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Legal Services Newsletter | Regsdienste Nuusbrief

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THE RETURN TO SCHOOLS AND LIABILITY	DIE TERUGKEER NA SKOLE EN AANSPREEKLIKHEID
Principals, SMT's and educators regularly ask questions about the risk of incurring legal liability at school. They no doubt ask - because they are frequently threatened by other parties. The fear is in likelihood not a realistic one, but what follows is a discussion of negligence and how it is determined.	Skoolhoofde, bestuurspanne en opvoeders vredikwels vrae oor regsaanspreeklikheid by die skool, hoofsaaklik uit die vrees vir die gereelde dreigemente vanaf ander partye. Hierdie vrees is waarskynlik onnodig maar hieronder volg 'n bespreking van nalatigheid en hoe dit bepaal word.
Negligent actions can lead to at least two consequences, namely a criminal charge and a civil claim for damages. (The latter being referred to as a "delict" in contrast to a contractual claim).	Nalatige optrede kan lei tot ten minste twee gevolge, naamlik in die eerste plek 'n kriminele klag en tweedens 'n siviele skade eis (laasgenoemde word in teenstelling met 'n kontraktuele eis, 'n "delik" genoem).
Examples of Criminal charges and Contractual claims	Voorbeelde van kriminele klagtes en kontraktuele eise
Criminal charge: You are driving a vehicle under the influence of alcohol and cause an accident, with a passenger in your vehicle dying. The State will investigate a charge of culpable homicide , presupposing that the death was at least caused by some negligent action. Criminal charges have to be proved beyond a reasonable doubt in Criminal Court.	Kriminele klag: U bestuur 'n motor onder die invloed van alkohol en veroorsaak 'n ongeluk waarin 'n passasier in u voertuig sterf. Die Staat sal 'n klag van strafbare manslag ondersoek gebaseer op die feit dat u optrede nalatig was. Dié tipe klagte moet bo redelike twyfel bewys word in 'n strafhof.
A contractual claim could emanate when the school leases a photocopier, and omits to pay the monthly payment. The supplier may then	'n Kontraktuele eis sou byvoorbeeld ontstaan waar die skool 'n fotokopieërder huur by 'n verskaffer, en nie die maandelikse paaiemment betaal nie. Die

institute a civil claim based on the contract in either the Magistrates or High Court.	verskaffer sal dan 'n siviele eis instel gebaseer op die kontrak wat geteken is, in die Landdroshof of Hoë Hof.
Delict	Onregmatige daad
<p>A Delict occurs where a person intentionally or negligently, and by act or omission, that is causally linked, causes damage to another.</p> <p>The legal requirements are:</p> <ul style="list-style-type: none"> (i) conduct; (ii) wrongfulness; (iii) fault; (iv) causation; and (v) damage. <p>The legal requirements are frequently mentioned alongside phrases like “<i>in loco parentis</i>” (“in the stead of the parent”) and “a duty to take care”. A delict is prosecuted in the civil court for pecuniary damages.</p>	<p>'n Delik vind plaas waar 'n persoon doelbewus of nalatig, en op grond van optrede of versuum wat verband hou, skade aan iemand veroorsaak.</p> <p>'n Delik se regstegniese onderbou bestaan uit:</p> <ul style="list-style-type: none"> (i) 'n handeling of late; (ii) onregmatigheid; (iii) skuld; (iv) kousaliteit (oorsaaklikheid); en (v) skade. <p>Hierdie bewoording geskied dikwels saam met die vermelding van die woorde “<i>in loco parentis</i>”, direk vertaal “in die plek van die ouer” en “die plig tot sorgsaamheid” (a <i>duty to take care</i>). 'n Deliktuele eis geskied deur die uitrek van 'n dagvaarding in die siviele howe vir skadevergoeding.</p>
Relevant court rulings in the Education Sector	Relevante hofuitsprake in die Onderwyssektor
<p>The Wynkwart Case: In the process of exiting the school premises a child climbs over a fence. He falls and injures himself and parents sue for damages. The Court intimates that the plaintiffs have to show that the educators, acting in the stead of parents, omitted to act in the same manner that the <u>reasonable person</u> in the same circumstances would have acted. Further the plaintiffs would have to show that once a risk was indicated – the school did not identify same and did not take steps to mitigate the risk.</p> <p>In this case the court found that the school did in fact identify the danger and immobilized 3 of the 6 gates to prevent them from being used. In addition, the Court admitted that the educator's duty of care <u>did not include watching the child for every waking moment of the day</u>. The Court consequently found that the claim failed because the school did act reasonable, they identified the risks, and acted to mitigate said risks.</p>	<p>Wynkwart Saak: 'n Kind word ernstig beseer na hy oor 'n hek/heining klim om uit die skoolterrein uit te kom. Die ouers dagvaar vir skadevergoeding. Die Hof se houding is dat die eisers moet aantoon dat die opvoeders, in plek van die ouers, nie opgetree het soos '<u>n redelike persoon</u> in dieselfde omstandighede nie. Die eisers moet bewys dat daar 'n risiko was en aantoon dat die opvoeders /skool min of niks daaraan gedoen het nie.</p> <p>In die betrokke geval bevind die hof dat die skool juis die gevare identifiseer het en 3 van die 6 hekke van die skool geïmmobiliseer het sodat dit nie gebruik word nie. Die Hof reken verder dat die sorgplig <u>nie insluit dat die opvoeder die kind elke wakende oomblik van die dag dop te hou nie</u>. Die Hof bevind by gevolg dat die eis onsuksesvol is aangesien die skool wel redelik opgetree het, die bestaande gevare identifiseer het, en gehandel het om die risiko te verminder.</p>

<p>The Hawekwa Matter: The learner attended a school camp. He slept on the top level of a “bunkbed”. While asleep, he fell from the top of the bunkbed onto the concrete floor and was injured seriously. The parents sued. The court, on the testimony before it concluded that the educators knew that the boy was prone to convulsions and that the top bed did not have some sort of retaining device to ensure a person did not fall off. The claim was successful as the Court found that the requisite care had not been taken.</p>	<p>Hawekwa se Saak: Die leerder woon 'n skoolkamp by. Hy slaap bo in 'n stapelbed. Gedurende die nag val hy af op die betonvloer en word ernstig beseer. Die ouers dagvaar en die hof kom ingevolge die getuienis tot die gevolgtrekking dat die opvoeders betrokke, geweet het dat die seun geneig was om konvulsies te kry. Die boonste bed het ook nie 'n veiligheidsraamwerk gehad wat sou keer dat 'n persoon maklik afval nie. Die eis is suksesvol, aangesien die hof meen dat die persone op die kamp nie die vereiste sorg en vooruitsig toegepas het nie.</p>
<p>The Gouws matter: Young learners are dropped off in front of the school before the formal school day. At that time the educators are busy with their own preparatory meetings. The school arranges for the children to be accommodated in a class, but without educator supervision. During the interaction in the class a young girl's finger gets slammed in the door with serious repercussions, and the parents institute a claim. The court determines that educators' role does not extend any further than that which is equal to a parent's responsibility – <u>The “in loco parentis” rule is therefore not a heavier burden and the claim was dismissed.</u></p>	<p>Gouws se saak: Jong leerders word voor die formele skooldag by die skool afgelaai. Op daardie tydstip is die opvoeders met hul eie voorbereidende vergaderings besig. Die skool reël dat sodanige kinders in 'n klas akkommodeer word, maar sonder 'n opvoeder wat toesig hou. In die interaksie in die klas word 'n jong dogter se vinger in 'n deur toegeslaan met erge gevolge, en die ouers stel 'n eis in. Die hof bepaal dat opvoeders se rol niks verder strek as dit gelykwaardig aan 'n ouer se verpligte nie – <u>Die “in loco parentis” reël is dus nie 'n swaarder las of verpligting nie - en weier die eis.</u></p>
COVID-19 AT SCHOOL	COVID-19 BY SKOLE
<p>There are two prevailing scenarios, namely the educator being worried that s/he could be infected at school, by transmission through an infected third party; or a child being infected under the same circumstance. Nobody can guarantee that one or the other may not happen. The lockdown was instituted not to try and eradicate the virus, but to allow enough time for the Public Health system to prepare for the increase in infection rate.</p>	<p>Daar is twee scenario's by skole, naamlik die opvoeder is bekommern sy/hy kry die infeksie by die skool deur oordrag vanaf enige persoon wat dit reeds het of 'n kind kry dit "by" die skool op dieselfde manier. Niemand kan waarborg dat die voorgaande nie sal gebeur nie en dit dien bygevoeg te word dat die grendel periode nie bedoel was om op 'n manier die virus te stop of uit te wis nie maar om die gesondheidswêreld tyd te gee om voor te berei vir 'n verhoging in infeksies.</p>
Can the educator claim?	Kan 'n opvoeder 'n eis instel?
<p>COVID-19 was designated in March 2020 as a reportable illness and included in the list of conditions that form part of the compensation basis of Workman's Compensation / COIDA. The</p>	<p>COVID-19 is in Maart 2020 aangewys as 'n aanmeldbare siekte en is opgeneem in die lys van toestande wat deel vorm van die vergoedingsbasis van Beroepsveiligheid wetgewing / COIDA. Die</p>

educator may then report/register the occurrence as an injury on duty if it can be shown that the infection is work related.	opvoeder kan die voorval dan aanmeld / registreer as 'n besering aan diens as daar aangetoon kan word dat die infeksie werksverwant is.
<p>Can the parents of a learner claim?</p> <p>They will have to comply with the requirements as mentioned in the relevant court findings above. The claim will be fraught with practical legal difficulty. The plaintiff will have to prove that the infection occurred at the school; moreover, <u>the plaintiff will have to prove that it happened because of an act or omission by an educator.</u></p> <p>This will be complicated if the educator acted in line with the COVID 19 Plan that the school has to develop. A plaintiff will also have to contend with the effect of section 60 of SASA, where the risk is in effect devolved upon the State.</p>	<p>Kan die kind se ouers 'n eis instel?</p> <p>Die eisers sal moet voldoen aan die vereistes soos genoem in die relevante hofuitsprake hierbo. Dit sal duidelik uiters moeilik bewysbaar wees, veral aangesien die eiser sal moet aantoon dat die oordrag by die skool <u>en as gevolg van een of ander handeling of late van 'n opvoeder gebeur het</u>, veral waar die opvoeder wel inlyn met die skool plan vir COVID 19 opgetree het.</p> <p>Daarmee saam sal die eiser moet rekening hou met artikel 60 van die SA Skolewet; welke bepaal dat die risiko deur die staat gedra word.</p>
<p>Advice to decision makers at school</p> <p>Do not let threats of litigation cause inaction. It is lamentable that at the time of writing hereof the DBE and Provincial Departments have not produced a set of Education specific regulations. In compiling advice to schools, we thus utilise the COGTA and Department of Employment and Labour sets of regulations produced on 29 April 2020. These regulations clearly espouse the requirement for a safe workplace (also for educators) – and this underlies the SAOU approach that educators should not enter or attempt to work in un-sanitized surrounds or without proper PPE.</p>	<p>Raad aan besluitnemers by skole:</p> <p>Moet nie dat dreigemente met litigasie en vrese daaroor u besluitneming en optrede verlam nie. Ten tye van skryf hiervan het die DBO en Provinciale Departemente op betrouenswaardige wyse nagelaat om regulasies te publiseer wat "skool spesifiek" is.</p> <p>Ons volg dus die regulasies gepubliseer op 29 April 2020 deur COGTA en die Departement van Arbeid. Daaruit is die plig om 'n veilige omgewing vir opvoeders te skep duidelik, en dit onderlê die SAOU benadering dat opvoeders en ander personeel wat nie 'n gesaniteerde werkplek, met beskermende toerusting het nie, eenvoudig nie daar gaan werk nie.</p> <p>Dit spreek vanself dat u nie onder sulke omstandighede leerders aan so risiko moet onderwerp nie. Ons aanvaar dat die fisiese omstandighede by elke skool maklik aanleiding kan gee tot allerlei gevalle en vrae wat nie geredelik deur regulasie gedek word nie.</p> <p>In sodanige geval - evalueer wat 'n redelike persoon onder die omstandighede sou doen en bepaal (desnoods by wyse van die insette van andere) welke risiko's deur die verskynsel gegenereer word en neem stappe om daardie</p>
<p>It speaks for itself that following the above you should take care not to expose learners to the same risks. From experience we know that, at a school, you may be confronted with any number of practical challenges or situations that are not clearly covered or "governed" by regulation.</p> <p>In such a case – evaluate what a reasonable person in the same situation would do, and determine (if needs be by way of the advice of others), which risks are generated by the occurrence – and take steps or actions to</p>	

mitigate the risk.

Keep a record of these matters, by way of e-mail, letter, recording in a COVID-19 journal or by way of photos or video.

risiko te minimaliseer.

Hou rekord van hierdie optredes deur e-pos / brieve / rekordering in 'n COVID-19 joernaal, foto's of video's.

