

Defining 'reasonable' in the school setting: The legal standards for school principals, administrators, and educators in South Africa and the United States

Phillip T.K. Daniel^{*} and Scott Greytak^{**}

1 Introduction

The expectations and barriers that public school managers¹ face in today's educational atmosphere are extensive. They include a multitude of problems requiring a range of different responses. In a study published in the United States by the Stanford Educational Leadership Institute, researchers asserted that modern school principals are expected to be both well-versed in legal, contractual, and policy matters and to act as 'educational visionaries ... assessment experts, budget analysts, facility managers, [and] special program administrators'.² At the same time, principals are charged with tending to the needs of often-conflicting parties, including students, parents, school district leaders, teachers, teachers' unions, and a variety of state and national governmental agencies.³

Unfortunately, in analysing whether a principal is fulfilling his or her *legal* duties, the standard used by courts in South Africa and the United States only invites further inquiry: school principals and administrators are required to act 'reasonably'. Usually, this vague yet definable standard of 'reasonableness' reflects how a society – through its laws – believes that an objective person in society *should* act. Furthermore, in the case of school principals or administrators,

^{*}JD, EdD, William and Marie Fleisher Professor of Educational Administration and Adjunct Professor of Law at Ohio State University, Columbus, Ohio, United States.

^{**}JD, attorney with Campinha Bacote LLC in Washington, DC, United States.

¹The term 'principal' is used in South Africa, whereas principals are considered one type of school 'administrator' in the United States.

²Davis *et al* *School leadership study: Developing successful principals* (2005) 3.

³The terms 'learners' and 'educators' are preferred in South African law and policy, while 'students' and 'teachers' are used in America. In this article these terms will be used interchangeably.

reviewing courts in both South African and the United States have implicitly customised this objective standard as a reasonable *school principal* (or administrator), thus incorporating a specialised and tailored standard that reflects the unique context of the school environment.

The purpose of this article is to explore how these two nations define and describe a reasonable principal when addressing conflicts between a school and its students. In exploring this standard, the meaning of such 'reasonableness' is drawn from many sources, including the constitutions, legislation, judicial opinions, and laws of tort and delictual liability of the United States and South Africa. Ultimately, the legal duties of the 'reasonable school principal' are found to be multidimensional, complex, and roundly demonstrative of the ever-evolving nature of two distinct social landscapes.

2 The reasonable administrator in the United States

Unlike the South African Constitution, the United States Constitution (hereinafter US Constitution) makes no provision for a system of public education, nor does it explicitly guarantee the citizenry any right to public education.⁴ The United States Supreme Court has accordingly been unwilling to read into existing constitutional rights an implicit guarantee of public education. Thus, the right to a public education must be found within the constitutional and statutory provisions of the individual states, and all 50 states do in fact guarantee some form of education to their residents. However, the amount and type of education, the specific beneficiaries, and the degree of financial support offered to schools differ significantly among both the states and the individual districts within the states.

This is not to say that the federal government has no role in enacting education-related legislation or influencing state education systems. Rather, the federal government has promulgated several pieces of legislation with a direct bearing on state educational policy, including Title VI of the Civil Rights Act of 1964 (addressing race, gender and national origin discrimination), Title IX of the Education Amendments of 1972 (addressing gender discrimination in education), and the Individuals with Disabilities Education Act (addressing handicapped students in pre-K through twelfth grade). Once a state undertakes to provide education, rules governing access remain subject to constitutionally protected rights and must be reasonable. Accordingly, courts have found state statutes and regulations unconstitutional because they limit access to public education based on race, sex, religion, marriage, wealth, pregnancy, or physical or mental disability.

⁴See Daniel and Greytak 'An analysis of the "right" to education in South Africa and the United States' (2012) 27(2) *SA Public Law* 355-364.

2.1 *Equal protection*

The Equal Protection Clause of the Fourteenth Amendment to the US Constitution is the primary constitutional mechanism for combating discrimination. In the education context, the Supreme Court in *Brown v Board of Education*⁵ held that the denial of educational access to children on the basis of race violates the Equal Protection Clause.⁶ *Brown* was the progenitor of a number of desegregation cases in which the federal courts retained a great deal of authority. But over the years, the Court has taken a different course, employing a more deferential standard. For instance, in the case of *Milliken v Bradley*,⁷ then-Chief Justice Warren Burger found that judges were not educators, did not have specialised knowledge and, hence, had no power to address cases involving inter-district segregation based on private decision-making. The Court continued this deference to 'local control' by upholding attendance policies established by school officials, independent of discriminatory motive or result, and stated that judges were not in a position to supplant the decisions of states.

More recently, in *Parents Involved in Community Schools v Seattle School District No. 1* (hereafter 'PICS'), the Court held that school districts could not use race as a factor to achieve diversity in public schools.⁸ Specifically, the Court held that K-12 school districts are not 'constitutionally compelled or permitted to undertake race-based remediation.'⁹ This judicial dance concerning local control has, at best, left educators confused as to whether they can take affirmative steps to address racial inequality.

2.2 *Freedom of expression*

The First Amendment to the US Constitution protects every American citizen's right to freedom of speech.¹⁰ However, this protection is not absolute;¹¹ rather, courts must weigh the school's need to promote community values and to control discipline against a student's right to free and unfettered expression.¹² Further, the First Amendment does not provide safe harbour to what is considered

⁵347 U.S. 483 (1954).

⁶*Id* 483.

⁷418 U.S. 717 (1974).

⁸551 U.S. 70 (2007).

⁹*Id* 70.

¹⁰US Constitution amend. I.

¹¹*Konigsberg v State Bar of California*, 366 U.S. 36, 49 (1961). (The Supreme Court expressly declared that it 'reject[ed] the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are absolutes').

¹²The First Amendment of the United States Constitution (hereinafter US Constitution) reads in part that 'Congress shall make no law abridging the freedom of speech'.

'unprotected' speech.¹³ Incorporating these two premises, the Supreme Court created a framework for schools to follow when regulating student speech in *Tinker v Des Moines Independent Community School District*¹⁴: if the expression (1) substantially interferes with the work of the school or (2) impinges upon the rights of other students, the prohibition of particular expression of opinion is justified.¹⁵

This landmark case became the foundation upon which almost every student speech case now rests. However, the *Tinker* decision has been tempered by subsequent Supreme Court decisions. Since *Tinker*, the Supreme Court has declined to extend First Amendment protection to student speech that is lewd and sexually provocative,¹⁶ promotes illegal drug use¹⁷ or occurs as part of official school-sponsored activities (such as a school newspaper).¹⁸ Unlike *Tinker*, the Court in its subsequent decisions appeared to be less protective of student speech and more deferential to school authorities, based on the lewd or improper content of the student's words.

The implications of the Court's free speech jurisprudence on school administrators seeking to maintain a stable, non-disruptive learning environment are serious and involve many multi-faceted questions, including whether the speech is protected or unprotected, and whether a sufficient nexus exists to suppress off-campus speech. The Court's jurisprudence has failed to provide clear guidance to administrators in this respect.¹⁹

2.3 Due process

The due process protections for public school students are found in the Fifth and Fourteenth Amendments to the US Constitution. The Fifth Amendment restrains the power of the federal government, while the Fourteenth Amendment restrains the power of individual states. Both amendments provide, among other things, that no person shall be deprived of life, liberty, or property, without due process of law.²⁰ The federal courts have interpreted these provisions to confer two kinds

¹³See Ceglia 'The disappearing schoolhouse gate: Applying Tinker in the Internet Age' (2012) 39 (4) *Pepperdine LR* 939-988.

¹⁴393 U.S. 503 (1969).

¹⁵*Id* 509.

¹⁶*Bethel School District No. 403 v. Fraser*, 478 U.S. 675(1986).

¹⁷See *Morse v Frederick*, 551 U.S. 393 (2007).

¹⁸See *Hazelwood School District v Kuhlmeier*, 484 U.S. 260 (1988).

¹⁹See, eg, Daniel and Greytak 'A need to sharpen the First Amendment contours of off-campus student speech' (2011) 273 *West's Education Law Reporter* 21.

²⁰The relevant portion of the Fifth Amendment reads: 'No person shall be ... deprived of life, liberty, or property, without due process of law ...' US Constitution amend. V. The comparable portion of the Fourteenth Amendment reads: 'No State shall ... deprive any person of life, liberty, or property,

of rights: procedural due process rights, and substantive due process rights. Generally, substantive due process claims are rare, and only prevail when school officials act either outside their scope of authority or in an arbitrary manner. Thus, this article focuses on the issues surrounding procedural due process.

Procedural due process requires that fair procedures be employed in restricting someone's right to life, liberty, or property. The basic elements of procedural due process, common across varying circumstances, are: (1) notice, i.e., informing the person of the contemplated governmental action to restrict one's life, liberty, or property, as well as the reason for the action; and (2) a chance to respond, i.e., allowing the person to tell his or her side of the story at some kind of a hearing, whether informal or formal. The amount of process due can be viewed as a sliding scale: the less serious the contemplated governmental action against the person, the more informal the procedures. When more is at stake, more extensive procedures are required.

At school, procedural due process issues arise primarily in the context of disciplinary actions against students. Temporary and brief disciplinary actions such as being sent to the principal's office, brief detentions, and the restriction of privileges often do not implicate due process because when the infringement of alleged rights is *de minimus* (trifling), the legal system declines to get involved. However, when it comes to more onerous disciplinary actions such as suspension from school, the Supreme Court has held that students have both a property right and a liberty interest at stake.²¹ Therefore, prior to the imposition of such a sanction, it is necessary for school administrators to provide students facing suspension with oral or written notice of the charges and with an opportunity to hear the evidence and present the students' side of the story.

2.3.1 Discipline

As intimated above, due process is often associated with student discipline. In addition to procedural mechanisms utilised to address student misbehaviour, due process also affects the formulation and implementation of student discipline codes and regulations. Broad discretionary authority is given to state legislatures and boards of education in enacting rules and regulations pertaining to the health, safety and general welfare of the school population. It is thus within their purview to enact any reasonable regulation that is considered essential to maintain order and discipline on school property, and that measurably contributes to the maintenance of order and decorum within the educational system.²²

without due process of law ...' US Constitution amend. XIV.

²¹See, eg, *Goss v Lopez*, 419 U.S. 565 (1975).

²²*Donaldson v Bd. of Educ. for Danville Sch. Dist.*, 424 N.E.2d 737 (Ill. App. Ct. 1981).

However, school officials are not without limitations or constraints when it comes to enforcing school rules. *Tinker v Des Moines Community School District*, discussed above, held that students do not shed their rights at the schoolhouse gate. Again, the administrator must rely on standards of reasonableness. In light of this general standard, it is impossible to define in precise terms what manner of punishment is acceptable; rather, the Courts are forced to analyse the appropriateness of disciplinary action on a case-by-case basis.

2.3.2 *In loco parentis*

The implementation of discipline and the determination of due process have been influenced by the concept of *in loco parentis*, meaning 'in place of the parent'. In the United States, when applied, the concept is often used to hold that school officials owe certain rights and duties to children in their care. In recent times, the use of such status by public school educators has been brought into question and arguably replaced by a reasonableness standard. For instance, the United States Supreme Court, in addressing the propriety of an administrator's search of a student's belongings, emphasised reasonableness (as opposed to undergoing an *in loco parentis* analysis) as the touchstone of evaluating a school administrator's actions.²³

Still, there are proponents of *in loco parentis* who claim the doctrine retains vitality in certain circumstances. The Supreme Court's decision in *Vernonia School District 47J v Acton* demonstrates that student athletics may be one of the circumstances in which *in loco parentis* retains its vitality.²⁴ The Court's *Vernonia* decision and rationale were further expanded in *Board of Education of Independent School District No. 92 of Pottawatomie County v Earls*,²⁵ where the Court declared that a school board's policy requiring all students who participated in competitive extracurricular activities including chess and 4-H (a youth development programme administered by the US Department of Agriculture) to submit to drug testing was constitutionally permissible.

This case law makes clear that determining in which context the *in loco parentis* doctrine applies and in which context the 'reasonableness' standard applies is critical for the reasonable school administrator. For, as highlighted above, different legal frameworks entail different responsibilities and duties owed to students.

²³ *New Jersey v T.L.O.*, 469 U.S. 325 (1985).

²⁴ *Vernonia School District 47J v Acton*, 515 U.S. 646 (1995).

²⁵ *Board of Education of Independent School District No. 92 of Pottawatomie County v Earls*, 536 U.S. 822 (2002).

2.4 Torts

The concept of 'reasonableness' emanates from tort law (known as the law of delict in South Africa), which involves a civil wrong for injury or damage to property. In the education context, one typically encounters such a legal concern under a theory of negligence.

2.4.1 Negligence: Elements and duty of care

Negligence is generally the omission or failure to do something that a reasonable person would do, or the doing of something that a reasonable person would not do. In order to prove that a defendant was negligent, the plaintiff must show the following:

- (1) The existence of a duty of care owed by defendant to plaintiff;
- (2) breach of that duty;
- (3) actual and proximate cause of plaintiff's injury; and
- (4) actual loss or damage to the plaintiff's person or property.

In addition to these elements, a plaintiff pleading a negligence claim of action must overcome several other hurdles in convincing a court or jury he or she is entitled to relief. For instance, a plaintiff must show that the injury or harm caused was foreseeable or could have been foreseeable to a reasonable person in the defendant's position. Second, a plaintiff must overcome the school board or administrator's possible claims of immunity. Many public school educators are protected with immunity from suits based on tort accusations by students unless the actions or omissions were outside the scope of employment or were malicious, wilful, wanton, reckless, or in bad faith.²⁶ The overriding purpose of providing immunity to schools and school personnel is to encourage them to use their broad discretion in managing the school-teacher-student relationships, which would be seriously jeopardised by permitting ordinary negligence actions for accidents occurring in the course of exercise of such authority.²⁷

2.4.2 Section 1983 claims

Another litigation option is a claim of intentional tortious deprivation of certain rights under United States national law. The applicable federal statute, 42 U.S.C. section 1983, may impose liability on persons for violation of any right or privilege secured by the US Constitution and associated laws. Public school employees

²⁶This is a rigorous standard for states. For example, the State of Ohio abrogates immunity in its statute by using the word 'reckless' with 'malicious purpose,' 'bad faith,' and 'wanton,' which suggest behavior more egregious than simple carelessness. Ohio Revised Code 2901.22(C) of 2002.

²⁷*Hadley v Witt Unit Sch. Dist.* 66, 462 N.E.2d 877 (Ill. App. Ct. 1984).

are not generally immune from tort liability when the personal injuries and/or property damages suffered by the plaintiff arise from the knowing, unreasonable, and intentional, deprivation or violation of state or federal constitutional rights.²⁸ To be protected from a section 1983 claim, defendants must pass a two-part test.²⁹ First, they must show that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.³⁰ Second, defendants must demonstrate that reasonable officials in the defendants' positions under the circumstances could have believed that their conduct comported with clearly established legal standards.³¹

These guiding principles – whether established through constitutional, statutory, or judicial decree – are in part mirrored, limited, and expanded upon in the South African approach to administrator liability. The following section addresses the structural similarities and substantial differences at play in the legal architecture of South Africa.

3 The reasonable school principal in South Africa

As in US law, principles of tort law describe, inform, and shape the relationship between students and teachers in South Africa. This section explores the South African counterpart to American law: the system of liability allocation that governs the educator-learner relationship in a country that is vastly different, and yet operates a legal system doctrinally similar to our own.

South African law is first governed by the country's 1996 Constitution, considered one of the most progressive and ambitious in the history of the western legal tradition.³² It is from this starting point that national legislation extends specific protections and obligations to a variety of actors, among them school principals, educators, and learners. Finally, the legal vagaries that remain in this legal architecture are ultimately given clarity by South Africa's courts through the development of case law and common-law principles.

3.1 Constitutional foundations and statutory developments

3.1.1 A model for modernity: South Africa's Constitution

Serving as the centrepiece of the social contract of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) is Chapter 2 – the 'Bill of Rights.' This collection of fundamental human rights – praised as some of

²⁸*Wood v Strickland*, 420 U.S. 308 (1975).

²⁹*Stoneking v Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989).

³⁰*Id* 726.

³¹*Ibid*.

³²See Bradley *et al* *South Africa: Lesotho & Swaziland* (2011) 53.

the most substantive, all-encompassing, and forward-thinking in existence – approaches the practicality of governance with no references to the perpetual tug-of-war that exists between idealistic declarations and scarce national resources. In total, the guarantees of South Africa’s Bill of Rights – combined with the legislative enactments that give them life – illustrate the central challenge underlying the educational context: the need to balance the inviolability of human dignity and freedom with the collective necessity of maintaining a disciplined and industrious learning environment.

The heart of South Africa’s constitutional commitment to education lies in section 29, asserting, ‘Everyone has the right ... to a basic education ... and ... to further education, which the state, through reasonable measures, must make progressively available and accessible’.³³ South Africa’s Bill of Rights also includes the right to dignity (s 10), the right to freedom and security of person (s 23), the right of children to be protected from maltreatment, neglect, abuse or degradation (s 28(1)(d)), the right to freedom of expression (s 16), and the right to an environment not harmful to health and well-being (s 24).

Without enforcement, however, these optimisms serve as mere advice. As an additional push toward meaningful enforcement, section 7(2) explicitly requires the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. South Africa’s Constitutional Court has interpreted these obligations to mean that ‘the State must provide the legal and administrative infrastructure necessary to ensure children are accorded the protection contemplated’ such as ‘the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse’³⁴ Thus, the state has an *affirmative* obligation to construct a blueprint for enabling the rights enunciated in the Bill of Rights.

Illustrated below are those rights pertinent to the education context, along with examples of their interpretations.

a Section 9: The right to equality

Section 9 is the foundational principle of the entire Bill of Rights, if not the entire Constitution. Its language establishes mechanisms for asserting the substantive – as opposed to merely formal – equality of all people, implicitly prohibiting conduct that endangers a person’s equal worth. Importantly, the language of section 9 distinguishes between all discrimination and ‘unfair[r]’ discrimination. The Constitutional Court has defined the term ‘unfair discrimination’ as unequal

³³ Section 29(1) of the Constitution of the Republic of South Africa of 1996 (‘SA Constitution’).

³⁴ *Government of the Republic of South Africa v Grootboom and 2001 1 SA 46 (CC)* at 82 C-E (interpreting s 28).

treatment that either infringes on human dignity or that otherwise affects a person in a comparably serious manner.³⁵

In the school context, section 9 extends an obligation – albeit a general one – to principals and educators to provide equal opportunities and administer equal treatment to all learners.

b Section 10: Human dignity

Section 10 states that: 'Everyone has inherent dignity and the right to have their dignity respected and protected'.³⁶ Though section 10's elevation of a more abstract right – dignity – may be difficult to tether to specific claims against the state, the notion of dignity is deeply embedded in much of the Constitution. Because of dignity's ubiquitous influence, section 10 has the capacity to be tied to a number of other alleged violations of the Bill of Rights, such that when a violation of section 9 is alleged, it can almost be assumed that a violation of section 10 will be alleged as well.

c Section 12: Freedom and security of the person

Closely aligned with section 10's enshrinement of human dignity, section 12 is a broad, and yet at points detailed, prohibition against acts that violate a person's integrity and security. Section 12 states that every person has the right (1) not to be deprived of freedom arbitrarily or without just cause; (2) not to be detained without trial; (3) to be free from all forms of violence from either public or private sources; (4) not to be tortured in any way; (5) not to be treated or punished in a cruel, inhuman or degrading way; (6) to bodily and psychological integrity.³⁷

This section is particularly germane to the educator-learner relationship. Specifically, the prohibition of 'cruel, inhuman and degrading punishment' serves as a pointed check against the use of corporal punishment. Further, the section's assertion that a learner has the right to 'bodily and psychological integrity' pushes back against any inappropriate disciplinary measures that fall short of physical punishment, such as intimidation, threats of force, sexual harassment, and bullying.

³⁵ See *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC).

³⁶ Section 10 of the Constitution.

³⁷ *Id* s 12.

d Section 16: Freedom of expression

A reflection of the First Amendment to the US Constitution's ideals,³⁸ except with far more specificity, section 16 of the South African Constitution is written broadly to protect all means of communication, including freedoms of the press and other media, artistic creativity, academic and scientific research, and the freedom to receive or impart information or ideas. Section 16 does not, however, protect propaganda for war, speech that incites imminent violence, or speech concerning the 'advocacy of hatred that is based on race, ethnicity, gender, or religion.'³⁹ By the strict language of this section, a learner would be entitled to near-absolute freedom of expression, uncurbed by any possible disciplinary interests.

However, section 16's breadth has been curtailed by the respective ambits of other constitutional guarantees, including section 16(2) and the Constitution's general limitation clause (s 36).⁴⁰ The most abrasive interplay has stemmed from section 10's affirmation of the right to human dignity: does the freedom of expression always override the right to human dignity? The Constitutional Court in *Le Roux and Others v Dey* answered in the negative, explaining that 'the right to freedom of expression cannot be said automatically to trump the right to human dignity'.⁴¹

e Section 24: The right to an environment not harmful to health or well-being

Section 24 establishes the right to 'an environment that is not harmful to their health or well-being'.⁴² Though this section discusses ecological protection, the term 'environment' most likely also extends to the schoolhouse environment. In this vein, learners should rely on a constitutional right to receive an education in a healthy and safe school environment. While the equality, dignity, and freedom of expression principles reinforce the direct interests of the learner, the security of the person and safe environment protection weigh in the favour of the principal. Thus, when school governing bodies or school principals develop a school's code of conduct – which to some extent will invariably threaten to encroach upon

³⁸Content-wise, however, the most notable difference is the section's prohibition of 'hate speech.' See Perry *Hate speech* (2009) 218. ('There is a fundamental difference in approach in the United States to hate speech. The framework of the First Amendment presupposes that just as hate speech is permissible, so too is speech intended to counter and negate hate speech'.)

³⁹Section 16 of the SA Constitution.

⁴⁰The general limitation clause (s 36) maintains that all rights in the Bill of Rights can be limited, so long as such limitations 'be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

⁴¹*Le Roux v Dey* at 45 (quoting *S v Mamabolo (E TV and others intervening)* 2001 5 BCLR 449 (CC) at 41.

⁴²Section 24 of the Constitution.

learners' other constitutionally-protected rights – section 24 serves as the principal's strongest source of constitutional authority.⁴³ The details of a safe school environment might include well-maintained school facilities, school land and property that is free from danger, the protection of learners' personal belongings, and perhaps most importantly, the creation of a school culture that values and encourages safety.⁴⁴

3.2. National legislation

3.2.1 The South African Schools Act

The South African Schools Act⁴⁵ serves as the nation's most comprehensive effort toward integrating and equalising South Africa's public school systems.⁴⁶ This omnibus legislation, passed during the same year that the Constitution was adopted, was the primary medium for translating the values of the Constitution into the classroom. Though a number of the Schools Act's sections are of great importance, the most pertinent to this article include section 3, obligating parents to send their children to school; section 5, promoting equal access to public schools; section 8, mandating procedural due process rights similar to those found in US law, and section 60, discussed in further detail below.

When an actionable harm does occur in the school setting, section 60 of the Schools Act speaks to the allocation of liability between the state and the school governing board or individual school. According to section 60(1) of the Schools Act as amended in 2011, the state is liable for any 'damage or loss' arising out of any 'act or omission' related to any 'school activity conducted by a public school.'⁴⁷ However, subsection 9(b) speaks to circumstances under which the state's liability will be limited, when particular schools have taken out liability insurance.⁴⁸

⁴³But see also s 8 of the Schools Act, which includes policies dealing with safety and school discipline.

⁴⁴See generally Manvell *The violence continuum* (2012) 13. ('School culture is the foundation of collective beliefs, attitudes, norms, standards, policies, and habits that drive what happens in a school. It is the operational blueprint and the origin of school climate.')

⁴⁵South African Schools Act 84 of 1996 (Schools Act). In this article the 'Schools Act' refers to the consolidated South African Schools Act 84 of 1996 as amended by the Education Laws Amendment Act 100 of 1997, Education Laws Amendment Act 48 of 1999, Education Laws Amendment Act 53 of 2000, Education Laws Amendment Act 57 of 2001, Education Laws Amendment Act 50 of 2002, Education Laws Amendment Act 1 of 2004, Education Laws Amendment Act 24 of 2005, Education Laws Amendment Act 31 of 2007, and Basic Education Laws Amendment Act 15 of 2011.

⁴⁶See Fiske and Ladd *Elusive equity: Education reform in post-apartheid South Africa* (2004) 83.

⁴⁷Schools Act.

⁴⁸See *Prinsloo v Van der Linde* (n 35) 779.

3.2.2 *The Children's Act, the Domestic Violence Act, and the Prevention of Family Violence Act*

The landscape of educator liability gains additional dimensions through the Children's Act,⁴⁹ the Domestic Violence Act,⁵⁰ and the Prevention of Family Violence Act,⁵¹ which all play roles in the educational setting. As one would expect, the Children's Act seeks to protect children's rights,⁵² while the provisions of the Domestic Violence Act create a legal obligation on the part of educators to report to the pertinent police authority or social welfare agency any perceived form of maltreatment, neglect, abuse or degradation of children.⁵³ Finally, section 4 of the Prevention of Family Violence Act mandates any educator 'who examines, treats, attends to, advises, instructs or cares for' children to report any incident that 'gives rise to reasonable suspicion that such child has been ill-treated'.⁵⁴ Thus under this scheme, an educator/principal could be held accountable for the *secondary* conduct of failing to report reasonably perceived evidence of child abuse or maltreatment.

3.2.3 *The Promotion of Equality and Prevention of Unfair Discrimination Act*

Finally, South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act,⁵⁵ or the 'Equality Act', is the national legislature's fulfilment of section 9's prescription that '[n]ational legislation must be enacted to prevent or prohibit unfair discrimination'. The Equality Act specifically lists race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth as 'prohibited grounds' for discrimination.⁵⁶

The Constitutional Court fleshed out the meanings of both section 9 and the Equality Act in the ground-breaking case *MEC for Education: Kwazulu-Natal v Pillay*.⁵⁷ Importantly for the Court's equality jurisprudence, the Court found that while the structure of the Constitution certainly permitted deference to the schools and their governing bodies in their areas of expertise, the government could not

⁴⁹Children's Act 38 of 2005.

⁵⁰Domestic Violence Act 116 of 1998.

⁵¹Prevention of Family Violence Act 133 of 1993.

⁵²Children's Act 38 of 2005.

⁵³*Id* ss 4 and 6.

⁵⁴Prevention of Family Violence Act 133 of 1993 s 4.

⁵⁵Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁵⁶*Ibid*.

⁵⁷*MEC for Education: Kwazulu-Natal v Pillay* 2008 2 BCLR 99 (CC).

permit such deference where constitutionally-protected issues of equality were at stake.⁵⁸

3.3 The 'reasonable' principal

In South Africa, any intentional or negligent act or omission that gives rise to a legal obligation between parties is called a 'delict.' South African law in general, and the law of delict in particular, are not radically different from their US corollaries.⁵⁹ Though the South African law of delict is Roman-Dutch in structure and appearance, its content is, nevertheless, often English.⁶⁰ In contemporary South African law, there are three categories of delicts:

- (1) Intentional Acts, which include assault, battery, and trespass;
- (2) strict liability, where a person has been injured through no actual, identifiable fault of anyone; i.e. injured via use of sports equipment or after participating in extremely dangerous activities; and
- (3) negligence, where a person fails to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances.⁶¹

3.3.1 Duty and standard of care

In the courts of South Africa, the test for principal negligence requires four elements: a duty of care, a breach of that duty, harm or injury, and a causal link between the breach and the harm.⁶² This standard of conduct, against which a defendant will be judged, is generally articulated as how a reasonable person, in the position of the defendant, would have acted or should have acted.⁶³ Importantly, this is to say that the 'reasonable person' standard is qualified to incorporate the particular circumstances of the educator. An educator's 'duty of care' thus extends far beyond a typical person's duty: it is a highly particularised obligation to all learners under the principal's supervision. This principle of

⁵⁸*Id* 81.

⁵⁹See Roederer 'Working the common law pure: Developing the law of delict (torts) in light of the spirit, purport, and objects of South Africa's Bill of Rights' (2009) 26(2) *Arizona Journal of International and Comparative Law* 427-503.

⁶⁰See Du Bois and Visser 'Symposium: Export of the rule of law: The influence of foreign law in South Africa' (2003) 13(2) *Transnational Law and Contemporary Problems* 593.

⁶¹Where criminal conduct is involved, the school should report the matter to the South African Police Services. See Barry *Schools and the law: A participant's guide* (2006) 128.

⁶²*Minister van Polisie v Ewels* 1975 3 SA 590 (A). See also Potgieter 'Delictual negligence of educators in schools: The confusing influence of the *in loco parentis* doctrine' (2004) 22(3) *Perspectives in Education* 153-156.

⁶³*Knop v Johannesburg City Council* 1995 2 SA 1 (A). See also *Government of the Republic of South Africa v Basdeo* 1996 1 SA 1157 (A).

common law, known as *in loco parentis*, therefore creates a duty in the governing school body, the school, and the principal to guarantee the safety of learners.⁶⁴ Put another way, South African law generally expects principals to act as *diligens paterfamiliae* (or as 'fathers of the family') in educational settings.

As in US law, principals can only be held liable for harm done to learners if such harm was reasonably foreseeable, such that it could have been avoided or interrupted.⁶⁵ This potential for liability forces educators to foresee and protect learners from dangers that learners may come across in the school setting or during educational activities, including recreational activities that take place under an educator or principal's purview, such as sport.

Importantly, any person involved in a school's educational activities may be held liable.⁶⁶ This may include not only educators and principals, but an educator's assistants or aides (whether professional or student aides), government employees acting in supervisory positions, and law enforcement officers working to ensure the safety of the school.⁶⁷ Furthermore, South African courts have specifically found that vicarious liability can be found between the school and a specific school employee. Thus if a school employee harms a learner, the learner is entitled to sue not only the particular school employee for damages, but the school and the school governing board as well.

4 Conclusion

Though separated by variant, highly contextualised approaches to liability, the legal systems of the United States and South Africa are governed by the same common, immutable tensions present at the heart of many 21st century democracies. Courts in both countries analyse the 'reasonable principal' (or administrator) on a case-by-case basis, making it difficult to offer principals concrete guidance for managing the daily disciplinary and managerial activities of their respective school districts. Generally, however, a 'reasonable principal' means a principal with an awareness of his duty to promote a safe and stable learning environment along with a keen sense of this duty's boundaries and limitations – making sure not to infringe on a learner's protected rights thereby creating litigation and liability for the school district and perhaps him/herself personally. Through affording deference and recognising certain immunity

⁶⁴See Joubert, Izak and Prinsloo *The law of education in South Africa* (2009)150. Interestingly, there do not appear to be any statutes or cases establishing a school governing body's liability for damages that occur through the negligence of educators at a school or representatives of the Department of Education.

⁶⁵*Kruger v Coetzee* 1966 2 SA 428 (A).

⁶⁶See Barry, *supra* (n 61) at 128.

⁶⁷See Joubert, Izak and Prinsloo (n 64).

defenses, court systems of both countries have attempted to insulate the day-to-day decisions of school principals attempting to fulfil their duty to students in a reasonable manner. On the other hand, in some situations, the law seems to hold the 'reasonable *principal*' to a higher standard than the general 'reasonable *person*,' especially when employing the *in loco parentis* doctrine – a theory still recognised in both countries (but arguably of declining regard in the US).

In sum, while both countries have renowned aspirations to accessible and equitable education systems, the circumstances of modern governance work in strong opposition to any sense of absolutism. Further research in this particular set of combined circumstances is certain to uncover additional complexities to educational policy that stand to inform both Americans and South Africans.