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School discipline and the delictual negligence test for teachers – a case in point

Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng case no. 3223/11 (24 October 2012) (GP)

1. Introduction

Proper discipline is a prerequisite for safety in schools. In addition to creating an environment conducive to learning, school discipline is essential to ensure the safety of staff and learners. School discipline includes the implementation of reasonable measures to secure the safety of staff and learners as well as responsible behaviour by learners. The failure of school staff and authorities to enforce discipline may have serious educational and legal consequences. Where such failure amounts to conduct that causes personal injury and financial loss, liability for the recovery of such loss may follow if all the requirements for a delict are met.

In the schools' context, our courts have painted an ambivalent picture as far as the delictual test for negligence is concerned. For example, a fairly recent Supreme Court of Appeal decision¹ shows that, even in our highest courts, there is still disagreement regarding this test. In *Hawekwa Youth Camp v Byrne*, two different approaches were followed: the majority of the court applied the 'reasonable teacher' criterion, whereas the minority adhered to the standard of 'a reasonable parent in relation to his or her own children'. These two tests led to divergent conclusions in *Hawekwa* about whether the defendants should be held liable for the injuries suffered by a child when he fell off a bunk bed during a school excursion. This shows that the formulation and application of the negligence test for teachers is not merely a theoretical matter, but could have important implications in practice. The courts' conflicting approaches to the negligence test in the schools' context continued in the judgment of Mabuse J in the case under discussion, namely *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng*.²

1 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA).

2 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP).

2. Facts

The plaintiff (G) instituted a delictual action for damages against the defendants as a result of the injuries suffered by his Grade-1 daughter (K) during an incident at school. K was sitting in her classroom, together with other pupils, before school commenced, waiting for the bell to ring. There was no teacher in attendance in or around the classroom. When the bell rang, children rushed out of the classroom and K also moved to the door in order to go out. As she went outside, some pupils slammed the classroom door shut. K's hand was caught between the door and the its frame, causing an injury to her right-hand little finger which resulted in an amputation through the distal phalanx and removal of the nail bed. G claimed damages for medical expenses, and for the pain and suffering, emotional shock and trauma, disfigurement, loss of amenities, and enjoyment of life suffered by K.³

The plaintiff based his delictual claim on the alleged negligence of the school (the first defendant) or its staff members in failing to take a number of reasonable steps to prevent the incident, *inter alia*, its failure to ensure that children did not run through the classes, that K was under suitable observation, and that classroom doors could not be slammed shut, for example by fitting the doors with hatches to keep them open.⁴ The school denied any negligence on its part, pleading that it acted reasonably at all times and that the incident, in which K was injured, and the manner thereof was neither reasonably foreseeable nor preventable.⁵ The second defendant, Gauteng Province's Member of the Executive Committee for Education, was sued in his official capacity in terms of section 60(1) of the *South African Schools Act 84 of 1996*, which provides that the state is "liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such public school would have been liable but for the provisions of this section".⁶

3. Legal principles and discussion

3.1 Wrongfulness

After examining the evidence,⁷ Mabuse J turned to the legal principles involved. As point of departure, the judge,⁸ somewhat surprisingly and seemingly at the behest of counsel for the school, employed McKerron's

3 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP);paras. 4, 6, 7 and 21.

4 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP);par. 5.

5 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP);par. 8.

6 *South African Schools Act 84/1996*;par. 2.

7 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP);paras. 9-21.

8 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP);par. 22.

outdated definition of a delict,⁹ which describes a delict as “the breach of duty imposed by law, independently of the will of the party bound, which will ground an action for damages at suit of any person to whom the duty is owed and who has suffered harm in consequence of the breach”. This definition is clothed in English law ‘duty of care’ terminology, which, as will be pointed out below, some of our highest courts have often strongly criticised. The judge could have achieved more clarity about the concept of a delict and its requirements by utilising one of the modern textbooks on the law of delict.¹⁰

The judge approached the wrongfulness question by stating that it needed to be established “whether there was a duty on the [defendant] or its staff members to ensure the safety of the children from such incidents as the present one”. He then declared that “[t]here is no doubt in my mind that the injuries suffered by [K] amounted to invasion of [her] rights and that, under such circumstances it is wrongful”. At this point, Mabuse J interrupted the wrongfulness enquiry by turning briefly to negligence, stating: “Negligence denotes the absence of due care where there is a duty to exercise due care. This may involve a conduct which is careless or wrongful.” Returning to wrongfulness, the judge seemed to accept that the issue of whether or not there is a ‘duty to care’ is determined by judicial judgment involving the consideration of reasonableness, policy and, where appropriate, constitutional norms. He also accepted¹¹ that there is a legal duty on educators to prevent harm from being sustained by learners, and “that the source of such duty to exercise care may firstly be common law, secondly [the *South African Schools Act* 84 of 1996], thirdly the Code of Conduct of School Governing Bodies and, fourthly the Conduct of the Educators”.

Although one could agree with Mabuse J’s finding that wrongfulness had been established in this case, the fact that he approached the enquiry from the so-called ‘duty of care’ perspective, particularly after he had already found that wrongfulness had been established because K’s rights had been infringed, did not contribute to the clarity of his exposition. Indiscriminate use of the English law ‘duty of care’ approach in our law should be avoided, as it leads to confusion between wrongfulness and negligence as distinct elements of a delict, as has been pointed out by the Supreme Court of Appeal on more than one occasion.¹² In addition, a

9 McKerron 1971:5.

10 See, for example, Loubser & Midgley 2012:7-8 who, in reflecting on the various definitions of a delict in South African law, do not even mention McKerron’s definition; Van der Walt & Midgley 2005:1; Neethling & Potgieter 2015:4.

11 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP); par. 23.

12 See, for example, *McIntosh v Premier, KwaZulu-Natal* 2008 6 SA 1 (SCA) 8-9; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144; see generally Neethling & Potgieter 2015:55 footnotes 120, 158-160 and the authorities cited there.

degree of confusion may be evident from Mabuse J's needless references to the element of negligence whilst considering wrongfulness.

3.2 Negligence

Unfortunately, Mabuse J's approach to negligence¹³ is not clear. As will be evident below, structurally the court's investigation into negligence leaves much to be desired; at times it appears to require actual (instead of reasonable) foreseeability of harm for establishing negligence, and it relies on a minority judgment of the Supreme Court of Appeal in accepting the unacceptable 'reasonable parent' test for negligence in the schools' context, instead of the 'reasonable teacher' test as laid down by the majority of that court.

Mabuse J approached negligence as follows.¹⁴ To begin with,¹⁵ he remarked in general that "there can be no doubt that the reasonable possibility of a child being injured [on] the premises of the [school] was foreseeable", that the school was obliged to take reasonable precautions to guard against such eventuality and that appropriate steps would depend on the type of eventuality in question and on an examination of all relevant factors. In this regard, the judge referred to *Gouda Boerdery BK v Transnet*,¹⁶ where Scott JA held that, in this instance, a value judgement is involved during which various competing considerations are balanced, including the degree or extent of the risk created by the actor's conduct, the gravity of the possible consequences if the risk of harm materialises, the utility of the actor's conduct and the burden of eliminating the risk of harm: If a reasonable person would have done no more than was actually done, there is no negligence.

Mabuse J¹⁷ continued by stating that, in order to establish whether or not the school and its staff were negligent, one would have to determine whether a similar incident had taken place in the past and whether the school had taken precautions to prevent it happening again. For this purpose, the evidence had to be examined in order to determine "if it establishes any history of this incident having taken place before and the circumstances under which it took place" and "whether there existed a reasonable possibility of the school and its staff having foreseen this eventuality taking place and having failed, notwithstanding such a reasonable possibility, to take precautions to prevent it from taking place".

13 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):paras. 24-32.

14 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):paras. 24-32.

15 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 24.

16 *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA):par. 14.

17 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 25.

Next, the judge,¹⁸ with reference to *Minister of Education v Wynkward*,¹⁹ underscored the well-known principle that the failure of teachers to keep learners under constant supervision does not in itself constitute “a breach of a duty of care” (or, rather, negligence) and that the degree of supervision required depends on the risks to which the learners are exposed. Mabuse J²⁰ proceeded to point out that there was no evidence that a similar incident had ever taken place previously, or that the school had ever foreseen a reasonable possibility of this eventuality taking place. In this regard, Mabuse J referred with approval to the following statement from the English case *Wright v Cheshire County Council*:²¹

There may well be some risk in everything one does or in every step one takes, but in ordinary everyday affairs the test of what is reasonable care may well be answered by experience from which arises a practice adopted generally, and followed successfully over the years so far as evidence in this case goes.

Mabuse J²² concluded that, in the circumstances of this case, “there was no reasonable possibility of the school or its staff foreseeing the eventuality in which [K] was involved taking place”. Only at this stage did the judge refer to the reasonable foreseeability and preventability negligence test set out in *Kruger v Coetzee*,²³ which is generally regarded as the standard formulation of the negligence test in our law, and the preferred starting point for the determination of negligence in a given case. Then, despite (apparently) having concluded that fault was absent in this matter,²⁴ he proceeded with a further investigation into negligence.²⁵ He pointed out²⁶ that, although the school foresaw the reasonable possibility of children being injured when they played outside the school building and took precautions to protect them by always having a teacher in attendance there, the school principal “did not admit that he foresaw the reasonable possibility of this event in which [K] was involved, taking place”. Then Mabuse J²⁷ warned against approaching the negligence question with the benefit of hindsight. For this purpose, he relied on certain authorities cited

18 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 26.

19 *Minister of Education v Wynkward* 2004 3 SA 577 (C).

20 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 27.

21 *Wright v Cheshire County Council* [1952] 2 All ER 789 (CA) 792.

22 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 27.

23 See *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

24 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 27.

25 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):paras. 28-32.

26 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 28.

27 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 29.

in the minority judgment of Griesel AJA and Mlambo JA in *Hawekwa*.²⁸ Mabuse J²⁹ also agreed with the argument of counsel for the school (again replicating the approach of the minority judgment in *Hawekwa*³⁰) that:

the school exercises the same degree of care in the same manner as a reasonable parent would, in the circumstances of the case, have done in relation to his or her own children. It is correct that no parent keeps his children under constant surveillance where they are not exposed to the risk of being injured. [K] and her classmates were, in my view, not exposed to, at least, this form of risk. Accordingly, the school, through its staff members, could not reasonably have foreseen the possibility of injury to the pupils in this particular form.

Mabuse J³¹ then made the following statement (which appears to relate to causation rather than to negligence):

It is indeed so that the presence of any staff member in [K's] classroom would not have prevented her ... from sustaining any injuries. The fact that a teacher is present on the playground or in the classroom will in no way prevent a child from sustaining any injury. As an example, notwithstanding its vigilance over its chicks all the steps that it takes to protect them a hen will not always prevent a sparrow from snatching one of its chicks.

Ultimately, Mabuse J,³² again referring to the 'reasonable parent' test for negligence as formulated by Griesel AJA in his minority judgment in *Hawekwa*,³³ found that the school's employees had not been guilty of any culpable act or omission and dismissed the plaintiff's claim.

Mabuse J's approach to negligence and certain other matters deserves comment. Before addressing my main concern with the judgment, namely that the incorrect test for negligence was applied, it should be mentioned in passing that the foreseeability test for negligence entails an objective enquiry into whether *a reasonable person* (the *bonus paterfamilias*) in the position of the defendant would have foreseen the harm in question with such a degree of probability that s/he would have taken steps to *prevent* it (which forms the so-called second leg of the negligence enquiry).³⁴ As a broad guideline, the foreseeability of harm will depend on the degree of probability of the manifestation of the harm (or how great the likelihood or possibility is that it will occur). Therefore, the greater the possibility that damage will occur, the easier it will be to establish that such damage

28 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):94-95.

29 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 30.

30 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):95-97.

31 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 31.

32 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 32.

33 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):97.

34 See *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

was (reasonably) foreseeable.³⁵ Mabuse J did not formulate the objective negligence test very clearly.³⁶ The judge stated, for example: “[O]ne would have ... to establish whether there existed a reasonable possibility of the school and its staff having foreseen this eventuality taking place”;³⁷ “[n]o evidence has been placed before this court that the [school] ever foresaw a reasonable possibility of this eventuality taking place”, and “[i]t would appear that in the circumstances of this case there was no reasonable possibility of the school or its staff foreseeing the eventuality in which [K] was involved taking place”.³⁸ But the negligence question is not whether the school and its staff (in fact) foresaw the reasonable possibility of harm to K, but whether the reasonable person would have foreseen the occurrence of such harm. The difference may be subtle and merely the result of inaccurate formulation, but it is there: if the question is whether the school staff (in fact) foresaw the (reasonable) possibility of harm, an element of subjective foresight – which points to whether intention rather than negligence was present – is brought into the picture, whereas the negligence enquiry should simply be whether the reasonable person would have foreseen (and prevented) the loss.

Be that as it may, of greater concern is that Mabuse J, uncomprehendingly relying on the minority judgment of Griesel AJA in *Hawekwa*,³⁹ applied the so-called ‘reasonable parent’ test (the degree of care of a reasonable parent in relation to his/her own children) in establishing the negligence of the teachers involved in this case. In passing, it appears that Mabuse J also relied on Griesel AJA’s minority judgment in other respects, *inter alia*, for the argument proffered in *Wright*⁴⁰ that, in ordinary everyday affairs, reasonable care may well be deduced from experience arising from a generally adopted practice which has been followed successfully over the years.⁴¹ Whilst it stands to reason that a lower court is bound to follow the (majority) decisions of the Supreme Court of Appeal, Mabuse J did not refer at all to Brand JA’s majority judgment in *Hawekwa*,⁴² in which a different negligence criterion in the schools’ context was applied, namely the reasonable teacher test. Not only is the reasonable teacher test different from the reasonable parent test, as preferred by the minority in *Hawekwa* and Mabuse J in the present case, but the two tests may lead to different outcomes as regards delictual liability in the schools’ context,

35 See generally Neethling & Potgieter 2015:137ff., 150.

36 See, for example, *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):paras. 25, 27 and 28.

37 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 25.

38 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 27.

39 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):94-97.

40 *Wright v Cheshire County Council* [1952] 2 All ER 789 (CA):792.

41 See *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):97.

42 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):84-94.

as is evident from *Hawekwa*. It is, therefore, important to apply the correct negligence test where the conduct of schoolteachers is involved.⁴³

In my view, the reasonable teacher test, as applied by Brand JA in *Hawekwa*,⁴⁴ is preferable to the reasonable parent test employed by the minority of the court. Brand JA describes negligence as the reasonable foreseeability and preventability of damage with reference to the authoritative formulation of the negligence test in *Kruger v Coetzee*, whereafter he simply makes use of the 'reasonable teacher' concept. This is acceptable, as 'reasonable teacher' in the context of the case is a convenient short description of the '*diligens paterfamilias* in the position of the defendant', as applied in *Kruger v Coetzee* to summarise the negligence test as formulated in this authoritative case. The use of 'reasonable teacher' as a norm is also consistent with the general approach whereby the negligence of experts is determined with reference to the conduct of the 'reasonable expert', and not that of the 'ordinary' reasonable person. Generally, greater care is expected from an expert such as a dentist, surgeon, pilot, electrician, police officer – and teacher working within his/her field of expertise, than from the 'average' reasonable person; this is the well-known area of so-called 'professional negligence', in terms of which greater care is expected and demanded from professional people acting within their field of expertise than from ordinary, lay persons.⁴⁵ On the other hand, the reasonable parent test, as applied by Griesel AJA in his minority judgment in *Hawekwa* and referred to with apparent approval by Mabuse J in *Gouws*, is subject to criticism. As has been pointed out elsewhere,⁴⁶ the South African and English decisions, upon which Griesel AJA relied for the reasonable parent test,⁴⁷ do not support this approach without more ado, whereas other aspects of Griesel AJA's judgment cannot be accepted without reservation.⁴⁸ For example, although it may be true, as pointed out in *Wright*,⁴⁹ that, "in ordinary everyday affairs", generally accepted practice may be indicative of reasonable care, it is at least open to question whether

43 For an analysis of the SCA's approach in *Hawekwa* to the negligence test for teachers, see Potgieter 2013:13-26.

44 *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA):91ff.

45 See generally Neethling & Potgieter 2015:145-147 and the authorities cited there; see also, for example, Linden & Feldthusen 2011:164ff.; Jackson 2007:8ff., and with regard to the reasonable teacher test, *Wynkward v Minister of Education* 2002 6 SA 564 (K); *Transvaal Provincial Administration v Coley* 1924 AD 24 28-9; *Broom v The Administrator, Natal* 1966 3 SA 505 (D) 516; *Rusere v The Jesuit Fathers* 1970 4 SA 537 (R); *Knouwds v Administrateur, Kaap* 1981 1 SA 544 (C) 553; *Williams v LUK van Gauteng Departement van Onderwys* case no. 3687/01 (2003-5-14) (T). For further authority, see also Davel 2003:405ff.; Joubert & Prinsloo 2009:153ff.; Barry 2006:111ff.; Potgieter 2004:153ff.; Potgieter 2008a:331ff.; Potgieter 2008b:193ff.; Potgieter 2013:13ff.; Neethling & Potgieter 2011:161ff.

46 Potgieter 2013:13ff.

47 For example, *Broom v The Administrator, Natal* 1966 3 SA 505 (D) 518-519; *Rusere v The Jesuit Fathers* 1970 4 SA 537 (R) 539; *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA) 412).

48 See Potgieter 2013:20-22.

49 *Wright* 792.

leaving grade 1 children unattended in a classroom before school starts, qualifies as an 'ordinary everyday affair', whilst there is authority, precisely in the context of professional conduct, that the mere fact that a defendant followed the accepted practices of his profession does not necessarily exculpate him from negligence in a particular case.⁵⁰

In the schools' setting, the standard of care exercised by parents over their own children is not an appropriate yardstick to determine the negligence of teachers. The parental standard of care is exercised mostly in a secluded and restricted home environment and is ill-suited to deal with the supervisory functions required to ensure the reasonable safety of large numbers of children of various ages in extensive school-building complexes, on large school premises and sports fields, and to deal with the potential dangers lurking in school buildings, equipment, vehicles, transport and activities related to schools and education. In addition, as was pointed out at the outset of this discussion, safety in the schools' milieu is closely connected to the proper exercise of good discipline. In this regard, it is evident that the nature and application of discipline in the home and school environments are fields apart and that the disciplinary principles and measures applicable in the parent-child context would, in many respects, be completely inadequate and inappropriate in the school setting, and vice versa. In certain instances, parent-child disciplinary measures would even be illegal if applied in schools: for example, while corporal punishment as disciplinary action is still allowed at home, it is prohibited in schools in terms of section 10 of the *South African Schools Act* 84 of 1996. Lastly, it is clear that members of the school teaching profession must be considered experts who possess proficiency and expertise in respect of school discipline and school safety. When considering the possible negligence of the conduct of an expert, it is self-evident that, in accordance with the general approach towards the negligence of experts,⁵¹ such conduct must be measured against the reasonable expert (teacher) test that calls for a higher standard of care than that of the 'ordinary' reasonable person, including the reasonable parent.

Be that as it may, in the end, Mabuse J⁵² found that negligence was absent, because the school exercised the same degree of care as a reasonable parent in the circumstances would have done in relation to his/her own children; in other words, by applying the reasonable parent test. The question is whether the application of the reasonable teacher test, instead of the reasonable parent test, would have resulted in a different outcome in the case. In other words, would a reasonable teacher, in contrast to a reasonable parent, have foreseen and prevented the injuries to K? From the facts as set out by the judge, it appears that this may indeed

50 See the case law, albeit American, referred to by Dugdale & Stanton 1989:243-244.

51 Neethling & Potgieter 2015:145-147.

52 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP):par. 30.

have been the case. The court stated,⁵³ *inter alia*, that the class teacher (V) acknowledged that, on the day of the incident, there was no supervision by teachers at the Grade-1 playground or in the classrooms and that she was aware of the possibility of learners injuring themselves in the classroom, as they had the proclivity to run through the classroom without appreciation of the dangers involved. V also acknowledged that the school could have taken steps to prevent the incident in which K was injured from taking place, but that neither she nor the principal had considered the possibility of taking any steps to prevent that situation from arising. The principal also acknowledged that there would be no supervision of the children by the staff members at the time when the incident took place, because all the teachers would be in a staff meeting. It is submitted that all these acknowledgements by the class teacher and the principal indicate not only that a reasonable teacher or principal would have foreseen the injury and would have taken steps to prevent it, but may even have amounted to intentional conduct, albeit in the form of *dolus eventualis*.⁵⁴ In fact, the teacher and principal foresaw that the unsupervised children may be injured in the classrooms before school, knew that steps could have been taken to prevent such injury, but nevertheless (calculatingly) chose not to do anything about it. In the event, their conduct was clearly (at least) negligent, with the result that delictual liability should have been imposed for the loss resulting from K's injuries.

4. Conclusion

It is unacceptable that Mabuse J, by applying the reasonable parent test to determine the negligence of educators in *Gouws*, ignored the majority judgment of the Supreme Court of Appeal by Brand JA in *Hawekwa*, which favoured the reasonable teacher test. In my view, application of the reasonable teacher test (and, where applicable, the reasonable principal criterion) in *Gouws* would probably have resulted in a successful delictual claim for the harm suffered by the injured K and her father. Of course, the plaintiff would then still have had to prove that the injury to K's little finger would not have occurred, had proper discipline been exercised and reasonable supervision been performed; this is a matter of causation or 'relevance of negligence'.⁵⁵ But the probabilities are that, if there had been proper discipline and reasonable teacher supervision in the classroom before school started, the children would have left the classroom in an orderly fashion when the school bell rang, without slamming the door shut, with the result that K would not have been injured.

53 *Peet Gouws v Laerskool Lynnwood & MEC for Education, Gauteng* case no. 3223/11 (24 October 2012) (GP); paras. 19-21.

54 See Neethling & Potgieter 2015:133-134.

55 See *Williams v LUK Gauteng, Departement van Onderwys* case no. 3687/01 (14 May 2003) (T) and its analysis by Potgieter 2008b:193ff.; Neethling & Potgieter 2015:162.

Ultimately, in the schools' context, the correct approach to delictual negligence should be that educators must adhere to the standard of care expected from the reasonable educator in the particular (educational) circumstances; in other words, the reasonable teacher test for negligence, as reflected in the judgment of Brand JA in *Hawekwa*, must be applied, and not the test of the reasonable parent in relation to his/her own children, nor any other formulation of the negligence test.

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