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## Exploring the Practice of In Loco Parentis in Public Schools

### Abstract

The purpose of this conceptual paper is to highlight challenges educators face in the practice of in loco parentis in South African public schools. Responsibilities of school educators in children's education are increased, while those of social institutions like the home, church and community are reduced. This responsibility known as the 'in loco parentis' principle, tasks educators to act in the place of a parent by carrying out legal responsibilities and functions in line with the Fundamental Rights of children in the Constitution of the Republic of South Africa (CRSA) of 1996. Educators ought to show care and supervision to learners in the same way a reasonable and prudent parent would; taking responsibility for the emotional, psychological and physical well-being of the learners to ensure there is no foreseeable risk of injury to the child. This parent-teacher relationship is unique and requires educators to exercise care that ensures protection of learners from harm and injury so that they are not rendered negligent while performing their tasks. Despite these laws put in place to protect both learners and educators, physical and psychological violence is a threat. This paper thus focuses on how educators' practice of in loco parentis ensures protection, security, safety and wellbeing of learners in South African public schools. Findings, reveal that the whole system of parent-teacher co-operation should be reorganized to balance the tasks of the school community. The study is significant for the realistic consideration of educators' in loco parentis practice amidst their teaching and administrative tasks.

Keywords: in loco parentis, teacher responsibilities, duty of care, negligence, legal obligations, safety and security, violence

### Introduction

Since 1994, when South Africa became a constitutional democracy, emphasis was on creating a peaceful society that promoted respect, dignity, tolerance and non-violent solutions to problems (Power, n.d.). Educators' responsibilities increased while traditional responsibilities of parents or guardians, and, social institutions were reduced (Oosthuizen, 1992). Educators perform academic tasks with learners and are also responsible for the emotional, psychological and physical well-being of the learners, a responsibility known as 'in loco parentis'. Educators act in the place of a parent and execute legal responsibilities in line with the Fundamental Rights chapter in the South African Constitution (De Waal, Theron & Robinson, 2001, p. 151; Oosthuizen, 1998, p. 99), the Child Care Act (Act 74 of 1983); Domestic Violence Act (Act 16 of 1998), and the South African Schools Act (Act 16 of 1993). The teacher-learner relationship compel educators to ensure risk to injury is not reasonably foreseeable (Newnham, 2000, p. 47) for educators to be held negligent. The in loco parentis practice is within the school but includes 'acts associated specifically with travelling to and from school, or arriving at or waiting outside the school grounds' (Power, n.d.).

Educators should be able to anticipate foreseeable dangers and to take reasonable steps to protect learners from danger the same way a reasonable and prudent parent would do in the same circumstances for their children. Negligence refers to injury occurring because of legal standard required not observed (Citizens information, 2015). When this duty starts, where it ends and precisely what constitutes a breach of duty, are not clear-cut. Both the teacher and the learner have rights and responsibilities. A right always connotes discretion or a choice (Soliven, 2016). But when we are speaking of an obligation or a responsibility, one has no choice but to fulfil this action. The significance of the study is that it calls for realistic consideration of educators' practice of in loco parentis towards learners amidst their teaching and administrative tasks and offers suggestions as to how to avoid litigations of negligence.

### **The role of the law in protecting learners**

Like all the people of South Africa, children are entitled to all the rights set out in the Constitution's Bill of Rights. Educators, parents and learners are aware of their rights and this increases the litigation to pursue those rights (Newnham, 2000). Should children be subjected to violence at school, rights are violated. These include: Section 9: the right to equality; Section 10: the right to human dignity; Section 12: the right to freedom and security of the person; Section 28: the right to be protected from maltreatment, neglect, abuse or degradation; and Section 29: the right to basic education. Parents send their children to school to learn under the guidance of educators. The South African Schools Act (SASA) of 1996 also lays a strong foundation for: the development of all people's talents and capabilities, advances to democratic transformation of society, the combat of racism and sexism and all other forms of unfair discrimination and intolerance. Section 10, in SASA, prohibits the use of corporal punishment in schools, and any educator administering corporal punishment to a learner is guilty of assault. Section 28(1)(b) of the Constitution states that every child has the right to appropriate childcare when removed from the family environment.

### **The role of the teacher**

Educators are regulated by the Employment of Educators Act (EEA) (1998), Section 18, which among other things, states that, "unfairly discriminating against a learner on the basis of race, gender, disability, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution, constitutes a misconduct on the part of the teacher". The EEA lists includes acts of serious misconduct: sexual assault on a learner, student or other employee; theft, bribery, fraud or an act of corruption regarding examinations or promotion reports; having a sexual relationship with a learner in place of employment; assault causing grievous bodily harm, or making a learner perform any of these acts (EEA, 1998). Should a learner become injured while under the school's protection, a teacher or school will face legal action in negligence, and will have to prove that a duty of care was not breached, and the injury was not a reasonably foreseeable consequence. It is rare for a teacher to face

criminal charges but happens if a teacher had intention to harm or acted reckless (Newnham, 2000).

The National Education Policy Act (NEPA) (1996) facilitate the democratic transformation of the national system of education serves the needs and interests of all the people of South Africa and upholds their fundamental rights. The South African Council for Educators' (SACEs') Code of Professional Ethics enhances NEPA stipulations in respect of school violence: what educators must do, what educators must refrain from, and the consequence of failure. Educators must: "refrain from improper physical contact with learners; refrain from: any form of sexual harassment (physical or otherwise) of learners; sexual relationship with learners; using inappropriate language or behaviour during interaction with learners". The Protection from Harassment Act 17 (2011) and the Sexual Offences and other related matters Act 6 (2012) do not specifically mention educators, but criminalises a wide range of violence. SACE has prescribed disciplinary procedures for alleged complaints on breach of the code.

Guilt of a breach results in a reprimand, or payment of a fine. Educator's name can be removed from the SACE register, for a specific period, indefinitely or permanently or an educator can face dismissal. Sometimes educators appeal dismissal at the Education Labour Relations Council (ELRC) based on facts. The high courts of South Africa and the Supreme Court of South Africa (as recently as April 2016) held that, if a child is under the care and control of the school, the educators of that school owe the child in their care a legal duty to prevent physical harm, when the children are at school (Louw, 2009). Parents share some of the responsibility with educators and school leaders and the status is legal and not just descriptive. Parents, in effect, delegate the powers of restraint and correction necessary for the education of their children, to schools. This *in loco parentis*, has been defined and reviewed by the courts, as both learners and educators came to harm in the school.

## **Negligence**

The most important aspect of *in loco parentis* is ensuring there is no negligence in the execution of duties with learners. The negligence law ensures learners are protected at all times and that schools are aware of what is acceptable and unacceptable practice when caring for learners. According to Cotton (1995) educators in the United States have some basic knowledge of negligence, however, most are unaware of how the law operates regarding the liability of educators. The situation is similar in Australia and South Africa (Newnham, 2000, p. 46). Negligence is established when a duty of care existed, was breached through an act or omission, and the student suffered injury that was reasonably foreseeable (Newnham, 2000). For example an appellate court in New York (*Garcia vs City of New York*, 1996), held that schools, once they take over physical custody and control of children, effectively take the place of their parents and guardians. Negligence is the most likely reason a teacher will face legal action, however, *in loco parentis* is a weighty responsibility imposed on educators who must answer for any injury to the child while inside the school (Soliven, 2016).

## **School violence**

South African law places a legal duty on schools to ensure that learners are not harmed but participate in a safe environment, however, violence's harmful impact is experienced in schools (SAHRC, 2006). There is no one cause of violence in schools; but rather, several intersecting factors that lead to school violence (Ncontsa & Shumba, 2013). It is important to remember that present-day school violence in South Africa relates to the country's legacy of political struggle and the existing economic disadvantage and social inequality that manifest itself in many different ways, and to differing degrees, depending on the context in which it arises (Power, n.d.). Despite the fact that schools reflect the norms and values of society, they can also be at fault for enabling school violence and failing to prevent it (Power, n.d.).

Measures are put in place by the Department of Education (DoE) and schools themselves (Fishbaugh, Berkeley & Schroth, 2003; Human Rights Commission, 2006) to address the problem. Both educators and students are justified in fearing for their own safety in schools (Fishbaugh, Berkeley & Schroth, 2003, p. 19). Educators are compelled to protect learners, however, the learning process is sometimes also hindered by unruly behaviours of learners, aggression and violence. The Human Rights Commission (2006, p. 1) indicated that the environment and climate necessary for effective teaching and learning is increasingly undermined by a culture of school-based violence and this is viewed as a matter of national concern. *Rusere vs The Jesuit Fathers*, is an example of a case about a learner who lost vision in one eye after playing a game using grass shoots as arrows, where it was acknowledged that the school failed to protect a learner. This was in breach of Section 28(1)(b) of the Constitution which states that every child has the right to appropriate childcare when removed from the family environment.

In *Hawekwa Youth Camp vs Byrne*, a case about a learner who fell from a bunk bed and fractured his skull at a school camp, the Minister of Basic Education acknowledged that educators owed learners a duty of care to ensure learner safety. The high courts of South Africa and the Supreme Court of South Africa have repeatedly held (in April 2016) that children under the care and control of the school, are owed a legal duty of preventing harm (Vally, Dolombisa & Porteus, 2002). In a general comment made by the Committee on the Rights of the Child, it was stated that children do not lose their human rights by virtue of passing through the school gates, implying that they are protected while also on their way home. Article 16 of African Charter on the Rights and Welfare of the Child (ACRWC) provides similar protection.

## Reasons for violence

The South Africa Council for Educators (SACE, 2000) states that "school-based violence does not take place in a vacuum, but is rather influenced and shaped by contextual factors". Studies indicate that school violence often occurs more in lower-income communities in South Africa (Burton & Leoschut, 2012). Socio-economic factors such as poverty and unemployment can make people feel disempowered and frustrated by their circumstances, leading them to use violence, rape and other forceful acts as a means of asserting power and being in control. Increased exposure to violence at home or in communities can also influence the prevalence of violence at schools. Burton (2008) from the Centre for Justice and Crime Prevention, explains that violence does not only occur within the physical

border of the school but includes “acts that are, on a daily basis, associated with school, specifically travelling to and from school, or arriving at or waiting outside the school grounds”. Violent acts are understood, as the deliberate “use of physical force, or power, threatened or actual” that “results in or has a high likelihood of resulting in injury, death, psychological harm, lack of development or deprivation” (SACE, 2000).

Patrick Burton and Lezanne Leoschut, from the Centre for Justice and Crime Prevention, explain that in *Hawekwa Youth Camp vs Byrne*, where a learner on a school camp fell from a bunk bed and fractured his skull, it was submitted that the Minister of Basic Education acknowledged that educators owed learners a duty of care, to take reasonable steps to ensure learners are safe from risks and dangers. In the 2002 draft Regulations to Prohibit Initiation Practices in Schools, the Minister stated that educators have a duty to care for and protect learners from violence because of their *in loco parentis* status.

### **Implications for educators**

Violence in South African schools is not a new phenomenon and exists within the physical walls of the school environment (Burton & Leoschut, 2012). School violence is often influenced by violent incidents covered in the media and now are studied under school safety literature in the past ten years as a national concern. Education authorities, individual schools and educators who do not understand *in loco parentis* and its impact often find themselves being litigated against (Moswela, 2008). Ignorance of the law related to one’s occupation cannot reduce violence in schools, and results in educators accepting liability and agreeing to pay compensation an implication of acceptance of negligence and agreement to further employment repercussions in cases not even heard in court. Such educators experience negative feelings and may resign without being expelled, because they feel embarrassed and blame themselves for the event. Other staff members develop attitudes towards the person who reported the violence, increasing the likelihood for future violence perpetration (Burton & Leoschut, 2012).

### **Conclusion**

*In loco parentis* fundamentally transforms the way educators should understand and practice their rights and responsibilities. It has raised awareness of educators’ educational tasks that are compounded by the *in loco parentis* principle. The educators’ duty of care is in most cases constitutionally compliant and progressive in giving recognition to learner and teacher rights, the government and educational institutions need to emphasise this as a joint responsibility between parents and educators. Both educators and parents should cooperate in ensuring that injuries to learners are minimised. The law and its impact on education should not only be part of university programs but should form part of ongoing professional development of educators. Because educators have legal responsibility for the safety of their students, they should behave as superior parents would in educating learners to behave responsibly.

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