THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 218/2003
Reportable

In the matter between

THE MINISTER OF SAFETY AND SECURITY **First Appellant**

JOHAN JACOBUS BECKER **Second Appellant**

and

PIETER NICOLAAS RUDMAN **First Respondent**

PETRUS BOTHA SCHABORT **Second Respondent**

CORAM: ***MPATI DP, FARLAM JA et VAN HEERDEN AJA***

HEARD: ***23 MARCH 2004***

DELIVERED: ***18 AUGUST 2004***

Summary: Delict – child suffering severe hypoxic brain damage from near drowning in unsecured family swimming pool – whether policeman attending scene and stopping cardio-pulmonary resuscitation commenced earlier acted wrongfully and negligently and, if so, whether his action causally connected with brain damage – applicability of s 2 of Apportionment of damages Act 34 of 1956 – successive wrongdoers – person who had left pool unsecured also negligent – allocation of liability for damages suffered.

Order set out in para [90].

JUDGMENT

VAN HEERDEN AJA

Introduction

[1] On 6 October 1997, Roald John Rudman, then a toddler of two years and eight months ('Roald'), fell into the swimming pool at the Pretoria home of his father, the first respondent, Pieter Nicolaas Rudman. The South African Police Service ('SAPS') were summoned to the scene of the accident and the second appellant, Johan Jacobus Becker ('Becker'), then a sergeant with the SAPS, acting within the course and scope of his employment with the first appellant, the Minister of Safety and Security ('the Minister'), attended to the scene together with his colleague, Sergeant Daniël Pienaar. Roald survived this incident (hereinafter referred to as 'the near-drowning incident'), but sustained severe hypoxic brain damage as a result of which he is now a spastic tetraplegic with an epileptic tendency.

[2] This appeal primarily concerns the issues of whether Becker's actions and/or omissions at the scene of the near-drowning incident, in his capacity as a servant of the Minister, were wrongful and negligent. There are also further issues of whether Becker's negligence, *if* it is held to exist, is causally connected with the brain damage suffered by Roald and, if so, the extent to which the Minister is vicariously liable for such damage.

[3] In September 1998, Mr Rudman instituted an action for delictual damages against the Minister and Becker in the Pretoria High Court, acting in his personal capacity as well as in his capacity as Roald's father and natural guardian. In his particulars of claim he alleged that Becker, in his capacity as an official of the SAPS, who attended to the scene where Roald had fallen into the swimming pool, owed Roald 'a duty of care' and that Becker –

'. . . breached this duty of care and acted in a negligent manner in one or more or all of the following respects :

7.1 He prevented, *alternatively* prohibited, *further alternatively*, hindered, the continued administration of cardio-pulmonary resuscitation ['CPR'] which had been commenced and continued throughout prior to his arrival at the scene;

7.2 He failed to continue with, *alternatively* assist with, the administration of cardio-pulmonary resuscitation upon his arrival at the scene and thereafter in circumstances where he could and should have done so;

7.3 He declared baby Rudman [Roald] dead, without examining baby Rudman, *alternatively*, whilst he examined baby Rudman insufficiently, *further alternatively*, whilst he examined baby Rudman inappropriately, whereas in truth and fact, baby Rudman was still alive;

7.4 He allowed baby Rudman to remain without essential cardio-pulmonary resuscitation for approximately ten minutes in circumstances where he could and should not have done so.'

[4] The Minister and Becker denied liability. Furthermore, they issued a third party notice, joining the second respondent, Petrus Botha Schabort ('Bo'), Mr Rudman's stepson and the son of Roald's mother, Mrs Elna Rudman, born from a previous marriage, as a third party. They claimed a contribution from him in the event of the trial court holding that Becker acted negligently and that such negligence contributed to the damages suffered by Mr Rudman and Roald. This joinder was based on the allegation that Bo acted negligently in that, although he was aware of the fact that his toddler step-brother, Roald, was on the premises and that there was a danger of his falling into the swimming pool, he (Bo) removed the safety net from the pool, opened the door and security gate leading to the pool, failed to inform the domestic worker looking after Roald of the fact that the pool was unprotected and unattended, and then left the premises, only instructing his seven-year-old sister, Chantal, to look after Roald.

[5] The trial was run during May 2001. At the pre-trial conference held in late April 2001, the parties agreed that 'subject to the honourable court's approval . . . a separation of issues is indicated and [that] at commencement of the trial [they would] apply for an order that the issue of liability be decided first and separately from the issue of *quantum*. The issue of liability will include the issue of the negligence of the employee of the first defendant as

well as the third party, as well as the defendants' special plea and the question of causality.'

At the commencement of the trial, the trial judge, Motata J, made an order, in terms of rule 33(4), to the effect that 'the issue of liability will be decided first, separate from the issue of *quantum*'.

[6] The trial on the separated issue was concluded during May 2001 and judgment was delivered on 7 June 2002. The trial court declared, *inter alia*, that the Minister and Becker were jointly and severally liable to Mr Rudman for the full extent of such damages as Mr Rudman might prove in his personal and/or his representative capacity. The extent of the third party's contribution to the damages to be paid by the Minister and Becker was declared to be 20 per cent.

[7] The appellants now appeal against these orders of the trial court, leave to appeal having been granted by this Court, on petition to it, during April 2003. Although leave to appeal was also granted in respect of the trial judge's dismissal of the appellants' special plea (non-compliance with s 57(2) of the South African Police Service Act 68 of 1995), the appellants are not proceeding with their grounds of appeal relating to such special plea. They

are also not proceeding with their additional grounds of appeal, being those relating to Mr Rudman's alleged vicarious liability based on the alleged negligence of Mrs Siena Baloi, the domestic worker who was looking after Roald at the time of the near-drowning incident.

Factual evidence

[8] As indicated above, Roald fell into the swimming pool at the Rudman residence in Pretoria whilst he was in the care of Mrs Baloi on 6 October 1997. Roald's half-brother, Bo, had on that day arranged with his friend, Kobus Pienaar ('Kobus'), the manager of the video shop just up the street from the Rudman residence, at which Bo worked part-time, to relieve Kobus for a short while so that Kobus could visit the Rudman residence for a swim. Before leaving for the video shop, Bo took the safety net off the swimming pool and opened both the sliding door of the sitting room leading out to the swimming pool area, as well as the expanding security gate on the sliding door. He did not tell Mrs Baloi that he had done so, nor did he tell her that he would be leaving the premises, but simply asked Chantal to 'watch' Roald.

[9] Mr Rudman testified that, on the afternoon in question, he came home to collect a suit that needed adjustment. On his arrival, he met his step-daughter, Chantal, at the front gate of the property, wearing a swimming

costume. Chantal told him that 'they' were waiting to swim with Bo. Having collected his suit from his bedroom, Mr Rudman departed, leaving Roald in the kitchen where Mrs Baloi was preparing the evening meal. He did not see Bo, nor did he know that the safety net had been removed from the swimming pool and that the sliding door and security gate leading to the swimming pool area were open. He left the premises in his car at 16h02 and went to the Menlyn Shopping Centre. A while later, he received a call on his cellular telephone from his wife, telling him that Roald had fallen into the swimming pool and was dead. According to the telephone records handed in as an exhibit by the respondents' counsel during the trial, this call was made from Mrs Rudman's cellular telephone at 16h36. Mr Rudman asked his wife if somebody was 'doing CPR' and she replied in the affirmative. He sped home, arriving at approximately 16h45, by which time the qualified paramedics were already on the scene, working to revive Roald who was lying on the carpet in the dining room. His wife and one of her colleagues, Mr Cornel Windell, were standing outside the house, together with two policemen, while Bo and Kobus were in the dining room and Mrs Baloi was in, or in the vicinity of, the kitchen. Mr Rudman testified that neither Roald nor Chantal was allowed to be in the swimming pool area without supervision, even when the safety net was fixed on the pool, and that every member of the Rudman household, including Bo and Mrs Baloi, knew that the security gate and door

leading to the swimming pool area had to be closed and the swimming pool safety net fixed in place at all times when the pool was not in use.

[10] Mr Rudman further testified that, very early on the morning after the near-drowning incident, Becker came to the Unitas Hospital, where Roald had been admitted the previous day, to enquire about the little boy's condition. He conceded that Becker had no duty to be there and that he was not 'completely insensitive' to what had happened.

[11] Mrs Baloi testified that she had seen the safety net in place on the swimming pool earlier on the day in question. At the time that Mr Rudman left the Rudman residence, she was in the kitchen, cooking. Immediately thereafter, she had, at Roald's request, switched on the television in the sitting room so that he could watch KTV. She had not checked whether or not the sliding door and security gate were open, because she knew that they were always kept closed. She had then telephoned her husband and was again cooking in the kitchen after this telephone call when Kobus arrived to have a swim. (Chantal had told her earlier that Kobus was 'coming to swim with them'.) She had opened the main gate for Kobus by activating the switch next to the front door. Shortly thereafter, as Mrs Baloi was walking from the

kitchen to the sitting room to fetch Roald (apparently to go for a swim), she met Chantal who informed her that Roald had fallen into the swimming pool.

[12] Mrs Baloi immediately ran outside to the swimming pool and found that Kobus had already taken Roald out of the pool and had by then laid him on the lawn. According to Mrs Baloi, Roald was lying on his stomach and Kobus Pienaar was pressing at his back. She testified that she could see 'the breathing movement of his body'. She ran back into the house to telephone her employer (Mrs Rudman) at the latter's office, which call is recorded as having been made at 16h15. She told Mrs Rudman that Roald had fallen into the swimming pool, whereupon Mrs Rudman said that she was coming home at once. Mrs Baloi then returned to the swimming pool area and, apparently acting on Mrs Rudman's instructions, told Kobus that they must take Roald into the house. Kobus carried Roald into the dining room and laid him on the dining room table. He blew into the toddler's mouth, then used one or more of his fingers to 'try to unblock something in his [Roald's] throat or something in his mouth', and thereafter pressed him on the chest.

[13] Mrs Baloi answered a telephone call and held the telephone receiver to Kobus's ear while 'Kobus was listening to the instructions being given by the rescue people from the ambulance centre'. It is common cause that Roald was

dressed only in a pair of red underpants and that neither Kobus nor Mrs Baloi had made any attempt to dry his body off after he was removed from the pool. Mrs Baloi described his colour as 'between being white and red, but not being blue and not black', while she described the temperature of the toddler's body as 'not cold . . . warm, not hot but medium'. She stated that, while Roald was lying on the dining room table, being helped by Kobus in the manner described, she (Mrs Baloi) had touched Roald's chest with her right hand and had listened for a heartbeat by placing her ear on the left-hand side of Roald's chest. According to Mrs Baloi, she had heard a heartbeat but it was 'too low'; the heart was beating 'slowly' and and she could hear the heartbeat only very faintly. Although she was 'very glad' and had 'some hope' when she heard and felt the heartbeat, she did not tell Kobus about this; indeed, she did not speak to Kobus while all this was going on.

[14] While Mrs Baloi was listening and feeling for the heartbeat, Kobus was 'busy massaging him and pressing the body'. She thought that Kobus had been 'working on' Roald in the dining room for about three minutes when the police (Becker and Sergeant Pienaar) arrived. She stated that, when the police arrived, Becker spoke aggressively to Kobus and told him to move away from the child, as he (Becker) wanted to see him. Although her evidence was somewhat unclear in this regard, it would appear that Becker had only told

Kobus to 'move away' from Roald after Becker had examined the child and looked into his eyes with the aid of a small torch. Becker asked Mrs Baloi to fetch a blanket, telling her that the child was dead, and after she had done so, he had covered the toddler's body with the duvet she had fetched. She could give no coherent version as to what had happened after this, but stated that she had certainly not seen either Becker or Sergeant Pienaar performing any CPR on Roald. Although she said in her statement that she had told Becker, prior to his examination of Roald, that she had heard a heartbeat and that he had ignored this information, Mrs Baloi testified in court that she had not spoken to the police at all until she was sent by them to fetch a blanket.

[15] Kobus had just turned twenty at the time of the near-drowning incident. He confirmed that Bo had offered to relieve him at the video shop on the day in question so that he (Kobus) could go for a swim at the Rudman residence. Bo had come to relieve Kobus at approximately 16h00 and Kobus had arrived at the Rudman residence very shortly thereafter. He had pressed the bell at the main gate and someone had opened the gate for him, whereafter he had walked around the house to the swimming pool area.

[16] After having changed into swimming gear, he found Roald in the swimming pool, floating face down at the shallow end. The safety net had

been totally removed from the pool. Kobus immediately jumped into the swimming pool at the shallow end, lifted Roald out of the water and, while still standing in the pool, placed the child next to the pool on his back and looked in his mouth to ascertain whether there were any 'obstructions' there. He then turned Roald onto his side and pressed with both hands above the child's hips in the area of the 'short rib'. This caused water and a vomit-like substance to run out of the child's mouth. It would appear that the latter substance was the remains of the egg which Roald had eaten for lunch. Kobus then turned the child back onto his back, once again looked in his mouth and 'het goed uitgekrap uit sy mond uit'.

[17] When Kobus lifted Roald out of the swimming pool, the toddler showed no signs of life whatsoever. Kobus listened to Roald's chest in order to ascertain whether there was a heartbeat or a pulse, but there was nothing of the kind. He also looked at the child's chest to determine whether he was breathing, but the chest was not moving at all. The temperature of the body was cold and the colour was very pale.

[18] Whilst still standing in the water at the shallow end of the swimming pool, Kobus put his hand under Roald's head and ensured that it was tilted back and that there were no obstructions in his mouth or throat. He then

pinched the child's nose closed, put his mouth over the child's mouth and blew five times into his lungs, thereafter pressing with both hands five times on the child's chest. He testified that, each time he blew into Roald's mouth, the child's chest rose and thereafter fell. He performed these actions rhythmically, administering approximately five breaths every five seconds, following by five compressions every five seconds.

[19] While still standing in the pool, Kobus became nauseous and vomited on the side of the pool. He therefore climbed out of the pool and carried Roald to a nearby patch of lawn, where he continued with the same procedure of alternative mouth-to-mouth resuscitation and chest compressions.

[20] At some stage (it is not clear exactly when) Kobus asked Chantal, who was outside, to fetch somebody to telephone for help. Chantal apparently went inside and conveyed the message to Mrs Baloi, who came outside and was told by Kobus to summon help. Mrs Baloi thereafter informed Kobus that the people from the emergency services were on the telephone, whereupon Kobus carried Roald into the house, placed him on the dining room table and continued performing CPR on the child. At no stage, however, did the child show any reaction whatsoever to the CPR, remaining without any sign of life, his body temperature remaining cold and his colour very pale.

[21] While in the dining room, Kobus spoke very briefly over the telephone to an official from the emergency services, while Mrs Baloi held the telephone receiver to his ear and he continued with CPR. As far as Kobus could recall, the telephone conversation lasted only a few seconds, the official simply telling him to look in the child's throat, to blow into his mouth and to compress his chest. According to Kobus, he was satisfied that he was already doing these things correctly. Kobus further testified that, while he was performing CPR on Roald on the dining room table, he saw Mrs Baloi holding her ear next to Roald's upper body, apparently listening for a heartbeat. Mrs Baloi had not, however, told him whether she had heard a heartbeat or anything else, and he had not asked.

[22] According to Kobus, he had been performing CPR on Roald for a total of between ten and fifteen minutes when two policemen (Becker and Sergeant Pienaar) arrived at the Rudman residence. Becker came over to Kobus and told Kobus in a rather brusque manner (`'n bietjie van 'n krasse manier') to stand aside. Kobus did so, because Becker was a policeman and he (Kobus) was under the impression that the police were going to 'take over the situation' and that they would continue with the resuscitation.

[23] Becker then examined Roald, lifting up his arm and feeling for a pulse, shining a little torch into the child's eyes, and bending down and looking into the child's mouth. Kobus conceded that, at that time, Roald's body was still lifeless, cold and very pale. Although Kobus agreed that Becker had not found any pulse, he was not able to confirm Becker's evidence to the effect that, when Becker shone the torch into the child's eyes, the pupils were fully open, fixed and dilated. Becker then said quite loudly that Roald was dead and, for this reason, he told Mrs Baloi to fetch a blanket to cover the child. Kobus stated that he was so astounded ('verbaas') when Becker said that Roald was dead that he did not know what to think. He asked Becker if there was not anything more that they could do ('ek het vir hom gevra of ons nie nog iets kan doen nie, of ons nie moet aangaan of wat kan ons doen nie'), but Becker replied in the negative. Like Mrs Baloi, Kobus insisted that neither Becker nor Sergeant Pienaar had performed any form of CPR on Roald, in contrast to the evidence of Becker and Sergeant Pienaar to the effect that they had commenced with CPR, but had stopped very shortly thereafter.

[24] As stated above, Kobus testified that he had ceased performing CPR on Roald when told by Becker to stand aside, because Becker was a policeman and he (Kobus) thought that Becker was going to 'take over the situation' and continue with resuscitation. When this did not happen, despite Kobus asking

Becker whether there was not something more that they should be doing, Kobus felt helpless and accepted Becker's statement that Roald was dead. He did so because Becker's actions in 'taking over the situation' and examining the child made him think that Becker knew what he was doing. He conceded, however, that at the stage when Becker examined the child, there were still no signs whatsoever that Roald was alive.

[25] According to Kobus, approximately ten minutes after he had been instructed by Becker to stand aside and had ceased performing CPR on Roald, Mrs Rudman arrived at the house, together with Mr Windell.

[26] In his affidavit, Kobus stated that shortly after Mrs Rudman and Mr Windell had arrived at the house, further policemen arrived, one of whom was a paramedic, and the latter then resumed performing CPR on Roald. This was at about 16h30. He also stated in his affidavit that the time lapse between the time that he stopped performing CPR on Roald and the time when CPR was resumed 'would have been approximately ten minutes'. He inferred that one of the policemen was a paramedic because he was carrying a small medical bag and, as Kobus could recall, he gave Roald an injection (which Kobus assumed was an adrenaline injection) directly into the child's lungs. According to Kobus, the policeman with the medical bag (apparently

Sergeant Louis Adriaan Nel) who had given Roald the injection, had also started with CPR. Other paramedics thereafter arrived at the Rudman residence. They put a pipe into Roald's trachea and lungs and worked on Roald, using a machine with electrical leads and sensor points, until a pulse was detected, whereafter Roald was rushed to hospital in an ambulance.

[27] Kobus's brother had explained to him how to do CPR when he (Kobus) was in standard six or seven. His brother, who was a medical student at that time, had demonstrated on Kobus how CPR should be performed, although the CPR which he had demonstrated was that applicable to adults. Since that time, Kobus had not had the opportunity to apply what his brother had taught him. When asked in chief how he knew that the CPR should be continued until Roald revived or until somebody arrived him to assist him, Kobus answered as follows:

'. . . Jy sien dit orals, jy kan dit op TV ook sien. Jy moet aanhou tot iemand jou kom hulp bied, tot die ambulans aankom en hulle kan aangaan.'

According to Pienaar, if Becker had indicated to Kobus that he (Becker) did not know how to do CPR, Kobus would have continued with the CPR which he was doing until expert help arrived.

[28] Mrs Rudman testified that, on the day of the near-drowning incident, she was at her place of employment when she received a call from Mrs Baloi at 16h15, telling her that Roald had fallen into the swimming pool and that she should come home at once. She immediately thereafter telephoned the emergency services, told them what had happened, gave them her address and asked them to send help to her home, as also to telephone her home to give instructions how to perform CPR. This call was made at approximately 16h17. At that stage, she thought only Mrs Baloi and her seven-year-old daughter, Chantal, were at home and was unaware that Kobus was also there.

[29] Mrs Rudman then left her office and a friend, Mr Windell, drove her in her own vehicle to her residence. While travelling in the motor vehicle on her way home, she made two telephone calls on her mobile phone, one to her husband's office (recorded at 16h19) in a futile attempt to contact him, and the second one (recorded at 16h21) to her home. According to Mrs Rudman, during the second telephone call, she spoke to her daughter, and 'in a child-like way that she would understand I explained to her what to do until we arrived home'. Under cross-examination, she elaborated by saying that she had told her daughter to continue rubbing Roald's chest, closing his nose and blowing into his mouth, doing this rhythmically until she got there. She testified that she knew how important it was for Roald to get immediate

attention after being removed from the swimming pool, and that she had gained this knowledge 'from reading and listening'. She had never performed CPR on anybody or even on a model, but knew about CPR from what she had seen on 'actuality programmes or on TV'. At a later stage in her evidence under cross-examination, Mrs Rudman stated that she had not asked Kobus how he had performed the CPR, as she was not a medical expert and she thought that, even if he had explained to her what he had done, she would not have understood it. She had asked the emergency services to give telephonic instructions how to do CPR and she had trusted that the instructions given were correct. When asked by counsel for the appellants what the correct method was of performing CPR on an infant, she refrained from answering this question, stating that she was not a medical expert.

[30] From her affidavit, it would appear that she and Mr Windell arrived at the Rudman residence at about approximately 16h25, about the same time as her eldest son, Bo. She jumped out of the car while it was still in motion and ran into the house. Two policemen were already on the premises. One of them who was outside the house (apparently Sergeant Pienaar) followed her inside and the other (apparently Becker) was already in the dining room, standing at the dining room table on which Roald was lying. Roald's whole body, including his head, was covered by a duvet. She was about three paces

away from Roald when Sergeant Pienaar stopped her by holding her arm and Becker lifted the duvet, telling her that her son was dead. Her son's body looked very pale. Mr Windell had in the meantime stopped the car and followed her into the house, while her son Bo had run into the house with her. Kobus was already in the dining room.

[31] Upon being told that her son was dead, she was 'terribly shocked' and 'very upset' and ran out of the house. As she stated in her affidavit :

'I lost total control of the situation for a period and cannot calculate the time that passed since then in that I was in total shock'.

After spending a short while outside, she re-entered the house, spoke to Mrs Baloi in the kitchen, and then went to her bedroom to try to telephone Mr Rudman, once again without success. She then went outside again, where she saw a police vehicle, which was driving very fast, stopping abruptly in front of the house. Two policemen got out of the vehicle and entered the house. Mr Windell told her that these people would perform CPR on Roald. She returned to the bedroom and used her cellular telephone to telephone her sister-in-law (at 16h35) to tell her what had happened and that Roald was dead. She testified that this was shortly after the second group of policemen (Sergeants Nel and Binneman) arrived.

[32] At 16h36, she eventually got through telephonically to her husband on his cellular telephone number and told him what had happened. She waited outside the house for Mr Rudman, who arrived shortly thereafter and who went inside to check what was going on, while she remained outside. A while after the second set of policemen - who had recommenced CPR - arrived, an ambulance arrived with paramedics. She was still outside at that time talking to Mr Windell and Becker. Her evidence was that, when Becker told her that her son was dead and also subsequently, he spoke to her abruptly and roughly, certainly not in a soothing or comforting way.

[33] After the emergency personnel had arrived in the ambulance, she knew that they were performing CPR and 'eventually, what felt like hours later', she was told that they had detected a pulse. Roald was then taken by ambulance to the Unitas Hospital.

[34] According to Mrs Rudman, Becker was responsible for what had happened to Roald because 'he should not have declared my son dead'. She conceded, however, that Becker had answered a call for help, had driven to her home at high speed to render assistance and had found a critical situation upon arrival there. She also conceded that, *if* in fact Roald had been dead at

the time he was examined by Becker, putting a blanket over his body 'would have been a humane thing to do'. Nevertheless, she reiterated her strong belief that the CPR should have been continued by Kobus, who had received telephonic instructions from the emergency services, until expert help arrived and that Becker should not have caused the CPR to be interrupted. She was of the view that her son's brain damage was (at least partially) the result of the interruption, on Becker's instructions, of the CPR being performed by Kobus, and she blamed Becker for this.

[35] As indicated above, Mr Windell drove Mrs Rudman to her home after she had received the telephone call from Mrs Baloi. He was in fact with her in her office when this call had come through. On the way to the Rudman residence, he had driven 'fairly fast with hazards on and my emergency lights', although the traffic at that time was 'fairly high or dense' because it was peak time. They arrived at the Rudman residence at approximately 16h25 and Mrs Rudman's daughter, Chantal, ran out and told Mrs Rudman that Roald was dead. Mrs Rudman, who was understandably 'very, very upset' at that stage, ran into the house, Mr Windell following two to five metres behind her. He was on his way to the front door when Mrs Rudman, who had been in the house for a very short period, came running out again, 'shouting and screaming'.

[36] Mr Windell then entered the house and saw Roald lying on the dining room table covered with a duvet. Mrs Baloi and Kobus were near the table on which Roald was lying, Mrs Baloi crying and Kobus in a state of shock. According to Mr Windell, he thought that he would attempt to start CPR on the little boy and he therefore went up to the table and removed the duvet. Roald was very pale and cold, but Mr Windell did not listen for any breathing, try to find a pulse or to detect any breathing, or check the pupils of the child's eyes. When asked under cross-examination why he wanted to start CPR, he stated that 'I just thought that I am going to try something. Elna is a friend of mine and maybe, maybe we can, I can do something.' He had previously been in the police force and, although he had had a bit of training in CPR in the police college, using a model, he had never himself performed CPR on a person. He testified that, when he was in the police force, this 'bit of training' was part of the basic training that all policemen received.

[37] Before Mr Windell was able to start performing CPR on Roald, another policeman from the flying squad, whom he knew very well and with whom he had worked, one Pierre Binneman ('Sergeant Binneman'), arrived at the house, accompanied by Sergeant Nel whom Mr Windell did not know. As Mr Windell knew that 'Pierre was a medic or had medic experience', he left the

situation to Sergeant Binneman and walked out of the house. He testified that Sergeants Nel and Binneman took Roald off the table and 'were busy with the child' as he (Mr Windell) left the house.

[38] Mr Windell recalls the paramedics arriving on the scene in an ambulance approximately fifteen minutes after the arrival of Sergeants Nel and Binneman. He was still at the house after Roald was taken by ambulance to the hospital. He also remembered Mr Rudman arriving at the house just before the ambulance took Roald away. According to Mr Windell, Mr Rudman was 'also quite out of it, hysterical, did not know what had happened'.

[39] Sergeants Nel and Binneman, members of the Highway Patrol at the relevant time, were patrolling in their vehicle on the afternoon in question when they heard a radio call made from a Lyttelton police vehicle to the relevant police station requesting an ambulance for a child who had possibly drowned. Because Sergeant Nel was a police diver and had also been trained by the military in emergency help (he was a Level 3 emergency worker), they decided to react to the call as they knew that they could get to the scene quicker than the emergency services. Neither of them was able to say how long it had taken them to get to the Rudman residence, but they had driven

relatively fast in a BMW 328i, using their siren and emergency blue lights. They thought that they must have picked up the call after 16h00 because it was already peak traffic time.

[40] They arrived at the Rudman residence after Becker and Sergeant Pienaar. Sergeant Nel asked Becker and Sergeant Pienaar what had happened and was told that a child had fallen in the pool and had drowned or almost drowned. They immediately took Sergeant Nel, with Sergeant Binneman close on his heels, to the dining room where they found Roald lying on the dining room table completely covered with a duvet. It would appear that Kobus was in the dining room at that time, while Mrs Baloi was screaming hysterically in the kitchen.

[41] Sergeant Nel removed the duvet, finding Roald's body to be ice cold and already showing sianotic patches (viz the skin had a bluish tinge). Roald did not react to Sergeant Nel's voice. Sergeant Nel performed a finger sweep in Roald's mouth and found what looked like food and mucus ('slym') there, which he removed. He held his ear to the child's mouth, listening and feeling with his cheek for any breathing, while at the same time touching the child's chest with his hand. This he did for ten seconds, as he had been trained to do, without any success. He also used a stethoscope held against the child's chest

to try to find a heartbeat, while feeling for a brachial pulse at the child's wrist. This too he did for ten seconds, as he had been trained, without any success. It would appear that Kobus told him that, although they did not know how long the child had been in the water, CPR had already been performed. According to Sergeant Nel, Roald's Glasgow Coma scale was three (the lowest possible figure), as the child had showed no reaction whatsoever to sound or to pain and his eyes did not react in any way to light.

[42] It was at this stage that Sergeant Nel decided to do CPR :

'Toe moet ek vir myself besluit of ek kan begin om KPR [te doen] of ek dit gaan los waarop ek besluit het ek gaan probeer en ek het die kind van die tafel afgehaal en op die vloer neergesit.'

He took this decision because, if someone had already performed CPR, there was perhaps a small possibility that this could have helped.

[43] Once the child had been lifted from the table onto the floor, Sergeant Nel performed another finger sweep to check whether there were any obstructions in his mouth. At that stage, the paramedic, Mr Jan Adriaan Oosthuizen, from the Pretoria Fire Department and Ambulance Services, arrived on the scene. According to Sergeant Nel, Mr Oosthuizen took over the scene as he was much better qualified to deal with the situation than Sergeant

Nel. Sergeant Nel could not remember whether, by this time, he had 'ventilated' the child at all. Helped by Sergeant Nel, Mr Oosthuizen began with active and advanced resuscitation, intubating the child (ie putting a pipe into the child's trachea and into the lungs), and making use of a so-called 'ambusack' to pump air into the child's lungs. Sergeant Nel also testified that Mr Oosthuizen had made use of a heart monitor, but that he himself did not understand how such equipment worked. Sergeant Nel estimated that Mr Oosthuizen had 'worked on' the child for between thirty and forty-five minutes before a heartbeat was detected. He reiterated that, at the time that he, Sergeant Nel, had examined the child, he had found the body to be completely lifeless.

[44] It is also important to note that Sergeant Nel testified that he had not received any instruction in CPR or other such 'behandeling' during his police college training (he had joined the SAPS in December 1988, while Becker had joined in January 1986), although he had received some training in emergency help. He conceded that, before he had done his course in emergency help at the military base, he had 'reeds geweet daar is iets soos KPR en min of meer wat dit is'. He also conceded that, before he had received his formal training, he knew that CPR was an important component in an attempt to save somebody, particularly in the case of a drowning.

However, although his wife was a paramedic, it was only when he had done his formal training in emergency help that he had learnt how CPR actually worked ('hoe dit regtig werk'). The course which he had done at the military base (in Gauteng) in about 1997 had stretched over five weeks and had qualified him as a Level 3 emergency helper. At the time of the trial, he was no longer registered as such, because his qualification had to be renewed every three years by writing a refresher examination and he had not done this. As far as he knew, Sergeant Binneman had no similar qualifications.

[45] The following exchange between counsel for the respondent and Sergeant Nel, during the latter's cross-examination, is an important one:

'Sou dit korrek wees om te sê sersant, dat as iemand by u gekom het voordat u self formele opleiding gekry het en vir u gesê het moet 'n mens probeer met KPR en as jy eers begin het daarmee moet jy ag, sommer na 'n rukkie net ophou of sou u, is u kennis dat 'n mens moet aanhou so lank soos wat jy kan totdat iemand daar kom wat regtig weet wat aangaan? - - - Dit sal moeilik wees vir my om so te antwoord. Na my opleiding kan ek vir u sê ja, 'n ou kan nie net ophou met KPR nie.

U kan nie onthou wat u kennis was vantevore nie, lei ek af. - - - Dit is moeilik. Ek kan nie sê of ek sou dit geweet het of ek dit nie so geweet het nie.

Sersant, kom ons soos hulle sê, "let's talk frankly". Ek verstout my om te sê daar is, ek wonder of daar mense is wat nie weet, ek praat nie van doktors en paramedici en noodhulpers, volgens wat u nou al gesien het – u het moes nou al 'n bietjie rondbeweeg in die wêreld – dat daar kwalik mense wat nie weet (ek praat nou van volwassenes) dat as jy

met KPR begin moet jy aanhou so lank as wat jy kan. Nie waar nie? - - - Dit is waar, maar die voorbeeld wat jy gebruik het soos op TV's en dié goed. Ek kan selfs my opleiding vat. Die manier wat ek KPR geleer is en die manier wat ek nou al gesien het hoe paramedici KPR doen verskil ook van mekaar. So daar is – ek kan nie met eerlikheid sê dat ek dit sou gedoen het of ek sou só gemaak het nie.

Wel, in dié geval wou ek dit doen. - - - Op dié spesifieke dag sou ek alles in my vermoë gedoen het om daardie kind te probeer help.'

[46] Mr Oosthuizen, the paramedic who took over from Sergeant Nel, conceded that his independent recollection of the incident was rather vague (obviously because of his frequent involvement in multiple trauma incidents – between eight and twelve such incidents in an eight hour shift). Nevertheless, he testified that he 'took over the scene' and treated Roald according to 'protocol', *inter alia* intubating Roald, administering adrenaline (as far as he could remember), and using an ECG monitor, with leads and electrodes placed on the patient, to detect electrical current in the heart, if any. He could not remember how long it took before he detected a pulse, although in his statement, made some ten months after the near-drowning incident, he stated that :

'Na 'n hele paar minute het ek 'n pols teruggekry en besluit om die kind na die Unitas Hospitaal te neem vir verdere behandeling wat toe ook gedoen is.'

He conceded under cross-examination that he would not have used the words `'n hele paar minute' if it had taken thirty to forty-five minutes (as was estimated by Sergeant Nel) to detect a pulse.

[47] When asked by counsel for the appellants why he had commenced with resuscitation despite the child's apparent lifeless condition (ie, ice-cold, no breathing, no heartbeat, no reaction to external stimuli), he responded as follows :

'In die eerste plek, dit is my werk. Ons moet maar altyd probeer en oor die geskiedenis wat ek gekry het baie vaag was. Niemand kon vir my sê hoe lank die kind onder die water was nie en hoe lank die kind al so was nie, en 'n ou probeer.'

It is also important to note that when asked by counsel for the appellants whence he obtained his knowledge that, particularly in the case of a drowning, one should not stop CPR until qualified medical personnel arrived to take over, Mr Oosthuizen stated that 'ek is dit geleer uit boeke uit en deur my opleiding'.

[48] As regards the evidence given by both Becker and Sergeant Pienaar, it is in my view clear from the record as a whole that counsel for the first respondent was correct in his submission that both were in many respects unreliable witnesses and that, insofar as their evidence differed from the

evidence given by Kobus and Mrs Baloi, the evidence of the lastmentioned two witnesses should be accepted.

[49] It would appear that, whilst on police motor patrol on the day in question, Becker and Sergeant Pienaar (the driver of the police motor vehicle) received a radio message concerning a possible drowning at an address in Wingate Park (the Rudman residence). At that time, they were some 11.8 kilometres away from the Rudman residence. As pointed out by counsel for the appellants, they could not have received this radio message any earlier than 16h17, the approximate time at which Mrs Rudman telephoned the emergency services from her office, as this call still had to be relayed to the police radio control room and sent out to police vehicles within its reception area. It would appear that they immediately proceeded as quickly as possible to the address given, taking approximately seven minutes (in peak hour traffic) to reach the scene.

[50] Upon entering the house, they found a small boy lying on the dining room table, with an unknown young man (Kobus) giving the child mouth-to-mouth resuscitation. Although both testified that Kobus was struggling and was performing the CPR incorrectly, neither was able to explain at all convincingly what Kobus was doing incorrectly. Becker approached the table

and told Kobus to stand aside. Under cross-examination, Becker conceded that he was upset, that he spoke in a louder tone than usual, and that he might have shown some of the emotion which he was feeling at that stage.

[51] Becker then apparently examined the child, feeling for a pulse, possibly listening to Roald's chest for a heartbeat, and shining a little torch into the child's eyes. There were no signs of life whatsoever – the body was very cold and very pale and the pupils of the child's eyes were dilated and fixed.

[52] Both Becker and Sergeant Pienaar testified that they 'took over' the performance of CPR from Kobus, Sergeant Pienaar performing the mouth-to-mouth resuscitation while Becker performed chest compressions. In my view, however, it is clear from the record as a whole that, after Becker had told Kobus to stand aside and had examined the child, he had concluded that the child was dead and had asked Mrs Baloi to fetch something to cover the child's body. He had then covered the body completely with the duvet which Mrs Baloi had fetched. When asked why he had done so, he responded as follows :

'Omdat Roald vir my . . . na my mening dood was wou ek hom bedek. Dit was vir my toepaslik om hierdie klein seun toe te maak dat almal hom nie kan sien nie. Dit is vir my waaroor dit gegaan het.'

[53] That Becker had believed from the outset that Roald was dead and that neither he, nor Sergeant Pienaar, had performed any CPR on the child, was the version put several times to Becker by the first respondent's counsel during cross-examination. In my view, this was established by the first respondent on the requisite balance of probabilities, having regard to the record as a whole. It is, however, important to note that it was not suggested at any stage by the first respondent that Becker's belief that Roald was dead was not a genuine and *bona fide* belief, nor was this put to Becker during cross-examination.

Expert evidence

[54] Most of the expert evidence given during the trial for both sides was devoted to the effectiveness or otherwise of the CPR performed by Kobus on Roald after the child had been removed from the swimming pool. All the experts also testified on the question whether the discontinuation of such CPR upon Becker's instructions and Becker's failure himself to perform CPR on the child, coupled with Becker's conclusion that Roald was dead and his decision to cover the child completely with a duvet, caused or significantly contributed to the brain damage ultimately suffered by Roald. Much of the judgment of the trial court was devoted to an analysis of the expert evidence on both sides, the trial court ultimately concluding that the neurological

outcome for the child would have been significantly different if Becker had not intervened and caused the CPR being performed by Kobus to be stopped. However, in argument before this Court, counsel for the appellants conceded that, on the expert evidence as a whole, the respondents had succeeded in proving, on the requisite balance of probabilities, that there was a causal connection between Becker's conduct in causing the CPR to be discontinued and at least some of the brain damage ultimately sustained by Roald.

[55] From the expert evidence as a whole, including that given by the experts for the respondents, it is clear that at least part of the irreversible brain damage sustained by Roald was caused by the initial submersion in the swimming pool and that this damage could well have been significant. The experts for both sides were agreed that it was simply not medically possible to determine to what extent the interruption of the CPR upon Becker's instructions exacerbated the brain damage suffered by Roald and contributed to his present condition. In view of the conclusion which I have reached on the aspects of wrongfulness and negligence, however, it is not necessary to analyse the medical evidence on the aspect of causation in any further detail.

Existence of legal duty (wrongfulness)

[56] Before this Court, counsel for the first respondent submitted that the latter's case in the trial court was not that Becker had a special legal duty imposed upon him solely by reason of the fact that he was a policeman, and that Mr Rudman's case would have been exactly the same even if Becker had not been a policeman but a member of the public. To my mind, this submission is not really borne out by the manner in which the particulars of claim were framed.[1] Moreover, counsel for first the respondent submitted further that the case against Becker (and hence also against the Minister) was that Becker, *being in a position of authority*, elected to exercise authority, purposely interfered with the steps which were being taken to administer CPR and assumed responsibility. According to counsel, this imposed upon Becker a legal duty vis à vis Roald, as a matter of common sense and justice, and because, in the circumstances of this case, it was fair, just and reasonable to impose such a duty. Moreover, the imposition of such a duty would be in accordance with the legal convictions of the community, which would demand that Becker's interference with the CPR which Kobus was performing; his failure himself to perform CPR on the child; his conclusion in the absence of the required medical knowledge that Roald was dead; and his decision to cover Roald's body with a duvet, ought to be regarded as unlawful.

[1] See para 3 above.

[57] Insofar as the negligence relied upon by the first respondent consists in positive acts by Becker causing physical harm to Roald, it is presumed to be unlawful.[2] Thus, Becker's conduct in interrupting the CPR which Kobus was performing at the time of Becker's arrival at the scene of the near-drowning incident, his conclusion in the absence of the required medical knowledge that Roald was dead, and his decision to cover the child's body with a duvet, give rise to a presumption of wrongfulness in respect of such conduct. However, insofar as Becker's alleged negligence consists of his failure - after having caused the CPR which Kobus was performing to be ceased - himself to perform CPR on the child, this omission would be wrongful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.

[58] The test for determining the wrongfulness or otherwise of an omission or failure to act in the context of an action for delictual damages was formulated as follows by this Court in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as* Amicus Curiae*):*[3]

'[9] . . . An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A

[2] See, for example, *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 497B-C; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 26F-H; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12 at 441E-F; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) para 24 at 528F-G.
[3] 2003 (1) SA 389 (SCA) paras 9-10 at 395I-396E (per Vivier ADP).

defendant is under a legal duty to act positively to prevent the harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered. See the judgment of this Court in *Carmichele* [*Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA)] at para [7] and recent decisions of this Court in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paras [14]-[17]; *Cape Metropolitan Council v Graham* 2001 (3) SA 1197 (SCA) para [6]; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) paras [11] and [31]; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para [13] and the unreported judgment of this Court in *Minister of Safety and Security v Van Duivenboden*, case No 209/2001 delivered on 22 August 2002 [now reported at 2002 (6) SA 431 (SCA)], para [16].

[10] In applying the concept of the legal convictions of the community the Court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the Legislature and Judges. . . . '.

[59] In *Minister of Law and Order v Kadir*,[4] this Court, dealing with the alleged wrongfulness of the conduct of two police constables in failing to take down the particulars of an offending driver and his vehicle, which information would have enabled the seriously injured respondent to pursue a claim against the Multilateral Motor Vehicle Accidents Fund, despite such constables having been informed by a witness to the collision of the circumstances under which it occurred, stated as follows :

'As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (*per* M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands.'

[60] In *Knop v Johannesburg City Council*[5] Botha JA stated that the general nature of the enquiry in this regard is correctly set out in the following well-known passage in Fleming *The Law of Torts* 4 ed at 136 (as quoted in *Administrateur, Natal v Trust Bank van Afrika Bpk*):[6]

[4] 1995 (1) SA 303 (A) at 318F-H.
[5] 1995 (2) SA 1(A) at 27F-I.
[6] 1979 (3) SA 824 (A) at 833 *in fine*–834A (per Rumpff CJ).

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'[7]

[61] In this case, Roald's 'invaded interest' is his right to bodily integrity and security of the person, a right long regarded in our law as 'one of an individual's absolute rights of personality'.[8] As is abundantly clear from the inclusion of this right in the Bill of Rights in both the 1993 and the 1996 Constitution,[9] it is most certainly a right 'deemed worthy of legal protection'. However, it must be emphasised that:

'[21] When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict when its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of

[7] See too *Van Duivenboden* (*supra*) para 13 at 442C-E.
[8] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 145I-146C.
[9] Constitution of the Republic of South Africa Act 200 of 1993 (date of commencement 27 April 1994), s 11; Constitution of the Republic of South Africa Act 108 of 1996 (date of commencement 4 February 1997), s 12.

accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of the State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at the time be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting . . . There are also cases in which non-judicial remedies, or remedies by way of review and *mandamus* or interdict, allow for accountability in an appropriate form and that might also provide further grounds upon which to deny an action for damages. However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm . . .

[22]. . . It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed, as there were to be found in *Knop v Johannesburg City Council* [*supra*] . . . I accept (without deciding) that there might be particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence . . .'.[10]

[10] See *Van Duivenboden* (*supra*) paras 21-22 at 446F-448A. See further *Minister of Safety and Security and Another v Carmichele* 2004 (2) BCLR 133 (SCA) para 37 at 145B-146B.

[62] As was pointed out in both *Van Duivenboden*[11] and in the most recent *Carmichele* (SCA) case,[12] where there is no effective way to hold the State to account other than by way of a private law action for damages, and in the absence of any norm or consideration of public policy that outweighs it, a legal duty should be recognised unless there are public policy considerations which point in the other direction.

[63] In my opinion, there are, in the circumstances of this case, compelling public policy considerations which militate against imposing upon policemen such as Becker any positive duty to save people from drowning or to administer CPR on near-drowning victims. As emphasised by this Court in *Minister of Law and Order v Kadir*:[13]

'. . . The police force is first and foremost an agency employed by the State for the maintenance of law and order and the prevention, detection and investigation of crime with a view to bringing criminals to justice.'

Thus, in terms of s 205(3) of the 1996 Constitution:

'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

[11] *Supra* para 22 at 448D-E.
[12] *Supra* para 38 at 146C.
[13] *Supra* at 321F.

So too, under the South African Police Service Act 68 of 1995,[14] the functions of the police are in the main the maintenance of law and order and the prevention of crime. Unlike the situation in *Van Duivenboden*[15] and in *Minister of Safety and Security v Hamilton*,[16] the recognition of a legal duty on the police to save people from drowning or to attempt to resuscitate near-drowning victims would indeed, to my mind, have the potential to disrupt the effective functioning of the police and would require the provision of substantial additional training and resources. In my view, while the imposition of such a duty upon policemen in the position of Becker and Sergeant Pienaar might possibly be in accordance with the moral convictions of the community (upon which question I express no opinion one way or the other), the legal convictions of the community do not demand that Becker's failure to attempt to perform CPR on Roald ought to be regarded as unlawful.

[64] In summary, therefore, while I am of the view that Becker's positive acts in preventing the continuance of the CPR which Kobus was performing,

his conclusion in the absence of the required medical knowledge that Roald was dead, and his decision to cover Roald's body with a duvet, were indeed

[14] Date of commencement 15 October 1995.
[15] *Supra*.
[16] 2004 (2) SA 216 (SCA).

prima facie unlawful, any failure on his part himself to attempt to perform CPR on the child was not.

Negligence

[65] The following question is whether or not Becker acted negligently. The classic test for establishing the existence or otherwise of negligence, quoted with approval in numerous decisions of this Court, is that formulated by Holmes JA in *Kruger v Coetzee*[17] in the following terms:

'For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

. . . Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.'

[66] As was emphasised by this Court in *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Limited and Another:*[18]

'[21]. . . it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained

[17] 1966 (2) SA 428 (A) at 430E-G.
[18] 2000 (1) SA 827 (SCA) para 21-22 at 839G-840B.

of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.

[22] It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case . . .

. . . it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.'[19]

[67] Moreover, it must constantly be borne in mind that, in considering the question as to what is reasonably foreseeable:

'. . . one must guard against what Williamson JA called "the insidious subconscious influence of *ex post facto* knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight" . . . In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G-H (in All ER) :

> "After the event, even a fool is wise. But it is not the hindsight of the fool; it is the foresight of a reasonable man which alone can determine the responsibility."'[20]

[19] See too the most recent *Carmichele* case (SCA) (*supra*) para 45 at 148G-149A.
[20] See *S v Bochris Investments (Pty) Ltd and Another* 1988 (1) SA 861 (A) at 866J-867B, quoted in *Sea Harvest Corporation* (*supra*) para 27 at 842G-H and in the most recent *Carmichele* case (SCA) (*supra*) para 45 at 149B-D.

[68] Counsel for the first respondent submitted that Becker clearly had training in CPR and had a fair knowledge of the importance of CPR in a situation such as the present. I am of the view that this has by no means been established. In his examination in chief, Becker testified that he had received some CPR training in 1987 as part of his operational 'bush warfare' training, but that this training did not cover mouth-to-mouth resuscitation and was directed to the treatment of wounded persons in a war situation. Becker testified further that, in 1993, he had undergone a basic training course at the military base and that, during this course, basic CPR principles had been explained. However, no part of this course concerned the performance of CPR on infants. It is significant to note that, during his cross-examination, Becker was not questioned in any way as to the content of either course or as to the actual extent of his knowledge of CPR and matters connected therewith. Moreover, as was submitted by counsel for the appellants, there is no probative value in any allegation that any reasonable person should and would know that a near-drowning victim should be resuscitated until medical assistance arrives, because it is apparently so propagated in the media, particularly in so-called 'actuality programmes' on television. It is clear from Becker's evidence that, at the time of the trial, and having listened to the expert evidence, he realised, *with hindsight*, that he should not have stopped Kobus from performing CPR. However, at the time he examined the child, he

genuinely thought that Roald was dead, with no pulse, no breathing, fixed and dilated pupils, very pale and ice-cold. In this regard, it is important to note that both Sergeant Nel, who was a Level 3 emergency helper at the time, and Mr Oosthuizen, a qualified paramedic, testified that they had acquired their knowledge regarding the importance of continuing with CPR on a near-drowning victim until the victim revives or until expert help arrives, during the course of their specialised training.

[69] Both Dr Naudé and Professor Fritz, the expert witnesses who testified for the respondents, acknowledged that near-drowning victims do often appear to be dead to persons without any proper medical training and that, in such cases, it may be extremely difficult to detect any signs of life such as a pulse, breathing, a heartbeat, or pupil reflexes of the eye. Dr Naudé agreed that a layperson would consider that CPR was something to be performed on somebody who was still alive. It is also clear from the record that Kobus himself observed no signs of life whatsoever in Roald after he had been removed from the pool and after CPR had been performed upon him for some time. As Becker had no specialised medical training and did not know at the relevant time that CPR should be continued, in the case of a near- drowning incident, until suitably medically qualified personnel arrived, I am of the view that it cannot be concluded that Becker should, at the relevant time, have

realised that medical advances might be able to revive the child. Without any specialised knowledge of the importance of CPR, it cannot, in my opinion, be said that a reasonable person in Becker's position would have foreseen the reasonable possibility that an interruption of CPR on a child whom he genuinely believed to be dead, or the covering of such a child with a blanket (which he believed to be the decent and humane thing to do), could cause further harm to Roald. To my mind, it cannot be said that the respondents succeeded in establishing, on the requisite balance of probabilities, that Becker's conduct on the day in question fell short of the standard of the reasonable person in his position and with his knowledge.

[70] During the course of argument before this Court, reference was made for the first time to the possible applicability of the maxim *imperitia culpae adnumeratur*, ie that 'it is negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such activity'.[21] However, as is evident from the case law on the application of this maxim, it applies only if the person undertaking the activity in question knows or ought reasonably to know that he lacks the requisite expert knowledge or skill, so that the undertaking of the task or the engagement in the activity is itself

[21]J C van der Walt (revised by J R Midgley) 'Delict' 8 *Lawsa* Part 1 (reissue, 1995) para 94 and the authorites there cited.

blameworthy.[22] In the circumstances of the present case, it was not, in my view, established that Becker knew, or ought reasonably to have known, that deciding that Roald was dead and acting accordingly - when the child showed no signs of life whatsoever and when (as conceded by Dr Naudé) CPR would be considered by a layperson as something to be performed on a live 'patient' – was something for which special knowledge was required and that he did not have such knowledge. This being so, the maxim cannot be applied so as to establish negligence on Becker's part.

[71] Thus, as the first respondent did not, to my mind, succeed in proving, on the requisite balance of probabilities, that Becker was negligent in his conduct on the day in question, I would have allowed the appeal with costs and would have amended the order made by the court *a quo* so as to dismiss Mr Rudman's action with costs. As this is a minority judgment, however, it is not necessary for me to craft any order.

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B J VAN HEERDEN
ACTING JUDGE OF APPEAL

[22]Ibid; see also J Neethling. J M Potgieter & P J Visser (edited by J C Knobel) *Law of Delict* 4 ed (2001) 137 and the cases cited by these writers.

FARLAM JA

[72] I have had the advantage of reading the judgment written by my colleague Van Heerden AJA. While I agree with her conclusion that Becker's positive action in preventing the continuance of the CPR which Kobus was performing was unlawful and that his failure himself to attempt CPR on the child was not, I am unable to agree with her further conclusion that Becker did not act negligently in doing what he did.

[73] In my opinion, by taking charge of the situation and giving what amounted to an instruction to Kobus to discontinue CPR in circumstances where, because of his ignorance, he did not appreciate that it was inappropriate to do so, that there was a possibility that the child was still alive and that the latter's chances of making as full a recovery as was possible were being reduced, Becker acted negligently. He knew that his own knowledge of CPR was limited and he also knew that members of the police service whose

knowledge in this regard was more extensive than his were on their way to the scene. There was no necessity for him to interfere. If he had allowed Kobus to continue with the CPR which Kobus was administering, then it is clear that at least some of the brain damage ultimately sustained by Roald would not have been caused.

[74] In other words Becker's negligence consisted, not in being ignorant about CPR and whether it could be of any assistance to a child who had apparently drowned, but in undertaking the responsibility of deciding whether it should be discontinued when he lacked the skill and knowledge required for the proper exercise of the authority that went with that responsibility: see McKerron *The Law of Delict* 7 ed 38.

[75] In my opinion a reasonable person would not have undertaken the responsibility, in the circumstances then prevailing, to cause CPR to be discontinued because he or she would have appreciated the extent of his or

her ignorance on the point. After all, the consequences of stopping the CPR (which were potentially catastrophic if it was efficacious) were far more serious than those of continuing with it (if it were not doing any good).

[76] This finding makes it necessary for me to consider the further question as to whether Motata J was correct in holding that the Minister and Becker were liable for the full amount of the damages suffered by Mr Rudman in his personal and his representative capacities and that, *vis-à-vis* Bo, Becker was liable for 80 per cent of the damages and Bo for 20 per cent.

[77] The medical witnesses all agreed that it was simply not medically possible to determine to what extent the interruption of the CPR on Becker's instruction exacerbated the brain damage suffered by Roald and contributed to his present condition.

[78] Motata J held that Becker's negligence far exceeded that of Bo, that Becker and Bo 'were both concurrent wrongdoers at common law and joint

wrongdoers for the purposes of the apportionment of damages'. He found that Becker was 80 percent negligent and Bo 20 percent negligent, hence his finding as to their respective percentages of liability to which I have already referred.

[79] I do not agree that Becker and Bo are to be regarded as 'joint wrongdoers for the purposes of apportionment of damages'. The matter is governed by s 2(1) of the Apportionment of Damages Act 34 of 1956, which is in the following terms:

'Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.'

As was held in *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 622 B-D and *Minister of Communications and Public Works v Renown Food Products* 1988 (4) SA 151 (C), to fall within the Act the two defendants must have caused 'the same damage' and, where two separate acts of

negligence have caused different damage and resultant loss to a plaintiff, each defendant is liable only for such damage as he or she has personally caused. There is nothing in the Act which detracts from this position. See also *Rahman v Arearose Ltd and Another* [2001] QB 351 (CA), a judgment of the English Court of Appeal, to which counsel for the appellants referred, which concerned the meaning of the expression 'same damage' in s 1(1) of the United Kingdom Civil Liability (Contribution) Act 1978 (c 47). I shall return to this matter later in this judgment after I have considered the extent to which Bo is liable for all the damage suffered in this case.

[80] In the present case there was no basis for holding the Minister and Becker liable, as Motata J did, for all the damage Roald suffered from the time of his immersion in the swimming pool. Becker did not cause his immersion and he cannot be held liable for damage suffered prior to his intervention when he caused the CPR being administered to the child to be

stopped. He and the Minister (who is vicariously liable for his actions) can only be held liable for the damage he caused.

[81] Where, in a case such as this, it is simply not possible to make an allocation as to how much of the damage sustained was caused by the actions of Becker as opposed to Bo and it is clear that all the available evidence has been led on the point (the position may well be different when all the available evidence has not been led: cf the *Renown* case at 154 F-G and I-J), then it would seem that the court's duty to do the best it can in such circumstances (cf *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969 H-970 G and *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 573 I-J) will lead to a finding – as counsel for the appellants suggested should be made in this case – that Becker and the Minister are liable to pay half of the damages proved to have been suffered. This is the third of the three approaches discussed by Professor AM Honoré at p 72 of his monograph on

‘Causation and Remoteness of Damage’, published as part of Volume XI of the *International Encyclopaedia of Comparative Law,* and the one preferred by him as commending itself ‘as the fairest to both parties’, an opinion with which I respectfully agree.

[82] The first of the three approaches discussed by Professor Honoré is that in terms of which a plaintiff is non-suited because he or she has failed to show how much damage the particular wrongdoer has caused. This approach is contrary to the basic principle of our law referred to in the cases I have cited that, where a plaintiff proves that he or she has suffered some damage, in respect of which all the available evidence on the point has been led, the court does not non-suit such plaintiff but does the best it can (even if that best amounts to no more than an estimate) to assess the damages suffered.

[83] In terms of the second approach discussed by Professor Honoré, a successive wrongdoer is held liable for all the loss suffered because he or she

cannot show what portion thereof such wrongdoer did not cause. This involves putting an onus on the wrongdoer or wrongdoers in question, something which was in my view rightly rejected in the *Renown* case, *supra* at 154 E-F.

[84] The next question to be considered is whether Bo is jointly and severally liable for that portion of the total damage suffered by the plaintiff in his personal and his representative capacities for which the first and second defendants are liable. That Bo was negligent is not disputed, nor can it be disputed that he is liable for the damage suffered up to the time when Becker ordered the discontinuance of the CPR by Kobus. In my opinion Bo is also liable for the damage sustained thereafter because the discontinuance cannot be regarded as a *novus actus interveniens.* I say that because I am satisfied that the discontinuance was an inherent risk created by Bo's negligent acts and was reasonably foreseeable by him: cf *Kruger v Van der Merwe and*

Another 1966 (2) SA 266 (A) at 273 F-G.

[85] It is now convenient to return to the question as to whether s 2 of Act 34 of 1956 applies to Bo and Becker in respect of that portion of the damage for which Becker and the Minister are liable. It is true that for the reasons given above, Bo is also liable for the damage to the infliction of which Becker contributed, but I do not think that that makes Becker and Bo 'joint wrongdoers' for the purposes of the Act.

[86] I say this because I am of the view that the expression 'the same damage' in s 2 refers to all the damage suffered by the plaintiff in a case falling under Chapter II of the Act: cf s 2 (6) (a), which gives a joint wrongdoer against whom judgment is given 'for the full amount of the damage suffered by the plaintiff' a right of recourse against any other 'joint wrongdoer' to claim a contribution in respect of the other wrongdoer's responsibility for such damage based on the degree to which the latter was at

fault in relation to the damage suffered by the plaintiff, and to the damages awarded. Where, as here, the judgment to be given against Becker and the Minister is not for the full amount of the damage suffered by the plaintiff but only for that part of the damage for which Becker is to be regarded as being responsible, then the subsection does not apply and any right of recourse available to Becker and the Minister will have to be sought in the common law.

[87] If such a right does exist under the common law, it may well amount simply to a right to be reimbursed half of what Becker and/or the Minister are liable to pay to the plaintiff, once this has been paid, and not to a proportion based on the respective degrees of fault: cf *Windrum v Neunborn* 1968 (4) SA 286 (T) at 289 H to 290 G.

[88] While counsel for the Minister and Becker attacked in argument Motata J's finding that the extent of Bo's contribution to the damages to be paid by

the Minister and Becker was 20% - a finding based on the assumption that the Act applied and that the respective degrees of fault of Bo and Becker were to be determined - the wider questions to be considered if the common law applies were not argued. In the circumstances I do not consider it appropriate to investigate, without the benefit of counsel's submissions, the legal questions left open in *Windrum's* case, *supra*.

[89] In all the circumstances I am of the view that the appeal should be allowed with costs.

[90] The following order is therefore made:

1. The appeal succeeds with costs.

2. Paragraphs 4 and 5 of the order made by the court *a quo* are set aside and the following paragraphs are substituted therefor:

'4. It is declared that the first and second defendants are liable to the plaintiff, jointly and severally, the one paying, the other to be absolved, for

one half of the damages which the plaintiff may prove that he suffered in his personal and in his representative capacities as a result of the brain damage sustained by his son Roald on 6 October 1997.

5. It is declared that the third party is jointly and severally liable with the first and second defendants for the damages payable by them.'

IG FARLAM
JUDGE OF APPEAL

Concur:
MPATI DP