IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 15910/2011

DATE: 18 NOVEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

CS V[...] D[...] M[...] obo H[...] V[...] D[...]

M[...] **Plaintiff**

And

P[...] T[...] A[...] CC Defendant

JUDGMENT

STRAUSS, AJ:

1. Plaintiff instituted an action against the defendant on behalf of her minor son for damages arising out of an incident which occurred at the premises of the defendant, a primary school, when the plaintiff's minor son, one H[...] v[...] d[...] M[...], was injured when he was impaled by a metal dropper through his rectum.

2. The pleadings were in English, but all the evidence tendered was in Afrikaans and the heads of argument of the plaintiff was in Afrikaans but those of the defendant in English, I will therefore continue to deliver judgment in this matter in English.

3. At the outset of the trail I was requested by counsel for the parties to only decide the merits of the matter,

and the quantum was separated in terms of Rule 33(4) of the Rules of Court.

4. From the evidence in this matter, it became clear that the minor child one H[...] v[...] d[...] M[...] referred to during trail as Jaco, hereinafter also referred to as "Jaco" was enrolled in the school of the defendant in 2006. The defendant is a private school who provides remedial schooling to pupils who suffer learning disabilities or other emotional disabilities and can therefore not cope in a "mainstream" school environment. Evidence was tendered that Jaco was of average intelligence and therefore did not have the intellectual capacity to cope with a mainstream school.

5. There was also evidence that he had an adjustment disorder, suffered from anxiety, depression and was also hyper-active which caused him socially and age appropriately, inept to perform in a mainstream school.

6. The plaintiff testified that since Jaco's birth he never reached his normal milestones and that she and her ex-husband were always worried about the minor child's mental capacity.

7. Jaco was born on [...] 1996, and from grade 1, he attended a mainstream school, i.e. W[...] Primary School, up until 2006, when the school contacted the parents and informed them that he was not coping in a mainstream school and that they should consider placing him in a special school.

8. The mother, after investigation, acquired the details of the defendant, who held them out to be experts in the field of teaching children who could not cope in a mainstream school environment due to either remedial and or other learning difficulties, and they could cope with children who suffered from hyper-active behaviour or social disorder behaviour, generally known as Attention Deficit Disorder or Hypertension Deficit Disorder.

9. Since the age of 2, Jaco suffered from epilepsy, he had been diagnosed by inter alia a neurologist paediatrician, Dr MM Lippert, and after his diagnosis, Jaco was put on Epilim, which is medication for his epilepsy as well as Concerta, which I was told is medication for his hyper-activity.

10. Jaco attended the defendant school from January 2006, and was enrolled in Grade 4.

11. On the 2nd of September 2009, an unfortunate incident occurred on the playground at the premises of the school when Jaco became impaled on a metal dropper through his rectum. He sustained severe injuries inter alia the tearing of his rectum and the bladder. He underwent extensive operations and he suffered severe pain and discomfort due to the unfortunate incident and also had to wear a stoma for a period of three months post accident.

12. It is clear from the pleadings that the plaintiff based her cause of action on the negligent breach of a legal

duty of care that rested on the defendant, in that they :

12.1 failed to ensure a safe environment, specifically a safe play area,

12.2 failed to supervise the scholars at the school in general, and Jaco in particular,

12.3 failed to ensure that he was safe while playing on the school field.

12.4 failed to ensure that Jaco in particular was not exposed to potential hazardous items and/or equipment in general and the metal dropper in particular,

12.5 failed to take any alternative sufficient steps to ensure that all scholars in general and Jaco in particular were exposed to potentially hazardous items and that no harm would befall them,

12.6 failed in general that they permitted a metal dropper to be in the vicinity of playing children and particularly Jaco, notwithstanding the risk that an incident such as the incident might occur.

13. None of the witnesses called by the parties witnessed the incident, and the plaintiff testified that she was informed that Jaco had sat on the metal dropper when she collected Jaco the day after the incident occurred. This information was relayed to her by a certain Mr H[...]. I will get to the evidence of Mr H[...] later.

14. The defendant pleaded that they were not negligent in any manner as set out in the plaintiff's claim, and also denied the reasonable foreseeability of the incident, they pleaded that Jaco, himself was solely negligent in that he proceeded to sit on the metal dropper that impaled him.

15. The common facts were that the defendants in January 2009, had planted five small trees on the property of the school in order to provide shade for the children in future. These small trees were supported by metal droppers that were tied to the trees to lend them support. The evidence and photographs handed in during trial, showed pictures of young trees, the tree with the metal dropper that caused the accident in particular. I pause to mention that the photographs were taken in 2014, and no photographs were provided by the parties of the tree and the metal dropper as it was in 2009, when the incident occurred. Thus all the pictures of the trees had no metal droppers still planted adjacent to such trees any longer, and all the trees were bigger and taller than what they were in 2009.

16. The evidence, however, was that this specific tree was situated 2/3 into the general playing field where the bigger learners from Grade 2 onwards would play cricket and/or rugby and/or "*brand baf'* and that it was accepted that the children would run around it, in front of it, and at the back of this specific tree planted in the area.

17. It was further the evidence that this tree had a metal dropper in 2009 embedded next to the tree, which metal dropper protruded approximately 30cm above the said tree due to the fact that the tree was approximately 30cm high in at the time when the incident occurred.

18. It was testified by the defendant's that the tree, although this is disputed by the plaintiff, was surrounded by a small flowerbed which contained small flowers and had chicken mesh around the flowerbed in order to prevent the chickens walking around free on the property, from picking at the flowers. It was thus not in dispute that the specific tree and metal dropper could be accessed in a very easy manner by any of the children or adults on the property, and that the chicken mesh did not provide any hindrance for access to the tree.

19. The evidence was further also that the children sometimes used these trees as cricket poles when they did not have the necessary poles to play cricket with, and that the specific tree was in the direct vicinity where the children would usually play.

20. The plaintiff called an expert, Mr Lotter, who conceded that he was an expert in motor vehicle accident reconstruction and that he had not previously compiled any report in regard to an incident such as this. He also did not look at the tree or the property in 2009 and only took the photographs and had a general look at the playground in 2014.

21. He conceded that it was normal to use a metal dropper to support a small sapling tree as his own grandfather did the same, and it is a normal manner of supporting a tree. He also conceded that if one wanted to you could support yourself on a dropper in light of the fact that he stated initially that it was inconceivable for him that a person would do so, but that it was not impossible, and conceded that one could lean against a dropper if you displaced your weight evenly. He testified that a dropper would penetrate through an individual's pants. Mr Lotter viewed the metal dropper in the middle of a playing field as creating a dangerous and hazardous situation.

22. The plaintiff testified that the only version she had about the incident is the version she got from Mr H[...], who had told her that the minor had sat on the metal dropper. She testified that Jaco had always been impulsive and hyper-active to such an extent that on a prior occasion he had fallen into the dam at the school and also on one occasion had taken his dog to the roof of their house and sat on the roof. This is the very reason why Jaco had been enrolled at the defendant school in order for them to deal with a child that had different social and learning abilities than other children.

23. She conceded that even if a teacher was present when Jaco was injured either by falling in or sitting on the metal dropper, the incident could probably not have been prevented.

24. The minor child now 17 years old also testified, he confirmed that he knew the difference between a lie and the truth and his ability to act in accordance therewith and he confirmed that he would tell the truth to the Court. He confirmed that the seniors would normally play ball games on the field where the incident occurred. On the day of the incident they were playing cricket, he also confirmed the approximate size of the tree and the metal dropper protruding above the tree. He confirmed that he was aware of the metal dropper which was attached to the tree. He however could not recall how it came about that he had sat on the dropper.

25. On the morning of the incident he was not feeling well, he had been sick the week before, he had also received an injection the previous day, he said he was feeling dizzy and he felt as if he had malaria, as he had previously contracted malaria. This was confirmed by his mother in her evidence. He stated that if he indeed sat on the dropper he would not know why he would do so. He says he does not know what would have made him to sit on the dropper. He could not remember that he went to sit on the dropper. He says that there are normally teachers on the playground, but he cannot remember if a teacher was present when the incident occurred. He knows that a certain Ms M[...] v[...] R[...] was doing playground duty on the day of the incident.

26. He further testified that on the day of the incident he was wearing short jean pants up to his knees and underpants. After he had injured himself he says he was frightened and it was very, very sore, so sore that he hit his head against the mirror in the bathroom. He did not want the specific teacher to enter the bathroom due to the fact that she was a woman and the other children with him called a Mr H[...] who is the brother of the Head of the school, Mrs C[...].

27. He says that Mr H[...] came and helped him in the bathroom and looked at his rectum. He provided his mother's cell phone number to Mr H[...] who in turn phoned his mother and she collected him and took him to hospital.

28. It is clear that the incident had a huge effect on Jaco afterwards and his mother also confirmed this. He was in hospital for quite a while and had extensive surgery. He also had to wear, what is called a "stoma" due to the incident for three months after his operation. He went back to the defendant's school for approximately a week, but due to bullying from his fellow students that he was wearing a stoma, he emotionally could not handle the fact to be back in the school and he was eventually home-schooled by his mother until she enrolled him in a remedial school, Transvalia, which he is currently attending and it is going very well with him.

29. After the incident the plaintiff testified that Jaco had blocked out the incident and that he could not handle it and he tried to commit suicide on one occasion. She says the only version she has is that he sat on the dropper as Jaco refuses to emotionally deal with the incident and tell her what happened.

30. The defendant, after the plaintiffs case, sought absolution from instance and full argument was heard in regard thereto. I refused the application for absolution from the instance on the basis that I wanted to hear evidence on the balance of probabilities that a reasonable person in the position of the defendant could have foreseen the possibility of the dropper injuring Jaco.

31. The defendant thereafter called their first witness, the Head of the school, Mrs C[...]. She stated that the school caters for children with learning problems and learning disabilities, children that suffer from attention deficit syndrome as well as hyper-activity and children that cannot function in a mainstream school due to either remedial or emotional problems caused by trauma or divorce.

32. She also testified that although Jaco was a smart student he had been emotionally subjected to his parents' divorce, which was not amicable at all. They had used Jaco as a pawn and he had suffered emotionally under the stress and the manner in which his parents proceeded to get a divorce. She also confirmed that he was a hyper-active boy, but could sometimes also be the complete opposite and be quiet and reserved.

33. Jaco physically appeared to the Court to be quite large for his age. He was visibly overweight, he also seemed very innocent and honest to the degree that he did not seem to be age appropriately as a boy of 17 years old.

34. The defendants called Mrs C[...] further testified that the school is properly registered in terms of legislation, that 5 trees were planted during the beginning of 2009 to commemorate the five first learners of the school. All the trees were planted in the same manner assisted by a general labourer when the trees were planted with a metal dropper, attached to the trees, surrounded by small flowers and wire mesh to keep out the chickens.

35. She testified that she did not see the tree with the dropper causing a dangerous situation in the middle of this playing field where the children played, and said that she would never be reasonably foreseeable that a child would have sat thereon. She confirmed that there were rules at school pertaining to supervision and that the amount of students being no more than 15 were allowed to one teacher in class, but during school break there was only one teacher allocated for all 71, learners and that this teacher had to move between three play areas which were situated approximately 50 -100 metres apart.

36. She conceded that it was impossible for this teacher to be present at all three play areas at any given time, but she said that one teacher per 71 learners was in accordance with the normal rules of a government school that regarded supervision during break, sufficient, if one teacher was present for 100 pupils.

37. She was not present when Jaco was injured, she was busy in the main building which is situated

approximately 120 metres away in the tearoom, as she and the other teachers were attending a function due the fact that it was Spring day. She said that during this function she was approached by her brother, Mr H[...], who informed her that Jaco was injured. She did not accompany Mr H[...] to the bathroom where Jaco was, as she first had other duties to complete and stayed in the teachers' room with the other teachers and only went to the bathroom later. She was therefore not present when Mr H[...], dealt with Jaco or handed him over to the plaintiff.

38. Mr H[...], the brother of Mrs C[...], testified that he was not a teacher at the school, he gave horse-riding lessons to the children at the school on a contract basis. He knew Jaco, although not very well as Jaco had taken horse-riding lessons from him. He says on the day of the incident some of the children approached him and urgently wanted him to attend to Jaco. They told him that Jaco had been injured. Upon entering the bathroom he found Jaco on the toilet with a puddle of blood in front of him, approximately the size of a plate. He asked Jaco to stand up and spread his bum cheeks so that he could establish what had caused the bleeding. Upon asking Jaco what had happened he stated that Jaco told him that he sat on a metal dropper and that it had entered him.

39. Mr H[...] testified that he was surprised due to the blood because there were no marks on Jaco's buttocks. Albeit, he also confirmed that at that stage he knew that it was a serious injury and that the child was in serious pain. There was blood on Jaco's pants and on the floor, and he viewed it as a serious injury. He confirmed that he ran back to his sister, Mrs C[...], in the main building to tell her about the incident. He confirmed that when conveying the message to Mrs C[....] that the urgency thereof was relayed to her, and he was stressed and anxious when he relayed such message. I pause to mention that the evidence of Mr H[...] conveying Jaco's injury to Mrs C[...] is disconcerting to the court when one has regards to Mrs C[...] seemingly off handish approach the day in question when the news was conveyed to her. One would have expected her as the headmistress to have immediately acted and left whatever she was busy with and rush to Jaco's aid, as the responsible head of the school.

40. The evidence of Mrs V[...] R[...] was in brief that she was the teacher in attendance during the school break to supervise 71 children who were playing on various playgrounds the day of the incident. She said that she was also called by children to assist Jaco, but the children told her that he did not want a woman to come into the bathroom and she was informed that he had sat on a dropper. As Jaco did not allow her access to the bathroom she instructed the children to call Mr H[...]. She was not present at all when the incident occurred.

41. She and Mr H[...], in contrast to Mrs C[...], both confirmed that they did not think anybody would sit on the dropper, but that both of them certainly regarded the metal dropper protruding above the tree on the general playground as being dangerous and that injury could have been caused, for instance, that a child could fall on the dropper.

42. The only evidence thus before this court of how the incident happened was most probably that the minor child either sat on the dropper or leaned against the dropper and the dropper thereafter penetrated his rectum and caused the injuries he sustained afterwards. It does not seem plausible to any of the parties or the court that Jaco could have injured himself in this specific manner if he had fallen backwards on the dropper.

43. That was the evidence, and during the trial it crystallized that it was common cause that the defendant had a duty of care in regard to the minor child in particular. The plaintiff's counsel argued that the court had to find negligence on the side of the defendant for placing a metal dropper in the middle of a playing field where minor children who are known to be impulsive and have certain disregard for rules and/or their own safety would create a hazard and a dangerous situation for these children.

44. The plaintiff counsel also argued that injury was foreseeable by the defendant. The court was asked to have regard to the fact that both Mr H[...] and Mrs V[...] R[...] conceded that the dropper protruding above the tree, could injure a child due to the fact that it was situated in the general playing field and also due to the fact that children often act contrary to the normal reasonable person.

45. The defendant' counsel on the other hand argued that it is not a dangerous situation per se, especially in light of the purpose of the dropper and that the trees were planted for the purpose of shade. It was argued that by securing the tree by a dropper was not per se negligent and/or causing a dangerous situation. The probabilities that the minor fell on the dropper, which was effectively not the version of the plaintiff, cannot be supported by the fact that there were no scratches on his buttock, therefore he must have sat on the dropper and this would never have been foreseen by any of the defendants.

46. The defendant's counsel referred me to various case law to which I will refer later, and argued that each case must be determined on its own facts and based on the case law there could never have been a possibility or reasonable foreseeability that the minor child would sit on this object and that the defendant foresaw this, damage causing event.

47. Furthermore, it was argued that the element of causality was not present in that even if there was a teacher present that supervised the children, the evidence was that this teacher would not have been able to prevent Jaco from injury.

48. Both plaintiff and defendant's counsel addressed me on the issue that if it is not found that the defendant was 100% negligent for the injury caused to Jaco that there would be contributory negligence by Jaco. Neither counsel wanted to commit themselves in argument towards a contribution of negligence, although the defendant's counsel in their heads of argument stated that in the alternative, and only in the event that the court found contributory negligence, that an apportionment of 60/40 in favour of the defendant is reasonable

under the circumstances.

49. I now deal with the case law as argued by counsel. In **Kruger v Coetzee** 1966 (2) SA 428A at 430E - H the test for negligence has been set as follows:

> "*According to this test negligence will be established if-*
>
> *(a) the diligence paterfamilias in the position of defendant -*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his personal property and causing him patrimonial loss: and*
>
> *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) 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 the diligence 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 on a particular circumstances of each case."*

50. The same test was applied in **Transvaal Provincial Administration v Coley** 1925 AD 24 at 28 in which the following was stated by De Villiers J A:

> "*But, applying this test to the facts of the present case, I have come to the conclusion that a prudent and careful man, who gave his mind to the matter as such a person would naturally do, should have foreseen that the sticks with such sharp projections in the neighbourhood of the mound where children would naturally play were a source of danger to very young children and sooner or later might result in injury. <u>If the sticks had been placed in the middle of</u> <u>the playground where children are wont to play hockey, for</u> <u>instance, it can hardly be doubted that that would constitute</u> <u>negligence,</u> (own underlining) And, apart from the presence of the mound in the immediate vicinity, there is also much to be said for the view that the prudent man should not have placed the sticks where the accident occurred, for although they were not on the cleared space it was admitted that they were on ground which formed part of the playground."*

51. In the matter of Coley *supra* the facts are important and I will shortly deal with them as set out in the heading of the case. [24] "*The school in question was under the administration of the appellant and through its servants planted a number of young trees upon a portion of the playground of a school under its control, and in order to protect the trees erected wooden stakes with sharp and jagged points round each tree. These*

stakes were pressed into the ground and brought together at the top in the form of a pyramid. The area covered by the trees had become overgrown with the grass and in that area a hole had been dug, and the earth heaped up at the side of it, forming a mound two or three feet in height, Respondent daughter a child of six years, when playing on the mound ran down it and fell on one of the stakes, which pierced her eye in such a way that it had it be removed

Per Innes, C J

> *[25] She was told by the teacher to play under a certain tree, but childlike she wandered a little further into the playground and accompanied by a companion began to run up and down the mound which had been described in the evidence. She fell while running down the mound and one of wooden stakes planted over a small tree near the foot of the mound penetrated her eye.....*
>
> *From these facts a duty arose to prevent these stakes being a danger to children playing in the vicinity, if such danger ought to have been apprehended. And the question whether danger ought to have been apprehended resolves itself into an enquiry whether a diligens paterfamilias or a reasonable prudent person would have foreseen that they would be likely to cause harm- in which case he would have been bound to either remove them or take other steps to obviate the danger*

The defendants relied on the minority judgement by Wessels J A:

> "*I can understand the view that on or near the playground of small children these should be no obstruction whatever. Nothing over which they may trip or on to which they may fall because small children do not appreciate the danger that may lurk in ordinary objects. It is useless to plant trees unless they are protected when young and the usual way of protecting them and of warning the public of the whereabouts is to put some stales around them. The evidence does not justify any conclusion that the grass was so high that the stick did not project above the grass. I do not think that a prudent man would regard such a proceeding in an infant school as unreasonable way of protecting trees. Such protection is no more dangerous that deciduous trees themselves, for these after their leaves have fallen are not unlike stakes and may cause the same damage to children as a stake may cause.... I do not think that any prudent man could have foreseen such a calamity..... I think this belongs to the class of unforeseen accidents and not to an injury caused through culpa or negligence.*

52. Counsel for plaintiff relied heavily on this case and argued that these circumstances are similar to the fact in causa.

53. In the matter of **Hawekwa Youth Camp v Byrne** 2010 (6) SA 83 (SCA) at paragraph 22 the principles of wrongful omission were set out as follows:

"*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 positive act causing 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 of 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 a public or legal policy consideration requires such omission, if negligent, should attracted legal liability for the resulting damages."*

54. The plaintiff's counsel therefore argued that wrongfulness was proven when the defendant accepted that a legal duty existed for the defendant to prevent any loss and/or injury to the minor child and once the legal duty stood the neglect to prevent a dangerous situation to exist, led to prima facie wrongfulness. This is set out in **Neethling, et al, Deliktereg,** 4th Edition, Butterworths, page 17.

55. Thus, it was argued that the defendant was negligent by placing a steel dropper next to a small tree in a playing field where children were playing on a daily basis, either cricket and/or rugby and/or other forms of ball play and that the reasonable man could foresee that the dropper where the children were playing, was a source of danger and that it could at any stage have caused injury.

56. Counsel for defendant argued that the Coley case supra, is discernible due to the fact that the case refers to circumstances in which a child was injured due to the fact that she fell on these sticks while running over a mound, but in the matter in causa no such evidence is before me, as the only evidence, I have, is that the minor child sat in the dropper.

57. The next question the court had to answer in the positive in order to find for the plaintiff was if the injury was foreseeable. Injury in general, I find, was foreseeable due to the fact that a dropper sticking out on a general playing field such as a rugby field or a field where children play ball, would cause injury if any children either stepped in or fell on such dropper, as underlined in the Coley matter supra.

58. It was also the evidence of Mr. H[...] and Mrs. V[...] R[...] that they regarded the dropper as creating a dangerous situation in the playing field, thus I find, in general, it could cause harm to the children on the playing field.

59. The plaintiff's counsel argued that it is irrelevant for the test of negligence as formulated in Coetzee *supra* if the specific incident had to be foreseeable. The test is not directed on a specific incident, but on the reasonable foreseeability of the reasonable person by placing the metal dropper in the general vicinity where

children were playing and knowing that these children, specifically the children in the matter in causa, were hyper-active children, were children receiving remedial schooling and were also children that acted even more so erratic and irresponsible than other children.

60. It was also evident that no alternative steps were taken to prevent any harm being caused by the droppers. The evidence was on the contrary that after the incident occurred the droppers were not removed and were still situated next to the trees and were only taken out when the trees were stronger.

61. Mrs V[...] R[...], also confirmed that although she viewed it as dangerous she did not take any steps to bring it to the attention of the Head or other teachers.

62. In **Knouwds v Administrateur Kaap** 1981 (1) SA 544 (C) at 553D -554D a school was held liable for the injuries caused to a child while putting her hand on a lawnmower trying to hold her balance. The evidence in this matter was, inter alia, that the teacher that was supposed to supervise the children was not present when the accident took place. In his judgment Friedman, R said the following:

> "*Dit is welbekend dat die gedrag van kinders dikwels impulsief, onvoorspelbaar en onverantwoordelik kan* wees. *(Sien R.v. Press 1938 CPD 356). Ook is dit welbekend dat kinders so verdiep raak in die aktiwiteite waarmee hulle besig is dat hulle onbewus is van enigiets anders. (Sien Jones N.O. v Santam 1964 (2) SA 542 (A) te 553F - G.) Hierdie eienskappe van kinders moes aan die hoof van 'n primêre skool wat bemoeid is met die opvoeding van jong kinders, insluitende die in Sub A en wat daagliks met hulle in aanraking kom, bekend gewees het. Uit die foto's van die grassnyer wat aan die Hof voorgelê is, blyk dit dat dit 'n oop waaierband het en daar 'n oop en onbedekte ketting is wat die wiele blykbaar aandryf. Onderaan die grassnyer is daar natuurlik lemme.*
>
> *Dit word deur die verweerder erken dat die grassnyer aangedryf word deur krag wat deur 'n petrolenjin verskaf word en dat die wiele van die grassnyer op soortgelyke wyse aangedryf word. Die grassnyer is uiteraard 'n gevaarlike tipe masjien om in aanraking mee te kom veral indien dit inwerking is. Die moontlikheid dat jong kinders met 'n grassnyer soos die wat in die ongeluk betrokke was, sou bots indien dit op 'n betrokke tydstip en op die betrokke plek gebruik was en dat hulle as gevolg daarvan beserings sou opdoen, moes deur die skoolhoof voorsien gewees het. Dat die skool hoof inderdaad die moontlikheid besef het, blyk uit sy brief.*
>
> *Die opsigter, Smit, se plig op die betrokke dag was om toe te sien dat geen kind naby die spesifieke terrein kom nie. Die moontlikheid van skade en beserings moet derhalwe ook minstens deur mnr. Smit homself voorsien gewees het. Trouens, sodanige moontlikheid moes deur enige redelike persoon wat met so 'n tipe grassnyer gewerk het, voorsien gewees het. Derhalwe sou sodanige moontlikheid deur*

Gert Links ook voorsien gewees het. Die volgende vraag was *of 'n redelike persoon in die omstandighede voorsorg sou getref het ten einde die intrede van die skade like gevolg te vermy of te voorkom. Myns in sien s, is die antwoord op hierdie vraag bevestigend... Ten tye van die ongeluk was mnr. Smit egter nie op sy pos nie. Selfs al sou hy deurentyd op die perseel teenwoordig gewees het, sou dit myns insiens nie 'n doeltreffende voorsorgmaatreël gewees het om bloot op die aanwesigheid van mnr. Smit staat te maak om die veiligheid van die kinders te verseker nie, in ag genome die aanwesigheid van die aantal jong kinders wat daar gespeel en rondgehardloop het. Daar kan ook nie gesê word dat daar nie 'n alternatiewe keuse bestaan het nie."*

63. Plaintiff's counsel further argued that the concession of Ms V[...] R[...], who confirmed that on the day in question, she could not provide any supervision at any certain time to all the children who were playing on the various playing fields, and it was impossible for her to have regard to the bigger children when she was 150 metres away with the Grade 1's and the smaller children. Thus, the fact that there was no supervision when Jaco was injured was evident and the fact that the supervision was lacking, I find, also in the circumstances evident.

64. If regard is had to the specifications of a general State school or Government Department that provides for supervision of one teacher per 100 children in break time, one cannot in these circumstances, especially in view of the fact that these children are special remedial children who are hyper-active and who do need more attention, I find, that supervision on the playground was in the circumstances not sufficient.

65. If the accident could have been prevented is a purely speculative question on both parties' and the witnesses' part. This court does not know if it is possible that if a teacher was present and she saw that Jaco was not feeling well and proceeding towards the metal dropper could have prevented the injury. It might well be so that the injury could have prevented. That, however, I think is not the question to be answered here. The plaintiff's case is based mainly upon the fact that the metal dropper created a dangerous situation and that it was foreseeable that injury could be caused by it, and that the defendant acted negligently in not preventing the injury causing the harm to Jaco.

66. I was also referred by defendant's counsel to **Wright v Cheshire Country Council** 1952 (2) All ER 789 (CA) at 792 where it is stated:

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

67. I was also referred to the case of **Williams v LUK van Gauteng, Department van Onderwys & Andere** 2004 JOL 12450 (T), a judgment handed up to the Honourable Court by the Learned Bertelsmann, J who had to determine the question of injuries sustained by a minor child pertaining directly to the question of negligence and causation. In this matter the court went on to say the following:

> [P8] "*Dat die skool en sy opvoeders in loco parentis gestaan het en dus 'n regsplig teenoor die leerders gehad het om hulle teen beserings en ander benadeling te beskerm, was ook gemeensaak. Volgens Magolego, The Legal Implications of Teachers and Education Authorities in loco parentis and Safety at Schools, Codecullis, Volume XCIV No 1, May 2003 at 64 et sê Mynhardt N.O. v Minister of Education & Another 2002 (6) SA 564 (C) en die gesag daarin aangehaal.*
>
> *Dit is egter nie die einde van die ondersoek nie. Die vraag is steeds of Victor se optrede voorkom sou kon word indien daar 'n opvoeder of opvoeders op die A veld* was *ten tye van die voorval. Daar bestaan geen getuienis dat dit die geval is nie. Dit is onbekend op welke tydstip Victor op die skoolterrein verskyn het. Daar is geen aanduiding dat enigiemand voor die tyd bewus was van sy toestand of van die feit dat hy weer daarop uit was om skoor te soek nie. Ek het die vraag spesifiek tydens argument geopper of die voorval nie sou plaasgevind het nie as daar drie onderwysers aan die ander kant van die veld* was *toe Victor op die punt gestaan het om die hou te slaan nie.*
>
> *Die partye* was *dit feitlik eens dat dit Victor nie sou gekeer het nie. Tensy iemand in gesag in Victor se onmiddellike teenwoordigheid* was *toe hy wou slaan, sou hy horn volgens die algemene oortuiging van al die getuies nie laat weerhou het van sy voorneme nie.* A/a *my mening plaas dit die saak in die kader van beslissings soos Moses v Minister of Safety & Security 2000 (3) SA 106 (K) op bladsy 107C - H en word die kern van die saak in die kopstuk soos volg korrek opgesom: ...''The deceased in a state of inebriation have been placed in a cell which had been set aside for the detention of persons arrested for drunkenness and also disorderly conduct. It was obvious that if such persons were detained in a confined space such as a police cell the possibility of physical conflict was a real risk. In view of the aforegoing and the nature of the relationship between the defendant and the persons being detained, the defendant's servants had a legal duty to have taken reasonable steps to protect the deceased against assaults by any of the other persons detained in the cell with him... I fit were accepted that cell inspections should have been conducted at regular intervals the question* was *at what intervals should they have been made and whether a reasonable person would have made them at shorter intervals than 25 minutes. Bearing in mind the absence of knowledge of the deceased's assailants on the part of those on duty in the charge office the absence of overt signs of aggressiveness on their part, the relative limited manpower (sic) available and the number of matters that had to be attended to at the time the reasonable person would not have done more than the*

defendant's servants had done. In the premises the plaintiff had failed to prove on a balance of probabilities that the defendant had been negligent. The defendant was not in law liable for the injuries suffered by the deceased and the sequelae thereof. "

Bertelsmann, J went further having regard to the facts of the matter supra at [p11]:

"*In hierdie geval was daar wel 'n versuim om behoorlik toesig oor die leerders te hou. Na my mening egter is daar geen getuienis wat daarop dui dat indien hierdie versuim nie plaasgevind het nie die skade veroorsaak en 'n handeling voorkom sou gewes het. Daar is geen getuienis wat daarop dui dat indien een of meer opvoeders onmiddellik voor of self tydens die voorval in die algemene omgewing van die A veld* was *die voorval nie sou plaasgevind het nie. Onder die omstandighede is dit derhalwe onmoontlik om ten gunste van die eiser te beslis. Op 'n menslike grondslag is hierdie resultaat onbevredigend maar regtens is dit die enigste gevolgtrekking waartoe ek kan kom."*

68. Being mindful of the judgment supra, the defendant counsel argued that it must be borne in mind that albeit that there might a legal duty on the defendant's, it can never be found that a defendant acted wrongfully if there is no negligence. Where pupils are not kept under constant supervision of teachers, is not in itself a breach of the duty of care owed to such pupils. The degree of supervision required depends on the risks to which the pupils are exposed. The principle comes from the decision of **Rosere v The Jesuit Fathers** 1970 (4) (SA) 437 (A) where a group of children between the ages of 7 and 10 were left unattended and engaged in a game using bow and arrows during which an 8-year old boy sustained a serious injury to his eye. The court entered judgment in favour of the defendant and Beck, J held at 539 F - H that:

"In my opinion, however, the duty to keep children of this age under constant supervision depends on essentially the risk to which they are exposed in their particular surroundings. No doubt a reasonable man who is in charge of a number of young children at the seaside would be guilty of negligence if he were not to keep them under constant supervision. To contend, however, that children of this age should never be more than momentary out of sight of a responsible person even when they are in normal and familiar surroundings which are devoid of features that could ostensibly be regarded as hazardous, I think exact too a high duty of care from the bonis paterfamilias. [540] H *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 schoolmaster must keep his pupils under supervision for every moment of their school lives.* "

69. Thus, the defendant counsel argued that the facts of each case must be determined and the relevant case law having regard thereto could never have been a possibility or reasonable foreseeability that the minor child would sit on this object which is the only evidence before Court. The defendant further argued that the

element of causality is not present in that even if a teacher had been present and even if one should accept the version of the plaintiff that the minor child had fallen, that if teachers were present, the incident could it could not have been prevented, thus negating the element of causality.

On the evidence and the common facts and all the legal principals and case law as referred to supra, I make the following findings:

70. The defendant, I find, when planting the specific tree that caused the damage and inserting the dropper next to the tree in the general playing field where children were known to play rugby, cricket and other ball games, created a hazardous and dangerous situation. I find, that the foreseeability of damage was present, due to the fact that it is general knowledge that if children run in a specific area where a dropper is protruding above a tree any of these children could fall and injure themselves on the protruding dropper. This was also confirmed by two of the witnesses for the defendant.

71. I find that, as set out in the Coley matter *supra*, a prudent man in the shoes of the defendant would not have placed the dropper in the vicinity where children were known to run and play. The prudent man might also have secured this specific tree by other means, less hazardous and or less potentially harmful.

72. I also agree with the Hawekwa matter *supra,* which one I am bound to follow, that once the legal duty existed, which was not in dispute to exist in this case, it would be a criteria of public and legal policy consistent with constitutional norms to determine whether the legal duty was in fact present and any negligent omission, by the defendant, when causing loss will only be regarded as wrongful if public policy requires such a deduction of negligence would result in legal liability for damages.

73. I find therefore that failure therefore to prevent or control the dangerous situation by the defendant was *prima facie* wrongful. If the specific damage causing act was foreseeable, as is set out in the matter of Coetzee *supra*, is not relevant, due to the fact that the defendant only had to foresee that it could cause harm to the children in general.

74. The fact that there were no teachers present the day in question when Jaco was injured is also, irrelevant, due to the fact that it will be speculation to in these circumstances to try and determine if supervision would have prevented the harm causing event. It may well have, if a teacher was present and saw that Jaco was in a "state" and was going to sit on the dropper.

75. I therefore find that the planting of the dropper in the playing field was wrongful, caused a dangerous situation and that the defendant should have foreseen that it could cause harm to any of the children and Jaco in particular.

76. I now have to deal with the fact that the defendant argued, although not pleaded, and addressed me on the contributory negligence of Jaco. The defendant counsel submitted that it is provided in **AA Mutual Insurance Association v Mameka** 1976 (3) SA 45 (AD) *that albeit that allegations of contributory negligence were pleaded by the defendant in casu and it did not pleaded in the alternative in terms of the Act, that if the court found that the collision* was *not due solely to the plaintiffs fault, or partly to his fault, that the damages suffered should be reduced to the extent as the court may deem just and equitable. The decision held that in void of decisions prior and provided that the plaintiff's fault is put in issue, an apportionment need not be specifically pleaded or claimed: Provided therefore, it is clearly put in issue that the plaintiff* was *at fault, either completely to a certain agree, the court has to apply the provisions of the Act.*

77. The defendant in light thereof submitted that this court is in a position to apply a contribution in that Jaco who is evidently not *doli incapax* in light of him taking the oath and the evidence of the witness that he understood the difference between right and wrong, was solely negligent in having sat on the dropper, alternatively, that the court should apportion damages on a basis of 60/40 in favour of the defendant.

78. When dealing with contributory negligence I was referred to **Eskom Holdings v Hendricks 2005 (5)** SA **503** (SCA) at **511 - 512** where the following was stated:

> "*The Supreme Court of Appeal again had to deal with this matter in evaluating the alleged contributory negligence of a child of 11 years of age. The court took cognisance of criticism of the reasonable person test for children that refer to the approach in the abovementioned case of Webber v Santam Versekerings-maatskappy and reiterated that in each case what had to be determined was whether the child in question had developed emotional intellectual maturity to appreciate the particular danger to be avoided and, if so, to act accordingly. In this matter the child climbed a power pilon to a height of 14 metres and* was *injured by an electrical shock when he wanted to touch an insulator. According to the court the child would in casu have acted negligently if he had sustained injuries by merely falling from the pilon since this kind of risk* was *learnt by children from an early age. However, the child* was *not injured in this manner, but rather as a result of the fascination with the insulators. Although his conduct* was *foolhardy in extreme he did not have sufficient knowledge of the electricity on pilons and high voltage cable to resist the urge to continue with his exploration. His dangerous conduct* was *in fact an indication that he did not have the ability to act in accordance with any insight into the danger that he might have had. Therefore, no grounds were present to find contributory negligence on his part.''*

79. As in this case Jaco informed the court that he did not know why he would have sat on the dropper because it would have been silly for him to do so. Coupled with the evidence of the expert indicating, which evidence was accepted by all the parties, that it is possible for a person to sit on a dropper if one distributes

your weight evenly, I cannot find that Jaco acted foolhardy in the extreme. I can only find that Jaco when he sat on the dropper did not foresee any of the harm that would befall him.

80. In the circumstances I must consider and determine his capacity for fault with due regard to his youthful inability to control irrational or impulsive acts, his knowledge and experience must not be equated with maturity and judgment just because he is required to measure up to the objective standard of a reasonable adult. The court must be satisfied that he is sufficiently mature to do so before holding him *culpae capax.* This was set out in **Webber v Santam Versekeringsmaatskappy Beperk** 1983 (1) SA 381 (AD).

81. The court went on to say further that when both parties have been found negligent and the child *culpae capax*, the fact that he is a child is irrelevant in the apportionment process in all cases where the defendant knew or ought to have known that he was dealing with a child, because a defendant's failure to take extra care required in those cases makes his degree of fault greater than the child's.

82. Thus I find in this case that the defendant, which is common cause, had a legal duty towards the minor child, Jaco.

83. The defendant further knew that it was dealing with a child that was sometimes irrational, hyper-active, had learning disabilities and had suffered some form of trauma through the divorce of his parents. He was not a special child in the mental sense, but certainly a special child emotionally and a child in need of protection more so than the diligence *paterfamilias* could provide to children in mainstream schools.

84. In the circumstances, I must therefore find that the apportionment of negligence must be exercised in favour of Jaco and that the degree of fault must be equated greater to the defendant than to Jaco.

85. I therefore make the following order:

1. That the defendant is 80% liable to compensate the plaintiff in the amount of damages the plaintiff is able to prove.

2. That the defendant shall pay the plaintiff's costs of the action, finding in favour on the merits, which costs shall include the costs of senior counsel.

S.STRAUSS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv.: G C MULLER (SC)

Instructed by: N VAN DER MERWE ATTORNEYS

For Defendant: Adv.: P A VENTER

Instructed by: VAN ZYL LE ROUX