

Limitations to the Indemnification of a Minor's Right to Recourse

Izak J. Oosthuizen, Potchefstroom University, South Africa

Introduction

Educators have a duty of care towards those students who are entrusted to them (*Peter Wynkward v Minister of Education and Another* (2002)). The **duty of care** implies that in certain instances and under certain circumstances, the educator (or the school) has a legal duty to ensure the safety of the students under their control.

The legal determinants with regard to the South African educator's duty of care are as follows (Bray *et al.*, 1990:96):

- **Common law** can be described as the uncodified set of legal principles based on the South African legal tradition as derived from the Roman-Dutch legal heritage and adapted to the distinctiveness of the South African legal background. At the root of an approach to the South African educator's duty of care lie South African common law principles. And at the heart of the South African educator's duty of care lies the common law principle of *in loco parentis* (in the place/in lieu/ instead of a parent) (Hiemstra *et al.*, 210).
- **Legislation:** From time to time certain legislative provisions are promulgated that have an altering effect on a common law principles.

Provisions of the utmost importance with regard to the safety and general well being of children are sections 28(1)(a) – (d) as well as 28(2) of the South African Constitution (SA, 1996) which specifically emphasise the best interests of children, their right to proper care, shelter and protection against neglect.

Section 42 of the South African Child Care Act (SA, 1983) determines that educators are to take care of learners in the sense that they are compelled to report cases of child neglect and abuse.

- **Case law:** The rulings by various High Courts and/or the Supreme Court of Appeal form another source of law, known as case law. With regard to case law the findings of the High Courts are binding in terms of the doctrine of precedence. Basically, this implies that the court could deal with a particular case in the same way that a similar case has been dealt with previously.

Probably the first Supreme Court of Appeal Case in South Africa in this regard was *Transvaal Provincial Administration v Coley* in 1925. The most recent case was that of *Peter Wynkward v Minister of Education and Another* of 2002.

Apart from these sources, it is also imperative to take cognisance of international law and foreign law:

- **International law:** In terms of section 39(1)(b) of the South African Constitution, a court, when interpreting the Bill of Rights, must consider international law. Of all the international law instruments, the United Nations Convention on the Rights of the Child (UN, 1989) as ratified by South Africa in 1995, could be deemed the most significant International Law instrument with regard to educator's duty of care and learner safety.

One should also take cognisance of the Declaration of the Rights of the Child of 1959 (UN, 1959) where the present well-known phrase of 'the best interest of the child' was introduced. Principle 7 determined the best interests of the child to be the 'guiding principle' of those who are to be responsible for the education and guidance of children.

- **Foreign law:** In terms of section 39(1)(c) of the South African Constitution, a court, when interpreting the Bill of Rights, may consider foreign law. Foreign law implies foreign case law, which are applicable to educator duty of care and learner safety in South Africa.

Consequently, it is clear that under certain circumstances, an educator can for example be held delictually liable for damages incurred by a learner as a result of the fact that the educator's conduct did not adhere to legally required standards.

The objective of this article is to amplify these legally required standards with regard to the educator's duty of care. A further objective is to analyse the Supreme Court of Appeal's approach in *Minister of Education and Culture (House of Delegates) v Azel and Another* to endorse the learner's independent right to compensation, given the absence of an appropriate standard of care by an educator.

The Law Of Delict (Law Of Torts)

Basically, what is labelled as law of torts in the Australian context, is referred to as law of delict in South Africa. Neethling *et al.* (2001:3) contend that the role of the law of delict is to identify which civil or private law interests are recognised by law, the circumstances under which such interests are protected, and in what manner (how) such a disturbance can be restored to a harmonious balance of interest between parties.

To constitute a delict, the act has to meet the following five prerequisites or elements:

- there has to be wilful human **conduct** (an act);
- there has to be **damage**;
- the damage has to be **causally linked** to the particular act;
- the act must be **unlawful** - infringing a legal interest; and
- there has to be **fault** in the form of negligence (*culpa*) or intent (*dolus*).

Fault As An Element For Delictual Liability

Fault manifests itself either in the form of intent or negligence. This article emphasises the element of **negligence** since, according to Squelch (2001:145), it has been scrutinised in almost all the reported South African delict cases in education.

Negligence occurs when a person's conduct fails to meet the standard of care that is legally required of that person. This required standard is defined by the reasonable man test. The latter implies that the court will ask the following kind of questions: 'How would a **reasonable man** have acted in the wrongdoer's circumstances? Would a reasonable person have foreseen the damage as a possible consequence of his/her conduct? Would a reasonable person, having foreseen the likelihood of damage, have taken steps to prevent such harm from occurring?'

In *Rusere v Jesuit Fathers* Judge Beck referred to the educator's duty of care and the manner in which it has to be conducted as follows:

The duty of care owed to children by school authorities has been said to be to take such care of them as a careful father would take of his children ... This means no more than that schoolmasters, like parents, must observe towards their charges the standard of care that a reasonable prudent man would observe in the particular circumstances.

In the absence of any particular circumstances giving rise to a measure of risk beyond that which is normal in the daily routine of life, it is not the law that a school master must keep his pupils under supervision for every moment of their school lives.

As far as educators are concerned, various factors, which influence an educator's negligence, have to be considered. These factors are:

- Proficiency and expertise -

As in the case of medical doctors, attorneys, etc., educators are regarded as professionals, and thus a high degree of proficiency, expertise, skill and care are required from them in exercising their profession. Due to their expertise, 'reasonable educators' have to comply with a higher standard of care – the standard of an expert - one who is experienced and trained to handle and care for learners (Botha, 2002: 80).

- Greater care when dealing with children -

The fact that an educator is not only professionally trained to handle learners, but also experienced in doing so, has to be kept in mind when an educator's conduct is judged. Due to the impulsive and often immature conduct of a learner, a greater degree of care is required where learners are involved (Scott, s.a.: 123).

In *Peter Wynkwart v Minister of Education and Another* (2002) Judge Ngwenya contended the following:

Teachers act *in loco parentis* most of the times. They are even better trained than parents about children development. School-going children spend the best part of

their active lives with educators rather than their parents. So, in my view, it is not asking too much of a person acting *in loco parentis* to be judged according to the normal test in the discharge of his/her duties towards his/her ward.

Some Ramifications Resulting from *Azel*

The appeal of *Minister of Education and Culture v Azel and Another (1995)* resulted in some significant ramifications with regard to learner safety in South African schools, as well as the educator's duty of care. The first respondent (*Azel*), whilst still a minor and a student at a school under the jurisdiction of the appellant, was transported on a school tour by Mrs J., a Biology educator, employed by the first respondent. *Azel* was seriously injured in a motor car accident, which resulted from Mrs J's negligent driving. Prior to the tour, *Azel*'s mother had signed a letter of indemnity, which excluded the school's liability for medical and other costs incurred by the parent. Consequently, since the mother had waived her rights to claim, she did not file suit.

However, in terms of the legal principle that a parent may not act to the detriment of a child, such indemnity can normally be valid only with regard to damage suffered by the parent, but not with regard to and on behalf of damage suffered by a child. Consequently, on having obtained the age of majority, *Azel* instituted an action against the Minister of Education.

The South African Supreme Court of Appeal dismissed the Minister's appeal, and confirmed the decision of the court *a quo*, ruled in favour of *Azel*, and ordered the Minister to pay for damages to the amount of R765, 252 (\pm AUD\$124,000 at the exchange rate current in September, 2002).

Some of the ramifications for student safety in contemporary South African schools that arise from *Azel* are:

The Educator's Duty Of Care Confirmed

Azel confirmed the educator's duty of care and emphasised the point that the role of educators is based on their common law position of *in loco parentis*. As early as 1925, in *Transvaal Provincial Administration v Coley*, this common law role of the educator was seen to be that which a *diligens paterfamilias* would have played in all circumstances. Judge De Villiers defined it as follows:

It is not the care which the man takes in his own affairs, nor that which the ordinary or average man would take. It is higher than that. The law sets up a standard to which everybody has to conform that degree of care which would be observed by a careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty. It will be observed that the standard of care is a high one. The test is not the diligence of the supine man, but of the man who is alive to probable dangers and takes the necessary steps to guard against them.

A Parent May Not Act To The Detriment Of A Child

Azel (again) endorsed the common law principle that determines that a parent cannot act to the detriment of their child.

Constitutional Endorsement Of A Child's Interests

It could be contended that this common law approach is also embedded in the Constitutional approach to serve the 'best interest of the child'.

Azel not only emphasises the common law principle, but it also has to be adjudged as a sound Constitutional approach. At the time of the court's ruling in 1995, the transitional Constitution (SA, 1993) was in effect. Section 30(3) emphasised the 'best interests' of a child to be of 'paramount importance'.

With reference to the present Constitutional approach, section 28(2) of the SA Constitution determines that a 'child's best interests are of paramount importance in every matter concerning the child' (SA, 1996). In a situation such as that of *Azel*, it seems to be a valid approach to contend that it is not to the best interests of children if parents sign indemnity forms on their behalf whereby they waiver their children's rights to safety, care and recourse.

It is of interest to raise the question as to whether a student supported by a parent/guardian could sign/endorse a valid letter of indemnity. Apart from the Constitutional consideration of 'the best interests of the child' - in an effort to find a valid answer - it seems to be worth the while to turn to South African common law for an answer. It is likely that the common law principle of *restitutio et integrum* (Robinson, 1997:25) is also applicable in an instance such as this. This remedy is aimed at restoring the *status quo ante* (the situation which would have existed if there were no contract). It is available to the minor who can satisfy the court that a transaction entered into by his/her guardian on his/her behalf, or one entered into by the minor himself/herself with the guardian's assistance, is so inherently prejudicial that he/she will suffer serious loss if it is not set aside.

International Law Endorsement

One of the major international instruments on the rights of the child, The Convention on the Rights of the Child of 1990, was ratified by South Africa in 1995. Article 19(1) of this Convention is relevant to the educator's duty of care. In terms of the child's physical and mental wellbeing, the signatories agreed as follows:

States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

According to Sloth-Nielsen (1995:408) part of the 'soul' of the Convention lies embedded in the fact that the child is to be seen as the independent bearer of his own rights. Referring to the contents of article 12 of the Convention, Sloth-Nielsen contends that it recognises the fact that the best interests of the child are not only those rights that are merely to be read off from what adults

think the best for children are to be – but that children are bearers of rights of their own. And those children now have an opportunity concerning all judicial and administrative decisions that affect them. Article 12 determines:

States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Application Of The Prescription Act

For the first time in South African education, litigation was based on the specifications of section 13 of the Prescription Act of 1969 (SA, 1969). This section determines as follow:

13. Completion of prescription delayed in certain circumstances

(1) If

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force ... the period of prescription shall not be completed before a year has elapsed ...

This implies that minors, on obtaining majority, have one year to file suit for damages incurred as a result of negligence by an educator / the school.

The Right To Claim For Damages

Minors, on obtaining majority, have a right to file suit regardless of the fact that the parent / guardian has signed a letter of indemnification. This implies that such a minor will theoretically have the right to claim for, *inter alia*, damages for pecuniary losses such as:

- damage to property, and
- medical costs. Also ongoing (future) medical costs resulting from the aggrieved negligence. After obtaining majority, plaintiffs are normally responsible for their own medical expenses. Consequently, this implies that they will be entitled to claim for future medical expenses causally linked to the act of negligence. Medical costs incurred by the parents have a bearing on their (parental) own claims.
- In addition, minors obtaining majority may claim for the following compensatory damages:
- Pain and suffering. A plaintiff has the right to claim for all physical and mental pain, suffering and discomfort resulting from past or future injuries (Corbett & Buchanan, 1990: 51).

- Emotional shock is normally identified with pain and suffering for which compensation may be claimed (Potgieter, s.a.: 9).
- Disfigurement which includes all forms of facial and bodily disfigurement including scars, loss of limbs, a limp caused by a leg injury or facial and bodily distortion (Erasmus & Gauntlett, s.a.: 45).
- Loss of amenities of life which refers to physical or mental disabilities – temporary or permanent – which diminishes the plaintiff’s enjoyment of life (Erasmus & Gauntlett. s.a.:45).
- In *Goldie v City Council of Johannesburg* it was held that a plaintiff could, under certain conditions, successfully file for compensation due to a shortened life expectation. This could for example imply that a plaintiff’s normal expectation has been reduced by injuries.

Letters Of Indemnification

Letters of indemnity and their validity to exclude liability did not come under scrutiny as such. However, it seems obvious that such letters could exclude liability and that by signing them, parents (or guardians) waive or limit their rights of recourse ‘thereby holding the educator (and/or the school) harmless for any damages that they may suffer’ (Botha *et al*, 2002:85).

The wording of letters of indemnification has to be chosen very carefully. In this particular instance, the last phrase of the letter of indemnification was as follows:

... in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child.

The judge emphasised the implications of this phrase as decisive in his ruling. It implies that a school could easily limit its scope of indemnification by inserting phrases such as the above-mentioned in a letter of indemnification to be signed by parents.

From an American perspective a waiver generally does not seem to prevent an injured student from suing and schools are in general unsuccessful in using waivers in their defence against suits for negligence (Fischer *et al.*, 1999:82). In *Alexander v Kendall Central School District* it was ruled that minors are not bound by letters of indemnification signed by a parent. Particular cases where releases have been upheld were mostly those instances where the parents or guardians failed to disclose essential information pertaining to the student. For example, in *Powell v Orleans Parish School Board*, 354 So. 2d 289 (La.Ct.App.1978), the court ruled in favour of the School (and the legitimacy of the letter of indemnification). In this instance a parent signed a letter of indemnification allowing his son to swim, but refrained from mentioning that his son could not swim.

Conclusion

During the past two decades there have been renewed efforts to alter and improve the living conditions of children. The Convention on the Rights of the Child underlines this on an international level. Some of the main objectives of the Convention seem to be aimed at the

protection of children, the acknowledgement of their individuality, and the fact that they are independent bearers of their own rights.

On a national level the South African Constitution focuses pertinently on the promotion of the best interests of the child when it determines that 'A child's best interests are of paramount importance in every matter concerning the child'.

Consequently, in evaluating the merit of the *Azel* ruling, it is obvious that these tendencies were carefully endorsed. In addition, the ruling should not be seen to be alien to the South African legal tradition either. Especially when adjudged in the light of the common law principle that a parent cannot act to the detriment of a child.

References

- Botha, P. & Oosthuizen, I.J. (2002). The educator as caring supervisor. In I.J. Oosthuizen (ed.), *Aspects of Educational Law*. Pretoria: Van Schaik.
- Bray, W., Van Wyk, J.G. & Oosthuizen, I.J. (1990). *Case law on Education*. Durban: Butterworths.
- Corbett, M.M. & Buchanan, J.L. (1990). *The quantum of damages in bodily and fatal injury cases*. THHR
- Erasmus, H.J. & Gauntlett, J.J. sa. *Damages* 7 LAWSA.
- Fischer, L., Schimmel, D., & Kelly, C. (1999). *Educators and the law*. New York: Longman.
- Hiemstra, V.G. & Gonin, H.L. (1990). *Trilingual Legal Dictionary*. Kewyn: Juta.
- Neethling, J., Potgieter, J.M. & Visser, P.J. (2001). *Law of Delict*. Durban: Butterworths.
- Oosthuizen, I.J. (2002). Common law. In I.J. Oosthuizen (ed.), *Aspects of Educational Law*. Pretoria: Van Schaik.
- Potgieter, J.M. s.a. *Emotional shock*. 9 LAWSA 1
- Robinson, J.A. (ed.) (1997). *The Law of Children and Young Persons in South Africa*. Durban: Butterworths.
- Scott, T.J. s.a. Die reël *impertitia culpa adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg. In Petere fontes: LC Steyn Gedenkbundel. Pretoria: The Hugo de Groot Organization.
- Sloth-Nielsen, J. (1995). Ratification of the United Nations Convention on the Rights of the Child: some implications for South Africa. *SA Journal for Human Rights*.
- Squelch, J. (2001). Do Governing bodies have a duty to create safe schools? An educational law perspective. *Perspectives in Education*, 19(4).
- SA: see South Africa
- South Africa (1969) *The Prescription Act, No.68 of 1969*. Pretoria: Government Printers.
- South Africa (1983) *South African Child Care Act, No. 74 of 1983*. Pretoria: Government Printers.
- South Africa (1993) *The Transitional Constitution of the Republic of South Africa. Act 200 of 1993*. Pretoria: Government Printers.

South Africa (1996) *The Constitution of the Republic of South Africa, Act 108 of 1996*. Pretoria: Government Printers.

UN: see United Nations

United Nations (1989) *Convention on the Rights of the Child*. New York: United Nations General Assembly.

United Nations (1959) *Declaration of the Rights of the Child*. New York: United Nations General Assembly.

Court Cases

Alexander v Kendall Central School District, 634.NYS 2D 318 (App. Div. 4th Dept. 1995).

Goldie v City Council of Johannesburg 1948 2 SA 913 (W).

Minister of Education and Culture (House of Delegates) v Azel and Another 1995(1) SA 30 (A).

Peter Wynkwart v Minister of Education and Another 2002. case 4168/1999 (C).

Powell v Orleans Parish School Board, 354 So. 2d 289 (La.Ct.App.1978).

Rusere v Jesuit Fathers 1970 4 SA 537 (RSC).

Transvaal Provincial Administration v Coley 1925 AD 24.

