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## Theme

Occupational health and safety, risk management and liability in school workshops:  
An Education Law perspective

*SAOU CONFERENCE FOR EDUCATORS AT LSEN- AND INCLUSIVE MAIN STREAM SCHOOLS*

*2 November 2021*



It all starts here

Is there a distinction between teachers in  
the eyes of the Law?

**ABSOLUTELY YES !!!**



teachers teachers  
All ~~animals~~ are equal, but some ~~animals~~ are more  
equal than others.

(George Orwell)



## **"Other teachers – Academic schools"**

Mathematics, Languages, EGD, History, Geography  
etc.

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## **“Some teachers – Focus schools”**

FET Technology (Civil, Mechanical, Electrical)

GET Technology

Science and Biology laboratories

LSEN workshops

Art studios

Agricultural Technology



# What legislation is applicable to whom?

## **“All teachers”**

The Constitution of the Republic of South Africa, 1996

South African Schools Act 84 of 1996

The National Education Policy Act 12 of 1998

The Employment of Educators Act 76 of 1998

The South African Council for Educators Act 31 of 2000

The Occupational Health and Safety Act 85 of 1993

## **“Some teachers”**

Driven Machinery Regulations, 2010

General Safety Regulations, 1986

National Building Regulations and Building Standards Act 103 of 1977

Workplace Environmental Regulations, 1987

Hazardous Chemical Substances Regulations, 1995

Guidelines for General Upkeep and Maintenance of Education Facilities, 2018



# Legal duty of care

Teachers have a legal duty of care to ensure that workplaces are safe, and to protect learners against unsafe conditions and environments.

Workshops and laboratories require a heightened duty of care due to the presence of dangerous machinery and conditions like circular saws, milling machines, lathes, flammable liquids, gasses and hot surfaces.



Teachers have a **heightened duty of care** towards learners in workshops, with LSEN teachers bearing the highest duty.

Teachers must be able to **reasonably foresee** accidents in their workshops, and must take **reasonable steps to prevent them.**





Was the conduct of this learner foreseeable by the teacher?



# Duty of care - Children or people with disabilities

Teachers are expected to exercise **greater care and vigilance** when it is likely that children with **disabilities** i.e. blindness and deafness, or people with **limited capacity** to direct their actions are in the vicinity (Loubser & Midgley, 2010:128).

Teachers must take the limitations of these learners into consideration, and take **reasonable precautions** to prevent injuries.

The following factors are relevant when determining reasonable behaviour of children with disabilities:

- Visibility of the child
- The child's apparent age
- The child's mobility or liveliness
- Extent of supervision by the teacher
- The child's awareness of the danger involved

The **heightened duty of care** of LSEN teachers are emphasized in the case of a deaf-mute learner in *Dziwenka et al. v. The Queen and Mapplebeck* (1971)





Civil Technology is considered as the **most dangerous** workshop in high schools.....

**Why?**

Statistics show that:

- Majority of school accidents take place on **woodworking machinery**.
- **Circular saws** are responsible for the majority of these accidents.
- The **majority of claims for damages** resulted from accidents in Civil Technology workshops.



## Civil Technology workshops are classified as high risk by insurers due to:

- Seriousness of the injuries.
- High medical costs associated with these injuries.



## Contributing factors:

- Large groups in workshops.
- Learner ill-discipline.
- Financial challenges with regards to maintenance / repairs.
- Lack of inspections from Works inspectors.
- Non functioning safety committees.
- Insufficient practical skills of newly trained teachers.
- Lack of support from DBE with infrastructure.



# Fundamentals of Delictual Liability

Loubser and Midgley (2018:04) defines delictual liability as follows:

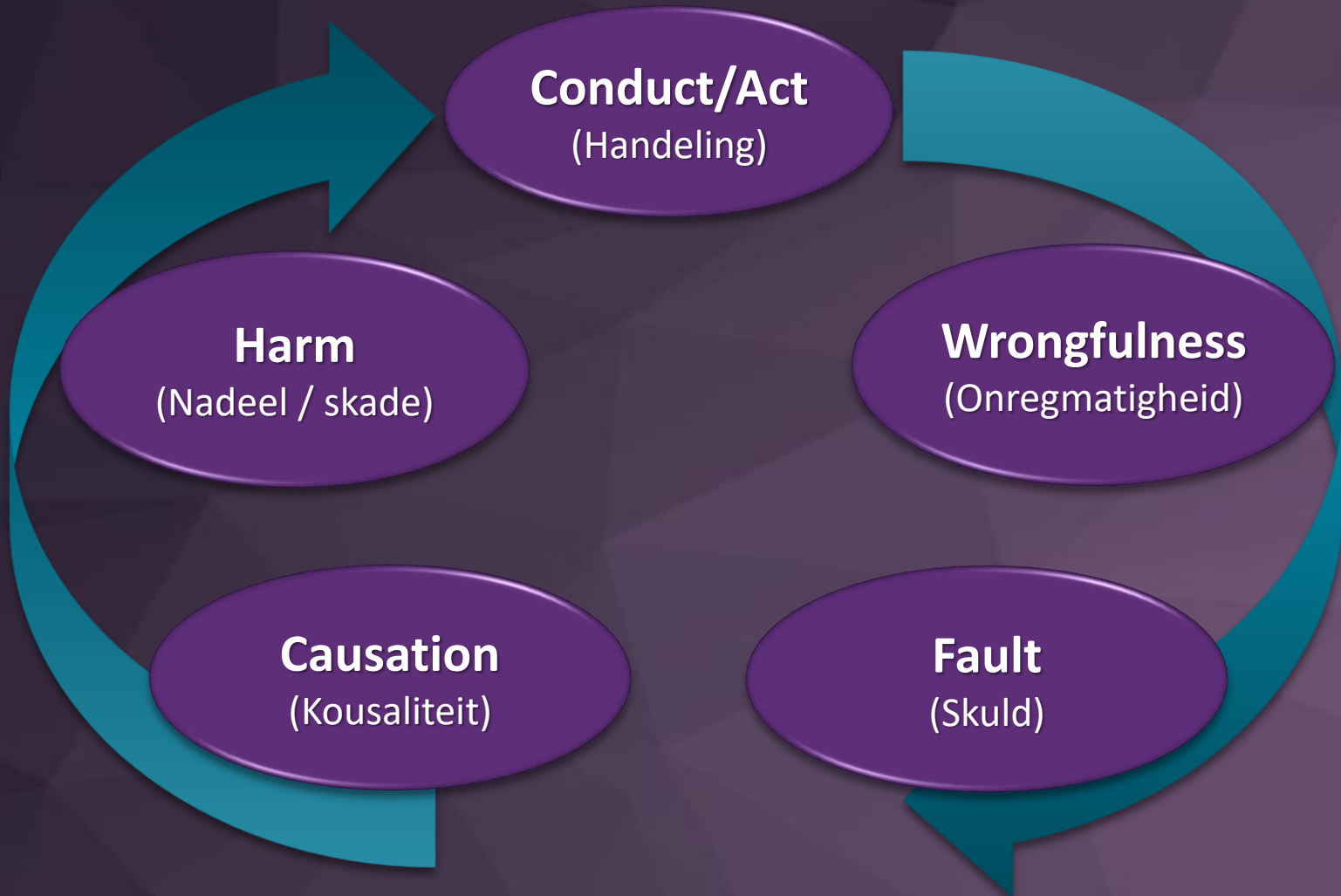
***Delict:*** “a civil wrong”, “wrongful and blameworthy conduct which causes harm to a person”

***Liability:*** responsibility, accountability i.e. “being held liable for damages”

A delict occurs when one party commits a wrong against another. The basic elements of delict are conduct, wrongfulness, fault, causation and damage. All five elements mentioned above must be present before a person can be held delictually liable. If any one (or more) of these elements are missing, there is no question of a delict, and consequently no liability (Neethling *et al.* 2010:4).



# Elements of a delict





**Conduct** - a voluntary human **act** or omission to act.

**Wrongfulness** - for delictual liability to be conferred upon the Defendant, his conduct must be regarded as **wrongful**. To determine whether or not conduct is wrongful, the following two questions need to be asked:

- *Is there a legally recognised interest that has been infringed?*
- *Was the legally recognised interest infringed wrongfully or in an unreasonable manner?*

If the answer to the above two questions is yes, the conduct is wrongful.

**Fault** - According to Neethling *et al.* (2010:133) fault is the reprehensible attitude or behaviour of someone who has acted illegally.

Two main forms of fault are found, namely, intention and **negligence**.

**NB !!** In South African law, fault is a prerequisite for delictual liability.

**Causation** - For a delict to exist there must be a **connection** (causal nexus) between conduct and damage. In other words, did the conduct cause the damage?

**Harm** - includes both **patrimonial** (pecuniary) as well as **non-patrimonial** (non-pecuniary loss).





# Accountability

A person is accountable for his actions if he can distinguish between **right and wrong** and act in accordance with such distinction. If a person is found not to be accountable, **no fault** can be attributed to him.

In terms of South African law, people have been found not to be accountable when one or more of the following factors are present:

## 1. Youth

- Ages 1 - 7 (infantes) - can never be accountable

- Ages 7 - 14 (impubes) - can be proven to be accountable

- Ages 14 onwards – accountable

Children between the ages of 14 and 18 are **legally accountable** for their actions, and can be held liable.



## 2. Mental illness or disease

Not accountable if he/she can not distinguish between right and wrong at a specific given time



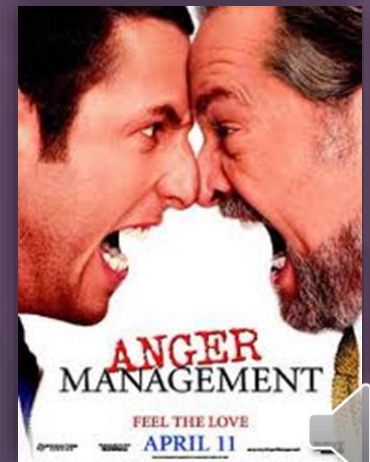
## 3. Intoxication

Someone who is under the influence of alcohol or other narcotics can be considered unaccountable.



## 4. Provocation

Where a person loses his temper due to provocation or defiance, and becomes enraged with anger, he may be considered unaccountable. This anger can lead to a state of temporary insanity.



# Intent or negligence?

## Intent (Dolus)

A person acts **intentionally** if he purposely does something he knows to be wrong, or can cause harm.

The majority of delictual claims in school workshops are based on negligence, not intent. However, there are court cases where it has been found that educators acted intentionally and caused harm, as in *Courson v. Danville School District no.118* [Ill. App. 4 Dist, 2002].



# Negligence (Culpa)

Negligence on the other hand occurs when a person **unintentionally** commits a wrongful deed. In the case of negligence, a person is blamed for an attitude or behaviour of negligence or carelessness by not paying sufficient attention to what he does, or not meet the standard of care legally required of him.



## Reasonable person test

In this regard, the reasonable person test is used to determine negligence, which involves the answering of two questions:

- Would the reasonable person have foreseen his conduct causing damage?
- If so, could any steps have been taken to reasonably avoid the damage?

A person is negligent if the answer to both questions is yes.



# What is the legal view of a reasonable person?

**The reasonable person must possess the following characteristics:**

- is not extraordinarily gifted, careful or developed person;
- but is also not under developed, reckless , or shows no discretion.
- the behaviour (or standard of behaviour) of the reasonable man can also be measured against that of common sense and reasonableness.





# Considerations in educator negligence

Two considerations that influence the test for negligence of educators are:

## 1. Level of expertise and skill

Educators are regarded as professional persons, and due to their specialized training they are expected to show a higher standard of care in the implementation of their profession. Educators, like doctors, surgeons and lawyers, are therefore seen as someone with specialised training in their respective fields.



The educator's behavior (action) is therefore no longer measured to the usual “reasonable person” standard, but to the (increased) standard of the **reasonable expert**.

## **2. Higher degree of care for children**

- Is knowledgeable and competent (professional qualification), and knows the essence of the learner,
- are proficient in their profession, and is aware of the dangers to which learners may be exposed,
- are aware of the risks when learners are left alone in a class (workshop),
- are aware that they must provide first aid in an emergency, but that they may not give medical treatment or medicine to learners,
- are knowledgeable about the legal provisions applicable to their profession, and is not negligent.



What should the reasonable expert (teacher) have done?



# Contributory fault

The **harm** (damage) that a learner may suffer in some cases is not always due to the actions of the teacher or educational institution alone. Sometimes the wrongdoing of the learner can **contribute** to the harm (damage) that the learner has suffered. However, it may happen that harm was inflicted due to both the wrongful actions of the educator, as well as **contributory fault** of the child. The cases of *Fallin v. Maplewood-North St. Paul District No. 622 [1985]*, and *Hudson v. Lansingburgh Central School District [2006]* illustrates contributory fault.



Can you determine who was negligent?





# Suggestions to limit educator liability

- **KNOW THE LAW!** It is to your own advantage.
- Build a “paper trail” - Keep all **agendas and minutes** of safety meetings where you have reported and addressed unsafe situations in workshops and laboratories. **Safety tests** that can serve as proof of learners' knowledge regarding machinery and laboratory equipment must be kept.
- Keep **evidence** that **safety demonstrations** have been presented on all machinery and equipment used for PAT
- You must be able to prove that all learners were present during the presentation - **attendance register NB!**  
See *Parkin v. Australian Capital Territory Schools Authority* [2005]





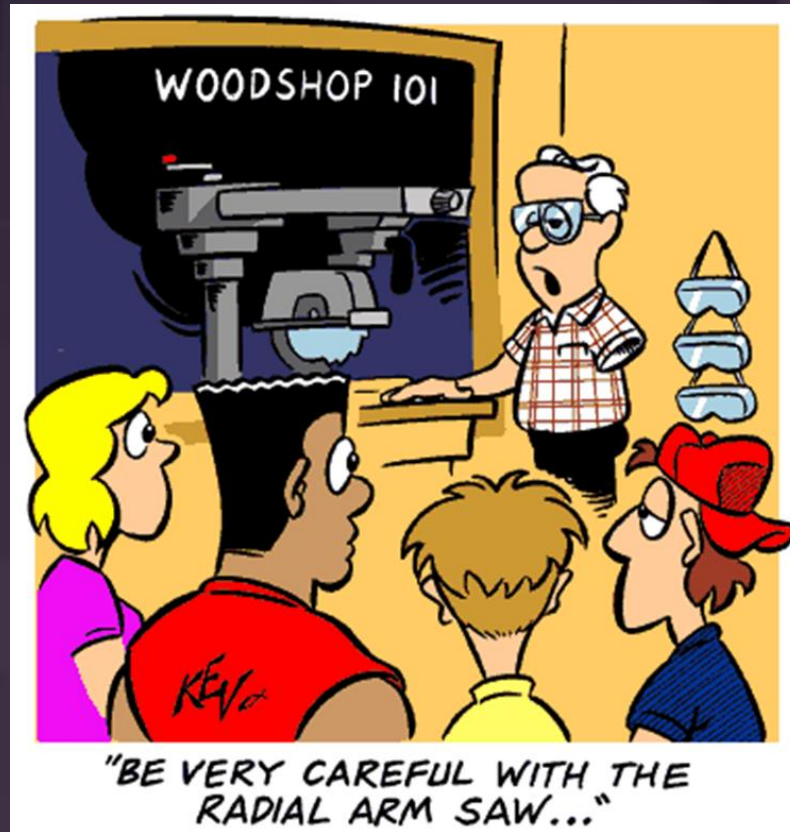
- **NEVER** leave the classroom during practical periods ... **EVER!**
- Ensure that **safety signs** are displayed in the workshop that unauthorized work is not permitted unless explicit consent from the teacher was given.
- Provide **PPE** to learners ( safety glasses, push rods, hearing protection etc.) and **ENSURE** that safety equipment is worn at all times ... **NO** exceptions!  
*See Scott v. Independent School District. 709, Duluth [1977]*
- Ensure order in your class by **limiting congestion** at machines, and plan accordingly to limit the chances of injuries.
- Ensure **main power supply** is turned off when not in use, or in cases when cleaning takes place.



- Ensure machinery is regularly maintained and is in safe working condition and adhere to regulations - do it yourself or get specialist service providers.
- Ensure that you are trained in FIRST AID, and that a fully stocked first aid kit is available in your workshop.
- Take out personal liability insurance as well as disability. Familiarize yourself with legislation pertaining to compensation for occupational injuries and diseases (COIDA, 1993).



Thank you for listening...and stay safe



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