Republic of South Africa

- REPORTABLE -

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 7244/06

In the matter between:

GARY MICHAEL BYRNE Plaintiff

and

HAWEKWA JEUGTERREIN First Defendant

THE MINISTER OF EDUCATION
FOR THE WESTERN CAPE PROVINCE Second Defendant

Counsel for the Plaintiff: Adv AR Sholto-Douglas SC – 021 423 4298
Plaintiff's Attorneys: Heyns & Vennote Inc

Counsel for the First Defendant: Adv H McLachlan – 021 424 1918
First Defendant's Attorneys: Visagie Vos & Partners

Counsel for the Second Defendant: Adv M Donen SC – 021 424 4793
State Attorneys on behalf of Second Defendant

Matter was heard on the following dates:-
5, 6, 10, 11, 12, 18 and 19th of March 2008

Argument was on 11 April 2008.

Judgment was handed down on 16 September 2008

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JUDGMENT: DELIVERED ON 16 SEPTEMBER 2008

Le Grange, J:-

[1] The Plaintiff instituted action on behalf of his minor son, Michael Nicholas Byrne ("Michael"). The Plaintiff claims damages suffered as a result of bodily injuries sustained by Michael during an incident that occurred on 4 March 2004 at the premises of First Defendant.

[2] The First Defendant's main business was to supply accommodation for groups of persons, including schools, wishing to attend camps on its premises near Wellington in the Western Cape.

[3] The Second Defendant is cited in his capacity as the Minister responsible for schools in the Western Cape Province. In March 2004 Michael was 8 years and 9 months old and a grade three pupil at Durbanville Preparatory School (the school). The school resorts under the authority of Second Defendant.

[4] It is common cause that the school, on a regular basis, organised camping excursions for their grade three pupils at the premises of First Defendant. The school organised such an excursion and Michael was one of the pupils who was part thereof.

[5] In the early hours of 4 March 2004, Michael was found by Mr Moosa Raise ("Mr Raise"), on the floor of one of the bungalows of First Defendant with visible bodily injuries and in a state of unconsciousness. Michael was immediately taken

to the local hospital. It is further common cause that as a result of the fall, Michael suffered severe head injuries.

[6] The Plaintiff's Particulars of Claim of the breach of duty and liability of the Defendants were framed as follows:-

> *"**BREACH OF DUTY OF CARE***
>
> *[13] The first defendant, alternatively the first defendant and its employees acting within the course and scope of their employment as such, alternatively the first defendants employees acting within the course and scope of the employment as such negligently breached their duty of care to Michael in one or more of the following respects;*
>
> *13.1 They caused or allowed Michael to sleep in a bunk bed which was devoid of any protective railing that would prevent him (or any other child) from falling from the bunk bed;*
>
> *13.2 They caused or allowed Michael to sleep in the bunk bed thus increasing the risk of him falling there from;*
>
> *13.3 They failed to ensure that a protective barrier complying with normal safety standards was present on the bed in which Michael slept;*
>
> *13.4 They failed to take any or any adequate steps to prevent Michael falling and injuring himself."*

[7] In terms of Rule 33(4), the only issue for determination is the liability of the Defendants. The question of *quantum* stands over for later determination.

[8] The First Defendant denies liability for the alleged negligent breach of its duty of care towards Michael as averred by the Plaintiff in its Particulars of Claim. The Second Defendant denies that it owes a duty of care towards Michael as averred by the Plaintiff in its Particulars of Claim. The Second Defendant also pleaded that Michael's mother, Mrs Byrne, has signed an indemnity form exonerating the headmaster and staff of the school and Second Defendant from all blame and liability for any claim which may arise from injury to Michael in the course of his participation in the excursion.

[9] In the Plaintiff's case, the following persons testified: Mrs Byrne, the mother of Michael, Mr. Oelofse, one of the bungalow parents during the excursion, Ms N Du Toit, a qualified social worker employed by the Child Safety Centre at Red Cross Children's Hospital, Rondebosch and Dr. Butler, a neurologist.

[10] Mr and Mrs Enslin, who at various times held the position of manager of First Defendant, testified on its behalf. On behalf of the Second Defendant, the following persons testified: Mr. Coetzee, a bungalow parent, Mrs Trollip and Mrs Range, the teachers who arranged the excursion on behalf of the school, Mr. Moosa Raise, the bungalow parent where Michael slept and Dr Reid, a neurologist.

[11] Mr AR Sholto-Douglas, SC, appeared on behalf of the Plaintiff and Mr HG McLachlan for the First Defendant. Mr M Donen, SC, appeared for the Second Defendant. Mr Sholto-Douglas principal arguments in brief are, that the inference drawn by the Plaintiff in his particulars of claim coincides with the inference drawn by all the witnesses who were present in the bungalow shortly after Michael's fall. The inference that Michael fell out of the upper bunk bed, according to him, is also consistent with the proven facts and that a duty of care existed on the employees of Second Defendant in the circumstances of this case. He also contended that the Plaintiff on a balance of probabilities has proven the pleaded negligence on the part of the employees of First and Second Defendant and established that such negligence caused the brain injury Michael sustained.

[12] Mr McLachlan's argument, briefly stated, is that there is no evidential and or legal basis upon which the Plaintiff has on a balance of probabilities established culpable conduct on the part of First Defendant. He also questioned the expertise of Ms N Du Toit's testimony regarding protective railings of bunk beds. Mr Donen's principal arguments, briefly stated are that the Plaintiff failed to prove that the employees of Second Defendant acted wrongful or negligent. He also contended that Dr Reid's opinion should be accepted and that the contents of the letters that was written between the school principal and First Defendant are not material to the issues in dispute in this matter.

[13] The common cause facts, before Michael was found on the floor by Mr Raise, can be summarised as follows:

> The parents of the children who attended the excursion were told they would be accommodated in chalets and would sleep on bunk beds. It is also common cause that the parents were reassured that the First Defendant's premises were safe, in particular, the swimming pool area was fenced, that the pool was shallow and that there would be constant supervision at all times.
>
> Parents were asked to volunteer their services as bungalow parents or in relation to the transporting of children to and from the camp. The camp was held during a school week, commencing on a Thursday morning and finishing on a Friday afternoon.
>
> The parents of the children were required to complete an indemnity form as well as a form which indicated information regarding their child that may be relevant to those responsible for them during the course of the camp. This included information such as medical conditions and medication used by the child. In addition, parents were encouraged to record any specific characteristic of their child that may be relevant such

as bed-wetting or restless sleeping. Michael's mother completed such indemnity form and provided information regarding Michael.

The volunteer bungalow parent was to be placed in a position to oversee the children while they were on the camp. One parent was placed in charge of a bungalow of children. Each bungalow housed ten persons in five double bunk beds. In a full bungalow, there would be nine children and one adult. Three teachers were placed in ultimate control of the group.

The parents who volunteered to assist as bungalow parents attended a further meeting at which their duties and responsibilities were outlined. These duties included maintaining supervision over the children at all times and ensuring that they were settled down and went to bed at an acceptable time.

On the morning of 3 March 2004, Michael and his classmates set out for their overnight camp at the First Respondent's premises. The first day of camp was filled with activities that had been pre-arranged by the teaching staff. By all accounts, the children were kept busy and active throughout the day.

Michael had been elected bungalow leader by his peers. The bungalow parent of the bungalow in which Michael slept was Mr Raise. The children retired to bed about 10 pm that night. Michael slept on the top of a bunk-bed in the far right hand corner of his bungalow as approached from the doorway. As bedding, Michael took a new sleeping bag with him that his mother had bought shortly before the camp.

At or shortly after 4am Mr Raise was awoken by what he described as a growling noise. He turned the light on to find Michael on the floor in a state of unconsciousness. Michael was being taken to hospital and his parents were informed of the incident.

[14] The issues in dispute are firstly, whether Michael was asleep in his sleeping bag on an upper bunk bed before he fell. Secondly, was there any other cause, including a medical condition that precipitated the fall of Michael. Thirdly, were there protective measures on the bunk bed and if so, was it reasonably adequate to prevent Michael from falling off the upper bunk bed. Fourthly, does Second Defendant and its employees owe a duty of care towards Michael, and if so, did the employees of First and Second Defendant fail to take reasonable steps which a reasonable person would have taken in the circumstances to prevent the injuries Michael sustained, by preventing him from sleeping in the upper bunk bed which, as averred, was not adequately protected.

[15] There is no direct evidence of the circumstances that gave rise to Michael's fall.

[16] The tried and tested principles regarding the interpretation of circumstantial evidence are reflected in the test enunciated in R v Blom 1939 AD 188 at 202 –203. These principles were suitably modified to reflect the civil burden of proof in Macleod v Rens 1997(3) SA 1039 at 1049 A – C, where the following is stated:-

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn;*
>
> *(2) The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail."*

[17] The evidence of the witnesses who saw Michael on the floor in the early hours of the morning of the incident, can briefly be summarised as follows. Mr Raise testified that he saw Michael lying on his right hand side facing the wardrobes. The wardrobes run across the middle of the bungalow, parallel to the bed in which Michael was sleeping. He said Michael was at a slight angle to the bed with his upper body closer to the wardrobe than his lower half, which was

closer to the bed. Mr Raise indicated that he had woken Mr Coetzee and asked him to keep an eye on Michael while he went to wake the teachers. Mr Raise was questioned what may have caused Michael to be found on the floor. He replied that they all believed he had fallen from the bed. He also testified that there were planks (as depicted on pages 62 and 63 of exhibit "A") on the bunk beds in the bungalow.

[18] Mr Coetzee's evidence was that he found Michael on the floor on his right hand side. He said that he was in the middle of the floor between the bed and the wardrobe. He described the floor as being wet. He found Michael partially covered with a blanket and pulled the blanket further up over him. He cradled him in his arms and waited for the return of Mr Raise and the teachers. He further testified he did not observe any protective planks on the bunk beds in the bungalow where Michael slept.

[19] Mr Oelofse testified that he had been woken by Mr Coetzee asking whether he, Mr Oelofse, had any first aid knowledge or a first aid kit. He went from his bungalow, to the bungalow in which Michael was sleeping. He noticed people standing around Michael, who was on the floor. He noticed a great deal of mucus with some blood in it around Michael's face. He was adamant that Michael was in a sleeping bag at the time he saw him. He indicated that at that stage, there were a number of other people in the bungalow as well. He also

testified that there were no protective planks on any of the bunk beds in the boys' bungalow where he slept.

[20] Mrs Trollip went into the bungalow after being summoned by Mr Raise. She saw Michael being cradled by Mr Coetzee. He was still lying on his right hand side and had saliva coming out of his mouth. He was covered in a blanket. She did not take notice if there was a protective plank on the upper bunk bed on which Michael slept. In cross-examination she conceded that in relation to the school children there may, according to her own words, "ten to one" not have been enough protection to prevent them from falling from the upper bunk beds.

[21] Mrs Range testified that she did take notice of the planks on the bed in which Michael slept. She also testified that her own son was attending the camp and placed no significance on the fact that he may have slept on a double bunk bed. She conceded that there were parents of children who refused to allow their children to sleep on upper bunk beds. She also admitted that on recent visits to the same premises, she prohibited her learners to sleep or play on the top bunk bed because of what happened to Michael and the legal consequences that may follow should anyone be injured.

[22] The witnesses who saw Michael lying on the floor drew inferences from what they had seen. Mr Oelofse's evidence was that Mr Coetzee had told him

that someone had fallen off a bed. Mr Coetzee testified that Mr Raise had told him that it appeared that someone had fallen off a bed. He testified that he drew the same inference when he saw Michael. Mr Raise gave evidence that the children were woken by the commotion and that he had told them that Michael had fallen out of bed and that they should lie still in their beds while he went to call the teachers. Mrs Trollip testified that she had told Mrs Enslin, the manager of the camp, that Michael had fallen from the bed. Mr Range told the doctor at the hospital that Michael had fallen off a bunk bed. The following information was recorded by the hospital (page 69 of Plaintiff's bundle):- *"?Konvulsie geval vanaf hoë bed, stapel bed".* She however also mentioned in her evidence that she felt Michael had a seizure and was not sure whether it happened before or after the fall. Mrs Enslin's version on this issue confirms that she had been told in passing that one of the school's children had fallen out of a bunk bed.

[23] Apart from the evidence of Mrs Range, who also volunteered the opinion that Michael may have had a seizure and was not sure when it happened, the rest of the witnesses who were present when Michael was found on the floor drew the conclusion that he had fallen out of the upper bunk of the bed whilst asleep.

[24] The Plaintiff called Dr James Butler, a specialist neurologist. His evidence confirms that Michael's injuries, which included bruising of the right shoulder and

right hip, were entirely consistent with him falling off the bunk bed during his sleep, as children are sometimes prone to do, and as a result sustained an acute traumatic brain injury that caused an acute symptomatic epileptic seizure. The Second Defendant called Dr Johan Reid, a neurologist who had a different opinion. Dr Reid testified that it was most probable that Michael had experienced a generalised tonic clonic epileptic seizure before he fell out of bed and sustained his injuries.

[25] Dr Reid, who examined Michael as a result of the injuries he sustained, diagnosed him as suffering from epilepsy and prescribed certain medication for him in this regard. Dr Reid made his diagnosis on his interpretation of an MRI scan and on the basis of a brief discussion with Michael and his parents. During the discussion, Michael who at the time was twelve years old, mentioned that he and the other boys were playing in the bungalow until 03h00 in the morning, swinging from the rafters and generally being boisterous. Michael's parents decided to contact a paediatric neurologist, Dr Van Der Walt, who had in turn referred Michael to Dr Butler for assessment. The primary purpose of Dr Butler's assessment was unrelated to the present litigation, but was rather arranged as a second opinion to that presented by Dr Reid. In addition to examining all of the available radiological and historical material, Dr Butler subjected Michael to two 24-hour periods of EEG examinations. During this time Michael was hospitalised, EEG monitors were attached to his scalp, a video camera was used to monitor his every movement, and nursing staff trained in this function, were alerted to

watch for any signs of epilepsy. The test conducted by Dr Butler was entirely negative. In his view, there was no evidence of any interictal epileptiform discharges indicative of any form of epilepsy and stated that in a population of people who have epilepsy, 90% or more of such people will demonstrate interictal epileptiform discharges on such EEG recordings. His view was that there was no clinical evidence for epilepsy and also no electrographic evidence of any susceptibility for epilepsy.

[26] The evidence of these two Doctors and what informs the basis for their respective medical opinions, needs closer scrutiny.

[27] Dr Reid's reasons for holding his opinion are as follows: Michael had a pre-existing abnormality of the brain in the form of a mesio temporal sclerosis and on the night in question, there were precipitating factors in the form of sleep deprivation and low blood sugar due to a spare diet which brought on the generalised first epileptic seizure. According to him, Michael is now epileptic, suffering from complex partial seizures which have been described by him and identified by his mother.

[28] Dr Reid also testified that the pre-existing abnormality of Michael's brain is established by radiological evidence of a smaller temporal lobe. He also stated slow language development, and a history of a complicated birth will give

rise to a predisposition to epilepsy. Dir Reid readily acknowledged that his opinion in this regard is in the minority.

[29] In cross-examination, Dr Reid accepted that the asymmetry in the lateral ventricles of Michael's brain constitutes a normal variant if there are no symptoms of epilepsy. Dr Reid categorised the evidence regarding the events surrounding Michael's birth as a hint that Michael may have suffered some brain injury and as a consequence may have given rise to epilepsy in later life. He also questioned Michael's allegedly slow language development. According to him, the conclusions arrived at by speech therapists who suggested the slow language development was associated with bilingualism in Michael's home is wrong, as they were not aware of the neurological implications. The evidence of Mrs Byrne that Michael had been placed in an incubator after his birth because his temperature had been low was not gainsaid. There is no evidence to support the suggestion by Dr Reid that Michael may have suffered from an inability to oxygenate his body at birth. Dr Reid's further suggestion that Michael's slow language development may have been as a result of his pre-existing abnormality of the brain is also questionable. Michael's initial reticence to speak as a result of learning two or three different languages at the same time was not refuted.

[30] On the date of the incident, a CT scan was performed on Michael's brain and Dr Mouton, a radiologist, filed a report on it. Dr Mouton indicated the

presence of asymmetry of the lateral ventricles without any underlying demonstrable pathology. Dr Mouton expressed the view that this image was consonant with the appearance of a normal variation in the symmetry of the brain. Dr Reid described the asymmetry of the lateral ventricles as an abnormality. Dr Butler on the other hand explained this on the basis that every person has asymmetry on either side of their midline, and that an asymmetry in the brain is a *"naturally occurring phenomena"* and is often encountered. Moreover, that an asymmetry in the brain is not an indication of any underlying pathology.

[31] During Dr Butler's evidence, certain scans, "exhibit B", were shown to him in an attempt to elicit his agreement that the scans depicting abnormalities of the brain is likely to predispose Michael to epilepsy. Dr Butler denied any radiological signs or indications consonant with brain abnormality pre-existing the injury which could be seen on the scans. Dr Butler volunteered to place the scans before one of two qualified radiologists who specialised in neurological work and to furnish the Court with the report of that radiologist as soon as possible. During the cross-examination, it was evident that Dr Reid was the source of most of the questions put to Dr Butler. It was mentioned in passing by Dr Butler that during a short vacation recently, his 5 year old sleeping son fell from a top bunk bed which did not have a safety rail and suffered no major injuries.

[32] Dr Du Toit, one of the radiologists identified by Dr Butler as having a particular knowledge of neurological matters, produced a report dated 18 March 2003. Shortly prior to the production of this report, Dr Reid formulated a set of questions on which he sought the particular response of the radiologist who was to prepare the report. These questions were formulated and recorded as follows:

> *"Apart from the different stages of cerebral, cerebella and mid brain contusions, please comment on the following:*
>
> 1. *The size and lack of symmetry of the ventricles, including the temporal horn of the lateral ventricle.*
> 2. *Are the two cerebral hemispheres of equal size?*
> 3. *Is the left temporal lobe of equal size to the right temporal lobe?*
> 4. *Is the left mesial temporal lobe of similar size to the right (with specific reference to coronal sections)?*
> 5. *Are the left hippocampus and the left amygdala of similar volumetric size compared to the right?"*

[33] In his radiological report, Dr Du Toit dealt with the CT scan of the skull taken on 4 March 2004, the MRI scan of the brain taken on 7 March 2004, the MRI scan of the brain taken on 31 March 2004 and the MRI scan of the brain taken on 14 February 2008. In dealing with the MRI scan of the brain taken on 7 March 2004, Dr Du Toit reported the following:- "*an incidental asymmetry of ventricular size, with the left lateral ventricle being larger than the right. Mild*

asymmetric enlargement of the subarachnoid space on the medial aspect of the left temporal pole."

[34] In answer to Dr Reid's direct questions, the response was as follows:

> *"1. Asymmetry of ventricular size, including the temporal horns, is a normal variant.*
>
> *2. Cerebral hemispheres of equal size.*
>
> *3. Temporal lobes of equal size.*
>
> *4. Mesial temporal lobes of equal size.*
>
> *5. Left hippocampus and left amygdala of similar size compared to right."*

[35] This report was prepared before Dr Reid testified, but after Dr Butler had given his evidence. Dr Reid, despite the evidence of the EEG tests, the radiological reports, the denial by Mrs Byrne under oath of anything amounting to sub-clinical or complex partial seizures and a similar denial of such symptoms by Michael's teacher Mrs Trollip, persisted with his opinion. Moreover, at the time that Dr Reid made his diagnosis, he did so on his own interpretation of an MRI scan and on the basis of a brief discussion with Michael and his parents. Dr Reid also conceded the evidence of Dr Butler that the medical literature reveals that a normal child has 95 times greater chance of seizure from a brain injury of the type sustained by Michael, than in the absence of such an injury.

[36] The bulk of the medical evidence does not support the opinion advanced by Dr Reid. He, however, admitted that his opinion is the minority. On a conspectus of all the medical evidence, I am satisfied that Dr Reid's opinion can safely be rejected as unimpressive. The opinion he advances is not plausible in the face of the overwhelming medical reports and objective evidence of other medical practitioners that supports the opinion of Dr Butler. The facts Dr Butler based his opinion on, are recorded as follows:-

"a) Michael was a developmentally and neurologically normal boy until the night in question.

b) There are no risk factors in the history for the development of seizures. He had no family history of seizures or febrile seizures and no previous episodes of head injury or meningitis that would have increased his risk for developing seizures.

c) The history obtained from his parents indicates that there have been no clinical seizures in the 4 years since the fall from the bed. (The time of the only clinical seizure that has occurred in his entire life.)

d) Forty eight hours of continuous EEG recordings, which include wakefulness and sleep, demonstrate no interictal epileptiform discharges. In a population of people who have epilepsy, 90 % or more of such people will demonstrate interictal epileptiform discharges on such EEG recordings.

e) Forty eight hours of continuous EEG recording have not demonstrated any "subclinical seizures", as has been suggested previously.

f) The sequential MRI scans show no evidence of any pre-existing and or chronic disorder of the brain. There is compelling evidence of acute multifocal signal abnormalities on the initial MRI scan performed 3 days after the fall and these all showed evolution and or improvement, and or resolution on subsequent MRI scans supporting the conclusion that these are entirely attributable to the fall and a traumatic brain injury."

[37] I accept the evidence and the conclusion of Dr Butler. I am satisfied, having regard to the totality of the medical evidence that it is more probable that the epileptic seizure Michael suffered, was consequent upon the fall rather than the cause of the fall in this matter. Moreover, all the witnesses who were present when Michael was found on the floor drew the conclusion that he had fallen out of the upper bunk of the bed whilst asleep. Mrs Range did volunteer a different opinion, but the accepted objective medical evidence overwhelmingly proves that the epileptic seizure Michael suffered was as a result of his fall. I am satisfied that having regard to the totality of the evidence in this case, the only reasonable inference to draw from the proven facts, is that Michael was asleep in the upper bunk bed and during his sleep fell from the bed. The proven facts does not allow for another more or equal probable inference to be drawn. Dr Reid's report did made mention that Michael suggested he and the other boys in his bungalow were playing until 03h00 in the morning, swinging from the rafters and generally being boisterous. The evidence of the bungalow parent, Mr Raise, does not support this version given by Michael who appears to have suffered severe

brain damage as a result of the fall. This version is completely at odds with the probabilities and objective facts in this case, and can safely be rejected as highly improbable.

[38] The contradictory evidence by the witnesses who were in the bungalow as to whether Michael was in a sleeping bag whilst lying on the floor, or only covered in a blanket and that a mattress was on the floor does not, in my view, detract from the objective facts and probabilities that Michael was asleep in the upper bunk bed when he fell.

[39] The First Defendant accepted that it owed a duty of care to Michael. The Second Defendant in its amended plea denies it owed such a duty of care. The proposition by Mr Donen that, in the circumstances of this case, the Plaintiff has failed to prove that the Second Defendant was under a legal duty to act positively to prevent the harm suffered by Michael is in my view misconceived.

[40] The question whether a legal duty exists in a particular case is a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered. A legal duty is however not determined by the mere conversion of societal attitudes into legal policy. The question is always whether the defendant ought reasonably and practically to have prevented harm to the plaintiff. Our Courts

have repeatedly stressed that what is required in every case is to consider and balance, amongst others, the following aspects: the foreseeability and possible extent of harm; the degree of risk that the harm will materialise; the interests of the defendant and the community; any constitutional obligations; who has control over the situation; the availability of practical preventative measures, and the chances of their success; whether the cost in preventing the harm is reasonably proportional to the harm, and whether or not other practical and effective remedies are available. In this regard see Minister of Safety and Security v Hamilton 2004 (2) SA 216 SCA at paragraph 16 and the cases referred to therein.

[41] There is no doubt in my mind that in this case, public policy demands that parents are entitled to expect that schools will take reasonable measures to prevent risks of harm to pupils on a school excursion, the standard of care is that of a reasonable and prudent parent, nothing more and nothing less, and includes the duty to protect pupils from reasonably foreseeable risks of injury. Section 28 (1)(b) of the Constitution also provides that every child has a right to family care or parental care, or to appropriate alternative care when removed from the family environment. In this instance the teachers of the school who organised the camp, owed the pupils in their care a legal duty to act positively to ensure that the sleeping environment and sleeping quarters of the pupils are reasonably safe to prevent them from harm and sustaining injuries.

[42] The test for negligence is to be found in the statement of Holmes JA in Kruger v Coetzee 1966(2) SA 428 (A) at 430 E-G

"For the purposes of liability, culpa arises 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;

(b) the defendant failed to take such steps;"

[43] Ms N Du Toit, a social worker employed by the Child Accident Prevention Foundation at the Red Cross Children's Hospital, testified that she conducted a study during 1989 and 1993 to determine; how many children who had fallen from bunk-beds attended the Red Cross Children's Hospital; used this information to motivate for legislation on the safe design of bunk-beds and draft prevention strategies to ensure safe usage of bunk-beds. From the study, Du Toit concluded that bunk-bed injuries are sufficiently common to merit specific preventative strategies, and that the injuries can be prevented if side rails are made mandatory for the top bunk in accordance with the safety standards for bunk-bed design as released by the South African Bureau of Standards in 1992,

after a motivation by the Child Accident Prevention Foundation. She also testified that the protective railing on the bed as depicted in photographs 62 and 63 of exhibit "A" would have been inadequate to prevent a child from falling from the bunk-bed.

[44] The evidence of Ms Du Toit was attacked on the basis that her evidence can be of little or no probative value as her study was nothing more than a collection of data put into statistical format and lacks specific or detailed information with regards to the number of children that fell from bunk-beds and under what circumstances they fell from these beds. Moreover, her study have little or no purpose in determining the magnitude of any risk created by allowing children to sleep on upper bunk-beds which are not equipped with protective railings.

[45] The evidence of Ms Du Toit cannot be regarded as having no probative value. Her evidence is a stark reality of the dangers unguarded bunk beds pose, if small children, like the age of Michael, are allowed to sleep on upper bunk beds that are unguarded.

[46] The Enslin's evidence, who both at various times held the position of manager of the First Defendant's business near Wellington, is that they actually foresaw the possibility of children or other persons falling from unguarded upper

bunk beds and injuring themselves. They testified that in order to guard against such occurrence, the First Respondent resolved to have small planks of wood affixed to the upper bunks. Mrs Enslin referred to the planks of wood as depicted on pages 62 and 63 of exhibit "A. She also indicated that the planks, as depicted the photographs, were present in the girls' bungalows at the time of Michael's injury. She testified that the planks affixed on the beds in the boys' bungalows were smaller than those in the girls' bungalows. The Enslin's also testified that all the upper bunk beds had protective planks affixed to it. It is not in dispute that the majority of witnesses who were in the bungalow where Michael slept, were unsure or did not notice whether or not there were any protective planks on the boys' beds. Mrs Enslin also suggested in her evidence that the people looking at the beds may have missed the planks because they were so small. Mrs Trollip in her evidence also accepted that the upper bunk beds may not have had enough protection to prevent the children from falling out of the upper bunks of the bunk beds.

[47] A few days after the incident, the principal of the school wrote a letter to First Defendant referring to the incident. Reference was also made to railings that the First Defendant was affixing to the upper bunk beds. The relevant portions of the letter, at page 143 of the Plaintiff's bundle, records the following:-

"Geagte Meneer

<u>Is Slaapbanke Hawekwa</u>

Graag verwys ek na 'n insident waar een van ons leerders by name Michael Byrnes beseer is toe hy van 'n stapelbed afgeval het. Die leerder was bewusteloos, maar daar is spoedig opgetree en die leerder is na die Paarl Medikliniek geneem.

……..

Ek het ook van die onderwyseresse verneem dat u tans besig is om reëlings aan die boonste slaapbanke aan te bring.

Ek wil dit ten sterkste ondersteun, aangesien die veiligheid van ons leerders altyd voorrang moet geniet.

Ek wil u vriendelik versoek om hierdie skrywe onder die aandag van die bestuur te bring.

Ek verneem graag van u.

R.J. Nortier
SKOOLHOOF"

[48] The response of Ms Enslin is recorded as follows:

"Geagte mnr. Nortier

<u>Is. Slaapbanke Hawekwa</u>

Hiermee erken ons ontvangs van u skrywe van 8 Maart 2004 (wat vandag aan ons gefaks is.)

Die veiligheid en gerief van elke kampganger, en veral leerders, is ook vir ons van die hoogste belang. Daarom bevestig ek graag dat reeds opdrag gegee is dat reëlings by al die boonste slaapbanke van die kompleks aangebring word.

Met vriendelike groete

Magriet Enslin
Bestuurder"

[49] This correspondence between the principal of the school and the First Defendant is in my view indicative that the protection First Defendant affixed to the upper bunk beds of the bungalows was seriously questionable.

[50] I am satisfied on a conspectus of the evidence of this case that the steps First Defendant took to guard against an injury that the Enslin's foresaw might occur to an occupant of the upper bunk beds, were inadequate and insufficient. The reasonable person in the position of the First Defendant would have affixed proper and adequate protection on the upper bunk beds, particularly in the boys' bungalows, and not the small planks as testified by the Enslin's. It is also not in dispute the costs associated with affixing proper and adequate railings in the form of continuous pine railing across the bunk, well above the mattress height, would have been negligible.

[51] The evidence of Mrs Trollip and Mrs Range was that they could not confirm whether or not railings or planks were affixed to the bed Michael slept on. It is evident that both of them certainly knew that some parents of children attending these camps, refused to allow their children to sleep on the upper bunks. Although Mrs Range was evasive as to the reason for this, the proposition by Mr Sholto-Douglas that parents did not wish their children to sleep on upper bunk beds because of the possible danger it may pose, is not without merit.

[52] The parents of the children attending the camp were told that the children will sleep in bunk beds. There is however no evidence that they were told about the type of bunk beds and whether or not they have adequate guard rails to prevent a child from rolling out of the bed in his or her sleep. In my view a reasonable prudent parent would have inspected the premises which were to house his or her child and would, upon a proper inspection, foresaw the reasonable possibility that the absence of proper guard rails would cause injury to his or her child. The Second Defendant's employees ought to have done so, but did not and failed to pay any close attention to the presence or absence of safety railings. In the circumstances of this case failure to do so constitutes a deviation from the postulated conduct of the reasonable person. Mr Donen also sought to rely on the evidence given by Dr Butler where the latter stated the he allowed his son to sleep on an unguarded bunk bead, to argue that the conduct

of Second Defendant's employees were not wrongful or negligent. Dr Butler on his own version admitted that his conduct, with hindsight, was questionable and he should have been more vigilant. He also conceded that he will not allow it to happen again.

[53] In the circumstances of this case and on a conspectus of all the evidence I am satisfied that the employees of the First and Second Defendants failed to take the reasonable steps to prevent the injury to Michael which the reasonable person would have taken. I therefore find that the Plaintiff has on a balance of probabilities established the pleaded negligence on the part of the employees of the First and Second Defendant, and has established that such negligence caused the brain injury sustained by Michael.

[54] A final aspect which requires consideration is the amendment by Second Defendant of its plea to rely on the terms of an indemnity form, which was signed by Mrs Byrne. The dictum in the matter of Minister of Education and Culture (House of Delegates) v Azel and Another 1995 (1) SA 30 AD at 33 B and 33 F is instructive. In the aforementioned matter, an indemnity form almost identical in terms to that signed by Mrs Byrne was considered by the Court. The Court held that the words contained in the indemnity *"in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child"* constituted an integral part of the exemption and

qualified it that the indemnity did not serve to indemnify the Minister of Education against claims arising from bodily injury to a child. Moreover the clauses applicability was restricted to damage to property as opposed to injury to persons and perhaps other causes of action, for instance the actio de pauperie.

[55] In the circumstances of this matter, I can find no plausible reason to make a different finding and find that the Second Defendant cannot rely on the terms of the indemnity to exclude the Plaintiff's claim.

[56] In the result the following order is made:

(a) The Defendants are, jointly and severally, held liable for the damages, if any, that the Plaintiff has suffered in consequence of the injuries sustained by the Plaintiff's minor son, Michael Byrne, on 4 March 2004;

(b) The Defendants are ordered to pay the Plaintiff's costs occasioned by this hearing, such costs to include the qualifying fees of Dr James Butler and Ms Nelmarie Du Toit;

(c) The matter is postponed for hearing on a date to be arranged with the Registrar of this Court and the Registrar is directed to afford the matter such precedence on the roll as she is able to do in the circumstances.

LE GRANGE, J