

**November 2016**

In the 2015 matter of *Strydom v Strecker and Another 2015 (6) SA 356 (GP)*, the High Court in Pretoria heard the very sad story of the Strydom family.

During 2005, the Strydom family was visiting the Strecker family. The two families were in the garage and B, the Strydom's three-year-old daughter came in and out of the garage intermittently. Mr Strydom went inside the house to wash his hands and heard his wife screaming when he rushed outside to find his wife lifting B out of the Strecker's fish pond. As a result of the 20 minutes that it took to revive B, she sustained massive brain damage and requires constant care and supervision.

The plaintiff (Mr Strydom) founded his case on the negligence of the Streckers in that they failed to take the necessary precautions to safeguard the pond. The Streckers created a dangerous situation by having the pond in their house, no proper lookout was kept in respect of B and there was inadequate supervision of guests when in the vicinity of the pond. The defendants raised the defence that Mrs Strydom undertook to supervise B. The ultimate dispute that the court had to decide was whether there was a legal duty on the defendants towards B to prevent any harm from coming to her, and whether there was any duty on the defendants to the Strydoms to warn them of the dangers of the fish pond.

In order to make a determination on these questions, the court had regard to the legal convictions of the community (the *boni mores*). Regard was also had to section 28(2) of the Constitution, which establishes a child's rights, and the specific section indicates that a child's best interests are paramount in every matter concerning the child. The court found that family and friends are invited into each other's homes on a regular basis. Society does not and cannot expect the owners of a property to go above and beyond reasonable means to prevent harm from coming to their visitors, both adults and children, as it would place an unfair burden on the owners of that property. The court then found that there had been a legal duty on the defendants to prevent harm from coming to B, as the fish pond presented an overt source of danger. However, based on the testimony of the Strydoms, that they had been warned by the defendants of the dangers that the fish pond posed together with their own knowledge that the fish pond did indeed pose a danger to B, the court found that the duty placed on the defendants towards B had been discharged. The court accepted that a higher duty of care towards B could not be placed on the defendants as opposed to the Strydoms, who were her legal guardians.

From the *Strydom v Strecker* matter we are able to determine that when a child is on your premises, there is a duty on the owner of the premises to ensure that the child is protected from any overt danger that the property presents, however, that duty is never more than the duty that is placed on the parents/guardians of the child to ensure that their child is not in danger.

But what happens if one is not an individual in a home but rather a juristic person running a business? This matter was examined in the case of *P and Another v Big Sky Trading 489 CC t/a Mike's Kitchen* (5894/2013) [2015] ZAGPPHC 379. The question of whether a restaurant has a legal duty towards children making use of their playground to ensure their safety was canvassed.

P, a 13-year-old boy, was left at Mike's Kitchen for a milkshake by his mother while she attended to shopping for the weekend. While performing tricks on the trampoline P injured his neck, which then required the insertion of a plate. The judge emphasised that Mike's Kitchen had taken all the necessary precautions in order to ensure that the trampoline was safe if utilised correctly. The plaintiff (P's mother) testified that P was an unruly child and that she was aware that he would jump on the trampoline even though he exceeded the height restriction as indicated by Mike's Kitchen management. Mr Kleynhans, one of the co-managers of Mike's Kitchen, testified that the playground rules had been posted at the entrance to the playground, by the jungle gym and at the trampoline. A sign indicating the height restriction for the trampoline was posted on the outside of the trampoline and as P exceeded the height restrictions, he should not have been jumping.

The court examined the negligence and wrongfulness aspects of the matter while making use of the *boni mores*. The court had regard to "playground rules", which are found in many countries across the world, and the common thread that runs through all of these rules, adult supervision. Cases that related to overt danger on a party's property were disregarded as they were not applicable to the matter. In this instance, the parents of the child were aware of the possible dangers to which a child is exposed. In this matter, the court also had regard to section 28(1)(b) of the Constitution in relation to the rights of children, which reads as follows:

"(1) Every child has the right (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;"

The court found that in relation to children, they should be allowed to play and explore their surroundings and environment, within limitations and always under the supervision of an adult. Should this supervision be lacking, but an entity has taken all the necessary precautions to ensure the safety of a child, then the entity will have protected itself from any liability arising against it in these circumstances. As Mike's Kitchen had previously warned P's parents that he was to be supervised by an adult and that he exceeded the height restriction for the trampoline, Mike's Kitchen's conduct could not have been found to be wrongful and therefore they were not liable. Again, the court made reference to the fact that a greater legal duty towards the child could not be placed on a third party as opposed to the parents/guardians' legal duty towards the child.

However, the matter of *Pro Tempo v Van der Merwe* (20853/2014) [2016] ZASCA 39, establishes a different set of facts. The Pro Tempo Akademie was held negligent for its actions as it created a dangerous situation and failed to take the necessary precautions to ensure the

safety of the children at the school. The Pro Tempo Akademie is a school for children with learning disabilities and hyperactivity. The school decided to plant trees on the field and planted saplings that were supported by metal rods. While J, the plaintiff's minor child, was playing cricket on the field where the saplings were planted, he became impaled on one of the metal rods, causing serious internal damage.

The court found that the school had created a dangerous situation in that it had planted trees with metal rods on the field where children play. The court stated that the reasonable man, as taken from the test in *Kruger v Coetzee*, would not have supported the trees with metal rods where children were known to run and play, and instead would have secured the trees in a less dangerous manner. In making its finding, the court also referred to section 28(1)(b) of the Constitution indicating that children have the right to alternative care when removed from the family environment. The court dismissed the appeal on the basis that by placing the metal rods in an area where children run and play, the school created a dangerous situation and that the school's failure to take precautions against any injury arising as a result of the metal rods. As a result, the school's omission was wrongful and it was held liable for the damages suffered by the minor child.

Based on the Pro Tempo Akademie case, it is evident that one cannot create a dangerous situation and then not expect to incur any liability in respect of any injuries that a child may sustain. It must be kept in mind that children are more spontaneous and impulsive than adults and as such provision should be made for children acting on impulse or not taking the same reasonable steps as expected of an adult.

In our current legal climate, we will undoubtedly be seeing more cases with regard to a legal duty owed to children. As it has been stated by all the cases discussed, the interests of the child are paramount. This principle is firmly entrenched by the Children's Act and by the Constitution. While the child's parent or guardian obviously has the greatest duty of care towards the child, as it has been established, adults owe children a duty of care, to a certain extent. So it is not as easy as saying "not my kid, not my problem". A child is every person's concern and the necessary precautions need to be taken to safeguard them from any danger, even the danger into which they may spontaneously stumble.

> [Read the full article online](#)