

# The sad truth about the drowning of a minor

It's a cold Cape Town winter's morning in July. You and your three-year-old daughter are attending the weekly prayer group meeting at a friend's house. Your husband is busy at work and you therefore arranged with a friend to go there with her. On arrival you greet everyone and start with the usual religious activities. The children are building puzzles outside on the patio. Your friend indicates that she needs to leave early, but luckily, one of the other members offer you a lift home.

You go out to put the child car seat in the other car. You get back to the house, and quickly pop in to see if the children are still fine. You notice that your child is not playing with the other children anymore. You search the whole house for her but are unable to find her. You run outside to see if she is maybe playing in the garden. Then, you notice that she is floating upside down in the swimming pool.

These were the facts of *Stedall and Another v Aspeling and Another* 2018 (2) SA 75 (SCA), an appeal case in the Supreme Court of Appeal in South Africa.

The case was mainly focused on answering the question whether an omission to close a swimming pool gate can constitute wrongfulness and eventually lead to delictual liability for the owner of the premises.

The facts of this case were as follows:

On 27 July 2004, at the House of the Appellants (the Stedalls), in Constantia, Cape Town, the respondents' (the Aspelings) two-and-a-half-year-old girl, "C", fell into a swimming pool. Although she did not drown, she had already suffered serious brain damage by the time she was found in the pool. In the meantime, the Aspelings sued the Stedalls in the Western Cape Division of the Supreme Court for a claim for damages. They claimed that both they and "C" suffered because of the negligence of the Stedalls to close the pool gate.

In the Western Cape High Court the court initially found that the homeowners (the Stedalls) were liable for their negligence to ensure that the pool gate was closed.

The Stedalls did not agree with the decision and, in turn, appealed to the Supreme Court of Appeal.

## **Decision**

The Supreme Court of Appeal found that the Western Cape High Court failed to determine whether the Stedalls' negligent conduct was also wrongful.

It is important to note that in South African Law every wrongful act or delict consists of different elements and that each of the elements need to be proven before a person can be held accountable for his actions.

The element that was discussed here was wrongfulness. Wrongfulness, as an element, requires an assessment according to the community's perceptions, as to whether the actions of a person are of such a nature that he or she has to be held accountable for those actions.

With that in mind, the court had to answer whether the failure by a home owner, to close a pool gate when guests with children are visiting, is of such a nature that the owner should be held accountable for his actions if one of the children fell into the swimming pool.

The court ruled that in the event that a child visited another person's premises under the supervision of his parents, the duty to ensure that the child does not fall into a pool rests on the parents under whose supervision the child is. To hold the owner responsible, will mean that the owner is expected to exercise greater supervision than the parents themselves, which is not the position in our law.

The appellants were thus successful and the Aspelings' claim was rejected.

It is important for parents to always ensure that their children are safe and not close to swimming pools, no matter where they are.

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