

'Father to sue education department over rape'¹ – civil remedies for sexual violence and harassment in public schools

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In the light of the matter reported by Samodien (2012) where a father intends to sue the Department of Education for damages incurred by his child who was raped at school, this article focuses on the duty of educators and schools to take measures to prevent and deal with sexual harassment and violence in schools. Sexual harassment and violence is conceptualised by drawing from definitions of sexual harassment and violence as well as those pertaining to sexual offenses. The duties of schools, school governing bodies, school principals and educators are outlined within the parameters of the Bill of Rights, education-specific legislation and policy as well as common law. The possibility of civil remedies for victims who have been subjected to sexual harassment and violence at school is investigated. Five requirements for delictual liability (damage, an act, unlawfulness, fault and causation) are used to demonstrate how the criteria for awarding damages may be met when learners approach the courts for civil remedies.

1 BACKGROUND

Sexual harassment and violence directed at learners in South African schools have become the topic of many reports and research projects over the last decade (HRW 2001; De Wet 2008; De Wet, Jacobs & Palm-Forster 2008:97-122; De Wet 2010). Newspaper reports also reflect incidences of harassment that learners suffer in South African schools (Govender 2005; Kgosana & Pitamber 2006:10; Botha 2007:3; Samodien 2012). On 10 August, 2012, the Western Cape High Court granted permission to the father of a school-rape victim to sue the Western Cape education department and Member of the Executive Council (MEC) for damages (Samodien 2012). The victim, aged seven at the time, was raped by the school janitor at her school while she was attending aftercare (Samodien 2012). Although the perpetrator was found guilty and received a life sentence, the father sought civil remedy for the damages his child had suffered due to the rape incident.

Compulsory school attendance, the rights of learners and common sense lead to a reasonable expectation on the side of learners and parents that learners will be safe while at school. In terms of the common-law role of *in loco parentis*, the educator has the duty to take care of the learner's wellbeing, which includes the duty to protect the learner against danger and abuse (Botha, Smith & Oosthuizen 2009:61-62). The argument that lies behind the father's approaching of the court entails the notion that the school and educators were expected to supervise the child in order to keep the child safe from harm, including the harm that may result from sexual violence

and harassment. Against this background, the article focuses on the duty of educators and schools to take measures to prevent and deal with sexual harassment and violence in schools. It investigates the possibility of civil remedies for victims who have been subjected to sexual harassment and violence while in the care of the school.

To reach the stated aim, the article is structured as follows: Firstly, sexual harassment and violence against learners in the school setting are conceptualised, followed by a discussion of the duty of schools in this regard. Hereafter, possible civil liability for a school's failure to protect learners from sexual violence is probed.

2 CONCEPTUALISATION

Coetzee (2012:27-29), in her analysis of law and policy dealing with learner sexual misconduct in schools, grapples with concepts related to sexual violence and harassment. She contends that the use of *sexual violence and harassment* as an 'umbrella phrase' is problematic due to the many nuances found in concepts such as harassment, abuse and violence and the resultant issues with the inclusion and exclusion of certain conduct in definitions. She holds that some sexual offences neither qualify as harassment nor as sexual violence. This author agrees with Coetzee when she makes the point that some of the conduct listed or named as sexual violence in the Guidelines for the Prevention and Management of Sexual Violence and Harassment in Public Schools (DoE 2008, hereafter *The Guidelines*) is not necessarily of a violent nature. Coetzee (2012:29) suggests that the term sexual misconduct

rather be used (referring to learner conduct in her article) and suggests that legal definitions of criminal sexual offenses be used as guidelines for determining the content of sexual misconduct. Having duly noted these gaps and recommendations, this article wishes to define sexual harassment and sexual violence in schools as two separate concepts. However, it does not focus on learner conduct only but on the sexual violence and harassment that learners suffer in the school environment, whether inflicted by fellow learners, educators, other school employees or any other person who gained access to the school environment. In this context, where sexual violence is not always perpetrated by someone directly connected to the school, the use of ‘misconduct’ is inappropriate. Nevertheless, the use of legal definitions remains important and will be considered when conceptualising sexual violence and harassment.

The Guidelines adapted the definition of *sexual harassment* from the Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace (RSA 2005). It defines sexual harassment in the school as ‘unwanted conduct of a sexual nature’ and proceeds to list circumstances under which ‘sexual attention’ constitutes harassment, and it also lists other qualifying aspects for sexual harassment that may occur in the school environment or setting (DOE 2008:6). However, pursuant of a clear and inclusive definition which will render long listings of examples, conduct or requirements unnecessary, and which is not merely an adaptation of the labour law definition this article refers to sexual harassment in the school environment in terms of the definition by De Wet and Oosthuizen (2010:195) as:

any unwanted and unwelcome verbal or nonverbal conduct of a sexual nature, or conduct based on sex, gender or sexual orientation, which is persistent or serious and which is demeaning or humiliating, or creates a hostile, offensive or intimidating environment, or is intended to induce submission by actual or threatened adverse consequences.

This wide definition includes many different forms of sexual harassment that may occur, such as *quid pro quo*, hostile-environment, verbal, nonverbal, gender and secondary harassment (De Wet & Oosthuizen 2010:195). The use of physical force, intimidation or threats of physical force may or may not be involved. The definition thus also includes criminal forms of gender and sexual violence, such as rape, sexual violation and sexual abuse. This conceptualisation is mindful of the nature of various forms of sexual

harassment and violence learners suffer in the school environment as indicated by literature, which ranges from sexist remarks and sexual comments to sexual violation and rape.

When considering this definition, sexual violence may be viewed as a form of sexual harassment, since it meets the criteria of being unwanted and unwelcome conduct of a sexual nature which is serious and is demeaning or humiliating, and may be intended to induce submission. In this sense, sexual harassment is defined as a wider concept encompassing both ‘non-violent’ and violent forms of unwanted sexual conduct. One could argue, for example, that sexist jokes, although it constitutes sexual harassment, are of a non-violent nature. This suggests that violence is understood in terms of the narrow definition as “the use of physical force, usually intended to cause injury or destruction” (Collins 2008:902). In using this understanding of violence, non-physical forms of violence such as emotional, psychological and systemic violence are excluded from the understanding of violence.

However, violence may also be understood in a broader sense of violation, where ‘violate’ is defined as “treat disrespectfully” or “disturb rudely or improperly” (Collins 2008:902). If this is the case, sexist jokes could also constitute sexual violence. On the one hand, sexual violence may be included as a form of sexual harassment, but on the other hand, sexual harassment may be viewed as a form of sexual violence. In the latter case, and with a broader understanding of violence, physical and non-physical forms of unwanted sexual conduct may be included in the definition of sexual violence. *The Guidelines* (DoE 2008) defines *sexual violence* as sexual conduct which utilises intimidation, threats or physical force and states that sexual violence in schools may include sexual harassment. Including sexual harassment as a form of sexual violence thus seems sensible if one understands violence in its broader sense (‘to violate’). Thus *The Guidelines* also refers to emotional abuse resulting from sexual violence in the forms of threats of violence but at the same time states that sexual violence constitutes a criminal offense and should be “immediately reported” to the police (DoE 2008). One wonders whether *The Guidelines*, in its definition of violence, attempted to include forms of sexual harassment which constitute criminal behaviour but to exclude forms of sexual harassment that are not criminal in nature, such as sexist remarks

or unwelcome sexual attention. Does sexual violence in terms of *The Guidelines* exclude forms of sexual harassment that do not entail the use of physical force, intimidation or threats? Or does *The Guidelines*' definition of sexual harassment refer to only forms of harassment that do entail the use of physical force, intimidation or threats? The intertwined nature of harassment and violence, as well as the separateness and interrelatedness of concepts such as abuse, violence, non-violent, violation and harassment, was probably not grappled with and conceptualised adequately when defining violence and harassment in *The Guidelines* (DoE 2008).

In order to separate the two concepts of sexual violence and sexual harassment meaningfully, this article uses violence in its narrow sense, referring to mostly physical forms of violence that present a violation of a person's bodily integrity. Thus while sexual harassment is defined as wide enough to include sexual violence that is exercised as a form of sexual harassment, sexual violence is defined in a narrower sense to exclude forms of sexual harassment that do not meet the criteria of the definition for sexual violence. This article distinguishes between *sexual harassment*, which meets the criteria of the definition from De Wet and Oosthuizen (2010)², and *sexual violence* which the author defines here as

Sexual conduct which involves the unlawful and intentional use of threatened or actual physical force and results in a violation of the bodily and/or sexual integrity of another person.

This definition refers to conduct that is both sexual and violent in nature, where violence is understood as a violation of the bodily integrity of the victim, whether by means of physical force or threatened physical force. It draws from definitions of violence by the United Nations (1993), the World Health Organisation (1993: 3-4) and the South African Human Rights Commission (2008:5), as well as criminal law definitions of assault and sexual violation (RSA 2007; Snyman 2007).

The definition of sexual violence as conceptualised here thus includes the different sexual offences in terms of Chapters 2, 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (RSA 2007, hereafter the Criminal Law Act) and thus excludes sexual conduct that does not present a violation of the bodily integrity of another. Included are two offences of note and which need further clarification: sexual violation and rape. The definition of rape was widened by the

Criminal Law Act (RSA 2007) to include victims and perpetrators of any gender. In addition, the new definition does not only include rape in the traditional sense but uses the concept "sexual penetration" and extends to include sodomy, oral-genital violation involving penetration of a person's mouth by the genital organs of another person and the use of an object for sexual penetration. The traditional term "indecent assault" has also been extended by introducing the term "sexual violation" which is defined more widely than indecent assault (RSA 2007). Whereas the use of the concept 'sexual harassment' in this article includes both non-violent and violent as well as non-physical and physical sexual conduct or conduct based on sex, gender or sexuality, the term 'sexual violence' is used when referring to sexual conduct which is unlawful and entails the use of physical force, including rape, sexual violation and other sexually-related crimes as defined in the Criminal Law Act (RSA 2007).

3 A DUTY TO PROTECT

Sexual harassment and violence in schools have grave consequences for learner-victims which are widely documented and will not be repeated here save to say that without protection from sexual harassment and violence in schools, effective education and equal access to quality education are impossible. Educators, schools and the Departments of Education have a duty to ensure that schools are free from sexual harassment and violence so that education can be offered in an environment that enables all learners to enjoy their right to equality, dignity and freedom and to pursue education and realise their potential. The basis of the educator's duty can be found in the rights of the learner and in the educator's roles in terms of education-specific law and policy as well as common law.

3.1 The rights of the learner

Internationally, the child's right to protection has been recognised by the United Nations in 1959 when the principles in the Declaration of the Rights of a Child were formulated and emphasised again in the Convention on the Rights of the Child (UN 1989). Here, state parties are expected to ensure protection of children from all forms of violence while in the care of, *inter alia*, educators (UN 1989: section 19). In Africa, the African Charter on the Rights and Welfare of the Child further expects member states to protect the child from forms of torture, inhuman or degrading treatment and especially

physical or mental injury or abuse, neglect or maltreatment including sexual abuse (OAU 1990: article 16). The South African Constitution (RSA 1996a) has endorsed several rights in the Bill of Rights which contribute towards the protection of not only children but all learners in schools.

Every person has the right not to be unfairly discriminated against on the basis of sex, gender or sexual orientation, (RSA 1996a: section 9). Since sexual harassment often involves conduct based on sex, gender or sexual orientation, it discriminates on these bases. Such conduct is directed at the victim usually because of his or her gender and would probably not have been exercised towards the victim had the victim’s gender been different. Legislation recognises this notion when it defines sexual harassment as a form of discrimination on the basis of sex, gender or sexual orientation (RSA 2005; RSA, 2000).

Everyone is also entitled to inherent dignity and has the right to have that dignity respected and protected (RSA 1996a: section 10). Due to the demeaning or humiliating nature of sexual harassment and violence, it impacts on the victim’s right to dignity. Unlike wanted or welcome sexual attention, which may be flattering and boosts self-esteem, sexual harassment and violence are demeaning and non-reciprocal and result in feelings of powerlessness, fear, shame and a low self-esteem (Walls 2009; Selikow, Zulu & Cedras 2002:23). Rape as a form of sexual violence has been accepted by many courts as the worst form of humiliation one can suffer (cf for example *S v V & Another* 1989; *S v C* 1996; *N v T* 1994).

Section 12 (RSA 1996a) grants every person the right to freedom and security of the person, which includes the right to be free from all forms of violence from public and private sources and not to be treated in a cruel, inhuman or degrading manner. This right further includes the right to bodily and psychological integrity. Serious and violent forms of sexual harassment, including assault and rape, impact greatly on the right of the learner to be free from violence and the right to bodily and psychological integrity. Sexual harassment, where it manifests as psychological violence, affects the right of the victim to be free from all forms of violence, not only physical violence. Furthermore, most forms of harassment are demeaning and degrading, which also violates the victim’s right not to be treated in a degrading manner. Sexual harassment, intimidation and

violence against learners are an infringement of their bodily and/or psychological integrity and therefore infringe on their right to freedom and security of the person (Prinsloo 2006:310-315). Judge De Kock summarised this in the first sexual harassment case before the Industrial Court, *J v M Ltd* (1989), as follows:

Sexual harassment, depending on the form it takes, violates that right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally and civilly.

In *Attorney-General, Eastern Cape v D* (1997), a matter dealing with rape, the judge also saw it fit to comment on the way sexual violence impacts on bodily integrity by making the following remark:

The respondent acted with callous disregard to the rights of the complainant and the sanctity of the body.

In terms of section 28 (RSA 1996a), children under the age of 18 have the right to be protected against neglect, abuse, maltreatment and degradation. This is especially applicable to sexual harassment of under-age learners by educators or other adults (learners, parents, employers and visitors) at school. Although this does not imply that learners of 18 years and above are not protected, their protection comes from other sections in the Bill of Rights as well as other legislation. Section 28 of the South African Constitution specifically protects children.

Section 29 (RSA 1996a) endorses the right to equal education opportunities. Sexual harassment in the school interferes greatly with the learning process, as it robs learners of the secure environment needed for effective education (OCR 2008: 1). Victims of school-based sexual harassment frequently report school performance difficulties which include a difficulty to concentrate in class or on school work, decreased quality of school work, skipping or dropping classes, lower marks, tardiness, truancy and loss of interest in school (Wessler & De Andrade 2006:520; Klein 2006: 160; HRW 2001:3). Some drop out completely or skip classes to avoid further harassment (AAUW 1993:15; Holt *et al.* 2007:504; Fekkes *et al.* 2006:1569).

Some authors, such as Leach (2002:108), De Wet and Palm-Forster (2008:9) as well as Boer and Mashamba (2007:53), hold that sexual harassment exists in schools because it exploits the power imbalance between the victim and the perpetrator, which is “largely but not exclusively that of male over female”. In a study in Zimbabwean schools, Leach (2002:105) found

that boys often exercise sexual harassment, which mostly took the form of being demeaning or humiliating towards girls, as a means of affirming male dominance over females. Thus, sexual harassment often serves as a demonstration of masculine power and a means of exercising control over females. Such behaviour and attitudes impact on girls' right to have their dignity respected and protected, while also violating their right to equality. It contributes to a hostile school environment for girls, denying them access to an equal education experience which, in turn, may reduce academic performance and limit their career choices (Fineran, Bennet & Sacco 2001:215; Khoza 2002:75).

Clearly, sexual harassment and violence in schools interfere with victims' learning and affect their ability to fully benefit from educational opportunities. Equal access to schools is immaterial if sexual harassment and violence inside the school interfere with the victim's ability to utilise the opportunities provided. The failure to provide learners with a safe learning environment infringes on the learners' access to equal educational opportunities and, therefore, on their right to education (Joubert, De Waal & Rossouw, 2004:214).

On the basis of these and other rights of the learner, the educator, school (including school governing bodies and school management teams) and departments of education have the duty to ensure a safe schooling environment for all learners.

3.2 Education-specific law and policy

Educators should create a culture of respect for human rights in schools and classrooms while schools should have an effective safety programme to protect learners from sexual harassment and violence (Joubert & Prinsloo 2001:107). This duty is included in the educator's pastoral role in terms of the Norms and Standards for Educators in the National Education Policy Act (RSA 1996b) which states that:

the educator will uphold the Constitution and promote democratic values and principles in schools and society. Within the school, the educator will demonstrate an ability to develop a supportive and empowering environment for the learner and respond to the educational and other needs of learners.

The exercising of this role is further emphasised by provisions in the SACE Code of Professional Ethics for Educators (SACE 2006). This code states that educators who are registered with the council:

Acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa (2.3);

Respect the dignity, beliefs and constitutional rights of learners... (3.1); and

Strive to enable learners to develop a set of values consistent with the fundamental rights contained in the Constitution of South Africa (3.3).

The Regulations for Safety Measures at Public Schools (RSA 2001, hereafter *The Regulations*) further provide regulations for school safety and declared all public schools violence-free zones. *The Regulations* bestows responsibilities for ensuring school safety on the heads of departments (HODs) and school principals, who are also indicated by the School's Act (RSA, 1996c: section 16(3) and 16A) as the professional managers of their schools. Furthermore, functions and obligations in terms of school safety in *The Regulations* apply to public schools as legal entities. This means that a school governing body as representative of the school and sanctioned with the governing function of the school in terms of the Schools Act (RSA 1996c: section 16(1)) bears the duty of ensuring that their schools are safe learning environments. The duty of the school to take measures to ensure learner safety is extended to include not only learner safety during normal school hours and on the school premises but also during any school activity, whether educational, cultural, sporting or social, and whether within or outside the premises of the school (RSA 2001: regulation 8A).

In terms of section 16A of the Schools Act (RSA 1996c) the principal has the duty of implementing legislation and policy in the school, as well as informing the governing body of relevant legislation and policy. Governing bodies, of which the principal is part, also have the duty to put a Code of Conduct in place which reflects the responsibilities of learners, the school ethos and school and class rules and outlines procedures to be followed when learner misconduct occurs (RSA 1996c: section 8). Such document should include reference to and safety measures for dealing with sexual harassment and sexual violence in schools, outline related misconduct and the nature and seriousness thereof, provide complaints procedures and stipulate disciplinary procedures and sanctions. Pertaining to sexual harassment and violence that are perpetrated against learners by educators or other personnel, the principal has a further obligation since he/she has the responsibility to manage all educators and support staff (RSA

1996c: section 16A).

From education-specific legislation and policy, it becomes clear that educators, schools (school governing bodies) and school principals bear the duty of taking safety measures to protect learners from sexual harassment and violence.

3.3 Duty of care

The educator’s duty of care demands that learners be protected from possible harm, including the risk of being subjected to sexual harassment and violence in the school environment. The school and the educator should foresee the possible harm that may result from sexual harassment and take steps to prevent such harm from occurring.

Within common law, the educator’s duty of care is derived from *in loco parentis*, which is understood as “in the place of the parent; instead of the parent; charged fictitiously with a parent’s rights, duties, and responsibilities” (Black 1983: 403). Judge Beck described this duty of care in the matter of *Resure v The Jesuit Fathers* (1970) as follows:

The duty of care owed to children by school authorities has been said to take such care of him as a careful father would take of his children.

To do this, the educator, where possible, as well as the school should have measures in place to both prevent sexual harassment from taking place and to deal with the perpetrators and support the victims where sexual harassment does occur. In fact, not only does *in loco parentis* place the responsibility of careful supervision on educators, it also gives the educator the authority and responsibility to control learner behaviour in providing them the “autonomous right to maintain authority” (Botha *et al.* 2009:161). It is the duty of educators to safeguard learners by forbidding any form of violence on school grounds (Joubert & Prinsloo 2001:109) and to act against learners who make themselves guilty of sexual harassment and violence against others.

Although stopping short of enacting *in loco parentis* as a legislative mandate, section 3.7 of the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (DoE 1998) provides as follows:

An educator at the school shall have the same rights as a parent to control and discipline the learner according to the Code of Conduct during the time the learner is in attendance at the school, any classroom, school function or school excursion or school-related activities.

Thus, when looking at the learners’ rights, education-specific law and policy as well as the educator’s common law duty of care, it is clear that the educator, school, school governing body (SGB) and school principal as well as officials of the department of education have duties towards the protection of learners from sexual harassment and violence at school or school-related activities. With this in mind, the possibility of delictual liability for failure to exercise such duties needs to be investigated.

4 CIVIL REMEDY FOR EDUCATORS’ FAILURE TO PROTECT LEARNERS FROM SEXUAL HARASSMENT AND VIOLENCE

Although South African law of delict follows the basic principle that harm rests where it falls, harm can be recovered by delictual action if such harm was caused by a delict, being wrongful and blameworthy (or culpable) conduct (Neethling, Potgieter & Visser 2006:3-4). Possibly, civil liability may be utilised as a remedy for victims when an educator or school has failed to take preventative measures to protect learners from sexual harassment and violence in school or during school-related activities, or when an educator or school has failed to act against learner perpetrators of sexual harassment and violence, or in the case where employers (department of education or school) failed to act against employees who subjected learners to sexual harassment or violence (Fisher, Schimmel & Kelly 1999:107). The defendant in this case is not the actual aggressor of the victim. Instead, the defendant is the party who has neglected to act preventatively where such neglect resulted in harm which could have been prevented.

The courts decide whether a party can be held liable for the harm another suffered by evaluating the details of each case and ascertaining whether criteria for liability are met. In the matter of the *Minister of Police v Ewels* (1975) the plaintiff claimed damages from the Minister of Police after he was assaulted in the presence of several police officers who did nothing to stop the assault or to protect or help the plaintiff. The case argued whether the omission of the constables with regard to the protection of the plaintiff could be regarded as delictually unlawful conduct. Judge Rumpff held that an omission may be regarded as unlawful conduct when circumstances demonstrate not only a moral disturbance but also when the *boni mores* demands that the omission be regarded as

unlawful and that damages should be paid by the person who failed to act preventatively. He found that the police had a legal duty to prevent crime and to protect the plaintiff, as demonstrated by the circumstances of this specific case, and the defendant consequently had to pay damages.

In the light of this case, it seems possible to argue for delictual liability and claim damages for the failure (*omissio*) of an educator to prevent or deal with incidents of sexual harassment or violence. To demonstrate how criteria for delictual liability may be met, five requirements from Botha *et al.* (2009:188) will be used. They are damage, an act, unlawfulness, fault and causation.

4.1 Damage (*damnum*)

Damage refers to the detrimental impact upon any patrimonial or personal interest deemed worthy of protection by the law (Neethling *et al.* 2006:196). *Pain and suffering*, described as injury to physical-mental integrity, include bodily and psychological pain, as well as inconveniences resulting from physical injury, emotional shock or the treatment made necessary by the injury. It also encompasses past and future physical and emotional pain (Neethling *et al.* 2006:224). Pain and suffering as injury to bodily integrity occur when sexual harassment results in physical injury and always in the case of sexual violence.

As injury to mental integrity, sexual violence as well as sexual harassment often causes *shock*, resulting in sleeplessness, anxiety, hysterics, depression or other psychological or psychosomatic sickness for which compensation can be awarded. As indicated in *Ntsabo v Real Security CC* (2004), the psychological consequences of sexual harassment or violence are often more serious than the physical injuries.

Inconvenience may be caused by sexual harassment and sexual violence. Firstly, when a female victim falls pregnant as a result of sexual harassment or violence, she endures pain and suffering as well as tremendous inconvenience as a result of the pregnancy. Likewise, there is the possibility of physical and emotional pain as well as inconvenience caused by abortion should the victim choose to end such pregnancy. In particular, if a victim of sexual violence were to fall pregnant and carry the baby full term, inconvenience will be caused by the pregnancy as well as having to raise a child as a young mother, which will impact severely on her education. Secondly, in the event of sexual

violence, the victim has to endure intimate physical examinations and other inconveniences arising from criminal procedures against the perpetrator, which in some cases prove to be traumatising to victims. Thirdly, any form of sexual harassment/violence that involves the risk of infection with HIV or other STDs results in further inconvenience due to the treatments such a risk necessitates. In the fourth instance, inconveniences result from any medical or psychological treatment that is necessary because of sexual harassment or violence. Finally, the impact sexual harassment or violence has in terms of avoidance tactics cause further inconvenience. This is possible especially where ongoing sexual harassment causes a hostile environment for the victim. In short, victims may try to avoid the harasser or the hostile environment, or a particular person who has perpetrated sexual violence against her. In instances such as these, the only option may be to change subjects, classes or even school.

Loss of amenities of life, which refers to any disability which diminishes the victim's enjoyment of life (Neethling *et al.* 2006:225), may occur in some instances of sexual harassment or violence. Where female learners experience a hostile environment as a result of sexual harassment, for example, it may affect their education to such an extent that they experience school performance difficulties which cause the learner to leave school with fewer career choices and decreased economic opportunities (Fineran *et al.* 2001:215; Khoza 2002:75). In these instances, loss of amenities therefore occurs where sexual harassment and violence deprives learners from equal education opportunities, as these learners will never have the freedom of choice concerning type of education and careers, which could have a possible detrimental effect on their future income levels. Thus, these victims develop a disability which prevents them from participating in and enjoying general and specific activities and from enjoying life as they previously could (Neethling *et al.* 2006:225)

Loss of general health may be suffered when HIV or other STDs are contracted during sexual violence or harassment. Likewise, this may occur as a result of some injuries resulting from sexual violence or even complications due to pregnancy, abortion or childbirth in the case of a girl who falls pregnant due to sexual harassment or violence. If HIV is contracted, non-patrimonial loss in the form of *shortened life expectancy* is also suffered.

Patrimonial loss in the form of *medical expenses* may be suffered where sexual harassment or violence necessitates medical or psychological treatment. Longer term losses in this regard may occur in cases where HIV or other STDs are contracted, where teenage pregnancy occurs and where sexual violence causes severe injury with long-term health consequences.

Another form of patrimonial loss is the *financial loss* that victims of sexual harassment or violence may suffer due to the impact that sexual harassment or violence has on learners’ academic achievement and, consequently, on their career opportunities. Fineran and Bennet (1998:55) indicate that victims of school-based sexual harassment or violence frequently report school performance difficulties which include absenteeism, decreased quality of school work, skipping or dropping classes, lower marks, tardiness and truancy. These factors may cause the learner to leave school with fewer career choices and decreased economic opportunities that can affect the learner for the rest of his or her life. However, such losses may be difficult to assess.

In her analysis of judicial perceptions of harm in child sexual abuse matters, Van der Merwe (2007) indicates that the courts unfortunately do not always appreciate the extent of harm suffered by children when subjected to sexual violence. She indicates that judicial officers often hold uninformed perceptions regarding such harm, despite the fact that recent research attests to the contrary (Van der Merwe 2007:13, 17): All the more reason why evidence of the impact sexual violence has had on victims should be clearly presented. Although Van der Merwe investigated criminal and not delictual cases in her article, the need for evidence to convince judiciary of damage suffered should be duly noted.

4.2 An act

Having established damage or harm, the question of whether there was an act performed by the defendant (school/educator/SGB) needs to be answered. An act refers to wilful human conduct and may refer either to a positive action (*commissio*) or to an omission (*omissio*) (Neethling *et al.* 2006:23-24). The act in the case of damage caused to a learner through sexual harassment or violence at school will be the school or educator’s failure (*omissio*) to protect learners from the foreseeable harm caused by sexual harassment or violence at school. An

example of such an omission would be where an educator had been aware of sexual harassment or violence that took place, either because of being notified by someone or by witnessing the events, and had been deliberately indifferent in responding to the notice or the conduct witnessed. In the matter of the girl who was raped by the janitor, it can be argued that the damage resulted from the educator’s failure (omission) in terms of careful supervision of the child.

Liability for an omission (failure to protect) is generally more limited than liability for a positive action (the sexual harassment or violence itself), and it is not that easily found that a person was under a legal duty to act positively in order to prevent harm to another (Neethling *et al.* 2006:28-29). Where the educator and school neglect taking preventative measures to prevent the damage that sexual harassment and violence in the school may cause the learners, a definite omission is present. However, the question should be answered whether such omission was indeed wrongful (in other words, whether a legal duty to act existed).

4.3 Wrongfulness

An educator, school or employer can only be held liable if an omission referred to above was unlawful, in other words legally reprehensible, forbidden or unreasonable (Neethling *et al.* 2006:31). The *boni mores* test may be used to test for unlawfulness and is an objective reasonability test which asks the question whether the doer violated the plaintiff’s damaged interest in a reasonable or unreasonable manner in the light of all the circumstances of the case in accordance with the sense of justice of the community (Neethling *et al.* 2001:40-41). Conversely, this test is not generally used to determine unlawfulness, since more specific measures have been developed. It is, however, used in cases where it is difficult to distinguish between lawful and unlawful (*Minister van Polisie v Ewels* 1975).

More specific measures used to decide unlawfulness are to determine whether the action involved the infringement of subjective rights (*Universiteit van Pretoria v Tommie Meyer Films (Edms.) Bpk.* 1977) or the breach of a legal duty (*Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004). In the event of damage which was caused through an omission, unlawfulness of the act is generally judged by asking whether there was a legal duty on the doer to prevent such damage. Each individual case should be judged because

of the fact that the *boni mores* does not expect every person to prevent any damage to others at all times. Therefore, legal duty must be established to determine unlawfulness in the form of a breach of duty (Botha *et al.* 2009:189; Neethling *et al.* 2006:51-52). The matter of *Minister van Polisie v Ewels* (1975) quoted above as well as the earlier discussion of the duty of the educator clearly shows the possibility for the educator or school to be found as having had a legal duty to act in order to prevent harm to the learner. In the case of the educator, school, SGB and school principal, the duty arises from the rights of the child, education-specific legislation as well as common law.

The onus of prove lies with the injured individual, who needs to show that the duty was breached by the failure of the school or educator to exercise an appropriate standard of care (McCarthy, Cambron-McCabe & Thomas 1998: 443). Since a legal duty is, in fact, the other side to the coin of subjective rights, the same standard of reasonableness is applied when evaluating the objective reasonability of one person's actions in the light of the damage another suffered, with reference to the *boni mores* (Neethling *et al.* 2006:41-44). Factors that may probably be taken into account when evaluating the legal duty of educators to protect learners from damage caused by sexual harassment and violence include legal directives (either statutory or common law), a special relationship between the educator and the learner, the position of the educator and the creation of an impression that the learner will be protected (Neethling *et al.* 2006:62-64).

4.5 Causation

Liability can only be assessed when the act is causally linked to the damage or loss suffered. Damage must have resulted from a "damage-causing event" (Neethling *et al.* 2006:159), meaning that the educator or school's unlawful failure to prevent harm should have been the "proximate or legal cause" of the loss (McCarthy *et al.* 1998:445). The *conditio sine qua non* theory is generally used to determine causation. This entails that the act is the cause of the damage whenever the damage disappears on thinking away the act. In other words, the question is asked: would the damage have taken place if the act was not there? Thus, the act must be a *conditio sine qua non* for the damage (Neethling *et al.* 2006:161-163). Courts apply this theory in the case of an *omissio* by trying to

think what would have happened when one puts a positive action into the place of the omission (*S v Van As* 1967; Neethling *et al.* 2006:161-163). Thus, the question is asked whether the damage would still take place if the school or educator has acted differently. One can argue, for example, that when the school or educator has become aware of sexual harassment and has not dealt with such harassment, the damage suffered by the learner from that point forward could have been prevented had the school or educator acted against the perpetrator/s. When a learner is raped while in the care of an educator, as in the case of the seven-year-old girl being raped by the janitor while in aftercare (Samodien 2012), the failure of the educator to supervise the child can be said to have caused the damage she suffered due to the rape.

According to Jones and Lupton (1999:378), the harm a learner has suffered in the case of abuse was a result of abusive treatment that could have been prevented had the teacher acted appropriately in preventing or stopping such abuse. Similarly, damage suffered by a learner as a result of sexual harassment or violence can and should be prevented by a school's preventative measures or should at least be stopped by acting against perpetrators immediately when the deeds come to the fore. Therefore, where an educator or school became aware of sexual harassment or violence and did nothing to stop it, it can be argued that the educator's omission caused the further damage the child has suffered.

It may even be argued that where a school did not have a policy and certain preventative measures in place, damage suffered by learners as a result of sexual harassment or violence in school is caused by the omission of such school. When using the American perspective (*Davis v Monroe Country Board of Education* 1999) as guideline, it seems that schools may be held liable for damage suffered due to school-based sexual harassment in cases of deliberate indifference, in other words when schools or school boards were aware of sexual harassment but did nothing to stop it.

- **Fault (culpa)**

Finally, for the defendant to be held liable, the act must have been committed with fault, which may occur either in the form of intent or in the form of negligence, where a person's conduct does not adhere to the standard of care expected from him or her (Botha *et al.* 2009:192-193). An act is committed with fault when the behaviour

or disposition of a person who acted unlawfully is blameworthy (culpable) (Neethling *et al.* 2006: 109). In the case of the school or educator’s failure to protect learners from foreseeable harm caused by sexual harassment or violence at school, fault may be established in the form of negligence.

The test of the reasonable person should be applied to determine what is expected of the person who is accused of negligence. A person is negligent if the reasonable person would have acted differently in the position of the doer than the doer actually did (Neethling *et al.* 2006:116-117). The reasonable person would have acted differently only if the damage as a result of the doer’s actions was reasonably foreseeable and reasonably preventable. In a case where the harm was both reasonably foreseeable and reasonably preventable, yet the defendant did not act to prevent the harm, such person is guilty of negligence. Therefore, two questions in the test of the reasonable person need to be answered in the affirmative (Botha *et al.* 2009:192-193; Neethling *et al.* 2006:117-118):

The first question asks whether the harm as possible result of the accused’s conduct was *reasonably foreseeable*. Where the school and educator fail to act preventatively and especially reactively where they became aware of sexual harassment, the harm that may come to the victim of sexual harassment or violence could be viewed as reasonably foreseeable. In *Grobler v Naspers Bpk and another* (2004), it was indicated that sexual harassment in the workplace has become so common that an employer can, in a general sense, foresee the possibility of harassing conduct taking place in its workplace. Similarly it can be argued that knowledge and awareness of sexual harassment and violence in South African schools have increased to such an extent over the past two decades that schools can reasonably anticipate the possibility of such conduct taking place within the school or at school activities, perpetrated by learners, educators, other staff or even by total strangers who have gained access to the school or school activity.

The second question seeks to know whether the harm which occurred as result of the conduct was *reasonably preventable*. The answer to this question would rely on the specifics of each case, but where it was possible for the school to take preventative steps and to act against perpetrators of sexual harassment, the harm a victim suffered as result of the omission to do so would be reasonably preventable. When a school

becomes aware of sexual harassment that took place or is taking place, the school should deal with such harassment in order to prevent harm resulting from continued sexual harassment. Harm resulting from sexual harassment that the school is not notified of or which is not witnessed by educators would be either impossible or very difficult to prevent. However, schools should act preventatively by having policies and safety measures in place which are aimed at sensitising learners and educators to the issue, thereby creating a safe learning environment and encouraging complaints.

In *The Minister of Education v Wynkward* (2004), the judge noted that

...the true inquiry is not into foreseeability but as to what constitutes reasonable steps for the appellants to take in the circumstances, and whether these, if taken, would probably have averted the harm.

Thus, it is possible for a school to avoid liability if the school can show that, having foreseen the possibility of harm resulting from sexual harassment or violence in school or during school activities, reasonable steps have been taken to prevent such harm to the learner. In the application to education of *Ntsabo v Real Security CC* (2004), which showed that employers can avoid vicarious liability for sexual harassment conducted by their employees by taking all reasonable measures to ensure that employees do not make themselves guilty of sexual harassment, it may be concluded that schools can avoid liability if they are able to prove that they did all that was reasonably practicable to ensure that learners are not subjected to sexual harassment and violence in school or during school activities.

In an alternative approach to establishing negligence where a duty of care or legal duty was breached, it is unnecessary to apply the test of the reasonable person to determine negligence. Two questions simply need to be answered in the affirmative: 1) Did the doer have a duty of care towards the plaintiff, and 2) was there a breach of this duty (Neethling *et al.*, 2006:137)? These two questions could be answered in the affirmative where an educator, who has a duty of care towards learners, refrains from protecting the learners from the damage caused by sexual harassment and violence or where a school has failed to implement safety measures as in *The Regulations* which could have prevented sexual violence against a learner. Such a breach of duty may constitute negligence.

The foregoing discussion shows clearly that educators, schools and heads of department have

the duty to protect learners from sexual harassment and violence at school. Depending on the details of each case, educators, schools, heads of departments may possibly be held liable for failure to exercise this duty. In terms of section 60(1) of the Schools Act (RSA 1996c), the state and, by implication, provincial departments of education are liable for

damage caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of this section.

The application of section 60(1) includes conduct by educators appointed by school governing bodies (*Louw v LUR vir Onderwys, Vrystaat* 2005) but excludes schools that are not public schools. The outcome of the matter where the father plans to sue the Western Cape Department of Education (Samodien 2012) will provide a clear indication of whether and hopefully some guidelines as to under which circumstances learners can in future seek civil remedies for a school's failure to safeguard them from sexual harassment and violence in school or during school activities.

5 CONCLUSION

This article has analysed law and policy to indicate the duty of educators, schools, school

principals, school governing bodies and departments of education to take measures to protect learners from sexual harassment and violence. The possibility of civil remedies for harm suffered due to sexual harassment and violence in schools is shown from an application of the 'requirements for delictual liability' as used by Botha *et al.* (2009) as well as relevant court cases that may provide an indication of how courts may deal with such cases. To avoid being held liable and paying compensation to victims of sexual harassment or violence, educators, schools and departments of education should take note of their duty to protect learners in this regard. *The Regulations* (RSA 2001) as well as *The Guidelines* (DoE 2008), although imperfect due to "ambiguities and provisions that are in conflict with other policy and public document" (Coetzee 2012:36) provide important measures and guidelines for schools to prevent sexual harassment and violence in schools and to ensure the safety of learners. Schools should take note of these and school principals, with the help of governing bodies, management teams and educators, should adhere to their duties as set out in this article by implementing public guidelines but also by taking note of how courts deal with comparable situations and following the guidelines set by the courts.

Acknowledgements

Parts of this article was conceptualised in a PhD study at the Faculty of Education Sciences, North-West University (cf De Wet 2010).

Endnotes

1 Heading of a newspaper report in City Press, 13 August, 2012. Available at <http://www.citypress.co.za/SouthAfrica/News/Father-to-sue-education-dept-over-rape-20120813>.

2 See De Wet and Oosthuizen, 2010 for discussion of criteria for sexual harassment in the school environment.

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