THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1326/2016

In the matter between:

GEOFFREY STEDALL	**FIRST APPELLANT**
LINDA STEDALL	**SECOND APPELLANT**

and

CLINT PATRICK ASPELING	**FIRST RESPONDENT**
MANUELA WALTRAUT URSULA ASPELING NO	**SECOND RESPONDENT**

Neutral citation: *Stedall v Aspeling* (1326/2016) [2017] ZASCA 172 (1December 2017)

Coram: Cachalia, Leach, Petse and Mocumie JJA and Ploos van Amstel AJA

Heard: 15 November 2017

Delivered: 1 December 2017

Summary: Delict: claim based on negligent omission: young child falling into swimming pool: necessity to show landowner's omission to secure gate in pool fence wrongful: child under parental supervision: wrongfulness and negligence of landowner not established.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Donen AJ sitting as court of first instance):

1 The appeal is upheld, with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:
'The plaintiffs' claim is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Leach JA (Cachalia, Petse and Mocumie JJA and Ploos van Amstel AJA concurring)

[1] This appeal has its origin in a tragic accident that occurred on 27 July 2004 at the appellants' home in Constantia, Cape Town when the respondents' 30 month old daughter, C, fell into a swimming pool. Although she did not drown, by the time she was discovered floating face down in the pool she had suffered severe brain damage. In due course, the respondents sued the appellants in the Western Cape Division of the High Court, claiming damages they alleged both they and C had suffered due to negligence on the appellants' part.

[2] The minutes of a pre-trial conference held in April 2015 record that the parties agreed 'to separate the merits and quantum'. Presumably their reference to 'the merits' meant that the court would be called upon to determine issues relevant to liability. Despite this Court having regularly warned of the necessity to clearly identify what issues are to be separately decided under Uniform Rule 33(4), and to obtain a formal separation order, there is nothing in the record to indicate that this was done. Nor was any mention made in opening of the separation of issues. None of this is acceptable for the reasons set out, inter alia, in *Adlem v Arlow* 2013 (3) SA 1 (SCA) para 5 and the authorities there cited.

[3] In any event, the court a quo recorded in its judgment that 'only the merits are in issue at this stage', before proceeding to hold that the accident had been due to the joint negligence of the appellants and the second respondent. It apportioned blame on the basis that the appellants were twice as culpable as the second respondent, so that any of the damages capable of being apportioned fell to be reduced by a third. The order it made attempting to reflect this is not unattended by procedural difficulties, but those need not be discussed for purposes of this judgment. With leave of the court a quo, the appellants appeal to this Court against this order. The essence of their appeal is that they ought not to have been held liable for any of the claims made against them.

[4] I turn to the facts. It is common cause on the pleadings that the appellants are either 'individually or jointly' the owners or the persons in control of their home in Constantia where the accident occurred. It consists of a large double-storied house set in a two acre property to the south of a public road. The house faces north. Access is gained by way of a driveway that extends from a gate in the northwest corner of the property in a southerly direction down the western border before swinging around to form a parking area to the south of the house. To the southwest of the house is a large swimming pool, fully enclosed by a

fence. Within this enclosure is a tool-shed, presumably used for the storing of garden tools. There are two gates, one to the north and the other to the eastern side of the pool enclosure, which allow access to the pool. In a wing on the western side of the house is a lounge that opens through a glass sliding door onto a patio to the north of the house. Persons seated in the lounge can see through this door onto the patio.

[5] The second appellant and the second respondent were members of a prayer group which met weekly at the appellants' home on Tuesday mornings. The second respondent was often accompanied by C who, during the course of the meeting, would generally play with her toys and puzzles seated on the floor of the lounge while the adults prayed, sang and discussed matters of religion. Sometimes C, bored with her play-things, would toddle out onto the patio and play, but within sight of the adults in the lounge.

[6] According to the second respondent, on several occasions during earlier visits she had not only observed that the swimming pool gate had been left open but that she had remonstrated with the second appellant and asked her to ensure that it was kept closed. On one previous occasion, the first respondent had accompanied the second respondent, and he and C had gone into the pool enclosure where there was a slide next to the pool. He testified that C had enjoyed playing on the slides in a public park, and so he allowed her to go down the appellants' slide although he warned her she must not go anywhere near it without adult supervision. He also testified that on that occasion the gate leading to the pool was open.

[7] On the fateful day of the accident, the second respondent and C were given a lift to the appellants' home by another member of the prayer group. On that day as well, C spent most of the prayer group meeting playing with her toys

on the floor of the lounge but, at a late stage she went outside onto the patio. Whilst in the second respondent's sight, C was in no danger. Unfortunately, however, the woman who had brought them to the house wished to leave early, and another member of the prayer group offered to give the second respondent and C a lift home. The second respondent took her up on her offer and, leaving C to her own devices, went to the parking lot behind the house in order to transfer a baby-seat from the car in which they had arrived to the motor vehicle that was to take them home.

[8] The exercise did not go as smoothly as had been anticipated as the seat did not fit easily into the second vehicle. After a while, the second respondent, whom the evidence establishes was a devoted and careful mother, became nervous and went back to see what C was up to. She went through the lounge onto the patio calling for C by name. When she received no answer and she could not see the child, she panicked and shouted to the other members of the prayer group, who were then in the kitchen with the second appellant who was making pancakes. They scattered to help look for the child.

[9] The second appellant immediately dropped the pan she was using and ran out onto the patio and, then, around the house to the swimming pool. The second respondent followed her. At the pool they found C lying face down in the water. Whether she had gone there to play on the slide one does not know, and it is idle to speculate on what had motivated her to going off on her own, something she had not done before. In any event, the second respondent leaped into the pool and lifted C out of the water. She was rushed to a nearby hospital for treatment but, as I have mentioned, had by then suffered severe and permanent brain damage.

[10] The above description of these tragic events was that of the second respondent. Sadly, before the trial, the second appellant fell down the stairs at her home and suffered a major head injury. As a result, she was confined to a wheelchair and unable to testify. Whether she would have been able to elucidate any of the issues, one does not know. The court a quo, however, found that C would not have been able to unlatch the gate on her own and that the gate must either have been open or at least unlatched for her to have gained access to the pool. I did not understand the appellants to challenge this conclusion. What they did challenge was the trial court's further conclusion that, in all these circumstances, they should be held liable for damages in delict.

[11] As is apparent from its judgment, the court a quo regarded negligence as the essential issue that fell to be decided. Consequently it confined itself to the inquiry whether the appellants' failure to secure the swimming pool gates so they could not be opened by a young child, and the second respondent's failure to keep C under constant observation, constituted negligence as determined by the well-known test in that regard – namely, whether a reasonable person would in the circumstances have foreseen that C might be injured by falling into the pool, and taken reasonable steps to avert such harm. However, in doing so, it appears to have overlooked the requirement often stressed by both this Court and the Constitutional Court, particularly in recent years, that wrongfulness is also an essential and discrete element which has to be established for delictual liability to ensue – see eg *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 12; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12; *ZA v Smith & another* 2015 (4) SA 574 (SCA) para 15; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras 20-21 and *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) paras 12 and 17 – this list is not meant to be exclusive.

[12] In so far as the element of wrongfulness is concerned, Khampepe J said in *Country Cloud*[1] that it functions 'as a brake on liability' and that conduct is not to be regarded as wrongful if public or legal policy considerations determine it would be 'undesirable and overly burdensome to impose liability'. In similar vein, in *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122 the Constitutional Court said:

'(I)n the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant *by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.*' [Footnotes omitted; emphasis provided].

[13] As our courts have regularly stressed, the fact that an act is negligent does not make it wrongful. Thus in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 320B-C, Hefer JA said 'I think it may be stated with equal certainty that society's legal convictions do not demand every [negligent][2] omission to be branded as wrongful and in effect that retribution be exacted from the wrongdoer by holding him personally liable for loss suffered'. The words emphasized in the passage in *Country Cloud* just quoted thus stress the need to ensure that wrongfulness and negligence are recognised as separate and discrete elements as, if they are not and negligence is elevated to the determining factor, they would be conflated. Should that occur, the safeguard of regarding

[1] Para 20-21.
[2] My insertion.

wrongfulness as a separate requirement would be lost. In explaining the danger of confusing the two elements, Brand JA stated the following in *Za v Smith*:[3]

'It should be readily apparent that if the test for wrongfulness is whether it would be reasonable to have expected the defendant to take positive measures, while the test for negligence is whether the reasonable person would have taken such positive measures, confusion between the two elements is almost inevitable. It would obviously be reasonable to expect of the defendant to do what the reasonable person would have done. The result is that conduct which is found to be negligent would inevitably also be wrongful and vice versa . . . But where the confusion will indeed make a difference is where negligence — properly understood or under the guise of wrongfulness — is found to have been established. In that event it will lead to the imposition of liability without the requirement of wrongfulness — properly understood — being considered at all. The safety valve imposed by the requirement of wrongfulness — as described by the Constitutional Court in *Country Cloud Trading CC* — will simply be discarded. If that were to have happened, for instance in [*Telematrix* and *Kadir*[4]] the defendants in those cases would have been held liable, despite the ultimate conclusion arrived at by this court in those cases that, for reasons of public and legal policy, it would not be reasonable to impose delictual liability on them.'

[14] In order to avoid such confusion and the conflation of the two elements, this Court has now determined that foreseeability of harm, a critical requirement of negligence, should find no place in the inquiry into wrongfulness – see *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA) para 27, as read with *MTO Forestry* para 18 where this Court said:

'It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability.'

[15] Moving to a different issue, in contrast to a positive act which causes physical harm to a person or property, a negligent omission, as relied on by the

[3] Para 19.
[4] Full citations quoted in the judgment are omitted for present purposes.

respondents, is not necessarily regarded as prima facie wrongful. Consequently in *Van Duivenboden*, Nugent JA stressed that a negligent omission should only be regarded as being wrongful 'if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm'.[5]

[16] The use of the phrase 'legal duty' in these circumstances means no more than that the omission must not be wrongful as judicially determined in the manner referred to above ie involving criteria of public and legal policy consistent with constitutional norms – see *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA) para 22. Importantly, the concept is not be confused with the English law concept of 'a duty of care' which encompasses both wrongfulness and negligence. Indeed, F D J Brand, the author of the judgment in *Hawekwa*, has stated extra-curially[6] that reference to a 'legal duty' has been no more than an attempt to formulate a practical yardstick as to when policy considerations will require legal liability to be imposed – a sentiment approved by this court in *MTO Forestry*.[7] This is particularly important to bear in mind in the present case where, as appears below, the parties have referred to various older South African authorities as well as decisions in foreign jurisdictions.

[17] There is another matter relevant to the dispute before this Court. As an omission is not prima facie unlawful the respondents, on particularising their claim, should not only have alleged that the negligent omissions upon which they relied had been wrongful, but pleaded the facts upon which reliance was placed in support of that contention. Indeed in *Kadir* this Court stated that the facts pleaded 'in support of the alleged legal duty represent the high-water mark of the factual basis on which the Court will be required to decide the question'.[8] Conspicuous by its absence in the particulars of claim, however, was even a

[5] Para 12.
[6] F D J Brand 'Aspects of wrongfulness: A series of lectures' (2014) 25 *Stellenbosch LR* 451 at 455.
[7] Para 14.
[8] At 318I-J.

bare allegation of wrongfulness on the part of the appellants. All that was alleged was the alleged negligent failure to take reasonable steps to ensure that the swimming pool gate was closed or properly secured.

[18] Counsel for the respondents attempted to persuade us that it was implicit in the pleading that the alleged negligence of the appellants had been wrongful. But not even on a generous interpretation of what was pleaded, can this be found. This is an issue that should have been raised before the court a quo; but it was not, and both sides proceeded to litigate seemingly oblivious to the fact that a necessary element of liability had not been mentioned in the pleadings.

[19] In his heads of argument before this Court, counsel for the respondents objected to the appellants, in their notice of appeal, having raised the fact that the court a quo had 'overlooked' the fact that as C had been accompanied by her mother they were entitled to rely on the latter to look after her. This, he complained, had never been pleaded by the appellants, and if it had been evidence could have been led 'to show why appellants could not in the circumstances have relied on second respondent's presence at the house to negative their defence'. All of this overlooks that it was in fact the respondents who bore the onus to allege and prove wrongfulness, and that the appellants were not called on to establish a 'defence' to a claim based on wrongfulness that had not been levied against them.

[20] In any event, during the course of cross-examination it was put to the second respondent that the appellants had been entitled to assume that she, devoted as she was to C, would not leave her child unattended. Moreover, it is hard to imagine what further evidence could have been led relevant to how the accident had occurred on the day in question. In these circumstances, the only way in which justice can be done to the parties is to determine the issue of

wrongfulness without reference to the allegations made in the court a quo and in the light of the facts placed on record.

[21] Turning to that issue, when asked why the failure to secure the swimming pool gate should be regarded as wrongful, counsel for the appellant argued that it was reasonably foreseeable that an unattended child might gain access to the swimming pool and be injured. But as I have already attempted to point out, that puts the cart before the horse as foreseeability should not be taken into account in considering the question of wrongfulness. Moreover, on the respondents' own case, C was not an unattended child. She was brought onto the premises, to the knowledge of all, in the care of her doting and careful mother. It is on this basis that the issue of wrongfulness must be considered, rather than on the premise that she was an unattended child who had free rein to roam wherever she wanted on the property.

[22] The issue then becomes whether, when a toddler is brought to the private premises of a homeowner in the custody and supervision of her parent, the homeowner should be held liable if the custodian parent, momentarily distracted, allows the child out of her sight – and the child is then injured when falling into a swimming pool of which her mother was aware. The test for this is whether in these circumstances, and in the light of constitutional norms, including in particular the necessity to protect the best interests of a child, the failure to ensure that the swimming pool gate was secured so it could not be opened by a toddler not only 'evokes moral indignation, but also that the legal convictions of the community demand that it be regarded as wrongful and that the loss be compensated by the person who failed to act positively'[9] – or whether it would be over-burdensome to impose liability.

[9] *Kadir* at 320A-C.

[23] In seeking to persuade us that the issue ought to be decided against the appellants, counsel for the respondents hung his argument largely upon the judgment in *Hirschman NO & Hirschman v Kroonstad Municipality* 1914 OPD 37. In that case it was shown that the municipality used to dump coals from its power station on a piece of immovable property. Although those coals were supposed to have been slaked, this was not always effective and live coals that could not be detected during the day often ended up on the ash heap. The claim arose from a child traversing the property having burnt his foot when he stood on a live coal. The court found the live ashes on the ash heap constituted a concealed source of danger to anyone who happened to be there. The evidence also established that the land in question was not fenced off and the general public especially children, often went onto it. This was known to municipal officials. The court concluded that in these circumstances, placing ashes on an open, unfenced and unprotected piece of ground close to a public street, without taking any precautions to avoid accidents, amounted to an act of negligence. The municipality was therefore held liable for damages suffered by the child in consequence of his burns.

[24] I must immediately comment that, as appears from what to set out in *Za v Smith*[10] (a case in which a person had been injured by slipping on ice concealed under snow) the judgment in *Hirschmann* was given at a time where liability for omissions was confined to certain defined categories, one of which was that those in control of dangerous property had a duty to render it reasonably safe for those who could be expected to visit it – and that although things have changed, those categories have not become entirely irrelevant. However, in *Za v Smith*, Brand JA went on to find that wrongfulness had been established as, apart from the fact that the defendants were in control of the property, which held a risk of dangers for visitors, they had made the property available to members of the

[10] At para 20.

public for a fee in order to allow them to use four wheel drive motor vehicles to drive a route designed to lead directly to the dangerous area.

[25] The respondents also relied upon the recent decision of this Court in *Van Vuuren v eThekwini Municipality* (1308/2016) [2017] ZASCA 124 (27 September 2017). In that matter a young child came to be injured when pushed by a child behind him whilst using a municipal beachside pool slide. It was accepted that the slide itself was safely constructed but that it could lead to a dangerous situation if a child was pushed and came down the slide in an awkward position. In these circumstances, this Court was called on to deal with the question of wrongfulness and whether there was a legal duty to supervise and control access to the slide. Bearing in mind that a child's best interest is of paramount importance, as enshrined in s 28(2) of the Constitution, that the parents of children using the slide were not allowed entry to the facility itself and were therefore unable to control the actions of their children, and that children were allowed to use the slide in a chaotic manner, this Court concluded that the municipality owed a legal duty to avoid negligently causing harm to persons in the position of the injured child.

[26] *Hirschman* and *Van Vuuren* both concerned situations in which there was public access to potentially dangerous places by children who might not be in the custody and care of a supervising adult. And in *Hirschman* and *Za*, the injury suffered was due to a concealed danger of which the victim was unaware. The facts of those cases differ substantially from the present. They are a far cry from the scenario of a toddler being taken to a private home as a guest in the care and under supervision of her mother who knew of a potentially unguarded swimming pool on the premises. They are thus wholly distinguishable from the present facts and of limited assistance in the task at hand, and certainly do not set a precedent for the appellants being held liable.

[27] In seeking to persuade us that there was no wrongful omission by the appellants, their counsel relied heavily upon the decision in *BS v MS & another* 2015 (6) SA 356 (GP). In that matter the father of a child who had sustained brain damage after falling into a fishpond on the defendants' property, instituted a claim for damages on behalf of his injured child founded on an alleged omission to render the fishpond safe. The claim was dismissed, with the court concluding that the defendant's warning in regard to the danger of the fishpond, taken together with the reasonable expectation that the child's parents would supervise her, were sufficient to discharge the legal duty resting on them not to expose persons on their property to harm or injury.

[28] Unfortunately, the reasoning of the court in reaching its decision is somewhat confused. It fell into the trap of failing to separate the issue of wrongfulness from that of negligence, and seems not to have appreciated the distinction between a duty of care as envisaged in England and echoed in older cases in this country – such as *Cape Town Municipality v Paine* 1923 AD 207 to which it referred – and the modern concept of a legal duty associated with wrongfulness. Consequently, although the result may have been correct, the reasoning by which it was reached is of little help. Nevertheless it is of assistance to the extent that in circumstances not dissimilar to the present, a court held a defendant not liable.

[29] Significantly, similar claims have also failed in other jurisdictions. For example, the English decision in *Phipps v Rochester Corporation* [1955] 1 All ER 129 (QB) is instructive. The facts differed from the present in that it involved a claim on behalf of a child of tender years who fell into a trench on a building site, and the matter was further complicated by the requirements English law doctrine of licence. However, after dealing with a number of cases in which it had been held that if a child of tender years is not capable of

appreciating danger it ought not to be allowed to be unattended, Devlin J stated:[11]

'But the responsibility for the safety of little children must rest primarily on the parents; it is their duty to see that such children are not allowed to wander about by themselves, or, at the least, to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. *It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land.* Different considerations may well apply to public parks or to recognised playing grounds where parents allow the children to go and accompanied in the reasonable belief that they are safe.' (My emphasis.)

[30] This decision was referred to and relied upon in the England and Wales Court of Appeal in *Bourne Leisure Ltd t/a British Holidays v Marsden* [2009] EWCA Civ 671. In that case a small child fell into a pond at a camping site operated by the appellant after wandering away from his parents who were momentarily distracted in conversation. A statutory provision obliged the appellant to take such care is in all the circumstances was reasonable to see that a visitor would be reasonably safe and, in regard to children, to expect they would be less careful than adults. Despite this, the appellants were held not to be liable.

[31] We were also referred to a number of American decisions in which claims brought as a result of small children falling into swimming pools were dismissed: in particular, *Workman v Dinkins* 442F. Supp. 2d 543; *Horace Ex Rel, Horace v Braggs* 726 So 2d 635 (1998); *Englund v Englund* 615 N.E. 2d 861 (III. App. Ct. 1993); *O'Clair v Dumelle*, 735 F. Supp. 1344 (N.D. III. 1990) and *Wilford v Little* 144 Cal. App. 2d 477 (1956). No point would be served in setting out a detailed analysis of the facts, circumstances and reasoning in each of these decisions. Suffice it to say that common to all is the sentiment that

[11] At 143G–I.

where small children are in the care and under the supervision of their parents whilst visiting the home of another, the duty to keep the child safe lies upon the latter and the homeowner should not be held liable in the event of the child falling into a swimming pool when the parent is distracted.

[32] I am acutely aware of the pitfalls of relying too heavily upon decisions in foreign jurisdictions for the reasons already mentioned. But all of these cases are of persuasive value and seem to me to reflect public and legal policy of this country as well, namely, that it would be unreasonable – in the sense of reasonableness as explained by the Constitutional Court in *Country Cloud* – to impose liability upon the owner of a residence should a small child in the care of her mother wander off when the mother is briefly distracted and accidentally fall into a swimming pool of which the mother is aware. To hold otherwise would be to expect the host to provide greater supervision than the parent itself.

[33] In all the circumstances, I am of the view that the respondents failed to establish the element of wrongfulness on the part of the appellants. That being so, their claim must fail on this basis alone, and the appeal must succeed.

[34] Strictly speaking, this renders it unnecessary to consider the question of the alleged negligence on the part of the appellants. I therefore do not intend to discuss this topic in any detail, but for completeness I feel I should mention that on this leg as well the respondents failed to establish their claim.

[35] In considering the question of reasonableness and foreseeability of harm, a reasonable person in the position of the second appellant would have realised that the child was in the custody of the second respondent, that the latter was a doting parent and had always kept the child under close observation, and that she was aware of the potentially open or unlatched gate at the swimming pool

on the property. The child was the primary responsibility of the second respondent, and it would have been reasonable to assume that she would have continue to keep the child under observation and not to allow her to roam free. There is no absolute duty upon a landowner to ensure that any person upon his property will not be injured in some way. The sources of potential danger to a toddler in a normal domestic household and garden are numerous, and no homeowner can be expected to guard against all the harm that might befall a young child. On the other hand, a homeowner can reasonably expect that a child will be supervised and guarded from harm by its supervising parent, and would not foresee that the parent would be distracted whilst caring for its child. Moreover, it must also be remembered that a reasonable person is neither a timorous faint-heart always in trepidation of harm occurring but, rather, ventures out into the world, takes reasonable chances, takes reasonable precautions to protect his or her property and person and expects others will do the same – see *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490E-F.

[36] In the context of the facts of this case, a reasonable person in the position of the appellants was entitled to expect that C would be looked after by her mother whilst at their home that day. There was nothing to alert either of the appellants to the fact that she had been left unattended on the patio. It seems from the evidence that at the brief time the second respondent became distracted by the matter of the baby-seat, the second appellant was busy making pancakes in the kitchen and was in no position to observe C's movements. The suggestion in the respondents' heads of argument that the second appellant's action in immediately running to the swimming pool justified the probable inference that she had seen C heading that way and that she knew the gate at the pool was not secured, is not sustainable and, wisely, I did not understand counsel for the respondents to persist in this allegation.

[37] In the light of these circumstances, and although it is not necessary to discuss the question of negligence in any greater detail, in my view, the respondents failed to establish that negligence on the part of the appellants led to C being injured. This does not imply that the second respondent was negligent in this tragic affair. As stressed in a number of the authorities already mentioned in similar circumstances, accidents unfortunately do happen. But the fact that an accident happens does not mean that someone must be held liable.

[38] In all the circumstances, the court quo erred in holding the appellants liable in damages arising out of C having fallen into their swimming pool. The appeal must therefore be upheld.

[39] In the result it is ordered:

1 The appeal is upheld, with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:
‘The plaintiffs’ claim is dismissed with costs, including the costs of two counsel.’

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L E Leach

Judge of Appeal

Appearances:

For the Appellant:	C W Jordaan SC (with him M J M Bridgman)
Instructed by:	Cliffe Decker Hofmeyr Inc, Cape Town
	Pieter Skein Attorneys, Bloemfontein
For the Respondent:	R A Brusser SC
Instructed by:	John O'Leary Attorneys, Cape Town
	Webbers Attorneys, Bloemfontein