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WITH COMPLIMENTS

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Property Owner and Body Corporate Liable After Child's Electrocution?

A recent High Court decision saw both a sectional title unit owner and his cupboard contractor held liable for damages suffered by an 11-year-old boy electrocuted by a communal tap. The

complex's body corporate and an electrician were also sued but escaped liability.

The reasons given by the Court for these contrasting outcomes provide valuable lessons for property owners, contractors, and bodies corporate.

Electrocuted when he turned on a tap

- You don't expect to be electrocuted when you turn on a tap, but that is what happened to an unfortunate boy, aged 11, who had offered to wash his mother's car in a residential complex.
- When he touched a communal tap to fill up a bucket of water he was electrocuted and unable to remove his hand for 1 to 2 minutes. Fortunately the tenant of the unit which was the source of the electric current arrived home in time to switch off the electricity so that the boy could be rescued.
- He was rushed to hospital with serious injuries and his mother sued all the role-players for more than R3m in damages on his behalf.
- To simplify as much as possible some very complicated facts, a cupboard contractor had been brought in to do work in the unit by the owner's agent/employee at the request of a tenant. The contractor employed two workers who caused the initial problem by drilling through a wall and damaging the electrical insulation.
- The owner's agent then contracted an electrician to fix the problem, but he only compounded the danger by bungling the repair job and leaving the plumbing live.
- The tenant, shocked (electrically, presumably also figuratively) when she turned on taps in the unit, switched off the electricity and reported the danger to the agent. Unfortunately the two workers, in her absence the next day, switched it on again – thus creating anew the dangerous situation that later that day led to the boy's electrocution.

Let's have a look at some of the legal principles that led the Court to its decision in regard to each of the role-players –

Your agent or employee doesn't tell you of a dangerous situation – are you liable?

There was a dispute over whether the owner's "agent" was legally an agent or an employee, and whether or not he had told the owner of the dangerous situation. But it made no difference, held the Court – the "agent's" knowledge of the dangerous situation in the unit was attributed to the owner because (1) he had acquired that knowledge in the course of his employment, and (2) in the circumstances he had a duty to report it to the owner.

Make sure your agents and employees are trustworthy enough to tell you about any dangerous situations in your property!

Are you liable for your contractor's negligence?

Clearly the workers employed by the contractor had caused the dangerous situation, firstly by damaging the electrical insulation and secondly by turning the electricity back on knowing of the danger. The contractor was accordingly liable, but what about the property owner who had employed him?

Our law is that you are not automatically liable for your contractor's negligence, but you must "exercise that degree of care that the circumstances demand". On the basis that "**It is the principal, who selects his agent and represents him as a trustworthy person, and not the other party to a contract who has no say in the selection, who bears the risk……**" (emphasis supplied), the Court found both the contractor and the unit's owner liable for "the negligent omissions and/or acts on the part of their

agents/employees."

In any event both the "agent's" inaction and the actions of the two workers "jointly contributed to the cause of the electrocution of the minor. Had either acted as they ought to have, the minor would not have been electrocuted."

You are at risk for the conduct of any contractors and employees on your property, so again make sure they are trustworthy!

When is a body corporate liable?

A body corporate is as much at risk of being sued as any individual owner in a case such as this – it was presumably sued in this matter on the basis that the tap in question was a "communal" one and therefore under its control.

Its security officers had become aware of the situation when they queried the presence of the workers in the complex. However the claim against it failed as the evidence was that the child's electrocution "was unforeseeable as far as it [the body corporate] was concerned. It had no duty to do anything while it was unaware of the danger posed. There had never been any problem with the electrical installation and it follows that what occurred was not reasonably foreseeable to it. Immediately the dangerous situation was brought to its attention it acted immediately."

As a body corporate, take all reasonable steps to prevent dangerous situations arising in the complex in the first place, and take immediate action to rectify any that come to your notice!

What about the negligent electrician and the "chain of causation"?

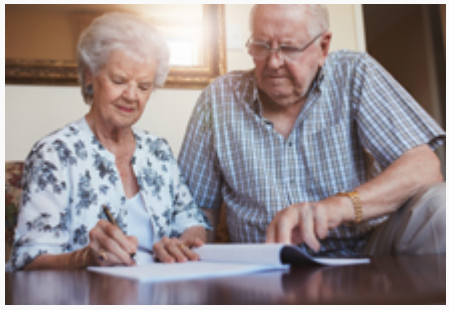
Our law is that you are only liable if there is a "chain of causation" between your negligence and the damage resulting. So you can sometimes escape liability if there is a new "intervening cause" that interrupts that chain of causation.

In this case, the electrician's failure to do the repairs properly was held to have been a "direct cause" of the incident. But his bacon was saved by the fact that the two workers, in switching the electricity back on, knew they were creating a dangerous situation anew. This made it sufficiently "unusual", "unexpected" and not "reasonably foreseeable" for there to be – from the electrician's point of view - a new "intervening cause" which interrupted the "chain of causation" between his negligence and the electrocution. The claim against him failed accordingly.

Any break in the "chain of causation" may come to your rescue if you are sued. But don't count on it!

Don't Accidentally Disqualify Your Chosen Heirs from Inheriting!

"Death is not the end. There remains the litigation over the estate." (Ambrose Bierce)



Your will ("Last Will and Testament") will always be the keystone of your estate planning, and a recent High Court decision sounds yet another warning to beware the "do your own will" concept. By not having his will drawn by a professional, a father inadvertently caused one of his children to be disqualified from inheriting her intended share, whilst her husband was disqualified from being appointed as executor.

Who is disqualified from inheriting?

Our law, in the form of the Wills Act, provides that no one (or their spouse) can receive "any benefit" under a will if –

- They signed it as a witness (unless it was also witnessed by two other competent people not receiving any benefit), or
- They signed it for the testator (even though in their presence and at their direction), or
- They wrote out the will or any part of it in their own handwriting.

"Any benefit" in this context means not just inheritance as an heir, but also appointment as executor, trustee or guardian.

A court can only allow such a person to inherit "if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will". Importantly (as we shall see below), it is up to the heir to prove the absence of any fraud and undue influence.

As the Court put it: "This disqualification exists in order to prevent falsity and fraud, and to prevent 'the exertion of undue influence over people in bad health or in feeble state of mind'. This is because the fact that someone who stands to benefit from the death of a testator in terms of a will, and who is involved in the drawing of the very will in which that benefit is declared, ineluctably invites speculation that he or she may have improperly influenced the testator in the framing of his final testament, more particularly so where the will is executed at a moment of crisis in the testator's life."

If the beneficiary would have inherited anyway under intestacy (i.e. if the deceased had not left any valid will at all) they may still inherit but no more than the value of their intestate share.

The facts of the family fight

- In poor health and realising he needed a will, the testator had asked a friend to help him draw one. The friend produced a typed will, in terms of which each of the testator's three children (from two different marriages) received one third of his estate. In addition a son-in-law was appointed as executor.
- The will was, said the Court, "slightly unusual" in that it included a narrative on the father's difficulties with his third wife, but the real problem (as it turned out) came from the fact that annexed to it was a four-page typed schedule of 69 assets with spaces against each of them for insertion of the name of the child to receive that asset. Critically, those names were filled in by hand by one of the daughters – on, she said, her father's instructions.
- The will and schedule were properly signed and witnessed, and the father died five days later.
- As is regrettably all too common when a deceased leaves behind children from more than one marriage, a fight developed between them, with a claim that the schedule of assets did not reflect the father's wishes through either fraud or undue influence.
- The end result (much bitter dispute over facts later) the Court held that the daughter who had completed the names on the schedule by hand was disqualified from inheriting any more than her share on intestacy, and her husband was disqualified from being appointed as executor.

The bottom line

All that dispute, uncertainty and legal cost could have been avoided had the father called in a competent professional to draw his will for him (preferably long before his illness struck). Don't make the same mistake!

Exemption Clauses and Thieving Employees: Can You Sue (or Be Sued)?

"Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out." (Extract from judgment below)

Employee theft has been a headache for employers from the dawn of history, and no business should ignore the dangers it poses, particularly if your business handles third-party high value goods. Your chances of being sued if one of your employees steals a customer's asset/s are high, the reason being of course the concept of "vicarious liability" – the legal rule that can make you generally liable for your employee's actions.

Your best defence (other naturally than taking steps to stop light-fingered employees from stealing in the first place!) is the "exemption" or "disclaimer" clause. It can present a formidable obstacle to any customer (or their insurer) seeking to hold you liable, but it needs to be professionally drawn, unambiguous, and tailored to suit your particular industry, circumstances and contracts.

A recent Supreme Court of Appeal (SCA) decision illustrates –

The cargo thief who stole R4.5m worth of computers

A customer imported by air freight some R4.5m worth of computers and accessories, and contracted a clearing and forwarding agent to receive and forward them to the customer from the SAA cargo warehouse.

The agent's employee, armed with his "identity verification system" card and the necessary custom release documents, collected and loaded the consignment into an unmarked truck, signed the cargo delivery slip, and disappeared with his loot.

Sued by the customer for its losses, the agent relied on the exemption clauses in its Standard Trading Terms and Conditions. These clauses were comprehensive and widely worded which, as we shall see below, proved central to the agent's legal victory here.

On appeal the SCA dismissed the claim against the agent on the basis that it had been able to prove that its liability was excluded by the exemption clauses. Let's see how it achieved that…

Employers – can you be sued?

Without an enforceable exemption clause in its standard contract, the employer in this case would have been liable for R4.5m (plus substantial legal costs).

Critically, the forwarding agent's success here resulted from the Court's interpretation of the wording of these particular clauses, in the context of this particular contract, and in the particular circumstances of this matter. Any ambiguity in meaning would have been fatal for it, and it was particularly assisted in this case by the fact that it had made special provision in the contract for "goods requiring special arrangements". In other words, **make sure your contracts all contain unambiguously worded exemption clauses tailored to your specific industry and circumstances**.

Customers – can you sue?

Read and understand the contracts you sign, follow any requirements applying to specified or “valuable” goods, and take professional advice if you are unhappy with any of the terms. The reality is however that few service providers will be prepared to compromise on exemption clauses, which leaves you vulnerable unless you have the right type of insurance cover – check upfront!

What Can You Do When Someone Close to You Has No Control Over Their Spending?

“A prodigal is a person who, through some defect of character or will, squanders his or her assets with such abandon that he or she threatens to reduce himself or herself and/or her dependents to destitution” (extract from judgment below)

What can you do when someone you know (often but not always an elderly relative and/or someone with a gambling, drug or drink problem) starts squandering their money and property irresponsibly and recklessly? **Note that we are talking here not about a mentally ill person but about someone “of sound mind but unsound habits”.**

The good news is that you don’t have to look on helplessly while they spend themselves (and their dependants if they have any) into destitution. Our law provides a remedy in the form of a High Court order declaring the person to be a “prodigal” and appointing a curator bonis to manage their financial affairs.

It is however a drastic remedy, and you will have to make out a clear and strong case to succeed. Let’s look at a practical example -

The “hard drinker” accused of giving his estate to prostitutes

- After a 30 year “romantic relationship” soured and ended, one partner sued the other for R2m (or 50% of his estate), repayment of R15k, and maintenance of R7,500 p.m. On the receiving end of this claim was a 68-year-old “semi-retired bookkeeper” who defended it on the basis that he and his former co-habitant had never intended to create a joint estate nor to form a partnership.

- She then applied for him to be declared a prodigal and “incapable of managing his own affairs”. She claimed that he was “being manipulated and needed assistance” and that he was “busy alienating and giving his estate to prostitutes” to her prejudice. Already a “hard drinker”, she said that “his intake of alcohol had tripled on a daily basis since he got involved with prostitutes”.

- The man’s version was very different. He admitted spending more than his income but said this “was not out of the ordinary”, he denied spending irresponsibly and said he wasn’t as reckless or wasteful as alleged, the only change in his drinking habits had been a move to drinking at home rather than at the pub since the pandemic struck, he “considered his girlfriend and her daughter as special and wanted to contribute financially towards their well-being” and he was continuing to contribute to his ex-partner’s financial needs “as he always did for the last 30 years”.

- In dismissing the application, the Court commented that to be declared a prodigal “would be one of the most drastic remedies in the law for the protection of a major person which had the potential to impact on his constitutionally protected rights such as dignity, privacy and freedom … **A court will not**

appoint a curator bonis until it is absolutely satisfied that the patient has to be protected against loss which would be caused because the patient is unable to manage his affairs." (Emphasis supplied)

- The onus to prove your case is on you as applicant, and it is a heavy one: "The appointment of a curator constitutes an interference with the right of the person concerned to manage his own affairs. The right should not lightly be interfered with, especially not on the basis of what amounts to no more than vague and unsubstantiated allegations … A proper enquiry into the mental condition of the alleged patient should be held before a court could interfere with the right of an adult to control his own affairs."

- "It is clear" concluded the Court "that no real factual basis was laid to justify the granting of the relief sought". Application dismissed, with costs.

Your Website of the Month: The 9 Key Points of Making a Difficult Decision

"Avoiding a decision is itself a decision … probably the wrong one"

Decisions, decisions – we spend our days making them, most of them minor but every now and then a really big, important one comes along. Perhaps it's something like "Should I resign my 9-to-5 and start up that artisanal bakery business I've always dreamed of?" or "Should we sell up and move to the coast?" or even "Should we list on the JSE?".

Whatever difficult decision may be looming over you, remember that delay is tempting but unwise. Rather grab the nettle with the "9 key points" in Psyche's article "How to make a difficult decision" **here**.

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