.[32] Before the enactment of POPI, scholars have held that information privacy is a sub-category of the right to privacy.[33]

A person may inhibit access to his or her personal information and may prevent others from disclosing such personal information to third parties.[34] In terms of the common law, a person can enforce his or her right to privacy by the *actio iniuriarum*, the *actio legis Aquiliae* or an interdict.[35] The *actio iniuriarum* is used to claim satisfaction for the wrongful, intentional interference with the right to privacy, whereas the *actio legis Aquiliae* is used to claim patrimonial loss occasioned by the wrongful and negligent infringement of privacy.[36] To prevent an imminent interference with one's privacy, or to avert an on-going wrongful infringement, the aggrieved party may obtain an interdict against the offender.[37]

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27 Roos "Data Protection: Explaining the international backdrop and evaluating the current South African position" 2007 *SALJ* 400 422.

28 Woolman and Bishop *Constitutional Law of South Africa* (2d ed) ch 38 p 3. See also *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) 249.

29 1954 3 SA 244 (C).

30 Roos "Personal data protection in New Zealand: Lessons for South Africa?" 2008 *PER* 62 90.

31 Neethling *Law of Personality* (2005) 30.

32 *Ibid*.

33 See Neethling "The concept of privacy in South African law" 2005 *SALJ* 18 20. Neethling contends that "the constitutional concept of privacy is, on the face of it at least, also concerned with what can briefly be described as informational privacy". Also see Currie and De Waal *Bill of Rights Handbook* (2013) 302. The authors argue that the right to privacy includes "informational privacy", which is a person's right to control access to and use of private information.

34 Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 244.

35 See *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T). McQuoid-Mason "Invasion of privacy: Common law v constitutional delict – does it make a difference?" 2000 *Acta Juridica* 227 234. See also Roos "Data protection: Explaining the international backdrop and evaluating the current South African position" 2007 *SALJ* 400 423.

36 Roos "Personal data protection in New Zealand: Lessons for South Africa?" 2008 *PER* 62 93.

37 Neethling *Law of Personality* (2005) 254. In addition to the aggrieved party's common-law right to an interdict aimed at preventing threatening infringement or continuing infringement of his or her right to privacy, POPI now also gives the Information Regulator the power to issue an enforcement notice if it is

2.3 *The constitutional right to privacy*

The common-law right to privacy is now reinforced by section 14 of the Constitution of the Republic of South Africa, 1996.[38] Public policy, and society's convictions and beliefs that everyone is entitled to his or her privacy, are deeply rooted in the Constitution and the values that underlie it.[39] Common law, insofar as it is reflected in public policy, is determined by constitutional values.[40] Despite the fact that the Constitution reinforced the common-law right to privacy, traditional remedies afford only limited protection for an individual's personal information because they do not provide the data subject with active control over his or her personal information.[41] Roos points out that the common-law principles cannot ensure, for example, that the data subject receives notification of the fact that his or her personal information has been collected or is being processed, or that he or she has the right to access the information, or that he or she has the right to update and correct incorrect information.[42]

Prior to the enactment of POPI, the Law Reform Commission deliberated whether data-protection measures ought to be legislated in order to address the obvious deficiencies of the common-law principles or whether the regulation of the right to privacy should be left in the hands of the courts to mould in accordance with the principles of the laws of delict.[43] Four fundamental reasons spurred the Commission to enact POPI. Firstly, the conservatism of the courts, their averseness to developing and adapting the common law, and the infrequency of case law relating to privacy infringement meant that the development of the common law and the right to privacy would only occur incrementally. Secondly, drastic law reform can be best achieved not through the judiciary but through the legislature. Thirdly, many countries,

satisfied that the responsible party has interfered or is interfering with the protection of a data subject's personal information. Such enforcement notice may require the responsible party to take certain steps within a specified time; to refrain from taking certain steps; or to cease the processing of personal information specified in the notice. See s 95 of POPI and De Stadler and Esselaar *A guide to the Protection of Personal Information Act* (2015) 87. See also McQuoid-Mason "Invasion of privacy: Common law v constitutional delict – does it make a difference?" 2000 *Acta Juridica* 227 257.

38 McQuoid-Mason "Invasion of privacy: Common law v constitutional delict – does it make a difference?" 2000 *Acta Juridica* 227 228.

39 *Barkhuizen v Napier* 2007 SA 323 (CC) 333C-D. Hawthorne "The 'new learning' and transformation of contract law: Reconciling the rule of law with the constitutional imperative to social transformation" 2008 23 *SAPR/PL* 77 89.

40 *Barkhuizen v Napier* 2007 SA 323 (CC) 333E-334A.

41 Roos "Data Protection: Explaining the international backdrop and evaluating the current South African position" 2007 *SALJ* 400 423.

42 *Ibid*.

43 Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 244.

especially European countries, require adequate data-protection legislation. And fourthly, the common law does not make provision for the cross-border flow of personal information.[44]

2.4 *Remarks*

From the above it is clear that privacy has always been respected and entrenched in South African law. The Constitution places a duty on the legislature to create legislation that protects personal data.[45] Personal data, as a specific aspect of privacy, is now protected by POPI.

[44] Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 244.

[45] Neethling *Law of Personality* (2005) 271-272.

CHAPTER 3

THE PROTECTION OF PERSONAL INFORMATION ACT

3.1 *The purpose of POPI*

As was indicated in chapter 2, the Constitution affords everyone the right to privacy.[46] The state is obligated to protect this fundamental right and the Constitution compels the state to respect, protect, promote and fulfil the rights in the Bill of Rights, which includes the right to privacy.[47] In compliance with the state's obligation to give effect to the right to privacy, POPI was enacted. POPI's preamble recognises that section 14 of the Constitution provides that everyone has the right to privacy. Each person's right to control access to and the use of his or her private information conforms with the objective of POPI to promote the protection of data subjects' personal information processed by responsible parties and to provide data subjects with some degree of control over their private and personal information.[48] The right to privacy includes the data subject's right to have his or her personal information processed in a lawful manner.[49] The notion that information privacy is a sub-category of the right to privacy is echoed in the definition of personal information as contained in section 1 of POPI, which determines that personal information means any information relating to an identifiable, living, natural person.[50]

POPI's preamble states further that POPI's purpose is "to promote the protection of personal information processed by public and private bodies" while, according to section 2 of POPI, the purpose thereof is, *inter alia*, to (i) "give effect to the constitutional right to privacy, by safeguarding personal information …"; (ii) "balancing the right to privacy against other rights, particularly the right to access information;" (iii) "regulate the manner in which personal information may be processed …"; and to (iv) "provide persons with rights and remedies" if POPI is contravened.

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46 See par 2.2 above and s 14 of the Constitution.

47 See the Preamble to POPI. *Cf* s 7(2) of the Constitution.

48 See s 5 of POPI (Rights of data subjects) for a concise list of the rights of data subjects.

49 See s 5 of POPI (Rights of data subjects). For a definition of processing see s 1 of the Act. "'Processing' means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including – (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use; (b) dissemination by means of transmission, distribution or making available in any other form; or (c) merging, linking, as well as restriction, degradation, erasure or destruction of information."

50 See par 2.2 above.

3.2 *Responsibility of compliance*

The first condition for lawful processing determines that the responsible party must ensure that the conditions, and all the measures that give effect to such conditions, are complied with.[51] POPI specifically assigns accountability for lawful data processing to the employer (as the responsible party)[52] and holds an employer accountable for non-compliance with POPI.[53] It is thus the duty of the employer, as the responsible party, to ensure compliance with POPI.

Although POPI does not directly refer to the responsible party as an employer, POPI does provide sufficient clues which allow the reader to arrive at this logical and inferential conclusion. One such clue is found in the definition of responsible party.[54] POPI defines a responsible party as "a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information."[55] Stated differently, the responsible party is the person who requires personal information of data subjects for a specific purpose and who determines how such personal information will be processed. For purposes of discussion, and in order to bring across a pivotal point around which this dissertation turns, it is reasonable to surmise that the responsible party to whom POPI refers will be an employer, since it is usually the employer who determines the reason for the processing of personal information. There can be no doubt that the decision-making authority associated with the responsible party's right to determine the purpose of and means for processing points to the authority inherent in the position of an employer.[56] A further clue is found in section 3(1)(a) which determines that POPI "applies to the processing of personal information entered into a record by or for a responsible party." In practice, employers would be more inclined to keep records of personal information and may even be obligated by law to do so.[57] As mentioned above, it is apparent, or at the very least conceivable, that in most instances the responsible party will be an employer.[58] This inference is plausible since personal

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51 See s 8 of POPI.

52 *Ibid*.

53 See s 99(1) of POPI.

54 See s 1 of POPI.

55 *Ibid*.

56 Grogan *Workplace Law* (2014) 56.

57 See for example s 31 of the Basic Conditions of Employment Act 75 of 1997 (as amended) which determines that an employer must keep a record containing at least information on its employees' names, occupations, time worked, remuneration paid, date of birth and any other prescribed information.

58 See par 1 above.

information processed by individuals for personal reasons or for household activity,[59] and which does not form part of the responsible party's records or filing system,[60] is excluded from the ambit of POPI. Finally, another clue is found in the said accountability condition, which holds the responsible party accountable and responsible for the compliance with POPI.[61] This familiar concept, in terms of which the accountability ultimately falls on the shoulders of the employer, is universally known as the doctrine of vicarious liability. By ascribing accountability to the employer, POPI creates a form of strict liability for the contraventions by its employees.[62] Moreover, POPI permits a data subject, whose privacy has been unlawfully invaded or infringed at the hands of an employee, to institute a civil claim against the responsible party.[63]

3.3 *Lawful processing of personal information*

Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of a data subject.[64] For the processing of a data subject's personal information to be lawful, POPI requires that certain conditions, or minimum requirements, must be met.[65] To discourage non-compliance with the conditions for lawful processing, POPI provides for various sanctions. Penalties,[66] administrative fines,[67] and civil remedies[68] function as encouragement to comply with the conditions for lawful processing.[69]

Section 73 of POPI specifically deals with interference with the protection of personal information of a data subject and determines, among other things, that a breach of the conditions for lawful processing of personal information will constitute a violation of a data subject's right to privacy. Failure to comply with the conditions of lawful processing will thus render the

59 See s 6(1)(a) of POPI.
60 See s 3(1)(a) of POPI.
61 See s 8 of POPI.
62 According to Scott (Scott "Some reflections on vicarious liability and dishonest employees" 2000 *Acta Juridica* 265 265-266) "[t]he vicarious liability of an employer for the delict of his or her employee in an instance of so-called strict liability, or liability without fault."
63 See s 99(1) of POPI.
64 See s 9 of POPI.
65 S 4 of POPI lists the eight conditions for lawful processing of personal information.
66 See s 107 of POPI.
67 See s 109 of POPI.
68 See s 99 of POPI.
69 See s 99 of POPI.

processing of personal information unlawful, which will entitle the aggrieved data subject to institute a civil action for damages against a responsible party.[70]

3.4 *Security safeguards*

POPI places a duty on the employer to secure the integrity and confidentiality of the personal information in its possession and under its control by taking appropriate, reasonable technical and organisational measures to prevent the loss of, damage to, or unauthorised destruction of personal information or the unlawful access to or processing of personal information.[71] This exercise is intended to be cyclical as opposed to once-off.[72] The duty to establish and maintain sufficient security safeguards entails more than just technical and technological measures associated with information technology systems. It includes the duty to educate staff and others who are responsible for the day-to-day processing of personal information on behalf of their employer on a continuing basis.[73] What is appropriate and reasonable is, however, dubious and dependant on the size and nature of the organisation.[74]

3.5 *Remarks*

Unfortunately, no security safeguard can ever be perfect or flawless.[75] An employer may, for example, implement stringent security safeguards, constantly train its staff and implement compulsory security policies but still find itself accountable for the deliberate and obstructive breach of POPI by a mischievous or careless employee. Although the employer will be able to

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70 Chapter 3 of POPI sets out eight conditions for lawful processing.

71 See s 19 of POPI. See also Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 253.

72 S 19(2)(a) of POPI determines that the responsible party must ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

73 De Stadler and Esselaar *A guide to the Protection of Personal Information Act* (2015) 35. The authors contend that "[a]lthough security of [personal information] is usually associated with technical, IT measures, the security of physical records should not be ignored. That is why section 19 also refers to 'organisational steps'. This would include changing the procedures that determine how physical records are processed and tightening access control to areas and filing cabinets (for instance) where [personal information] is kept. Implementing a clean desk policy … and training staff to recognise security threats and take appropriate steps are critical."

74 Although expensive, the ISO 27001 (international security standard) may in most instances constitute reasonable and appropriate technical security standards.

75 This is most probably why POPI only requires that responsible parties implement "appropriate" and "reasonable" security measures.

argue that it complied with its duty to implement appropriate and reasonable security safeguards as required by section 19 of POPI, it appears as if this fact will not protect an employer against a civil action brought by a data subject whose privacy had been unlawfully infringed for the reason that section 99(2) does not list it as a distinct and separate defence. Despite the statutory defences available to the employer, no provision is made in POPI for the employer to avert the statutory vicarious liability in cases where the employer has made every effort to entice its employees to comply with POPI.[76] The fact that an employer has discharged the onus placed on it by section 19 may perhaps be taken into account by the court as mitigating circumstances when determining a just and equitable amount as damages.[77] The next chapter illustrates the deficiencies in POPI and shows that it leaves employees in an unenviable position.

[76] See s 99(2) of POPI.

[77] See s 99(3) of POPI.

CHAPTER 4
ILLUSTRATIVE CASE STUDY: SETTING THE SCENE

4.1 *Introduction*

For the purpose of argument the following fictional scenario will be used. The facts of this fictional case study will be applied to the common law, contrasted with the EEA and compared to foreign data-protection statutes to illustrate the glaring inadequacy of the statutory defences available to the employer when faced with a civil claim, brought by a data subject, in relation to an infringement caused by an employee in contravention of POPI. In the chapters that follow this dissertation will show that the common-law defences to a claim based on vicarious liability could potentially enable an employer to deflect an aggrieved party's common-law action. This dissertation will further show that the analogous EEA contains a special defence which would allow the employer to escape liability in similar circumstances. Finally, the dissertation will show that similar data protection laws of foreign jurisdictions provide a defence for employers who are able to prove that they did all that was reasonably practicable to prevent a contravention of the Act. Neither the common-law defences nor the employer's ability to show that it did all that was practicably possible to prevent an unlawful infringement of privacy are recognised by POPI as valid defences to a civil action based on section 99(1). For this reason, it is concluded that the employer will be worse off if the claimant's case against the employer is based on the statute as opposed to the common law.

> Mrs A is employed as an administrative assistant at a higher education institution. It is part of her tasks and job description to process personal information that the university holds on its students, such as grades, subjects and modules passed, etc. Since the inception of the first draft of the Protection of Personal Information Bill her employer, the university, proactively sought to educate its employees on the impact of the pending Act, and in particular, the conditions for lawful processing and the general prohibition against the processing of personal information that does not comply with these conditions. Since then, the university has been determined to actively promote compliance with POPI by frequently conducting educational and informative workshops, circulating newsletters and emailing circulars containing tips, instructions and guidelines on compliance. Furthermore, in anticipation of the enactment of POPI, the employer prepared a policy and a standard operating procedure setting out the institution's formal stance in relation to the lawful collection, processing, storage, retention and destruction of students' personal information. Moreover, the employer conducts thorough training of all employees on the impact of POPI and the requirements for compliance therewith, which includes electronic online training sessions, formal assessment and face-to-face group sessions. Despite Mrs A's familiarity with POPI, her employer's policy and standard operating procedure, and notwithstanding her training and frequent *aide-mémoire* of the level of compliance required from her, she is

> induced by a third party, company B, to divulge to it the academic records and contact details of the university's top students for the purpose of offering these students employment at the conclusion of their studies. One evening, while attending to her personal emails from home, she decided to accept the hefty bribe offered by company B and provided them with the requested information via her personal email account. The students consequently receive unsolicited calls and emails from company B who mentions to the students that it received their information from a university employee. One particular student is outraged at the flagrant infringement of her privacy and decides to institute an action against the university.

It is manifest that the dissemination of the students' personal information by Mrs A to company B is in flagrant contravention of POPI and does not conform to the principles of lawful processing. *In casu* several conditions for lawful processing of personal information have been contravened. These will now be discussed below *seriatim*.

4.2 *Consent and justification*

Neither the student, nor a competent person acting in the interest of the student, provided the consent required for Mrs A to disclose the student's academic record to the company B.[78] Consent is defined in POPI as the "voluntary, specific, informed, expression of will in terms of which permission is given for the processing of personal information".[79] The definition implies that the student's prior consent should have been obtained for the purpose of divulging her information to company B. The definition further entails that the student, in order to provide such specific consent, should have been duly informed of the purpose for which Mrs A intended to process it. The processing of the student's personal information was not necessary to carry out actions for the conclusion or performance of a contract between the university and the student.[80] The processing of the student's personal information was furthermore not necessary to comply with an obligation imposed by law.[81] The processing was also not done in order to protect a legitimate interest of the student,[82] the university or company B.[83] Finally, the processing was not necessary for the performance of a public law duty.[84]

78 See s 11(1)(a) of POPI.
79 See s 1 of POPI.
80 See s 11(1)(b) of POPI.
81 See s 11(1)(c) of POPI.
82 See s 11(1)(d) of POPI.
83 See s 11(1)(f) of POPI.
84 See s 11(1)(e) of POPI.

4.3 *Compatibility with the function or activity of the employer*

Personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party.[85] "Explicit" is defined as "stated clearly and in detail leaving no room for confusion or doubt".[86] Assuming that the university clearly informed the student of the purposes for which her academic record will be used (i.e. to confer a degree), the purpose for which Mrs A processed the student's personal information was completely removed from any function or activity of the university.

4.4 *Compatibility of further processing with the original purpose*

"Further processing" involves secondary processing of personal information for reasons other than the original purpose for which it was collected, but which nonetheless are related to the original purpose. Further processing of personal information must therefore be in accordance or compatible with the purpose for which it was originally collected.[87] Section 15(2) provides five factors which must be considered to determine whether further processing is compatible with the original purpose for which the personal information was obtained and collected. These are:

(i) the relationship between the new processing activity and the original activity;
(ii) the nature of the personal information concerned;
(iii) the consequences of the new processing activity;
(iv) the way in which the personal information was collected; and
(v) the contractual rights and obligations between the parties.

A consideration of these five factors brings one to the conclusion that the purpose for which the personal information of the students was used by Mrs A is not compatible with the purpose for which it was originally collected by the university.[88]

85 See s 13(1) of POPI.
86 Stevenson (ed) *The Oxford Dictionary of English* (2005).
87 See s 15(1) of POPI.
88 See s 10, s 13, and s 15 of POPI.

4.5 *Authorisation*

In addition to the preconditions for lawful processing of the student's personal information, section 20 of POPI determines that—

> "anyone processing personal information on behalf of a responsible party… must—
>
> (*a*) process such information only with the knowledge or authorisation of the responsible party; and
>
> (*b*) treat personal information which comes to their knowledge as confidential and must not disclose it,
>
> unless required by law or in the course of the proper performance of their duties."

The requirement of authorisation by the employer differs from the requirement of consent by the data subject and forms part of the employer's duty to implement sufficient security safeguards in order to secure the integrity and confidentiality of personal information in its possession.[89] Only employees who are duly authorised by their employers to do so may process personal information on behalf of their employer. Such authorised employees should process personal information confidentially and only for official purposes.[90]

4.6 *Remarks*

In casu Mrs A clearly contravened section 20. Her employer, the university, neither authorised the dissemination of the students' personal information to company B nor had any knowledge of it being disclosed to company B. In addition, Mrs A deliberately disregarded the obligation to treat the information as confidential.

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89 See par 3.4 above.

90 S 13 of POPI determines that personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party.

CHAPTER 5
COMMON-LAW ACTION

5.1 *Introduction*

The sovereignty of the Constitution and the promulgation of POPI does not mean that the common-law notions of privacy has or will become redundant.[91] By virtue of the infringement of the student's right to privacy *in casu*, the student may either base her claim against the university (as Mrs A's employer) on her common-law right to privacy or on her statutory right as confirmed by POPI. This tenet is evident from two cases which dealt with sexual harassment in the workplace. Although POPI is not concerned with the issue of sexual harassment in the workplace, the principle that a complainant has "two roads" to an employer's vicarious liability (one in terms of the common-law vicarious liability for delicts committed by an employee and one in terms of section 99 of POPI) is evident from a consideration of the *Grobler v Naspers* and *Ntsabo v Real Security CC* cases.[92] In *Grobler*[93] the claim against the employer was based on the common-law doctrine of vicarious liability while in *Ntsabo*[94] the claim was based on the statutory vehicle which provided for statutory liability of the employer for wrongful dismissal.[95]

At common law, a party who suffers damage can only claim against the perpetrator and only if he or she can prove a wilful or negligent wrongful act or omission on the part of the perpetrator that is causally linked to the damage or personal injury. One exception to this rule is found in the doctrine of vicarious liability in terms of which a third party is held accountable for the delicts committed by another.[96] The party who suffers damage or injury need not prove that the *employer* acted wilfully or negligently.[97] For this reason the employer's vicarious liability for the wrongs committed by its employees is regarded as strict liability since the employer cannot be said to be the perpetrator whose actions or omissions caused the damage complained of.[98] There is also therefore no causal link between the damages suffered and the

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91 Woolman and Bishop *Constitutional Law of South Africa* (2d ed) ch 38 p 3.

92 Whitcher "Two roads to an employer's vicarious liability for sexual harassment: *S Grobler v Naspers Bpk en 'n ander* and *Ntsabo v Real Security CC*" 2004 25 *ILJ* 1907.

93 (2004) 23 ILJ 439 (C); (2004) 2 All SA 160 (C).

94 (2003) 24 ILJ 2341 (LC).

95 Millard and Botha "The past, present and future of vicarious liability in South Africa" 2012 *De Jure* 225 231-232.

96 See Neethling and Potgieter *Neethling, Potgieter and Visser Law of Delict* (2015) 389.

97 Millard and Botha "The past, present and future of vicarious liability in South Africa" 2012 *De Jure* 225 227.

98 *Ibid*.

actions or omissions of the employer. Consequently both the employee and the employer are held liable although only the employee might have been at fault and although the employer was entirely removed from the event.[99]

5.2 *Vicarious liability and the deviation cases*

Vicarious liability is a form of strict liability in terms of which an employer is held accountable for the delicts committed by an employee in the scope and course of employment.[100] The doctrine of vicarious liability, in its modern form, is motivated by considerations of public policy.[101] Public policy demands that a person whose rights have been wrongfully infringed should not be left without a claim.[102] Since employers, through their activities, not only create the risk of harm to others but also enjoy the profits resulting from the labour of their employees, employers should be held liable for the wrongful acts of their employees.[103] For an employer to be held vicariously liable for the wrongful acts of its employees, certain requirements have to be satisfied:[104] the existence of an employer-employee relationship;[105] committing of a delict by the employee;[106] and the fact that the employee acted within the scope and course of his or her employment.[107]

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99 Loots "Sexual harassment and vicarious liability: A warning to political parties" 2008 *Stell LR* 1. The author points out that in the seventeenth and eighteenth centuries the maxim *qui facit per alium facit per se* ("he who acts through another acts himself") was regarded as reflecting the view that the unlawful acts of one person may be attributed to another.

100 Loubser et al *Deliktereg in Suid-Afrika* (2010) 383.

101 Le Roux "Vicarious liability: Revisiting an old acquaintance" 2003 24 *ILJ* 1879.

102 *Ibid*.

103 *Ibid*. There is an array of theories that justify the doctrine of vicarious liability. See for example Neethling and Potgieter *Neethling, Potgieter and Visser Law of Delict* (2015) 389. The authors list the various theories that have been advanced for the rationale behind vicarious liability: (i) the *employer's own fault theory* (see for example *Feldman (Pty) Ltd v Mall* 1945 AD 733 where the court held that *culpa in eligendo* referred to the employer's fault in the choice of an employee); (ii) the *interest or profit theory* (in terms of which the employer must, together with the benefits and profits received from employing employees also bear the losses occasioned by its employees' wrongful acts); (iii) the *identification theory* (in terms of which the employee is simply an extension of the employer); (iv) the *solvency theory* (in terms of which the employer is financially in a better position to carry the costs of compensating the claimant); and (v) the *risk theory* (in terms of which the employer should be held accountable for the wrongful acts committed by its employees since entrusting employees with work creates a risk of harm to others).

104 See Calitz "Vicarious liability of employers: Reconsidering risk as the basis for liability" 2005 *TSAR* 215 216.

105 *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 61-62. See also *Gibbins v Williams, Muller, Wright & Mostert Ingelyf* [1987] 1 All SA 417 (T); 1987 2 SA 82 (T).

106 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA).

107 Scott "Staatsaanspreeklikheid vir opsetsdelikte van die polisie – die hoogste hof van appèl kry nogmaals bloedneus" 2012 3 *TSAR* 541 546. See also *Masuku v Mdlalose* [1997] 3 All SA 339 (A), 1998 1 SA 1 (SCA) and *Costa da Oura Restaurant t/a Umdloti Bush Tavern v Reddy* (2003) 24 ILJ 1337 (SCA).

Whether or not the employee acted within the scope and course of his or her employment has been the most contentious and at times most difficult question to answer.[108] Over the years there have been an abundance of cases that illustrated how difficult it can be for the courts to differentiate between acts falling within the employees' course and scope of employment and acts falling outside of the employees' course and scope of employment.[109] The dividing line is at times difficult to locate and acts that fall within and without the course and scope of employment cannot always be located in specific silos.[110] Generally speaking, employees act within the scope and course of their employment when they carry out instructions authorised by their employer, even when they perform the instructions in an unlawful manner.[111] The problem occurs when employees carry out deeds that are contrary to, or deviates from, the tasks for which they were appointed. The difficulty in the exact application of the doctrine of vicarious liability therefore lies in the deviation cases.[112] Despite criticism, the courts have recognised the possibility that one act may fall both within and without the course and scope of an employee's employment.[113] In *Feldman (Pty) Ltd v Mall* the court held that the employer "may or may not, according to the circumstances, be liable for harm which [its employee] causes to third parties."[114] The court made a clear distinction between deviation that would amount to the employer's liability and deviations that would not.[115] The court went on to state that:

> "If the servant's abandonment of his master's work amounts to mismanagement of it, or negligence in the performance of it and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm … If, on the other hand, the

108 Scott "Staatsaanspreeklikheid vir opsetsdelikte van die polisie – die hoogste hof van appèl kry nogmaals bloedneus" 2012 3 *TSAR* 541 546.

109 Loubser et al *Deliktereg in Suid-Afrika* (2010) 392 indicate that the problem lies in distinguishing between the unlawful manner in which authorised work is performed, an unlawful act which falls outside the scope of the employee's work and an act which involves the use of the employer's time or equipment but which is aimed solely at the advancement of the employee's own interests.

110 See for example *Viljoen v Smith* 1997 1 SA 309 (A) where the employer was held accountable for the damage caused by its employee after the employee caused a fire to the neighbouring property by smoking while relieving himself. Also see *Feldman v Mall* 1945 AD 733 where the employer was held liable for an accident caused by the employee with the employer's delivery vehicle, after the employee drank alcohol and collided with another driver en route back to work. Also see *Carter & Co (Pty) Ltd v McDonald* 1955 1 SA 202 (A) where the employer was not held liable for the damage caused by the employee who collided with a pedestrian when the employee rode to the market, on his own bicycle, for personal reasons.

111 Loubser et al *Deliktereg in Suid-Afrika* (2010) 389. See also *Costa da Oura Restaurant t/a Umdloti Bush Tavern v Reddy* (2003) 24 ILJ 1337 (SCA).

112 *Minister of Safety & Security v Jordaan t/a André Jordaan Transport* 2000 4 SA 21 (SCA).

113 Le Roux "Vicarious liability: Revisiting an old acquaintance" 2003 24 *ILJ* 1879.

114 *Feldman (Pty) Ltd v Mall* 1945 AD 733.

115 Mischke and Beukes "Vicarious liability: When is the employer liable for the wrongful acts of employees?" 2002 *Contemporary Labour Law* 11 17.

> harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible … If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for the harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs."[116]

In *Minister of Police v Rabie*[117] the court applied the so-called standard test which consists of a subjective and objective enquiry. The subjective enquiry considers the employee's intentions while the objective enquiry considers whether or not there is a sufficiently close link between the employee's independent acts for his or her own interests and purposes and the business of the employer.[118] The employer will be held accountable for the unauthorised deeds of its employees provided that there is a sufficiently close link between the unauthorised deeds and the authorised deeds.[119]

5.2.1 The disobedient employee

An employee who acts in defiance of an express instruction, acts outside of the course and scope of his or her duties.[120] In *Bezuidenhout NO v Eskom*[121] the court held that the employer was not liable where the employee, in the negligent performance of his tasks, caused severe injuries to another because the employee ignored express instructions. In this case, the employee was employed to carry out repairs to electrical equipment. To enable him to perform his duties, he was supplied with the use of a truck. The truck was clearly marked as the property of Eskom. The employee was expressly prohibited from giving lifts to anyone without permission from his superiors. Despite this, the employee offered a lift to another person while on duty. The employee negligently caused a collision during which the passenger sustained severe head injuries. The court, in reaching its decision that Eskom was not liable, relied on the *dictum* in *SA Railways & Harbours v Marais*[122] that an instruction not to give lifts to passengers limits the scope of employment *vis-à-vis* the employer. The court further noted that the

116 *Feldman (Pty) Ltd v Mall* 1945 AD 733.
117 1986 1 SA 117 (A) 134.
118 Loubser et al *Deliktereg in Suid-Afrika* (2010) 390.
119 *Ibid* 391.
120 *Ibid*.
121 [2003] 1 All SA 411 (SCA), 2003 3 SA 83 (SCA).
122 1950 4 SA 610 (A).

subjective state of mind of the employee, in addition to the absence of an objective link between the employee's interests and that of the employer, could indicate that the employee's deed, which caused the damage, fell outside of the scope of his or her employment.[123] Moreover, the court was mindful of the fact that the passenger was fully aware that the driver of the vehicle was prohibited from giving lifts to passengers and noted that where subsequent negligence in completing tasks within the course and scope of the duties causes damage to a passenger who has associated himself or herself with the action taken in defiance of an express instruction, the employer will not be held liable.

5.2.2 Frolic of his or her own

Le Roux states that employers often attempt to escape vicarious liability by alleging that, although employed by them, the offending employee was on a frolic of his or her own at the time he or she committed the delict.[124] If the employee was engaged in a frolic of his or her own or did something which he or she was prohibited from doing for the purposes of employment, but which he or she may have been permitted to do for his or her own personal purposes, the employer will not be liable, unless the act was incidental to the employment.[125] Loubser *et al* eloquently phrases it as follows:

> "As die werknemer hom of haar heeltemal van die werkgewer se take losmaak, dit wil sê betrokke raak by aktiwiteite heeltemal onverwant aan of nie ter bevordering van die werkgewer se werk nie, en as gevolg van hierdie aktiwiteite 'n onskuldige party benadeel, is die werkgewer nie aanspreeklik nie."[126]

The problem cases relate to cases where the employee made use of the employer's equipment or property, but for the advancement of his or her own interests.[127] In *Ess Kay Electronics (Pty)*

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123 Le Roux "Vicarious liability: Revisiting an old acquaintance" 2003 24 *ILJ* 1879. See also Neethling and Potgieter *Neethling, Potgieter and Visser Law of Delict* (2015) 389. According to the authors "[t]he employee acts within the scope of his employment if he acts in the execution or fulfilment of his duties in terms of the employment contract. However, he acts outside such scope if he disengages himself completely from his employment and promotes his own objectives or interests exclusively."

124 Le Roux "Sexual harassment in the workplace: Reflecting on *Grobler v Naspers*" 2004 25 *ILJ* 1897.

125 *Minister of Law and Order v Ngobo* [1992] 2 All SA 492 (A); 1992 4 SA 822 (A); *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd* [2001] 1 All SA 315 (A); 2001 1 SA 1214 (SCA); *Viljoen v Smith* 1997 1 SA 309 (SCA); *K v Minister of Safety & Security* [2005] 3 All SA 519 (SCA); *K v Minister of Safety & Security* 2005 3 SA 179 (SCA); and *K v Minister of Safety & Security* 2005 6 SA 419 (CC).

126 Loubser et al *Deliktereg in Suid-Afrika* (2010) 383-396.

127 *Ibid* 389. In *Bezuidenhout NO v Eskom* [2003] 1 All SA 411 (SCA); 2003 3 SA 83 (SCA) the court found that the employee's act of transporting a passenger with the employer's vehicle (who later sustained injuries)

Ltd v First National Bank of Southern Africa Ltd[128] the bank was found not liable where an employee unlawfully appropriated bank drafts for himself. The court found that the employee exploited his position and opportunities to promote his own interests and held that—

> "an employer may escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but viewed objectively, has also completely disengaged himself from the duties of his contract of employment…"[129]

Equally, in *Absa Bank v Bond Equipment Pretoria (Pty) Ltd*[130] an employee paid cheques, payable to his employer, into a cheque account of his own. Despite the fact that it was the duty of the employee to collect and deposit cheques on behalf of his employer, the court found that the stealing of cheques could not be said to form part of his duties. It was clear that the employee went on a frolic of his own in order to promote his own interests.[131] In *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*[132] the SCA held that the employer was not liable where the employee, a barman, assaulted and injured a patron outside the employer's establishment. The court considered the fact that the employee was specifically required to treat customers with courtesy and respect and to refrain from getting involved in any incidents. The court further took cognisance of the fact that the employee followed the patron outside the establishment after a disagreement ensued. Although the assault was provoked by a disagreement which took place inside the workplace and while the employee was performing his duties, the court held that—

> "[the assault] was a personal act of aggression done neither in furtherance of the employer's interests, nor under the express or implied authority, nor as an incident to or in consequence of anything [the employee] was employed to do."[133]

In *K v Minister of Safety and Security*[134] the applicant was brutally raped by three uniformed policemen who had given her a lift. The Constitutional Court considered whether the common-law doctrine of vicarious liability conformed to the spirit, purport and objects of the Bill of

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contrary to express prohibition, did not fall within the course and scope of his employment. The employer was held not to be liable.

128 [2001] 1 All SA 315 (A); 2001 1 SA 1214 (SCA).

129 At 1108.

130 2001 1 SA 372 (SCA).

131 At par 6.

132 (2003) 24 ILJ 1337 (SCA).

133 At par 7.

134 2005 6 SA 419 (CC).

Rights and found that the doctrine and its application conformed to these constitutional norms. The state was held to be vicariously liable for the unlawful acts of rape by policemen. Subjectively seen, the policemen pursued their own interests, but, objectively seen, their actions were sufficiently closely linked to their employment because members of the public are likely to trust policemen with their safety. In *Minister of Finance v Gore*,[135] Cameron J made the following comment in respect of an employer's vicarious liability for the deliberate delicts of its employees:

> "Even though a deliberately dishonest act that, subjectively seen, was committed solely for the employee's own interests and purposes may fall outside of the ambit of conduct that renders the employer liable, it is in our law established that liability may nevertheless follow if, objectively seen, there is a 'sufficiently close link' between the self-directed conduct and the employer's business."[136]

In *F v Minister of Safety and Security*[137] a police officer on standby duty assaulted and raped a young woman.[138] The Constitutional Court applied the two-pronged test, as refined in *K* above, to the facts of this case and found that the actions of the police officer were sufficiently closely linked to the operations of the South African Police Service (SAPS).[139] On this basis the majority of the Constitutional Court held that the SAPS was vicariously liable for the delicts of the police officer despite the fact that the police officer pursued his own selfish interests and despite the fact that he was on standby duty at the time of the commission of the delict.[140]

5.3 *Remarks*

In determining whether the employee acted within or without the course and scope of employment, the subjective intention of the employee is of relevance.[141] If, however, objectively seen, there is a sufficiently close link between the employee's conduct and the employer's business, the employer may nevertheless be held liable even though the unlawful

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135 2007 1 SA 111 (HHA).

136 At par 28.

137 2012 1 SA 536 (CC).

138 The fundamental difference between the cases of *K* and *F* is that in *K* the policemen were on duty, while in *F* the police officer was on standby duty.

139 At 550D-557B.

140 At 557B, 557D and 557E-G.

141 *Minister van Veiligheid en Sekuriteit v Japmoco* 2002 5 SA 649 (SCA).

act may have been committed solely for the employee's own personal interests and purposes.[142] The opposite should then also be true: Theoretically the employer should be able to escape liability if the employee, subjectively viewed, promoted only his or her own interests, and, objectively viewed, entirely disengaged himself from contractual duties.[143]

In casu Mrs A's subjective intentions were completely divorced from her employment duties at the time of the breach and solely for the purpose of personal benefit and gain.[144] The actions of Mrs A could be described both as deliberate, self-directed, disobedient behaviour and a frolic of her own. At common law, her employer could be held vicariously liable for her actions although they were committed outside of Mrs A's normal scope of duties since they could potentially be sufficiently linked to her employment.[145]

In *K v Minister of Safety and Security* the court held that vicarious liability serves two functions, namely "affording claimants efficacious remedies for harm suffered" and to "incite employers to take active steps" to ensure that employees do not cause harm to others.[146] This second function presupposes that an employer who is able to prove that it did in fact take proactive measures to motivate and incite its employees to act properly and honourably should be able to escape a claim based on vicarious liability. If there were no vicarious liability, employers would not be encouraged to minimise risks created in the course of business. Vicarious liability therefore incites employers to take proactive steps to ensure that their employees refrain from infringing the rights of others. An employer should therefore be able to escape liability by proving that it proactively promoted and demanded lawful processing of personal information.[147] Furthermore, it seems that, if the employer is able to prove that Mrs A ignored an express instruction[148] not to breach the conditions of lawful processing, and that her actions were of a personal nature committed solely in her own interests, done neither in the furtherance of the employer's interests nor under express or implied authority nor incidental to or in consequence of anything Mrs A was employed to do,[149] the university should be able to

142 *Minister of Finance v Gore* [2007] 1 All SA 309 (SCA); 2007 1 SA 111 (SCA).

143 *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd* [2001] 1 All SA 315 (A); 2001 1 SA 1214 (SCA). Also see Mischke and Beukes "Vicarious liability: When is the employer liable for the wrongful acts of employees?" 2002 *Contemporary Labour Law* 11 17.

144 *Minister van Veiligheid en Sekuriteit v Japmoco* 2002 5 SA 649 (SCA).

145 *K v Minister of Safety and Security* [2005] 3 All SA 519 (SCA); *K v Minister of Safety & Security* 2005 3 SA 179 (SCA); and *K v Minister of Safety & Security* 2005 6 SA 419 (CC).

146 [2005] 8 BLLR 749 (CC).

147 Neethling and Potgieter *Neethling, Potgieter and Visser Law of Delict* (2015) 389. See n 103 above.

148 *Bezuidenhout NO v Eskom* [2003] 1 All SA 411 (SCA); 2003 3 SA 83 (SCA).

149 *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (2003) 24 ILJ 1337 (SCA).

effectively defend a common-law claim of vicarious liability. As stated in *Minister of Police v Rabie*:

> "[A]n employer cannot be held liable if his employee performed an independent act, or acted for a purpose personal to the employee, or was motivated entirely by personal reasons such as spite or malice." [150]

Apart from disproving the elements of a delict, the employer may, at common law, offer the following defences to a claim founded on vicarious liability:

(i) that its employee deliberately defied an express instruction and acted outside the course and scope of his duties;[151] or

(ii) that the employee deliberately committed a dishonest act solely for the employee's own interests and purposes and such self-directed conduct is not sufficiently linked to the employer's business, thus falling outside the ambit of conduct that renders the employer liable;[152] or

(iii) that the employee abandoned his or her work and engaged in a frolic of his or her own, doing something that that he or she was not permitted to do for the employer.[153]

150 *Minister of Police v Rabie* 1986 1 SA 117 (AD).

151 *Bezuidenhout NO v Eskom* [2003] 1 All SA 411 (SCA); 2003 3 SA 83 (SCA).

152 *Minister of Finance v Gore* [2007] 1 All SA 309 (SCA); 2007 1 SA 111 (SCA).

153 *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd* [2001] 1 All SA 315 (A); 2001 1 SA 1214 (SCA).

CHAPTER 6
ACTION BASED ON POPI

6.1 *Introduction*

As stated before, POPI provides data subjects with rights and remedies to protect their personal information from processing that is unlawful.[154] Although POPI does not constitute labour legislation, it has far-reaching consequences for responsible parties who are employers, and just as certain labour legislation, such as the Employment Equity Act (EEA)[155] and the Occupational Health and Safety Act (OHSA),[156] create strict liability on the part of employers, so too does POPI create strict liability on the part of the responsible party who is an employer.[157] By ascribing accountability to the employer, POPI creates a form of statutory vicarious liability. This is so because section 99(1) of POPI, which deals with civil remedies, determines that a civil action for damages may be instituted against the responsible party whether or not there is intent or negligence on the part of the responsible party. The employer, as the responsible party, is obligated to ensure that its employees comply with POPI and failure by its employees to comply will render the employer accountable.

Unless a data subject consents thereto, selling of personal information is unlawful. Both the seller and the buyer of the personal information will be in breach of POPI: The seller for failing to obtain the data subject's express prior consent[158] and the buyer for failing to collect the information from the data subject directly[159] (and from failing to obtain the data subject's express prior consent). Where the responsible party is an employer, the situation may arise where, despite such employer's efforts to educate its staff in relation to the requirements of POPI and despite its attempts to regulate the lawful processing of personal information by way of policies, regulations, codes or standard operating procedures, it could still nevertheless face civil action where an employee wrongfully and culpably interferes with or infringes a data subject's right to privacy. *In casu* the student may elect to institute a civil action in terms of

154 See s 2(c) of POPI.

155 Act 55 of 1998 (as amended).

156 Act 85 of 1993 (as amended).

157 See s 8 of POPI.

158 See s 11 of POPI (Consent, justification and objection) for the different justifications for processing personal information without consent of the data subject.

159 See s 12 of POPI (Collection directly from data subject) for the different circumstances that justify the collection of personal information from other sources than the data subject directly.

section 99 of POPI against the university on the ground that Mrs A, who is an employee of the university, unlawfully sold her personal information to company B. Any breach of POPI or any unlawful interference with a data subject's privacy will result in the employer being held accountable. According to Neethling "this principle is really-self-evident and in line with the common law position that the person processing personal data can be … held liable – and thus accountable – for the wrongful infringement of privacy…".[160] It is therefore clear that POPI creates a form of statutory vicarious liability on the part of an employer in respect of contraventions of POPI by its employees.

The responsible party must ensure that the conditions for lawful processing of personal information, and all the measures that give effect to such conditions, are complied with at the time of the determination of the purpose and means of the processing and during the processing itself. Any unlawful interference with a data subject's privacy will render the employer, as the responsible party, civilly liable for the acts of its employees.[161] The defences that the employer may raise are set out in section 99(2)(a) to (e) of POPI:

> "(2) In the event of a breach the responsible party may raise any of the following defences against an action for damages:
> (a) Vis major;
> (b) consent of the plaintiff;
> (c) compliance was not reasonably practicable in the circumstances of the particular case; or
> (d) the Regulator has granted an exemption…".

In casu the defences contained in section 99(2) would not enable the employer to escape liability. The disclosure of the student's personal information by Mrs A could hardly be regarded as an act of God.[162] It is also clear that the student never gave permission for her academic records to be disclosed to random third parties with whom she has no relations.[163] It could neither be said that compliance was not reasonably practicable nor that the Regulator granted an exemption.[164] Apart from the above defences, the employer will be unable to avert a claim for damages brought by a data subject whose privacy has been infringed by said

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160 Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 247.

161 See s 99 of POPI. Also see Neethling "Features of the Protection of Personal Information Bill, 2009 and the law of delict" 2012 *Journal of Contemporary Roman-Dutch Law* 241 247.

162 S 2(a) of POPI.

163 S 2(b) of POPI.

164 S 2(c) and (d) of POPI.

employer's employee. To the employer's detriment, POPI does not recognise good deeds, intentions or aspirations as defences to a civil claim brought in terms of section 99.

6.2 *Comparison with analogous statutes: POPI defences inadequate*

As mentioned before, the essence of this dissertation is to illustrate that an employer who took reasonable proactive precautions to avoid non-compliance by its employees with POPI, should be able to escape liability. Neethling seemingly agrees with this contention when he states that "the wrongfulness of [an employer's] processing should be set aside if he took all reasonable steps to comply with the data protection principles."[165] There are in fact several other domestic statutes that determine that an employer, who otherwise would have been held vicariously liable, could escape liability by proving that it took reasonable steps to prevent a contravention of such statutes.[166] It is the absence of the employer's effort to anticipate and prevent contravention of a statute that creates the employer's liability.[167] Conversely then, it follows that an employer who constantly and proactively strives to eliminate infringement of legislation should be able to escape liability.

As alluded to earlier, comparable data protection laws of other jurisdictions contain similar provisions which allow an employer to avoid liability by proving that it took reasonable steps to prevent the contravention of such statutes. The fact that other domestic and foreign statutes make provision for such a defence, while POPI does not, supports the view that the liability created by POPI is too harsh and practically inescapable.

6.2.1 South African legislation

It is not uncommon for legislation to impose vicarious liability and to list the possible defences available in resistance of such a claim.[168] Both the EEA and the OHSA are examples of statutes that create vicarious liability on the part of an indifferent employer and also sets out a number of defences. Section 60(3) of the EEA, for example, determines that an employer must be

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165 Neethling *Law of Personality* (2005).

166 See, for example, the EEA and the OHSA.

167 See s 5 of the EEA, which stipulates that every employer must take steps, in advance (and proactively), to promote compliance with the Act.

168 See the Consumer Protection Act 68 of 2008; National Nuclear Regulation Act 47 of 1999; Civil Aviation Act 13 of 2009; Post and Telecommunication-Related Matters Act 44 of 1958; and Genetically Modified Organisms Act 15 of 1997.

deemed to also have contravened a provision of POPI if the employer has failed to take necessary steps to eliminate conduct which does not comply with the EEA. However, if the employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA, the employer will be able to avoid being held vicariously liable for the contraventions by its employees.[169] The notion here is that employers should have taken reasonably practicable precautionary actions prior to the incident.[170] A further obstacle that a claimant will have to overcome is to prove, as a minimum, that the employee, *whilst at work*, had contravened the provisions of the EEA.[171] The enquiry is whether the employee, at the time of the contravention, busied himself or herself with the affairs or business of the employer while at work.[172]

The OHSA equally determines that the employer shall be held liable whenever an employee of such employer does or omits to do any act which would be an offence for the employer to do or omit to do, *unless the employer is able to prove that all reasonable steps were taken to prevent a contravention* of the OHSA.[173]

6.2.2 Brief survey of selected Commonwealth legislation

6.2.2.1 The United Kingdom's Data Protection Act

Although POPI is comparable to the United Kingdom's Data Protection Act of 1998 (UKDPA),[174] one instance where POPI parts from the UKDPA is with respect to the limitation of the accountability of the responsible party. The UKDPA (and other counterpart foreign statutes) contains a mechanism for the employer to escape liability if the employer is able to show that it took proactive measures to prevent contravention of the statute, whereas POPI contains no such provision.[175]

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169 See s 60(4) of the EEA. There seems to be an exception to this rule to the extent that the employer will be unable to escape liability for unlawful conduct in breach of the EEA by senior employees, since senior employees are often viewed as "the employer". The effect hereof is that knowledge of the contravention will be imputed to the employer and will defeat the use of the defence.

170 Cooper "Harassment on the basis of sex and gender: A form of unfair discrimination" 2002 23 *ILJ* 1.

171 *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* (2007) 28 ILJ 897 (LC).

172 Whitcher "Two roads to an employer's vicarious liability for sexual harassment: *S Grobler v Naspers Bpk en 'n ander* and *Ntsabo v Real Security CC*" 2004 25 *ILJ* 1907.

173 Own emphasis. See s 37 of OHSA (as amended).

174 Data Protection Act 1998.

175 See s 13(3) of UKDPA.

The UKDPA affords an individual who suffered damage by reason of any contravention by a data controller of any of the requirements of the Act entitlement to compensation from the data controller for that damage.[176] However, in proceedings brought against an employer (data controller) it is a defence to prove that the employer had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned.[177] Moreover, section 55A of the UKDPA determines that the Information Commissioner has the power to impose monetary penalties against a data controller (responsible party) if there has been a serious contravention of the UKDPA which the data controller knew or ought to have known could occur and *failed to take reasonable steps to prevent the contravention*. This presupposes that no penalty would be imposed if the employer proactively took reasonable steps to prevent the contravention. As such, the employer's reasonable steps would aid in defending a claim in terms of the UKDPA.

The vicarious liability created in terms of the UKDPA, and the defences thereto, are informed by EU Directive 95/46/EC. Article 23 of the Directive provides as follows:

> "Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any at incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered."

The vicarious liability of data controllers is however limited by sub-article (2), which determines that "[t]he controller may be exempted from liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage".

6.2.2.2 New Zealand's Privacy Act

Section 126(1) of New Zealand's Privacy Act 28 of 1993 (NZPA) determines that—

> "[s]ubject to subsection (4), anything done or omitted by a person as the employee of another person shall, for the purposes of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval."

176 See s 13(1) of UKDPA.
177 See s 13(3) of UKDPA.

By virtue of subjection 4 the employer may be exempted from being held vicariously liable for the acts of its employees if—

> "[i]n proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she or it took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description."

It is not unusual for the New Zealand Privacy Commissioner (NZPC) to exempt employers from being held vicariously liable for the deeds of their employees by applying the exemption passage found in section 126(4). In one particular case before the NZPC,[178] an insurance company manager followed the complainant into a retail store, following a near accident between their cars. In the presence of other customers, the insurance company manager threatened to endorse the complainant's file and made reference to and disclosed sensitive personal information regarding the complainant's past accident record. The NZPC considered, *inter alia*, whether the insurance company had security safeguards, (including rules and procedures), to guard against the unauthorised processing of information and whether such safeguards were reasonable and practicable. The NZPC found that the company provided intensive training and resources on the NZPA to its employees, including an instruction manual. Moreover, the manager had not only taken part in the training but had facilitated discussions in some sessions. The NZPC concluded that the insurance company did not breach the NZPA since it had taken reasonable steps to ensure that the personal information it held was not disclosed unnecessarily or without authority of the company or data subject. In light of the conclusion reached, the NZPC went on to consider the impact of section 126. Section 126(1) places the responsibility on the employer for any act or omission by the employee. However, section 126(4) recognises that there are limits on employers' liability for employee actions. The NZPC regarded the defence contained in section 126(4) to be available to the employer under the circumstances.

Applying the principles of the case described above in comparison with the fictional case study, it seems peculiar that the South African legislature failed to make provision for a similar exemption clause in POPI. Mrs A's employer, just as in the case described above, regarded the training of its employees on POPI as a serious matter. The intensive training of

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178 Case Note: 16005 [2001] NZPrivCmr 17 (1 July 2001).

employees, its policies, standard operating procedures, circulars and frequent newsletters would have, under New Zealand law (and the laws of other Commonwealth jurisdictions), constituted a sufficient defence for the university to escape liability.

6.2.2.3 The Australian Privacy Act

Section 99A(2) of the Australian Privacy Act 119 of 1988 (as amended) determines that—

> "[a]ny conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority is to be taken, for the purposes of a prosecution for an offence against this Act or proceedings for a civil penalty order, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct."

Once again the Australian legislature recognised the importance of limiting an employer's liability for the wrongful actions by employees.

6.3 *Critical observations and remarks*

Considering the fact that Mrs A blatantly and intentionally contravened POPI (and clear instructions from her employer) and despite being *au fait* with the lawful conditions of processing and the consequences of a breach, and bearing in mind that she did so for her own personal gain, outside the course and scope of her employment, one would imagine that her employer would be able to escape liability on these grounds. This is, however, not the case since POPI does not recognise these realities as defences available to the employer.

An employer, who is determined to steer clear of expensive litigation, will implement comprehensive policies and rules, offer constant training, pilot workshops and awareness campaigns, monitor the attitude of employees and the effect of the training, etcetera, in order to ensure that all employees are well-informed of the employer's expectation of them. It is trite that in terms of the EEA (and foreign data protection statutes) an employer will be able to escape statutory vicarious liability if the employer is able to prove that it proactively took reasonable and practicable steps to prevent a contravention of POPI. Such steps may include identification and assessment of risks, development of policies and incorporation of rules into the employer's conditions of employment but to name a few. The courts have recognised that employers, who

do in fact act proactively, should not be held liable for the delict caused by their employees. Why this principle was not extended to POPI is dumbfounding.

CHAPTER 7
CONCLUSION

7.1 *POPI's glaring deficiencies*

At first glance POPI seems progressive and flawless. It gives credence to the constitutional right to privacy and provides mechanisms for holding those responsible for breaching the fundamental right to privacy, liable and accountable. It is widely accepted that POPI has been based on the UKDPA and the EU Directive on Data Protection 1995,[179] which strengthens the initial supposition that POPI is the product of careful consideration. This initial inference is further strengthened by the preamble to POPI which recognises that the legislature enacted POPI in order to regulate, "*in harmony with international standards,* the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests."[180] The reference to international standards implies that the legislature had considered international conventions and precepts. However, upon closer inspection it is clear that unlike the UKDPA (and equivalent foreign statutes) and the EEA, POPI does not provide for protection of an employer who has done everything reasonably and practicable in its power to ensure that its employees comply with the requirements of protection of personal information. The omission is so glaring that it seems to be deliberate. Nevertheless, one cannot help but wonder whether this omission was simply an oversight on the part of the legislature and whether, in time, the legislature will address the paucity.

Returning to the illustrative case study, it would seem as if Mrs A's employer would have been able to escape liability had the student's action been brought against the employer in terms of the common law. The developments of the common-law defences would have enabled the employer to prove that the actions of Mrs A were for personal gain and completely removed from her duties. As a result of POPI (and the limited defences available to the employer), there is a greater challenge to circumventing accountability and liability. There is thus a clear disjuncture between the statutory defences to a claim based on vicarious liability in POPI and

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179 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of data.

180 Emphasis added.

other domestic statutes. There is furthermore a clear disjuncture between the statutory defences to a claim based on vicarious liability in POPI and foreign counterparts.

From the facts it is clear that the transgression took place after hours, at the home of Mrs A. For the statutory vicarious liability to kick in in terms of the EEA, the act or omission in question should have been committed "while at work".[181] Had POPI contained a similar escape clause to that contained in the EEA, Mrs A's employer would have been able to escape liability for her contravention of POPI.

7.2 *Conclusion and recommendations*

The expression "no good deed goes unpunished" has never seemed more appropriate than in the case of the POPI. POPI does not require intent or negligence on the part of the employer for the employer to be held accountable. As such, even employers who actively promote compliance with POPI and who campaign for absolute and unqualified observance of the conditions for lawful processing may be held accountable and liable. Neither the fact that the employee was expressly prohibited from committing an unlawful transgression in contravention of POPI, nor the fact that the employer proactively sought to avoid such contraventions, nor the fact that the contravention did not occur "while at work"[182] would aid the employer in evading liability. It appears then that, as a result of the legislature's short-sightedness, the only recourse available to the virtuous employer would be to make use of comprehensive (and costly) liability insurance to reduce or mitigate the risk of contraventions of POPI by its employees.[183] Thus, the good deeds of the good employer will not be recognised as a defence. This position is at variance with analogous domestic acts[184] that also create forms of statutory vicarious liability and corresponding foreign legislation.[185]

One would expect that the proactive and law abiding employer will take all necessary steps and precautions to reduce the risk of expensive and protracted litigation and settlement orders. But, POPI makes no distinction between the liability of an employer who exudes a

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181 Murray *The extent of an employer's vicarious liability when an employee acts within the scope of employment* (2012 dissertation SA) 41.

182 See s 60 of the EEA.

183 Lawlor *Vicarious and direct liability of an employer for sexual harassment at work* (2007 dissertation SA) 45. Also see Smit and Van der Nest "When sisters are doing it for themselves: Sexual harassment claims in the workplace" (2004) *TSAR* 520-543.

184 See, for example, the EEA and the OHSA (as amended).

185 See, for example, the UKDPA; the NZPA and the Australian Privacy Act (as amended).

nonchalant approach to the duty to respect the privacy of data subjects on the one hand, and an employer who actively promotes a culture of awareness and compliance with POPI on the other hand. Both the virtuous and the indifferent employer are treated alike in respect of contraventions by their employees. Consequently, the good deeds of the virtuous employer (i.e. its relentless campaigning and advocating for compliance with POPI) seem to be of no significance. So, it seems that the expression "no good deed goes unpunished" is in fact undisputable when one considers that the law abiding employer's good deeds will not constitute an acceptable defence to retribution in terms of POPI.

This dissertation has tried to raise, in a preliminary fashion, the issue around the employer's (seemingly boundless) liability for the contraventions of POPI by its employees. The question was, in essence, whether an employer should be held vicariously liable for the gross and deliberate perpetration of an employee despite the fact that the employer has discharged its duty to proactively dissuade employers from breaching POPI. In light of the analogy with the EEA and the comparative study, it is submitted that that an additional defence to a claim based on the statutory vicarious liability in terms of POPI should be included to the benefit of an employer who faces a civil action brought by a data subject whose privacy has been infringed by an employee of such employer. Such additional defence should mirror the defences contained in section 60(4) of the EEA, section 126(4) of the NZPA,[186] section 13(3) of the UKDPA,[187] and section 99A(2) of the APA,[188] respectively. More specifically, it is submitted that section 99(2) should be amended to include the following wording, namely: 'Despite subsection (1), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.' This simple addition will no doubt bring POPI in line with the legislation mentioned and alleviate the plight of the employer without compromising any of the all-important objectives of POPI.

186 Act 28 of 1993.
187 Of 1998.
188 Act 119 of 1988 (as amended).

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