CHAPTER 4

THE EDUCATOR'S DUTY OF CARE

4.1 INTRODUCTION

One of the most important duties which rest with a school is that of responsibility for the physical care of learners (Harris *et al.*, 1992:158).

It is evident that in South Africa the emphasis falls on people's rights and not on their legal duties (Visser, 1997:3). Visser finds the reason for this over-emphasis of rights in South Africa's history of a denial of fundamental rights, especially in the field of education. Ironically enough, rights are often seen not only as the embodiment of success, but also as the answer to all the wrongdoings of the past. The reality that rights dealing with education must first be realised in practice before any beneficiary consequences can occur, is frequently forgotten (Visser, 1997:3).

With reference to the fact that legal duties are relatively unpopular in South Africa, Neethling *et al.* (1992:45) and Davel and Jordaan (1995:2) make the reader aware of the fact that the existence of a duty is indicative of a corresponding right and that it is therefore conceptually impossible to have rights without duties. Some of the authors who lay claim to extravagant rights in the field of education are often guilty of ignoring the corresponding duties and burdens which they place either on the State or on others to fulfil those rights (Visser, 1997:3).

A practical source of duties in the field of education will be common law, which, especially through the law of delict, regulates the degree of care to be exercised in conduct which is potentially detrimental to others (Visser, 1997:4). While it is the function of private law to demarcate and counterbalance individual interests (*cf.* 2.1 and 2.2.2), the law of delict (*cf.* 4.5) is concerned with determining in which circumstances a person could be held liable for the damage caused to someone else (Neethling *et al.*, 1992:3).

In this chapter the duty of care of the educator will be scrutinized by focussing on the following:

- the juridical foundation of the educator's duty of care;

- legal obligations of the prudent educator;
- content and scope of the educator's duty of care; and
- legal liability at non-compliance with the duty of care.

4.2 JURIDICAL FOUNDATION OF THE EDUCATOR'S DUTY OF CARE

Although the SA Constitution has created rights against the State, it imposes duties on educators in the employ of the State as well as on public schools acting through their governing bodies (Visser, 1997:3). Examples of this can be found in section 15 of the Schools Act which stipulates that every public school is a juristic person with legal capacity to perform its functions; section 16 which stipulates that the governing body of a public school, standing in a position of trust towards the school, is vested with its governance, and that the professional management of a public school must be undertaken by its principal; and section 60 which holds the State liable for any damage or loss caused as a result of any act or omission in connection with any educational activity at a public school. The latter forms the basis of liability for negligence (*cf.* 4.4).

As long ago as 1770 the author William Blackstone (as cited by Zirkel & Reichner, 1987:466) wrote that the father may delegate part of his parental authority to the educator of his child, endowing the latter with such portion of the power which the parent has committed to his charge. This implied delegation of parental authority by parents to educators is supported by Harris *et al.* (1992:142), and Maithufi (1997:260).

On the other hand, Bray *et al.* (1989:108) refer to the fact that the educator is vested with special status which empowers him to act authoritatively in terms of the law. Based on the legal relationship with the learner, this would mean that the educator is given authority over the subordinate position of the learner. Both Van Wyk (1991:94-95) and Maithufi (1997:260-261) point out that persons *in loco parentis* (such as educators) are granted such authority over children in South African common law (*cf.* 3.3.5).

Van Wyk (1991:93) and Beckmann (1995:51) agree that the educator has both delegated and original authority on the school grounds and during the normal school session (*cf.* 3.3.5). Beckmann (1995:51), however, points out that the duration and area of the educator's duty of care may even be extended to include extra-mural and

extra-curricular activities on and away from the school grounds. Prinsloo and Beckmann (1988:119) mention the possibility that it may be extended even to include excursions and other school activities during weekends and school holidays.

According to Neethling *et al.*(1992:140) it is imperative to remember that "duty of care" does not refer to a general obligation: it refers to an obligation towards specific persons or specific groups of persons in the care of a specific educator. An example would be the educator who is in charge of learners during the normal school session, extra-mural and other activities. Such an educator must be made aware of the fact that he has a duty to protect the learners from coming to harm, since this duty of care (under appropriate circumstances) can be a legal obligation (Prinsloo & Beckmann, 1988:127). Failure to act reasonably could cause liability for harm suffered by a learner, provided all the other legal requirements for liability are also present (Dendy, 1988:395; *cf.* 4.5.2).

The educator therefore needs to know exactly what is legally expected of him.

4.3 LEGAL OBLIGATIONS OF THE EDUCATOR

The educator needs to supervise his learners during school activities as the learner is entitled to protection ensuring his welfare because of his physical dependence on adults (Bondesio, 1995:34). Although Van Wyk (1991:95) states that in such circumstances an exceptional degree of care is expected of persons with expert knowledge, he also points out that educators and education authorities are not held liable for learner injuries in cases where negligence (*cf.* 3.3.3.1 and 3.3.3.2) cannot be proven.

This is important, because not only is the potential for injury to learners from the actions of their fellow learners or from the increasingly run-down state of many school premises great, but the extended range of sporting activities offered to learners and the growing emphasis in many areas of the curriculum on learning through practical work rather than simply from textbooks, have also undoubtedly increased the potential risks to learner safety (Harris *et al.*, 1992:158; *cf.* 4.3.2.1.3). It has of necessity heightened the educator's legal obligations.

Therefore it is important that the educator should see himself in the exact role expected of him.

4.3.1 The prudent educator acts like a *diligens paterfamilias*

The role of the educator is best determined as that of the *diligens paterfamilias* (sometimes also referred to as *bonus paterfamilias*) which Merriam-Webster (1985:355 and 862) defines as the father of a household who shows the attention and care legally expected or required of him. Judge Harcourt (as quoted by Bray *et al.*, 1989:103) explains the concept of the *diligens paterfamilias* as someone who not only ventures out into the world, but also engages in affairs and even takes reasonable chances. At the same time he takes reasonable precautions to protect his person and property and expects others to do likewise.

By expecting the educator to act like a *diligens paterfamilias*, reference is made to the quality of care expected of him. The expression therefore implies that the law expects of the educator to act as prudently as a good father (Beckmann,1995:56). The same author points out that what is expected of the prudent educator is linked closely to the concept of delictual liability (*cf.* 4.5.2).

Baxter (1991:488) states that the former seeks to apportion the risks of social activity according to the standards of behaviour of the actors. Reasonableness has been adopted as the minimum acceptable standard of behaviour of the educator (*cf.* 3.2.3.2. and 4.5.3.5).

This standard of care which the law requires for the protection of learners from danger and harm is further explained by Prinsloo and Beckmann (1988:122) in terms of the conduct of an abstract person (an imaginary legal concept), namely the *reasonable person* (*cf.* 3.2.3.2). According to Merriam-Webster (1985:981) the concept of a reasonable person refers to someone whose behaviour is not extreme or excessive, but moderate and fair; someone who possesses sound judgement.

In the majority judgement of the case ***Transvaal Provincial Administration v Coley 1925 AD 24*** (*cf.* 4.3.1.1.3 for a detailed discussion of the facts) De Villiers J.A. made the following remarks about the reasonable person:

" The care which is exacted by our law is that which the diligens paterfamilias *would have taken in the circumstances. It is not the care which the man takes in his own affairs, nor that which the ordinary or average man would take. It is higher than that. The law sets up as a standard to which everybody has to conform that degree of care which would be observed by a careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty. It will be observed that the standard of conduct is a high one. The test is not the diligence of the supine man, but of the man who is alive to probable dangers and takes the necessary steps to guard against them ".*

However, Prinsloo and Beckmann (1988:122) point out that it should be kept in mind that the reasonable person remains a person whose conduct must be judged in the light of the limitations imposed on him by human nature.

4.3.1.1 The reasonable educator

Although the law requires the normal degree of care of the educator where he is dealing with adults, a higher degree of care is required of the educator in his professional relationship with children (learners) under normal circumstances (Prinsloo & Beckmann, 1988:121; Beckmann, 1995:53).

Conduct which may endanger the learner calls for the exercise of even more care than would otherwise be required (Prinsloo & Beckmann, 1988:121). However, before this higher standard of care can be adjudged in a specific case, it must be clear that the reasonable person's conduct against which the educator's position is to be evaluated would have to have been involved with children too. Not only is it a fact that the higher standard of care which the educator demonstrates is part of his solicitude for disabled and infirm persons, but it should also be pointed out that with children their disability consists of a propensity for sudden, impulsive, heedless, irrational behaviour (*cf.* 4.3.2.1.2). Boberg (1984a:355) states that the reasonable person anticipates and guards against such behaviour.

With regard to the protection of the learner against a variety of dangers (*cf.* 4.3.1.1.3), the educator is expected to act like a reasonable person in the sense that it is expected of him (in a given situation) to foresee the reasonable possibility of injury or

harm to the learner, to take steps to prevent such an eventuality and to see to it that steps are taken to prevent it (Beckmann, 1995:57; *cf.* 5.4.1 and 5.4.2).

Obviously this calls for knowledge and skill.

4.3.1.1.1 The prudent educator is knowledgeable and skilled

The various education ordinances require of the educator not only to possess suitable qualifications for his appointment as educator, but they may at the same time expect of him to improve his qualifications and skills (Prinsloo & Beckmann, 1988:199).

Since the educator is specifically trained for his task, and since he performs his task both professionally and for financial gain, the law sometimes expects more from him than from the parent. According to Beckmann (1995:52) the educator should indeed be able to exercise more effective care than the parent with respect to the physical and psychological integrity of the learner because of his work, his teaching experience, and his training which includes specialised knowledge of the learner in general.

4.3.1.1.2 The prudent educator knows the nature of learners

From a legal perspective, specific reference is made to that knowledge of the learner and his nature which will enable the educator to protect the learner against unneccesary risks of harm or injury (Beckmann, 1995:59). Bray *et al.* (1989:97) point out that the educator should bear in mind that he is dealing with learners who are immature and who, because of a lack of the necessary power of judgement, cannot always see the relationship between cause and effect.

From the facts of ***Knouwds v Administrateur, Kaap*** *1981 SA 544 (C)*, Beckmann (1995:59) deduces that the law expects of the educator to know that children are inclined to act impulsively and irrationally (*cf.* 4.3.1.1) in the sense that they are either not aware of the dangers perceived by adults, or that they do not act in accordance with the nature of the danger (*cf.* 4.3.1.1.3).

Knouwds instituted a claim for damages on behalf of her eight-year old daughter whose finger had to be amputated after it had been caught in the lawnmower's fan belt. One day before school, the child and her friend played on the lawn between the

school buildings where the labourer was mowing the grass. Her friend bumped into her, causing her to stumble against the lawnmower and have her finger caught in the fan belt. At that point the labourer was making his way towards the administrative offices, about thirty metres away.

The court contended that the mowing of the lawn at that time of the school day created an unnecessary risk of injury to learners. It came to the conclusion that the principal, the caretaker and the labourer had not taken the necessary precautionary steps that would have been expected of a reasonable person (*cf.* 4.3.1) under similar circumstances. In this judgement the principal, caretaker and labourer were found to be negligent (*cf.* 4.3.1.1.4).

It follows logically that the educator must pre-empt all potential dangers.

4.3.1.1.3 The prudent educator knows the dangers to which the learner is exposed

According to Beckmann (1995:53-54) it would be wrong to think only in terms of physical dangers which may threaten the learner. He points out that while a violation of the learner's physical welfare may cause psychological harm or injury, a violation of the learner's psychological integrity may also have an influence on his physical welfare (*cf.* 4.3.1.1). He uses the case ***S v T, 1986*** *(2) SA 112 (O)* to illustrate the possible tragic consequences of harm to the learner's physical and psychological welfare where the particular learner is not adequately protected. A schoolboy was continuously tormented physically and mentally by an older and bigger boy in a dispute concerning a girl, to the point that eventually the younger boy shot dead the older one. In this case the court found that the reasonable *child* test had to be applied, since the younger boy could not be expected to handle the matter like a reasonable adult (*cf.* 4.3.1).

The dangers to which the learner is exposed at school can be divided as follows (Beckmann, 1995:54-56):

- Permanent dangers would refer to dangers which are always present at schools, such as chemical substances in laboratories, lawn-mowers, a dangerous river flowing past the hostel grounds, participation in sports and an unsafe fence. Temporary dangers would refer to objects which are brought onto the school

premises from time to time or which are on the school grounds only temporarily, and even to a person who may be present on the school premises from time to time. An example would be that of the truck which delivers stock to the tuck shop.

- Conspicuous dangers would refer to the dangers which are obvious in attracting attention. On the other hand, hidden or concealed dangers would for example refer to poisonous plants such as the oleander (Ceylon Rose) which looks beautiful but has poisonous leaves, or wooden pegs which have become overgrown with grass.
- Most of the dangers which occur within the school, call for a particular responsibility towards the learner within the normal school session. The fact that there may be dangers for learners who are under an educator's supervision outside the school grounds (*cf.* 4.2) should, however, also be taken into account. Examples of these dangers would be the bus terminus at which learners embark after school, dangerous animals in zoos, tall pavilions at sport stadiums and mountain roads when an excursion is undertaken.

In ***Transvaal Provincial Administration v Coley*** *1925 AD 24* (*cf.* 4.3.2) a six-year old learner came out of school earlier than her sister and decided to wait for her on the school playground. Two years before the incident trees had been planted and protected by means of long wooden stakes with sharp, pointed tops. While playing on a heap of ground next to one of the planted saplings, she fell onto one of the wooden stakes and injured one of her eyes seriously. The court argued that the education authorities should have foreseen the potential danger and should have removed the wooden stakes.

Prinsloo and Beckmann (1988:121) point out that although a greater degree of care must be exercised to ensure the safety of the learner where an educator is in control of an inherently dangerous object or a potentially dangerous object which constitutes a strong attraction to a learner, it is also true that certain activities involve an element of risk. At the same time such risks are part of the normal course of events and are, therefore, accepted by all (*cf.* 3.3.3.1 and 4.3.1.1.3).

In order to deal wisely with such intricate circumstances, the educator needs to be vigilant at all times.

4.3.1.1.4 The prudent educator is not negligent

Beckmann (1995:67-68) points out that an educator cannot be held delictually liable if he had the necessary knowledge and skill to foresee a specific harmful or detrimental eventuality, actually foresaw it, took reasonable steps to guard against it or to prevent it, and took effective steps to ensure that his counter-measures were implemented (*cf.* 4.5.2). Moreover, if an educator cannot be held liable delictually, he cannot be held responsible for injury or harm suffered by the learner in his care.

A specific legal test in the form of the questions is applied to establish negligence (Beckmann, 1995:67-68; *cf.* 3.3.3.1):

- Could an educator (*qua diligens paterfamilias*) have foreseen that his action (or his failure to act) could cause damage or injury to the learner?
- Could an educator have the knowledge and skill which would have enabled him to foresee the damage or injury?
- Could an educator have taken reasonable steps to guard against or prevent such an eventuality?
- Could the educator have made arrangements to make sure that the steps envisaged were carried out?
- Did the educator neglect to do so?

In ***Rusere v The Jesuit Fathers*** *1970 4 SA 537 (RSC),* Rusere put in a claim against the Jesuit Fathers for permanent damage caused to his eight-year old son's right eye. Having finished playing a game of soccer, a group of hostel boys whiled away the time before supper by playing "Cowboys and Indians" on a secluded terrain which consisted of trees, bushes and long grass. Someone made a 50 cm arrow from a grass shoot and shot Rusere's son in the eye at a short distance. The boy lost the sight of this eye permanently. Rusere based his claim on alleged failure of the educators to supervise properly, thus contributing towards the accident through their negligence.

The court interpreted the legal principle relating to the supervision of learners and found that the duty to keep learners of this age under constant supervision depends essentially on the risks to which they are exposed. In this case it would be exacting too

high a duty of care from the *diligens paterfamilias* (*cf.* 4.3.1) to contend that learners of this age should never be more than momentarily out of the responsible person's sight even when they are in normal, familiar surroundings. The judge found these surroundings to be devoid of features that could sensibly be regarded as hazardous. He quoted Lord Goddard (***Camkin v Bishop and another*** *(1941) 2 All E.R. 713; LCT 334. 423.)* who observed: *"If every master is to take precautions to see that there is never ragging or horse-play among his pupils, his school would indeed be too awful a place to contemplate."*

Having considered all the facts, the court found the Jesuit Fathers not guilty of negligence on the following grounds:

- The learners were warned regularly against such dangerous games (*cf.* 4.5.3.6 and 4.5.4).
- The learners did not usually play that game.
- The hostel staff and prefects were available.
- The staff acted as a reasonable person would have done in similar circumstances (*cf.* 4.3.1).

According to Bray *et al.* (1989:98) the most important part of the judgement (the so-called *ratio dicidendi*) is embedded in the legal principle that it is not legally required that an educator must keep his learners under supervision for every moment of their school lives if a particular circumstance does not give rise to a measure of risk beyond that which is normal in the daily routine of life (*cf.* 4.3.1.1.3).

It thus follows that the educator's duty of care is commensurate not only with the danger the learner is exposed to (*cf.* 4.3.1.1.3), but also with his age (Bray *et al.*, 1989:99; *cf.* 2.2.2.2).

The intricacies of this situation call for the educator to have clear insight into his legal position.

4.3.1.1.5 The prudent educator is not ignorant of legal provisions governing his profession

Beckmann *et al.* (1995:10-11) point out that South African law has reached the stage of development where a person who is active in a specific field is expected to stay abreast of those legal provisions which will, to a large degree, regulate or govern his actions in that field. Thus a person cannot advance ignorance of the relevant legal principles as an excuse for what happened.

These authors base this statement on the case ***S v De Blom 1977*** *(3) SA 513 (A).* The defendant was accused in connection with South African Exchange Control Regulations. She was charged with trying to take American dollars and jewellery exceeding the value of R600 out of the country in contravention with the mentioned regulations. Her plea was one of ignorance of the law: she claimed not to have known that she needed permission to take the money and jewellery out of the country. This was not her first trip overseas. From the judgement handed down it becomes clear that, although the court found no ground for the existence of the cliché *"every person is presumed to know the law"*, it was expected of a person who involves himself in a particular sphere to keep himself informed of the relevant legal provisions (*cf.* 3.2.3.1. and 3.2.6 and 3.3.4).

Applied to education, it means that the educator can never invoke ignorance of the law concerning the practice of his profession as a defence (Beckmann & Prinsloo, 1995:4). The educator should rather be abreast of the legal principles governing the field of education (Beckmann *et al.*, 1995:11).

4.4 CONTENT AND SCOPE OF THE EDUCATOR'S LEGAL DUTY OF CARE

According to Dendy (1988:395-396) the relevance of the educator's duty of care becomes clear when the learner suffers material or psychological damage because of negligence on the part of the educator. The same author makes it clear that the educator's duty of care is linked not only to wrongfulness (*cf.* 4.5.2.1), but also to liability for damage or harm (*cf.* 4.4.1) on the grounds of negligence (*cf.* 3.3.3.1 and 3.3.3.2) because a reasonable person (*cf.* 4.3.1) would have foreseen and avoided or prevented the harm or damage (*cf.* 4.4.2).

La Morte (1990:438) defines the term *damages* as referring to the compensation or indemnity claimed by the plaintiff or allowed by the court for injuries sustained as a result of a wrongful act or negligence of another.

The two concepts *liability for damages* and *prevention of damages* have an important influence on the contents and scope of an educator's legal duties, since the question of liability or non-liability of an educator (or a school) in a specific case is largely dependent on these two principles (Botha, 1998:73).

4.4.1 Point of departure regarding liability for damages

Neethling *et al.* (1992:3) state that the basic point of departure of South African law is that *damage rests where it falls*, implying that the person who sustains the damage must in fact bear his own damage (*cf.* 4.5.4). However, this point of departure does not mean that damages *always* rest where they fall. Neethling *et al.* (1992:3) and Botha (1998:73) point out that there is one notable exception to this principle: when damages are caused by the unlawful and negligent or intentional act of another (*cf.* 4.5.2), the legal duty to bear the damages is transferred to the latter. This transfer of duty is referred to as liability.

The person to whom the duty to bear the damage has been transferred, is liable to pay compensation in the form of damages to the person who suffered the damage as a result of his conduct (Botha, 1998:73).

However, just because one person is the cause of another person's harm or damage does not in itself constitute unlawful conduct (*cf.* 4.5.2.1) on the grounds of which he could be held liable. Certain requirements have to be met to establish delictual liability (Neethling *et al.*, 1992:4; *cf.* 4.5.2).

4.4.2 Point of departure regarding prevention of damages

According to Neethling *et al.* (1992:50) South African law places no general duty on one person to prevent other persons from suffering damages or to act to other persons' benefit. Although there may in some instances be moral grounds on which a person is expected to protect another from damage, it does not always follow that a moral duty is enforced by a legal duty to act preventively. This approach would, according to Botha (1998:73-74), make all human activity virtually impossible.

The current legal position is therefore that a legal duty to prevent damage exists only in certain specified circumstances, such as in the case of the educator and his duty of care.

4.5 LEGAL LIABILITY FOR NON-COMPLIANCE WITH THE DUTY OF CARE

La Morte (1990:381) writes about educators who are concerned about the extent of their liability for damages as a result of their official action or inaction. Examples of the types of concerns would be possible liability for the injury or death of a learner while under school supervision, for depriving a learner of his constitutional right, or for malpractice. He refers to a civil wrong where one suffers loss as a result of the improper conduct of another as a *tort*.

Botha (1998:74) reminds the educator that he (or the school) may cause a learner to suffer damage (loss) to his property (for example his school bag or bicycle) or his person (for example his physical integrity, reputation or privacy) through his unlawful and guilty conduct. South African law distinguishes between patrimonial loss (damage to property) and non-patrimonial loss (infringement of personality rights). The same author points out that in both cases the wrongdoer is said to be delictually liable.

While the principles of the law of delict in South African law regulate liability for damages caused by an unlawful act and through the fault of a wrongdoer (Botha, 1998:74), a *delict* is defined by Neethling *et al.* (1992:4) as an act of a person which causes loss (damage) to another in an unlawful and guilty way (*cf.* 4.5.2).

4.5.1 General principles of delictual liability

Bray (1988:85) points out that the types of damage that can be recovered because of administrative acts (*cf.* 3.2) are determined by private law (*cf.* 1.1). Although both the *actio legis Aquiliae* and the *actio iniuriarum* are referred to as delictual actions, they are instituted with regard to the nature of the damage suffered (Bray, 1988:85; *cf.* 4.5.2.3).

4.5.1.1 Actio legis Aquiliae

According to original Roman law, when someone has suffered harm to patrimonial interests (damage to property, also called pecuniary loss; *cf.* 4.5.2.3) through the

unlawful action of another, compensation is normally claimed from the wrongdoer in terms of the amount of money which is equal to the actual or expected loss suffered. This action is called *actio legis Aquiliae*. An example would be damage to the school bus because of the negligent action of the principal (Bray, 1988:85).

Neethling *et al.* (1992:9) point out that, as time went by, the *actio legis Aquiliae* also became applicable to two forms of patrimonial loss which involve injuries to the body. A father could claim for patrimonial loss due to injury suffered by his child, and a free man for patriminoal loss due to personal injuries .

In order to be successful with his claim, the plaintiff has to prove (Van der Vyver & Joubert, 1991:15-16):

- that he has actually suffered loss;
- the extent of the damage suffered; and
- that the plaintiff caused the loss intentionally or negligently (*cf.* 4.5.2.2).

Van der Vyver and Joubert (1991:350) comment on the fact that no extenuating circumstances are taken into consideration here since loss is considered to be loss, and the scope of the loss is not enlarged or reduced because of the circumstances involved. However, contributory fault (*cf.* 4.5.3) of the defendant could come into play, making it necessary to calculate the percentage of guilt of both the plaintiff and the defendant.

4.5.1.2 Actio iniuriarum

Non-patrimonial loss (infringement of personality rights, also called non-pecuniary loss; *cf.* 4.5.2.3) can be recovered by applying the *actio iniuriarum*. The plaintiff's reputation or honour could, for example, be violated, such as when the educator slanders the learner. Although the loss is not suffered in terms of money, the court will (in the case of a successful claim) calculate and award the plaintiff a sum of money that would be related to the loss suffered (Bray, 1988:85). In the case of the *actio iniuriarum* where the infringement of personality rights involve compensation through satisfaction or reparation, it is important to focus on the fact that satisfaction embodies solatium, which means money given as solace for suffering (Neethling *et al.*, 1992:6). The scope of solatium is influenced by extenuating as well as aggravating

circumstances. Thus, as pointed out by Van der Vyver and Joubert (1991:350), a claim based on the *actio iniuriarum* has to take into account limited legal capacity (*cf.* 2.2.2.1).

Van der Vyver and Joubert (1985:16) point out that the plaintiff need not prove specific loss with this act. However, proving negligence on the side of the defendant is not sufficient: the plaintiff must be able to prove the defendant's intentional act.

Clearly the private law status of the South African learner (*cf.* 2.2.2) proves to be relevant in the educator-learner relationship.

4.5.2 Elements of delictual liability

Baxter (1991:601-602) points out that the actions *actio legis Aquiliae* and *actio iniuriarum* have in recent years been analyzed into four distinct elements of liability which are requirements of both: wrongful conduct, fault, damage, and causation. According to Botha (1998:74) delictual liability does not exist if any of these requirements are absent. Conduct and wrongfulness are being considered together in this instance.

4.5.2.1 Wrongful conduct and unlawful administrative action

For any act to give rise to delictual liability it must be *wrongful* or *unlawful*. The terminological difficulties of the concepts "wrongful" and "unlawful" are discussed by Baxter (1991:602-603). While "wrongful" is used in the sense of meaning *contrary to the law*, the conduct complained about must actually have infringed a legally protected right or interest of the victim. Mere unlawful conduct (such as exceeding the speed limit without injuring someone) is not an actionable wrong in delict. Moreover, even if the act concerned does cause harm to the victim, the act is not wrongful unless that harm is of a type which invades a legally protected interest.

The same author is concerned about the ambiguity of the term *unlawful*. In the context of delictual liability, only those acts which breach a legally protected right or interest are unlawful (Baxter, 1991:602). However, in the context of the principle of legality (*cf.* 3.2.1) and its applicability to an administrative act, any administrative act which is not authorized by law would be *unlawful*.

He thus comes to the conclusion that by the term "wrongful" is meant those administrative acts which satisfy the first element of delictual liability, which is unlawful conduct; (*cf.* 4.5.2). While not all unlawful administrative acts are wrongful, they are only wrongful if they are also unlawful. Where an administrative act does infringe legally protected private rights and interests, unlawfulness, according to the principle of legality, always coincides with wrongfulness or unlawfulness as they are employed in delict (Baxter, 1991:612).

Botha (1998:75) agrees with Baxter in the sense that the educator could in fact infringe the rights of the learner by disciplining him, without implying definite unlawful infringement (*cf.* 3.3.5). Under certain circumstances grounds of justification do exist (*cf.* 4.5.3) which would make an educator's actions justifiable. According to him the conduct of an educator is usually unlawful when certain legal interests are infringed unjustifiably by the conduct of the wrongdoer or a legal duty of care is breached (*cf.* 3.3.4) without justification.

4.5.2.2 Fault

According to Botha (1998:78) *fault* refers to the legally reprehensible nature of a wrongdoer's state of mind when he performs the unlawful conduct which causes the damage.

As is pointed out by Baxter (1991:615-616), even if it is shown that a public authority has acted wrongfully (*cf.* 4.5.2.1), it is also necessary to prove that the public authority was *at fault* in so acting (or failing to act in the case of breach of statutory duty). In the case of patrimonial loss where *aquilian* liability (*cf.* 4.5.1.1) is relied upon, this would mean *fault* in the form of *dolus* (intent) or *culpa* (negligence). Where the *actio iniuriarum* (*cf.* 4.5.1.2) is relied upon in cases of personal affront, *animus iniuriandi* (intention) is required (Baxter, 1991:615-616).

Van der Walt (as cited by Neethling *et al.*, 1992:62) defines intent as follows: *"There seems to be sufficient authority for defining intent as a legally reprehensible state of mind consisting of the direction of the will to the attainment of a certain consequence and the consciousness that the conduct in question is wrongful"*. Thus, a person acts with intent if his will is directed at a preconceived result, knowing that his conduct in

bringing about the result is wrongful. A person is negligent if his conduct does not adhere to the standard of care legally required of him (Botha, 1998:78).

In the case of patrimonial loss where negligence is relied upon, this is the same standard of negligence which refers to failure to measure up to the standard of the reasonable person or the *diligens paterfamilias* (Baxter, 1991:616; *cf.* 4.3.1).

4.5.2.3 Damage

While Erasmus and Gauntlett (as cited by Neethling *et al.*, 1992:198) define damage as the loss sustained by a person as a result of the wrongful invasion of his rights, Neethling *et al.* add that it refers to harmful impact upon someone's patrimonial interests (pecuniary loss; *cf.* 4.5.1.1) or infringement of his personality rights (non-pecuniary loss; *cf.* 4.5.1.2). Botha (1998:81) points out that it is imperative that educators be aware of these items of damage since the extent of the damage is calculated with reference to them.

Damages for pecuniary loss (*cf.* 4.5.1 and 4.5.1.1) are claimed under the following headings (Botha, 1998:81-82):

- Damage to property, such as the learner's school uniform, school bag, bicycle, motor vehicle and other personal property. If the learner is the legal owner of a damaged bicycle, for example, then he (assisted by his parent; *cf.* 2.2.2.2) is competent to sue the wrongdoer responsible for the damage.
- Medical expenses. These relate to the treatment of physical and psychological injury and are usually claimed by the parents of the learner.
- Loss of income and earning capacity. Damages may be claimed for a learner who is gainfully employed (for example as a teenage model) and who sustains loss of income. Damages for loss of earning capacity may be recovered if the injuries sustained by the learner are so serious that there is a complete loss of earning capacity.

In the case of non-pecuniary loss (*cf.* 4.5.1 and 4.5.1.2) the court normally awards compensatory damages under the following headings (Botha, 1998:82):

- Pain and suffering, as in the case of physical pain endured and suffered.

- Disfigurement, meaning compensation is awarded for permanent physical disfigurement, especially in the case of facial injuries.
- Loss of general health.
- Loss of amenities. Compensation is awarded for the fact that the victim's lifestyle has been adversely affected.
- Shortened life expectancy, which means that compensation is awarded for the psychological effect of the knowledge that the victim's life expectancy has been shortened.
- Emotional shock. Compensation is awarded where the victim suffers psychological trauma witnessing a distressing event.

4.5.2.4 Causation

Baxter (1991:620) points out that, even if an administrative act or decision is wrongful or harmful (*cf.* 4.5.2.1), the plaintiff must still prove that the act or decision was the cause of the damage in order to establish liability. This requires proof of factual causation as well as satisfaction that the damage caused was not too remote.

The presence of these five elements are necessary to prove *delictual liability*, but there may be justification for the action.

4.5.3 Grounds of justification

The presence of grounds of justification leads to the situation in which an ostensibly wrongful act by the educator will legally not be regarded as such, but will be regarded as lawful conduct (Neethling *et al.*, 1992:66; Botha, 1998:75).

4.5.3.1 Self defence

Self defence is described by Neethling *et al.*(1992:68) as being present whenever the defendant defends himself in a reasonable way against the wrongful or threatening action of another in order to protect his own or another person's legal interests. This would be legally acceptable where it can be proved.

4.5.3.2 Necessity

Van der Walt (as quoted by Neethling *et al.*, 1992:78) describes *an act of necessity* as lawful conduct directed against an innocent person for the purpose of protecting an interest of the author or a third party (including the innocent person himself) against a dangerous situation.

4.5.3.3 Statutory authority

Baxter (1991:603-604) states that *statutory authority* can be a ground of justification in the sense that where a statute has authorized the infringement of one's legal rights or interests, there is no wrongful conduct and the infringement cannot found liability. At the same time the authority must be statutory and not simply the orders of authorization of a superior officer, unless the latter is himself empowered to issue those orders. Acting under superior orders or authority is no defence if the act was unlawful, since no superior officer may authorize unlawful conduct (Baxter, 1991:603-604; *cf.* 3.2.4 and 4.3.1.1.5).

Clearly then, administrative acts which infringe the legally protected rights or interests of an individual are lawful only as long as they occur within the bounds of the empowering statute, in other words, as long as they are *intra vires*. Whenever ostensible statutory authority has been exceeded, that would comprise *ultra vires* acts (*cf.* 3.3.4) which are not protected by statute (Baxter, 1991:612).

4.5.3.4 Disciplinary power

Meting out discipline or punishment in compliance with *disciplinary power* is lawful (Neethling *et al.*, 1992:102) and offers grounds of justification (Beckmann & Prinsloo, 1988:270) as long as it is executed in a moderate and reasonable manner (Neethling *et al.*, 1992:103; *cf.* 3.3.5).

According to case law the following factors will determine whether discipline is moderate and fair (Neethling *et al.*, 1992:104):

- the nature and seriousness of the offence;
- the physical and psychological frame of mind of the learner;
- the age of the learner;

- the physique of the learner;
- the nature of the punishment; and
- the purpose and motive of the person administering the punishment (*cf.* 3.2.6).

South African courts of law will only interfere with the discretionary power to maintain discipline in cases where the discretion was exercised in an unreasonable manner (Neethling *et al.*, 1992:104; *cf.* 3.2.6).

Although *disciplinary power* is vested in parents and persons with authority over children such as educators and house masters (Beckmann & Prinsloo,1988:267; *cf.* 3.3.5), if such a person were to exceed the bounds of his authority (*cf.* 3.3.4), he may be held liable for damages and/or compensation (*cf.* 4.4.1) and may be prosecuted for assault (Beckmann & Prinsloo, 1988:271; *cf.* 3.3.4).

Discipline must aim at correcting the child (so-called *correctio* in legal terms) (Neethling *et al.*, 1992:103) and should be exercised with compassion and love (Beckmann & Prinsloo, 1988:296).

4.5.3.5 Provocation

Provocation occurs when one person is taunting or soliciting another person through his words or conduct, resulting in a harmful causative act of the latter. Case law recognises provocation as a defence in the sense that the plaintiff who has provoked the defendant, has lost the right to claim compensation for the infringement of his personality rights (Neethling *et al.*, 1992:85; *cf.* 4.5.1.2).

The same authors point out that provocation as a defence is concerned with objectively weighing out the provocative conduct against the reaction according to the standard of reasonableness (*cf.* 3.2.1 and 3.2.3.2 and 4.3.1).

Amerasinghe (1967:72) states that it would seem to be implied that the court must decide on an objective test; whether in all circumstances of the case a reasonable person in the position of the defendant would have been provoked to retaliate with an assault by the unlawful action of the plaintiff. It is thus clear that it is not merely a question of whether the defendant was in fact provoked by the plaintiff's action, but whether another reasonable person would have acted similarly to the defendant.

4.5.3.6 Consent

Neethling *et al.* (1992:90) describe consent as a defence implying that the harmed person (the plaintiff) renounced his legal right when he vested the defendant with the power to infringe his interests. Boberg (1984b:724) defines consent which is freely and lawfully given by a person who has the legal capacity to do so, as justifying the conduct consented to, thus making the infliction of the ensuing harm lawful.

Consent can take on two shapes, namely consent to risk of injury or voluntary assumption of risk (Neethling *et al.*, 1992:91; Botha, 1998:76). An example of consent to risk of injury would be when one person agrees that another may take his pen, thus risking the possibility of losing it. On the other hand, voluntary assumption of risk would occur when a rugby player takes part in an actual game.

Botha (1998:76) refers to the frequent argument that a learner or his parent actually consented to participation in an activity and that consequently the educator (or the school) is not liable for damages resulting from such participation. When a defence of consent to risk of injury is upheld, it effectively prevents the learner (as plaintiff in an action) from pursuing any legal remedy and he consequently has to bear his own damages. Upholding consent to risk of injury as a ground of justification in effect establishes an absolute defence against a delictual claim, thus strict requirements for such a defence have to be set by the courts (Botha, 1998:76).

Botha (1998:76) further points out that there is a difference of opinion as to whether a learner has the personal capacity to give valid consent to risk of injury, as the giving of consent involves a unilateral legal act of the waiver of rights which requires legal capacity (*cf.* 2.2.2.1) in order for the consent to be valid. The guiding principle is to establish whether a learner has sufficient mental ability to appreciate the consequences of his consent to the risk of injury. If it is established that a learner cannot legally consent to risk of injury, the question arises whether a learner's parent or guardian has the capacity to give the required consent (Botha, 1998:76-77).

In order to determine whether a parent or a guardian's consent to risk of injury is unreasonable, a more stringent test is applied according to Boberg (1984b:732), because a parent or guardian is not as free to consent in such circumstances as when he consents to the infringement of his own rights.

The following are requirements for valid consent of risk to injury that the consenting person (the learner or his parent or guardian) and the activity to which consent is given must meet (Botha, 1998:77):

Such consent must be in the best interest of the learner (*cf.* 2.3.2.1 and 2.4.1.2 and 3.3.2.2.3).

- Such consent must be given freely and voluntarily. If a learner has been coerced in any way, such consent to risk of injury is invalid.
- The consenting person must fully realize or appreciate the nature and extent of any possible harm which may result.
- The consenting person must subjectively consent to the harmful action.
- The activity must not be against public policy, but permitted by the legal order.
- The activity must fall within the limits (*cf.* 3.3.4) of the consent given.

The same author (Botha, 1998:77-78) distinguishes between consent to risk of injury and indemnification from liability (*cf.* 4.5.5), the latter referring to the parent's undertaking not to institute civil action against an educator (or a school). He points out that an educator (or a school) can never be indemnified by a learner or a parent or guardian acting on behalf of a learner against any personal claim by such a learner. Such indemnity would be invalid either because of the legal incapacity of the learner (*cf.* 2.2.2.1) to enter unassisted into an agreement of indemnification, or because of the fact that an indemnity by a parent or guardian on behalf of his child would not be in the best interest of the child (*cf.* 2.3.2.1 and 2.4.1.2).

However, it would be wrong to assume that the educator is always solely responsible where harm or damage is done to the learner. The other possibility should be considered.

4.5.4 Contributory fault of the learner

According to Botha (1998:82) it often happens that the harm suffered by a learner cannot solely be attributed to the conduct of an educator (or a school). In some case the learner may even be entirely to blame. In the latter instance the principle applies that the learner bears his own damage (*cf.* 4.4.1).

At the same time cases occur where the accident was caused by the wrongful (*cf.* 4.5.2.1) and negligent or intentional conduct (*cf.* 4.5.2.2) of the educator as well as by the contributory guilty conduct (fault) of the learner. In this instance the court apportions the damage between the parties according to the provisions of the Apportionment of Damages Act 1956. According to this Act, the damages are apportioned relative to the parties' blame in causing the damage (Botha, 1998:82).

Whatever the case may be, the educator is not merely exposed to liability without recourse to legal help.

4.5.5 Precautions against liability

Each individual educator and school should take sufficient legal measures to exclude personal liability whenever possible. There are two possibilities.

4.5.5.1 Indemnification and waiver

As already pointed out (*cf.* 4.5.3.6), indemnification refers to the parent's undertaking not to institute civil action against the educator (or school). The parent thus effectively waives or limits his rights of recourse, thereby holding the educator (and school) harmless for any damages that he may suffer (Botha, 1998:84). However, such indemnification can only be valid in respect of damage suffered by a parent or guardian and not in respect of damage suffered by the learner, due to the legal principle that a parent or guardian may not act to the detriment of a learner (Botha, 1998:84). The action should always be taken in the best interest of the learner (*cf.* 2.3.2.1 and 2.4.1.2 and 3.3.2.2.3 and 4.5.3.6).

The same author clarifies the function of indemnities as that they can be used to a *limited extent* and *in limited instances* in order to indemnify the educator (or school) against the possible personally-instituted claim of a learner for damages or compensation for the infringement of his personality rights. Thus it follows that a contract of indemnity which includes a waiver of the personal claims of the learner must be signed by the learner himself who must be duly assisted by his parent or guardian (*cf.* 2.2.2.2). At the same time the contract of indemnity should furthermore state that the parent or guardian or learner undertakes not to sue the educator (or school) for negligent conduct by the educator.

It should, however, be borne in mind, as Botha (1998:85) points out, that a contract of indemnification can never indemnify an educator (or school) against harm caused *intentionally* or *recklessly*. Furthermore, according to section 5(3)(e) of the Schools Act (*cf.* 2.3.2.1.2) no learner may be refused admission to a public school on the grounds that his parent or guardian has refused to enter into a contract in terms of which he waives any claim for damages arising out of the education of the learner.

4.5.5.2 Insurance of educators against liability

The aim of this type of insurance is to indemnify a wrongdoer against delictual liability. According to Botha (1998:85) the personal claim of a parent or guardian will be met by the insurance company in the event of insurance being effected against the risks to which an educator or a school may be exposed.

In spite of such precautions that can be taken to exclude the educator's personal liability, this chapter has highlighted the importance for the educator to execute his duty of care professionally, keeping abreast of all legal requirements.

4.6 SUMMARY

Educators as persons *in loco parentis* are vested with special status which empowers them to act authoritatively in terms of the law. Not only do educators have both delegated and original authority over learners on the school grounds and during the normal school session, but (in terms of common law) they are also granted authority over the learners during extra-mural activities on or away from the school grounds.

The law expects of the educator to act like a *diligens paterfamilias* and a *reasonable person* in the education situation at all times. The fact that the educator is dealing with children, affords a higher degree of care than is normally the case when dealing with adults and his conduct as a professional person will be subject to a more stringent test.

Based on the educator's knowledge of his subject and the nature of the learner, his skill, his familiarity with the dangers to which the learner is exposed, his guarding against negligent acts, and his knowledge of the legal provisions which govern his profession, the reasonable educator is able to function safely within the parameters of the law.

In order to meet the demands of current legal developments, the educator should, however, keep abreast of the changing legal requirements and execute his duties professionally and with the necessary care at all times.

However, the possibility is always there that the learner may suffer material or psychological damage because of a wrongful act or negligence on the part of the educator. So the principles *liability for damages* and *prevention of damages* influence the contents and scope of an educator's legal duties to a large extent.

Private law determines the types of damage that can be recovered because of administrative acts. They are the actions *actio legis Aquiliae* (pecuniary loss and bodily injuries) and *actio iniuriarum* (infringement of personality rights). Both of these actions need to be proved by the presence of unlawful conduct, fault, damage and causation. On the other hand, there may be grounds of justification such as self defence, necessity, statutory authority, disciplinary power, provocation or consent.

It is also feasible that a learner may be partly or wholly responsible for the harm he has suffered. Each educator and school should nevertheless take sufficient legal measures to exclude personal liability, such as indemnification, waiver or insurance against liability.

It is therefore certain that the educator's duty of care must not be taken lightly.

In the next chapter a comparative legal perspective of the educator-learner relationship will be dealt with.