

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: 493/2016

Heard: 07 to 11 November 2023

Argued: 26 February 2024

Delivered: 12 April 2024

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Regional Magistrates: YES/NO

Circulate to Magistrates: YES/NO

In the matter between: -

W[...] L[...] obo M[...] L[]

PLAINTIFF

and

THE MEC FOR EDUCATION:

NORTHERN CAPE PROVINCIAL GOVERNMENT

FIRST DEFENDANT

THE SCHOOL GOVERNING BODY: BOEGOEBERG

BRANDBOOM INTERMEDIARY SCHOOL

SECOND DEFENDANT

JUDGMENT

Stanton J

INTRODUCTION:-

- [1] On 08 March 2016, Mr William L[...], on behalf of his then minor son, M[...] L[...], born on 10 August 2002 (“M[...”]), instituted an action for a delictual

claim against the defendants, the MEC for Education: Northern Cape Provincial Government (*“the Department of Education”*) and the School Governing Body for the Boegoeberg Brandboom Intermediary School (*“the Governing Body”*).

[2] The action against the Governing Body was withdrawn on 16 October 2020.

[3] A notice of substitution was filed on 31 October 2023 as M[...] had reached the age of majority.

[4] The merits and the quantum were separated; and on 11 August 2023 an order was granted in terms of Uniform Rule 33(4) that the following issues should be determined separately from any other issues in the trial: -

4.1 Whether M[...] had slipped on the wet concrete floor causing him to knock his head on the edge of the urinal in the bathroom of the Boegoeberg Brandboom Intermediary School (*“the school”*);

4.2 Whether M[...] suffered severe injuries in slipping on the wet floor and knocking his head on the edge of the urinal; and

4.3 Whether the injuries suffered by M[...] were caused by the negligence of the Department of Education.

(“the separated issues”)

[5] According to the particulars of claim, the following are relevant to the determination of the separated issues: -

5.1 On or about 02 November 2011, during school hours and in the afternoon, M[...] attended the boys’ bathroom/changing room;

5.2 Unbeknownst to M[...], the floor of the bathroom/changing room was wet;

- 5.3 M[...] slipped on the wet cement floor and knocked his head against the edge of the urinal, which resulted in him immediately feeling pain to the left side of his head and causing him severe injuries (*“the incident”*);
- 5.4 Due to the injuries sustained in the incident, he did not return to class, but became tired and went to rest under a tree. He was struggling to walk, dragging his leg behind him;
- 5.5 Three teachers employed by the Department of Education and the Governing Body walked past M[...], without offering him any assistance;
- 5.6 M[...] embarked the bus with great difficulty and was assisted to his home; whereafter he was taken to the Gordonia Hospital;
- 5.7 As a result of the incident M[...] suffered a severe head injury, including brain swelling and permanent hemiparesis to his left side (*“the injuries”*);
- 5.8 The Department of Education and the Governing Body owed a legal duty of care to all learners on the premises, including M[...], as well as to the learners who were travelling on the bus to ensure that:
- 5.8.1 The school premises did not constitute a source of danger to learners;
- 5.8.2 All necessary and reasonable precautions are taken to ensure the safety of the learners;
- 5.8.3 Systems were put into place to keep the bathroom/changing room clean and tidy; and that water would not remain on the floor of the said area so as to constitute a danger to the learners;

- 5.8.4 A minor would not be injured whilst on the school premises;
- 5.8.5 Assistance is given to any pupil, in particular M[...], when it was clear that he was not well and needed assistance;
- 5.8.6 All reasonable steps were taken to ascertain why M[...] did not return to the classroom after he went to the bathroom/changing room; and
- 5.8.7 M[...] was given such reasonable assistance as was required and as was evident to them whilst M[...] embarked and disembarked the school bus.

(“the legal duties”)

- 5.9 The defendants wrongfully and negligently breached one or more of the legal duties.

[6] According to the Department of Education’s amended plea: -

- 6.1 The pupils were dismissed early on 02 November 2011; and the incident had not occurred during official school hours;
- 6.2 M[...] went to a bathroom where the floor was dry;
- 6.3 After the alleged incident, M[...] went to play with friends as usual, became tired and had rested under the tree whilst waiting for the bus;
- 6.4 M[...] had no visible injuries to his body and he did not require help;
- 6.5 M[...] boarded the bus without difficulty; and
- 6.6 M[...]’s mother informed the principal that the message she had received from the doctors is that they “*suspected that M[...] had had a light stroke*”.

[7] The Department of Education furthermore denies that: -

- 7.1 M[...] had slipped and fell, knocking his head on the cement part of the urinal;
- 7.2 M[...] had hit his head, which resulted in severe injuries;
- 7.3 M[...] had sustained any injuries;
- 7.4 The school premises constituted a danger to either M[...] or the other learners;
- 7.5 The floor of the bathroom was wet or had in any way posed a danger to any of the learners; and
- 7.6 M[...] was injured on the school premises.

[8] The Department of Education specifically pleaded that the bathrooms are cleaned after school hours. It did not, however, plead that M[...]’s negligence had contributed to the incident.

THE PLAINTIFF’S EVIDENCE:-

[9] During his examination in chief, M[...] testified that:-

- 9.1 He was in Grade 3 when the incident happened, that it happened during November 2011, but that he could not remember the date;
- 9.2 He completed Grade 12 at the school in 2020;
- 9.3 He was in Ms Geyer’s class, but she had left that day to attend a workshop. The class was then divided into groups, and he went in a group to Ms Faro’s class for the day from 10:00 to 13:00. The school had two breaks per day. After the first break, he went to Ms Faro’s class. After the second break, he went to class, sat on the

carpet, and requested Ms Faro's permission to leave the room. He left with her permission and went to the bathroom;

9.4 After urinating, he tucked in his shirt, fastened his pants and stepped off the cement block of the urinal. As he stepped off, he slipped in water, fell and hit his head behind his right ear against the cement block. He lay there for a little while, rubbing his head, whereafter he stood up and walked slowly back to class. He felt "drunk" or "dizzy" and a little sore, but he was not in pain.

9.5 After school adjourned, he walked slowly and went to sit under a tree to wait for the bus. He did not play with his friends as his head was still dizzy. His last memory was of sitting under the tree watching the children play. He could not remember getting on or off the bus. His first recall thereafter was when he was in the ambulance in front of the hospital;

9.6 He demonstrated the physical result of the injuries and explained that he has a permanent claw-like left hand, that he cannot use his left arm as before and that he cannot extend his fingers. Three photographs depicting the result of the injuries were handed in as exhibit B;

9.7 Nobody was inside the bathroom with him when he fell, and nobody enquired from him as to what had happened;

9.8 He did not feel dizzy before the fall; and

9.9 On being referred to the photographs that his sister took on 14 June 2019 of the bathroom where he fell ("the photographs"), he confirmed that: -

9.9.1 He fell in the bathroom depicted in the photographs;

9.9.2 He notices the water and the old water stains on the floor;
and

9.9.3 He could not remember if the wall looked the same on 02 November 2011 or whether there was always water on the floor, and that he doesn't know where the water had come from on 02 November 2011.

[10] When cross-examined: -

- 10.1 M[...] testified that the incident happened a long time ago;
- 10.2 He explained that he asked Ms Faro to leave the classroom, but he did not ask to go to the bathroom as it was normal for a teacher not to ask; and she knew where he was going;
- 10.3 When it was put to him that Ms Faro will testify that he was not in her class the day of the incident, he persisted that he was in her class;
- 10.4 With reference to the photographs, he conceded that he could not remember whether the conditions on 02 November 2011 were identical to the conditions as depicted in the photographs;
- 10.5 He testified that when he entered the bathroom on 02 November 2011, he noticed that the floor had some wet spots of water, but that it was dry at the door and at the base to the urinal.
- 10.6 He reiterated that he stood on the cement block and had stepped off onto the floor;
- 10.7 On why he didn't step on a dry spot, he answered that he did not see the wet spot as he had his back to the floor. He also elaborated that he could not have reached the dry area as it was too far, and even if he had jumped, he would have slipped and fell;
- 10.8 He did not get any stitches and he also did not have any visible bruises as a result of the incident;

- 10.9 He repeated that no teachers enquired about his welfare;
- 10.10 With reference to a note on the Gordonia Hospital patient record of 03 November 2011, reflecting that he had fainted, he was adamant that he hadn't fainted but had slipped and fell; and that he doesn't know where the doctor got that information;
- 10.11 On being confronted by further notes on the Gordonia Hospital patient record of 03 November 2011 that states a doctor "*thinks RMCA might have caused the fall*" and "*young CVA*", he persisted that he did not faint, but had slipped and fell;
- 10.12 He couldn't comment on whether young children could suffer strokes;
- 10.13 He disagreed with a statement that Mr van der Westhuizen, the principal, would testify that the school activities were not normal on 02 November 2011. He explained that is not what he remembers.
- 10.14 He repeated that he went to Ms Faro's classroom after Ms Geyer left; and
- 10.15 He denied Ms van Staden finding him lying on the floor and asking whether he was "okay" after she was told by a learner that he had fallen in the bathroom and was lying on the floor.

[11] During re-examination, M[...] confirmed that: -

- 11.1 He had informed the doctor that he had fallen, not that he had fainted;
- 11.2 He explained that he got off the cement block in the manner he did as it was the safest way to exit the bathroom; and
- 11.3 he never suffered any dizzy spells prior to the incident.

[12] Mr DP Prins, a cleaner in the employ of the school from 2012 until 2019, testified that: -

12.1 He would clean the boys' bathrooms after school, prior to the school commencing, and after it had adjourned for the day;

12.2 During his time of employment at the school the bathrooms were always very dirty, and the floors were very wet.

12.3 With reference to the photographs, he stated that: -

12.3.1 The stains on the floor were caused by water as the floors are often wet as a result of the urinal's being clogged up with paper and rubbish, causing water to spill over; and

12.3.2 The condition of the bathroom as depicted on the photographs are similar to the conditions he saw daily during 2012.

[13] When cross-examined, Mr Prins conceded that he could not comment on the conditions of the bathroom during November 2011. On being re-examined, Mr Prins testified that he often found the bathroom in a very dirty state, as depicted on the photographs, but that he would then clean it up. He also reiterated that he did not clean the bathrooms between 12:00 and 13:00 as he would usually clean the classrooms first.

[14] Mr Benjamin Jonkers testified in chief that: -

14.1 M[...] is his nephew;

14.2 On 02 November 2011, he was a learner at the school in Grade 8;

14.3 When school adjourned for the day on 02 November 2011, on his way to the bus, someone asked him why M[...] is sitting under the tree. He went to help M[...] up from where he was leaning against

the tree. He helped M[...] to and into the bus as he was struggling to walk by himself;

14.4 He noticed that M[...]’s clothes were wet and full of soil on the right side of his body;

14.5 He assisted M[...] to get off the bus. M[...] could only walk slowly; and he was unbalanced;

14.6 He asked his sister, Brumhilda L[...], to carry their bags;

14.7 He put M[...] on his back and carried him home; and put him on his bed;

14.8 M[...] could not speak and he was slurring; and

14.9 He could not remember whether M[...]’s father and mother was at home when they arrived.

[15] On being cross-examined, Mr Jonkers: -

15.1 Persisted that he assisted M[...] to get into and off the bus, and that he carried him home, despite the fact that M[...] did not testify about this;

15.2 Asked M[...] what was wrong with him, but he could not talk;

15.3 Was adamant that he had helped M[...] into and off of the bus; and

15.4 Said he could not remember whether there were any teachers either on the playground when M[...] was leaning against the tree; or on the bus.

[16] Miss Brumhilda L[...] in essence corroborated Mr Jonker’s evidence pertaining to:

- 16.1 M[...] having struggled to walk to the bus;
- 16.2 The assistance Mr Jonkers provided to M[...] to get him into and off the bus;
- 16.3 Mr Jonkers having carried M[...] on his back; and
- 16.4 M[...] not speaking or reacting when he was put on his bed.

[17] In addition, Ms L[...] testified that: -

- 17.1 When they disembarked from the bus, she too helped M[...] and had carried the bags;
- 17.2 There was something wrong with M[...] and he spoke with difficulty;
- 17.3 02 November 2011 was a Wednesday and that school had adjourned as it normally did, which was earlier than on Tuesdays and Thursdays; and
- 17.4 She could not comment on the condition of the boys' bathroom, but she added that the girls' bathroom was always dirty with water on the floor.

[18] When cross-examined, Ms L[...] persisted with the version she provided during her examination in chief. She explained that the help she provided was to carry the bags and to help Mr Jonkers keep M[...] steady. When it was put to her that Mr Jonkers did not testify that she assisted him to keep M[...] steady, she stated that she only helped him a little bit.

[19] Dr Z Domingo, a neuro-surgeon, was called to testify as an expert on M[...]’s behalf. During his examination in chief, he restated his opinion, contained in his report, dated 15 December 2017, of which the following is pertinent: -

- 19.1 He examined M[...] in the presence of his father on 10 April 2017;

- 19.2 In addition to his physical assessment of M[...], he also studied the medical records of the Gordonia Hospital that reflect the following pertinent notes: -

"02 November 2011 -11:00 pm

M[...] fell at school

Since this afternoon he has decreased power left side of the body, specifically the left arm

02 November 2011 -11:30 pm

Apparently well until fall this morning at school

? circumstances

? part of body that made contact with the floor

Tongue deviated to the left

Left sided hemiparesis

Upper limb power grade of 1/5

Lower limb power grade 4/5

Assessment

Left hemiparesis

? cause of the intracranial pathology

For CT scan

03 November 2011

Telephonic report:

Right middle cerebral artery infarct

03 November 2011

Child fainted in toilet

Then depressed level of consciousness

Scanned - right middle cerebral artery infarct

08 November 2011

Young CVA

Right middle cerebral artery infarct

Left hemiparesis

11 November 2011

Final diagnosis – young CVA

CT – right middle cerebral artery infarct”

[20] Dr Domingo: -

- 20.1 With reference to his assessment of M[...] and the hospital record, confirmed that the CT scan confirmed the diagnosis of a right middle cerebral infarct; and the absence of any evidence of any intracranial trauma, as a result of which M[...] has been left with clinical evidence of left hemiparesis affecting his arm more than his leg;
- 20.2 Expressed his opinion that there is no doubt that M[...] sustained a middle cerebral infarct, as demonstrated on the initial CT scan; and that M[...]’s clinical picture, progress in the ward and current physical deficits are in keeping with this diagnosis;
- 20.3 Stated that there is no evidence that M[...] sustained a significant traumatic brain injury and his current problem is not as a result of a traumatic brain injury, but a slow progressing cerebral infarct;
- 20.4 With regard to the cause of the middle cerebral infarct, and the causal relationship to the fall at school, opined that in view of the fact that the weakness developed over a period of a few hours, and he was initially able to stand and walk home, that it is highly unlikely that the fall was as a consequence of an infarct;

- 20.5 Explained that it appeared from the hospital records that there were no underlying factors which placed M[...] into a high-risk category of having a stroke; and
- 20.6 Opined it to be highly probable that he sustained a carotid artery injury when he fell which resulted in a carotid artery dissection, which then resulted in a stroke.

[21] Dr Domingo furthermore: -

- 21.1 Testified that he examined M[...] on 08 November 2023 and found no change in his condition or functioning since 18 April 2017;
- 21.2 Confirmed his final diagnosis of a right middle cerebral artery infarct as a result of the fall. He added that the result of the injury would not be immediate, but would take time to develop;
- 21.3 Restated that he was absolutely certain that M[...] did not have a stroke before he fell as he could still stand up and walk to the tree;
- 21.4 Explained that M[...]’s cerebral artery was most likely stretched as a result of the fall, which caused the blood to divert into the cavity, which reduced blood flow to the brain; and ultimately caused the infarct;
- 21.5 Confirmed that the CT scan confirmed an infarct and no intracranial bleeding or a haemorrhage;
- 21.6 Testified that M[...]’s blood pressure was normal when he assessed him in 2017 and Dr SM Nhlapo’s report, dated 12 October 2020 also confirmed that M[...] does not suffer from high blood pressure;
- 21.7 Explained that: -

21.7.1 A stroke as a result of high blood pressure would result in a haemorrhage, which M[...] clearly did not have according to the CT scan;

21.7.2 M[...]’s infarct was caused by a whiplash type injury, which does not require severe trauma; and would not always cause external bruising;

21.7.3 The type of injury sustained by M[...] was caused by a fall, which resulted from a change of movement of the neck, almost like a whiplash type injury which could only have happened had he fallen and knocked his head. He referred the court to seven articles, recorded in academic literature, where similar incidents caused similar injuries in young children. In one instance a young 9-year old girl suffered a stroke after a minor cerebral trauma 20 days after she was hit by a volleyball;

21.7.4 The force of the impact is irrelevant and even a mild force could give this effect as a result of the change of movement of the neck, which causes a tear or dissection in the carotid artery, which would then result in the artery becoming blocked, and as a result thereof, blood would not be able to reach certain parts of the brain.

[22] Dr Domingo’s evidence was not placed in dispute when he was cross-examined, and he persisted with his explanations, findings and conclusions. The Department of Education did not call a medical expert to testify on its behalf.

THE DEFENDANT’S EVIDENCE: -

[23] Ms Geyer testified that: -

23.1 She was M[...]’s class teacher on 02 November 2011; and

23.2 The school was dismissed at 10:00 as some teachers had to attend the SATU workshop in Upington.

[24] She denied that the pupils were divided into groups or that M[...] was in a group that was placed in Ms Faro's class.

[25] Ms Faro corroborated Ms Geyer's evidence about the school adjourning early on 02 November 2011; and that M[...] was not placed in her class. She also denied that M[...] asked her whether he could leave the classroom. According to her evidence: -

25.1 She did not attend the SATU workshop, but remained at school;

25.2 She was on her way to the bus with Ms van Staden when some learners approached them and informed them that M[...] had fallen in the bathroom;

25.3 On the way to the bathroom, they met M[...] outside and he informed them that he was "okay";

25.4 She checked M[...] for injuries, but saw none and his clothes were dry and unsoiled;

25.5 She and Ms van Staden inspected the bathroom and found same clean and dry;

25.6 She and Ms van Staden reported the incident to the principal, Mr van der Westhuizen;

25.7 While waiting for the bus, M[...] played with the other learners; and

25.8 M[...] alighted the bus without any assistance; and also walked on his own when he got off the bus.

[26] Ms Faro's evidence when cross-examined was not seriously disputed. She, however, did state that she did not know where M[...] fell in the

bathroom. Ms Faro became confused when confronted with a statement that M[...] used the senior bathroom depicted on the photographs; and she stated that they inspected the junior boys' bathroom. Later she testified that *"Ek is regtig nie nou seker of dit die junior of die senior toilette is nie. Ek kan nie nou sê nie."* She conceded that M[...]s clothes may have been wet; and that she perhaps did not notice it; and that M[...] could have been injured, but she did not notice that as she is not an expert. She also agreed that when she inspected the boys' bathroom on previous occasions, she found the floor to be wet and that the floor had stains caused by water.

[27] Ms S van Staden, a grade R teacher at the school on 02 November 2011, testified and corroborated Ms Faro's evidence in all material respects, save to add that she asked M[...] if he had fallen, to which he answered in the affirmative. She did not ask him where or how he fell. When she was referred to the photographs, she conceded that the stains on the floor were made by water that had dried up. She was adamant that she and Ms Faro inspected the junior bathroom and not the senior bathroom depicted in the photographs.

[28] Mr DC van der Westhuizen, the principal of the school from 1990 to 2021: -

28.1 Confirmed that the school adjourned at 10:00 on 02 November 2011;

28.2 Had inspected the bathroom after the incident had been reported to him and found same to be clean and dry;

28.3 Attempted to explain the condition of the bathroom as depicted on the photograph by referring to three incidents of vandalism to the bathrooms, which occurred during 2018/2019 and 2020; and

28.4 Testified during cross-examination that in addition to having the bathrooms cleaned after school, it is also cleaned after every break. He conceded that his evidence in this regard was not contained in the pleadings, and that it was also not confirmed by Mr Prins when he had testified.

APPLICABLE LEGAL PRINCIPLES: -

[29] It is trite that the plaintiff bears the overall *onus* to prove his or her claim on a balance of probabilities. In **Stacey v Kent**¹, Kroon J, writing for the majority of the full bench, put it in this way: -

“...The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.”

[30] The application of the balance of probability test, where there are two factually different versions before court, has been enunciated as follow: -

“In deciding whether the plaintiff has discharged the onus of proof, the estimate of the credibility of true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nonetheless believes him and is satisfied that his evidence is true and that the defendant’s version is false. It is not desirable for a Court first to consider the question of the credibility of the witnesses and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry.”²

[31] In *casu*, according to the particulars of claim, M[...]’s claim is based on a wrongful omission. In summary, in the present circumstances, this Court must first decide whether M[...] has established that there was an omission in relation to the harm that forms the basis of his claim. Then, assuming that M[...] establishes such an omission, this Court must secondly decide whether the omission on the part of the Department of Education was wrongful. In the third instance, this Court must consider whether there was fault on the Department of Education’s part in the particular circumstances of this case. Finally, this Court must consider whether M[...] has

¹ 1995 (3) SA 344 (ECD) AT 352H-I.

² National Employers’ General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E).

established both factual and legal causation in relation to the harm he has suffered; and in respect of the question of legal causation, whether as a matter of public policy, the Department of Education should be held liable for the harm.

- [32] The Supreme Court of Appeal in the matter of **McIntosh v Premier Kwazulu-Natal**,³ with reference to the judgment in **Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd** ⁴ reaffirmed as follows: -

"Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) in para [12]; Gouda Boerdery BK v Transnet 2005(5) SA 490 (SCA) ([2004] 4 All SA 500) in para [12]). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms."

.. when we say that negligent conduct... consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not...."

*The second inquiry is whether there was fault, in this case negligence. As is apparent from the much quoted dictum of Holmes JA in **Kruger v Coetzee**,⁵ the issue of negligence itself involves a twofold inquiry. The first*

³ [2008] 4 All SA 72 (SCA) at paragraphs [11], [12] and [14].

⁴ 2006 (3) SA 138(SCA) [also reported at [2007] 1 All SA 240 (SCA) - Ed] Brand JA, at 144A-C, paragraph 10.

⁵ 1966 (2) SA 428 (A) at 430E-F [also reported at [1966] 2 All SA490 (A)].

is; was the harm reasonably foreseeable? The second is; would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word "duty", and sometimes even the expression "legal duty", in this context, must not be confused with the concept of "legal duty" in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression "duty of care" is similarly a source of confusion. In English law "duty of care" is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in the Trustees, Two Oceans Aquarium Trust case, at 144F, "duty of care" in English law "straddles both elements of wrongfulness and negligence.

The crucial question, therefore, is the reasonableness or otherwise of the respondents' conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations including such factors as the degree or extent of the risk created by the actor's conduct, the gravity of the possible consequences and the burden of eliminating the risk of harm. See e.g. Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA) [also reported at [2001] 1 All SA 215 (A) - Ed] paragraph 17. Where, however, a public authority is involved a further consideration arises. It is this: a court when determining the reasonableness or otherwise of an authority's conduct will in principle recognise the autonomy of the authority to make decisions with regard to the exercise of its powers. Typically, a court will not lightly find a public authority to have failed to act reasonably because it elected to prioritise one demand on its possibly

limited resources above another. Just where the line is to be drawn is no easy matter and the question has been the subject of much judicial debate both in England and other Commonwealth countries. See e.g. Stovin v Wise [1996] AC 923 (HL); Gorringe v Calderdale Metropolitan Borough Council [2004] 2 All ER 326 (HL); Barratt v District of North Vancouver (1980) 11 4 DLR(3rd) 577 (SCC); Brodie v Singleton Shire Council (2001) 20 6 CLR 512 (HC of A) paragraphs 161 – 162. But whether the criterion to be applied is ultimately one of rationality or some other principle is unnecessary to decide. What, I think, is clear is that if in the actual implementation of a policy or procedure adopted by the authority, or for that matter in the course of its operations, foreseeable harm is suffered by another in consequence of a failure on the part of the authority's servants to take reasonable steps to guard against its occurrence, a court will not hesitate to hold the authority liable on account of that omission..."

THE APPLICATION OF THE LEGAL PRINCIPLES TO THE EVIDENCE: -

Ad omission:-

[33] It is not in dispute that M[...] fell. It is, however, in dispute whether M[...] slipped and fell as a result of water on the bathroom floor.

[34] In view of the pleadings and the evidence, I am persuaded that the probabilities are overwhelming that there was water on the floor, and therefore constitutes an omission by the Department of Education. I come to this conclusion as a result of the following:-

34.1 M[...]’s evidence that the school did not adjourn at 10:00 is contradicted by the evidence of all of the Department’ of Education’s witnesses. Despite inconsistencies in M[...]’s evidence, which I regard as immaterial, I take into consideration the fact that he was 9-years old when the incident occurred; and that he only testified 12 years after the incident;

34.2 I was, however, favourably impressed by M[...]’s evidence in respect of the fall and the reason for having fell. His evidence was

consistent throughout examination in chief and cross-examination and it was not disputed in cross-examination that he had slipped and fell as a result of water on the floor;

34.3 In my assessment, I found Ms Faro and Ms Van Staden's evidence somewhat unsatisfactory for the following reasons: -

34.3.1 The evidence of both these witnesses contradicts the plea that a report was made that M[...] was lying on the floor of the bathroom as this was not their evidence;

34.3.2 Ms Van Staden's evidence also contradicts what was put to M[...] in cross-examination, in that she would testify that she found him lying on the floor of the bathroom;

34.3.3 M[...], Ms L[...] and Mr Jonker's evidence was that M[...]’s clothes were wet. Ms Faro initially persisted in her examination in chief that his clothes were dry, but when cross-examined, she conceded that it could have been wet;

34.3.4 Ms Faro and Ms Van Staden both testified that nothing was wrong with M[...] and that he immediately went to play with his friends. The plea, however, stipulates that “*..M[...] recovered to play with his friends as usual.*” Furthermore, in reply to a request for trial particulars when asked what is meant by “*M[...] recovered*” it was stated that: “*M[...] was (sic) appeared a little subdued or not in the mood to play and later joined the play*”;

34.3.5 M[...] clearly identified that the bathroom where he fell was the one depicted on the photographs, being the senior boys' bathroom. Ms Faro was uncertain in whether she had inspected the senior or the junior bathroom and Ms Van Staden testified that they inspected the junior bathroom. Ms Faro and Ms Van Staden's evidence that the floor was dry is to my mind doubtful;

34.4 I agree with Mr M van Heerden SC, on behalf of M[...], that it is highly improbable, having regard to young children and a urinal in the boy's toilet, that there would not be water on the floor at the time when the incident happened, based on the following: -

34.4.1 According to the plea and Mr Prins's evidence the bathrooms are cleaned after school hours. Therefore, it is highly improbable that the bathrooms would have been clean prior to the incident;

34.4.2 The neglect, decay and lack of maintenance to and of the toilets is evident from the photographs taken on 14 June 2019. Although these pictures were taken some 8 years after M[...] had fallen in the bathroom, the following is relevant: -

34.4.2.1 Mr Prins stated that when he was at the school (he started work at the school on 16 July 2012, less than a year after M[...]’s fall) that the condition of the toilets when he arrived was similar to that in the photographs. This is in total contradiction of the evidence of Mr Van Der Westhuizen, who tried to put across to the court that he ran this “model” school with safe and clean toilets, but he could not explain why the toilets looked like they did when the photographs were taken;

34.4.2.2 Ms Faro, Ms Van Staden and Mr van der Westhuizen all confirmed the existence of water stains on the photographs. This is indicative of many years of neglect and a lack of maintenance;

34.4.2.3 Mr Prins testified that it was a regular problem that there was water on the floor of the bathroom as a result of the urinal becoming blocked and/or water spilling over from the hand basins; and

34.4.2.4 M[...]’s evidence that, although he could not state that the photographs 100% reflect the condition of the toilets on the day of his fall, they were substantively in the condition as reflected on the photographs.

Ad wrongfulness: -

[35] In its plea, the Department of Education denied that it owed a legal duty to M[...]. Mr Van der Westhuizen, however, conceded under cross-examination that the Department had a legal duty to all learners, including M[...], to ensure that: -

35.1 The school premises did not constitute a source of danger to learners;

35.2 All necessary and reasonable precautions are taken to ensure the safety of the learners;

35.3 Systems were in place to keep the bathroom/change room clean and tidy and that water would not remain on the floor of the said area so as to cause a danger to the learners;

35.4 A minor would not be injured whilst on the school premises;

35.5 Assistance is given to any pupil, in particular M[...], when it was clear that he was not well and needed assistance;

35.6 All reasonable steps had to be taken to ascertain why M[...] did not return to the classroom after he had gone to the bathroom/changing room; and

35.7 M[...] was given such reasonable assistance as was required and as was evident to them whilst M[...] embarked into and disembarked out of the school bus.

[36] In view of the judgment of the Supreme Court of Appeal in the matter of **Pro Tempore Academie CC v Van der Merwe**,⁶ where Navsa ADP affirmed with approval the following statement by Desai J in **Minister of Education and Another v Wynkwardt NO**,⁷ there is no uncertainty that the Department of Education owed a legal duty to M[...]: -

“It was not in dispute that [the Respondents’ minor son] R was injured at school while under the control and care of the appearance employees. And it was fairly and properly conceded that teachers are young children in their care illegal duty to act positively to prevent physical harm from being sustained by them through misadventure.”

[37] The next enquiry is to determine whether there was ‘fault’ on the part of the Department of Education. In other words, whether the Department can be said to have been negligent. In **Ngubane v The South African Transport Services**⁸, the Appellate Division was called upon to determine the issue of negligence where a passenger had fallen from a moving train, sustaining an injury. Kumleben JA restated the well-known principles applicable to liability in delict in the following terms: -

“Liability in delict based on negligence is proved if:

(a) *a diligens paterfamilias in the position of the defendant –*

(i) *would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*

(ii) *would take reasonable steps to guard against such occurrence; and*

⁶ 2018 (1) SA (SCA) 188 B to C.

⁷ 2004(3) SA 577 (C) at 580 A-C.

⁸ 1991(1) SA 756(A) at page 776-778.

(b) *the defendant failed to take such steps.”*

[38] It can hardly be contended that: -

38.1 Department of Education could not foresee the reasonable possibility that the failure to keep the floor dry could injure a learner, which could result in injury; and cause patrimonial loss; and

38.2 Department could not take reasonable steps to guard against such an occurrence; and

38.3 The Department had failed to take such steps.

[39] To my mind, the evidence amply demonstrates that omission created a risk of injury to M[...]; and to prevent its occurrence, by carrying out reasonable procedures, would have involved no extra cost to the Department of Education.

[40] As can be seen from the pleadings, the Department of Education has, *inter alia*, placed in issue the question of factual causation. The test to determine factual causation is the *sine qua non* test, sometimes referred to as the ‘...but for test’. As Jansen J in the matter of ***Cilliers v South African Railways and Harbours***⁹ put it: “Would the collision have occurred but for the negligence of the defendant?”

[41] This question has been considered by the then Appellate Division in the matter of ***International Shipping Co (Pty) Ltd v Bentley***¹⁰ where the position was summarised as follows: -

“As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a

⁹ 1961(2) SA 131 (T)

¹⁰ 1990 1 SA 680 (A)

cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part."

[42] I can come to no other conclusion than that the wrongful omission is sufficiently linked to M[...]’s injury, and his patrimonial loss; and that M[...] has proven that the injuries sustained by him were caused when he slipped on the wet floor and hit his head in the bathroom at the school, in view of: -

42.1 Dr Domingo’s uncontested evidence that M[...] did not have a stroke which resulted in the fall, but that the fall had caused his condition, which progressively worsened until he had the stroke that resulted in M[...]’s left-sided hemiparesis;

42.2 Dr Domingo’s evidence of M[...]’s progressive worsening condition which is supported by the evidence of Ms L[...] and Mr Jonkers;

42.3 The hospital record which reflects that M[...]’s condition deteriorated after his fall, and which is also consistent with the

manner in which the injury was caused as stated by Dr Domingo;
and

42.4 Ms Faro and Ms Van Staden's evidence that M[...] walked to the tree and waited for the bus also confirms that M[...] did not have a stroke that resulted in the fall, but that the fall resulted in the injury as described by Dr Domingo.

[43] On a proper evaluation of the evidence, I accordingly find that: -

43.1 M[...] slipped on the wet concrete floor in the bathroom of the school and knocked his head on the edge of the urinal;

43.2 M[...] suffered severe injuries as a result of slipping on the wet floor and knocking his head on the edge of the urinal; and

43.3 The injuries suffered by M[...] were caused by the negligence of the Department.

ORDER:

Wherefore the following order is made: -

1. The defendant is liable to pay the plaintiff's agreed or proven damages arising out of the plaintiff's fall at the Brandboom Boegoeberg Intermediary School on 02 November 2011; and
2. The defendant is ordered to pay the reasonable qualifying, preparation, reservation and appearance fees of Dr Domingo; and
3. The defendant is ordered to pay the plaintiff's costs incidental to the trial in respect of the separated issues, including the cost of the plaintiff's senior counsel.

**STANTON, A
JUDGE**

On behalf of the plaintiff:

Adv. M van Heerden SC

(on instruction of Solomon Attorneys Inc. c/o
Van de Wall Inc)

On behalf of the defendant:

Adv. B Babuseng

(on instruction of Lulama Lobi Inc.)