THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 615/2008

In the matter between:

HAWEKWA YOUTH CAMP	**FIRST APPELLANT**
THE MINISTER OF EDUCATION FOR THE WESTERN CAPE	**SECOND APPELLANT**
and	
GARY MICHAEL BYRNE	**RESPONDENT**

Neutral citation: *Hawekwa Youth Camp v Byrne* (615/2008) [2009] ZASCA 156 (27 November 2009)

CORAM: **Brand, Mlambo, Malan, Bosielo JJA *et* Griesel AJA**

HEARD: **6 November 2009**

DELIVERED: **27 November 2009**

SUMMARY: Claim in delict against Minister of Education – loss resulting from injuries sustained by child during school excursion under control of his teachers – held that injuries caused when child fell from top part of double bunk bed because of insufficient barrier on bunk – further held that resulting loss caused by wrongful and negligent omissions on the part of teachers – Minister vicariously liable.

ORDER

On appeal from: High Court, Cape Town (Le Grange J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

BRAND JA (Malan *et* Bosielo JJA concurring):

[1] The respondent, Mr Gary Byrne, is the father and natural guardian of Michael Byrne, who was born on 15 June 1995. In March 2004, when Michael was almost nine years old and a grade 3 learner at the Durbanville Preparatory School, he accompanied a school group under the control of his teachers on a two day excursion to the Hawekwa Youth Camp site outside Wellington. The group arrived at the camp on 3 March where they were accommodated in bungalows. During the early hours of the next morning Michael was found on the cement floor of his bungalow. No-one saw how he ended up there, but he was unconscious and appeared to be having convulsions. He was taken to hospital where medical examinations revealed that he had suffered a fractured skull with underlying brain injuries which led to some degree of permanent brain damage.

[2] In the event, the respondent instituted action against the first and second appellants in the Cape High Court for the damages that he and Michael had suffered as a result of these injuries. The nub of his case was that Michael's injuries could have been prevented by the employees of the two appellants, who had wrongfully and negligently failed to do so. The first appellant ('Hawekwa') is a company not for gain incorporated in accordance with s 21 of the Companies Act 61 of 1973. In March 2004 it was the owner of the Hawekwa Youth Camp site where the incident occurred. The second appellant is the Minister of Education in the Western Cape (‘the Minister’) who

was cited in his capacity as employer of teachers at Government schools within his area of jurisdiction, including the Durbanville Preparatory School. In his plea the Minister admitted that he would indeed be vicariously liable in delict if Michael's injuries were attributable to the wrongful and culpable acts or omissions of his teachers.

[3] At the commencement of the trial the parties agreed to and the court a quo (Le Grange J) ordered a separation of issues. In terms of the separation order the issues relating to the liability of the appellants were to be decided first, while those pertaining to the quantum of the damages claimed stood over for later determination. The preliminary issues were decided in favour of the respondent. Hence the court declared the two appellants liable, jointly and severally, for the loss resulting from Michael's injuries. Leave to appeal to this court against that judgment was then sought and obtained by both appellants from the court a quo. After the appeal was noted, a settlement was, however, reached between the respondent and Hawekwa with the result that it played no further part in the appeal. But, proceedings between the Minister and the respondent continued.

[4] It is not in dispute that during the night of 3 March 2004 Michael slept on the upper portion of a double bunk. Likewise it is common cause that he was not assigned to that bunk but chose to sleep there. From the outset, the respondent's contention as to how Michael ended up on the floor of the bungalow was that he had rolled from the upper bunk in his sleep because there was no barrier – or, at best for the appellants, a barrier which was ineffective – to prevent him from doing so. The Minister's response in his plea was that he had no knowledge as to how Michael landed on the floor where he was found. But, during the course of the proceedings, various alternative suggestions were made on his behalf as to how the incident might have occurred. To these suggestions I shall presently return in more detail. Pertinent for present purposes, however, is that they gave rise to the major issue at the trial, that is: how did Michael come to land on the floor where he was found? The other issues at the trial resulted from the denial by the Minister of the respondent's further contention that Michael's fall could have

been prevented if not for the (a) wrongful and (b) negligent omissions on the part of the teachers who accompanied and were thus responsible for the safety of the group. The court a quo decided all these issues against the Minister. Hence they were again presented, albeit in somewhat different form, for determination on appeal. The exact nature of these issues will best be understood in the light of the background facts that are to follow.

[5] The bungalow where the incident occurred was divided by cupboards and lockers that ran up to the roof beams along the middle of the room. On the right-hand side of the bungalow – as one entered through the doorway – there were two double bunks and on the left side there were three. During the night of the incident the five double bunks were occupied by nine boys and one adult, referred to as the volunteer bungalow parent, Mr Moosa Raise. Though it was his daughter who accompanied the group, he had voluntarily undertaken to look after the nine boys in the bungalow during that night. Michael slept on the top bunk in the far right-hand corner of the bungalow while Mr Raise occupied one of the bottom bunks on the left. Hence his view to where Michael slept was obstructed by the room divider of cupboards. The three teachers who accompanied the group on their excursion were Ms Solomons, Ms Range and Ms Trollip. They slept in a separate bungalow on their own.

[6] Mr Raise was called to testify on behalf of the Minister. Two other volunteer parents who were in charge of other bungalows also gave evidence: Mr Roland Oelofse who was called on behalf of the respondent and Mr Kevin Coetzee on behalf of the Minister. It appears to be common cause between the three of them that the boys retired to their bungalows between 9 and 10 pm and that by all accounts they were asleep before midnight on 3 March 2004. According to Mr Raise, he was awoken at or shortly after 4 am the next morning by what he described as a 'growling' noise. It was dark in the bungalow and the boys were asleep. He turned on the light to find Michael lying on the floor. Michael was unconscious and incontinent of urine. Foam was coming from his mouth and it appeared as though he was having an epileptic seizure. Mr Raise called Mr Coetzee and left him with Michael while

he went to the bungalow of the teachers to alert them. The time when Michael was discovered is confirmed by Mr Coetzee as well as by Mr Oelofse, who testified that he had been woken up, in turn, by Mr Coetzee.

[7] Two of the teachers, Ms Trollip and Ms Ranger, also testified on behalf of the Minister. The third one, Ms Solomons, had apparently emigrated in the interim and was not available to give evidence. Ms Trollip testified that she was summoned to the bungalow by Mr Raise where she also saw Michael lying on the floor. Ms Range accompanied Mr Raise and Mr Coetzee when they took Michael to the hospital. Between these witnesses who saw Michael in his injured state, there was no significant difference as to the condition he was in. Moreover, not one of them drew any conclusion other than that Michael had rolled off the upper bunk in his sleep.

[8] The plea advanced on behalf of the Minister was that he had no knowledge of the plaintiff's allegation that Michael fell from the upper bunk while sleeping. Shortly before the trial, however, the Minister delivered an expert notice to which was annexed a report prepared by a neurologist, Dr Johan Reid, who assessed Michael for purposes of the litigation nearly four years after the event. The contents of the report – and particularly the thesis advanced therein – came to serve as the basis for a positive proposition advanced on behalf of the Minister during the trial, namely that Michael had not fallen as a result of rolling out of the bunk bed during his sleep, but because he had suffered an epileptic seizure.

[9] The conclusion reached by Dr Reid and his recommendation that Michael be placed on anti-convulsive medication caused the respondent and his wife to seek a second opinion from another neurologist, Dr James Butler, whose main interest is in epilepsy. Dr Butler examined Michael and subjected him to 48 hours of continuous EEG recordings in order to ascertain the presence or absence of interictal (between convulsions) epileptiform discharges. His evidence was that in a population of people who have epilepsy, 90 per cent or more of such people will demonstrate interictal epileptiform discharges on such EEG recordings. Since Michael showed none

of these symptoms, Dr Butler concluded that Michael did not suffer from epilepsy – either before or after the event. He also pointed out that Michael had no history of clinical seizures in his entire life. These considerations and others led Dr Butler to decide that there was no evidence to support the conclusions arrived at by Dr Reid and accordingly he expressed the view that it was more likely that the convulsions observed by Ms Raise and others when they found Michael on the floor were caused by his brain injury, rather than the cause of it.

[10] There is, however, no need to analyse the difference between Dr Reid and Dr Butler any further. The court a quo subjected the testimony of both doctors to close scrutiny. It then accepted the evidence of Dr Butler and rejected the thesis advanced by Dr Reid as unimpressive and implausible. There is no attack on these findings. On the contrary, at this stage the Minister had distanced himself from the conclusions of Dr Reid. Another thesis as to how it happened that Michael ended up on the floor, which the Minister did persist in on appeal, also emanated from the testimony of Dr Reid. According to this part of Dr Reid's evidence he asked Michael, when he assessed him in February 2008, how the incident happened. Michael then told him, so Dr Reid said, that he and the other boys in the bungalow were up until about 3 o'clock in the morning; that they were boisterously swinging from the open rafters in the bungalow; that there was no adult present at the time; and that in fact, the adult person assigned to their room slept elsewhere.

[11] Counsel for the Minister sought to find support for Michael’s account in the fact that the roof beams of the bungalow were not covered by the ceiling and that they passed between the left and right walls above the bunk where Michael slept at about the height of the cupboard divider in the room. In addition counsel sought to rely on the evidence of Dr Butler that, though Michael's memory 'going forward' from the time of the incident could be expected to be poor, the presence of retrograde amnesia was unlikely. Finally, counsel found support for his argument in the evidence by Mr Coetzee that immediately after the incident, a mattress was found lying on the floor next to Michael. To my way of thinking, however, these are no more than

indications that, when considered in isolation, Michael's version, that he was swinging from the roof beams when he fell to the floor, could theoretically be true.

[12] But as I see it, sight should not be lost of the fact that Michael told this story four years after an event which occurred when he was eight years old. Moreover, according to Dr Reid's own evidence, individuals who suffered the same type of brain injury as Michael, are known to be manipulative and, in Dr Reid's words, 'to have us on'. What the court a quo found decisive, however, and, to my mind, rightly so, is that the theory based on Michael's report to Dr Reid is simply not to be reconciled with the evidence of the Minister's own witness, Mr Raise. It will be remembered that according to Mr Raise he was fast asleep in a dark bungalow when he was woken up by a growling noise at about four o'clock in the morning. When he switched on the light all the other boys were asleep. The proposition that he slept elsewhere or even that he was out of the bungalow when the incident occurred, was never put to Mr Raise. Nor was it suggested to him that he might not have woken up when the boys in his bungalow were boisterously swinging from the open rafters above him. To me it seems that the last mentioned suggestion would, in any event, border on the ludicrous.

[13] Another scenario proposed on behalf of the Minister for the first time on appeal was that Michael fell to the floor while he was voluntarily alighting from the upper bunk in order to visit the bathroom. In support of this theory counsel sought to rely on the evidence of some of the witnesses who found Michael on the floor, that he was without his sleeping-bag and that there was urine around him, coupled with the evidence of his mother that when his sleeping-bag was returned to her it was wet and smelled of urine. One of the conclusions to be drawn from this, so the Minister's counsel contended, was that Michael had wet himself during the night before alighting from the upper bunk in order to visit the bathroom. The first problem I have with this scenario proposed by counsel is that other explanations present themselves for the facts on which it relies. So for example, it is equally possible that Michael had wet himself after he sustained his head injury. His sleeping-bag could then

have been dropped in the urine at any time before or after he had been taken to the hospital and so on and so forth.

[14] My further problem with the proposed scenario is that it was never raised and hence not properly explored at the trial. Even so, I believe there is sufficient evidence to remove this thesis from the realm of probabilities. First, there is the uncontested evidence of Michael's mother that he had been sleeping on the top part of a double bunk from the age of two until the accident occurred and that he had never fallen off the bunk before. Her explanation for this was, of course, that his bunk at home had a proper railing which prevented him from rolling off. But the railing would obviously not protect him from a fall while he was voluntarily alighting. This means that Michael must have fallen off for the first time while alighting from his bunk when he was nearly nine. In short, I find it inherently unlikely that a nine year old boy who regularly slept on a top bunk would fall on his head while trying to alight from his bunk. As I see it, the proposed scenario should also be considered in the light of the evidence to which I shall presently return, that the barrier on the bunk used by Michael would as a fact not be able to prevent him from rolling off in his sleep, which lends support to the inference that this is exactly what happened.

[15] I therefore agree with the conclusion arrived at by the court a quo, that the most likely conclusion to be drawn from the available evidence is the one which occurred to all those present at the time, namely that Michael landed on the floor because he rolled out of the top part of the double bunk in his sleep. This leads me to consider the next step in the progression of the respondent's case, namely, his allegation that the direct cause of Michael's fall was the absence of an effective railing or barrier on the upper bunk which he occupied to prevent him from rolling off in his sleep.

[16] According to the respondent's particulars of claim his main contention in this regard was that the bunk used by Michael had no railing or barrier at all. This contention was supported by the evidence of Mr Oelofse who saw nothing of this kind. It was, however, in direct conflict with the evidence of Mr

and Mrs Enslin, who both at various times held the position of manager of the first appellant's Hawekwa Camp. Their version, which must, in my view, be accepted, was that there was some kind of barrier on the bunk that Michael occupied. The reason for the barrier, so the Enslins explained, was that they actually foresaw the possibility of children rolling from unguarded upper bunk beds and injuring themselves. In an attempt to prevent such an occurrence, they had affixed planks of wood to these bunks. Photographs depicting such planks were handed in at the trial as Exhibit A. Mrs Enslin testified, however, that the planks depicted in Exhibit A were those present in the girls' bungalows at the time of Michael's injuries. The planks affixed to the bunks in the boys' bungalows, she said, were smaller. Indeed, Mrs Enslin sought to explain the fact that some witnesses were unsure as to whether or not there were any planks on the boys' bunks at all on the basis that they might have failed to observe these planks because they were so small.

[17] Mr Enslin's version was somewhat different from that of his wife. According to his evidence, all the planks were of the same size. However, so he testified, the planks on some of the bunks in the boys' bungalows had been fixed in such a manner that the portion extending above the mattress, which actually afforded the protection, was lower than their counterparts in the girls' bungalows that are depicted in Exhibit A. However, be that as it may, whatever the exact position might have been, I find the bottom line to all this in the concession by Mr Enslin that even the planks depicted in Exhibit A were insufficient as safety railings or barriers to prevent a child from rolling off. Hardly surprising, in the circumstances, was the evidence that after Michael's injury, new, substantially larger planks were installed on the upper bunks in the boys' rooms. What is more, it appears that when the camp site came under new management, the barriers on the top bunks were once again upgraded.

[18] The fact that the planks depicted in Exhibit A were ineffective as a barrier to prevent someone from rolling off the upper bunk was confirmed by the respondent's expert witness, Ms Du Toit. She is a medical social worker employed by the Child Accident Prevention Foundation at the Red Cross

Hospital. She concluded from a study that she did between 1989 and 1993 that bunk bed injuries are sufficiently common to merit preventative strategies in the form of protective railings that complied with safety specifications. Apart from the fact that the planks depicted in Exhibit A did not comply with these specifications, so she testified, they were obviously not suitable to serve the purpose for which they were intended, ie to prevent someone from rolling off the bunk. In the light of all this I agree with the finding by the court a quo that, on the probabilities Michael rolled off the top bunk in his sleep because there was no effective barrier to prevent him from doing so.

[19] It was not disputed by counsel for the Minister, as I understood him, that, with the benefit of hindsight, the teachers in charge of Michael's group could and should have prevented the injuries that he suffered by not allowing him to sleep on a top bunk which had no effective barrier to prevent him from rolling off in his sleep. But, as we all know, hindsight does not establish negligence. The question remains – can the teachers' omission be characterised as negligent? And, if so, can their negligent omission be characterised as wrongful? In this court there was some debate as to whether the teachers in charge of Michael's group assumed the role *in loco parentis* and what that would entail. I do not believe, however, that it takes the matter any further. In my view the issues of wrongfulness and negligence can be approached from a position which is not in dispute, namely, that these teachers took responsibility for the safety of the group that included Michael.

[20] A substantial portion of the written heads of argument on behalf of the Minister had been devoted to the element of wrongfulness. Contentions in support of the proposition that omissions on the part of Michael's teachers to prevent his injuries would not be wrongful, included the following:

'[The Minister] does not dispute that [the teachers] owed Michael a duty of care, viz, to take reasonable measures to ensure that the environment in which he was to be accommodated as a learner participating in a school excursion would be free from risks and dangers such as could reasonably be expected to lead to him suffering harm or injury. . . .'

And:

'The duty of care upon [the teachers] arose from the school's assumption of a role *in loco parentis.* The school was bound to exercise the same foresight and care as a reasonably careful parent in relation to her own children. To that end, it is submitted, the school took every step that a reasonable parent would take to assess the risk to Michael while he was at the camp; and furthermore, the school's staff acted reasonably to prevent any harm to Michael.'
Further arguments were thereupon advanced to support the submission in the last sentence of the quotation.

[21] As I see it, the quoted contentions are indicative of a confusion between the delictual elements of wrongfulness and negligence. This confusion in turn, so it seems, originated from a further confusion between the concept of 'a legal duty', which is associated in our law with the element of wrongfulness, and the concept of 'a duty of care' in English law, which is usually associated in that legal system with the element of negligence (see eg *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27B-G; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 20). Warnings against this confusion and the fact that it may lead the unwary astray had been sounded by this court on more than one occasion (see eg *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 14; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11). Nonetheless, it again occurred in this case.

[22] The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if

public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages (see eg *Telematrix (Pty) Ltd supra* para 14; *Local Transitional Council of Delmas supra* paras 19-20; *Gouda Boerdery Bk v Transnet* 2005 (5) SA 490 (SCA) para 12).

[23] The separate test for the determination of negligence is the one formulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G. According to this test, negligence will be established 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

(b) the defendant failed to take such steps.'

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all, and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.'

[24] Depending on the circumstances, it may be appropriate to enquire first into the question of wrongfulness in which event it may be convenient to assume negligence for the purpose of the inquiry. On the other hand, it may be convenient to assume wrongfulness and then consider the question of negligence first (see eg *Gouda Boerdery Bpk* para 12; *Local Transitional Council of Delmas* para 20).

[25] In this case I find it convenient to deal with the question of wrongfulness first, primarily because I believe the answer to be self-evident. Properly formulated the enquiry under this rubric is this: on the assumption that the teachers in charge of the group could have prevented the harm that Michael suffered and that they had negligently failed to do so, should they – and by vicarious extension, the Minister – as a matter of public and legal policy, be held liable for the loss resulting from such harm? But for the confusion between wrongfulness and negligence which transpires from the Minister's heads of argument, it appears to me that wrongfulness had in fact

been conceded. What is in effect disputed is negligence. However, be that as it may, I am satisfied that wrongfulness had been established. In this regard I am in full agreement with the following statement by Desai J in *Minister of Education v Wynkwart NO* 2004 (3) SA 577 (C) at 580A-C:

'It was not in dispute that [the respondent's minor son] R was injured at school while under the control and care of the appellants' employees and it was fairly and properly conceded that teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them through misadventure. It was submitted that in this instance, as in many other delict cases, the real issue is "negligence and causation and not wrongfulness".'

[26] Reverting to the issue of negligence, the first question – in accordance with *Kruger v Coetzee* – is one of foreseeability. Was it reasonably foreseeable by Michael's teachers who were in charge of the group that the upper bunk which he was supposed to occupy, posed the danger that he may roll off in his sleep and injure himself? In support of the proposition that it was, the respondents adduced the expert evidence of Ms Nelmarie du Toit. According to her testimony, studies at the Red Cross Hospital and elsewhere had shown that the use of upper bunks as beds for children without the provision of adequate railings is notoriously dangerous in that children frequently roll off these bunks in their sleep in which event they often suffer serious injuries which may even be fatal. She also testified that a considerable amount of publicity had been given to these studies in various media. Though the danger related predominantly to children under the age of five, a good proportion of occurrences involved children of about ten.

[27] The Minister's answer to Ms Du Toit's testimony was essentially that she was an expert whose knowledge and experience could not be attributed to teachers in general. This response is, of course, not without validity. Yet, I do not see it as a complete answer. What Ms Du Toit's evidence shows is that as an objective fact unprotected bunk beds posed the risk of serious and even fatal injuries to children. The only question is whether her knowledge can be limited to those who share her expertise. I think not. Both Mr and Mrs Enslin, for example, testified that they actually foresaw the possibility of children

falling from unguarded bunk beds and injuring themselves. The very purpose of affixing the (inefficient) barriers to the bunks at the camp site was to guard against such an occurrence. That raises the question why a reasonable teacher would not foresee the danger actually foreseen by the Enslins. To this question no answer was put forward on behalf of the Minister and I can think of none. It strikes me as a matter of general knowledge that children frequently roll off their beds in their sleep. In this light common sense dictates, in my view, if one should put your mind to it, that if the fall occurs from the top part of a double bunk, as opposed to a normal bed, the risk of serious injury is exponentially increased simply because of the significant additional height involved.

[28] What is more, both Ms Trollip and Ms Range testified that to their knowledge some parents of children attending these camps refused to allow their children to sleep on the upper bunks. As to the reason for this, Ms Range was unfortunately somewhat evasive. To the reasonable teacher, the answer would be obvious: these parents did not wish their children to sleep on upper bunk beds because they thought it to be dangerous. As I see it, that would cause reasonable teachers to apply their minds as to why these parents regarded upper bunks as dangerous. Once they did so, even those reasonable teachers who had failed to realise the inherent danger before, would then appreciate the risk of a child rolling off an unprotected top bunk. In this regard, counsel for the Minister sought to rely on concessions by individuals such as the respondent's expert, Dr Butler, and Ms Range herself, that they had in the past allowed their own children to sleep on upper bunks without safety rails. To my way of thinking, this attitude is probably attributable to a failure on the part of these individuals to apply their minds. The same can, in my view, be said of parents who attended the camp and did not object to the bunks as being unsafe. As I have said, I believe that once a person of average intelligence applies his or her mind to the situation, the danger posed by an unprotected bunk becomes quite plain. Particularly when that reasonable observer is alerted by the concern of parents who refuse to allow their children to sleep on upper bunks because they regard them as dangerous.

[29] Another argument raised on behalf of the Minister was that the Durbanville Preparatory School had previously used the same campsite for ten years; that the teachers involved had not been informed of any reported incident where a child had fallen off an upper bunk; and that they therefore had no reason to think that it would happen on this occasion. Though this argument might be superficially attractive, I believe it is flawed. Firstly, the reasonable teacher would appreciate that incidents might have gone unreported. Secondly, logic dictates that once a risk has been recognised as inherently foreseeable, such as, for example, the one created by an unfenced swimming-pool, the reasonable person will not disregard that risk simply because it had never materialised before.

[30] In sum, I therefore find that Michael's teachers should reasonably have foreseen that in the absence of an adequate barrier affixed to the upper bunk which Michael occupied, there was the real risk that he may roll off in his sleep and injure himself. In this light, the next question, according to the *Kruger v Coetzee* approach, is what steps, if any, the reasonable teacher would have taken to guard against this foreseeable danger? As I see it, the answer is that the reasonable teacher would examine the beds and consider whether it afforded effective protection to prevent children from rolling off in their sleep. I say that because the obligation imposed on the teacher would require very little effort which should be weighed up against the seriousness of the foreseeable harm that could result from a failure to do so.

[31] Ms Trollip and Ms Range could not give any clear evidence as to the nature of the planks on the beds. The inference is inescapable that they simply did not look. If these two teachers had looked, like the reasonable teacher would, they would have realised that the planks on the beds did not offer sufficient protection to prevent a child from rolling off. That much appears to be virtually common cause. Apart from Ms Du Toit's evidence and the concession by Mr Enslin to that effect, Ms Trollip accepted, albeit with the benefit of hindsight, that the protection offered by the planks was 'ten to one' not enough.

[32] The final enquiry is what the reasonable teacher would have done once he or she realised that the upper bunk offered no sufficient protection. The answer is, I think, that there were many possible solutions, but, failing all of these, he or she would have instructed the children destined to sleep on the upper bunks to put their mattresses on the floor. That, incidentally, is exactly what Ms Range did at the excursions she arranged at the same venue after the incident where Michael was injured. I do not propose to introduce this evidence as the wisdom of hindsight, but to illustrate that the suggested solution would be adopted by the reasonable teacher, because it could be implemented without any difficulty. In the event, I agree with the court a quo's finding that the harm suffered by Michael could have been prevented by the teachers in charge of his group, who had wrongfully and negligently failed to do so. This inevitably leads me to the order that follows.

[33] The appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

GRIESEL AJA (Mlambo JA concurring):

[34] The evidence has been fully summarised in the judgment of my colleague Brand JA. I agree with his conclusion that, on the circumstantial evidence, the most probable inference is that Michael rolled off the top bunk in his sleep and fell because there was no effective barrier to prevent him from falling.[1] However, I respectfully disagree that, on those facts, the Minister should be held liable to the respondent.

[1] Paras 15 and 18 above.

[35] In my view, the present appeal affords a classic example of wisdom after the event. The proper approach to questions of reasonable foresight has been formulated by Nicholas AJA in *S v Bochris Investments (Pty) Ltd & another*[2] and followed by this court on many subsequent occasions.[3] He put it as follows:

'In considering this question, one must guard against what Williamson JA called "the insidious subconscious influence of ex post facto knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at 196E–F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight". (*S v Burger* (*supra* at 879D).) In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961 AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G–H (in All ER):

"After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility."'

[36] A number of the appellant's witnesses fairly and candidly conceded that, with hindsight, it was perhaps unsafe to allow children of Michael's age to sleep on upper bunks without adequate safety railings. Faced with the stark reality of what had happened to Michael, it would have been surprising had their attitude been any different. However, the fact that none of those witnesses thought, *before* the event, that it was necessary to take any precautions is significant.

[37] The plaintiff relied heavily on the evidence of Mrs Du Toit, as does my colleague.[4] Her opinion was based largely on the results gathered at the Child Accident Prevention Foundation at the Red Cross Children's Hospital in Cape Town over a five-year-period, from January 1989 to December 1993. The statistics show that a total of approximately 58 000 children were seen at the trauma unit of Red Cross Children's Hospital during the relevant period.

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[2] 1988 (1) SA 861 (A) at 866J–867B.

[3] See eg *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) para 27; *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA) para 45; *Minister of Safety and Security & another v Rudman & Another* 2005 (2) SA 16 (SCA) para 67.

[4] Paras 18 and 26 above.

Of these, falls accounted for 24 980, of which falls from beds were 3 160 and falls from bunk beds only 400. She was unable to state how many of those 400 falls occurred while the child was asleep; nor did she know in how many cases the falls occurred despite a safety railing, eg because the child was playing. We do know, however, that one of the falls was fatal. In my view, Mrs Du Toit's evidence falls short of establishing that the use of upper bunk beds without safety railings is 'notoriously dangerous', nor does it establish that children 'often suffer serious injuries' as a result of falls from bunk beds. As I read the results of the survey, almost 80% of the injuries resulting from falls from bunk beds were 'minor in nature, ie lacerations, contusions and abrasions'. In short, her evidence does not assist the respondent in proving that the risk of harm to Michael should have been reasonably foreseeable to the Minister's employees before the occurrence.

[38] Be that as it may, even if it were to be accepted that the possibility of harm to the children due to the absence of a proper safety railing was reasonably foreseeable, this is not sufficient to saddle the Minister with liability. What is required, is the reasonable foreseeability of 'a possibility of harm to another against the happening of which a reasonable man would take precautions'.[5] This was echoed 25 years later in the second requirement laid down by Holmes JA in *Kruger v Coetzee*, which has been followed ever since.[6]

[39] In considering whether any steps ought to have been taken by the appellant's employees, the standard of care required of them and other persons *in loco parentis* is that of 'a reasonably careful parent in relation to his own children'.[7] Although it has been suggested during argument before us (albeit somewhat tentatively) that the standard of care required of a teacher or someone else *in loco parentis* should actually be higher than the standard

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[5] *Joffe & Co Ltd v Hoskins & another* 1941 AD 431 at 451.

[6] Quoted in para 23 above. See also Boberg *The Law of Delict* vol I at p 275; *Bolton v Stone* [1951] 1 All ER 1078 (HL) at 1080 and 1084; *The Council of the Shire of Wyong v Shirt & others* 146 CLR 40 (HC of A) at 47; *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 213H–J; *Mukheiber v Raath & another* 1999 (3) SA 1065 (SCA) para 31.

[7] *Broom & another v The Administrator, Natal* 1966 (3) SA 505 (D) at 518F–519A and the English authorities referred to therein. See also *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R) at 539C–D.

required of a reasonably careful parent in respect of his or her own child, we have not been referred to any authority in support of such a proposition, nor am I aware of any such authority. In my view, the test enunciated in the authorities referred to above correctly states the position in our law. The position in English law is the same, where the Court of Appeal has held that it would be 'neither just nor reasonable to impose on the school a greater duty than that which rests on a parent'.[8] I do not read the *dictum* of Desai J in *Wynkwart's* case, referred to with approval by my colleague,[9] to state anything different.

[40] In essence, therefore, the issue can be reduced to the question whether a reasonably careful and prudent parent would allow his or her 8- or 9-year-old child to sleep on an upper bunk bed without an adequate safety railing. In the present case, we do not have to speculate about the answer: the record shows that a number of parents did just that. According to the evidence, quite a few parents accompanied the school group on this particular outing – as they did on similar outings during ten previous years. A supervising parent slept in each of the bungalows with nine of the children. Such parent was entrusted with full responsibility for the well-being of the children while under his or her care. Obviously this fact could not absolve the teachers from their primary responsibility for the care and safety of the group of children. What is significant in the present context, though, is that there is no evidence that any of those parents found it necessary in relation to the children under their supervision – including their own children – to prevent them from sleeping on the upper bunks. The high-water mark for the respondent was the evidence of one of the parents, Mr Oelofse, who testified that he 'felt a bit nervous' because of the absence of adequate safety railings. Yet even he did not find it necessary to take any steps to guard against the foreseeable risk of harm. Must each and every one of those supervising parents now be held to have been guilty of negligence? What about all the other parents who accompanied similar groups from Michael's school (and

[8] *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA) at 412; *Charlesworth & Percy on Negligence* 11ed (2006) paras 8–179; 8–193.
[9] Quoted in para 25 above.

countless other schools and youth organisations) to the same venue during the preceding ten years and who permitted the children to sleep on the same bunk beds? Must they now also be branded irresponsible and negligent parents? I think not. And if the failure in this case of the parents to take any preventative steps is not to be regarded as blameworthy, why should the duty resting on the teachers be more onerous?

[41] My colleague refers to the fact that, prior to the outing, some parents refused to allow their children to sleep on the upper bunks and concludes that this was so 'because they thought it to be dangerous'.[10] In my respectful view, however, this merely illustrates that some parents are by nature more cautious and nervous than others. This fact cannot serve to establish negligence on the part of those parents who did not take any steps to prevent their children from sleeping on the upper bunks. After all, we know that the reasonable parent is not a timorous faint heart, always in trepidation lest she or others suffer some injury.[11] For the same reason, parents falling into the more 'cautious' category will probably also forbid their children to take part in more robust forms of sport, such as rugby, where a risk of serious injury is certainly not unforeseeable.[12] Will teachers coaching and supervising rugby matches and practices *and* the parents allowing their children to participate therein in future be held liable for damages every time a player should get injured in the course of the game? If not, why should the position be any different with regard to the teachers in the present scenario? As it was put by Singleton LJ in *Wright v Cheshire County Council*:[13]

'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 the evidence in this case goes.'

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[10] Para 28 above.
[11] Cf *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490E–F.
[12] See eg *Van Oppen v Clerk to the Bedford Charity Trustees*, footnote 10 above, at 392a, where rugby football was described as 'the most dangerous activity in schools'.
[13] [1952] 2 All ER 789 (CA) at 792.

[42] I have come to the conclusion that the kind of harm that occurred in this case, even though perhaps reasonably foreseeable, is not such that a reasonable parent would have taken steps to guard against such risk. While one obviously has a great deal of sympathy with Michael and his parents for the consequences suffered as a result of the incident, I am not persuaded that the Minister's employees have been guilty of any culpable act or omission in this case. In the result, they cannot be held legally liable for such consequences. Accordingly I would have allowed the appeal with costs and would have amended the order made by the high court so as to dismiss the respondent's action with costs.

B M GRIESEL
Acting Judge of Appeal