THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No 20134/2014

In the matter between:

FEDERICA ZA **APPELLANT**

and

ANDRÉ FREDERIK SMITH **FIRST RESPONDENT**

MATROOSBERG RESERVAAT CC **SECOND RESPONDENT**

Neutral citation:	*Za v Smith* (20134/2014) [2015] ZASCA 75 (27 May 2015).
Coram:	Brand, Cachalia, Petse JJA, Fourie *et* Mayat AJJA
Heard:	**11 May 2015**
Delivered:	**27 May 2015**

Summary: Delict – claim by dependants for loss suffered through death of their breadwinner who fell over a sheer precipice in a mountain resort – liability of respondents as owner and entity in control of resort – element of wrongfulness, negligence and causation considered

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ORDER

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

1 The appeal is upheld with costs, including the costs of two counsel, against the respondents jointly and severally.

2 The order of the court a quo is set aside and replaced by the following:

'(a) It is declared that the respondents are liable, jointly and severally, to compensate the plaintiff in her personal capacity and in her capacity as mother and natural guardian of her three minor children in such sum as may be agreed or determined in due course.

(b) The defendants are liable, jointly and severally, for payment of the plaintiff's costs, including the costs of two counsel.'

3 The cross-appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Brand JA (Cachalia, Petse JJA, Fourie et Mayat AJJA concurring):

[1] This appeal originates from a tragic incident on 27 June 2009 when the late Mr Pieralberto Za (the deceased) slipped on a snow covered mountain slope and fell over a 150 metre sheer precipice to his death. The incident occurred at Conical Peak, one of the highest mountain peaks in the Western Cape. It is situated on the farm Erfdeel near the town of Ceres and in the Matroosberg private reserve. The reserve is the property of the first respondent, Mr Andre Smith, on which the second respondent, Matroosberg Reservaat CC, conducts the business of the private nature reserve for gain. The deceased was the father of three minor children. At the time of his death their ages varied from eight to two years of age. The appellant, Ms Federica Za, was married to the deceased and is the mother of their children. She instituted action in the Western Cape Division of the High Court, Cape Town, in her personal capacity and in her capacity as mother and natural guardian of her three

children, for the loss of support they had suffered through the death of the deceased. In substance, her claim was based on delictual liability arising from the wrongful and negligent failure by the first and second respondents to take reasonable steps to avoid the incident which led to the death of the deceased.

[2] Before the commencement of the trial, the parties agreed to a separation of issues in terms of Uniform rule 33(4). In terms of the separation agreement, the issues relating to the respondents' delictual liability were to be determined first while those relating to the quantum of the appellant's damages stood over for later determination. The matter came before Griesel J. At the end of the preliminary proceedings, he held that the appellant had failed to discharge the onus of proving a causal connection between the alleged wrongful and negligent omission of the respondents, on the one hand, and the death of the deceased, on the other. In consequence, her claims were dismissed with costs. The appeal against that judgment is with the leave of the court a quo. There is also a cross-appeal by the respondents which is likewise with the leave of the court a quo. Broadly stated, it is aimed at the failure by the court a quo to award the costs of the respondents' expert witness, Dr Meiring Beyers.

Background facts

[3] The facts are not particularly complex and largely common cause. They appear from what follows. In conducting its business of a private nature reserve, the second respondent invited and allowed members of the public, for a fee, to make use of the recreational facilities available in the reserve. It did so with the full knowledge and approval of the first respondent. The recreational facilities available included four-wheel drive vehicle routes. One of the main attractions, particularly during the winter season, was the specific four-wheel drive vehicle route leading up to Conical Peak. The route proceeds over very rough terrain and ends in a fairly level plateau at the foot of Conical Peak where members of the public park their vehicles. In the immediate vicinity of this parking area, there is a sharp precipice falling 150 metres into a gorge known as Groothoekkloof. Although it is clear from the parking area that there must be a very deep gorge between that area and the sheer cliffs on the other side, the actual edge of the plateau is not visible, particularly when the surroundings are covered with snow, as it was on the day of the incident.

[4] Two witnesses called by the appellant were actually present when the tragic incident occurred. They were Mr Benjamin Moggee and Mr Otto Rall. Rall took a series of photographs immediately before and after the tragic event. These photographs were introduced at the trial and are of great benefit in understanding the evidence. In addition, the court a quo had the advantage of an inspection in loco when there was a significant amount of snow, both at the scene and along the four-wheel drive route to the top. Photographs taken at the inspection were also dealt with in evidence. This, to some extent, alleviates the disadvantage of those, including the members of this court, who did not attend the inspection.

[5] Moggee was a close friend and business associate of the deceased. Their business had an Italian name, Soluzione, because the deceased was a qualified architect of Italian origin. Somewhat ironic, in view of how he met his fate in South Africa where snow is an uncommon phenomenon, is that the deceased grew up in an area of the Italian Alps known as the Dolomites where he partook in the sport of downhill skiing and where he must have spent many days in the snow. On the fateful day Moggee and the deceased drove from Cape Town to Matroosberg to see the snow, each in his own four-wheel drive vehicle. Moggee had been in the area on at least three previous occasions together with his parents, wife and children. On at least some of these occasions, snow conditions prevailed. The deceased expressed a keen interest in going up Matroosberg in the snow, but the occasion had not presented itself previously. When heavy snow fell in late June 2009, the two of them managed to arrange the excursion. Their plan was that, after they had experienced the snow, they would go down to the river where they would have a braai.

[6] Upon their arrival at the office on the farm, they paid their entrance fee to the second respondent and then proceeded along the designated four-wheel drive track up the mountain towards Conical Peak through thick snow. They arrived at Conical Peak between 12h30 and 13h00 and parked in the snowbound parking area behind the vehicles that had arrived before them. According to Moggee’s estimation, there were already about 20 to 30 people on the mountain, including children. Some were skiing down the face of Conical Peak on pieces of cardboard used as homemade sledges. Moggee and the deceased got out of their vehicles. They intended to walk to a position where Moggee had had a picnic with his family on a previous occasion

and to enjoy the scene down the gorge from there. Moggee took two folding chairs and two beers from the vehicle and started walking. His impression of the surface in the parking area and its surroundings was that of white snow. To him it looked similar to what he had encountered on his previous visits. There were tracks in the snow and the surface on which they were walking, made what he described as the sound of fresh snow. He was not aware of the 150 metre immediate drop where the snow ended. According to Moggee, he was also unaware that the situation on Conical Peak that day was dangerous in any way. In addition, he inferred that the deceased, despite his knowledge of snowy mountains, did not see any danger either. Given the deceased's personality and the fact that both of them were the fathers of young children, so Moggee said, it is highly unlikely that, if the deceased suspected any hidden danger, he would not have alerted Moggee.

[7] The two of them started walking to the spot chosen by Moggee. He was carrying the two folding chairs and the beers. They walked parallel to the edge of the precipice. Without warning Moggee slipped. He indicated that he at first lurched backwards, then pulled himself forwards and landed on his hands and knees, jettisoning the chairs and the beers in the process. He then started sliding uncontrollably towards the precipice on his hands and knees. The surface was hard and slippery. He tried to dig his fingers in, but was unable to do so. Instead, he picked up speed. He saw a little patch of what looked like grass and as he went past, he stuck his left hand into it and was able to arrest his slide in this way. When he stopped he saw the deceased sliding past him on his backside towards the precipice with his arms folded across his chest in a brace position. Sadly he slid over the precipice and fell to his death. Where Moggee had stopped, the conditions under foot were so slippery that he could not get back onto his feet. He therefore called for help and was pulled from his position by others present in the area using ropes. Unaware of what happened to the deceased he fashioned a harness from rope and attempted to approach the edge of the precipice in search of his friend. The surface was too slippery for him to do so. He therefore used a spade to dig footholds into the surface. According to Moggee's estimation, the point where he had arrested his slide was a few metres from the precipice.

[8] Rall arrived at Conical Peak shortly before Moggee and the deceased had reached the parking area. He parked alongside the other vehicles in the parking area. When he and his wife alighted from the vehicle, they found that the area where they had stopped was hard and slippery. He had to dig his heels into the snow to prevent himself from falling on his backside. Nonetheless, he obviously did not perceive the situation as exceptionally dangerous. On one of the photographs that he took, he identified his wife as standing near the edge of the precipice. He testified that before he took the photograph, he had stood there with her. He said that he would not have done so if he had appreciated that there was any danger in them doing so. The reason why he did not appreciate the danger, he said, was that it was not apparent where the precipice was in relation to where they had been standing. He realised that there was a slope towards the precipice, but regarded it as a gentle slope which did not create any particular danger. It turned out that his concern about the slippery conditions underfoot had nothing to do with a fear of slipping over the precipice. His real concern was to avoid falling on his backside. Others were obviously under the same mistaken impression as Rall and his wife because numerous footprints in the snow are depicted by his photograph of the area. Rall was aware of Moggee and the deceased arriving and noted that they had walked between his vehicle and the deceased's vehicle towards the point where the incident had occurred. He did not see precisely where they went because he had his back turned to them. He also did not know what had caught his attention but he turned to see Moggee lying in the snow calling for help. He then assisted in recovering Moggee from his dangerous position.

[9] The appellant also called two expert witnesses, namely, Dr Rik de Decker and Mr Dion Tromp. Although De Decker is a medical specialist, he was not called for his professional expertise, but for his experience as a mountaineer, skier and mountain rescue practitioner in mountains all over the world, since 1982. In the light of his experience, he was able to speak authoritatively about snow, ice, Alpine conditions and the dangers they pose. He also knew Matroosberg well and in fact partook in the recovery of Mr Andrew John in 2007, who fell to his death from a spot close to where the deceased had met his fate. His evidence was that the combination of snow and ice is a continually changing environment. It varies from place to place and from time to time, even during the cycle of a single day. Although it is not an unusual

phenomenon to those familiar with these conditions, amateurs may be caught unawares. In consequence, they would also be unaware of the danger it poses. The fact that Matroosberg may be accessed by four-wheel drive vehicles right up to Conical Peak, so he said, increases the potential danger, because it causes people to underestimate the conditions and thus be lulled into a false sense of security.

[10] The prevailing conditions near Conical Peak on the day of the incident were described by De Decker as 'objectively dangerous'. By that he meant that there was a real and imminent danger which was unlikely to be recognisable by those with no experience of these conditions. What rendered the conditions so dangerous, he said, was the fact that there was a soft layer of unfrozen snow, at places no more than one to two centimetres thick, concealing a hard layer of frozen ice which was extremely slippery and dangerous, particularly on a slope. And if one slipped and fell on the slope, he explained, one could slide for hundreds of metres, only coming to a stop once the incline flattens or something else arrests the slide. In his expert notice in terms of Uniform rule 36, he expressed the view that the layer of unfrozen snow had been caused by freshly fallen snow. After he had spoken to those who were there on the day, it became clear to him, however, that there was no snowfall on that day. He then concluded that the layer of unfrozen snow had been caused by the fact that the top layer had melted. With reference to the deep layer of unfrozen snow encountered by the vehicles on their route up the mountain, as depicted in the photographs of Rall, he explained that the temperature was higher at the lower altitudes than at Conical Peak. In addition, the rate of melting also had to do with the elevation and position of the sun, the slope orientation, protruding topographical features, and so forth. In short, because the parking area was higher and the incidence of sunlight less than en route up the mountain, this resulted in less melting of frozen snow than would have been encountered en route. To the unwary everything would, however, look virtually the same: a mountain area covered by soft snow.

[11] Tromp is an expert in height safety equipment and in working at heights. Part of his occupation is to train people to work around high and dangerous sites. In addition, he has substantial experience in mountaineering and skiing in snow and icy conditions. He has also been involved in mountain rescue operations since 1973. In this regard, he was involved in the recovery of the bodies of Mr Andrew John and Ms

Elaine Abrams, who fell to their deaths in the Conical Peak area, into Groothoekkloof in 2007 and 2010 respectively. He confirmed De Decker's evidence that, on 27 June 2009, circumstances at Conical Peak presented a serious danger which would not have been evident to the uninitiated. This danger was the risk of slipping on the hard frozen ice underlying a thin layer of snow, whatever the distance from the edge and then sliding down the precipice.

[12] Tromp also expressed an opinion as to what steps could have been taken in order to prevent the incident. In his expert summary in terms of Uniform rule 36(9), he made four suggestions: (a) The total prohibition of vehicles on Matroosberg when conditions are dangerous. (b) The erection of catching fences that will prevent people from falling over the edge. (c) The prohibition of vehicle access to the current parking area by providing a turning point and a parking site lower down. (d) Warning and educating people by way of signs and notices, when dangerous conditions present themselves, so that the unwary may know that they are entering a very treacherous area.

[13] In his evidence, he abandoned proposals (a) and (b). At the same time, he expanded on (c) and (d). As to (c), he proposed that a stonewall or gabion fence be built with an opening through which visitors would have to pass on foot. This would cause people to walk some distance in the snow and in this way make themselves aware of the treacherous mountain environment. At the entrance thus created by a stonewall or fence, he recommended that a number of graphic warning signs be placed that alerted visitors to keep away from the precipice and of the dangers of slipping and sliding on the surface. As to (d), he further proposed that a line of poles connected by markers should be placed along the line beyond which visitors should not be allowed to go closer to the precipice and warning that treacherous conditions existed on the other side of the line. He also suggested that an induction or briefing, alerting visitors to the dangers posed by conditions to be encountered on Conical Peak, beyond the line of poles, should be held at the entrance of the resort prior to visitors commencing the assent on the four-wheel drive route to Conical Peak. He further testified that all of this could be done at a minimal cost, which he estimated to be between R50 000 and R70 000. No witness was called on behalf of the

respondents, despite their notice in terms of Uniform rule 36(9), that they intended to call Dr Meiring-Beyers as an expert witness.

Wrongfulness

[14] In the court a quo as well as in this court the respondents' first line of defence rested on what they proposed to be the absence of wrongfulness. For this defence they relied, in the main, on a proposition of law for which they sought to find support in older authorities such as *Skinner v Johannesburg Turf Club* 1907 TS 852 at 860 and MacIntosh and Scoble *Negligence in Delict* 5 ed (1970) at 196-198. What this proposition amounts to in essence, is that owners and others in control of property, are under a duty to warn and protect those who visit the property against hidden dangers of which the latter are unaware, but not against dangers which are clear and apparent. The court a quo found merit in this defence. That much appears from the following passage in the court's judgment (paras 24 and 25):

'Having been to the scene of the incident . . . I am inclined to agree with this line of reasoning. . . . On arrival at the top one is presented with a dramatic view of the various mountain ranges and peaks towards the north and the east. It is immediately apparent, even to the first-time visitor, that there must be a very deep gorge between the parking area and the cliffs clearly visible on the other side of the kloof. The fact that the land slopes slightly towards the edge of the gorge is likewise clear and apparent even though the actual edge itself is not visible from the parking area. As for the condition of the snow underfoot, the qualities of snow can vary from moment to moment and from place to place and can be extremely treacherous. This likewise becomes clear and apparent as soon as visitors disembark from their vehicles, as confirmed by Mr Rall under cross-examination.

In short, the potential danger inherent in the snow-covered site near a deep precipice ought to be clear and apparent to a visitor upon arrival on the scene, which danger increases exponentially the closer one approaches the concealed edge of the precipice.

Having said that, I do not find it necessary to make any firm finding in this regard or to base the judgment on this issue. In the view that I take of the matter it may be assumed in favour of the plaintiff (without finding) that the defendants were under a legal duty to protect persons in the position of the deceased against the possibility of harm and that their failure to take adequate steps to prevent foreseeable harm was indeed unlawful and negligent. However, proof alone that reasonable precautions were not taken to avoid foreseeable harm and that the harm occurred does not establish that the former caused the latter. Before the defendants can be held liable, the court must be satisfied that there is indeed a causal link

between the defendants' negligence and the death of the deceased. It is on this aspect, in my view, that the plaintiff's claim falters.'

[15] As foreshadowed in the final sentence quoted, the court a quo eventually dismissed the appellant's claim on the basis that she had failed to establish the element of causation. I shall return to this. But I propose to deal first with the element of wrongfulness. In doing so, let me start out by saying that I do not believe that the concept of a clear and apparent danger, on which the respondents so heavily relied for this line of defence, has anything to do with wrongfulness at all. In my view it pertains to negligence. Hence it again brings to the fore the potential confusion between these two discrete elements of delictual liability: a confusion which not only offends the legal purists, but can in fact lead to the wrong imposition of delictual liability. The import of wrongfulness in the province of delict – and particularly with reference to delictual liability for omissions and pure economic loss – has been formulated, both by the Constitutional Court and in this court on numerous occasions recently (see eg *Gouda Boerdery BK v Transnet* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) para 12; *Local Traditional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 20; *Hawekwa Youth Camp v Byrne* [2009] ZASCA 156; 2010 (6) SA 83 (SCA) para 22; Johan Scott 'Akwiliese aanspreeklikheid vir suiwer ekonomiese verlies – Die Hoogste Hof van Appèl draai briek aan' 2014 4 TSAR 826). In the most recent of these expositions by the Constitutional Court in *Country Cloud Trading CC v MEC Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) paras 20-21, Khampepe J explained the position as follows:

'Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability.

Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this court in *Loureiro* [ie *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53] recently articulated that the wrongfulness enquiry focuses on –

"the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages", notwithstanding his or her fault.' (Footnotes omitted.)

[16] With reference to the criterion for wrongfulness referred to in *Loureiro*, as to whether it would be reasonable to impose liability on the defendant, the Constitutional Court sounded the following note of caution in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae*) [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122):

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

[17] The potential confusion between wrongfulness and negligence warned against in *Le Roux* becomes readily apparent when the test for wrongfulness is formulated, as it unfortunately was in *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 9, namely:

'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 defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.'

[18] This is to be compared with the well-known formulation of the test for negligence by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-G when he said that negligence would be established 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.

This has been constantly stated by this Court for some 50 years. Requirement *(a)* (ii) is sometimes overlooked. 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.'

[19] It should be readily apparent that if the test for wrongfulness is whether it would be reasonable to have expected the defendant to take positive measures, while the test for negligence is whether the reasonable person would have taken such positive measures, confusion between the two elements is almost inevitable. It would obviously be reasonable to expect of the defendant to do what the reasonable person would have done. The result is that conduct which is found to be negligent would inevitably also be wrongful and *visa versa*. The question then arising was the very title of an academic article by Prof Johan Neethling, namely 'The Conflation of Wrongfulness and Negligence: Is it always such a bad thing for the law of delict?' (2006) 123 *SALJ* 204*.* To which our former colleague, R W Nugent, responded extra-judicially in an article entitled 'Yes, it is always a bad thing for the law: A Reply to Professor Neethling' (2006) 123 *SALJ* 557. I find myself in respectful agreement with this answer by our former colleague. My reason, broadly speaking, is that this confusion may lead to the element of wrongfulness being completely ignored. If negligence – whether properly understood or under the guise of wrongfulness – is found to be absent, the confusion would make no difference to the result. In either event, liability will not ensue. By way of illustration a comparison can be made between *Administrateur Transvaal v Van der Merwe* 1994 (4) SA 347 (A) on the one hand, and *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA), on the other. In these two cases, the defendant was held not liable in circumstances which were virtually the same. This, despite the fact that the issue was considered in *Van der*

Merwe – wrongly in my view – as one pertaining to wrongfulness whereas in *Gouda Boerdery BK* it was regarded – rightly in my view – as one of negligence. But where the confusion will indeed make a difference is where negligence – properly understood or under the guise of wrongfulness – is found to have been established. In that event it will lead to the imposition of liability without the requirement of wrongfulness – properly understood – being considered at all. The safety valve imposed by the requirement of wrongfulness – as described by the Constitutional Court in *Country Cloud Trading CC* – will simply be discarded. If that were to have happened, for instance in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73;2006 (1) SA 461 (SCA) and in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A), the defendants in those cases would have been held liable, despite the ultimate conclusion arrived at by this court in those cases that, for reasons of public and legal policy, it would not be reasonable to impose delictual liability on them.

[20] Reverting to the enquiry into wrongfulness – properly understood – in this case, it will be remembered that prior to the watershed decision of this court in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A), liability for omissions was confined to certain stereotypes. One of these was referred to as relating to those in control of dangerous property, who were said to be under a duty to render the property reasonably safe for those who could be expected to visit that property. A discussion of this stereotype is to be found, for example, in the passages from *Skinner v Johannesburg Turf Club* 1907 TS 852 at 860 and MacIntosh and Scoble *Negligence in Delict* 5 ed at 196-199*,* upon which the respondents exclusively relied for their argument. After *Ewels*, those stereotypes did not become entirely irrelevant. They still afford guidance in answering the question whether or not policy considerations dictate that it would be reasonable to impose delictual liability on the defendant in a particular case, although these stereotypes no longer constitute the straitjackets that they were before *Ewels* (see eg *Cape Town Municipality v Bakkerud* 2000 (3) (SA) 1049 (SCA) para 14; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C) at 480; 8(1) *Lawsa* 2 ed sv Delict, para 65). Having regard to this stereotype of those in control of dangerous property, as well as other considerations of policy finding application on the facts of this case, I am satisfied that the element of wrongfulness had been established by the appellant.

[21] Broadly speaking my reasons for this finding are as follows. In determining wrongfulness, the other elements of delictual liability are usually assumed. Hence the enquiry is whether – on the assumption (a) that the respondents in this case could have prevented the deceased from slipping and falling to his death; and (b) that he had died because of their negligent failure to do so – it would be reasonable to impose delictual liability upon them for the loss that his dependants had suffered through their negligence. While denying, of course, that these assumptions could validly be made, counsel for the respondent conceded that, if they were true, the answer to the question posed must be 'yes'. I believe that this concession was rightly and fairly made. Apart from the fact that both respondents were in control of a property, which held a risk of danger for visitors, the second respondent, with the knowledge and consent of the first respondent, as owner of the property, allowed members of the public, for a fee, to make use of a four-wheel drive route, designed to lead directly to the area which proved to be extremely dangerous.

Negligence

[22] In the light of the aforegoing, it is apparent that the defence relied upon by the respondents, that the danger which materialised when the deceased slipped and slid to his death, was clear and apparent, relates to the second leg of the *Kruger v Coetzee* test for negligence. As we know, this leg calls for an enquiry into whether the reasonable person, in the position of the respondents, would have taken any steps to warn and protect persons in the position of the deceased against the harm that he eventually suffered. Properly construed, the defence raised by the respondents thus seeks to provide the negative answer to this question, namely, that the reasonable person would not have done so, because these dangers would be patently clear and apparent to those in the position of the deceased. In consequence, those in the position of the deceased could reasonably be expected to protect themselves.

[23] In support of their contention that the danger which eventually materialised was clear and apparent, the respondents aligned themselves with the factual findings by the court a quo, which were essentially threefold. First, that in this regard the conditions at Conical Peak were virtually no different from those prevailing at Table Mountain and Tugela Falls in the Drakensberg where, so the court held (in

para 23), ‘the danger was so clear and apparent that one simply does not find signs warning people that they were on top of a mountain – notwithstanding the fact that death or injury to visitors is entirely foreseeable at both places’. Secondly, that it should be apparent even to those visiting Conical Peak for the first time, that there must be a very deep gorge between the parking area and the cliffs on the other side of the kloof, and finally, that on the day in question, it should have become apparent to all visitors, as soon as they alighted from their vehicles, that conditions underfoot were slippery and extremely treacherous, as confirmed by the evidence of Rall.

[24] As to the first of these considerations, I think the short answer is that, in determining what preventative steps the reasonable person would or would not take, every case must depend on its own facts. It follows that if the question were to arise whether or not the reasonable person would take measures to warn and protect visitors to certain areas of Table Mountain or the Drakensberg escarpment at Tugela Falls against the dangers they may encounter, it could only be answered with regard to all the facts and circumstances of that case. Included amongst these would be, for instance, the proportionality considerations which would require the weighing up of the prospects of the proposed measures being successful; the degree of risk of the harm occurring; the extent of the potential harm; the costs involved in taking the preventative measures proposed; and so forth. To decide, without having regard to all these considerations that the reasonable person would never take any steps to protect or warn visitors to Table Mountain or Tugela Falls, would at best be superficial and ill-considered. Moreover, simply to transpose this ill-considered decision onto the facts of this case, would plainly be untenable.

[25] As to the second consideration, it is undoubtedly so that the presence of the deep gorge somewhere between the parking area and the cliffs on the other side must have been known to every visitor. The problem is that the distance to the gorge would be unknown, particularly in conditions of snow and ice, because the actual edge itself was invisible. And if anything, it is that distance which would assist the visitor in determining the extent of the danger. After all, as the court itself held (in para 25), ‘the danger increases exponentially the closer one approaches to the concealed edge of the precipice’. As a generic statement, this must be so. Even more significantly, however, is De Decker’s testimony that, once one starts slipping

on ice one may slide for hundreds of metres. In these circumstances, the exact distance to the gorge loses much of its significance. Knowledge which then becomes crucial relates to the extent of the danger of slipping on ice: that danger being that once one starts sliding one may not be able to arrest that slide, despite one's distance from the gorge that may otherwise appear to be quite safe. This, so De Decker testified, is exactly what the unwary visitor would not appreciate.

[26] As to the third consideration, namely that everyone in the position of the deceased would have recognised the possibility of slipping on ice, the first answer is that Moggee says he did not appreciate that danger. According to his evidence he thought he was walking in snow until his feet suddenly slipped from under him. Even if he then realised the extent of the danger confronting him, it was too late. De Decker gave a theoretical explanation why Moggee's description of what happened to him was plausible. The respondents' answer to the expert opinion of De Decker was, however, that direct evidence as to conditions prevailing on that day must trump the inferences upon which De Decker relied. That must be right. But, as I have said, De Decker's evidence only confirms the plausibility of the direct evidence of Moggee. The respondents' further contention that Moggee's direct evidence could nonetheless not be relied upon, rested on two legs. First, the evidence of Rall that he found conditions underfoot to be extremely slippery and, secondly, the photographs of the scene that were taken by Rall on that day showed that the danger was manifest. As to Rall's evidence regarding what he encountered, I do not believe it constitutes a sufficient basis for the rejection of Moggee's version. It was common cause at the trial that conditions underfoot varied from moment to moment and from place to place. It follows that the mere fact that Rall slipped on an icy patch when he alighted from his vehicle, does not mean that the same happened to Moggee.

[27] With regard to the photographs taken by Rall that day, the respondents sought to point out that, in the area where Moggee and the deceased had slipped and started sliding, the surface appears to be covered by ice as opposed to melted snow. Again I believe there are two answers to this argument. First, I find it very difficult to distinguish, by just looking at the photographs, between undisturbed molten snow, on the one hand, and hard ice, on the other. Secondly, it is common cause that where Moggee and the deceased actually slipped they were in fact on

hard ice. Moggee's testimony was that he did not realise that he was about to slip on hard ice before it actually happened. It follows that the photographs do not provide a sufficient basis to reject Moggee's version as to what happened to him and the deceased that day. On that version, Moggee and the deceased were indeed confronted by dangerous conditions that were not clear and apparent to them. Even more significant in the present context, however, is that Rall himself clearly did not appreciate the nature of the danger that confronted him. As he said, he thought that the consequence of slipping would be that he could fall. What he did not realise was that once he slipped and fell, he could slide over the edge of the cliff. To me the difference between the two types of danger is important. The one entails the risk of, at worst, an injury, while the consequences of the other could be fatal, as occurred in this case.

[28] With reference to the measures proposed by Tromp as to what the reasonable person in the position of the respondents could have done to warn and protect the unwary visitor against the danger of slipping and sliding over the precipice, the respondents did not contend that these measures would not be effective to protect those who were indeed unaware of these dangers. To me it is clear that they probably would have. The respondents' answer to these proposals was in essence that there could be no unwary visitors because the dangers would have been clear. But I have already decided that this answer is not good. The respondents also did not argue that the measures proposed by Tromp would be proportionally too expensive or unsustainable. I believe that they clearly would not be so. An answer that the respondents did raise with regard to these measures, was that they would deface the stunningly beautiful environment at Conical Peak. The problem with this answer, as I see it, is that the environment has already been compromised by the construction of a four-wheel drive route right up to the parking area and by the erection of direction signs. Equally clear is the fact that the respondents must take responsibility for these intrusions into the natural beauty of the environment. In the circumstances, I conclude that the reasonable person in the position of the respondents would have taken the precautionary measures proposed by Tromp. What inevitably follows, is the finding that the respondents were negligent in having failed to do so.

Causation

[29] As we know, the basis upon which the court a quo eventually found against the appellant was that she had failed to establish the element of causation. The ratio for this finding appears from the following statement in the court judgment: (para 36)

'Reverting to the evidence in this case, one is confronted with the striking example of Mr Moggee, who had previously visited the site on no less than four occasions, both in summer and in winter, and who was accordingly well acquainted with the lay of the land. He had previously seen the kloof and had sat with his family in the snow on the edge of the precipice admiring the view. He wanted to repeat that experience with his friend on the day in question and to experience the thrill associated therewith. Both he and the deceased were also acquainted with the varying qualities of snow in different circumstances. The "induction" and warning signs proposed by Tromp would have equipped first time visitors with the exact same knowledge that Moggee already had. The fact that, notwithstanding this knowledge, he slipped literally to within an inch of his life demonstrates persuasively that the steps proposed by Tromp would not, on the probabilities, have prevented the death of the deceased . . . .'

[30] The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, eg by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-H. What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty (see eg *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25; *Minister of Finance v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) para 33. See also *Lee v Minister of Correctional Services* [2012] ZASCA 30;2013 (2) SA 144 (CC) para 41.)

[31] I do not suggest that the court a quo misunderstood the but-for test. My difficulty lies in the manner of its application, which is reflected in the passage from the judgment that I have quoted. To begin with, the proposition that appears to be crucial to the application is that, even if the danger of slipping and sliding to one's death would not have been apparent to the amateur first time visitor, it was indeed apparent to Moggee who had been there before. Measures alerting him to that danger would therefore be neither here nor there. My first problem with this line of reasoning is that I do not understand how Moggee's knowledge can be transposed onto the deceased. More significantly, however, the very point of the matter appears to be that when Moggee visited the area on previous occasions, the conditions were quite different and far less dangerous. It follows that, if anything, this was one of the very factors which served to lull him into a false sense of security. Coupled with the court's line of reasoning was the proposition emphasised by the respondents on appeal, namely that, since the deceased grew up in the Dolomites, he would probably be in an even better position than Moggee to recognise the dangerous situation that confronted them. This may be so. But, I believe the argument again misses the point. The point is not whether Moggee or the deceased should have been more alert and that, if they were, they would have realised the danger. That could perhaps be classified as negligence. But since we are dealing with a dependant's claim, negligence on the part of the deceased – or even less on the part of Moggee – would be of no consequence.

[32] In order to succeed in proving that the warning measures proposed by Tromp would have made no difference, the respondents would have to show that the deceased – and, for that matter, Moggee – were actually aware of the danger that they were in. Moggee denied that he was. The respondents contended, however, that this denial is rendered untenable by the inevitable inference from the facts. In support of this contention, they again relied mainly on the evidence of Rall. However, I find this contention unsustainable. Rall himself, as I have pointed out, did not recognise the real import of the danger that confronted him or his wife on that day. In addition, as Moggee explained, he and the deceased were both the fathers of young children, and had good reason not to expose themselves to mortal danger. Their very behaviour that day also indicated that they were not looking for adventure or an adrenalin rush. While they were making their way to the lookout point with their

chairs and their beers, they were quite relaxed, until disaster unexpectedly struck. Unlike the court a quo, I therefore do not think it can be found as a fact that the warning measures proposed by Tromp would be of no consequence. On the contrary, in my view, they would probably have been effective. This means that, but for the respondents' wrongful and negligent failure to take reasonable steps, the harm that befell the deceased would not have occurred. On this basis I believe that the appeal should be upheld. As to the cross-appeal, counsel for the respondents conceded that it would only arise if the appeal were to fail. In the event, the cross-appeal cannot succeed either.

[33] In the result:

1 The appeal is upheld with costs, including the costs of two counsel, against the respondents jointly and severally.

2 The order of the court a quo is set aside and replaced by the following:

'(a) It is declared that the respondents are liable, jointly and severally, to compensate the plaintiff in her personal capacity and in her capacity as mother and natural guardian of her three minor children in such sum as may be agreed or determined in due course.

(b) The defendants are liable, jointly and severally, for payment of the plaintiff's costs, including the costs of two counsel.'

3 The cross-appeal is dismissed with costs, including the costs of two counsel.

F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	A R Sholto-Douglas SC & F Smuts Instructed by: Brink De Beer & Potgieter Inc, Cape Town c/o Honey Attorneys, Bloemfontein
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