



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**PROFESSIONAL DISCRETION OF EDUCATORS IN PREVENTING
NEGLIGENCE**

by

René Beyers

Submitted in partial fulfilment of the requirements for the degree

MAGISTER EDUCATIONIS

in

Education Management, Law and Policy

Department of Education Management and Policy Studies

Faculty of Education

University of Pretoria

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May 2020

DECLARATION

I declare that the dissertation, which I hereby submit for the degree

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at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution

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Signed on the day of 2020

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DEDICATION

I dedicate this dissertation to:

- My beloved parents, Ronnie and Andréhette, for their constant encouragement and allowing me to follow my dreams – “Aanhouer wen”.
- My little sister, Nadine, for her entertaining and inspiring pep talks.
- My dearest, Armand, for his understanding heart, never-ending support and countless hours of motivation.

Dear Lord, all praise and glory. I am blessed with talents, good health, and privileged with the opportunity to complete this dissertation successfully.

Thank you, Lord for never giving up on me! Amen.

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ABSTRACT

This research builds on and contributes to work in the field of educators' professional discretion and the prevention of negligence. Existing literature suggests that many educators are still unaware of how the law operates regarding policy requirements and their *in loco parentis* obligations. This is demonstrated by the number of litigations and how an educator's liability regarding negligence has grown. In South Africa, numerous authors have made contributions in relation to learner safety and educators' duty of care. An educator is tasked with duty of care and to use professional discretion appropriately. At the same time, educators should be mindful to minimise their exposure to lawsuits. However, not much appears to have been done in this country to establish how educators can maintain a respectable balance between professional discretion and policy requirements without being negligent.

The purpose of this study was, thus primarily to explore ways in which educators can reconcile professional discretion and legal and policy requirements to prevent negligence. The study utilised a qualitative research approach underpinned by an interpretive paradigm. Data collection was done by the means of qualitative collection techniques, namely semi-structured interviews supported by an analysis of relevant court cases. Twenty participants from two primary and two secondary public schools in the Tshwane South school district in Gauteng participated in the study. Two of these schools were fee-paying schools and two non-fee-paying schools. Five participants from each school were identified and invited to participate in this study and consisted of the principal, a member of the school management team (deputy-principal or head of department) and three educators. Each of the participants had different legal obligations, discretions, responsibilities and accountabilities as far as negligence is concerned.

The conceptual framework for this study, was based on Dworkin's (1978:31) 'doughnut' metaphor for the concept of professional discretion. Based on an adapted version of Dworkin's 'doughnut' metaphor, findings confirm that some educators feel restricted in their decision-making and limited in their professional discretion due to the legal and inflexible policy framework regulating their work. It came to the fore that the understanding and interpretation of certain school policies were dealt with differently by the participants due to their varied levels of experience, knowledge and training. The findings illuminated the fact that the participants did not fully grasp the

concept of professional discretion. In making decisions and exercising judgement, these participants may not be comfortable in their knowledge experience or personal intuition. Educators' capacity and ability to apply discretion is influenced by a number of external and internal factors. These factors restrict an educators' autonomy space, which could ultimately lead to the inability to apply appropriate discretion. This could lead to a form of paralysis to uphold a high standard of care in dire situations and could lead to negligence. Therefore, in order to achieve a high standard of care and not be negligent, educators should not only have the ability to apply appropriate discretion, but also have the freedom to do so.

Key terms: professional discretion; duty of care; *in loco parentis*; negligence; law of delict; standard of care; school safety policies.

ACRONYMS

| | |
|-------|-------------------------------------|
| SASA | South African Schools Act |
| CELP | Centre for Education Law and Policy |
| DBE | Department of Basic Education |
| DOE | Department of Education |
| GDE | Gauteng Department of Education |
| HOD | Head of Department |
| LEA | Local Education Authority |
| MEC | Member of the Executive Council |
| NEPA | National Education Policy Act |
| RSA | Republic of South Africa |
| SACE | South African Council for Educators |
| SASCO | South African Student Congress |
| SGB | School Governing Body |
| SMT | School Management Team |
| SNA | Support Needs Assessment |
| UK | United Kingdom of Great Britain |
| USA | United States of America |

TABLE OF CONTENTS

| | |
|---|-------------|
| DECLARATION | i |
| ETHICAL CLEARANCE CERTIFICATE | ii |
| CERTIFICATE OF EDITING | iii |
| DEDICATION | iv |
| ACKNOWLEDGEMENTS | v |
| ABSTRACT | vi |
| ACRONYMS | viii |
| TABLE OF CONTENTS | ix |
| LIST OF FIGURES | xiv |
| LIST OF TABLES | xv |
| CHAPTER 1 | 1 |
| INTRODUCTION | 1 |
| 1.1 INTRODUCTION AND BACKGROUND..... | 1 |
| 1.2 RESEARCH PROBLEM..... | 3 |
| 1.3 PURPOSE OF THE STUDY | 4 |
| 1.4 RATIONALE | 4 |
| 1.5 RESEARCH QUESTION | 6 |
| 1.6 CONCEPTUAL FRAMEWORK..... | 6 |
| 1.7 RESEARCH APPROACH | 9 |
| 1.8 METHOD OF DATA COLLECTION | 10 |
| 1.9 OVERVIEW OF THE STUDY..... | 10 |
| CHAPTER 2 | 13 |
| A REVIEW OF THE LITERATURE | 13 |
| 2.1 INTRODUCTION | 13 |
| 2.2 BEST INTEREST OF THE LEARNER | 14 |
| 2.3 ASPECTS OF PROFESSIONAL DISCRETION | 15 |
| 2.3.1 Professional Discretion Conceptualised..... | 16 |

| | | |
|--|--|-----------|
| 2.3.2 | Professional Discretion and Educators' Freedom to make choices | 17 |
| 2.4 | AN EDUCATOR'S DUTY OF CARE | 19 |
| 2.4.1 | Duty of Care as a Legal Construct | 19 |
| 2.4.2 | The Expansion of the Educator's Duty of Care: Its Link to the School Environment | 22 |
| 2.4.3 | Duty of Care in Education | 24 |
| 2.4.4 | Duty to Act | 24 |
| 2.5 | NEGLIGENCE IN EDUCATION | 25 |
| 2.5.1 | Characteristics of Negligence in Education | 25 |
| 2.5.2 | The Test of Negligence | 26 |
| 2.5.3 | Educational Malpractice | 27 |
| 2.5.4 | Causes of Negligence in Education | 30 |
| 2.5.5 | Elements of Liability in Education | 36 |
| 2.5.6 | South African Case Law and Negligence in Education | 39 |
| 2.6 | PROFESSIONAL STANDARDS FOR EDUCATORS | 48 |
| 2.6.1 | Professional teaching standards of educators | 49 |
| 2.6.2 | Educators' Standard of Care | 53 |
| 2.7 | SCHOOL SAFETY POLICIES | 55 |
| 2.7.1 | Objective of School Safety Policies | 55 |
| 2.7.2 | The Gap between Practice and Theory in Policy Making | 57 |
| 2.7.3 | Policy Flexibility | 58 |
| 2.8 | CONCLUDING REMARKS | 58 |
| CHAPTER 3 | | 60 |
| RESEARCH DESIGN AND METHODOLOGY | | 60 |
| 3.1 | INTRODUCTION | 60 |
| 3.2 | RESEARCH PARADIGM | 60 |
| 3.3 | RESEARCH METHODOLOGY | 61 |
| 3.4 | RESEARCH DESIGN | 63 |
| 3.4.1 | The Advantages and Strengths of a Case Study | 64 |
| 3.4.2 | The Disadvantages and Weaknesses of a Case Study | 65 |
| 3.5 | SAMPLING | 66 |
| 3.6 | DATA COLLECTION METHODS AND STRATEGIES | 69 |
| 3.6.1 | Court Cases | 69 |
| 3.6.2 | Press Reports | 69 |
| 3.6.3 | Interviews | 70 |

| | | |
|-----------------------------|--|-----------|
| 3.7 | INTERVIEW PROCESS..... | 72 |
| 3.8 | DATA ANALYSIS..... | 74 |
| 3.9 | TRUSTWORTHINESS OF THE RESEARCH | 75 |
| 3.10 | LIMITATIONS OF THE INTERVIEW PROCESS | 77 |
| 3.11 | ETHICAL CONSIDERATIONS..... | 78 |
| 3.12 | CONCLUDING REMARKS | 80 |
| CHAPTER 4 | | 81 |
| PRESENTATION OF DATA | | 81 |
| 4.1 | INTRODUCTION | 81 |
| 4.2 | BRIEF DEMOGRAPHIC DESCRIPTIONS OF SCHOOLS AND PARTICIPANTS | 82 |
| 4.3 | THEME 1: EDUCATORS' UNDERSTANDING OF THEIR DUTY OF CARE 84 | |
| 4.3.1 | Educators have a Responsibility and a Legal Obligation | 84 |
| 4.3.2 | Linking <i>in loco parentis</i> to Duty of Care | 87 |
| 4.3.3 | Acting <i>ultra vires</i> in the Best Interest of Learners..... | 88 |
| 4.4 | THEME 2: A LIMITED UNDERSTANDING OF PROFESSIONAL DISCRETION | 99 |
| 4.4.1 | Professional Discretion as perceived by the Participants..... | 99 |
| 4.4.2 | Professional Discretion and Professionalism | 100 |
| 4.4.3 | The Application of Professional Discretion..... | 102 |
| 4.4.4 | Factors that Influence a Professional's Discretion | 104 |
| 4.4.5 | Discretionary Power of Educators Regarding the Promotion and Expulsion of Learners..... | 111 |
| 4.5 | THEME 3: UNDERSTANDING OF EDUCATIONAL AND LEGAL PRINCIPLES PERTAINING TO NEGLIGENCE..... | 114 |
| 4.5.1 | Negligence in an Educational Environment as perceived by Educators 114 | |
| 4.5.2 | Causes of Negligence in the Educational Environment..... | 116 |
| 4.5.3 | Reducing the Risk of Negligence | 124 |
| 4.5.4 | Preventing Negligence whilst exercising Professional Discretion..... | 133 |
| 4.6 | THEME 4: SCHOOL SAFETY POLICIES | 139 |
| 4.6.1 | Distinguishing between Laws and Policies | 139 |
| 4.6.2 | Adapting School Policies to the School Context | 140 |
| 4.6.3 | Challenges when Implementing School Policies..... | 142 |
| 4.6.4 | Educators' Perspectives on their Safety Policies | 143 |

| | | |
|---|---|------------|
| 4.6.5 | Linking Educators’ Discretionary Power and School Policies: Transportation Policy as an Example | 144 |
| 4.7 | CONCLUDING REMARKS | 146 |
| CHAPTER 5 | | 147 |
| DISCUSSION AND FINDINGS | | 147 |
| 5.1 | INTRODUCTION | 147 |
| 5.2 | THEME 1: EDUCATORS’ UNDERSTANDING OF THEIR DUTY OF CARE 147 | |
| 5.2.1 | How do Educators Understand their Duty of Care? | 147 |
| 5.2.2 | Educators have a Responsibility and a Legal Obligation | 147 |
| 5.2.3 | Linking the Common Law Term <i>in loco parentis</i> to the Duty of Care.. | 149 |
| 5.2.4 | Acting <i>ultra vires</i> in the Best Interests of Learners | 150 |
| 5.3 | THEME 2: A Limited View of Professional Discretion | 155 |
| 5.3.1 | Professional Discretion as perceived by the Educators | 155 |
| 5.3.2 | Professional Discretion Linked to the Concept of Professionalism..... | 156 |
| 5.3.3 | The Application of Professional Discretion..... | 157 |
| 5.3.4 | Factors that Influence an Educator’s Professional Discretion | 159 |
| 5.3.5 | Discretionary Power of Educators..... | 162 |
| 5.4 | THEME 3: UNDERSTANDING OF EDUCATIONAL AND LEGAL PRINCIPLES PERTAINING TO NEGLIGENCE..... | 163 |
| 5.4.1 | The Term Negligence as perceived by Educators | 163 |
| 5.4.2 | Causes of Negligence in the Educational Environment..... | 164 |
| 5.4.3 | Reducing the Risk of Negligence | 167 |
| 5.4.4 | Preventing Negligence whilst Exercising Professional Discretion | 168 |
| 5.5 | THEME 4: School safety policies | 170 |
| 5.5.1 | How Educators Differentiate between Laws and Policies | 170 |
| 5.5.2 | Adapting School Policies to Fit the School Environment..... | 171 |
| 5.5.3 | Implementation of School Policies | 172 |
| 5.5.4 | Educators’ Perspective of their Safety Policies | 173 |
| 5.5.5 | The link between the educators’ discretionary power and school policies: transportation policy as an example | 173 |
| 5.6 | CONCLUDING REMARKS | 174 |
| CHAPTER 6 | | 176 |
| FINDINGS, RECOMMENDATIONS AND CONCLUSION | | 176 |
| 6.1 | INTRODUCTION | 176 |

| | | |
|-------|---|------------|
| 6.2 | SUMMARY OF THE FINDINGS..... | 176 |
| 6.2.1 | How do Educators Understand their Duty of Care? | 176 |
| 6.2.2 | Educators' Perceptions of Professional Discretion..... | 178 |
| 6.2.3 | The Prevention of Negligence | 179 |
| 6.2.4 | School Safety Policies | 181 |
| 6.3 | CONCLUSION WITH REGARD TO THE AIMS OF THE STUDY | 183 |
| 6.4 | SIGNIFICANCE OF THE STUDY | 184 |
| 6.5 | LIMITATIONS OF THE STUDY | 185 |
| 6.6 | RECOMMENDATIONS..... | 185 |
| 6.7 | SUGGESTIONS FOR FURTHER RESEARCH..... | 186 |
| 6.8 | CONCLUDING REMARKS | 187 |
| | REFERENCE LIST | 188 |
| | COURT CASES..... | 196 |
| 8.1. | South African court cases: | 196 |
| 8.2. | United States of America court cases: | 196 |
| 8.3. | Great Britain court cases: | 196 |
| | ANNEXURES | 197 |
| | Annexure A- Gauteng Department of Education Approval Letter | 197 |
| | Annexure B- Request to Principal | 199 |
| | Annexure C- Request to Participant..... | 201 |
| | Annexure D- Consent form | 204 |
| | Annexure E- Interview Schedule..... | 205 |

LIST OF FIGURES

| | |
|---|----|
| Figure 1.1: Dworkin's doughnut principle (adapted from Dworkin, 1978:31)..... | 9 |
| Figure 3.1: Purposeful qualitative sampling (Source: Creswell, 2012:206) | 67 |

LIST OF TABLES

| | |
|--|-----------|
| Table 3.1: The qualitative process | 62 |
| Table 3.2: Sample of both fee-paying and non-fee-paying schools | 68 |
| Table 4.1: Summary of the main themes and sub-themes | 82 |
| Table 4.2: Brief demographic description of School A and its participants | 83 |
| Table 4.3: Brief demographic description of School B and its participants | 83 |
| Table 4.4: Brief demographic description of School C and its participants | 83 |
| Table 4.5: Brief demographic description of School D and its participants | 84 |

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION AND BACKGROUND

Educators are expected to use informed judgement to prevent harm to learners (Joubert, 2007:107). Should an educator fail to exercise acceptable professional standards of care to prevent injury to a child, he or she will be seen as negligent (De Waal, 2011:183). The remedy is simple - to prevent negligence, educators should prevent injury to the learners in their care (De Waal, 2011:184; Newnham, 2000:45).

Learners generally spend more than seven hours a day at school with educators as their main care givers (Joubert & Prinsloo, 2013:27). Some educators are often not aware that, whenever learners are in their care, they have a duty of care that exists over and beyond academic responsibilities (Bremner, 2014:199; Mohammed, Gbenu & Lawal, 2014:139). Educational authorities such as a school governing body (hereafter referred to as SGB) need to implement policies that clarify and enforce this duty of care, for example Section 8 of the South African Schools Act of 1996 (hereafter referred as the Schools Act) stipulates that a SGB must draft a code of conduct for learners. Section 9 of the Children's Act 38 of 2005 states that an educator has the duty and responsibility to act in the best interest of the child (RSA, 2005). These responsibilities include caring for the child and acting as a guardian over the child (Mohammed *et al.*, 2014:138). Such duties empower educators to act in the place of parents, ultimately enabling control of learners' conduct by educators (Nakpodia, 2012:25). Parents and educators have a duty and responsibility to always "act in the best interest of the child" (Joubert & Prinsloo, 2013:27). Educators, in addition, also have a legal duty towards learners in terms of the legal principle of *in loco parentis* to safeguard learners in their direct care. Prinsloo (2005:6) and De Waal (2011:175) emphasise that an educator has a duty to safeguard all learners from physical injury and psychological harm. If an educator fails to apply the required professional standard of care to avert injury to a child, he or she will be negligent (Newnham, 2000:50). The current increase of litigation within the education sector emphasises the responsibility of educational professionals to reduce the risk of harm to learners and be attentive to potential hazards that could lead to any physical and psychological injuries (Newnham,

2000:46). Teh (2009:137) shares the views of Newnham (2000:45) by arguing that legal responsibility is not only applicable to incidences of physical injury, but also applies to intellectual harm. Educators are being held liable worldwide for educational malpractice because educators are legally held accountable for poor teaching resulting in low marks in literacy, numeracy and failure to pass tests and examinations (Teh, 2009:137).

A 2013 article in the *Pretoria News* reported on a Grade 8 pupil at Hoërskool Waterkloof, who sustained serious brain injuries in a game where older boys flipped the younger ones into the air on a cricket net. This dangerous game took place on the school grounds during school hours (Venter, 2013:1). In *MEC for Education in Gauteng Province v Rabie (2008)*, the court found that the school was negligent and breached its duty of care. The judge determined that there was no controlled supervision at the time of the injury. In another incident, educational professionals at a primary school in Soweto were found guilty of negligence after a Grade R pupil tragically died when he was run over by a lawnmower (*News 24*, 5 April 2014). These are just two of the many examples of incidents that have taken place in South African schools.

As someone's duty of care is an essential component in the prevention of negligence, it is imperative that educational professionals know how to balance the law and policy requirements with their professional discretion in the prevention of negligence (Newnham, 2000:46). Newnham (2000:45) argues that most educators and schools will, at some point, face legal action where a learner has been injured while in the school or the educator's care. When someone sues for damages because of negligence or the harmful actions of another person, it is done under the law of delict (Joubert, 2015:165) as it relates to circumstances where a person could be held liable for injuries or damages caused to someone else (Neethling, Potgieter & Visser, 2006:338). Educational professionals are increasingly being held accountable by society for their actions due to their supposed expertise and standard of care (Potgieter, 2004:156). An educator should accept accountability for a learners' academic and psycho-physical well-being and be mindful that he is also responsible for all actions towards the learners in his care (De Waal, 2011:183). It seems that when one's professional judgement deviates from the law and school policies, one may, when held accountable, in actual fact be liable to compensate the victim of one's negligence for harm and damage (Newnham, 2000:47).

1.2 RESEARCH PROBLEM

For the purpose of this study educators are viewed in the broader sense which includes principals, heads of departments (HODs) and post level 1 teachers. It is of paramount importance that educators maintain a balance between professional discretion and school safety policy requirements, without being negligent. These safety policies are based on the safety requirements, measurements and regulations stipulated by the South African Schools Act 84 of 1996 (hereafter referred to as the Schools Act) (RSA, 1996a), and aim to ensure the security and safety of learners (Eberlein, 2009:3). Newham (2000:45) and Thorn (2015:3) argues that educators in Australia and America are neither sufficiently trained nor equipped to apply laws and policies in an educational environment, nor do they have easy access to legal advice and relevant support structures, which in turn limits their professional discretion. More recently, Thorn (2015:3) emphasises that although most school leaders and managers have had some training in school law, they lack the understanding and ability to use this knowledge to develop policies and procedures. In a similar vein, Babalola (2012:193) contends that Nigerian educators are ignorant of how the law must be applied and often become confused between what is required by law and what is required by policy. In the South African context, De Waal, Theron and Robinson (2001:51) and Teh (2009:137) are in agreement that educators are not sufficiently knowledgeable about learners' rights or their own legal obligations towards learners. The duty to act *in loco parentis* is a challenging task and educators are often confused by the exact nature thereof (Nakpodia, 2012:30). Educators often do not apply appropriate professional discretion in cases of child neglect, as they often overstep boundaries that are unacceptable to the parent and the SGB (Boote, 2006:464). Literature suggests that despite policies and legislation, negligence is still shockingly widespread in South African schools (De Waal, 2011:184).

Educators are challenged when implementing policies formulated by policy makers who are not educators themselves and who have not themselves dealt with challenging situations within a school environment (Sethusha, 2012:83). As a result, their policies focus on theoretical rather than practical solutions (Hallsworth, Parker & Rutter, 2011:30). An educator's age, culture, experience, workplace environment and emotional intelligence are all aspects to consider, as they may influence policy making and ultimately the use of professional discretion by the educator (Sethusha, 2012:181).

The age of learners and their “capacity to appreciate danger” is also important and Newnham (2000:49) correctly points out that the younger the learner, the more significant and demanding the duty of care owed by the educator is. Hence, there is a need for specific legislation and policy that is clearly understood by educational professionals as well as learners. Learners younger than 18 have the right to legal representation, allowing them to litigate in instances where they view protection at school a necessity (Mahery & Proudlock, 2011:9). Therefore, learners (in a vulnerable state) should know their rights and understand relevant legislation and policy to keep them safe from harm.

Policy flexibility will allow educators to use their discretion, so their actions can suit particular functions or situations. In line with the ruling in the *Doreen Harris* case, in *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (CC,2013), the court held that inflexibility of the law directs educators to ensure that, when they follow policy or act in a situation, a particular law needs to be obeyed for the common good. The Court held that: “If there were good reasons to depart from the policy, it was always open to the principal or the Gauteng HOD to do so” (CC, 2013:28-29).

Educators therefore face a conundrum; namely, how to reconcile professional discretion with policy and legal requirements without being negligent. In other words, do educators really understand the full range of laws and policies in the context of their obligation of acting in a higher standard of care?

1.3 PURPOSE OF THE STUDY

The purpose of this study is to explore ways in which educators can reconcile professional discretion and legal and policy requirements to prevent negligence. Hence, the aim of this study is to investigate the reach of an educator’s duty of care, the ways in which professional discretion is used and how negligence can be avoided.

1.4 RATIONALE

My interest lies in using and adhering to legal and policy requirements as well as educators’ professional discretion to reduce the risk of negligence. After reading the *Wynkward* case, I recognised educators’ need for adequate training and legal support to successfully administer professional discretion.

In *Wynkwart v Minister of Education and Another* 2004 (3) SA 577, a nine-year-old boy, Ryndall Wynkwart attempted to climb over a locked unused school gate. He fell, broke his neck and was permanently paralysed. The court determined that there was insufficient supervision which led to a poor standard of care and ruled that the educators were skilled in learner development and should have been able to predict that children easily forget what they have been told not to do – such as climbing over a gate.

Educators must be judged in terms of the “normal test of negligence”. In this instance, the duty of care of a reasonable educator goes beyond explaining what potential dangers might arise (Potgieter, 2004:154). Joubert and Prinsloo (2013:27) go as far as to argue that a person (such as an educator in the case of education) has a duty to prevent any form of foreseeable harm to learners. Although this ruling was overturned on appeal, this case illustrates how the professional discretion of educators can be challenged.

This is one example of a court case where an educator was found negligent regarding his/her duty of care and the wrongful use of professional discretion. There was a failure to balance standards of care, professional discretion and policy. Joubert (2007:117), together with Hall and Manins (2001:119), aver that in such times, it is expected of an educator to provide the highest quality and best possible care to all learners as not to be found negligent. Providing educators with better training with regard to laws and safety policies seems necessary to allow them to make the best possible decisions for the learners in their care. This training should contribute to reducing the risk of educators being negligent whilst maintaining an appropriate balance between their professional discretion and strict policy requirements. However, educators are often faced with challenges that distort their professional judgement and discretion and lead to liability and negligence (Nakopdia, 2012:30; Boote, 2006:462). Policy requirements together with education law are perceived to be rigid, not allowing professional discretion to deviate from the policy. This apparent inflexibility increases the likelihood of negligence (Boote, 2006:469).

1.5 RESEARCH QUESTION

The following primary research question has been designed to assist in visualising my research goal:

How do primary and secondary school educators reconcile professional discretion with legal and policy requirements in order to prevent negligence?

The main research question above is complemented by the following sub-questions:

- How do educators interpret their 'duty of care'?
- How do educators interpret 'professional discretion'?
- How do educators understand the difference between law and policy?
- In the opinion of educators, what are the standards of professional discretion required to prevent negligence?

1.6 CONCEPTUAL FRAMEWORK

To better explore and examine the conundrum educators face in reconciling professional discretion, the principle of *in loco parentis* and strict policy requirements, we must ask the following questions: What is 'professional discretion' and what are the effects of professional discretion on educators' decision-making practices? How can professional discretion and policy requirements be reconciled to avoid negligence?

I used Ronald Dworkin's (1978:31) metaphor for the concept of professional discretion as the conceptual framework for this study. Dworkin (1978:31) explains that discretion is "like a hole in a doughnut". Discretion does not exist except as a region left open by a "surrounding belt of restriction" (Kanstroom, 1997:711). The hole represents the area in which discretion could be acted out or be a "space for autonomy", while the circle of the doughnut is the zone barrier or "belt of restriction" (Dworkin, 1978:31). In simpler words, the "surrounding belt of restriction" can also be referred to as the restrictive regulatory environment.

The ring of the doughnut implies that when exercising professional discretion, good judgement is required, which is to be exercised within a framework of accountability (Wallender & Molander, 2014:3). The action of exercising discretion can be interlinked and explained by the influential factor of duty of care by referring to a cautious, reasonable and careful educator (Du Plessis, 2019:101). The substantial view of discretion is constructed in the belief that discretion is an inevitable feature of the

application of common knowledge surrounded by “if-then” rules to specific scenarios (Wallender & Molander, 2014:1). Wallender and Molander (2014:1) found that all professions participate in the application of common knowledge as they are sanctioned to do so. Galligan (1986:8) believes that when common knowledge does not determine explicit decisions about what to be done in specific scenarios, there is a space for discretion or “space of autonomy”, in professional decision making.

By referring to Dworkin (1978:31), Wallender and Molander (2014:1) highlighted two elements of professional discretion, namely a “structural” element as well as an “epistemic” element. The structural element refers to the space where an educator has the freedom to make decisions and act according to his own judgement. The epistemic element refers to discretionary reasoning to take action, make decisions under certain circumstances of “indeterminacy” (Molander, Grimen & Eriksen, 2012:214). Discretion can only be applied against a framework of accountability (Molander *et al.*, 2012:214). It is important to understand that autonomy is inseparably linked to the concept of discretion. There are two definitions of autonomy when looking at discretionary space as well as discretionary reasoning, namely, judgemental capacity versus opportunities for judgement (Wallender & Molander, 2014:3). Wallender and Molander (2014:3) found that “autonomy becomes stronger the larger the discretionary space, and *vice versa*”. Wallender and Molander (2014:3) further emphasise that, due to the discretionary space of professionals who act by virtue of professional authority and power granted to them in their profession, there is a need for accountability. Autonomy refers to the educator’s ability to make good judgements (Wallender & Molander, 2014:3), although May (2010:11) found that educators are trapped between the internal forces of autonomy and the external factors of accountability.

May (2010:11) refers to the curricular zone of discretion as the place where educators must mediate internal factors (knowledge and experience, personality, and “fear factor”) and external factors (policy requirements, policy flexibility and rigid laws). Educators need professional discretion to make effective decisions, but if their space of autonomy is smaller, it becomes a problem, as educators cannot make appropriate decisions when it comes to learner safety (May, 2010:11). External factors such as policy flexibility and rigid laws occur in the belt of restriction (May, 2010:11). The belt of restriction influences educators’ decision making.

The extensive use of professional discretion in educational practice can challenge the rule of law (equal treatment, just administrative action, predictability and legality) as well as the implementation of policies (Molander *et al.*, 2012:217). The decision maker must not abuse his discretionary power in bad faith (De Waal, 2000:44-45). As stated above, it is evident in the literature that the concept of duty of care is not included in Dworkin's (1978:31) metaphor of professional discretion. De Waal (2000:87) stated that educators must not only not be negligent, they must also have the duty to foresee harmful environments, dangerous situations and make correct and responsible decisions based on their professional discretion. Duty of care should be at the centre of the 'doughnut' as it influences an educator's space of autonomy and professional discretion and *vice versa*. Educators are restricted by policies, that as indicated in the *Rivonia* case should not be viewed as inflexible, and common law terms such as *in loco parentis* (Joubert & Prinsloo, 2013:20).

Educators' duty of care is influenced by their knowledge, skills and experience when it comes to laws and policies, ensuring the safeguarding of the learners in their care. Educators should know where the boundaries of their decision-making power lie and Figure 1.1 below illustrates the notion that educators' duty of care is defined by their professional discretion as well as the belt of restriction. The arrows indicate that there is interaction between duty of care and professional discretion. Due to the importance of an educator's duty of care, I deemed it necessary to include the concept and adapt the original 'doughnut' shape by adding a new circle to develop and adapt Dworkin's (1978:31) design and conceptual framework to illustrate its applicability to educators' duty of care and professional discretion. In some situations, professional discretion should extend to an educator's freedom to exercise their duty of care and in other cases, it should restrict an educator's duty of care.

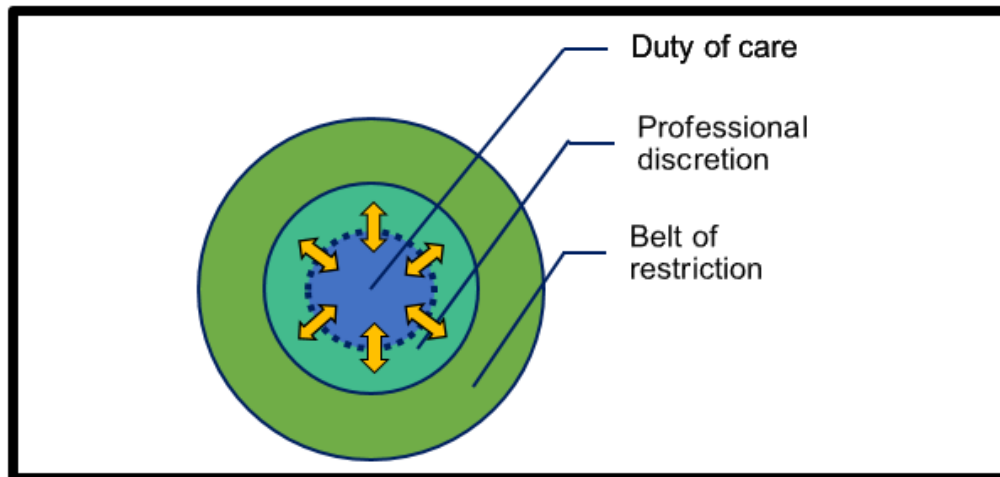


Figure 1.1: Dworkin's doughnut principle (adapted from Dworkin, 1978:31)

1.7 RESEARCH APPROACH

The study utilised a qualitative research approach. This approach enabled me to collect data on the experiences and insights of educators in terms of the common law term *in loco parentis*, together with their duty of care, policy requirements as well as their professional discretion. The research design enabled me to collect the data and formulate detailed explanations which helped to find, seek and apply solutions (Maree, 2016:309).

For the purposes of this study, an interpretative multiple case study design was applied. In this instance, the case study captured how educators apply professional discretion in challenging situations. It revealed how educators use their professional discretion whilst reconciling legal and policy requirements to ensure that the learners' best interests are ensured, as well as minimising negligence. The participants shared their personal experiences with regards to acts of negligence or shared their knowledge (Maree, 2016:107).

Participants and sites were identified by the underlying conjecture that differences may occur in the way educators handle the interplay of their professional discretion with policy and legal requirements due to differences in the school context. Participants were thus purposively selected for their potential to provide rich data with clear descriptions of their experiences in their positions (Maree, 2016:198). Two primary and two secondary public schools in the Tshwane South school district in Gauteng were selected. Two of these schools were fee-paying schools and two non-fee-paying

schools as categorised in Section 39 of the Schools Act. Therefore, sampling both fee-paying and non-fee-paying schools provided data from different contexts.

Five participants from each school were identified and invited to participate in this study. Selections were based on the following criteria: experience, post level and relevance to data. The five participants at each school were the principal, a member of the school management team (SMT) (deputy-principal or head of department HOD) and three educators. Each of the participants has different legal obligations, discretions, responsibilities and accountabilities as far as negligence is concerned. The educators selected had at least three years' working experience in the selected schools, prior to the research.

1.8 METHOD OF DATA COLLECTION

Data collection was done by the means of qualitative collection techniques, namely semi-structured interviews supported by an analysis of relevant court cases. The semi-structured interview data was organised by site as well as by participants, distinguishing between the different post levels and years of experience as well as between fee-paid and non-fee-paid schools. The participants' responses were audio-recorded, transcribed and analysed by using Atlas.Ti qualitative data analysis software. Words and phrases that relate to my research question were identified and documented and then identified and compared. Therefore, a process was followed to break down, examine, conceptualise, compare and categorise all the data. I collected information from different court cases applicable to this study that demonstrated the possible challenges faced by educators and schools. These challenges are related to the relationship between negligence, school safety, professional discretion and the educator's duty of care. I made use of numerous media reports such as *Die Beeld*, *News24* and the *Sunday Times* to formulate the problem statement. These reports, specifically focused on incidents where learners were injured due to educators being negligent, and their failure to reconcile professional discretion and regulatory policies.

1.9 OVERVIEW OF THE STUDY

Each chapter is summarised to highlight the primary issues mentioned in this study. This is done to clarify the understanding of the rationale of the study and to articulate the followed measures and processes to achieve the final results. The study's overview is therefore to reinstate the preceding chapters to the reader.

Chapter 1 is an introduction to the study on the professional discretion of educators in preventing negligence through examining primary and secondary school educators' experience and insights, court cases and media reports. *Wynkwart v Minister of Education and Another 2004 (3) SA 577* was one of the court cases that captivated my interest for this study and it supported the rationale of the study. This was preceded by the research questions and the aim of the research. The conceptual framework based on Ronald Dworkin's (1978:31) metaphor for the concept of professional discretion, was described in detail in this chapter. The research methodology and the research design to be applied in the study were introduced. A qualitative study was done using an interpretive approach through the use of semi-structured interviews, international and national court cases and press reports.

Chapter 2 is an interrogation of literature, both national and international. The literature deals with educators' professional discretion, how professional discretion is conceptualised and how professional discretion is linked to an educator's freedom to make decisions.

Literature on an educators' duty of care is reviewed to find out how it correlates with aspects of negligence in education. An educators' legal obligation to foresee potentially harmful events are also reviewed. This duty of care could lead to an educator being held liable for harm or damage or injury, which could see educators charged with negligence in courts or misconduct from the Department of Education (DOE) should educators not have fulfilled their duty towards the learners in their care. Therefore, characteristics of negligence, the test for negligence and causes of negligence are also reviewed. An overview of South African case law related to negligence in education, which deals with appropriate legislations, is reviewed. An educator's standard of care in relation to an educator's professional teaching standards, is reviewed in this chapter.

The literature review focuses on current academic literature pertaining school safety policies, the objectives of these policies, as well as the gap between theory and practice when it comes to designing safety policies. The influential factor of policy flexibilities on an educator's professional discretion as well as safety policy requirements are addressed in this chapter.

Chapter 3 discusses the research methodology and design in more detail. Through qualitative research, an interpretive case study research was employed in this research. The interpretivist research paradigm was used in this study, as it allowed me to explore and establish what standards of professional discretion are required of educators, to minimise the possibility of negligence. This chapter also addressed the sample and sampling procedure and the methods of data collection through semi-structured interviews. The principle of non-probability sampling, specifically purposive sampling was employed. The data collection interviews were conducted with the informed consent of three sets of participants, school principals, Heads of Departments, and post level 1 educators. A view into their world and their perennial struggle with their duty of care and a professional discretion is provided in Chapter 4 of my research.

The limitations of the interview process are disclosed and the data's credibility and authenticity are verified through the triangulation processes. The data collected were stored on an audio-recorder and the interviews were transcribed and were used to create codes and then arranged into themes. The study's ethical consideration concludes this chapter.

Chapter 4 is an introduction to the schools involved in the research, with a structured presentation of the data obtained during the interviews. In line with the participants' answers to the interview/research questions, findings were structured into four main themes. In each theme, larger units or major stages of understanding, thoughts, perceptions, feelings and experiences of the participants were recorded. The words of the participants are provided and quoted verbatim in this chapter.

Chapter 5 discusses and analyses the findings of my research in light of the four themes described in Chapter 4, while **Chapter 6** deals with the summary of the findings, the significance of the study, the limitations of the study as well as recommendations for any future research and the conclusion of the study.

In the subsequent chapter, Chapter 2, I provide a literature review focusing on professional discretion, duty of care and delve into aspects of school negligence and focus on current academic literature pertaining school safety policies.

CHAPTER 2

A REVIEW OF THE LITERATURE

2.1 INTRODUCTION

While Chapter 1 provided an introduction to the study, specifying the methods and the purpose of the study, this chapter probes aspects of negligence and an educator's professional discretion and provides a review of literature focusing on negligence in schools, the educator's duty of care and the professional standard required of an educator. The first sub-section investigates the best interests of learners. The second sub-section discusses the aspects of an educator's professional discretion, followed by an exploration of an educator's duty of care, its legal interpretation as well as the impact of environmental issues upon it.

The fourth sub-section investigates the characteristics of negligence as well as the important causes of negligence. This section includes an overview of the test for negligence in South African schools. This section will conclude with an overview of South African case law related to negligence in education which deals with appropriate legislations. The fifth sub-section reviews an educator's standard of care in relation to an educator's professional teaching standards.

The final sub-section of this literature review focuses on current academic literature pertaining to school safety policies, the objectives of these policies, as well as the gap between theory and practice when it comes to designing safety policies. The link between policy flexibility and educator's professional discretion as well as safety policy requirements, is addressed in this sub-section.

A sound understanding of the concept 'best interest of a learner', could equip educators with the ability to apply appropriate professional discretion and safeguard the learners in their care. This may reduce the risk of being negligent.

2.2 BEST INTEREST OF THE LEARNER

To better understand the common law principle best interest of the child, its position in practising professional discretion in a school environment needs to be clarified. It is important to note that the best interest of a learner has been part of South African common law for many years (Du Plessis & Küng, 2019:200).

Section 28(2) of the Constitution of South Africa clearly states that “a child’s best interest is of paramount importance in every matter concerning the child”. In other words, the Constitution (RSA, 1996b) calls for the principle “best interest of a child” to be considered supreme/highest priority in all matters concerning children/learners. According to Du Plessis and Küng (2019:200), it is evident that Section 28(2) of the Constitution has the best interests of the child at its centre and is becoming an enforceable constitutional right or principle. Section 28(2) of the Constitution leaves little doubt about the importance of the best interest principle (Du Plessis & Küng, 2019:200).

The best interests of a learner could refer to the well-being (physical and psychological) of a child, under the age of 18, as defined by Section 28(3) of the Constitution (RSA, 1996b). Thus, educators have a legal duty of care (and act *in loco parentis*) towards learners when making decisions concerning the child. To better explain what is meant by best interests, Visser (2007:461) defines the concept of “interest” as a concern, benefit or advantage. Hence, ‘best interests of a child’ would be “most advantageous practically possible and desirable in view of the relevant law” (Visser, 2007:461). In order to link an educator’s professional discretion to the obligation to enhance the best interests of a child, it is important to note that when the best interests of a child is determined, it entails the obligation of an educator to consider the best interest of a child before any decisions (that may affect the child’s life) are made (Du Plessis & Küng, 2019:201).

Du Plessis and Küng (2019:202), indicates that the best interest standards apply not only to the implementation of legislation, if somewhat individually or as a cohort, but also to conduct proceedings or decisions affecting learners. With regard to the professional discretion of an educator and the best interest of a learner, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009 (4) SA 222 (CC)* the court states that a child’s best interests will be

of paramount in all matters concerning a child. According Du Plessis and Küng (2019:202-203), a child being of paramount importance imposes an obligation on all those (including educators) who make decisions (exercising appropriate professional discretion) concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions and ensuring that they are not negligent. Section 28(2) of the Constitution provides a framework of accountability and a benchmark of how learners/children should be protected and treated.

In the South African legal landscape, the 'best interest' test requires the courts to exercise sufficient professional discretion in their role as supreme guardians of minors to ensure that the best interests of the learner outweigh the adult party in any case involving the learner (Du Plessis & Küng, 2019:203). Du Plessis and Küng (2019:205) suggests that in the South African education context, it is imperative for all educators to ensure that decisions are made in the best interests of learners, rather than taking convenient decisions that serve their personal needs.

Du Plessis and Küng (2019:205) argues that it is not always easy to determine what is in the best interests of learners, especially given that there are factors that may influence educators' decision-making and it may not be easy to control these influential factors. Therefore, when decisions are made with regard to learners' best interests, educators must always measure their decision against Section 28(2) of the Constitution which states that the best interest of the child is of paramount importance.

2.3 ASPECTS OF PROFESSIONAL DISCRETION

The understanding and conceptualisation of the notion (phenomenon) of professional discretion is vital for all educators as it equips them to make the best possible decisions in the best interests of their learners (Boote, 2006:461). A sound understanding of educators' professional discretion enables educators to make the best possible decisions for the learners in their care and reduces the risk of being found negligent and liable for damages (Ottesen & Moller, 2016:441). Research confirms that educators should have professional capabilities to adapt their decision making, including the need to improve educators' professional discretion (Boote, 2006:461).

2.3.1 Professional Discretion Conceptualised

In order to comprehend a broader understanding of the concept professional discretion, I analysed internationally accepted definitions of professional discretion. The term professional discretion comprises of two focus areas. Firstly, Wallender and Molander (2014:1) indicate that professional discretion refers to an educator as a practicing professional with some form of formal education and who is employed by either the government or private sector. Secondly it describes discretion as the ability of an educator to make appropriate decisions with regard to the learners in their care (Wallender & Molander, 2014:1).

However, with regard to the first focus area, Webb (2002:50) lists three important conditions. First and foremost an educator is accepted as being a professional when he/she possesses the necessary degree of skill and talent. Secondly, a professional educator must use their own knowledge, as well as body of knowledge to support their practice. Thirdly, professional educators need autonomy to make decisions in line with their knowledge and skills (Webb, 2002:50). Educators are provided with freedom to make choices that safeguard learners and are linked directly to educators being professionals in their decision making and the prevention of negligence. In relation to this study, Webb's (2002:50) three characteristics of a professional educator are key elements in an educator's decision making in order to promote the best interests of the learners in their care. Having the freedom to make choices to safeguard learners is directly linked to educators being professional in their decision making and prevention of negligence.

By referring to Dworkin (1978:31), Wallender and Molander (2014:1) highlight two elements of professional discretion, namely a "structural" element as well as an "epistemic" element. The structural element refers to the space where an educator has the freedom to make decisions and act according to his own judgement. Therefore, it is important to understand that autonomy is inseparably linked to the concept of discretion. On the other hand, the epistemic element refers to discretionary reasoning to take action, make decisions under certain circumstances of "indeterminacy" (Molander *et al.*, 2012:214). This means that discretion can only be applied against a framework of accountability (Molander *et al.*, 2012:214). Therefore, as argued by Wallender and Molander (2014:3), "autonomy becomes stronger the larger the discretionary space, and *vice versa*". In reference to the South African educational

environment, the applicability of the concept of professional discretion is no different. South African educators make decisions on a daily basis for the best interests of the learners. Having the freedom to make decisions and act on those decisions within the discretionary space, also seems relevant in the South African school environment.

2.3.2 Professional Discretion and Educators' Freedom to make choices

Professional discretion is associated with some degree of freedom to act in terms of one's own choices and judgement (Du Plessis, 2019:98). Du Plessis (2019:98) explains that space for professional discretion allows an educator some freedom to act or judge independently and, sometimes even go beyond the scope of one's legal power. Professional discretion can thus be described as one's freedom to exercise one's professional judgement (Kanstroom, 1997:710) in a careful, prudent, cautious, responsible and mature manner (Du Plessis, 2019:98).

Boote (2006:465) defines professional discretion as the capacity and obligation to decide what actions are appropriate and the ability to take action in certain situations. This could be seen as a reference to the discretion an educator should have to decide on what is more appropriate in furthering in the child's best interests in specific situations and to act on his/her decisions while taking into account the requirements of the law, in particular the rule of law, whilst not necessarily regarding themselves bound to the letter of the law.

Molander *et al.* (2012:215) highlight two reasons why professional discretion may be problematic. Firstly, there is rigidity between a person's discretion and the prescribed requirements of the 'rule of law'. This means that there is a general use of discretion in the way people (educators) apply the law that is influenced by the principles of legality, predictability and equal treatment. Secondly, they highlight that there is rigidity between discretion and democratic power. This means that discretionary power is by implication parallel to democratic power. Even though professional discretion refers to a person's judgement and decision activity, it should thus be applied in a conscientious manner (Molander *et al.*, 2012:214).

May (2010:11) compares the concept of professional discretion to a circular zone. The zone is described as the area in which educators must work and make judgements on what to teach, how to teach and execute their other professional duties. This zone is also an area in which educators have to take into account the learners and their

educational needs (May, 2010:11). Archbald and Porter (1994:25) postulate that this zone is influenced by external factors such as parental and governmental demands with curriculum changes. Internally, the boundaries of zones may be tested and expanded through individual beliefs, values, religion and personal interests (Archbald & Porter, 1994:25-26).

Another issue that Webb (2002:48) points out is the challenge which manifests itself when educators need to adjust or modify “curricular platitudes” regarding acting within the area of the circular zone to meet learners’ academic requirements. The area of the circular zone in which educators make decisions is influenced by internal forces of autonomy and external factors of accountability (May, 2010:11).

It is expected of an educator to adapt to situations with regard to school curricula, in order to meet the learners’ academic needs, standards and requirements. Therefore, educators need to utilise their skills and experiences together with their own legitimate professional discretion to ensure the success of their modified situational decisions in the classroom (Webb, 2002:48). Thus, an educator is held accountable for the learners’ academic standards. Webb (2002:48) states that educators face challenges when they exercise “their autonomy in the face of accountability systems, which aim to reduce or eliminate their independent decision-making”. These challenges relate to the judgemental capacity of teachers and the opportunities for judgement (Wallender & Molander, 2014:3).

Webb (2002:48) suggests that when educators understand how their autonomy supports better decision making, they are in a way reinventing professionalism. It can therefore create a new power for educators when exercising their skills, knowledge and expertise.

It is maintained by Boote (2006:462) that educators have sufficient professional discretion for certain tasks when that specific educator has the ability to make professional judgement and the competence to act on those judgements. Boote (2006:462) further argues that such judgements should be appropriate to a specific situation. An educator’s professional discretion develops during their professional careers and that with a well-defined understanding of professional discretion, good educators can combine professional discretion with their expertise in order to ensure that the needs of the learners are met (Boote, 2006:462).

Related to the conceptual framework of this study, the extensive use of professional discretion in educational practice can raise questions regarding possible wrongful actions in terms of the rule of law (equal treatment, just administrative action, predictability and legality) as well as the implementation of policies (Molander *et al.*, 2012:217). The decision-maker must not abuse his/her discretionary power in bad faith (De Waal, 2000:44-45). It is thus evident that the concept of duty of care must be included in educators' accountability framework or "belt of restriction" in Dworkin's (1978:31) metaphor of professional discretion.

Ottesen and Moller (2016:441, 443) believe that professional discretion plays a meaningful role in educators and learners' understanding of legal standards and that, even though legal regulations have increased, room for professional discretion remains. The challenge educators face is how to reconcile professional discretion with soaring legal demands and stipulations.

2.4 AN EDUCATOR'S DUTY OF CARE

To better understand duty of care as a concept, its legal interpretation as well as the impact of environmental issues on an educator's duty of care, it must be examined. Duty of care does not refer to a general responsibility. It is rather an obligation towards a particular group of individuals in the care of a specific educator or other relevant person (De Waal, 2011:184).

2.4.1 Duty of Care as a Legal Construct

In terms of Section 3 of the South African Schools Act, 84 of 1996, every guardian or parent is compelled to send their children to school. Thus, parents delegate aspects of their legal duty of care towards their child to an educator (Eberlein, 2009:28-29; Nakopida, 2012:26). Joubert and Prinsloo (2013:28), together with De Waal (2000:79), stress the fact that educators must accept their responsibilities for the safety and well-being of the learners as long as the learners are in their care. These responsibilities link directly to the educator's legal duty of care (Joubert & Prinsloo, 2013:26-28). De Waal (2000:80) mentions that South Africa puts emphasis on ensuring that an educator fulfils his/her duty to ensure a safe and caring environment for all learners. Educators are instructed and expected to prevent harm or injury to learners at schools (Bremner, 2014:54). Educators thus have a legal duty towards learners in terms of the common law principle of *in loco parentis* (discussed later in

this section) and must guard the learners not only from physical injury but also psychological harm (violating the psycho-physical integrity of children) (Prinsloo, 2005:5; De Waal, 2000:87).

Duty of care as defined by Section 1 of the Children's Act 38 of 2005 includes the following:

- Safeguarding and promoting the well-being of the child;
- Protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral hazards;
- Respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights as set out in the Bill of Rights;
- Guarding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age maturity and stage of development;
- Guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- Guiding the behaviour of child in a humane manner;
- Maintaining a sound relationship with the child;
- Accommodating any special needs that the child may have;
- Generally ensuring that the best interests of the child is the paramount concern in all matters affecting the child.

In loco parentis is a Latin expression which means 'in the place of the parent'. Parents are the primary educators in their children's lives. When taking their children to school, they do so with the expectation that the educators will handle them with love, integrity and discipline (Eberlein, 2009:28). The common law principle of *in loco parentis* is seen as the educator performing their duties as a caring parent to his/her learners or a diligent and protective father for his/her learners (Oosthuizen, 1992:31). In this regard, Section 7 of the Children's Act 38 of 2005 states that a parent has the duty and responsibility to act in the best interest of the child (Joubert & Prinsloo, 2013:15). British

and American common law adopted this tradition and incorporated it into their educational law and applied it to figures of authority in schools. This is where educational professionals received a portion of their discretionary power, to take charge of and assume responsibility for learners in their care (Lee, 2011:67).

One important aspect of *in loco parentis* is, however, that it does not grant the educator absolute control over the learners (Nakopida, 2012:26). A reasonable parent makes careful and sensible parental decisions that maintain the child's health, safety, and best interests (Epstein & Lancour, 2016:152). According to Strangler (2014:1), parents who are both reasonable and prudent will thus make decisions carefully, weighing the benefits and the potential risks of every decision in order to come to a sensible decision that is in the best interests of the child. Therefore, because an educator is "in the place of the parent" (Joubert & Prinsloo, 2013:20), it stands to reason that an educator must act as a responsible caregiver towards the learners (Joubert & Prinsloo, 2013:20). Based on the discussion of the doctrine of *in loco parentis*, parents should understand that placing aspects of their parental responsibilities on educators allows educators to take responsibility to act in their place (Eberlein, 2009:28). Mohammed *et al.* (2014:319) support Potgieter (2004:154) in that educators' responsibilities and duty of care should be viewed as "quasi-parental". Educators should thus take care of learners like reasonable educators would. Educators, parents and guardians need to work collaboratively to incorporate knowledge in terms of safety standards and safety regulations and add it to the current body of knowledge which is subject-orientated. This will allow learners the opportunity to understand what is acceptable regarding safety on the school grounds and ultimately assist educators in avoiding situations of negligence (Gallie & Keevy, 2014:1). *In loco parentis* thus provides a definite link between educators and parents in the educator-parent relationship.

South African educators have important duties towards learners, not only in terms of the common law principle of *in loco parentis*, but also in terms of the Bill of Rights and other legislations. These duties are thus included as an educator's responsibility for the learner's wellbeing (Joubert & Prinsloo, 2013:20).

Newnham (2000:46) describes "duty of care" as the first consideration when a possible incident of negligence is examined and that it is "concerned with the relationships

between people (in this instance, the educators and their learners)". Newnham (2000:46) suggests that an educator must take reasonable care of learners to avoid "acts of omission" which would be likely to cause harm or injuries to another person where it is foreseeable that such injuries could occur in given scenarios. Newnham (2000:46), Bremner (2014:9) and Oosthuizen and De Wet (2005:66) emphasise that the duty of care exists in the relationship between the learner and the school where common law and educational policies are well established. The relationship between the learners and the educator hinges on the duty of care owed by the educator. Thus, it remains the responsibility of the educator to maintain the learners' physical and psychological well-being, together with the learners' academic standards in the absence and in the place of the parents (Newnham, 2000:46).

2.4.2 The Expansion of the Educator's Duty of Care: Its Link to the School Environment

Nakopdia (2012:28) explains that an educator's duty has evolved to that of mentor and supporter of a learner outside his household. The role of an educator has developed into someone who helps learners distinguish between right and wrong, who supports learners with confidential issues and who makes them socially wiser (Nakopdia, 2012:28). Mohammed *et al.* (2014:319) emphasise that educators' duty of care goes even beyond the equivalent of parental authority and argue that, in addition, educators are faced with many challenges in ensuring disciplined learners and safeguarding their general well-being (Mohammed *et al.*, 2014:319).

It appears that an educator's role transcends beyond teaching in the classroom. Scriven (1994:29) argues that an educator has many duties other than teaching and that stretch to many areas of the school environment. Hall and Manins (2001:120) mention that in the times in which we are living, an educator cannot only provide and complete the basic duties expected of an educator, as it can be seen as negligent. It is now expected that an educator must provide the highest quality and best possible care to all learners. These duties range from committee work, to attending meetings where policies are discussed and explained (Scriven, 1994:29). Scriven (1994:29) contends that educators must not only attend meetings that discuss the development of the curriculum, but that supervision of learners on playgrounds, in study halls and school events are also important. In addition, educators have the duty of syllabus design, material selection and running school projects. Sport and recreational activities

are a massive duty and, finally, they also have the duty of evaluating and reviewing learners as well as ensuring honest and transparent communication with learners' parents (Scriven, 1994:29). Furthermore, Joubert (2015:180) emphasise that school sport contains an element of danger for the learners. Educators should therefore, meet specific requirements such as training and qualifications in order to ensure learners' safety during sport activities. Injuries, according to Joubert and Prinsloo (2013:31), can arise due to:

- Curricular activities, conducted in places such as workshops, laboratories, domestic science classes and physical training classes.
- Extracurricular activities, such as athletics, rugby, soccer, cricket and swimming.
- Transportation of learners during school/class tours and excursions, as well as the activities learners are expected to participate in during these excursions.
- Circumstances on the school playground, including the obvious threat of potentially dangerous objects such as sticks, fences, poles, lawn mowers, taps, slippery hallways and stairs.
- Conflict between learners, like bullying and other forms of assault.

Hence, it is part of educators' duty of care and they may be found negligent when learners sustain injuries due to a lack of duty of care and responsibility to prevent harm (Joubert, 2007:112 & Newnham, 2000:1). De Waal (2000:85) furthermore describes four elements of an educator's duty. The first is that an educator has to have appropriate knowledge and skills to be able to ensure that he/she can provide a positive and caring environment. The second is the duty of understanding one's environment and the nature of learners. It is related to having a sound understanding of the diversity of learners and the environment in which they teach. The third category is an educator's duty to understand the dangers to which their learners are exposed (De Waal, 2000:85). According to De Waal (2000:85), an educator has to be able to understand the difference between internal and external dangers. Internal can be seen as bullies and unsafe school areas (De Waal, 2000:86). External dangers are described as field exercises, road trips and dangerous areas surrounding the school (De Waal, 2000:86). The fourth and last duty of an educator according to De Waal (2000:87), is that an educator must not be negligent. Educators have the

duty to foresee harmful environments, dangerous situations and then make the correct and responsible decisions. This implies that an educators' duty of care must be seen in relation to the need for an educator to not only apply professional discretion, but also to have the freedom to apply such discretion.

There is a close link between liability and the duty of care and issues arising from an educator exercising his/her duty of care could result in charges of liability. Mohammed *et al.* (2014:319) suggest that educators should seek advice when they are accused of negligence. However, educators and the school have numerous liabilities and an educator should not be held responsible where he/she has exercised discretion in order to maintain a high professional standard of care and *vice versa*. Mohammed *et al.* (2014:320) conclude that educators have the duty to act as advisors and must have experience in psychology and human relations in order to be the best possible care givers to the learners in their care.

De Waal *et al.* (2001:159), however emphasise that an "accountable and responsive educator-learner relationship will certainly be promoted once all educators are dedicated to fulfil specific educational and juridical requirements in furtherance of the best interests of learners in the administration of justice". Therefore, making educational law a compulsory subject for all studies related to education, is a progressive step in promoting the duty of care (De Waal *et al.*, 2001:159).

2.4.3 Duty of Care in Education

Potgieter (2004:153) suggests that we should refer to an educator as a reasonable educator and not simply as a reasonable person. This is based on the idea that an educator has professional knowledge of the child's development and behaviour and should therefore be able to take better care of a child in specific circumstances than a parent. According to Scriven (1994:16) and Mthethwa (2015:27) educators should perform their duties in such a way that the child's best interests are not jeopardised and that no unnecessary and reasonably foreseeable risks in regard to the child's psycho-physical well-being, are created.

2.4.4 Duty to Act

In *Wynkwart v Minister of Education and Another* 2004 (3) SA 577, the court determined that there was insufficient supervision which led to a poor standard of care where educators had a "duty to act". The court held that the educators were

trained and skilled in learner development and should have predicted that young children easily forget what they have been told not to do – such as climbing over a gate. In this instance, the duty of care of a reasonable educator goes beyond explaining what potential dangers might arise (Potgieter, 2004:154).

Therefore, in ensuring that no injuries or harm occur, educators have a duty to act and to prevent any form of reasonably foreseeable harm to learners (Joubert, 2015:165). According to Bremner (2014:80), it is not sufficient for educators to simply warn or educate learners of the dangers but they are expected to also supervise in order to prevent intellectual or physical harm (Bremner, 2014:80-81).

2.5 NEGLIGENCE IN EDUCATION

The Department of Education views an educator as being *in loco parentis*, which is a responsibility that allows the use of professional discretion when executing this role (DOE, 2002:6). However, educators should be mindful that such discretion, when not cautiously administered, could easily lead to negligence (De Waal, 2011:183).

2.5.1 Characteristics of Negligence in Education

Joubert and Prinsloo (2013:33) describe educational negligence as the action(s) of an educator who has not fulfilled the standard of care or thoughtfulness of a reasonable person, whilst Eberlein (2009:33) defines negligence in the education environment as the behaviour of an educator who has failed to act or made decisions that failed to measure up to the way a prudent, reasonable or careful person would have acted under similar circumstances. Potgieter (2004:153) refers to conduct of negligence as a person's failure to take precautionary steps in order to prevent harm of injury as a reasonable 'ordinary' person would. Educators are thus negligent if their conduct and behaviour does not meet the standard of care that is legally required and in accordance with the position in which they find themselves (Bremner, 2014:29).

To prove an educator's negligence, it must be determined whether a reasonable (ordinary) person would have behaved differently in similar circumstances. Negligence is part of the law of delict which has gained more intensity in recent times than any other branch of the common law (Babalola, 2012:194). It deals with complaints where one party has suffered any injury or harm as a result of something the other party has done or neglected to do (Neethling *et al.*, 2006:5).

Beckmann (1995:67) argues that an educator cannot be held “delictually liable” if he/she had the essential knowledge and skill to foresee harmful events and took the necessary steps to avert such harm. The knowledge and skills to foresee harm and reduce negligence is linked to knowing what comprises the general test for negligence.

2.5.2 The Test of Negligence

Potgieter (2004:153) emphasises the importance of the general test for negligence to ensure that educators in South Africa have the necessary knowledge to prevent negligence. Potgieter (2004:154) holds the opinion that in the present-day approach to law, a misunderstanding of the negligence test is demonstrated by educators. In South African law, the general test for negligence refers to the objective standards of a reasonable person. The conduct of negligence is described as the failure of a person to act like a reasonable, careful and prudent person would have done under similar circumstances to foresee the possibility that his/her conduct could cause unreasonable risk or danger of harm or injury (Potgieter, 2004:154). Bremner (2014:84) suggests that negligence and the different aspects thereof imply that the professional training of educators should enable them to be better equipped to deal with various forms of negligence in school situations than people other than educators. Therefore, a higher level of standard is expected from educators (Oosthuizen, Rossouw & de Wet, 2005:69).

Oosthuizen *et al.* (2005:69) differentiate between two aspects that need to be considered when testing for negligence. These two aspects are reasonable foreseeability and reasonable prevention. The courts will attempt to establish the degree of probability of the damages or injuries sustained in order to determine reasonable foreseeability. If high probability exists, then the challenge is obvious that the reasonable person would have been able to foresee the injuries occurring (Oosthuizen *et al.*, 2005:69). If a reasonable person did not act on such reasonable foreseeability, then it might be viewed as negligence. Regarding reasonable preventability, the court will consider the cost of reasonably preventing the damage (Bremner, 2014:83). The seriousness of the injuries or the nature of the damages, as well as the risk created by the supposed wrongdoers’ actions, will be considered (Oosthuizen *et al.*, 2005:69). If the person involved has taken every precaution to avoid or prevent injuries, negligence is difficult to prove. It is important to remember that

when an educator has not taken reasonable measures to prevent or avoid injuries, he/she might be found negligent (Oosthuizen *et al.*, 2005:70).

Potgieter (2004:154) links to the care that educators should take with the concept of *bonus paterfamilias* (the good father of the family). Therefore, it is valid to say that an educator and educational professionals should perhaps not only be judged like any parent would under similar circumstances but, that, due to the fact that educators are supposed to be experts in their fields, a higher level of care should be expected from them. In this regard, Potgieter (2004:153) argues that “the standard of care exercised by parents over their children is not appropriate to determine the negligence of educators”. *In loco parentis* should not be used with reference to the negligence of educators because, as argued by De Waal (2000:81), educators are expected to have expert knowledge.

2.5.3 Educational Malpractice

Teh (2009:137) argues that legal liability is not only based on the occurrence of physical injuries, but also extends to the intellectual harm suffered by a learner. Educators are being sued for educational malpractice around the world due to the fact that the educators are legally held accountable for poor teaching which leads to low marks in literacy, numeracy and the failure to pass test and examinations. In other words, the educator has failed to ensure that the learners achieve expected educational outcomes (Teh, 2009:137). Teh (2009:138) suggests that being negligent and liable for a learner’s educational well-being is an “unimaginable prospect” due to the fact that educators are professionally trained and developed to ensure a duty to the learner’s intellectual as well as academic well-being. The breach of such a duty is thus referred to as “educational malpractice” or “educational negligence” (Teh, 2009:138). In addition, an educator’s appropriate decision-making skills can be influenced and challenged by their “lack of competence, lack of self-control, and a lack of independence” (Boote, 2006:465).

Even though Boote’s (2006:465) study focused on an educator’s ability to make decisions with regard to curriculum development, its relevance lies in the fact that educators who lack certain “competencies” may be found negligent when it comes to their decision-making abilities in the field of academics (learners’ performance). Although there has as yet not been any litigation in South Africa in this regard, it is

becoming a more common occurrence in countries like the United States of America (USA) and England.

For example, the case of *Peter W v San Francisco Unified School District* made history in 1979, being one of the first educational malpractice cases in the United States. The learner in this case sued the school authorities for failing to discharge their duties of providing adequate instruction, guidance or supervision in basic skills such as reading and writing. In terms of this educational duty of care, Mthethwa (2015:27) describes numerous duties and responsibilities of an educator. Mthethwa (2015:27) also argues the importance of adequate instruction pathways, effective communication channels, proper guidance and supervision skills. The learner in this case could not reach his full educational potential (regards to reading and writing) due to an educators' lack of appropriate professional discretion, poor professional teaching standards and inadequate duty of care (Teh, 2009:138).

Hoffman v Board of Education was another case of educational malpractice recorded in 1979 in the United States. The negligent act, according to Teh (2009:138), was that the school authority used an incorrect assessment of the learners' intelligence quotient (IQ) level and failed to reassess him two years after the first assessment. As a result of educational negligence, the learner was placed with the intellectually impaired, causing him intellectual and emotional injury. Although this was a case of educational negligence, the claim was rejected because it was precluded by the public policy considerations (Teh, 2009:138). This case illustrates the importance of accurate assessment tests, as inaccurate tests may lead to intellectual and emotional harm to learners.

In the case of Phelps v London Borough of Hillingdon (1998), a learner was neglected and misdiagnosed by an educational psychologist. The learner had dyslexia and was tested by the school, but the results instead reported that she did not have any specific weaknesses. The learner claimed that, because the school failed to diagnose her dyslexia and provide the necessary educational training, she now has difficulty obtaining jobs. She thus struggles with the necessary literacy skills (Teh, 2009:142). The High Court judged that the Local Education Authority (LEA) was liable for the negligence of misdiagnosing. According to Teh (2009:142), the court ruled that it was

the LEA's duty of care that should have been their first responsibility towards Ms. Phelps.

Boote (2006:466) argues that, although these competencies are necessary, they are not sufficient to develop an educator's professional discretion. It is essential for educators to have self-control and avoid making important decisions based arbitrarily or on impulse when it comes to the curriculum and a required work plan. Boote (2006:466) elaborates that novice educators tend to create or design curricula to maintain control over the class instead of teaching or educating the learners. Educators should have self-control when it comes to applying a new curriculum (Boote, 2006:466). Educators tend to avoid sections in the curriculum they feel uncomfortable to teach or when they do not comply with the knowledge of a specific section in the curriculum. This in return may lead to educational negligence and a lack of professional discretion.

As illustrated in this section, educational negligence or educational malpractice is an emerging and growing area of litigation in United Kingdom of Great Britain (UK), the USA and Australia (Teh, 2009:137). This area of litigation forms part of negligence where a physical injury is suffered by a learners' educational malpractice which refers to a claim laid by a learner that an educator has failed to facilitate learning (Newnham, 2000:1). Educational negligence can also link to learners' learning disabilities (Newnham, 2000:1). Therefore, it is essential that educators work together with educational psychologists to identify learning disabilities. Implementing professional discretion and applying ability in identifying a learning disability successfully, will allow educational psychologists to diagnose learning disabilities effectively without being negligent (Teh, 2009:138). As South African courts have yet to rule on such cases, the position in South Africa remains unclear.

Educators should be competent in their independence as they are expected to make instructional decisions on a daily basis without supervisor support or consultation. It is evident that educators who fail to make appropriate decisions lack independence (Boote, 2006:466).

2.5.4 Causes of Negligence in Education

Squelch (2001:138) defines a safe school as one that is free from danger and harm. It is an environment where learners and educational professionals can work without unnecessary fear of any physical or psychological harm (Squelch, 2001:138). Xaba, (2006:565-566) found that 50.8% of injuries reported in the School Injury and Surveillance System in 2002 were caused through negligence and 47.1% were not negligently caused. These injuries occurred in and around the school grounds and mostly during school hours (Xaba, 2006:566). Injuries do occur due to unsafe physical school facilities and unsafe elements that intrude the schools, with violent and criminal intentions (Xaba, 2006:566).

Babalola (2012:195) highlights three important causes of negligence, namely: lack of supervision, lack of proper instruction and dangerous equipment and facilities that are not well maintained. In order to ensure a high standard of care, school management teams must manage the sources of negligence by allocating the correct number of educators to supervise the learners, according to strict safety policies (Babalola, 2012:195). Proper instructions need to be provided to the educators, to avoid any ambiguity (Babalola, 2012:195). Equipment and facilities must be maintained by the school groundkeepers, according to the school safety regulations. Managing these possible causes of harm or damage will ensure that negligence is avoided (Babalola, 2012:195).

Teachers should be educated regarding the duties and liabilities they have in and outside of their classrooms. They should be mindful of these in order to minimise their exposure to lawsuits and learner/parent complaints (Wiemer, 2012:13). Educators should maintain high standards of supervision of learners, proper instructions with regards to safety requirements and be responsible to immediately report equipment and facilities that do not comply with safety and professional standards. In addition, educators must adhere to safety regulations to avoid negligence (Babalola, 2012:195).

Section 24 of the Constitution stipulates that every learner has the right to a safe environment that is not harmful to their welfare. It is thus a learner's constitutional right to enjoy education in a safe, clean, harmonious and carefree environment. In other words, learners have the right to safe premises, facilities and equipment. It implies that

educators must be able to comprehend the scope and possible repercussions of his/her actions before he/she can be held liable (Joubert & Prinsloo, 2013:32).

2.5.4.1 Supervision of Learners

It is a general rule that learners should be supervised whether they are in the classroom or anywhere else on the school grounds. The learners should be supervised by responsible (careful and prudent) educators in order to prevent injuries from occurring (Eberlein, 2009:42-43). The intensity of the supervision required depends on the risk factor to which learners are exposed in particular environments. The risk factor is closely related to the learners' ages, the activities at hand, the specific environment in which these activities are taking place, as well as the length of time learners are left unsupervised (Bremner, 2014:124). Every school should have a duty roster indicating where and when educators need to supervise learners and this applies to both primary and secondary schools (Joubert & Prinsloo, 2013:30).

Some playgrounds are essentially safe, but the behaviour and curiosity element of certain learners may endanger other learners or themselves. There might be other sources of danger on the playgrounds (Eberlein, 2009:41). For example, a building site where learners would like to explore, may be dangerous. Although it is not possible to watch all the learners at the same time, it is legally expected and necessary for educators to supervise learners anywhere in the school environment (Joubert & Prinsloo, 2013:36). However, when learners are unsupervised during school hours on school grounds, educators and school principals are liable for harm or damage that learners suffer (Eberlein, 2009:32). Joubert and Prinsloo (2013:36) highlight that some learners play rough and it is therefore also an educator's duty to protect and safeguard learners from themselves. Educators may thus be held liable for injuries sustained by the learners under their supervision if they allow them to play rough or even allow fighting (Joubert & Prinsloo, 2013:32).

According to Newnham (2000:47), in high risk situations, a higher duty of care is imposed on the educators. Russo (2014:34) argue that the needed level for supervision lessens before and after school hours, the reason being the reduced number of learners before and after school hours. Regardless, it is important to always have educators on duty before and after school hours to supervise learners (Eberlein,

2009:103) This is part of the requirements in Section 8A(2)(b) of the South African Schools Act.

In addition, Russo (2014:33) argues that awareness of educational professionals of their legal duty to supervise learners can help to effectively minimise negligence and protect the government from any liabilities. However, although educators have a responsibility to protect all learners from harm and foresee any injuries, educators are not “insurers” of learner safety (Bremner, 2014:81). This means that educators cannot be held responsible for all harm or injuries that occur but for harm or damage caused by the negligence (Russo, 2014:33). The majority of injuries in schools arise from what the law calls pure accidents or unavoidable injuries. Some of these injuries have no legal fault. Russo (2014:33) argue that it cannot reasonably be expected that educators should supervise all learners constantly but learners can only be left without supervision under specific conditions where the risk factor is relatively low.

Supervision during extracurricular school activities are just as important (Joubert & Prinsloo, 2013:30). Transportation of learners is a major responsibility. Learners often need transportation for sport events and excursions. The transportation vehicles can be buses and any other means of transportation, whether owned by the school or hired from private enterprise for excursions or tours (Eberlein, 2009:98). Joubert and Prinsloo (2013:37) argue that educators are responsible for the behaviour of the learners and the way in which the driver handles the vehicle. In addition, Joubert and Prinsloo (2013:37) mention two ways in which educators are involved when learners are transported. Firstly, the educator may be a driver of the vehicle and secondly, the educator may be the supervisor in the transportation vehicle. It is evident, that the educator is responsible for the learners’ safety in both cases (Joubert & Prinsloo, 2013:37).

Educators must follow the Regulations for Safety Measures set out by the Department of Education (DOE, 2006). In addition, it is of the utmost importance that educators know the law and regulations when it comes to supervising and safeguarding learners during transportation. In order to reduce the potential for negligence, in terms of the Regulations for Safety Measures (DOE, 2006) at public schools, schools must guarantee that:

- If it owns vehicles for transporting learners, such vehicles must have insurance and roadworthy certificates;
- Drivers of such vehicles must be in possession of valid driver's licences and public transport permits;
- Transportation companies or the owners of the vehicle must provide the school with the following:
 - a. insurance and roadworthy certificates for each vehicle;
 - b. passenger liability insurance; and
 - c. valid driver's licence and public transport driving permit of the driver;
- The transport company or owner of the vehicle must provide a substitute driver and transport support system *en route* when necessary; and
- The vehicle transporting learners must have a fire extinguisher.

It is the supervising educators' responsibility to ensure that the driver is not endangering the learners by driving recklessly. The educator should ensure that the learners follow the rules and not distract the driver. It is also the educators' responsibility to ensure that the learners do not hang out from the windows. It is of utmost importance that there is one educator on supervisory duty for every 30 learners on the transportation vehicle. The educators should sit in front and at the back of the bus in order to keep an eye on the learners' behaviour (Joubert & Prinsloo, 2013:37).

From the above-mentioned section, it is evident that negligence can be avoided through the effective application of an educators' professional discretion. However, for an educators' judgement to be successful, it should be procedurally correct, innovative and substantive (Boote, 2006:465). Section 8D of 2002 the Amended Regulations for Safety Measures states that the school must ensure that vehicles transporting learners comply with all the requirements set out by the Regulations. This section therefore empowers and directs educators, principals and the SGB to intervene should they deem that a vehicle and/or driver does not meet the safety standard as prescribed in the regulations. Thus, the educator who is supervising the learners must use their professional discretion to manage the situation and put the welfare of the learners first by not allowing the learners to be transported under certain circumstances or commanding the driver of a vehicle to stop (Eberlein, 2009:25). For example, if a driver of a vehicle is under the influence of alcohol, they endanger the learners by driving.

An educator who supervises learners has the responsibility and obligation to protect the learners' best interests, hence educators must make use of their professional discretion by ordering the driver to stop the vehicle.

2.5.4.2 Care and maintenance of equipment and facilities

Another cause of negligence is improper care and maintenance of equipment and facilities (Babalola, 2012:196). Squelch (2001:138) contends that a safe school is recognisable by certain physical aspects such as secure fencing, gates, walls and buildings that are in good state of repair with well-maintained school grounds. The most visible aspect of a safe school is thus the quality, security and maintenance of the school ground and buildings (Xaba, 2006:567).

It is expected that the SGBs must ensure that school buildings do not pose a risk to the educational professionals and learners (Joubert, 2007:111). This expectation can be found in Section 20(1)(g) of the South African Schools Act which obliges the SGB “to keep school buildings in good repair, keep school grounds free of dangerous objects and maintaining equipment in good working order...” (Squelch, 2001:142) and to follow the regulations and standards laid down by legislation (Eberlein, 2009:16)

School infrastructure can be divided into two categories, namely cosmetic features and structural features (Fisher, 2000:4). Cosmetic elements include exterior and interior painting, furniture, landscaping and school grounds. Structural elements include the actual building, windows, age of the building, size of the school grounds, classrooms, student density and flooring (Fisher, 2000:4). Neither cosmetic structural features should unreasonably place learners and educators nor other people associated with the school under any unnecessary risk.

Amsterdam (2010:1) reveals the concern about some schools with regards to their sanitation facilities and the lack of safe playing space for the learners in which to socialise, as well as the lack of sport equipment and facilities. She elaborates that learners feel more secure and safe at school when the infrastructure of the school, such as the buildings, classrooms, playgrounds and sanitation needs are well looked after (Amsterdam, 2010:1). An incident that occurred in March 2018 was devastating to many people. A five-year-old learner died after falling into a pit toilet (Etheridge, 2018:1). Basic Education Minister Angie Motshekga, stressed that “as a sector, we have not been able to address these infrastructure issues fast enough, for a number

of reasons, breaks my heart" (Etheridge, 2018:1). This is one incident where the school and the SGB failed to protect a learner from harm due to a lack of proper infrastructure and supervision.

Many South African schools are unsafe, especially in rural areas (Squelch, 2001:142). These schools' infrastructure is in poor condition, and may lack basic facilities (Eberlein, 2009:47). Squelch (2001:139) blames these unfortunate situations on the failure of SGBs of many schools to design and implement effective school safety policies. She further postulates that many South African schools are not sufficiently equipped to perform the important function of care and adequate maintenance of school facilities (Squelch, 2001:138).

Schools and educators could be liable for the damage and injuries that learners sustain due to poor infrastructure (Joubert & Prinsloo, 2013: 31). This, however highlights the role of the SGBs because failure to control and maintain facilities to keep them safe for use by learners and educators could lead to liability (Prinsloo, 2005:9). According to Section 14 of the Occupational Health and Safety Act 85 of 1993, employees (in this case educators) have certain duties. An educator has a duty to immediately identify and report unsafe conditions with regard to any faulty facilities or any dangerous environments, in order to rectify or control the situation and prevent injuries or harm to occur (Joubert & Prinsloo, 2013:35). This forms part of an educator's professional discretion due to the fact that appropriate judgement is needed to prevent injuries from occurring, as it is a key responsibility and duty of an educator. An educator's judgement of an unsafe situation is of the utmost importance to ensure that no harm is caused to the learners (Joubert & Prinsloo, 2013:35). Therefore, creating and ensuring school building safety revolves around the maintenance of buildings, the replacement, report and repair of general equipment and facilities (Xaba, 2006:576). Safety in this sense implies that school grounds must be free of any safety threats.

Minimum Uniform Norms and Standards for School Infrastructure are seen as significant as they would set out legal standards for minimum physical resources that all schools should have (DOE, 2014). These norms and standards would serve as a tool to hold the government accountable and liable when these norms and standards are not met (Draga, 2016: 239). The Minimum Uniform Norms and Standards for

School Infrastructure requires the Minister of Basic Education to ensure that all schools have basic infrastructures such as water, libraries and laboratories (Draga, 2016:239). This, however, highlights the failure of many SGBs to control and maintain their school facilities (Prinsloo, 2005:9). Educators have the responsibility to report all unsafe and damaged facilities to the SGB, which will enable them to better control and maintain their school facilities (Draga, 2016:239).

2.5.5 Elements of Liability in Education

Joubert (2015:166) state that in South Africa “liability for an unlawful act that causes damage to another is covered by the law of delict”. There are five elements to be considered in the definition of delict. These elements are: “act, wrongfulness, fault, causation and harm” and all must be present for the conduct of negligence in order for it to be judged as a delict (Neethling *et al.*, 2006:4). According to Rossouw, Rossouw and Lancaster (n/d) “under the law of delict a person can claim for physical, psychological and financial damage that was caused through intentional or negligent conduct of another person that is also wrongful”.

Eberlein (2009:29) explains that the act of a person who in a wrongful and culpable way causes harm to another person, is known as a delict. According to Bremner (2014:28), “a generalising approach is thus followed in South Africa where delictual liability is concerned, unlike the English and the Roman law of delict which makes use of a group of separate delicts (torts) each with its own rules”.

Joubert (2015:167-170) emphasise the five elements which must be proved to find a person guilty and liable to pay for compensation for any damages or injuries sustained. These elements represent the five constituent elements of the South African law of delict:

- **“An act”**- For a delict to be proved, there must be an action that resulted in injury or damages. It is important to remember that no one can be held liable for “Acts of God” (which are not reasonably foreseeable) where something happened beyond humanity’s ability to prevent (Eberlein, 2009:35). It is important to differentiate between a positive act and an omission to act. A positive act can be described as the actual action of doing something or reacting to an event or situation. Omission to act is the failure to act in certain

circumstances (Joubert, 2015:168). Both a positive act and an omission can lead to a delict.

- **“Wrongfulness”**- The essence of wrongfulness is an action or omission of the educator violating a learner(s)’ rights to psycho-physical safety and consequently, causing harm or damage or suffering. According to Joubert (2015:168) factors that the court may consider to determine whether an educator’s actions were wrongful include:
 - i. The nature and the extent of the harm caused.
 - ii. The foreseeability of the damage.
 - iii. The possible cost to the defendant or society of the harmful conduct.
 - iv. The cost and the efforts of steps to prevent harm.
 - v. The nature of the relationship between the parties.
 - vi. The motive and knowledge of the defendant that the conduct or omission could have caused harm.
 - vii. Ethical and moral issues.
 - viii. The values underpinning the Constitution and the Bill of Rights.
- **“Fault”**- A fault is a general requirement for delictual liability. In practice, two main forms of fault are recognised: intention (*dolus*) and negligence (*culpa*) (Joubert, 2015:169). Intention can be described as a person acting purposefully and intentionally when the educator is aware of his/her act of infringement on the rights of the learner. Negligence for an educator can be viewed as failing to adhere to the standards of care legally required from him/her (Joubert, 2015:169).
- **“Causation”**- The action taken or not taken by the educator was the cause of the injury or damage.
- **“Harm”**- Damage or injury must have occurred (Joubert, 2007:116). Two forms of losses can occur during the action of harm. The first distinction of loss can be defined as patrimonial loss (financial loss), for example damage of property and medical expenses. The second loss can be defined as non-patrimonial loss (pain and suffering), for example loss of general health or emotional shock (Joubert, 2015:170). Educators must be aware of different forms of harm as it can amount to more liabilities in cases of negligence (Joubert, 2015:171).

To summarise, liability can only be apportioned when prejudice is caused in an unreasonable or wrongful manner (Neethling *et al.*, 2006:31). However, it is important to note that American and Australian tort law, which is similar to law of delict in a number of ways, is not the way that South African law of delict functions. Educators should be careful not to allow tort law instead of the law of delict to guide the actions in terms of the duty of care.

In cases where injuries have occurred in South Africa, negligence is referred to as “the legal duty to bear the damage” and this is defined as liability (Joubert, 2015:166). When damages are caused by the unlawful, negligent or intentional act of another, it is seen as liability (Joubert, 2015:166). They argue that the person who causes harm or injury to another, whether by failure to act or intentional act, is responsible for the payment of damages to the party injured by his/her action (Joubert, 2015:166).

Neethling *et al.* (2006:3) state that the law of delict is part of private law which is known as the “law of obligation”. Neethling *et al.* (2006:3) define liability as the obligation of a “wrongdoer” to compensate the aggrieved party for the damages or injuries suffered as a result of law of delict. Liability in the educational environment commonly falls on the individual educator or the school as the government employer. When an individual educator is not held personally liable for injuries or damages, it reverts to the educator’s employer (the school or government). In cases where the employer (the Department of Basic Education (DBE)) is liable for the negligent action of its employees (principal or educator), it is referred to as vicarious liability. The employer may only be held liable under the following circumstances (Joubert, 2015:166; Eberlein, 2009:29; De Waal *et al.*, 2001:158):

- There is a contract of employment between the employer and employee.
- The irregularity occurred while the employee was carrying out his/her normal duties or was acting within the scope of his/her her employment when the delict was committed.
- The employee committed a delict.

Section 60 (1) of the South African Schools Act clearly defines the liability of the state in regard to damages or loss in public schools: “The State is liable for any damages or loss caused as a result of any act or omission in connection with any educational

activity conducted by a public school and for which such public school would have been liable but for the provisions of this section". This provision could confuse the issue and make educators believe that it protects them for liability on account of delict. However, an employer may accept liability on behalf of an employee as has been pointed above. It should also be pointed out that an employer may decide to accept limited liability only and that it has the option to recover the compensation it has paid from the employee in question.

2.5.6 South African Case Law and Negligence in Education

A number of court cases have influenced South African case law with regard to educators' duty of care, their professional discretion and the prevention of negligence. The court cases discussed in this section specifically dealt with incidents where learners were injured due to educators being negligent. Judgements in South African court cases were very useful as they highlighted current trends (Bremner, 2014:32), trends such as educators who become liable due to the failure to reconcile professional discretion and their duty of care. After reading the following court cases, I recognised educators' need for adequate training and legal support to successfully use their professional discretion. These court cases illustrate dilemmas with which educators and schools must grapple on a daily basis (Joubert, 2015:160).

(i) Wynkwart NO v Minister of Education and Another 202 (6) SA 564 (C) and the subsequent appeal

This case deals with the issue of reasonable care and the provision of supervision for learners on a school's premises.

a) Facts of the case

Eberlein (2009:43) and De Waal (2011:184) give the following facts regarding this case:

In April 1990, a Grade 3 learner (nine-year-old boy), enrolled in a school in Mitchells Plain in the Western Cape, sustained serious head injuries. The nine-year-old boy, Ryndall Wynkwart climbed over a 1,8m high unused school gate shortly after having been dismissed from class. As mentioned in Chapter 1, the nine-year-old boy broke his neck and was left permanently paralysed with permanent brain-damage.

Ryndall had climbed the locked gate in order to take a shortcut to his home. According to Ryndall's own evidence in court 11 years after the incident, he claimed that he and several other children had regularly climbed over the gate to take the shortest route home (Eberlein, 2009:43). It was unfortunate that his trousers were caught on the gate, causing him to slip and fall on his head.

The incident happened despite the learners being regularly told that they were not allowed to climb over the fences or gates surrounding the school premises.

b) The issue of the case

The plaintiff, Ryndall's father Mr Wynkwart, instituted an action against both the Minister of Education in the Western Cape and Highlands Primary School. The plaintiff urged the court to find the educator who had been negligent in not ensuring that all her learners were present on the day she had accompanied them to the gate. The plaintiff claimed that the school had acted negligently in not providing sufficient supervision of the learners in their charge at the time of the accident and that they are liable for his son's injuries. The insufficient supervision led to a poor standard of care.

The school (defendant) countered the claim saying that they had taken ample precautions to prevent such an accident from happening. Common practice allowed the junior learners, those in Grade 1-3, to be excused from classes before the seniors and to exit through gate 5 under educator supervision. The learners were thus escorted to the exit by the educators and the dangers of climbing the school fence and school gates had been pointed out to the learners during assembly and numerous school activities.

c) Matters to be decided by the court

The court had to decide whether the school had satisfactorily carried out its duty of care towards, Ryndall Wynkwart or whether it had, in fact, acted negligently, contributing to the occurrence of the accident and was therefore liable for the injuries (Eberlein, 2009:43).

d) The judgement

Judge Ngwenya found for the plaintiff on the grounds that Ryndall's educators had not taken sufficient care to ensure that the learners left the school grounds through the correct gate on the day of the accident (Eberlein, 2009:43). According to the school policy, the educator lined her class up and accompanied them to the school gate, where the learners left the school grounds. All the learners were warned about potential dangers of crossing the road, they were instructed not to use the gate that opened onto the busy street and that the gate was kept locked (Joubert & Prinsloo, 2013:27).

Judge Ngwenya based his judgement on testimony of Ryndall that he had not joined the line of his peers on their way to the correct exit, but had in fact gone straight from class to the locked gate. This was in contrast to the statement of his educator. His educator claimed that Ryndall had been with the class and left the line later on and climbed the locked gate (Eberlein, 2009:44).

The decision in *Wynkwart* seems to suggest that the duty of care owed by the school goes further than simply warning the learner of potential dangers. An educator must furthermore ensure that no harm occurs. The judge also stated that he did not believe the mere warning of young learners of dangers present in their immediate school environment was sufficient.

The judge determined that there was insufficient supervision which led to a poor standard of care. He ruled that the educators were skilled in learner development and should have known that children easily forget what they have been told not to do – such as climbing over a gate and thus predict a possible violation of school rules by a learner(s). Educators must be judged in terms of the “normal test of negligence” (Potgieter, 2004:153).

e) The appeal

The court overturned the judgement in the subsequent appeal entitled *Minister of Education v Wynkwart* NO 2004 (3) SA 577 (C) stating the following reason:

The fact that the court *a quo* accepted the testimony of Ryndall over that of the educator, as the initial case had not been based on sound reasoning. The events had occurred 11 years previously and the testimony of Ryndall was the memory of a nine-year-old against that of a senior educator of good reasoning. Although this

ruling was overturned on appeal, this case illustrates how the professional discretion of educators can be challenged.

f) Legal aspects of the case

The constitutional rights that had a bearing on the case were firstly Section 28(2) of the Constitution of 1996, which explicitly provides that a child's best interests are of paramount importance in every matter concerning the child. Section 28(2) is of particular importance when dealing with educational policies and legislation as it focuses on the educator and school's responsibility, as well as their duty to provide and promote safety to the learners.

Section 11 of the Constitution deals with the right to life. The impact of this right on educational policies and legislation is solely concerned with the safety of the learners and the educators at a school. The ultimate goal is the preservation of the lives of all the learners and all the educators. Lack of supervision and poor instruction and safety measures could potentially place the learner's (Ryndall's) life in jeopardy. One may argue that Ryndall's right to a safe environment which promotes quality life, health and well-being (Section 24 of the Constitution) was also violated in that the incident left him without quality life and health due to his brain injury, as well as paralyses.

g) The significance of the case

The judge in the initial case mentioned that children are impulsive, unpredictable and irresponsible. However, if schools have proper systems and procedures in place, they will limit their liability for damages when injuries occur. This illustrates the importance of an educator's duty of care. This is especially important in the case of younger learners - Ryndall was only 9 years old when the incident occurred.

In this instance, the duty of care of a reasonable educator goes beyond explaining to learners what potential dangers might arise (Potgieter, 2004:15).

(ii) TM Jacobs v The Chairman of the Governing Body of Rhodes High School & Others: Case no 7953/2004

The case deals with the educator (Jacobs) claiming damages for medical costs and trauma after the SGB and the school principal failed to respond to her complaint against a learner of Rhodes High School (Bremner, 2014:6).

a) Facts of the case

On 4 November 2010, an educator (Jacobs) complained to the principal and the Head of Department (HOD) after a death threat “I aimed at her”, was found in a learner’s journal. The Grade 8 learner, Bheki was already a troubled young boy with numerous infractions in and out of the school, and in addition, had social problems at home (Joubert & Prinsloo, 2013:28).

b) The issue of the case

The plaintiff Tania Jacobs reported this case to the HOD and the principal. The claim of negligence against the HOD and the principal was supported by their lack of action against the Grade 8 learner. The learner was placed outside of the principals’ office on a chair while the secretary phoned the police and the learners’ mother. The evidence of negligence was that the learner was not under proper supervision (Joubert, 2015:161).

c) Matters to be decided by the court

The court had to determine whether the school, the HOD and the principal had the correct measures in place to prevent harm and injury to the learners and the educator. The second matter that had to be determined by the court was, whether reasonable care and proper supervision was provided after the initial complaint (Joubert, 2015:161).

d) The judgement

According to Joubert and Prinsloo (2013:29), the judge found that both the HOD and the principal acted negligently in their duties to protect Jacobs. The state was also held liable for the damages and loss caused. The Member of the Executive Council for Educators in the Western Cape (MEC) paid out a large amount for damages. However, the judge found Jacobs 20% responsible for the negligence that occurred because she did not react immediately. The remaining 80% of the damages was the responsibility of the HOD and the principal.

e) Legal aspects of the case

It is clear that the right to human dignity (Section 10 of the Constitution) was the first right to be infringed. The right to human dignity in education goes hand-in-hand with ensuring that educators and learners are protected from being victims of perpetrators of violence. In addition, the educator, principal and the Head of

Department failed to apply the relevant school policies and legislation. In this case one of the factors that stood out was that the learner suffered from social neglect and had had previous issues with violence. The right, significant in this case, was Section 28 (1)(d) of the Constitution of 1996: “Every child has a right to be protected from maltreatment, neglect, abuse or degradation”. According to the Section 61 of the South African Schools Act, regulations for safety measures at schools have to be in place in order to ensure school safety. Clause 1 of the regulations deals with dangerous objects. Section 1(c) describes a dangerous object as “any article, object or instrument which may be employed to cause bodily harm to a person, or to render a person temporarily paralysed or unconscious, or to cause damage to property”. The learner in this case used a hammer and caused bodily harm to the educator and endangered his classmates in the process.

f) The significance of the case

The significance in this case was that the educator had previously confiscated a hammer from the learner. The educator knew about the previous misconduct and sanctions. Furthermore, the educator had a duty to ensure the safety of all the learners in her class. She failed to use her professional discretion sufficiently and did not act as a reasonable person with regard to the school rules and the safety policy. Thus, the judge found that the educator was partially responsible for her own injuries. The principal also failed to apply appropriate discretion when he left the learner unattended outside his office. The principals’ lack of judgement by leaving Bheki unsupervised for a few minutes, opened an opportunity for him to run back to the class and attack his educator with a hammer. The principals’ poor judgement not only led to the injuries of the educator, but it also placed the learners in the classroom in harm’s way.

(iii) Rusere v The Jesuit Fathers 1970 (4) SA 537 (RSC)

This case deals with educators failing to exercise proper supervision and reasonable care, resulting in negligence and an avoidable injury.

a) Facts of the case

An eight-year-old boy at the Missionary School lost the vision in his right eye because of an injury sustained during a game called “cowboys and crooks”. The court had to consider a claim concerning the eight-year-old learner who lost the

sight of an eye after being involved in a dangerous game using imitation bows and arrows. The hostel boys completed playing a soccer match and were playing unattended with grass shoots just before dinner, when someone's 50 cm grass shoot hit young Rusere's right eye at a short distance. Rusere complained that the educators had not complied with their duty concerning promoting learner safety and had contributed towards the accident.

b) The issue of the case

The case was based on the plaintiff's (Rusere) claim that the educators failed to exercise proper supervision under the rules of duty of care, vicarious liability and rules set out by the board of governors.

c) Matters to be decided by the court

The court had to determine what constituted reasonable care in this situation as well as the role *in loco parentis* played in this incident.

d) The judgement

Judge Beck found that the respondents were not guilty of negligence. The reasons for this judgement were:

- There were sufficient and constant communications about playing dangerous games and the consequences.
- Learners did not often play these games.
- Hostel staff, including educators, acted as any reasonable person would under these circumstances of this freak accident.
- Learners were made aware of the dangers involved when throwing or catapulting projectiles and were forbidden to own potentially harmful items.
- Hostel staff and learner council members were on hand if needed (De Waal, 2011:186).

e) Legal aspects of the case

In this case, there are two aspects that stand out. The first is Section 24 of the Constitution of 1996 which deals with a safe environment, which includes the school playgrounds and sport fields where the learners were playing. It is clear in most educational policies and legislation that educators have a duty to protect learners and secure these environments (Eberlein, 2009:16). The second aspect is Section 1(c) of the Regulations for Safety Measures which focuses on the

regulation of any object or instrument that could cause bodily harm. The learners did play with objects that caused an injury to one of the learners.

f) The significance of this case

The significance of this case lies in the way reasonable care was explained. The duties of the educators and expectations of the parents also had to be defined in this particular situation.

A key aspect highlighted by the judge was that keeping children of this age under constant supervision would have been too “timorous an approach” (De Waal, 2011:185).

(iv) Knouwds v Administrator, Cape 1981 (1) SA 544 (K)

In this case, a young girl was badly injured due to a lack of proper supervision and safety rules for learners. This case was concluded with a finding of guilt and negligence (Bremner, 2014:8).

a) Facts of the case

Bremner (2014:8), Eberlein (2009:41) and De Waal (2011:186) cite the following facts regarding this case.

The incident occurred when eight-year-old Ester Louw was racing against a friend on the school playground. She was bumped and fell against a running lawnmower resulting in her finger being amputated. Mr. Links (the gardener) was operating the lawnmower during a break under the supervision of Mr. Smit (Eberlein, 2009:41). At the time of the accident, the supervisor was approximately 30m away on his way to the school administrative office. Mr. Smit had a duty to supervise the learners and keep them away from the area in which the mower was being operated.

b) The issue of the case

Ester Louw’s mother, Mrs. Knouwds, instituted a claim of negligence against Mr. Links, Mr. Smit and the Principal Mr. van Huysteen. Mrs. Knouwds felt all three plaintiffs were responsible and negligent for running the lawnmower in the presence of the learners during break.

c) Matter to be decided by the court

The court had to determine whether the school had taken proper measures to prevent injuries under certain circumstances which were consistent with what any reasonable person would do under the same conditions.

d) The judgement

Judge Friedman's verdict was that children act in ways that are impulsive, unpredictable and irresponsible. He found that the principal and the educators should be familiar with these characteristics and should have foreseen the possibility of injuries that can occur in these circumstances (such as the lawnmower incident). The final verdict was that the Mr. Links had no valid reason to mow the lawn during this time (at break) and this represented an unnecessary risk to the safety of the learners.

e) Legal aspects of the case

This is an example of a case where the learners' right to a safe environment was violated (Section 24 of the Constitution of 1996). The learners that were allowed to play in an area where there was an active lawnmower, created an environment that was potentially harmful to their well-being. It is clear in educational policies and legislation that educational professionals have a major duty to promote and secure different school environments (Bremner, 2014:8; De Waal, 2011:184). Section 20(1)(g) of the South African Schools Act demands that the SGB control all property occupied by the school including the equipment and facilities. Protecting the safety rights of the learners at schools is an important function of all educational policies and legislation.

f) The significance of the case

In the judgement of this case, the significant aspect that emerged is that the school has a duty to ensure that learners are safe on the playground before, during and after school hours. This judgement acknowledges that playground duties and responsibilities should take into account the unpredictable behaviour of the learners. Educators should apply their professional discretion and duty of care in order to foresee and manage all activities that could cause injury or harm to the learners during any time on the school grounds.

A final aspect is that educators' professional discretion plays an increased role when it comes to younger children, because one has to take into account that the learners have a greater tendency to behave impulsively and unpredictably than older learners.

In the above-mentioned court cases, it is evident that the educators did not follow school policy when it came to learner safety and their best interests. These are only a few examples of court cases where educators were found negligent in their duty of care and the inappropriate use of professional discretion. Educators failed to reconcile a standard of care, professional discretion and policy requirements. De Waal (2000:87) states that not only must educators not be negligent, but they also have the duty to foresee harmful environments, dangerous situations and make correct and responsible decisions based on their professional discretion. Joubert (2007:114) indicates that in such times, an educator is expected to provide the highest quality and best possible care to all learners and not to be negligent.

2.6 PROFESSIONAL STANDARDS FOR EDUCATORS

Educators must “conduct themselves in ways that earn respect of those in the community and uphold the dignity of the teaching profession” (Chiloane, 2018:11). Chiloane (2018:11) further elaborate that educators are responsible for their own professional growth through self-reflection, reading on their subject matter and doing research to improve their teaching strategies.

Educators could improve their professional standards by following the Code of Professional Ethics as contained in the South African Council for Educators Act, 31 of 2000. The Code of Professional Ethics prescribes standards of conduct for all educational professionals (RSA, 2000). These standards, in general, expect educators to:

- Acknowledge the noble calling of their profession to educate and train the learners of the community.
- Acknowledge that the attitude, dedication, self-discipline, ideals, training and conduct of those in the teaching profession determine the quality of education in the country.
- Acknowledge, uphold and promote basic human rights as embodied in the Constitution of South Africa.

- Commit themselves to all within their power to act in accordance with the ideals of their profession as expected in this code.
- To act in a proper and becoming way such that their behaviour does not bring the teaching profession into disrepute (RSA, 2000).

Therefore, educators as professionals have the added obligation of creating a climate in which every learner is respected and protected from any physical and psychological harm, also as provided for in the Bill of Human Rights in Chapter 2 of the Constitution of 1996. This implies that the educator must, in exercising professional discretion, be a model with regard to their teaching standards (Du Plessis, 2019:102). Educator's professional teaching standards and standard of care are highlighted in the following sections.

2.6.1 Professional teaching standards of educators

The South African Council for Educators (SACE) has endeavoured to improve the quality of educators throughout South Africa by presenting a draft of *Professional Teaching Standards* (SACE, 2017). The draft created knowledge-rich learning for the educators and allowed them to provide learners with knowledge and skills. It is presumed that professional teaching standards will allow educators to build on their teaching experience, skills and develop expertise in their profession to comprehend the different standards as well as see the connection between these standards (SACE, 2017:1). SACE suggests that ten standards will be useful in challenging school environments and that educators should enable learners to access powerful knowledge, literacy and numeracy skills.

SACE (2017:1) argues that educators as professionals, “draw on different kinds of knowledge, namely subject, professional and contextual”, which empowers them to make appropriate choices for their classroom activities. Therefore, educators should decide how best to enable effective learning within their classroom. SACE (2017:1) further states that the educators' classroom actions and choices must be guided by a moral obligation to act in the best educational interests of the learners they teach. Hence, educators should maintain both a professional standard of care and professional teaching standard to uphold appropriate and professional discretion within the classroom with regards to the learners' educational welfare.

SACE (2017:2-3) introduces ten professional teaching standards which propose to develop educators' teaching practice standards. For this study, I will only focus on the standards relevant to an educators' professional discretion, duty of care and the doctrine of *in loco parentis*. The following standard is of utmost importance with regard to the appropriate use of professional discretion:

- Teachers make judgements that are conceptually informed, responsive to learners and contextually appropriate. Educators therefore justify their teaching choices as well as classroom experiences through internal assessment of their choices and actions. Professional discretion plays an integral role in the prevention of educational malpractice within this specific standard.
- Teaching requires that well-managed learning environments are created and maintained. Educators should implement class rules to maintain a disciplined classroom. A well-disciplined classroom will enable educators to uphold a safe and effective learning environment. Having a well-disciplined classroom will enable educators to make appropriate decisions when it comes to what to teach and how to teach. This may reduce the risk of educational negligence.

Educators that adhere to SACE's proposed standards may find it easier to apply appropriate professional discretion in the classroom with regard to what to teach, how to teach and to ensure a safe classroom environment (SACE, 2017:1). For that reason, educators are expected to make wise educational decisions in situations that are complex and unpredictable (SACE, 2017:1). Learners depend on educators to put their educational needs first and not to be negligent. Thus, it is expected that educators consider the best ways to create learning opportunities in the classroom (SACE, 2017:1). Educators may become liable through poor teaching standards that might result in the failure of learners being able to achieve the expected educational outcomes (Teh, 2009:137).

The Australian Professional Standards for Teachers focus on similar, but much more detailed standards than those of SACE. The Australian Professional Standards for Teachers (Australian Government, 2011:1) has seven interdependent, interconnected

and overlapping standards for educators which guide educators to new knowledge and skills. These standards are:

- Know students and how they learn.
- Know the content and how to teach it.
- Plan for and implement effective teaching and learning.
- Create and maintain supportive and safe learning environments.
- Assess, provide feedback and report on student learning.
- Engage in professional learning.
- Engage professionally with colleagues, parents and the community.

SACE's standards resonate clearly with the fourth Australian standard that focuses on conditions that will create and maintain learner safety. It is important to remember that the safety of learners is just as important as the educational/academic well-being of learners. Educators could be held accountable and be liable for damage resulting from negligence regarding learners' physical and intellectual well-being (Joubert & Prinsloo, 2013:15).

An example can be found in *Principal of Mbilwi High School v RM (633/2016) Limpopo 2017*. In this particular case, a learner was being retained in Grade 11 for not satisfying the appropriate academic requirements for being promoted to Grade 12. The learner's father lodged a complaint regarding this matter and appealed against the decision of the school. According to the school, they had followed all the necessary procedures of the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12. The National Policy and Procedure manual states that educators need to have an information meeting with parents/guardians regarding any case of progression and retention of Grade 9, 10 and 11 learners.

The significance of this case lies in the Appeal Court's recognition of the principal and his/her teachers' obligation to use their professional discretion to further the best interests of learners. The final ruling was based on Section 6 (4) of the Children's Act 38 of 2005 which states that in any matter concerning a child, confrontation should be avoided and decisions and actions must be aimed at serving the best interests of the child.

Gallie and Keevy (2014:1) argue that the purpose of the proposed teaching standards is to guide the country in defining the basic requirements related to knowledge, personal attributes and pedagogical skills of educators to achieve their teaching goals and develop their professions. Gallie and Keevy (2014:1) states that teaching standards improve the quality of teaching and should be implemented in undergraduate training programmes. Gallie and Keevy (2014:4) also argue that in some cases, it is believed that professional standards are the answer to all the challenges and problems with which educators are faced. Gallie and Keevy (2014:4) explain that professional teaching standards may provide developmental principles for educators but cannot necessarily solve issues linked to “dysfunctional school organisations”; “outmoded curricula”; “inequitable allocation of resources” or “the lack of school support for children and youth”. Professional standards are, however, believed to provide accountability to represent a higher level of quality for educators, therefore, it is argued that the instruction of professional standards cannot persuade the influence of the publics’ opinions and perceptions of the professional standards of care of educator (Gallie & Keevy, 2014:4). An appropriate understanding of professional discretion is that it provides a bridge between the autonomy and accountability views of an educator (Boote, 2006:462).

Professional discretion is an act of judgement as well as a process of making decisions influenced by a specific situation where the accountability for professional discretion falls solely on the person who acted or made decisions to deal with a situation. An example of accountability and professional discretion can clearly be identified in *TM Jacobs v The Chairman of the Governing Body of Rhodes High School & Others* (refer to paragraph 2.4.5.2). In this case, the educator and the principal were accountable for their unjust use of professional discretion and poor judgement of the situation at hand.

Gallie and Keevy (2014:5) suggest that professional standards attempt to achieve accountability that is powerful in order for educators to find solutions rather than being powerless and being unaware of their responsibilities, the standard of care expected of them and blaming other people for their mistakes in exercising their professional discretion and duty of care. Being more experienced in the teaching environment, allows educators to understand their responsibilities and standard of care towards the learners in order to keep them safe. According to Gallie and Keevy (2014:6) educators’

qualifications and experience vary from certificates, to child care diplomas, to four-year degrees and to postgraduate studies. In this report, policy perception is often not adhered to. The study's conclusion is that educator's minimum qualifications around the world are becoming more rigorous in order to improve the professional standards (Gallie & Keevy, 2014:6).

Establishing professional standards for educators could develop and attract quality educators (Gallie & Keevy, 2014:6). One might add that better quality educators might be better able to know and exercise their professional discretion and comply with their duty of care.

2.6.2 Educators' Standard of Care

According to Potgieter (2004:153), standard of care refers to the quality of care provided by educators to learners to which they are held an above average standard of care in this regard. Wiemer (2012:13) outlines standards as how another person with the same education, experience and training would respond in similar circumstances. This goes beyond the care of a reasonable person and educators who supervise learners are held to a higher standard of care than non-educators when protecting learners' health, well-being and safety (Potgieter, 2004:153) Educational professionals are held to an above-average standard of care in relation to learners (Teh, 2009:141) and Rossouw (2004:67) argues that the South African courts expect a heightened standard of care from sport educators due to their training and qualification in the specific sport. Sport coaches are experts in their fields because of their training.

Joubert (2007:118) states that standard of care together with duty of care requires educational professionals to take reasonable steps to minimise the risk of reasonably foreseeable harm. Russo (2014:34) contends that courts have attempted to create an "objective standard of care to require teachers to provide the same level of care as reasonably prudent professional of similar education and background". This statement aligns with Potgieter's (2004:153) view, which states that the standard of care of an educator goes beyond that of a reasonable parent to one of a reasonable educator. Joubert and Prinsloo (2013:31) argue that educators "do not have to protect the learners against every possible risk, but in all situations, they should act as a

reasonable person would” which means that the courts require professional standards, due to the fact that educators have received training (Joubert & Prinsloo, 2013:31).

However, Potgieter (2004:154) argues that in the South African context, more would be expected from educators as they are professionally trained and qualified in child development and psychology. Bremner’s (2014:26) study shows that when courts decide on an educator’s liability for the injuries of learners, a greater standard of care is expected than in the case of a rational person, as the educator is more experienced and better qualified than some parents and should know when to foresee risks in as well as outside the classroom. In a similar vein, Newnham (2000:48) agrees that the courts have stated in the past that the standard of care expected of an educator is that of a “reasonable parent” but it is challenging to apply this standard of care as the school environment differs to the home environment.

According to Newnham (2000:48), in many cases, a single educator is expected to be responsible for groups of learners in excess of 40 or more individuals, in the school environment. It is completely illogical to expect high levels of care when the educator to learner ratio is ludicrously high. Therefore, it is challenging for educators to act in the same manner as a parent would on a one-on-one basis or with a small number or group of learners, for example. The educator’s legal responsibility and standard of care goes beyond those of parents.

Newnham (2000:49) points out that there are two aspects that need to be considered as part of the determination of the standard of care. First, she emphasises, as does Potgieter (2004:153), that the standard of care of an educator goes beyond that of a reasonable parent to one of a reasonable educator. Potgieter (2004:153) agrees with this aspect, stating that the standard of care is that of a reasonable educator. The second aspect Newnham (2000:49) highlights, is the fact that the age of the learners and their competence to recognise dangers is crucial. Newnham (2000:49) reports that “the more dangerous the situation and the younger the children, the higher the duty of care owed by the teacher”. This is in line with children’s law in South Africa and which links the ability to accept responsibility to a child’s age.

Newnham (2000:50) concludes that to avoid being negligent, an educator should always maintain a high professional standard of care in any given circumstance. In

order for an educator to maintain a professional standard of care, it seems important to link it to how educators maintain a professional teaching standard.

2.7 SCHOOL SAFETY POLICIES

Educators may be found negligent when they do not adhere to school safety policies. Policy requirements together with education law are perceived to be rigid, not allowing professional discretion to deviate from the policy requirements (Newnham, 2000:45). This inflexibility increases the likelihood of being negligent (Newnham, 2000:45). The South African Schools Act (RSA, 1996a) and the National Education Policy Act (NEPA) (RSA, 1996c) are some of the many laws which guide educational professionals in the country, but it should not deviate from the provisions set out in the Constitution of 1996 (Bremner, 2014:59).

2.7.1 Objective of School Safety Policies

The objective of school safety policies is to create a learning environment that is safe, enhances human dignity and values innocence (Joubert, 2007:110). It is believed that regulations, rules and a school's code of conduct will automatically deliver a protected and safe environment for all learners as well as educational professionals in schools.

Learners and educators have the right to emotional, physical and cultural safety (Joubert, 2007:111). Section 24 of the Constitution of 1996 states that a learner has the right to a harmless environment where their wellbeing is protected. Therefore, it is the constitutional right of learners to receive education in a well-balanced and carefree environment (Joubert, 2007:111). A well-balanced environment in this case is "a secure school environment that has a very low risk of physical, emotional and psychological injury to its occupants" (Xaba, 2006:565).

Educational professionals dealing with school safety all visualise that SGBs, acting within their function under the South African Schools Act 84 of 1996, will give effect to their policies by including plans that reproduce the ethos, needs and values of the school community as well as the institution. And according to Joubert (2007:111), every educational institution is expected to develop their own safety policies and ensure that the policies interconnect with their school communities.

Joubert (2007:112) argues that the South African Schools Act (RSA, 1996a) places a responsibility on SGBs to foster the best interests of the school and manage the

school structures and properties (Section 20), but there is no detailed indication about providing a safe school environment. Educators may be found negligent when they do not follow rules and obligations set out by the safety policies especially if they do not have the skills and knowledge to apply legal principles (Joubert, 2007:112). Joubert (2007:111) strongly advises that school policies and risk management should be investigated, due to the fact that there are noticeable legal implications in respect of injuries or harm to learners as well as educational professionals within the school buildings and grounds.

Eberlein (2009:3) points out that every principal of a public school in South Africa should create, monitor and implement school safety policies. These policies must be based on the prescribed safety regulations and measures stipulated by the South African Schools Act. School safety policies should adhere to the Regulations for Safety Measures at Public Schools (DOE, 2001) as amended in 2006 (hereafter referred to as the Regulations). These Regulations have been drafted and promulgated in terms of Section 61 of the South African Schools Act. The following safety aspects are addressed in the Regulations:

- Violence and substance abuse in schools.
- Access to schools and visitors to schools.
- Organisation of school activities, including the transport of learners.
- Physical activities.
- Emergency and fire procedures.
- Early release of learners from school.

It is thus important to incorporate these Regulations into a safety policy to ensure that all the learners and educational staff are safe and that their constitutional rights are protected. Eberlein (2009:28) highlights that the importance that a school's safety policy should be suitable for adaption to suit the school's specific needs and requirements. The safety policy must be thoroughly implemented, monitored and maintained in order to enhance a positive effect on the school's safety situation.

The National Education Policy Act 27 of 1996 (RSA, 1996c) is used to design a school safety policy. This Act stipulates that all the educational professionals have a duty to protect all the learners before, during and after school hours. The main objectives of Section 7 of this Act are to establish national educational policies, provide

infrastructure to implement and publish educational policies whilst ensuring that the policies are constantly controlled and monitored (Bremner, 2014: 58).

Educators may be found negligent when they do not follow rules and obligations set out by the safety policies due to the lack of skills and knowledge when applying legal principles during their application of professional discretion (Joubert, 2007:117). According to Joubert (2007:117), educational professionals may not know how to respond to problematic situations and the results may be unlawful. Joubert (2007:117) states that the SGB has to help create a disciplined school environment by implementing a code of conduct in order to conduct fair disciplinary hearings in cases where educators may be accused for misconduct. However, there are no legal requirements stating that an SGB may be held accountable or liable for damages incurred through the negligence of educational professionals (Joubert, 2007:117).

Joubert (2007:117) highlights the “assumption that school governing bodies have to develop and implement safety policies at schools cannot be substantiated by law”. One of the basic responsibilities of the Department of Basic Education is providing a safe emotional and physical environment for all the school learners. However, Joubert (2007:117) emphasises that this specific responsibility is one of the most challenging authorities to address, due to the many factors that influence school safety. School safety problems do not always have a sure and easy solution (Joubert, 2007:117).

Eberlein (2009:110) suggests that school safety training programmes should be provided to all the educational professionals in order to further develop and create effective safety policies. Joubert (2007:121) concludes that adequate training leads to continuous development of educators and possibilities for better policies. However, it does not guarantee safer schools.

There is thus a gap between practice and theory when making safety policies. Closing this gap may reduce the educator’s discretion in decision-making processes out of reluctance to deviate from laws and policies whilst making the best possible decisions for the learners.

2.7.2 The Gap between Practice and Theory in Policy Making

According to Hallsworth *et al.* (2011:5), policy makers develop unrealistic models of policy making, and are often unsuccessful in providing support to turn anticipated practices into reality. Hallsworth *et al.* (2011:5) emphasise that a policy should be

both theoretical and practical for it to be successful. Since policies should be based on reality, it remains very difficult to design a safety policy as there are so many influential factors to consider, and every situation or scenario in school safety policy may be different (Joubert, 2007:116).

2.7.3 Policy Flexibility

Educational professionals implementing policies need the capacity and capability to adapt safety policies to changing circumstances. Policy flexibility, although a recent developmental aspect of policy approaches, is paramount to the success of policy implementation. Policy flexibility allows educators to improve their expertise on, in this study, safety policies (Hallsworth *et al.*, 2011:5). Safety policies should hence be open to professional discretion (Boote, 2006:474).

May (2010:11) refers to the curricular zone of discretion as the place where educators must mediate internal factors (experience and knowledge, personality and “fear factor”) and external factors (policy requirements, policy inflexibility and rigid laws). Educators need professional discretion to make effective decisions, but if their space to make autonomous decisions is restricted, it becomes a problem as educators may become confused as to whether they can make appropriate decisions related to learner safety or not (May, 2010:16). External factors such as policy flexibility and rigid laws occur in the belt of restriction (refer to Section 2.2.2) that influences educator’s decision-making.

Boote (2006:474) focuses mainly on educator’s professional discretion in terms of curriculum policies, but the idea can be applied to safety policies as well. It is of utmost importance to rethink the approach to safety policy development and implementation to comprehend how safety policies that can be more flexible and adaptive to educators’ professional discretion and developing growth, can be developed. Policy flexibility is vital as educators need to apply and adapt their discretion in order to influence their actions to suit specific functions (Boote, 2006:474).

2.8 CONCLUDING REMARKS

The literature suggests that many educators are still unaware of how the law operates regarding policy requirements and their *in loco parentis* obligations (Joubert, 2015; Hallsworth *et al.*, 2011; De Waal, 2011; Potgieter, 2004). This is demonstrated by the growth in the number of litigations and educators’ liability regarding negligence.

Numerous authors have made contributions with regard to learner safety and educators' duty of care in South African schools. According to these contributors, an educator has a duty of care and is expected to use professional discretion appropriately. At the same time, educators should be mindful of these matters to minimise their exposure to lawsuits. The relevant literature further suggests that educators may be found negligent when they do not follow rules and obligations set out by the safety policies. In addition, it appears as if many educators do not have the necessary skills and knowledge to apply legal principles. However, not much appears to have been done in South Africa to determine how educators can maintain a respectable balance between professional discretion and policy requirements without being negligent. Applying freedom of choice, reduction in the risk of negligence and improving educators' capability to apply professional discretion is an area which calls for further investigation to take place as it is seen as a gap within the literature.

In Chapter 3, I present the research methodology, research design, data collection strategies, research instruments and the data analysis procedures of this study.

CHAPTER 3

RESEARCH DESIGN AND METHODOLOGY

3.1 INTRODUCTION

This study is a qualitative study that was conducted as an interpretive case study in order to gather the data required to answer the research questions. This chapter presents the plan I followed in this research and sets out how I systematically implemented and executed the plan (Creswell, 2012:20). The research design assisted me in arriving at a conclusion. I interviewed participants, recorded their response to the questions and analysed and interpreted the data in order to reach a conclusion.

This chapter illustrates the specifics according to which the participants were selected and the research methods and data-gathering instruments employed. In addition, attention is given to the ethical considerations that needed to be considered in the design and completion of this study.

3.2 RESEARCH PARADIGM

The interpretivist paradigm was used to underpin this study as it allowed me to explore and establish what standard of professional discretion is required of educators to minimise the possibility of negligence and possible liability for damages (Cohen, Manion & Morrison, 2000:22). The interpretivist paradigm is “characterised by a concern for the individual” (Cohen *et al.*, 2000:22). This means that the main objective of this paradigm is to understand a human’s experience.

Interviewing the participants enabled them to make sense of the situation in which they find themselves; this being the fact that the educational environment is increasingly haunted by uncertainty as to how to reconcile professional discretion with policy requirements to prevent negligence in their respective schools. The participants try to interpret their experiences and understanding of the ever-changing educational environment.

The epistemological stance on this subject was to discover the underlying meaning of events and issues such as educators being negligent in their actions or decision-making. This study was an insider approach, as the research was done through

interaction with participants and the findings were subjective (Antwi & Hamza, 2015:222). The purpose of an insider approach in this study was to directly explore phenomena through the participants' eyes (Du Plooy-Cilliers, Davis & Bezuidenhout, 2014:123).

The interpretive perspective allowed for a "multi-faceted" image of human behaviour in the study (Cohen *et al.*, 2000:23). This was relevant to this study as each participant, principal, member of a school management team and educators, shared their own experiences, and interpretation of the phenomenon. Participants from the same school provided different perspectives with one answer from an educator's perspective, whilst the other answer from a management point of view (Bremner, 2014:149). Data was gathered through semi-structured interviews allowing the participants to give meaning and purpose to the source of information.

The relevance of the interpretivist paradigm stems from its ontological assumption which states that social reality may be interpreted differently by different researchers (Du Plooy-Cilliers *et al.*, 2014:27). I, therefore, gathered insights based on the different opinions and experiences of educators in terms of their first-hand experiences and interactions with regard to the act of negligence and their professional discretion.

3.3 RESEARCH METHODOLOGY

In line with the interpretivist tradition, this study utilised a qualitative methodology, which allowed me to focus on the experiences and subjective views of the participants (Hancock, Ockelford & Windridge, 2009:32). This approach enabled me to collect data on the experiences and insights of educators in terms of the common law term *in loco parentis* in relation to their duty of care, policy requirements and their professional discretion (Du Plooy-Cilliers *et al.*, 2014:174).

Maree (2016:89) state that qualitative data collection methods include the techniques of document analysis, interviews and observation, all of which are rather time consuming. However, they have become increasingly important as ways of developing evidence-based knowledge (Ploeg, 1999:37).

Creswell (2012:205) distinguishes five steps that need to take place in any qualitative study and reiterates that "these steps should not be seen as linear approaches, but often one step in the process does follow another". Firstly, it is important to identify the

participants and sites through purposive sampling, based on the locations and individuals that can help a researcher to comprehend the central phenomenon being studied (Creswell, 2012:205). Secondly, it is important to get approval and permission to observe or interview the participants (Creswell, 2012:205). The third step of qualitative research relies on interviews and observation without restricting the participants' views (Creswell, 2012:205). Therefore, Creswell (2012:205) argues that researchers "need to consider what types of information will best answer the research question". Data collection instruments and recorded information are seen as the fourth step in qualitative research. Lastly, Creswell (2012:205) mentions that "we will administer our procedures of qualitative data collection with sensitivity to the challenges and ethical issues of gathering information face-to-face and often in people's homes or workplaces". It is thus important for a researcher to address potential ethical issues that might arise during the data collection procedures.

A typical qualitative research process was followed as suggested by Creswell (2012:506). This is illustrated in Table 3.1 below.

Table 3.1: The qualitative process (Source: Creswell, 2012:506)

| The Research Process | Qualitative Characteristics |
|------------------------------------|--|
| Identify a research problem | <ul style="list-style-type: none"> • A qualitative problem requires exploration and understanding. |
| Review the literature | <ul style="list-style-type: none"> • Qualitative literature plays a major role. • Qualitative literature justifies the research problem. • Qualitative literature assists with gaining methodological insights (Randolph, 2009:2). • Qualitative literature helps identify recommendations of various other similar literature (Randolph, 2009:2). • Qualitative literature helps identify relationships between ideas and practices (Randolph, 2009:2). • Qualitative literature assists establishing the context of the research problem (Randolph, 2009:2). |

| The Research Process | Qualitative Characteristics |
|---|---|
| Develop a purpose statement and research questions | <ul style="list-style-type: none"> • Qualitative purpose statement and research questions are broad and general. • Qualitative purpose statement and research questions seek participants' experiences. |
| Collect qualitative data | <ul style="list-style-type: none"> • Qualitative data collection is based on using protocols developed during the study. • Qualitative data collection involves gathering text or image data. • Qualitative data collection involves studying a small number of individuals or sites. |
| Analyse and interpret qualitative data | <ul style="list-style-type: none"> • Qualitative data analysis consists of analysis of texts such as transcripts, notes on observations and policy and other relevant documents. • Qualitative data analysis consists of describing information and of developing themes. • Qualitative interpretations situate findings within larger meanings. |
| Write and evaluate a study | <ul style="list-style-type: none"> • Qualitative research reports use flexible and emerging structures and evaluation criteria. • Qualitative researchers take a relative and biased approach. |

3.4 RESEARCH DESIGN

McMillian and Schumacher (2010:19) state that a research design includes the general plan of the project as well as the process for conducting research. The research design for this study was structured in such a manner that it would assist me in answering the main research questions as well as the sub-questions (McMillian & Schumacher, 2010:19). The research design ultimately enabled me to collect the data and formulate detailed explanations and helped me to find, seek and apply solutions (Du Plooy-Cilliers *et al.*, 2014:93).

An interpretative case study design was employed. Yin (2009:18) refers to a case study as “an empirical inquiry about a contemporary phenomenon (e.g. a case), set within its real-world context – especially when the boundaries between phenomenon and context are not clearly evident”. The case in this study was therefore, the

application of professional discretion by educators in preventing negligence. A case study recounts a real-life situation by describing the scenario or context in which the phenomenon appears (Du Plooy-Cilliers *et al.*, 2014:179). Similarly, Gustafsson (2017:2) defines a case study as “an intensive study about a person, a group of people or a unit, which is aimed to generalise over several units”. A case study is, therefore, a detailed investigation, with data often collected over a period of time, allowing the development and analysis of the context of a study, as well as the process involved (Zainal, 2007:4).

3.4.1 The Advantages and Strengths of a Case Study

Firstly, a case study can contextualise the subjective experiences of the participants involved in the study and explain what is happening in the specific study or situation in question (Hearne, King, Kenny & Geary, 2016:13). Secondly, Zainal (2007:4) states that “the examination of the data is most often conducted within the context of its use”. This highlights the situation or the context where activities that are being studied take place.

The participants shared their personal experiences, shared their knowledge and became more empowered when they were able to talk about their experiences (Creswell, 2002:61). In education, these experiences relate to the classroom and school activities. Maree (2016:107) aver that case study designs use multiple data collection methods and analysis techniques. This provided me with prospects to triangulate data, to support the research findings and conclusions (Yin, 2009:18).

Another advantage, according to Cohen, Manion and Morrison (2002:184), is that a case study is strong in reality and it allows a reader to relate to the information he/she reads with his/her own experience. This can form a basis of generalisation. Zainal (2007:4) further suggests that “the detailed qualitative accounts often produced in case studies not only help to explore or describe the data in real-life environment, but also help to explain the complexities of real-life situations which may not be captured through experimental or survey research”. Therefore, using a case study design in this instance enabled me to capture a participant’s experience in the application of professional discretion in challenging situations.

In addition, Hearne *et al.* (2016:13) points out that a case study can explain the causal links in real-life interventions such as an educator using their professional discretion

in a specific situation whilst protecting a learner, in so doing minimising the risk of being negligent. Furthermore, case studies “recognise the existence and divergence of social ‘truths’ within an instance or situation, and can represent and often illuminate the discrepancies or conflicts between such truths or viewpoints” (Cohen *et al.*, 2002:184). It acknowledges that social truths exist within certain situations and various discrepancies persist, which illuminate the conflict between the numerous viewpoints of these social truths (Cohen *et al.*, 2002:184).

Another advantage of a case study according to Hearne *et al.* (2016:13), is that a case study captures the “lived reality” of the participants. A case study may provide data-rich information to allow a researcher to re-interpret the information in order to strengthen findings and consolidate a study. A case study can thus serve as a data source for researchers with a specific purpose in mind (Cohen *et al.*, 2002:184).

A case study is often used to interpret insights, and experience and put them to use for “individual and/or institutional development or for policymaking” (Cohen *et al.*, 2002:184). Hearne *et al.* (2016:13) highlight that a case study is “set out to develop an understanding of the case context that goes beyond representing the subjective understandings of participants and offers a means of investigating a complex social unit...” and serves as a research method to create an understanding of the context of the specific case that does not only represent the subjective characteristics of a participant, but offers more insights into the specific and intricate social area.

As mentioned in Section 3.4, an interpretivist case study design was utilised. Four schools (both fee-paying and non-fee-paying) in Tshwane South district formed part of the case study. The case investigated how educators reconcile professional discretion and policy requirements in order to prevent negligence. Educators from different post levels and years of experience were interviewed between May 2019 and June 2019.

3.4.2 The Disadvantages and Weaknesses of a Case Study

Firstly, Hearne *et al.* (2016:13) argue that a case study is susceptible to observer bias or subjective judgements. Secondly, Cohen *et al.* (2002:184) highlight the fact that case studies “are not easily open to cross checking and might therefore be selective, biased, personal and subjective”. Hearne *et al.* (2016:13) further stress that issues might arise in “the selection of single cases that are representative or typical of the

larger cohort, thus increasing transferability across cases". In addition, case studies are often time-consuming and provide a great amount of data to analyse (Cohen *et al.*, 2002:184). Cohen *et al.* (2002:184) further argue that a research study can be influenced negatively when sites and participation is denied. It can also be very time-consuming to gain permission to access sites. Cohen *et al.* (2002:184) point out that "the boundaries of a case study can be difficult to establish, leading to difficulty in selecting data sources and data collection instruments". According to Zainal (2007:5), "case studies are often labelled as being too long, difficult to conduct and producing a massive amount of documentation". Lastly, Zainal (2007:5) states that a "common criticism of case study method is its dependency on a single case exploration making it difficult to reach a generalising conclusion". This is a drawback as a result of a small sample size which then cannot be used to generalise an event or behaviour.

In this study, it was challenging to find schools to participate in the research study as two secondary schools that had been invited to participate declined the invitation. Fortunately, I managed to find replacements without having to adapt my research design.

3.5 SAMPLING

I employed the principle of non-probability sampling, specifically purposive sampling. According to Maree (2016:197) participants are selected because of certain "defining characteristics that make them the holders of data needed for the study". Non-probability sampling is a technique where the odds of any member being selected for a sample cannot be calculated. In other words, everyone will not have an equal chance to participate in the study (Maree, 2016:197). In this study it was done by means of non-probability sampling followed by a purposive sampling technique. This enabled me to gain easy access to the participants for the study with a specific purpose in mind.

Purposive sampling is used with a specific purpose in mind. According to Creswell (2012:206), in purposeful sampling “researchers intentionally select individuals and sites to learn or understand the central phenomenon”. In this case, I selected a certain section (Tshwane South District) of the wider population around the Gauteng area to include or exclude from the sampled selected from the four schools (Bremner, 2014:156). According to Cohen *et al.* (2000:99) “some members of the wider population definitely will be excluded and others definitely included”. Creswell (2012:206) highlights purposive sampling steps that helped me to select samples to provide rich information for this in-depth study. The steps I followed during the sampling process are illustrated in Figure 3.1.

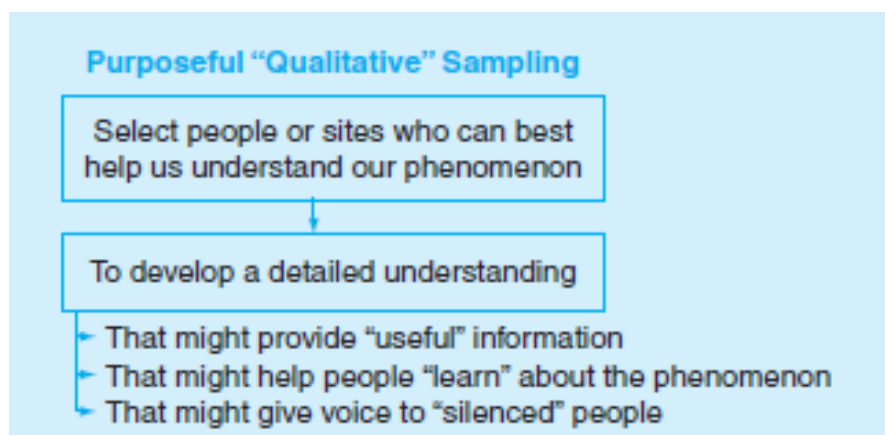


Figure 3.1: Purposeful qualitative sampling (Source: Creswell, 2012:206)

The participants were selected based on their potential to provide rich data with clear descriptions of their experiences in their positions. For this investigation, I selected two secondary and two primary schools in Pretoria in the Gauteng province of South Africa, more specifically in the Tshwane South school district. This narrowed down the sample size to be small enough, manageable and trustworthy. Two of these schools were fee-paying and two were non-fee-paying schools as categorised in Section 39 of the Schools Act, the division of the school sample is illustrated in Table 3.2. Sampling both fee-paying and non-fee-paying schools provided data from different and diverse contexts.

Table 3.2: Sample of both fee-paying and non-fee-paying schools (Tshwane South District)

| Fee-paying Schools | Sample size | Non-fee-paying Schools | Sample size |
|---------------------------|--------------------|-------------------------------|--------------------|
| Primary School | 1 | Primary School | 1 |
| Secondary School | 1 | Secondary School | 1 |

The four schools are referred to simply as School A, School B, School C and School D in the interests of anonymity and to avoid the potential identification of any particular school (Eberlein, 2009:62), and were named in the order in which field work visits were carried out. (Eberlein, 2009:62). Akin to Eberlein’s (2009:6) study, these schools were selected for their close geographical proximity. This allowed me to communicate and interact closely with the participants as well as the Gauteng Department of Education regarding permission to conduct the study (Eberlein, 2009:6).

It was important to gain access to participants. Permission for the study was sought from the Gauteng Department of Education (GDE). Letters were written to obtain permission to approach schools within the Tshwane South district. Another letter was written to enable me to approach the educators in the selected schools (See Annexures B and C). I obtained informed written consent from each participant before any interviews were conducted (See Annexure D).

At each school, five participants were identified and invited to participate in this study thus, allowing for a total of 20 participants. The selection process of the participants was based on the following criteria: experience, post level, relevance to data and high level of probability of having encountered negligence. The five participants at each school consisted of the principal, a member of the SMT (deputy-principal or head of department) and three educators. Each of the participants had different legal obligations, discretions, responsibilities and accountabilities as far as negligence was concerned. The educators selected needed to have at least three years’ working experience in the selected schools, prior to the research.

I arranged a meeting with the principal of each school in order to explain the aims of the proposed study, the methods to be followed and the importance of information-rich participants. At the same meeting, I invited the principal to assist in identifying a

member of the SMT and three educators in the school that might be interested in participating in the study.

At the meetings with each of the participants, I explained the aims and the methods of the proposed study and emphasised the importance of obtaining their written informed consent to participate in the study. I stressed that it was entirely voluntary to participate but that their participation was essential for the success of my study.

I delivered a copy of my research proposal for the study together with a standard GDE research application form to the provincial Head Office. Permission was granted for me to continue my study. The GDE issued a letter informing the four schools of the approval for my study from the district (See Annexure A).

3.6 DATA COLLECTION METHODS AND STRATEGIES

Data were collected through multiple techniques, namely analysis of court judgements and press reports (refer to Chapter 2) as well as semi-structured interviews.

3.6.1 Court Cases

I gathered information from specific court cases applicable to the study and which highlighted the possible professional discretion challenges educators and schools face. These challenges are related to the correlation between negligence, school safety, professional discretion and the educator's duty of care. Judgements in South African court cases were very useful as they highlighted current trends (Bremner, 2014:32), trends such as educators who become liable due to the failure to reconcile professional discretion and their duty of care (refer to Chapter 2 for examples of such cases). Although included in the literature review, the following cases formed the basic departure point for this study: *Wynkwart v Minister of Education and Another 2004 (3) SA 577*; *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (6) SA 582 (CC)* and *MEC for Education in Gauteng Province v Rabie 2008 A758/06 (CC)*.

3.6.2 Press Reports

I made use of numerous media reports from media outlets such as Die Beeld, News24 and the Sunday Times. These reports, specifically focused on incidents where learners were injured due to educators being negligent, and their failure to reconcile professional discretion and regulatory policies. These media reports enabled me to

identify and establish the research problem. The following articles were of particular significance: *“School negligent in lawnmower death – probe”* (Anon, 2014); *“School accident unfortunate, says principal”* (Venter, 2006) and *“School negligent in child's fall, says court”* (Schroeder, 2002). These and other articles were used to shed more light on the problem faced by educators and schools with regards to their duty of care, which is an essential component in the prevention of negligence.

3.6.3 Interviews

I employed semi-structured interviews to collect the required data to answer the research questions. This allowed participants, who were not hesitant to speak and who could share their experiences and ideas comfortably, to be freely interviewed (Bremner, 2014:155). Even though this data collection strategy was time consuming, it was ideal as the participants who were willing to speak, shared their ideas and experiences which assisted in answering the research questions. Gill, Stewart, Treasure and Chadwick (2008:291) state that a semi-structured interview consists of several key questions that help to define the areas to be explored. Semi-structured interviews also allow the interviewee or interviewer to diverge from the interview schedule to pursue an idea or response in more detail and return to the schedule later when the information from the participants has been exhausted.

Therefore, data was collected by means of semi-structured interviews using open-ended questions. The interview schedules were structured in such a manner that participants were encouraged to share their experiences on how educators reconcile professional discretion with policy and legal requirements without being negligent. The aim of the semi-structured interviews was for participants to share their perceptions on how they really understand the full range of laws and policies in the context of their obligation to comply with a higher standard of care while also exercising their professional discretion where necessary. Although the interview schedules were comprehensive in the light of the literature review, participants disclosed extra information that was not asked in the interview protocol but helped me to better comprehend their opinions and understandings. All interviews, with the participants' consent, were recorded.

Semi-structured interviewing, according to Gill *et al.* (2008:291), is the best data collection method especially when a researcher conducts several follow-up interviews.

Only two of the 20 participants requested to review the interview transcripts as well as listen to the audio recording. Both these participants were satisfied with the answers they gave to the interview questions. This adds to the quality of the interview process. Cohen *et al.* (2002:271) highlights that this type of interview structure “increases the comprehensiveness of the data”. Semi-structured interview methods are used most frequently to provide participants with some guidance on what to talk about (Gill *et al.*, 2008:291). Yin (2009:74) compares the flexibility of this approach to the inflexibility of structured interviews. Creswell (2012:46) described semi-structured interviews as “one of the most powerful ways in which we try to understand our fellow human beings”.

An advantage of semi-structured interviews is that they provide useful information when you directly observe participants. It also allows for detailed and personal information from the participants (Bremner, 2014:155). An interviewer has better control over the types of information received as more specific questions could be asked (Bremner, 2014:155). In contrast, a weakness of this data collection strategy is that it is very easy for the participant to be side-tracked or even deviate in their answer from the question and give irrelevant answers (Maree, 2016:93). Bremner (2014:155) argues that “information could be ‘filtered’ through the view of the participants and be deceptive to what the researcher wants to hear”. Cohen *et al.* (2002:267) highlights four unavoidable problematic characteristics of interviews I had to keep in mind.

- There are factors that differ from one interview to another, for example the issue of mutual trust, social distance and the control exerted by the interviewer.
- The tendency for respondents to feel uneasy and to adopt avoidance tactics if questions are too “deep”, that is personal or private or that could jeopardise them.
- In some instances, meanings of words or concepts, while clear to one party, will be opaque to another party.
- It is impossible, just as it is in everyday life, to bring every aspect of the interview within rational control.

I attempted to thoroughly prepare each participant before the interview, to calm any fears or uncertainties of the interview questions. I informed the participants of the types of questions by giving each of them a copy of the interview schedule well in advanced of the actual interview. The participants were reminded on the day of the interview that

they may ask for clarification on questions at any time, before and during the interview. I clarified and explained concepts that the participants did not understand or with which they were unfamiliar. Thereafter, I emphasised that they were very important to the study as they were the only ones that could give me the information needed to answer the research questions.

Participants were invited to share their experiences of incidents where educators might have failed to balance their standard of care, professional discretion and policy, which led to acts of negligence. The interviews focused on factors such as the educators' professional discretion, their duty of care, safety policies, safeguarding of learners, and prevention of negligence as well as knowledge of educational law. A copy of the interview schedule is appended to this research report as Annexure E. The questions were flexible although specific data was required from each of the participants.

I audio recorded the interviews to ensure that all the responses could be captured correctly. I made notes during the interviews to help highlight key ideas, experiences and insights. There were some educators who reacted emotionally during the interviews. However, I managed to remain professional throughout the research process.

After the interview with each respective participant, I played back random sections of the voice recording of the interview to establish the integrity and accuracy of the answers and the recording. I transcribed each interview to keep a record of the interviews. The transcription allowed for easy coding and analysis of the data.

3.7 INTERVIEW PROCESS

The interview planning phase was especially important as the success of the interview process determines the credibility and trustworthiness of the collected data (Du Plooy-Cilliers *et al.*, 2014:188). The steps I took to ensure productive interviews are as follows:

- Each participant received a letter explaining the purpose and the importance of the study.
- Participants were informed of my identity, credentials, training and experience. This helped participants to understand the reasons for the research, and the

participants viewed the research process as professional and important to themselves and to me.

- I asked for a private office, boardroom or an empty classroom in which to conduct interviews. This was done to avoid disruptions and for participants to feel safe and secure.
- Participants were assured that their identity would not be revealed. They would remain anonymous throughout the duration of the study. Each participant was given a pseudonym to protect their identity and separate participants' answers from one another.
- Participants were assured that the information provided by them would be confidential and that the information provided by them would be used for academic research purposes only.
- The structure of the interview schedule was explained to each participant. I made notes during the interview and audio-recorded the entire interview. Both written and verbal consent to use audio-recorders were obtained from participants.
- To master the art of interviewing, I practised the interview with a pre-school principal (pilot-interview).
- I used three probing strategies to obtain the maximum amount of data, to verify what I had heard and to determine what the participant actually meant by their answers. I made use of "detail-oriented probes" to understand the "who", "what" and "where" of the answers given by the participants (Maree, 2016:94). Secondly, I applied "elaboration probes" in order to get the full picture of a situation or an answer. I normally asked the participants to tell me more about a certain answer given. I aimed not to force any answers from participants. Lastly, I made use of "clarification probes". I employed this strategy to verify my understanding of what has been said in order to ensure accuracy (Maree, 2016:94).
- I ensured that my interview schedule is reproducible so that the same questions and subject can be used by other researchers to obtain similar information. The type of questions asked was reasonable to ensure that the information collected was accurate and added value. The interviews are transparent so that the

readers of this dissertation can see precisely how the data was collected and analysed (Maree, 2016:94).

- Taking the time to plan and prepare well for the semi-structured interviews well allowed me to be more confident and composed in the interviews.

3.8 DATA ANALYSIS

The analysis of data entailed a system that would organise and manage the data collected (Bremner, 2014:160). Kitto, Chesters and Grbich (2008:243) explain that “most commonly, qualitative research is concerned with the systematic collection, ordering, description and interpretation of textual data generated from talk, observation or documentation”. Vosloo (2014:355) explains data analysis “as the process of bringing order, structure and meaning to the mass of collected data”.

However, it is sometimes described as ambiguous, time-consuming and messy, but also as a fascinating and creative process (Vosloo, 2014:355). I overcame these limitations through meticulous planning and prudent use of time. This allowed me to avoid being disorganised and ambiguous. The information from the interviews was recorded, transcribed, coded, organised and grouped into relevant themes (Creswell, 2012:205). In this way, the analysis of the data assisted me in identifying patterns and themes in the text-based data. These patterns and themes supported me in answering the main research question and the sub-questions (Vosloo, 2014:355).

For the purposes of the study, I used thematic analysis utilising open or substantive coding. Thematic analysis is a process of data reduction by means of identifying themes (Du Plooy-Cilliers, *et al.*, 2014:241). In open or substantive coding, the researcher works directly with the data by separating and analysing it, initially through open coding for the discovery of a core category and related concepts, then through theoretical sampling and selective data coding to theoretically saturate the core and related concepts (Holton, 2007:265). Open or substantive coding enabled me to identify numerous codes within my interview transcripts. This coding process ultimately allowed me to pinpoint the main themes of my data. This entailed a system of coding, a term which means the assigning of a kind of idea or theme relevant to the study. According to Du Plooy-Cilliers *et al.* (2014:234), themes and codes of data refer to the careful scrutiny of your data and taking note of all the relevant interpretations and information. Each interview needs this coding so that the interview can be interpreted

at a later stage (discussed in detail in Chapter 4). Data analysis was the process whereby I answered the research questions. I therefore read through all the data text to form an overall impression and understanding of the data gathered (Du Plooy-Cilliers *et al.*, 2014:234). The participants' responses were audio-recorded, transcribed and analysed by using Atlas.Ti qualitative data analysis software.

I used a deductive approach, which implies that the findings in the interviews and case studies were general in nature and were applied to a specific finding (Du Plooy-Cilliers, *et al.*, 2014:234). When conducting in a deductive approach, the researcher uses a conceptual framework derived from applicable concepts or theories (the general) to identify several codes within the text which are grouped into several specific themes (the specific) (Du Plooy-Cilliers, *et al.*, 2014:234).

I identified themes and linked it to the literature and the conceptual framework (the general) that I described and interpreted within the context of this specific study (the specific) (Du Plooy-Cilliers, *et al.*, 2014:234). It is important to note that with a deductive approach the researcher moves from the general to the specific in several cycles of analysis and interpretation (Du Plooy-Cilliers, *et al.*, 2014:234).

The overall process of data analysis starts by identifying patterns, themes, phrases or segments obtained from responses to questions (Merriam, 2009:176). Words and phrases that relate to my research question were identified and documented (Du Plooy-Cilliers *et al.*, 2014:235). These concepts were identified and compared. Thus, I followed a process of breaking down, examining, conceptualising, comparing as well as categorising all my data (Du Plooy-Cilliers *et al.*, 2014:234).

After coding the data, the codes were grouped together in themes and analysed to relate to the findings and the conceptual framework of the study. These themes allowed for multiple perspectives to emerge from the participants (Creswell, 2012:257).

3.9 TRUSTWORTHINESS OF THE RESEARCH

In the pursuit of trustworthiness in qualitative research, one has to ensure that certain requirements are met. These requirements, according to Shenton (2004:64), are “credibility, transferability, dependability and confirmability”.

Credibility translates to “accuracy with which the researcher interpreted the data” (Shenton, 2004:64). I made use of member-checking and triangulation to confirm the

trustworthiness and credibility of the data collected from the participants. This strategy allowed me to go back to the selected participants and ask if my interpretation of the information they provided was acceptable and credible (McMillian & Schumacher, 2010:25-26). A researcher can become emotionally involved in the study and this could lead to loss of focus. Therefore, to ensure quality and credibility of the results, the interviews conducted were protected by recordings and transcripts (Shenton, 2004:64). This enabled me to revisit the transcripts and recordings to ensure that the element of bias had been eliminated. Furthermore, support systems such as Atlas.Ti ensured that all records of identified codes and themes were documented, structured and analysed in more detail.

Transferability is the researcher's capacity to apply the research findings to a comparable scenario in order to produce comparable outcomes (Maree, 2016:124). To ensure the transferability of the study, I provided a full and detailed account of settings where the study took place and provided detailed descriptions of the participants.

Dependability relates to the quality of the methods used between information collection and the techniques used to analyse and generate a theory (Du Plooy-Cilliers *et al.*, 2014:259). Dependability also relates to the confirmation that results obtained would yield similar or comparable outcomes if replicated with the same research participants under comparable circumstances (Maree, 2016:124). I documented all findings, changes and implementation regarding the research design in order to ensure that findings were dependable and that the findings provided detailed accounts thereof.

Confirmability refers to how fine the data was collected to support the findings and interpretation of the researcher (Du Plooy-Cilliers *et al.*, 2014:259). I provided detailed quotes from the participants recorded during the interviews process which indicates direct views and opinion of participants. Audit trails were kept of how all data-collection techniques were used.

Questions of trustworthiness were addressed by ensuring that this study did what it was designed to do (Du Plooy-Cilliers *et al.*, 2014:258). Trustworthiness of qualitative research should be understood within the context of the researcher's epistemological point of view. According to Hancock *et al.* (2009:36) in a qualitative approach, we "assume that reality is constructed, multidimensional and ever changing" and "that there is no such thing as a single, immutable reality waiting to be measured".

Qualitative research allowed me to increase the trustworthiness of the study by deliberately attempting to maintain a high level of objectivity and credibility throughout the study (Hancock *et al.*, 2009:36).

The credibility of the research might be seen in the data obtained from the twenty participants (principals, SMT members and educators), relevant court cases and newspaper articles. As mentioned earlier, I made use of a variety of methods to obtain the data necessary for the study.

Triangulation is the process of corroborating evidence from different individuals (principals and educators), types of data (interviews and court cases) and methods of data collection (interviews) in descriptions and themes in qualitative research (Creswell, 2012:259). Triangulation enabled me to examine these themes and find evidence to support the identified themes mentioned in the data analysis section.

Triangulation allowed me to access many perspectives, such as the educators and the principals' perspectives. This allowed me to confirm the credibility of the methods used in the study.

3.10 LIMITATIONS OF THE INTERVIEW PROCESS

The following issues were encountered during the interview process:

- From time to time, during the interviews, learners and staff still entered the interview room to talk to the participant.
- I asked for a private office, boardroom or an empty classroom in which to conduct interviews, but some of the participants insisted that we sit in the staffroom. There was a lot of movement and distractions during the interview. Some questions had to be re-asked and some of their responses were lost as a consequence of the noise.
- I was requested to do an interview in 25 minutes at one school, whilst the average interview time was between 45-55 minutes. As a result, I rushed through the interview schedule.
- I had to reschedule a number of appointments due to the participants' other school commitments.
- I had to bring one interview to an end in the middle of the questioning process, as the interview went beyond the anticipated time. I had to go back the following

day in order to complete the interview. This disrupted the flow of the interview and I may have lost significant information by stopping the interview.

- At some schools, the noise levels outside the interview room were high, particularly during the break and when the learners moved from one classroom to another.
- There were some participants who struggled to express themselves because English is not their first language. Some of these educators have Afrikaans or other African languages as their home language.
- There was a lack of interest displayed by some of the participants when they were interviewed.
- Some participants were challenged in understanding the questions. Consequently, they did not fully answer some of the questions, but responded to what they believed was being asked.
- It appeared as if some of the participants were intimidated by the use of the audio-recorder.
- I had to interview four participants one after the other at one school and I had to check the time continuously. It made me rush through some of the interview questions.

3.11 ETHICAL CONSIDERATIONS

In all fields of research, ethics are crucial because it could potentially affect all stakeholders in the study (Du Plooy-Cilliers *et al.*, 2014:272). Ethics relate to matters of integrity on a personal level but the implications of ethics reach much further than just the individual. As a researcher, one needs to ensure one adheres to all ethical principles and professional standards crucial to successful research practice.

Before I conducted the study, I obtained approval from the Ethics Committee of the Faculty of Education of the University of Pretoria. In addition, I obtained formal permission from the Gauteng Department of Education and the managements of the sampled schools. According to Du Plooy-Cilliers *et al.* (2014:273) “ethics are to a researcher what impartiality is to a judge” and it is the foundation upon which the interests of all stakeholders rest. The stakeholders who could potentially be affected by this research study are: myself, the participants, the broader education community and academic institutions. For instance, I obtained “informed consent” from each

participant and assured them that I would use the principles of anonymity and confidentiality and respected their right to privacy (De Vos, Strydom, Fouche & Delpont, 2011:129). I also asked the participants' consent to be audio recorded.

Even though interviewing the participants in their own environment created challenges, it was important to receive the necessary approval due to the sensitivity of the environment in which the interviews took place. The interviews took place on the school grounds in selected offices and classrooms at the convenience of the participants (Creswell, 2012:205).

Neuman (2014:359) emphasises that researchers intrude "into a participant's privacy by asking about intimate actions and personal beliefs". I had to ensure that participants felt comfortable in order to get honest and accurate information (Neuman, 2014:359). I had to ensure that the importance and value the research may have is explained to participants. In addition, all participants were informed of their right to withdraw from the study at any point (Neuman, 2014:359). Finally, I assured the participants of their pre-publication access before the research was finalised. The schools involved also had anonymity and the right to choose to participate. In order for all participants to be treated with dignity, I had to reduce discomfort and protect their confidentiality (Neuman, 2014:359).

Ultimately, a typed consent form was given to each participant and discussed prior to the interview. I had meetings with each of the school principals, where I introduced the topic of the study and invited them to participate in the study. This was also part of an introductory meeting where I explained the aims, the purpose and the scope of the study together with the methods that I would utilise. At the end of each meeting, the consent form was signed, confirming their willingness to participate in the study.

I had to take care that information was not falsified and that bias was not allowed to influence the results or allow the misuse any information that could harm the stakeholders. The success of this study largely depended on my ability to develop strong and trusting relationships with all the participants.

3.12 CONCLUDING REMARKS

This chapter detailed and explained my choice of research methodology. Underpinned by an interpretivist paradigm, a qualitative research approach was deemed most suitable for this research which attempts to understand the phenomenon under study. The research design guiding this research was an interpretive case study which captured the lived reality of the twenty (20) participants, purposively sampled, allowing them to freely relate their experiences and depth of knowledge. In order to gather data, three types of instruments were used. Court cases and press reports of incidents in South African schools assisted in developing a schedule for semi-structured interviews conducted with school personnel assisted in gathering a wide array of data. The data were then analysed using Atlas.Ti software program which resulted in the development of themes and sub-themes, all of which are presented in Chapter 4. In addition, two important aspects were discussed in this chapter, that of establishing trustworthiness of the research, which includes credibility, transferability, dependability and confirmability as well as triangulation. The second important aspect was ethical considerations, ensuring that all ethical procedures were followed.

The next chapter, Chapter 4 contains a detailed presentation and discussion of the data emerging from analysis of the data gathered through the research process.

CHAPTER 4

PRESENTATION OF DATA

4.1 INTRODUCTION

In this chapter, the data is presented in the form of situated and general descriptions based on each participant's answers in an attempt to answer the research questions:

- How do educators interpret their 'duty of care'?
- How do educators interpret 'professional discretion'?
- How do educators understand the difference between law and policy?
- In the opinion of educators, what are the standards of professional discretion required to prevent negligence?

To assist in contextualising each case, a short demographic description of each school is given as well as a short biographical sketch of each participant. This is followed by a substantial presentation of themes relevant to the research questions, which I have elicited from the empirical data. The themes recognised in the data were guided to some extent by the questions in the interview schedule. Identifiable units of meaning which constitute theme accounts, are grouped according to larger units or major stages of understanding, thoughts, perceptions, feelings and experiences. Where words of educators are quoted *verbatim* (presented in italics), no attempt was made to correct their language usage except to enhance its intelligibility and lucidity.

Four themes emerged from the data analysis and some interpretations are presented regarding the experiences of educators in terms of their ability to appropriately apply professional discretion in order to prevent negligence in a restrictive and regulatory environment.

The data is discussed and contextualised in Chapter 5 in light of the educational experiences of participants, relevant court cases and literature.

The four main themes identified are:

- Educators' understanding of their duty of care.
- A limited view of professional discretion.
- Understanding of educational and legal principles pertaining to negligence.
- School safety policies.

Each theme has a number of sub-themes, which are analysed separately. A summary of the categorised themes is given in Table 4.1.

Table 4.1: Summary of the main themes and sub-themes

| MAIN THEMES | SUB THEMES |
|--|--|
| 1. Educators' understanding their duty of care. | <ul style="list-style-type: none"> • Duty of care conceptualised • Common law term <i>in loco parentis</i> • Educators acting <i>ultra vires</i> in the best interests of the learners |
| 2. A limited view of professional discretion. | <ul style="list-style-type: none"> • Professional discretion conceptualised • Professional discretion linked to professionalism • The application of professional discretion • Factors influencing professional discretion • Discretionary power of educators |
| 3. Understanding of educational and legal principles pertaining to negligence. | <ul style="list-style-type: none"> • Negligence as conceptualised by educators • Causes of negligence • Reducing the risk of negligence • Preventing negligence whilst exercising professional discretion • A reasonable person |
| 4. School safety policies | <ul style="list-style-type: none"> • Difference between laws and policies • Implementation of policies • Aligning school safety policies with the school environment • Transportation policy requirements |

4.2 BRIEF DEMOGRAPHIC DESCRIPTIONS OF SCHOOLS AND PARTICIPANTS

A brief demographic description of each participating school and each school's participants is provided in Tables 4.2 to 4.5 below and is followed by the presentation of the data organised in terms of identified themes. The pseudonyms for the participants are interchangeably used, for example Participant 6 also refers to P6.

Table 4.2: Brief demographic description of School A and its participants

| Descriptor | | School A | | | |
|--|--------------------------------|---------------------------------------|---------------------------------|--|---------------------------------------|
| Type of school | | Secondary School | | | |
| Fee-paying or no-fee-paying school | | No-fee-paying school | | | |
| Number of learners enrolled at the school | | 1260 | | | |
| Number of staff members employed at the school | | 38 | | | |
| Participant code | Participant description | Years' experience in education | Years' experience as HOD | Years' experience as Deputy-Principal | Years' experience as Principal |
| Participant 1 | Principal | 22 | 5 | 3 | 1 ½ |
| Participant 2 | Educator | 27 | - | - | - |
| Participant 3 | HOD | 36 | 1 | - | - |
| Participant 4 | Educator | 24 | - | - | - |
| Participant 5 | Deputy Principal | 31 | 6 | 4 | - |

Table 4.3: Brief demographic description of School B and its participants

| Descriptor | | School B | | | |
|--|--------------------------------|---------------------------------------|---------------------------------|--|---------------------------------------|
| Type of school | | Primary School | | | |
| Fee-paying or no-fee-paying school | | No-fee-paying school | | | |
| Number of learners enrolled at the school | | 500 | | | |
| Number of staff members employed at the school | | 14 | | | |
| Participant code | Participant description | Years' experience in education | Years' experience as HOD | Years' experience as Deputy-Principal | Years' experience as Principal |
| Participant 6 | Deputy Principal | 23 | - | 10 | - |
| Participant 7 | Educator | 4 | - | - | - |
| Participant 8 | Educator | 14 | - | - | - |
| Participant 9 | Educator | 1 | - | - | - |
| Participant 10 | Principal | 24 | - | 7 | 11 |

Table 4.4: Brief demographic description of School C and its participants

| Descriptor | | School C | | | |
|--|--------------------------------|---------------------------------------|---------------------------------|--|---------------------------------------|
| Type of school | | Primary School | | | |
| Fee-paying or no-fee-paying school | | Fee-paying school | | | |
| Number of learners enrolled at the school | | 1950 | | | |
| Number of staff members employed at the school | | 150 | | | |
| Participant code | Participant description | Years' experience in education | Years' experience as HOD | Years' experience as Deputy-Principal | Years' experience as Principal |
| Participant 11 | Principal | 33 | 3 | 1 | 15 |
| Participant 12 | HOD | 31 | 7 | - | - |
| Participant 13 | Educator | 6 | - | - | - |

| Descriptor | | | School C | | |
|----------------|----------|---|----------|---|---|
| Participant 14 | Educator | 7 | - | - | - |
| Participant 15 | Educator | 9 | - | - | - |

Table 4.5: Brief demographic description of School D and its participants

| Descriptor | | | School D | | |
|--|-------------------------|--------------------------------|--------------------------|---------------------------------------|--------------------------------|
| Type of school | | | Secondary School | | |
| Fee-paying or no-fee-paying school | | | Fee-paying school | | |
| Number of learners enrolled at the school | | | 1200 | | |
| Number of staff members employed at the school | | | 70 | | |
| Participant code | Participant description | Years' experience in education | Years' experience as HOD | Years' experience as Deputy-Principal | Years' experience as Principal |
| Participant 16 | Deputy Principal | 26 | 4 | 23 | - |
| Participant 17 | Principal | 37 | 4 | 27 | 3 |
| Participant 18 | Educator | 30 | - | - | - |
| Participant 19 | HOD | 20 | 12 | - | - |
| Participant 20 | Educator | 3 | - | - | - |

4.3 THEME 1: EDUCATORS' UNDERSTANDING OF THEIR DUTY OF CARE

A leading theme elicited from the raw data comprises various responses of educators and their understanding of their duty of care. In this theme, the participants demonstrate a similar understanding of their responsibility toward the learners in their care.

It is evident that the majority of the participants understand that they have a legal obligation to act "in the place of the parent" whenever the learners are in their care, whether it is before, during or after school hours. Significantly, some participants are willing to circumvent or go beyond school policy requirements to serve the best interests of the learners.

4.3.1 Educators have a Responsibility and a Legal Obligation

It is evident that the participants see their duty of care as a professional responsibility rather than a legal obligation towards the learners. However, the data indicates that some of the participants have reasonable knowledge of their duty of care. For example, P5 summarised her understanding of her duty of care as follows:

My sole responsibility is to safeguard the learners throughout and ensure that the learners are safe in my hands up and till they go home. Hence,

during breaks I have to see to it that wherever they are in the playgrounds, there is safety by taking rounds. Or the playgrounds are safe and everything, they play around and they are just safe.

In similar vein, P2 understands his duty of care as:

...the responsibilities that are devolved upon you... you need to make sure the safety of these learners whilst they are in class. Even, whilst they are in the school yard, during breaks. You must help them. When they are taking paper work. When they go to toilet, you need to make sure that they are safe. Whatever they do during the school... in the school yard. That you must ensure that they are safe... Even, outside the school yard...

P3 said that:

...while the learners are in the school premises, they are under my care... And I must see to it that I protect the child as long as he or she is in the school environment.

P6 formulated his comprehension of duty of care as follows:

The duty of care toward the learner entails the fact as an educator, I have got to ensure at all times that the learners under my responsibility are always safe... The paramount thing of just keeping learners themselves safe. Because the safety of the learner is of paramount importance. It has got a huge influence. Whatever the discretion that we use, it must always be in the interests of the well-being of the learner.

An educator's role transcends beyond teaching in the classroom and educators have many duties other than teaching that include many areas of the school environment. These duties range from playground duty, supervision, the learners' academic well-being, school events, transportation of learners to sport activities or excursions to attending meetings where policies are discussed and explained. In addition, an educators' duty of care should protect the physical and psychological welfare of the learners.

P19 emphasised that her duty of care not only related to the physical well-being of learners, but it extends to the intellectual well-being of the learners in her care.

...physically and emotionally and intellectually. On all those levels I have a duty of care.

This is echoed by P11 and P15 in the following manner:

We are responsible not only for their academics but for their emotional well-being as well. And all the other things that goes along with it (P11).

Teachers should realise in primary school that our duty as teachers is far greater than just teaching a subject. Learners nowadays face greater emotional challenges than we did years ago (P15).

P11 also emphasised that:

The care towards the learners is to make sure they are well nourished, to keep them safe and equipping them and teaching them and guiding them and all that...

P12 believes that her duty of care starts as soon as a parent drops their child off at school. She also believes that she has the responsibility for the learners' academic and social well-being:

...as soon as the parent drop the child off, it is my responsibility to take care for that child. Not only in an academic way, but also in a social way... have to take care of that child.

Therefore, the participants generally recognise that they have a legal responsibility and role to be in the place of the parent at school and they seem to understand that the concept *in loco parentis* is related to an educators' duty of care to act in the best interests of the learner. The apparent deficiency identified among the understanding of the above-mentioned participants appears to be that the participants understand their duty of care as a professional responsibility rather than a legal duty to the learners in their care.

4.3.2 Linking *in loco parentis* to Duty of Care

The participants generally displayed the same understanding of the term *in loco parentis*.

P1 explained that:

...when I was still at school, I was told... teachers are in loco parentis. That is what I was taught... they told me what it meant is the fact that children are here, I take over the role of a parent from their biological parents and they become my children... as much as I would love to take good care of my children at home the same must happen with the children that I have in my care here. I must not look at them as children of some other people... The parents entrusted me with these children... I need to make sure that they are safe, protected from harm, protected from bullying, protected from whatever it is that may hurt them. As long as they are in my vicinity... It is my responsibility to make sure that these children are well taken care off.

P10 compared his duty of care to that of a parental responsibility towards the learners:

My duty of care towards the learner's, I understand it in terms of being a parent, because I think parents when they bring their children here they leave them in our hands... we are acting in so called in loco parentis and therefore we are supposed to... we are actually their parents, they expected us to take care of them the way the parents will do or everything that the parents will do to the children, we must be able to do it... whether they sick, whether they are doing this, anything but there is that parental responsibility. That is placed on us as educators.

P6 expressed his *in loco parentis* role as follows:

It informs us to put the safety and the interest of the learner above all. It is quite helpful. Like with regards to the previous examples that I gave... as educators we are employed as in loco parentis. Everything that the parent would do to ensure the safety of the child. When the children are intrusted in our care, we have got to do exactly that. So, you look at them as if they are your biological children, in your care. Then you do everything to ensure that they are indeed safe.

Similar views are held by P5 and P11 respectively:

...duty of care, solely because being a teacher – I'm also a parent to this kids, because the parents of these kids have entrusted their kids to me throughout the day (P5).

Well whilst they are here for the six (6) or seven (7) hours they are here, they are my children. I treat them like a bonus paterfamilias (prudent father of a family). That is simple and straight forward, but that is it! I don't have a professional responsibility towards them. I have a parental responsibility towards them (P11).

The participants recognised the common law term *in loco parentis* as the responsibility and power educators must accept, in order to take complete control over the learners in their care and acknowledge that the educators must be responsible caregivers. Parents place their parental responsibilities on the educators, which will allow the educator to be in the place of the parent at the school and exercise their professional discretion accordingly. The participants seem to confuse *in loco parentis* with duty of care. They also seem to assume that they are expected to assume all the rights and duties of parents.

4.3.3 Acting *ultra vires* in the Best Interest of Learners

Ultra vires is a Latin term, meaning “beyond powers” (De Waal *et al.*, 2011:156). In the context of this study, it refers to educators acting beyond their authority but in the best interest of learners. A valid administrative act takes place on the grounds of authorities' powers, and anyone acting beyond that, acts *ultra vires*.

I explored whether educators exercise their professional discretion by making choices that could go beyond or deviate from school policies in the best interests of learners. The participants indicated that they are generally prepared to act in the best interest of learners even if it means acting in contravention of school policies. When exercising their duty of care and when applying professional discretion, they should take cognisance of Section 9 of the Children's Act 38 of 2005 which states that “in all matters concerning the care, protection and well-being of a child, the standard that a child's best interest is of paramount importance must be applied”. Therefore, when making any decision affecting a child or which may lead to any element of negligence,

educators must give due consideration to this principle (Du Plessis, 2019:102). In this regard P11 specifically stated: *“I deviate from laws and policies everyday...”*

However, according to P20, educators are sometimes required to contravene policies and act *ultra vires* in the best interest of the learner. She explains that in certain situations, you do not have any other choice:

I do know that we need to follow the policy and the laws, but in certain situations one would want to breach the policy to protect the learner. One would first look at the learners' needs before deviating from a policy.

It is evident that some educator's decisions do deviate from policy and legal provisions with regard to life and death situations (physical well-being), academic well-being of learners and social well-being of the learners. For example, P15 feels that she has a duty of care to stop an injured learner's blood without any gloves or protection. She puts learner's physical well-being first without thinking about herself:

I saw some small injuries at hockey practice, but there were more than enough staff! It was just an accident and that was one of the situations, I just thought on the spot and tried to cover the blood. Where I shouldn't have done that I there is a whole process...

I'm not really allowed to touch the blood without wearing the appropriate things... you should do certain stuff to stop the blood or whatever and I just thought, I just want stop the blood. I didn't think anything else and that wasn't what I was supposed to do.

Similarly, P1 made a risky decision to stop an injured learner's bleeding despite being aware of the safety policy requirements and the consequences of infections as well as the risk factor of being negligent. He nevertheless decided to assist the injured learner as he felt he was acting in the best interests of the learner.

It is also a risk. One, you must make sure you protect yourself also. Like in the case of who was injured... One, needed to protect himself against the infections that might come through the blood... Other may touch that blood... Which, hamper with their safety, but at the end of the day just for the sake of that child to have a life again. You take such a risk. And make

sure that they are safe. And I hope that can't be negligence? It is just assisting the poor girl.

P2 had to make a dangerous decision in order to save the life of a learner who had an asthmatic attack whilst cleaning a dusty class. The learner forgot her inhaler and the participant had to choose between either sending her home or giving her an inhaler that belongs to one of the other educators at school.

They were cleaning the class... the class is dusty... this learner is asthmatic... And she suffered... she wanted to go home, to go get the medication... When I was busy completing the permission, to leave the school yard. I found one educator who's also having the same problem and that they also have this inhaler... Then that educator said to call that learner, then I'll assist her... He gave that to the learner... that is where I contravene to the policy.

Another noteworthy incident was mentioned by P13:

...the school policy on a sport day... When someone is injured on the field no parents are allowed except the parents of the child that got injured on the field! And to make way for the ambulance and it depends on the situation and how serious the injury is, but... We have a parent here that has all the medical aid qualifications... And one situation that we had here... one of the children broke their leg... above here (pointed to his femur) ... He broke his leg and there was no medical aid on the playground, it was a practice, it wasn't a game... but luckily, he was here! Protocol is, you have to call an ambulance... But we made a decision on the field to say, listen he has the qualifications, but he is here as a parent not medical staff... But he can help the child, so we allowed him. And if it wasn't for that action, he might have lost his leg!

P13 is well aware of his school's policy requirements when it comes to injured learners. P5 articulates her decision to contravene policy to ensure a learner's academic well-being as follows:

...for instance, you have written a test, this learner was absent without any reason. When the learner comes back, you would want to know why you

were absent, when we were conducting this test. Then you find that the learner comes with a very valid reason, but they failed to give you the reason before... And according to policy as long as you don't have a valid reason, that learner is not supposed to write that test... Unless he produces documentation that validates the... the reasons or absenteeism. But as UBUNTU says to us... I mean there was a death case and they were all devastated in the family it slipped their mind to come and report. And you have to make that learner write. Unfortunately, so you have to bend the policy.

Similarly, P5 explained her reason to contravene policy with the learner's best interests in mind by enabling a learner to retake a formal assessment as follows:

If I've followed policy... Let's say I have denied a learner to... for instance to carry out with either NSBA (National School Boards Association) task or a test, because of, he didn't produce a medical certificate or the parent didn't come. And then I said no, I'm going to put a zero (0). Then at the end when you do the formal assessment for this learner, then you find that, ah, this learner fails because of this. Then you tend to re-evaluate and go back... Let me just see if I can give the average...

P5's experiences deal with exercising professional discretion regarding scholastic matters. This example differs from the previous participants that dealt with serious and sometimes life-threatening injuries.

The principal of School 4, P17, explained that at his school, educators at times diverge from academic policies:

I think at our school there would have been far greater chaos and... in terms of academic chaos if teachers hadn't subverted policy. So, you look at the syllabus and you say... or there is nothing in the syllabus... that doesn't make any sense at all. So, they put it back in and by doing that they are subverting policy.

P17 made use of the word "subverting", suggesting that he is aware of policy requirements before he makes decisions. He does not simply ignore policy. It seems that he takes the policy requirements into consideration before he

deviates from policies. Therefore, P17 knowingly deviate from laws and policies in the best interests of the learners.

To protect learners' right to education, P7 deems it necessary to disregard laws and policies by removing disruptive learners from the classroom:

Say, a learner is misbehaving in your class and our school policy says you cannot keep a learner out of your class. But the thing is sometimes that one learner disturbs your class... I as a teacher, I take the learner and I place the learner outside my class. But at the same time, you are trying to protect your other learners that are trying to learn... many of times you don't know what is right and what is wrong, but you just make a decision at the moment. You know the law says, all learners have the right to education, so you think to yourself: I'm taking a learner out of the class... Sometimes we are left with no choice, just to make that decision.

The participant is aware that disruptive learners' basic right to education could be deprived by removing him from the class. She would rather remove one learner from her class than allowing the disruptive learner to violate the rest of the learners' right to education. The focus must be on maintaining a safe and dignified schooling environment for learners. It seems that the participant is aware of the fact that the specific learner's right can be curtailed by removing him/her from a class. It does not necessarily constitute depriving him/her of a right. There are certain factors that an educator should take into account when deciding to take action such as removing a disruptive learner from a classroom. The following factors from Section 36 of the Constitution of South Africa should be considered for both the parties involved (learner and educator): "the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose, the availability of less restrictive means to achieve the purpose" (Joubert, 2015:47).

Akin to P7, P19 also acts *ultra vires* whenever learners show signs of bad behaviour in her class:

Might be seen as overstepping policy lines, but I've done that in the past. I physically taken people out of my classroom who came in and started a fight with someone and I just dragged them out and closed... locked the

door. And I felt that was for the good of my learners, because they were senior and I was teaching Grade 9s. I just couldn't see how that can be acceptable... So, in that sense, I feel you can't have rigid laws there, because the safety of a learner is more important than policy.

P19 decided by removing a dangerous learner from her Grade 9 class. This could have been more dangerous as she could have exposed herself and her learners to other unknown risks. By removing dangerous learners from a class, risks such as learners being violent towards other learners or the educator could occur. Learners may even have dangerous weapons that could cause bodily harm to the younger learners or the educator.

Expressing his frustration with the admissions policy forced upon schools by the Gauteng Department of Education, P17 indicated that he departs from the admissions policy as he believes that it would be in the best interest of his school and by implication, all the learners in his school:

So, I'm very stressed in terms of trying to divert from policy which is... which I know not to be in the best interest of my school.

P16 added another dimension to this discussion with regard to his decision to transport learners in his personal vehicle in order for them to take part in an isiZulu oral examination. This is also related to the academic well-being of learners. He took matters into his own hands when he saw no other option and did not adhere to the Regulations for Safety Measures set out by the Department of Education (DOE, 2006). According to Eberlein (2009:98), learner transportation is a major duty to assume. For sporting activities and excursions, learners often need transportation. Transport vehicles can be buses and any other means of transport, whether owned by the school or hired for excursions or tours from a private company. In this case the learners needed to be transported to their isiZulu oral examination.

I have had to take learners in my own private vehicle... Because I was just told two hours before an oral, a Zulu oral by the facilitator that we have agreed that we are going to meet in Atteridgeville and... according to stipulations and regulations the learners are supposed to be transported in proper transport, school transport which is authorised and they can be... So

that if there is an accident they can be compensated. Right fully compensated (P16).

P16's experience is a good example of an educator exercising professional discretion to advance a specific learner's needs based on academic interests.

P1 also breached transportation policies. The participant transported a learner who was critically injured. The participant did phone the ambulance, but they were taking too long. He acted *ultra vires* and took matters in his own hands as he used his discretionary power to act in the best interest of the learner:

You will find a situation where a learner is critical. This happened at one school where... Not here. Where I was working before. There's a learner who got hurt. We phoned the ambulance. It delayed. The learner was bleeding. By law I should not put that child in my car...I must wait for the ambulance. But your conscience tells you this child is going to die and you are watching. What do you do? I had to pick that child up, put him in the car. I took that risk. Took him to the hospital... And then I phoned the parents to tell them that they will find the child at the hospital. But ordinarily I should have waited for the health professionals to pick this particular child up...

A similar situation confronted P5:

I myself once rushed a learner to a hospital not even a clinic, because of the condition of that learner not knowing what is going to happen next. Then later I was crossed questioned, why don't you know that you are not supposed to take a learner to a hospital with your car! Because the learner was pregnant! The learner was in labour, I didn't know what to do if she was supposed to deliver there and what was the other learners going to do in class? The best thing was just to rush to hospital!

In another situation, P6 shared his reasons for making decisions that deviate from policy in the best interests of the learner. He emphasises that in his no-fee-paying school there are a lot of social factors that are beyond their control. He expressed his concerns with regard to the learners' school uniform. He knowingly allows learners to

wear other clothes especially in the winter times. He is more lenient and flexible when making decisions regarding learners' school uniforms:

For instance, if we look at the issue that pertains to school uniform... By policy learners must all look the same in a particular uniform, but with the current status of the unemployment with most of our parents...At times we are bound to be flexible enough that those that don't have that uniform will still allow them to come, because it is indeed caused by factors beyond their control. And it is difficult for us as teachers to say... you cannot be wearing this kind of a sweater because it is not the same colours at the schools. Then, say we tend to be a little flexible as to allow them to be warm even it is not the school uniform.

Similarly, P7 stated the following:

...you have a learner, maybe their dressing is not right and the policies says, learners need to be well dressed. All learners should have school uniform but then you get learners coming in class with a uniform that is untidy... they come with normal home clothes. Then you cannot tell the learner anything, because you know the situation of the learner... it does bring your professional discretion into play.

P15 articulated what was expected from her as an educator whenever learners were faced with emotional problems. The participant agreed to follow the policy requirements when referring a troubled learner to a social worker, but in this instance, she believed it was vital to assist the needy learner personally as she felt the learner entrusted her. The participant circumvented policy to protect the learners' psychophysical integrity and prevent harm to the learners' psychological well-being and prevent self-inflicted harm.

...one of the policies at our school is: as soon as you come across a learner with emotional problems, they have to be referred to one of the social workers at school immediately! We aren't really equipped to handle situations like that! So, a few years ago I got a letter from a girl in my register class, she was 12 years at that stage, asking if she could speak to me during break time. I obviously responded with a yes, because ultimately being a teacher to me means making a difference far greater than just teaching a

subject! During our conversation the girl admitted that she was involved in self-harm...this being one of various other issues, it later also came to light that her mother died when she was, I think 8 or 9 years old... she trusted me to keep this to myself! Obviously, I knew that I had to report it to the social worker, but I was at risk losing the trust of the girl... I decided to keep it to myself and to use the knowledge I had about self-harm and how to heal emotionally. To help her even though it was against the school's policy. I eventually spoke to the social worker as well, but together we decided that I should keep on working with the girl but now and then I had to give feedback to her about the progress we made... this belatedly brought me to the conclusion that it is not that bad to sometimes go with your own professional discretion, especially since we work with kids that are still in such a defining time of their lives and they sometimes seek out a person they prefer to talk to. I knew that if I referred this girl to the social worker, she would have just kept quiet and who knew what might have happened then?

In a case where the expected outcome took a turn for the worse, P17 shared his experience of evading policy with the learner's best interest at heart.

We had a young girl... I knew about it because I was the manager, I did speak to her, but actually a social worker worked with her... she claimed that she'd been groomed by her father for further... for molestation... There weren't direct accusations that he was... but then she wanted to go to her mother, who lived in Springs. The mother didn't want her and that is really the truth... And the social worker and I had to write reports, go to the police station to try and get her removed from her fathers' care, it was very difficult because she misrepresented the story. When we had gone through half of the counselling and reporting et cetera, we found out there was no real necessity for a court order at all because she'd been given to the mother as it usually happened in a divorce settlement. The tragic story is that in the end we went way beyond our duty and actually got her to go and live with her mother... She was with her mother and committed suicide. We, went beyond the call of duty there, trying to get her to what she wanted and that

was going to her mother. And you sit with it today, because the truth of the matter is, she is dead, because she went to live with her mother.

Well, it was a difficult one, do you leave her at home? It is also one of those political things. I mean there was no direct... her father wouldn't for example, lock a bathroom door or a bedroom door... He took the keys and so on and then he would walk in. And I mean that for a teenage girl is totally and utterly unacceptable.

But she wanted to go to her mother, so we went with it. But actually, I didn't know if it was in her interest. And then she is died, but we went way out of our duty call there, way. And in the end, I don't know...Do you want an abused girl or dead girl? That is just... I don't know. No...

P15 and P17 each provided an example of two possibilities when making decisions. P15's decisions had a positive outcome, whilst the outcome of P17 turned out for the worse.

P17, together with his SGB, decided to deviate from the law in order to expel a learner for bullying another learner. This is a significant case in that it is an example where a principal decided to act *ultra vires* and deviate from the prescriptions of the law in terms of expulsions:

This is a current case that we are working on, the governing body decided that we recommend expulsion for he's a senior bullying a junior. It was so bad that it was regarded as expulsion material, after ignoring the gun incident last year. Ignoring it flat! Not... not replying at all...

...what we did is, because he is a safety and security problem for our school we said, okay you are suspended, which is ultra vires. You asked about adapting the law... seven days is the maximum he can spend as a punishment and we are saying – no we interpreting it this way...He is a present danger to all pupils in the school because previously, we know of his gun now he has bullied a Grade 8... he is a danger... he is just given an unlimited suspended which the department came back to us and said... that is illegal...You have gone over your mandate and we are saying we are waiting for you to expel him...because the boy then went to an union

SASCO (South African Student Congress)... They proposed a twelve-month suspended sentence, expulsion.

P10 expressed the opinion that, when it came to *ultra vires* acts, it was difficult to deviate from policies:

...it is very difficult to deviate from policies, because the end of the day if anything happens, they will always ask you: why did you not follow the policy? What does the law say? I think the laws that we have are sufficient enough to protect the learners.

P10 further alluded to the widespread belief that policies should be placed before the learners' interests:

I'll tell you the reason is, now if you act outside the policy then there is a problem that the first thing they will ask you: is what does the policy say? So, to safeguard yourself you always have to act within the policy framework... you are always trying to act in the best interest of the learner and as I said, now the policy comes first...

An example where such a rigid approach to policy can cause harm to learners was provided by P11 and P15 (both from school C). These two participants alluded to one of the educators in their school who applied the examination policy of the school without adequate professional discretion. The educator was blamed by parents for applying the policy without considering the consequences it may have for a learner.

School C's examination policy stated that the learners are not allowed to go to the bathroom whilst writing exams. They should either go before the examination or after the examination is written. In this instance, a learner urgently needed to go to the bathroom, but the educator did not allow her to go to the bathroom as she was strictly following the policy.

The learner relived herself in the class and the parents wanted to sue the educator, but P11 (the principal of school C) argued and said that the educator was following her direct orders and the policy that she enforced, took the blame for the educator. Later the SMT adapted the examination policy in order to ensure that this situation would not happen again.

It seems that the participants are generally prepared to act in the best interests of learners even if it means acting in contravention of school policies. It came to the fore that participants referred to three instances when they act *ultra vires* and exercise professional discretion in the best interests of learners. Some participants exercise professional discretion “everyday”, other participants “sometimes” exercise professional discretions whereas other suggested that they only exercise professional discretion “in certain situations” (refer to Section 4.3.3). It is apparent that some of the participants’ decisions deviate from policy and legal provisions with regard to life and death situations (physical well-being), academic well-being of learners and social well-being of learners. The general use of professional discretion amongst the participants was appropriate and in the best interests of learners. P17’s experiences showed that even when educators have the best interest of a learner at heart, it may not always turn out as expected and with a positive outcome.

4.4 THEME 2: A LIMITED UNDERSTANDING OF PROFESSIONAL DISCRETION

The participants revealed how and when they applied professional discretion. It is recognised that an educator has a freedom to exercise their own choices and judgements, but the acceptability of these choices and judgements is influenced and limited by a number of factors.

4.4.1 Professional Discretion as perceived by the Participants

Educators who have adequate professional discretion for a particular task has the ability to make professional judgements and has the capacity to act on those judgements. The participants displayed multiple understandings of professional discretion. Below are some of their verbatim responses:

I think professional discretion to me means, to be able to use your own judgement for certain situations. Doing so professionally still trying to keep everyone’s best interests at heart. And that last part is especially important to me, to make sure the decision you make has your interest and learners’ interests at heart (P15).

P6 agreed that professional discretion should always be in line with his duty of care towards the learners:

Whatever the discretionary choices that we make, they must always be in the interest of the well-being of the learner.

P19 described professional discretion as:

Well I think it's an obligation on the educator to use, to be able to make a decision, the right decision for a specific person at a specific time in a specific circumstance

P16 thought of professional discretion as acting as a reasonable person:

Professional discretion is where you extend, I mean use your degree of foreseeability and preventability. Ah, and then you arrive at a decision, having weighed these two concepts, you know? The element of what a reasonable person could do, you know? To prevent or to be able to foresee...

According to P16's beliefs, professional discretion means that you weigh up what the law and policy says against your professional knowledge and experience and then you take a decision based on your professional knowledge and experience.

4.4.2 Professional Discretion and Professionalism

It is evident that the majority of the participants understand their professional discretion to be based on their being professional educators and this relates to the concept of professionalism. Professionalism is associated with the educator's skills and knowledge of the profession as well as the competencies needed to be a professional educator. Professional discretionary decisions can always be justified in light of the best interests of children and by their reasonableness, their fairness and their appropriateness. It seems that the participants focused on the professional aspect rather than the discretionary aspect.

In this regard, P5 stated the following:

...with professional discretion, I think as a professional, you are supposed to understand the ethical aspects of the profession that you are in and apply or work according to the work ethics related to the profession itself. And show professionalism at its best, in most levels as required.

This view was shared by P8:

I can say, this is maybe the way in which one has that freedom to exercise her duties. Yes, as a professional.

Similarly, P1 stated:

...it says to one you must be in a position to apply your mind properly to some of the things you got to deal with. You've got to be able to separate professional things say from personal things.

P1 further suggested that:

If you are not that professional in your decision making you will be biased in the decision that you take.

Another participant (P17) indicated that:

It is the responsibility, I think, to make a decision based on your training as an educator...

If professionalism is equated to the concept of professional discretion, then the comment by P7 is appropriate:

So professional discretion would be, how as an educator you would behave or conduct yourself in the school environment... how you interact with your colleagues, how you interact with your students, I think it is something like that?

This was elaborated on by P2 and P5 as follows:

The class decision... during our meetings... staff meetings. And then again during the parent's meetings... (P2).

In meetings or in meetings with my colleagues... I always apply professionalism. During contact with learners or in the school premises... Let me put it... in the school premises is where I practise my professionalism. When I'm with my seniors or officials, I always maintain that. When I'm with parents... either in the parents' meeting also I don't forget that I'm a professional... (P5).

It is clear that P2 and P5 do not understand that they are professional people with professional training and experience in the profession and that they have knowledge

about children and education and as such, should apply professional discretion when required. However, their professionalism informs the decisions that they make even if they seem to be in conflict with legal and policy prescripts. Because they are professionals in the education sphere, they should be knowledgeable and skilled enough to use their discretion to make decisions in the best interests of the learners.

4.4.3 The Application of Professional Discretion

Educators' professional discretion is the capacity and obligation to decide what actions are appropriate and the ability to take those actions into certain situations where people might question their legality. If an educator does not apply appropriate professional discretion in the classroom, it might result learners not reaching their full potential and may constitute negligence by the educator. Educators may apply professional discretion without them even realising it. Educators may use professional discretion every day or less frequently, depending on the situations that confront them. This is confirmed by P15 who states the following:

I think this is something a teacher does on a daily basis. In the classroom, during break time, at the staff room also on the sports field. We work with so many different situations and different personalities. I don't think we even realise the amount of times we actually use professional discretion. I think there is a lot of times we have to make decisions...so quickly that you don't really have time to think about the process necessary. So, you just try to think what is best for the learner.

P11 applies his professional discretion whenever he deems it necessary:

Whenever I think it is necessary! I hope this doesn't sound arrogant? There's no text book that tells you when to decide when discretion is the best way to go. You have to use discretion in everything you do.

P17 applies professional discretion "just about every day".

I don't think there is a moment in a teachers' day that goes go by that the teacher isn't called on to use her discretion or his discretion every day.

The participants indicated that they apply professional discretion in... *promoting learners to the next grade (P6).*

The participants have similar views on how and when to apply appropriate professional discretion with regard to specific situations. For example, P2 emphasised that his discretion “*depends on the conditions that you find yourself in...*” whilst P8 expresses that she applies professional discretion according to “*the type of crisis...*”

In addition, P16 indicated that a situation or environment may influence an educators’ ability to apply professional discretion:

...teachers do not work in isolation. We look at the environment, the situation then you look at the learner that side. And then you look at yourself as the teacher... this is how you exercise discretion... What is the situation that I have? Then you look at the situation and then you look at yourself. From your position, what binds you?

So, despite the knowledge and the experience, we need to be worried that every situation provides its own challenges. It is a different scenario even though you may have building blocks...

This is echoed by P20:

...then definitely the background you have of the learner, the situation and then also the amount of information you have on the specific situation.

P16 shared an experience where he appropriately applied professional discretion during an excursion to Gold Reef City. He also acted *ultra vires* to safeguard learners by preventing accidents or incidents happening during a proposed visit to a mine:

I have deviated some time from policy... We went to Gold Reef City... And when we got to Gold Reef City, we were... these learners were supposed to go into the underground mine and all that, they have paid. When we charge them here, the money include a tour of the mine and all that... in our letter to the parent and the department, when we were planning this, we included that the learners will be charged this much which includes the tour of the mine, which include the tour of the museum and all that... that was the agreement and the parents paid knowing for well that this will happen...But when we got there, one lady... She told me that there were heavy rains the previous week...

After I heard that and I heard these other two guys. They were talking about the mine, it is not nice, and it is not safe... I then said... You are not going to go down the mine, because I've heard that it is full of water...

The participant applied appropriate professional discretion by acting *ultra vires* in this situation in the interest of the learners.

The general impression is that some of the participants have incomplete or vague knowledge about professional discretion and that they don't always know why they make decisions that may seem contrary to the laws to which they are subject. It also seems that they will not be able to motivate why they took certain decisions.

4.4.4 Factors that Influence a Professional's Discretion

Professional discretion has to do with an educators' freedom to exercise their own choices and judgements. Both internal and external factors emerged from the responses of the participants that may possibly influence an educators' professional judgement.

4.4.4.1 External factors

External factors are factors such as policy requirements and policy inflexibilities and rigid laws influencing the exercising of educators' professional discretion.

- ***Policy inflexibility and rigid laws:***

P13 stated that their school safety policy guides their decision making:

And I think it gives you a guideline in which direction to move and it helps...It helps if everyone is working together...Because if you don't have a policy, I'm going to make one decision and two other teachers are going disagree with me and say, you should have done this you should have done that. Now you can say, this is the policy of the school and we all follow the same direction.

Similarly, P16 explained as follows:

... laws that are so rigid and inflexible, they make decision-making difficult... in the end this is why you find teachers who are going on to use discretion, because it is rigid law which has not been changed and whilst the environment itself is changing. Then there is dynamism in the environment

and yet the rules, the laws are inflexible...Now there is a greater temptation to use professional discretion and thereby creating a high probability of negligence...

The participants expressed their thoughts on the influence rigid laws and inflexible policies have on their professional discretion as follows:

...we are restricted (P5).

... it influences my decision making when it comes to learners (P11).

...limits the options for us, that's why we go back to having a more open policy for us to be able to make decisions (P15 15:36 46197:46314).

You can't change the law. It somehow cripples you... (P1).

They bind us the policies... we cannot do anything because I'm bind by the law! I'm even afraid to do things against the law, because I'm securing my job (P3).

The school policies must be open... When drawing up the school policy it must fit the situation (P3).

Policy should be flexible. It should be functional (P8).

In addition, P14 had the perception that her decisions too were influenced by laws and policies and this instilled a fear in her when making decisions.

Yah, an influence, an impact, because you can't just say or do anything just the way you would like to or express how you would want to do it, because you have to think what the laws and the policies at the end says... It would definitely prohibit me to do something, because I believe that is why it is in place. And if I go beyond those rules or decisions they have made, then am, yah. It could put my work in danger.

Another participant (P20) indicated that:

A policy should definitely be flexible, because I mean if you are in a situation where someone is literally dying or busy dying, one should be able to first look at the child's needs before what the policy or laws are saying.

P11 had a different opinion regarding the influence of school policies on his decision-making:

In a crisis, not at all! In a crisis I have to trust my instincts. I know what the laws are and I know what the rules are so I am not going to be stupid...But I don't let laws dictate in a crisis, you handle it...You fix the crisis and then you worry about the laws afterwards.

4.4.4.2 Internal factors

The following internal factors that influence professional discretion such as experience and knowledge, personality and the “fear factor” to make decisions, are identified:

- ***Educators' experience and knowledge***

Educators must use their own knowledge to promote their practice. Educators need autonomy to make decisions in line with their knowledge and skills. Hence, it is important for educators to have the appropriate knowledge required in their profession to support their practice and shape their decision-making. Knowledge will help enable educators to make the best possible decisions in the interests of the learners in their care.

P5 stated that:

*Knowledge can never be enough. Knowledge can never be enough.
Lifelong learning!*

P5 expanded on this point as follows:

When you love what you are doing and when you want to know more in your profession or in what you are doing, the more you gain knowledge the more you want to know more... And the more you want to know more, is the more that you are going to go to higher levels.

P11 expressed the view that knowledge of the law is of paramount importance. Having knowledge of the law will enable educators to exercise appropriate professional discretion:

...my knowledge of the law is always paramount.

P13 highlighted that it was important to have experience because it influences your decision-making process:

I would say the more experience you have, the better your decisions will become!

P20 believes that novice educators find it challenging to apply appropriate professional discretion:

...you tend to get yourself in trouble if you aren't experienced as someone that has more experience!

Moreover,

...training and experience obviously has a big influence. The more experience you've got and the more training you have gone through, that's also going to help you to make a better decision (P13).

P15 explains that she became more confident in her decision-making process due to her nine years of experience:

Over the last nine years I have come across so many similar situations that it gets easier learning how to handle them. Even with situations that are completely different, you just gain more confidence and I think this is the key, in your own ability to make a professional and appropriate decision.

In addition, P15 states that her years of experience weigh more than policies when she exercises her professional discretion.

...certain factors like own values and experience influence my decision making more than the policy itself!

A novice educator, who participated in this study, finds it challenging to apply appropriate professional discretion.

If I'm a new teacher, in other words, I am an inexperienced teacher, it is hard for me to make decisions. Especially when you have seniors, because you can come make up with your own decision. But they will always crush your decisions (P8).

P20 supported this view:

...you tend to get yourself in trouble if you aren't experienced as someone that has more experience!

Another participant explained as follows:

...if you are not experienced in something then you don't want to put yourself in that situation. Am, so you would rather get someone to help you with more experience at the end... my training and experience would definitely have an influence on my decision making (P14).

Even though P17 is not a novice educator anymore, he strongly believes that whenever a novice educator makes a decision that wasn't the wisest decision at the moment, the educators' educational experience and background should be taken into account.

I mean if you are a beginner teacher people would only have to work on your educational experience and background. Um, but I think having you know lessor experience it would mean that when you made a decision... when you've made a decision that probably wasn't the wisest, one would have to take into account the fact that you are new and that you are learning and um, that the management of the school needs to step in and say, well yes it happened but that is the way we learn.

You can't expect a person... A new teacher to come in and do everything right the first time, they're still learning... That would influence your personal decision, your discretion in determining what you feel was negligent... As a rational experienced teacher, they shouldn't have, but then a person that is brand new, you would have to say – well that was a learning experience.

The above statement means that educators' decisions and actions should be justifiable and that educators learn from their experiences - *"experience is a very great teacher"* (P6).

- **Personality**

According to P16 an educator needs a lot of patience. Having patience allows him to think before he/she makes decisions.

...a person who is patient will not rush to make a decision and that is very important, because one thing that happens in decision making, is that you get pressurised! Most of the decisions that we make, we are under pressure, because of different things. It could be the environment is

pressurising you... So, personality is very important. Most people that have failed or that have landed in trouble in life, if you have to ask them, you will find the decision that they made is because of a certain personality imbedded in them and it lead them to that.

P13 explained that if an educator has confidence to make a decision, it would become an easier process:

...if you have a stronger personality then I think it is easier to make decision. If you are someone that is not that confident then obviously you are going to struggle with certain situations.

Another participant (P18) pointed out that a person's personality type plays an integral role when exercising their professional discretion:

You get different personality types, you get left brain people, right brain people. Am, for one person the situation is terrible and for another person you say – no, no, no there is a way out. So, definitely. Your personality has a great influence on how you handle stuff, how you react.

In addition, P6 acknowledged that:

...empathy and compassion go with personality... there are some people who just don't have that... don't care attitude of whatever is happening... they won't do anything... but if you are compassionate towards ah, any other person in any other situation. So, personality has a huge influence.

For P1 it is important to be sober (clear-headed or rational) in his thinking when making decisions within the school environment. He describes his personality as calm, which allows him not to overreact in crisis situations.

I consider myself to be a calm person... I need to be sober in my thinking. Because, if you are carried out by emotions. You end up taking decisions that will come back to haunt you the next day, but if you keep your calm, your cool you will be able to, to think your thoughts through. And at the end of the day you will come up with decisions that are sound...one's personality and training help a lot in that regard.

Being calm and collected allows P1 to think about the specific situation at hand before he makes a decision.

- ***The “fear factor” to make decisions:***

Some participants in this research disclose that, because they are controlled by legislation and policies, teachers are sometimes afraid to make a judgement call.

I think we are all scared of the law at the moment, because what you think is right might be interpreted differently by someone else (P18).

...when it comes to the laws and the policies, I’m also very scared to make a decision (P20).

The biggest factor probably is the fear of being wrong! The feeling that the choice you make on how to handle a situation wasn’t the right one and that you might have done something else that could have worked better... (P15).

...if I take a decision I always... there is always like a hundred (100) things buzzing around me and thinking okay, will somebody... will I get in trouble for this? Will the school get in trouble for this? What will the principal say? What will the other teachers say? Will the parents come to me? So, yes there is a lot of things you need to take into consideration (P7).

Sometimes we are afraid to make some decisions, because they will say you are not allowed to. It is not up to your level to handle some of the situations (P9).

It is important for an educator to be able to justify his/her decisions. P11 explained:

If you are afraid, something bad will happen. If you trust your instincts and you trust what you are doing and the reason why you are doing it, you’ll be fine. I truly believe that.

P11 expressed his opinion on the matter of educators being afraid to act or apply discretion as follows:

If a child is hurt, I care about the child. If I was too scared to help a guy who broke his leg, because I’m scared his parents will sue me. Then I shouldn’t be here. I have to save his life first and then face it afterwards...So would

you say in that sense you are bending the policy for the best interest for that learner?

Look, the teachers are afraid because their principal is afraid. The principal is afraid because we are threatened every day.

P14 recognised that educators are afraid to make decisions because of all the laws and policies:

I think in a school environment, because of all the laws and so forth, you are so scared to just take steps and maybe you put yourself in a position where you can lose your job.

The deputy principal of School D (P16) shared his view on the “fear factor” in novice educators:

Being a novice, is quite tormenting... They don't know if their decision will be respected or not.

It appears as if some of the participants are reluctant to exercise their professional discretion because they are bound by laws and policies and because of the consequences they may face after making decisions based on their own assessment. Some of the participants spoke of the fear of being "wrong" and making wrong decisions. The fear to make decisions could create a sense of uncertainty in the discretionary abilities of these participants.

4.4.5 Discretionary Power of Educators Regarding the Promotion and Expulsion of Learners

Participants indicated that their discretion to promote learners to the next grade and expelling learners in their respective schools is restricted. These participants indicated that policies should be more flexible and open to educators' discretion. This will enable them to have greater confidence in making decisions in the learners' best interest. P3 explains that:

...laws make our work very difficult for instance, in promoting learners. We know the learners who perform well in class, but the law will say... the policy will say, that no, because of the age the learner, mustn't be in this Grade

for more than two years and they will progress the learner to the next Grade... In matric, there no progressions.

I want the department to give us that decision making... If they can let the teachers decide on the part of the learner, because we know the learners.

P4 takes a similar stance on the deciding factor in promoting learners to the next Grade:

Like normally, they will tell you that they want evidence for a learner to not being promote. And then they come back and promote that particular kid. Even if they said... if the learner doesn't do his tasks blah, blah, blah you gave them all the information. And then the district then decides that this learner should pass. We normally hold them back, because we feel that they have not learned enough.

P10 is aware of the policy process to promote learners to the next grade. He explains the process as follows:

I think there is a policy we use to promote learners. So, when we do the promotion of learners, we look at that policy. Whatever the policy allows us to do we'll do, but if it does not allow do as to do certain things we will not.

He (P10) elaborated:

For instance, when it says a child is not expected to repeat a grade... The child can only fail once, so the next time you just have to progress the learner even though you can see that... but this learner is not ready, but because the policy imposes a certain obligation on you... you just have to follow it.

Participants feel their professional discretion is limited when they want to expel learners who are a threat to the school safety. P6 and P17 share their thoughts pertaining to this matter:

I think with regard to the law and the safety of the learner, it could be that as, as schools these days our hands are quite tied in terms of ah, ensuring that there is order within the schools. Because ah, there is only one man within the province that is able to ensure that there is an expulsion of the

learner. So, a learner who should be expelled stays way too long within the school, because it is only the Head of Department that can expel them. And in that period a whole lot of things may happen that can put the safety of other learners in danger... I think that power may not be given to an individual, but rather be given to the school governing body, because they are closer to the schools ah... Using their discretion to be able to assess the threat that a particular person or a learner poses to the school. Then an immediate decision can be taken. Which then puts the safety of all other learners within the school environment in a good place (P6).

I think one of the biggest challenges is fighting with the department to have pupils excluded from the school... then you try and have those pupils excluded from schools, you would struggle with the department. The department sometimes will reply, they don't always. Sometimes they just ignore you flat and you can ask until you are blue. And then at other times, they are passed on politically motivated decisions (P17).

P17 emphasises his challenge of expulsion by the means of an example of a current case:

This is a current case that we are working on. The governing body decided that we recommend expulsion for he's a senior bullying a junior. It was so bad that it was regarded as expulsion material, after ignoring the gun incident last year. Ignoring it flat! Not... not replying at all. They ignored this as long as they could until the boy himself... because what we did is, because he is a safety and security problem for our school we said, okay you are suspended, which is beyond the law... He is a present danger to all pupils in the school.

Educators should be more involved when creating policies. This is perceived as one key element where educators' feel their discretionary power is limited:

...when making these particular policies they must consider us teachers (P4).

P3 shares these thoughts:

I think the teachers must be given a chance to air their views concerning education, because we are the ones who are in contact with the learners. We know the needs of the learners and we cannot come with our own opinion, because everything that we do is guided by the policy, the laws and it makes our work very difficult for instance, in promoting learners.

Similarly, P5 expressed the following:

You know these policies? According to me, I think when these people who draft policies... before they can draft them, they have to engage people at the grass root. Let people at the grass root be part of policy makers, because they know what is happening... But now if policies are going to be drafted by people that are not even here, drafting policies for us. They don't know our situation they don't even know the people we are working with. It is difficult!

4.5 THEME 3: UNDERSTANDING OF EDUCATIONAL AND LEGAL PRINCIPLES PERTAINING TO NEGLIGENCE

Another central theme elicited from the raw data was that the educators displayed multiple understandings of negligence in a school environment.

4.5.1 Negligence in an Educational Environment as perceived by Educators

The participants described comprehensive and similar but also different understandings of the principles of negligence in education and negligence as a legal construct as illustrated below:

Negligence in a school environment refers to a scenario whereby the educator failed to use their discretion. And that has serious consequences, because now that can lead to litigation against the school that can also lead to personal liability of a teacher (P16).

I think in being negligent in a school environment refers to anything that might put learners at risk. Risk to me can refer to physical and emotional negligence either by a staff member, teacher or another child (P15).

...the term negligence may refer to the inability to carry out the... what according to your responsibility is your duty to do? It is within your scope to carry out. For instance, to ensure the safety of the learners. It happens sometimes that as educators, we have the responsibility to be on guard during break times. That when the kids are playing during break, I must be right there. So, the teachers who fail to be there, that will be deemed as the teachers being negligent (P6).

...as educators we are expected to perform duties in a particular way, but some of us choose not to do them the way that we are expected to do them... That is negligence (P1).

If negligence is defined as an educators' failure to act in the best interests of the learner, the comment by P20 is appropriate:

...for me it refers to the failure to take proper care over something or someone. In this situation [it means] taking care of the kids, taking responsibility for the child in front of you.

P11 shared his viewpoint:

Negligence is the worst thing that there can be. It is inexplicable and unforgiveable. There is no place for it. This is a job which main thing is responsibility. There is no place for negligence. Therefore, you must make very sure that everyone does what they are supposed to do, the way they're supposed to do it.

You are negligent if you don't do what you are supposed to do and you make a decision not to do it...

P20's understanding of the concept of negligence suggests that when educators fail to uphold their duty of care, they could be negligent. P11 believes strongly that negligence is the greatest mistake an educator can make. It is expected that educators, as professionals and *in loco parentis*, should always have the learners' best interests as their main priority.

4.5.2 Causes of Negligence in the Educational Environment

This sub-theme depicts the causes of negligence in the education environment from the participants' points of view. Educators who breach their duty of care may become liable for injuries, harm or damages arising from negligence or omissions. Participants are conscious that they will be held responsible if they fail to protect learners in their care or fail to apply appropriate professional discretion.

4.5.2.1 Lack of proper equipment and facilities

Participants acknowledged that injuries do occur due to unsafe school equipment and facilities. This is perceived as a major example of negligence. Educators are expected to report when equipment and facilities are not well-maintained:

If a window breaks or a chair breaks it is reported immediately (P 11).

A child can maybe sit on a chair and the chair gets broken. You need to make sure that that chair is out of the room as it is irresponsible, because one could step on that broken chair and get injured. It is something that you don't anticipate to happen, but accidents happen anyway. There may be a broken window. A child step against the window without noticing that they hurt themselves... So, now and then your class register teachers will always report... (P1).

If educators leave broken equipment and facilities unattended, children are more likely to get injured. The failure of preventing accidents or injuries is prevalent in P2's example of an educator failing to report a broken window:

There was this broken, ah window in the class. One learner put his head in like that... (Illustrates the movement of the learner, the learner puts his face in the space of the broken window) ...And someone who was passing there, he punched him... just like this. You see? And that learner, once he was trying to dodge that particular punch...Then he was injured. The pieces of glass cut his face... That is a dangerous thing because once this can be reported to the department...Then it becomes a problem because you were supposed to repair that...

It is important to report all broken facilities and equipment even if it seems safe. P4 set a good example by reporting her classroom's ceiling that started to collapse at the

beginning of the year. She prevented potentially serious injuries from happening in her class.

But like my class, when it was the beginning of the year it the ceiling was falling, partly so...Then I had to call out the guys who are working here to come and take it off, all together because I saw... I noticed that it will one day fall onto the kids.

P5 referred to a similar situation:

You can see that your ceiling of your classroom it collapses. It can fall onto learners at any given time, then you don't report that. That is negligence to my side, because if you don't report it and then you wait for the day it collapses on top of learners... (P5).

The maintenance of equipment includes sport equipment. P16 claimed he was aware of an educator who became liable for an injury to a learner owing to a failure to report a broken soccer goal post:

...he went to play, you know soccer? Just to join during school time and then one of the bars, that crossbars weren't fixed properly and everyone had seen it, but nobody did anything. So, what happened was, the boy rested against that pole, the vertical pole. And this horizontal bar came down and hit him in the head and then he became disabled.

Participants maintained that one of the major causes of injuries, at their respective schools, occur due to improper management of school facilities and equipment. It is the educators' responsibility to maintain safe school environments for the learners in their care. Educators have a duty of care to report all faulty equipment and facilities.

4.5.2.2 Lack of proper supervision

Educators should maintain high standards of supervision of learners and the participants demonstrated a good understanding of their duty of care towards learners. It is a general rule that learners should be supervised whether they are in the classroom or on the playground. The participants believe that insufficient adult supervision also leads to negligence.

Because educators are assumed to be supervising learners before, during and after school hours, this comment by P8 is applicable:

During breaks, before school, after school, as long as children are here at school, because this is their place, then they need supervision in most of the time.

According to P6 educators must supervise learners to:

...ensure the safety of the learners. It happens sometimes that as educators we have got the responsibility to even be on guard during break times. That's when the kids are playing during break, I must be right there. So, the teachers who fail to be there, that will be deemed as the teachers being negligent.

P10 maintains that:

...supervision is very important so that you can prevent this incidence from happening.

P8 and P6 highlighted that their schools have a playground duty roster where all the educators take turns to supervise the learners. However, some educators forget:

And it's easy for an educator to forget that I'm on duty today and when you are not there and something happens to the children - that is one of the biggest negligence that can happen in a school... Because if the children get injured and that educator was not on duty then that is the educator's fault!

An example of an incident of potential negligence was provided by P16.

You, may not be penalised if maybe one learner kicks a ball and it hits a boy wearing glasses watching them play and then the lenses rupture his eye. If you are there then you are quickly to take action and you can account to what has happened, but in a scenario whereby there is no teacher in sight and this happens, then the element of learners undertaking this activity and they are not supervised. Or will then... It may weigh heavily on the teacher and the school and the department...So in the same way you couldn't

prevent the event from happening, but you were supposed to be monitoring the situation.

The participants portrayed a general understanding that they have a legal obligation to supervise learners whenever the learners are in their care. However, several participants acknowledged that inadequate supervision may also be perceived as one of the major examples of negligence in a school. According to P16's belief, an educator should always supervise learners to ensure safety. Supervising learners allows educators the opportunity to immediately react when learners are injured or at risk.

4.5.2.3 Educators neglecting their duty of care

P1 provides an example. It was suspected that one learner was in possession of a firearm. The principal phoned the police to come and assist with the interrogation and the search for the firearm whilst some of the male educators searched the learner without the presence of the police. The educators used their professional discretion to search for the firearm in order to protect the safety of all the other learners and staff members, but were unsuccessful. After the police arrived, the educators left the learner under the supervision of the police, assuming that the learner would be safe. Whilst being interrogated by the police, the learner sustained a small injury and *bleeding from somewhere*.

The learners' father sued the school for breaching their duty of care towards the learner as he was injured during police interrogation without an educator being present. Educators are *in loco parentis* (in the place of the parents) which means that the educators have to protect the learner from any harm. The educators failed to apply appropriate professional discretion by leaving the learner unsupervised in the hands of the police.

They left the boy in the hands of the police. In the process of interrogation, the boy sustained an injury... That teachers failed to protect a learner in the school premises. So, it was like they were negligent in their duty of care... (P1).

In similar vein, P16 came across an educator who failed to report a broken soccer goal post which led to a serious injury. Whilst the learners were playing soccer, one learner stood against the goal post and it collapsed on top of him and caused a brain injury,

leaving the learner disabled. This is a serious case of neglecting duty of care by not reporting faulty equipment, hence becoming liable for injuries.

P7 reveals that she is aware of educators neglecting their playground duty. An educator who failed to attend playground duty nearly caused learners to abscond from school:

...there was a teacher that was supposed to be on duty, but that teacher was not on duty and the learners were trying to get out of the school or something... luckily nothing happened to the kids.

The above-mentioned scenario could have turned for the worse, especially if the learners suffered injuries outside the school premises.

P2 and P3 disclosed that disruptive or aggressive learners tend to make educators react by exercising corporal punishment in order to discipline the learners, even though they are fully aware of the laws in terms of corporal punishment.

Then sometimes when you feel that the other one is aggressive and doesn't want to listen, then you just... slap him (P2).

...sometimes when you are in the classroom and you have these learners who make silly comments or will distract the lesson and then you have to... and then maybe you become anxious and then you... you will punish the child or you clap the child then and there! And you know that it is not allowed, the law does not allow that (P3).

P15 adds another element by revealing that because of a lack of knowledge of signs of an asthmatic attack, she nearly made a decision to let a learner run with shortness of breath at a hockey practice. She believed that her actions potentially could have been negligent:

...that specific day one of the learners stopped and he told me that he couldn't breathe and obviously the first reaction you do is... 'Ag, come on! Stop doing that!' So, where that could have been negligent, because I'm not sure of the signs when you get an asthma attack. I have to be sure of that before I can tell a child.

Educators should take responsibility to ensure learners' safety and not be negligent. It appears that the majority of participants are aware of educators neglecting their duty of care by failing to protect learners from physical harm whilst they were on the school premises (playground duty, classroom, sports field). P15's experience for example, show that her lack of knowledge with regard to asthmatic attacks could have caused her to be negligent in her duty of care towards a hockey player at practice.

4.5.2.1. Breaching duty of care due to academic negligence

It is expected of an educator to adapt to situations with regard to school curricula in order to meet academic needs, standards and requirements. An educator could be liable for learners' poor academic standards.

P12, P13 and P15 (all from the same school) were confronted with similar situations where educators neglected their duty of care and potentially became liable for academic negligence. According to P15, an educator who fabricated marks is guilty of academic negligence.

The teacher didn't mark the exams and he faked the marks that he gave to the children (P13).

Teachers that do not mark their children's tests and then they fabricate the marks (P12).

Moreover, P19 disclosed that an educator also fabricated marks at her school:

I pulled open a drawer and there were a whole stack of Grade 8 papers unmarked in his drawer... And he had given marks for all the learners.

She continued:

I took a pack of papers yesterday and I found that one teacher hadn't marked the literary essay, but she given marks to all the learners for essays (P19).

P10 recognised another component of academic negligence:

...you might find an educator having conversation somewhere, when that educator expected to be in the classroom.

P17 strongly feels that educators who aren't teaching will cause learners not to develop the necessary skills and knowledge to succeed academically:

Non-teaching, I think that is critical. Teacher not teaching in the class and a teacher not being able to control a class at all, so that she can actually teach... the content doesn't get taught...Skills aren't developed and pupil's results were bad.

In a comparable vein, P18 expresses that she never came across educators who are liable for injuries, only for educational negligence:

Not liable for injuries, not in our school, but academic negligence... a teacher being absent, quite often... I often find that, that is a problem... I don't know how they cover the syllabus and that I will see as academic negligence.

Another important factor worthy of mentioning is the role the Department of Basic Education and parents can play in academic negligence, P7 explained:

Like we had one learner in Grade 6. I used to teach him English, he never used to know how to write a single sentence... The thing is we picked it up and we told the parents...And we reported it, we filled in SNA (Support Needs Assessment) forms, but they did nothing about it. And the thing is now from Grade 6 he's gone to Grade 7 and you can see that it is affecting him. He can't write a single thing and he cannot read. He is keeps... on getting pushed from grade to grade. Someday he is going to get caught. So, I think that is definitely some negligence.

In the above-mentioned case, the participant is aware of the learner's learning barriers. Being aware of the learner's learning barriers could allow P7 to exercise her professional discretion to retain the learner in Grade 6 in order for the learner to develop the necessary skills and knowledge. By allowing P7 to retain the learner to develop academic skills could reduce the risk of academic negligence on her side. The problem, however, is that she did exercise appropriate professional discretion by reporting the learner's learning barriers to the Department of Basic Education and the learner's parents. The Department of Basic Education and the parents also play a huge role in a child's academic well-being. Therefore, the Department and parents' actions

could harm the child by ignoring the child's learning barriers. In this case, negligence falls on the Department of Basic Education and the learner's parents. This could perhaps require an educator to exercise professional discretion by retaining a learner in the same grade.

An educator should take responsibility for a learner's educational and psycho-physical well-being and be conscious of potentially being liable for the consequences of decisions made for the learners in their care.

4.5.2.2 Fear to make decisions can cause negligence

The majority of the participants showed signs of being anxious when they have to make decisions.

P11 pointed out that educators are scared to make decisions because they could make mistakes.

If you are afraid, something bad will happen.

P15 said that:

...the biggest factor probably is the fear of being wrong! The feeling that the choice you make on how to handle a situation wasn't the right one and that you might have done something else that could have worked better!

...when you are younger you are so afraid to say what you think, because you are afraid to be wrong.

P16 explains that if an educator makes decisions in order to save a life, then it will not be seen as an act of negligence but rather an educator acting in the best interest of the learner. The actions taken by educators should always be justifiable:

And also don't be afraid of being blamed. If you can be blamed because you saved a situation, you know? It is still fine.

It is challenging to make decisions in crisis situations. It is important not to be afraid to take decisions as it may cause more mistakes and ultimately lead to negligence. In addition, negligence extends to not taking decisions which results in failure to act to prevent harm.

4.5.3 Reducing the Risk of Negligence

Variables such as the knowledge, experience, professional development and training of an educator can reduce negligence in the educational environment. However, several participants acknowledged that the risk of negligence will always be there even if they have all the experience, knowledge and training.

P1 stated that there is a “fifty-fifty” risk factor of being negligent when educators make decisions. He explained this statement by means of an example where he had to transport an injured learner in his personal vehicle, knowing policy requirements state the contrary:

... here is the catch... Say you take this child to put him in your car... They die before you get to the hospital... You are responsible... You were trying to help, but in you trying to assist things turned the other way around. You should have waited, should have waited. So, it's 50/50. But sometimes you have to take such type of a risk.

Similar to P1's 'fifty-fifty' risk factor, P18 referred to a *catch twenty-two* situation where parents might have expected an educator to react in a certain situation but failed to do so:

The consequences for you as a person... But you know that is a 'catch twenty-two' situation. So, the parent can say – but you could have done that. You did not save my child life, you could have. Okay, if you did that and something went wrong, then they say – but how could you?

P13 expressed the thought that although he has the power to exercise professional discretion, he will be held accountable for any decisions that he makes. He also describes the risk of transporting a learner in his personal vehicle:

I'm allowed to make it, but all the risks are coming to me now... If something happens in that car or we get to the hospital and they say, but this is because of the driving and not because of the injury on the field then I'm responsible for the... well I'm responsible for everything. Then I've made a decision that... I can lose my job, because of that and I made a decision that... I can make it worse for the child as well, so that is never a good ending...

P13 believes that an educator has the power to apply professional discretion in the best interests of the learner. Educators also have a duty of care to protect a learner from any physical or psychological harm. In the above-mentioned case, the participant explained his duty of care and the use of professional discretion in a hypothetical scenario. A learner has serious and life-threatening injuries, the participant has no other choice but to drive an injured learner to the hospital in his personal vehicle. He therefore, has the discretionary power and duty of care to make decisions to safeguard the learner. The law however, states that when an educator drives a learner in their personal vehicle, they need a licence which allows them to transport learners and take full responsibility for the learners. Thus, the participant is correct when he says that he is responsible for the learners in his care. Say the learner sustains more injuries in the vehicle due to reckless driving, then the driver will be held liable for further injuries. Applying the idea of professional discretion and the duty of care Exercising professional discretion and applying duty of care in this case, could have been correct in this case.

4.5.3.1 Educators' knowledge and experience and negligence

Educators need autonomy to make decisions informed by their knowledge and experience. For an educator to provide a favourable and caring environment, he/she must have the right knowledge and skills. By offering learners a favourable and caring environment, educators should be able to apply suitable professional discretion and avoid negligence. It is the educators' duty to have knowledge and skills in order to reduce the risk of being negligent and causing foreseeable harm or damage. P3 explained that her knowledge would assist her in not being negligent:

I have enough knowledge...with the knowledge that I get and the workshops that we attend they help us, so that we are not negligent in what we do.

P11 was confident that he has enough knowledge and experience to reduce the risk of being negligent. He explained:

I think I do have enough knowledge. I do think I have enough experience... the risk of being negligent will always be there, but if you are experienced enough and knowledgeable enough, you won't be negligent.

However, P15 argued that knowledge and experience will not necessarily guarantee that an educator will not act negligently:

Although I feel that the amount of knowledge and experience you have definitely helps decision making, I don't think there a teacher one can ever have enough of both! Since the learners each year are different, therefore the situations also change and the risk of being negligent is always there... As soon as you think you have enough knowledge and experience, I think the risk of being negligent increases. If you think you know it all you are going to make mistakes.

P15 was supported by the following participants who emphasised that their knowledge and experience will never be enough:

As much as it is helpful, it can never be enough (P6).

Knowledge will never be enough. Experience will never be enough, otherwise you'll get to a point where you say to yourself: I must stop learning (P1).

You'll never have enough knowledge (P18).

I'll never have enough knowledge of how to deal with a situation (P7).

However, P16 believed that he did have enough knowledge and experience, but that environment and situations might change. He believes that when environments and situations change, one's knowledge and experience might not help one to avoid negligence:

I do have enough knowledge; I do have enough experience unquestionably. Decisions are made on the spur of the moment, after having looked at those three pillars that we talked about. That you look at yourself as the educator, what are the laws governing you...the regulations governing you and then you look at the circumstance in which the learner is at that particular time and then you look at now. What is the situation that has made the learner get into that? All those three, when they come into play it may throw away all your knowledge and experience. And it becomes a completely different scenario.

P17 emphasised that a person cannot expect a novice educator to know everything. He explained that it is expected from experienced educators to make better decisions whereas novice educators are still learning by making mistakes and these mistakes should not necessarily be regarded as being negligent. It should be seen as learning how to make appropriate decisions:

You can't expect a new teacher to come in and do everything right the first time, they're still learning... that would influence your personal decision, your discretion in determining what you feel was negligent.

In addition, P19 believed that a novice educator with little or no experience cannot be blamed when making mistakes:

I think so and I don't think they can be blamed then, because they don't have the experience and they didn't have the training...

Possible consequences might arise from agreeing with P19's understanding. It seems that a set standard of understanding is needed for both novice and experienced educators to know that negligence would be dealt with equally across all cases (refer to the reasonable persons test).

4.5.3.2 Reducing the risk of being negligent through professional development and training

The professional training of educators equips them to prevent various forms of potential negligence in school situations. P1 stressed that his training made him aware of the vulnerabilities of children in his school. He also recognised that his teacher training also gave him a background of how children behave in certain situations, based on their age:

...you see, teacher training makes you aware of how children can be vulnerable to certain things...having that background of how the child behaves at that particular age. It, it tells you, because of this type of a behaviour you need to put one (1) and two (2) in place so that these children are protected against 1, 2, 3... It somewhat guides you and that information you can only get it as you go through teacher training. So, it helps a lot.

P5 emphasised that training also helped her to safeguard learners in her care and the skills she acquired make her a "Jack of all trades":

...the type of training that we've got gave us skills on how to go about. In the classroom, interacting with others, working as a team.

P8 also stated that her training prepared her a great deal especially when working with different learners. P6 believed his in-service training keeps him “*abreast with regards to the do's and don'ts*”. P6 believes that his in-service training focused him on always “*putting the safety and the interest of the learners above all*”.

P17 stressed that he received training to become a professional educator and his training helps him to apply appropriate professional discretion. He explained:

Look you have got your professional discretion which means you are trained in education, you are trained in education law, you are trained in education psychology and you are trained in your subject. So, in every one of those you have a discretion based on what you have learned and then also um, once you get into teaching, you're experienced.

In contrast, the following participants disclosed that their professional teacher training does not help or affect their decision-making processes:

My teacher training doesn't help me in anything...It never helped me... They don't teach you how to look after children's safety. They teach you academics. They don't even teach you how to teach. They teach you academics, so no! Experience has helped (P11).

P20 said that her training at university:

...lacks information and guidance...We are trained, but I feel that it is not useful in the teaching profession. So, whatever they teach at university level or in your teaching training, it's not really applicable in our daily profession...

P3 emphasised that she was

...trained three decades ago... There's a vast difference between the two training courses...

P19 stated that her ability to make decisions came from her teaching experience and not her teacher training:

Teacher training, I don't think my teacher training gave me that much. No! And I think maybe that's something that's needs to be fixed in teacher training. My training has been at school and it's been through experience.

P9 explains that she only went for training in her teaching subject. She felt her training and experience was not enough:

In terms of training and experience, I never got into too much of training...of disciplining a child in everything, but the training that I went to is for like, for my own subjects.

P7 stated that the training she received at university was very different from the actual classroom environment:

Studying something and actually being in class is two different things.

P15, elaborated on this point:

Teacher training did not add much to my decision making, when it comes to the emotional things, however when it comes to the handling academic struggles, I think it meant a lot. Am... because I'm I mean you learn about recognising and spotting barriers to learning. So, that helps you a lot and how to handle it from there

Being able to handle situations on so many different levels is not really something you get taught in varsity, it rather comes with experience, though you still doubt your own discretion.

Because educators are also expected to safeguard learners in their sport activities, educators should have knowledge about safety related protocols with regards to the extracurricular activities, especially regarding what actions to take in crisis situations.

The following participants felt that they had little or no training for their extracurricular activities:

No specific training... (P1).

I don't have any training...I just did the physical education... (P2).

The training that we have had, it has been quite elementary... (P6).

I actually want to go for training... (P7).

With the training we just did practicals whilst we were at the college... no specific training for that (P8).

I don't have any training...it is only my experience and my passion (P9).

No. I don't have anything particular training. I played my soccer myself, but no training in terms of coaching (P10).

...we haven't really received any training. Am, the only training that I might have received was a netball umpiring course (P20).

The following participants reported that they had undergone training for their respective extracurricular activities and in addition, had high levels of experience:

...with athletics coaching and I am a team manager up to district level. I specialised in recreational sports, all sporting codes (P3).

I've done courses in everything that I've ever done...rugby, I went up to the elite course... I coached rugby for twenty years whilst I was at the high school and up to the very highest level. Coached provincial and the same with the athletics (P11).

Rugby, cricket and athletics...The years of experience in all three of them are eight (8) years and ah in rugby IRB (International Rugby Board) level 1 and also "Bok Smart" that must be renewed every second year (P13).

Because I studied sport management... I've done netball umpire courses and so forth that helped me before I began at the school. Afterwards at the school they sent me for a level 1 coaching. Am, to umpire. And then I've got the level 1 cricket scoring (P14).

For the hockey I have level 1 coaching with 8 years' experience. And then I also have level 0 umpiring with 5 years' experience and then for the long jump I have a level 0 certification just for coaching (P15).

I have been trained am, by some of the best coaches... Pitso Mosimane has trained me in coaching soccer and I've also attended a lot of training from one of South Africa's Gold Olympic winners for high jump... I've also attended several courses on shot-put and for basketball, I have been

working as an understudy to several coaches that are very good in basketball (P16).

I was a level 2 Northern Gauteng javelin coach and I was a level 1 hockey coach, Northern Coach (P17).

I've received training... In training kids, coaching kids and also in adjudicating debate and I'd say about 5 years of experience (P19).

P13 is highly qualified in rugby coaching with eight years of experience. He emphasises that he renews his "Bok Smart" safety training every second year for rugby. This training enables him to make sure the rugby field is safe for the learners to play on. It equips him with the necessary skills to look out for dangerous tackles and enables him to make the best possible decisions on the rugby field. This participant also renews his Level 1 First Aid training every five years. Having the knowledge and qualification in first aid will also enable him to assist learners with minor injuries.

P15 is trained in coaching both hockey and athletics with eight years of experience. Her qualifications and training help her to ensure a safe field for the learners to practise their sports. Her umpiring course taught her about all the necessary safety precautions for hockey. She stresses that hockey is a dangerous sport with a hard ball and a stick:

...especially the umpiring part you have to make sure that's obviously according to the rules and it's a lot of safety in hockey. And because it is a very hard ball and the stick lifting and everything like that.

She (P15) further stated that their school expected all new coaches to attend a first aid course:

...before the hockey season as well, we kind of make it a priority for the coaches to attend, maybe just a level 0 first aid course just to know what to do in cases...

P14 emphasised the importance of netball safety before games and most importantly during practices. She also received first aid training at university, but felt it was not sufficient enough as it does not teach you how to work with specific situations. She feels that Level 1 in First Aid is not good enough in certain crisis situations.

There are numerous participants who have never had training relating to school policies but who would like to receive such training as they believe it would enable them to make appropriate decisions and not be negligent:

I've never been to any school safety policies, for training or anything... I would like to attend. Just so it makes you aware of what...maybe there is something I'm not doing in class that would maybe benefit the learners or benefit me as a teacher (P7).

In similar vein, P2 remarked:

One day I must get this training. So that I'm equipped.

P3 also stated that:

I do wish that I can get training for that...

P9 believes that going for policy training will “protect” and enable her to know what the policy “boundaries” are when making decisions.

P20 expressed her concerns:

I haven't seen the safety policy or the documents or anything like that. So, for me I would say, literally giving us the procedure. Teachers need to be informed on what to do in certain situations...

Several participants have undergone policy training. The training was either offered by the Gauteng Department of Education (GDE) or internally presented by the school management team.

Training was conducted by the Department of Education...our district...The training on how to craft policies, what to look for in crafting the policies. They give you guidelines...They outsource, they organise the workshop...They invite people to come and assist in terms of...They empower you on how to do these things (P1).

P6 stated:

We've had in the past, it was organised mainly by the department, Gauteng Department of Education. They give you guidelines on what needs to be included and then... They will even come themselves to check on the

policies, and if there are something that they feel that you need to include, then they'll also advise you in that regard.

According to P10 he underwent training a “long time ago. I think it was our safety co-ordinator at the district”.

P11 emphasised that even though he had received policy training it was “not good enough”. In addition, P13 said that he received training from the deputy-principal of the school:

...the deputy principal... On a regular basis he hosts a meeting with all the teachers and just to inform them, if there is a policy changing...

Similarly, P19 states that their school safety officer trains them for emergency situations:

...if a fire breaks out, how to evacuate the school, basic stuff like that and first aid training. He gave us like a presentation and notes as well to keep in your classrooms, stuff to put up on your notice boards.

It seems that the participants did not really consider their professional discretion or possible legal implications when they talked about their experience and training. Some of the participants felt that their training was inadequate or that novice educators, who had recently undergone teacher training, need more practical training, especially with regards to creating a safe school environment. Teacher training could enable educators to be more confident in their ability to apply appropriate professional discretion and reduce the risk of being negligent.

4.5.4 Preventing Negligence whilst exercising Professional Discretion

This sub-theme reviews the characteristics of a reasonable educator and their ability to foresee harm. A reasonable educator makes informed and sensible educational decisions that preserve the health, safety and best interests of the learner.

4.5.4.1 Foreseeability and preventability

Educators should prevent dangerous situations which could harm learners and must report equipment and facilities that do not meet safety and professional standards instantly. Furthermore, teachers must comply with safety laws and regulations to

prevent negligence. Here are some of the precautionary measures taken by the participants:

And in that way, you can foresee something. Say, listen I see something is going to happen here so let me stop that before something happen... (P13).

High degree of foreseeability! When you see a gutter, a gutter that is hanging there and it is almost coming off its hinge and you leave it like that. Then suddenly one boy... you can see the degree of foreseeability of what is likely to happen and a reasonable person would have seen that this is going to happen. And preventability... it could have been prevented. You know? Just taking down that gutter, take it down, take it down before it does something. And then you will put it up, when you know you can put it up properly (P16).

P9 however emphasised that there are some incidents or accidents you cannot be foreseen:

You can't foresee them, some you'll see...some you won't...

Table 4.6: Participants' precautionary measures to foresee any accidents or incidents

| Precautionary measures | Participants | Most valuable comment |
|--|---|--|
| Class rules and discipline | P1, P3, P9, P14, P15, P19 | <i>... ensure that such things are not happening or are eliminated... Because, to say they it cannot happen 100%. That might not be true. But you can eliminate them by putting in place some school rules (P1).</i> |
| Report on faulty facilities and equipment | P1, P2, P3, P4, P5, P6, P10, P11, P16, P17, P18 | <i>I report everything that I see that may cause danger to the kids (P3)</i> |
| Security guards/ patrollers at school | P1, P2, P5, P6, P12, P16 | <i>We have the patrollers... we are making sure that no one is coming into the scenery...with a weapon or whatever, which can cause some harm in the institution (P2).</i> |

| Precautionary measures | Participants | Most valuable comment |
|---|------------------------------|--|
| Conducive classroom environment/layout | P3, P4, P8, P16, P20 | <i>I'll always look at the layout of the class... when you come early in the morning, check the layout of the class, the arrangement of the furniture, first. And then if there are other things that are dangerous, you predict, you can see that this may be dangerous to these kids. Then make sure that you remove everything, before you start with this lesson (P8).</i> |
| Remove dangerous objects from the playground/class | P2, P5, P7, P8, P9, P12, P14 | <i>...the hinges tend to be loose and you find that the doors are slanting and that is dangerous to anyone who can get into the classes. So, such doors we, normally take them out, rather than injuring one. Some learners tend to leave buckets with water just in front of the class. Anyone can just spill the water and then one can just slip and get injured. So, we normally take those buckets and brooms away or we put them the back of the classroom or we take it to the store rooms (P5)</i> |
| Playground duty/Supervision | P6, P8, P9, P10 | <i>...supervision is very important so that you can prevent this incidence from happening... (P10).</i> |
| Safety evacuation plan | P10, P12, P14, P18 | <i>...must also have an evacuation plan, in case there is fire or maybe there is a bomb you must know how to evacuate the learner... (P10).</i> |
| Safety audit at school | P10, P11 | <i>We have a safety audit once a year. Where everything is checked, every window, every plug and every piece of furniture... (P11).</i> |
| Safety cameras | P17, P18 | <i>...the installation of the cameras really helps a lot. It protects both the learner and the teacher... (P18).</i> |

| Precautionary measures | Participants | Most valuable comment |
|-------------------------------|---------------------------|--|
| Trained First Aid | <i>P13, P14, P15, P16</i> | <i>...we have trained some of our girls and boys to do first aid (P16).</i> |
| Estate Manager | P16 | <i>... I chair the safety team... we have periodic inspections that we make in the school...we do them after fourth night and we have the Estate Manager involved. He is the guy responsible for infrastructure in the school (P16).</i> |

It seems that the participants do not fully realise that professional discretion is only exercised in a situation where a legally correct decision may be to the disadvantage of learners. In such situations, decisions made by educators may indicate that they exercise professional discretion that may seem wrong. However, some decisions may be appropriate where educators exercise professional discretion in the best interests of the learners as they intended to avoid predictable harm or injury. Although some participants claim to understand the idea of professional discretion, their knowledge of it is somewhat superficial and does not necessarily allow them to make legally safe decisions that will not lead to them found liable for damage, harm or injury to a learner.

4.5.4.2 The act of a reasonable person

If a reasonable educator failed to act on reasonable predictability of harm, it could be considered as negligence. If the educator involved has taken all reasonable precautions to avoid or prevent injury, then it will be hard to prove negligence. It is essential to understand that if an educator did not take appropriate measures to prevent or deter injury, he or she may be found to be negligent and may consequently be held liable for harm.

P6 stressed that there is a series of questions people will ask an educator in the event of an incident or accident. This participant refers to an educator's inability to supervise learners on playground duty:

... if by chance you were supposed to be at a particular sport on a particular day, and don't go. There is a series of questions that they'll ask you. They call them, the reasonable person test. Where they ask you, did you foresee

this to happen as a reasonable person? Then what did you do to prevent it from happening? ...instead of not doing anything, you would say... as a reasonable person I am bound... I am duty bound to be there to be able to do, knowing the consequences.

P16 explained why it was important for an educator to have the ability to foresee dangerous situations. He referred to what actions a reasonable person, sometimes also referred to as “the (innocent) bystander” in a similar situation would take to prevent foreseeable incidents and accidents:

High degree of foreseeability! When you see a gutter, a gutter that is hanging there and it is almost coming off its hinge and you leave it like that... you can see the degree of foreseeability of what is likely to happen and a reasonable person would have seen that this is going to happen. And preventability... it could have been prevented (also refer to 4.5.4.1).

In addition, P17 emphasised this aspect as follows:

Deciding how a rational person would behave in this circumstance... that would apply to any citizen... I think there is a greater responsibility because it is a professional discretion. ...how would a parent who maybe hasn't done courses on how to behave towards a child, but you have professional training and experience... I think in a court case, I think the legislation would go further than, what would a rational person do under the circumstances? It would be what a trained and experienced teacher would do under the circumstances...

P16 connected his knowledge of the notion of professional discretion with the actions or the capacity of a reasonable person to make choices to avoid damaging occurrences:

Professional discretion is where you extend, I mean use your degree of foreseeability and preventability. Ah, and then you arrive at a decision, having weighed these two concepts (the law and another action that a reasonable educator could do), you know? The element of what a reasonable person could do, you know? To prevent or to be able to foresee.

The reasonable person test will enable educators to determine whether in a specific scenario, someone with comparable knowledge and training would have acted the same.

4.5.2.3 Ability to reflect in order to prevent negligence

The participants indicated that they use reflection after realising they have made a mistake. They either overreact in situations or they do not know the reasons behind a learner's behaviour.

According to P3:

...you will punish the child or you slap the child then and there! And you know that it is not allowed, the law does not allow that. And then after a while... I've made a mistake. I should not have touched the learner...

Similarly, P7, explained:

...you just make a quick instant decision, but it is not the best. And, yes, a lot of times I would go back... But then you think about it, you know you can solve the problem in a better way...

P10 indicated that he has made decisions without knowing all of the information:

...we take a particular decision, when we don't have enough information. And when you get enough information you can always go back and say, but I shouldn't have acted the way I did, maybe this is how I should have done it.

According to P16:

...when you look at decision that you have made in hind sight, you will always feel that there could have been something that you could have done differently...

The idea of "reflect" all voices, suggests that you look back on something that has happened. What the participants do not seem to realise is that, in a situation that holds potential harm or injury for a learner, they should apply their minds to the situation and consider all the possible steps that they can take. Some of the steps will be allowed by law and policy and some not. An educator needs to also consider that exercising professional discretion with what law and policy allow, may not be appropriate or

sufficient to prevent harm or damage to the learners. They therefore need to weigh up the options before they make a decision about the actions they are going to take.

4.6 THEME 4: SCHOOL SAFETY POLICIES

It is assumed that regulations, rules and the code of conduct of a school will automatically provide all learners as well as educational experts in schools with a protected and secure environment. School safety policies are aimed at creating a secure educational environment that enhances human dignity and the promotion of values. In this theme, the view points of the participants are captured with regards to the need of adapting policies to fit their school environment. The participants share their perspectives of their school policies and link their professional discretionary power to their transportation policies in particular. Generally, educators find it challenging to implement school policies because the policies are sometimes found to be deficient in real life and dangerous situations.

4.6.1 Distinguishing between Laws and Policies

A policy has to do with the law. A policy is regarded as a guideline outlining what a school would like to accomplish. A policy involves all the principles and goals necessary to achieve an objective. Law on the other hand, is a collection of legally enforceable rules (principles, processes and norms) that society must follow. Laws are administered by the judiciary and are established by the constitution of the country. They must be obeyed by everybody to whom they apply. Laws are produced primarily to enforce justice in society.

P20 expressed the following views on the difference between laws and policies:

...policy is basically your outline, so I would say it's your set of rules. It's like a document and the laws will refer to the standards and the procedures that school should follow.

P16 explains his interpretation clearly:

When we look at laws, we have three levels of legislation. We are talking of first level legislation that is the Constitution. And you have second level legislation that is provincial governance law, when you look at provincial governance like what you have from provinces... All that is second level legislation and then you will have third level legislation. This is now

what...when we are talking about schools. The rules that we undertake... we make at schools that is third. Now what will happen is that you will find that third level and second level legislation all have to conform to first levels legislation... when you sit down to come up with policy, safety policy this is where you find what we did. We take the safety and health policy...Now we take it down and that we have to accommodate it. Everything that we come up with has to be in tandems with that legislation. Policy is a guideline; it has to be in tandems/attendant with the law. Whenever it is in contradiction with the law then it is null and void.

P10's interpretation is as follows:

...laws are there to regulate our actions. Ah, they are promulgated by parliament, they are meant specifically for certain behaviour, but the policies are guidelines on how certain things should to be done or should be carried out. That is how I understand the difference.

In similar vein, P1 conveyed his understanding of the difference between laws and policies:

Policy you can review. For a law to be changed, there is an upper structure, which may be somewhere above you. Most of these laws are passed at the legislative level, the parliament and all that... But policy, you have powers to now and then revisit, review, revive, edit and subtract this and that. This is the difference between the two. But with the law you can't change the law.

It seems that some participants confuse the concepts of law and policy. In addition, it appears as if the participants do not know or understand the content of their own school policies. Based on this premise, educators not knowing the content of their policies could increase their risk of being negligent and could adversely affect their decision-making autonomy.

4.6.2 Adapting School Policies to the School Context

The participants generally suggested that school safety policies should be adapted to suit a particular context of a school. Therefore, educational professionals implementing policies need the capacity and capability to adapt safety policies to changing circumstances. This is where the SGB of each school must apply their discretionary

power to determine what should be covered within their safety policies. The implementation of policies should be flexible (as discussed in Section 4.4.5 above) to enable educators to use their professional discretion. Following the letter of the law and policies could have the unintended consequence of being to the detriment of those (the learners) that they propose to protect and whose best interests are the most important criterion for decisions that need to be made.

P5 stresses that school policies should be “*reviewed*” in order to suit the “*contextual factors of individual schools, because we are not the same*”. P9 explained why school policies should conform to a particular setting as follows:

Remember the policies are created to suit the school and the interest of the learner in the specific schools. I think our school policy is different from the one in Laudium or somewhere else. They are different according to the environment.

In addition, P11 strongly believes that policies should be different and adaptable to allow for change:

Policy shouldn't only be different from here to the next school, because we have different environments. A policy is a working document, it is not cast in stone...

We've learned from our own experiences and we adapt it the whole time. So, it changes the whole time, it is renewed the whole time. Every time that something needs to be added, something is added...We have that policy in order to cover all our basis...

Furthermore, P11 explained that policy must be “*lawful and must be fair and it must apply to your unique situation*”.

P16 highlighted that when policies are not constantly revised to fit within the changing environment, it would become absolute and make it difficult for educators to apply appropriate professional discretion. He also stresses that a policy should be more “dynamic” and open to allow educators to exercise their professional discretion:

...in terms of policies, policy is created in broad general terms. And whilst it provides direction as to what to do, if policy is not consistently revised

according to the society in which it is supposed to be implemented, you will find that it may be come absolute... policies that are not constantly revised to match the ever changing situation, may not be really appropriate...

...policies that are stagnate they impact negatively on professional discretion... They jeopardise the decision maker, because now you have to exercise more of your discretion... Whilst policies that are dynamic are very suitable, because now you can exercise your discretion within a policy that accommodate the environment in which we are in.

Policy changes are not the same as professional discretion. Changing policies to be more adaptable or flexible to certain situations could, however, allow educators more freedom to exercise appropriate professional discretion and act on their judgements. Thus, policies that are frequently adapted to suit the educational environment and the needs of learners could allow educators to make appreciate decisions to ultimately safeguard the learners in their care. Adapted policies do not eliminate the need for exercising professional discretion, they enable educators to better apply appropriate professional discretion.

4.6.3 Challenges when Implementing School Policies

The implementation of school policies can be challenging due to the fact that each school's circumstances differ. The capacity and capability of educators can play a major role in understanding and implementing school policies.

P2 was worried about the implementation of safety policies. He believed that their school safety policy covered aspects such as a no-gun or drug policy, but to implement these aspects of the policy is challenging. He explains his concern as follows:

My worry is the implementation... school could have decisions but they are not implemented... We have the safety policy. Where we don't want weapons in the school yard... drugs we don't want them... But the challenge is, when coming to implement... part of implementation is problematic...

P2 acknowledges that the implementation of some policies is challenging. Problems may also arise for an educator who does not apply or implement a gun-free policy and a learner gets injured or even killed by somebody using an illegal firearm. Educators who fail to apply or implement gun-free policies, may face serious consequences when the school environment is unsafe and unprotected.

In addition to the above, P4 added the following:

...it is difficult to implement that, because of a lot of things... We've got this particular policy in hand and when we try to implement it, then we'll be called in or face the consequences.

P1 emphasised the importance of implementing the correct aspects in the school policies as the wrongful implementation of policies “could work against you”.

You need to guard against implementing or rather putting in place things that are not covered in your policy.

The implementation of school policies can be challenging for educators due to the fact that the circumstances of each school differ. It would seem that effective policy implementation depends on educators' capacity and competence. It is expected of a principal to ensure that policies are in place, educators are trained and are supported in the implementation of the policy.

4.6.4 Educators' Perspectives on their Safety Policies

The majority of the participants acknowledge that their schools do have a safety policy in place. However, when it comes to the quality of their safety policies, the participants have different views.

According to P11:

...we have a school policy. I think it is an excellent one... it influences my decision making when it comes to learners, because I set the school policy, the safety policy. Not just me, a bunch of us...

P12 had a similar view and stated that their safety policy is “very good”. In addition, P1 stated that he was satisfied with their school safety policy as it covers “a number of grounds”.

However, a number of participants are of the opinion that their safety policies are not sufficient enough.

...we do have a safety policy. And our safety policy... even though I may say, it may not be the best... but we have tried to adapt it to an environment. What happens is our decision making is influenced by that safety policy,

because we are focusing on what is safe for the learners and the teachers (P16).

I don't think it is good... (P8).

P9 and P20 indicate that although they are aware of their school's safety policy, they have never seen it.

I know that our school has a safety policy. I haven't seen it! I haven't read anything in it! So, I don't really have any information on the safety policy, which is a problem for me (P20).

Ever since I'm in this school, I've never seen any policy (P9).

In general, the participants acknowledge that their schools do have safety policies in place. The participants displayed a difference of opinion about the quality of their safety policies. P9 and P20 for example, are aware of that their schools have safety policies, but they have no recollection of the content of these policies. Based on this premise, the above-mentioned educators are more susceptible to being negligent and could find it more challenging to apply appropriate professional discretion.

4.6.5 Linking Educators' Discretionary Power and School Policies: Transportation Policy as an Example

It is essential that teachers apply adequate professional discretion whenever they deem it necessary to protect learners' well-being. Educators are responsible and legally obliged to intervene in instances where they think the safety of learners is at risk. Learner transportation is a major responsibility to assume as they often need to be transported to sporting events, excursions and when touring. There are transportation policies and requirements in place in order to ensure that the learners are safe.

Whenever they feel that a bus is unsafe, they have to report it to the Gauteng Department of Education if the transport is arranged by the Department. Fee-paying schools, according to Section 21 of the Schools Act, purchase their own buses, or independently contract transport companies. The obligation of these schools is therefore not only to have internal reporting mechanisms, but they also have to ensure that their buses are well-maintained.

P3, who is at a non-fee-paying school, explained as follows:

We inform the department that the bus that the learners are driving ... we think is not safe for our learners. So, the department are the ones who are going to communicate with company.

P3 stresses another responsibility shift from the educators to the Department to make arrangements for the transportation of learners.

In similar vein, P6 stressed that:

It is not actually our responsibility to do that. We've got a section of the department of education that looks at that...

P6's understanding of his responsibility with regard to the transportation of learners is dangerous as he believes he does not have the discretionary power to decide whether or not the learners will be transported in a vehicle that potentially could not be roadworthy.

P13 acknowledges that they, as a school, take precautionary measures whenever learners are being transported. They fill in a form every time indicating whether the driver of the vehicle is "sober" and that "*the driver is healthy enough*". The participant explained:

When something is not in place then I as a teacher can make a decision and say we are not climbing on this bus... then we must phone the bus company and say, listen this is not right you must send someone out to pick us up...we have the power to make a decision then...

P15 said that she applied her discretion to prevent a bus driver from driving as she thought they were unfit to drive the learners:

...the sports director, she hires the busses but then we get a small form to complete before we get on the bus. So that requires us to actually walk around the bus and just to make sure all wheels look safe, and everything looks right and the bus is in good condition and so on. I remember that we simply drove to, I think a school that was like 5 km from here, but the driver really drove crazy so when we got there, I told him that he could go! He is

not going to take us back to school and I just called my sport organiser and told her we are not getting on the bus again...

Both, P13 and P15 have a very good and clear idea of what professional discretion entails. They illustrated their good practice of professional discretion by the means of the above-mentioned examples.

4.7 CONCLUDING REMARKS

In this chapter, the data was presented in an attempt to answer the research sub-questions listed previously in Section 4.1. The following themes emerging from the data involved educators' understanding of their duty of care, a limited view of professional discretion, understanding of educational and legal principles pertaining to negligence and school safety policies. Each of the four themes were supported by a number of sub-themes which were presented with a commentary and verbatim quotes from the relevant participants. Themes 1 to 4 provided insight that the participants do have an understanding of both legislation as well as policy but are challenged to implement these for a number of factors such as inexperience, training, fear, and so on. The majority of the participants have an understanding that they hold a legal obligation to act *in loco parentis* whenever the learners are in their care.

It appears that some participants are willing to circumvent or go beyond the requirements of school policy to serve the learners' best interests. The participants' understanding of professional discretion could be seen as the capacity and obligation to decide what actions are appropriate and the ability to take those actions into certain situations where people might question their legality.

Some participants elaborated that their ability to apply appropriate professional discretion is influenced by both internal factors (experience and knowledge, personality and "fear factor") and external factors (policy requirements, policy inflexibility and rigid laws). It came to the fore that educators who breach their duty of care may become liable for injuries, harm or damages arising from negligence or omissions. Participants however, are very aware that they could be held responsible if they fail to protect learners in their care or fail to apply appropriate professional discretion. A discussion of the findings of the themes formulated in this chapter, with the aim of answering the research question, follows in Chapter 5.

CHAPTER 5

DISCUSSION AND FINDINGS

5.1 INTRODUCTION

The data was presented in the previous chapter in the form of detailed and general descriptions based on the participants' responses. In this chapter, I present a discussion of my findings. The chapter is structured according to the themes identified in the data in an attempt to answer the research question: *How do primary and secondary school educators reconcile professional discretion with legal and policy requirements in order to prevent negligence?*

5.2 THEME 1: EDUCATORS' UNDERSTANDING OF THEIR DUTY OF CARE

As long as the learners are in their care, educators must accept their responsibility for the safety and well-being of learners. As this is linked directly to their legal duty of care, educators should foresee physical and psychological harm that might be present in any environment and in dangerous situations and make correct and responsible decisions to prevent harm from occurring. In exercising their duty of care, educators may also need to use professional discretion and must have freedom to apply such discretion.

5.2.1 How do Educators Understand their Duty of Care?

It seems that the majority of participants have a sound general understanding of the concept of duty of care. The participants comprehend that they have a responsibility and a legal obligation to safeguard learners in their care. A few of the participants maintain that they not only have a legal duty to protect learners from physical and psychological harm, but that they also have a duty to take care of their academic well-being. Joubert and Prinsloo (2013:26-28) support this notion by suggesting that educators should acknowledge their obligations regarding the safety and general well-being of the learners. Such obligations are directly linked to the legal duty of care of an educator.

5.2.2 Educators have a Responsibility and a Legal Obligation

In order to adhere to the laws and policies regarding the safeguarding of learners, a deep understanding of these policies is necessary. Without this knowledge, educators are not able to adequately implement these policies in their daily teaching practice.

Duty of care does not refer to an educator's overall accountability for learners' education, but rather to their responsibility of keeping an individual learner or group of learners safe (De Waal, 2011:184). The evidence suggests that the participants perceive their duty of care as a professional responsibility rather than a legal obligation towards the learners. A trend was that most of the participants did not mention any aspects of their legal obligation in terms of their understanding of their duty of care, but rather focused on their professional responsibility within the school environment. De Waal (2000:80) points out that educators need to be aware of the fact that South African education stakeholders are adamant that educators should fulfil their obligation to provide all learners with a safe and caring environment. The participants made reference to numerous environments where they deem it fit to protect learners, such as the playground, school events, transportation of learners, supervision, learners' academic well-being, sport activities as well as excursions. It is here that the participants illustrate their understanding of the wide range of their responsibilities towards learners. Educators therefore, have many duties other than teaching that stretches to many areas of the school environment (Scriven, 1994:29).

For example, P5, the Deputy-Principal of School A, demonstrated reasonable knowledge of her duty of care. She emphasised that she has a responsibility to safeguard learners throughout the day and ensure that they are safe in her care up until the learners leave the school environment. Another participant (P6, the Deputy-Principal of School B) linked the safeguarding of learners to ensuring the best interests of learners.

P6, P19 and P11 mentioned how the learners' physical and emotional well-being forms an integral part of their duty of care (an example of this is discussed in Theme 2). Joubert and Prinsloo (2013:28) and De Waal (2000:79) agree with this view of the duty of care by emphasising that, as long as the learners are in the care of educators, educators must not only recognise their responsibility for the safety of learners, but the overall well-being of the learners as well. In addition, P5 and P2 also focused on their responsibility to safeguard the learners in their care. The data suggests that these participants focus on the general safety of the learners. The educators have to assume responsibility for the physical and psychological (psycho-physical) well-being of the learners in their care.

It is evident that participants view their duty of care as transcending teaching in the classroom. Therefore, it appears that most of the participants grasp the importance of the learners' general safety, which includes both the physical, emotional and psychological well-being of the learners. For example, P11, P15 and P18 explained that their duty of care includes the academic, physical and intellectual well-being of the learners.

It is therefore, expected that an educator must provide the highest quality and best possible care to all learners and this is generally recognised by the participants.

5.2.3 Linking the Common Law Term *in loco parentis* to the Duty of Care

A number of the participants demonstrated a distinct understanding of the common law term *in loco parentis* and how it is linked to their duty of care. This indicates that the participants understood that they have an obligation to take care of the learners as any reasonable parent would. Educators have a legal duty towards learners in terms of the common law principle of *in loco parentis* and must guard the learners not only from physical injury but also from psychological harm (De Waal, 2000:87; Prinsloo, 2005:5).

For example, Participant (P1) expressed the view that, as a principal and an educator, parents have entrusted him with the responsibility to protect their children from harm. He appears to understand that it is his responsibility to protect all the learners within his school environment as any reasonable parent would. Epstein and Lancour (2016:152) emphasise that a reasonable parent makes careful and sensible parental decisions to serve the child's health, safety and best interests. It seems that the participants understood the common law concept *in loco parentis* as having to accept responsibility for children's safety. Hence, they are empowered to take full control of the learners in their care and to be responsible caregivers.

Participants acknowledged that they accept this obligation as soon as the parents drop their children off at school. For example, P11's statement that the term *in loco parentis* is more of a "parental responsibility" rather than a "professional responsibility" is representative of the general understanding of the common law term *in loco parentis*.

A number of the participants generally shared the same understanding of the term *in loco parentis*. They, however, also articulated how *in loco parentis* links to the legal

obligation of an educator's duty of care without necessarily realising the connections they made.

5.2.4 Acting *ultra vires* in the Best Interests of Learners

In order to fulfil their *in loco parentis* obligation, educators should apply their professional discretion in conjunction with Section 28 (2) of the Constitution of 1996 (RSA, 1996b) and Section 9 of the Children's Act 38 of 2005 which states that "in all matters concerning the care, protection and well-being of a child the standard that a child's best interests is of paramount importance should be applied". Therefore, when making any decisions affecting a child or which may lead to any element of negligence, educators must give due consideration to this principle (Du Plessis, 2019:102). In addition, an educator may face a situation where he/she has to consider making a decision which seems to be *ultra vires* and thus necessary to protect the best interests of the child.

The data suggests that participants have conflicting views on whether an educator can justify acting *ultra vires* in order to ensure the best interests of a learner are served. Some participants, however, indicated that they do indeed act *ultra vires* when they deem it in the best interests of a learner. For example, P20 justified her *ultra vires* actions in that she uses her professional discretion to act *ultra vires* in the best interests of learners. Contravening a policy in order to ensure a learner's best interests is, according to P1, a risk worth taking.

On the other hand, there is recognition that educators should apply their professional discretion within the boundaries of policy, as it may reduce the risk of being found negligent. For example, P10 goes so far as to indicate that laws and policies should always be "placed first". It appears that P10 (School B Principal) prioritises laws and policies over the well-being of learners when making decisions as he is afraid to face the consequences when he goes against laws and policies. This could be seen as a contradiction of Section 28 (2) of the Constitution of 1996, which states that "a child's best interests are of paramount importance in every matter concerning the child". This statement underscores that a learners' well-being should always be placed first when making decisions but is understood differently by different educators. It is significant that P10 is a Principal and one can therefore assume that this rigid approach of "policy first" is applied widely in his school. This is one of the reasons why I deemed it

necessary to add the duty of care to my conceptual framework. It seems that appropriate professional discretion in education cannot be viewed as unrelated to an educator's duty.

In addition, Section 9 of the Children's Act 38 of 2005 also states that "in all matters concerning the care, protection and well-being of a child the standard that a child's best interest is of paramount importance should be applied". P10's statement shows inconsistency with Section 9 of the Children's Act 38 of 2005 and that the participant may display a fear of being found in the wrong in a court of law. It appears that educators are aware of the fact that whenever an educator does not take cognisance of or does not take care of learners' well-being, they may be found negligent (including decisions in courts) whenever decisions are made. Therefore, because P10 does not comply with the provisions of Section 9 of the 2005 Children's Act 38, it may increase his risk of being negligent by putting laws and policies before the learner's best interests.

Moreover, educators may be found negligent when they do not follow rules and obligations set out by safety policies due to a lack of skills and knowledge when applying legal principles during their application of professional discretion (Joubert, 2007:117). Principals lead by example, this means that if the principal has a viewpoint that the law or policies are more important than the well-being of learners, it might become a standard within his school. His understanding and leadership may influence the educators who works under him to have a similar stance when making decisions. Another participant (P20, a novice educator in School D) disagrees with P10's statement. P20 states that she would rather act *ultra vires* and contravene laws and policies in order to ensure the best interests of the learners. Like P20, P6 explains that he would always place the learners' well-being above everything else as he believes that he has a legal responsibility to do so. It is expected that every educator has to follow the legal rules regarding a child and their duty of care. It seems that if educators believe that they are acting in the best interests of the learner by disregarding the legal rules, it will be taken into account by the court in determining whether or not an educator has contravened the law or has caused damage (physical or otherwise). Such actions will, however, need to be well justified to convince the court that they did not act negligently.

In School C, an educator followed an examination policy to the letter and in doing so, she did not (or failed to) act in the best interests of the child. This is a risk that P10 (Principal of School B) could potentially be susceptible to if he strictly adheres to policy requirements without using any professional discretion. P11 and P15 explain that the examination policy states that a learner is not allowed to go to the bathroom during the writing of an examination. Learners are supposed to go before and after the examination. In the case of the bathroom incident described by P11 and P15, it seems that the educator failed to apply appropriate professional discretion and failed to protect a learners' well-being by not allowing her to go to the bathroom. By not allowing the learner to go to the bathroom, the learner relieved herself in the class in front of all her peers. As a result, the learner's right to dignity was not protected. In other words, it seems that the educator neglected her duty of care. This is an example of what could happen when educators prioritise laws and policies over the well-being of learners and fail to take into account the best interest of the child.

In the light of the above-mentioned case, it seems likely that if there are other instances where educators abide by their school policies, but because of the unjust use of professional discretion and misinterpretation of policies, they act negligently and become liable for their actions. Participants seem to refer to "situations" as a main factor when applying their professional discretion when considering learners' best interest. Every situation might be different and require different actions. So, in order to exercise professional judgements in a careful, prudent, cautious and responsible manner, educators should first analyse the situation before making decisions. Educators also need to consider their duty of care and the best interests of the learners when analysing a specific situation.

It is noticeable that some participants deviate from policy requirements regarding life or death situations (physical well-being), the educational well-being of learners, and learners' social well-being. When referring to the physical well-being of learners for example, P15 assumes she has a duty of care to stop the blood of an injured learner, even without gloves or protection. In this instance, this participant places the learners' well-being before her own and contravenes the rules. She acknowledges that there is an element of risk, but it seems that she would always attempt to place the learners' well-being before her own. Whilst she might have acted in the best interest of the learner in the particular situation, there could have been other consequences like blood

infection that could have jeopardised the learners' safety as well as her own. These consequences could have caused her to be liable, regardless of her good intentions to prioritise the well-being of the learner, because she contravened policy.

Some participants emphasised that they often deem it necessary to act *ultra vires* in contravention of policies in order to ensure the best interests of the learners' academic well-being. For example, one participant (P5) allowed a learner to re-take a test or a formal assignment despite school policy on absence without a formal letter or other evidence. The participant took into account that there was a death in the family and that both the learners and the parents were too upset to think about formal letters or documents. This means the participant exercised her professional discretion by acting *ultra vires* in the best interest of the learner.

Considering learners' social well-being, some participants note that they act *ultra vires* with regard to school uniform policies. For example, P6 (Deputy-Principal of School B), expressed his reasons for making decisions that contravene policy requirements. He admits that there are many socio-economic factors beyond their control in his non-fee-paying school. He explains that, especially in winter, he knowingly allows learners to wear other clothes. It means that, when it comes to school uniforms, he is more lenient and flexible when making decisions. The fact that P6 knowingly diverts from school policies in the best interests of learners, could be seen as a key factor when considering whether the use of professional discretion is permissible or not. It suggests that P6 used his professional discretion, applied his mind to the case and also considered things like duty of care and his professional discretion. If educators knowingly ignore the legal principles, they must have very sound reasons for justifying their decisions and actions.

Socio-economic conditions are regarded as an external factor affecting the professional discretion of an educator. It also seems that socio-economic conditions are an essential point in considering the locality and permissibility of the use of professional discretion. In order to make appropriate decisions, educators need professional discretion. However, if their autonomy space becomes restricted, it becomes a concern. The space for autonomy was significant in this case, which means that the educator had more discretionary space to make effective decisions to ensure the learners' best interests. The reason P6's space for discretion was greater was

because, in terms of school uniform policy, he was mindful of the socio-economic factors of the learners and able to apply the school uniform policy accordingly. This implies that he had more discretion to make effective decisions to ensure the best interests of the learners.

Nonetheless, it is clear that educators need to take into account that there are social factors that come into play when they need to make decisions regarding the best interests of learners. The circumstances in the above-mentioned case relating to school uniforms, are beyond their control. In addition, some educators find it necessary to not only intervene in their learners' social well-being but also in their psychological well-being whenever they deem it necessary. Examples of when there was a need for some participants to participate in the psychological well-being of a learner were provided by P15 and P17.

In an interesting situation, P15 attempted to meet the policy requirements for referring a vulnerable learner to a social worker, but in this case, she assumed it was important to directly assist the vulnerable learner because she felt the learner put his/her trust in her. To secure the emotional well-being and self-inflicted damage of the learner, she acted outside policy. It appears as if she was afraid that the learner might take her own life if she immediately reported it to the social workers. By reporting it to the social workers, she assumed that the learner might not trust her anymore. The participant thought about what could happen to the learners' well-being if she decided to abide by the policy requirements.

The intended outcome took a turn for the worse in the case of P17 (Principal of School D). With the best interests of the learners at heart, he shared his experience of acting beyond policy requirements. A teenage girl committed suicide after P17 went beyond the required duty of care to possibly assist in improving the learner's situation. It appears that P17 blames himself for the learner's suicide. A feeling of interpersonal conflict arose after the incident that might, moving forward, contribute to factors such as uncertainty or distrust in similar situations. It is important for the participant to take into account that the learner had a long history of abuse and neglect, which might have been the trigger point which led to her suicide. This may influence the participant's willingness to intervene in a similar situation in the future as he might be afraid that it could happen again.

It is important to note that there was no evidence that participants made decisions to deliberately cause harm to a learner. It appears as if the participants make decisions with the best intentions and in the best interests of the child as they perceive them to be. The participants indicated that they are generally prepared to act in the best interests of the learner even if it means acting *ultra vires* to school policies.

5.3 THEME 2: A Limited View of Professional Discretion

The participants revealed how and when they apply professional discretion. The data suggests that an educator has some freedom to exercise his/her own choices and judgements, but these choices and judgements are influenced by different factors.

5.3.1 Professional Discretion as perceived by the Educators

It is imperative for an educator to understand what professional discretion is in order to maintain a high standard and duty of care towards the learners and to make appropriate decisions in specific situations. Professional discretion is the obligation and capacity, after appropriate consideration of all relevant factors, to determine what actions are appropriate, as well as the power to take those actions in certain situations (Boote, 2006:462).

The participants displayed multiple understandings of professional discretion. P19 perceives the concept of professional discretion to be an ability to make appropriate decisions under specific circumstances. Only a few participants had a clear understanding of how their duty of care connects to the concept of professional discretion. There does not seem to be a common knowledge or understanding amongst the participants in general. In addition to the multiple understandings of professional discretion, P15 explains that professional discretion means that an educator should always be professional when making decisions. She emphasises that it is of the utmost importance to make decisions with the learners' best interests at heart. This participant linked her duty of care and her ability to apply appropriate professional discretion very well. Of the twenty participants, only one other participant, P6, agreed with P15's understanding of the concept professional discretion. The Deputy-Principal (P16) of School C incorporated the notion of reasonable person into his understanding of professional discretion and said that it was important to consider what a reasonable person should do when making decisions in order to maintain a high standard of care.

However, it seems that the majority of the participants had an incomplete understanding of professional discretion. The data suggests that there were no common descriptions and understandings among the participants of what the word discretion means. A number of participants linked the notion of professionalism to professional discretion, but generally the participants did not connect professional discretion to their duty of care. As suggested by Boote (2006:461), the understanding of professional discretion and conceptualisation of the phenomenon of professional discretion is vital for all educators as it equips educators to make the best possible decisions to serve the best interests of their learners. This limited understanding may limit the participants' ability to make appropriate decisions.

5.3.2 Professional Discretion Linked to the Concept of Professionalism

As suggested by Wallender and Molander (2014:1), professional discretion comprises two focus areas. Firstly, professional discretion refers to an educator as a practicing professional with some form of formal education and who is employed by either the government or the private sector. According to Wallender and Molander (2014:1), the second focus area describes discretion as the ability of an educator to make appropriate decisions with regard to the learners in their care. Both these focus areas stress that educators should not only be experts when making judgements, but they should also take into account their duty of care for the learners when making decisions. Therefore, it appears that these two focus areas are related and cannot exist without each other because they can affect the capacity of the educators to make reasonable decisions.

The evidence suggests that the participants focused on the professional aspect rather than the discretionary aspect of professional discretion. The participants appear to understand that professional discretion is about being a professional and making choices using their knowledge and expertise as an educator. Webb (2002:50), like Wallender and Molander (2014:1), subscribes to this notion of professional discretion by suggesting three important elements. First and foremost, an educator is accepted as being a professional when he/she possesses the necessary degree of skill and talent. Secondly, a professional educator must use their own knowledge, as well as a body of knowledge to support their practice. Thirdly, professional educators need autonomy to make decisions in line with their knowledge and skills (Webb, 2002:50). Hence, educators should be provided with freedom to make choices that safeguard

learners and are linked directly to educators being professional in their decision making and avoidance of negligence.

The data revealed that some participants did not have a clear understanding of the meaning of professional discretion as they continued to link it to the notion of professionalism alone. Professionalism is only one aspect of professional discretion. For example, in different school environments, P2 and P5 demonstrated how they behave professionally and practice professionalism on a daily basis. It seems the participants are still exercising discretion and duty of care in these cases without making a connection between the two elements. Whilst these participants might have a clear understanding of their duty of care and responsibility towards the learners, their understanding of professional discretion is limited and may lead to an inability to apply appropriate professional discretion and as a result, might become liable for harm or injuries or damages.

5.3.3 The Application of Professional Discretion

Educators' professional discretion is the capacity and obligation, based on their professional experience and knowledge and skills, to decide what actions are appropriate under specific circumstances and the ability make the necessary decisions to take those actions in certain situations. Generally, the participants indicated that they apply professional discretion every day. However, several participants indicated that they apply professional discretion without realising it. The fact that some of the participants are considering relevant factors, the force of habit and the repeated application of professional discretion may lead to what might be termed automatic application of professional discretion. However, this does not take away the fact that the educator uses professional discretion. P15 explains that educators apply their professional discretion in the classroom, in meetings with staff and parents, on the playground as well as on the sports field. However, evidence suggests that a number of the participants laid emphasis on the fact that their professional discretion is applied differently to that of other educators because of their personalities and the situations in which they find themselves.

From a management perspective, professional discretion consists of strategic and creative thinking as well as the ability to respond and adapt decision-making to the learners' specific learning needs and interests (Webb, 2002:47). Therefore, if an

educator does not apply appropriate professional discretion in the classroom, it might result in learners not reaching their full potential and may constitute negligence by the educator.

Various participants apply their professional discretion when they decide whether to promote or retain a learner in a grade. Educators apply their professional discretion when they decide on what methodologies they use when teaching their subjects. Boote (2006:465) confirms this notion by stating that an educator's professional discretion is centred on being able to decide what should be taught and being able to teach it. It is thus suggested that the participants apply their professional discretion when making decisions, such as curriculum decisions for the academic well-being of the learners. Educators should thus apply their professional discretion in various situations and environments within and around the school.

However, some participants seem to be hesitant in applying discretion. Perhaps these participants are not confident in their knowledge, experience and personal instincts when it comes to making decisions. The majority of the participants appear to find it challenging to apply discretion due to both internal and external influential factors. P16 for example, explains that a situation or an environment may influence an educators' ability to apply professional discretion, despite the amount of knowledge and years of experience. He further explains that every situation provides its own challenges. Therefore, educators should be confident and trust their competency when making decisions in order to ensure the well-being of the learners.

However, participant P16 (the Deputy-Principal of School D) revealed that he was not afraid to apply professional discretion in the best interests of the learners on an excursion to Gold Reef City. He applied appropriate professional discretion by not allowing learners to go down an allegedly flooded gold mine.

A few participants gave the impression that they are afraid to apply their discretion. P16 illustrated that courage is needed to apply appropriate discretion. This participant took all the rumours about the flooded gold mine at Gold Reef City into consideration in exercising his professional discretion not to allow learners to enter the mine. Not only did he receive numerous phone calls from angry parents who claimed that they had paid for the trip down the mine but, the principal also phoned him and pressurised him to take the learners down the mine. Regardless of the pressure, he stood his

ground. He expressed the thought that he would rather have angry parents than injured learners.

However, participants' space for autonomy, seems to be dominated by 'a belt of restriction'. Wallender and Molander (2014:3) suggest that "autonomy becomes stronger the larger the discretionary space, and *vice versa*". It suggests that educators make decisions based on the perceptions of possible negative outcomes to themselves.

In the light of the above, it is important to note that educators have the duty to foresee harmful environments, dangerous situations and being able to make the correct and responsible decision. This connects an educators' duty of care to the need for an educator to not only apply discretion, but also to have the freedom to apply such discretion.

5.3.4 Factors that Influence an Educator's Professional Discretion

All educators are exposed to factors which influence discretion. In the light of the conceptual framework of this study, May (2010:11) refers to the curricular zone of discretion as the place where educators must mediate both internal and external factors.

5.3.4.1 External factors

The evidence indicates that the capacity of an educator to apply adequate professional discretion is influenced by multiple external factors. External factors such policy requirements, policy inflexibilities and rigid laws influence the professional discretion of educators.

Policy inflexibility and rigid laws:

The evidence indicates that the participants experience ambiguity in the sense that on one hand, they are compelled to apply professional discretion, whilst being restricted by the rigidity of policies.

Laws are perceived to be rigid and policies inflexible. When it comes to making decisions with the intent of promoting the best interests of the learners, P1 feels crippled. He explains his feeling of restrictedness through the means of an example of violence in school. For example, a learner is violent towards an educator, but the educator knows (the law and school policy does not allow corporal punishment) that if

he protects himself by blocking a punch, it might be viewed as a form of corporal punishment and not an act of self-protection. This also reveals a limited understanding of the law in the sense that self-defence, within reasonable limits, is permissible.

Education professionals implementing policies need the capacity and capability to adapt safety policies to changing circumstances. Policy flexibility, although a recent developmental aspect to policy approaches, is paramount to the success of policy implementation. Policy flexibility allows educators to improve their expertise of, in this instance, safety policies. Policy flexibility is therefore, needed as educators should apply and adapt their discretion in order to influence their actions in accordance with certain functions (Boote, 2006:474; Hallsworth *et al.*, 2011:5).

Rigid laws and inflexible policies appear to limit the freedom of educators to exercise their professional discretion. In addition, the evidence indicates that laws and policies seem to create a fear of making decisions, as educators are unsure as to whether they should abide by the laws and policies or act in the best interests of the learners. For example, P11 explains that he will always put learners first in a crisis situation and worry about legislation and policies later because laws and school policies do not dictate his decision-making and discretion in emergencies.

5.3.4.2 Internal factors that influence professional discretion

Aspects such as educators' knowledge and experience, personal interests and the "fear factor" are among the internal factors identified that may affect the professional discretion of an educator.

Educators' knowledge and experience:

Professional educators need autonomy in making decisions that are consistent with their knowledge and expertise. In order to promote their practice, an educator must possess appropriate knowledge as well as competencies to apply this knowledge in practice. This enables educators to make the best possible decisions in the best interests of the learners in their care. However, some participants (P1, P5, P6, P7, P15 and P18) indicated that their knowledge and experience will never be enough. In addition, some of the participants identified their lack in training with a resultant lack of self-confidence in exercising discretion based on their competencies.

Being more experienced in the teaching environment assists educators better understanding their responsibilities and their duty of care towards learners. An educator must use his/her abilities and experience together with his/her own lawful professional discretion to guarantee that his/her altered situation choices are successful (Webb, 2002:48). However, should an educator not understand how to apply appropriate professional discretion and not utilise their abilities and experience in the best interests of learners, it might affect the learners negatively in that they will not reach their full potential. This may constitute negligence by the educator.

An understanding of the law is very important when making decisions. For example, P11 believes that having an understanding of the law should make it possible for educators to exercise adequate professional discretion. Nonetheless, P15 stated that her own experience weighs more than policies when she applies her professional discretion. Hence, she portrayed confidence in her own experiences and competencies to apply appropriate professional discretion when it comes to the well-being of the learners. This is a view held by most participants.

An educator's personality

Numerous participants pointed out that, in exercising their professional discretion, one's personality plays an essential role. Not only do educators' perceptions, experiences and competencies impact their ability to make appropriate decisions, but their personality also plays an integral role. The personality of an educator can add value to the contextual understanding of when and how to make decisions. Evidently some educators are naturally optimistic, whilst others may feel less confident and reluctant to make decisions. Traits in personality such as compassion, empathy, confidence, calmness, self-discipline and attitude are relevant factors that could affect the way in which they implement policies and exercise their professional discretion.

It is important that educators are clear-headed and rational in their thinking when making decisions within the school environment. P1 describes his personality as calm, which allows him not to over react in crisis situations. Being calm and collected allows him to think about the specific situation with which he is confronted before he makes a decision. Without a detailed analysis of a situation, personality may force insecurity and could affect the decision-making process. It is important to acknowledge that the

attitude, dedication, self-discipline, ideals, training and conduct of those in the teaching profession co-determine the quality of decision-making in crisis situations.

The “fear factor”:

The data suggests that some of the participants, because they are governed by laws and policies, are afraid to exercise their own professional discretion due to the implications they may encounter after implementing decisions based on their own judgements. A number of the participants referred to the fear of being "wrong" and making the incorrect decisions. Hence, the fear of making decisions instils a feeling of doubt in these educators' discretionary abilities.

5.3.5 Discretionary Power of Educators

Participants generally indicated that they would like to be entrusted with more discretionary power and autonomy for making decisions. They specifically refer to the discretionary power with regard to promotion and expulsion of learners.

5.3.5.1 Promotion of learners to the next grade

The participants indicated that they would like more discretionary power to retain or promote learners to the next grade, as this aspect is highly regulated. The data suggests that strategies should be more flexible and open to educators' discretionary power. This discretionary power would enable educators to have greater confidence in making decisions that will be in the learners' best interests. A number of the participants indicated very firmly that they are the ones that know learners' level of development and know what is in the best interests of the learners.

5.3.5.2 Expulsion of learners

The process of expulsion is time consuming and it adds to the stress of the SMT. The provincial education department has the power to expel learners, but the process is long and involved. Dangerous learners pose a threat to all the other learners at school and P6, for example, would together with the SGB, like more freedom to use their professional discretion in order to make immediate decisions. Applying their professional discretion will contribute to ensuring the safety of the rest of the learners. P17 feels he has no support from the education department to ensure that dangerous learners are expelled.

Granting educators more discretionary power or autonomy may allow for a larger discretionary space to exercise appropriate judgements regarding the well-being of learners (Wallender & Molander, 2014:3). The expulsion of problematic learners could be a key factor in ensuring the safety and protection of the rest of the learners in the school. Their limited autonomy in making these decisions may therefore, jeopardise the safety of other learners and educators. Educators need to be familiar with the core legal principles of expulsion and suspension and should be able to apply the principles accordingly. According to Section 9 of the Schools Act, school management staff may exclude learners whose behaviour interferes with or disrupts the school's activity, who continually defy school rules, who pose a threat to other learners or educators, and whose behaviour is intentionally disobedient (Joubert, 2015:146). Educators should be knowledgeable about learners being permanently expelled or temporarily suspended from school after a recommendation is made to the provincial Head of Department (HOD) and the learner's rights to just administrative action (due process) has been respected. Learners have a right to basic education and are compelled to attend school up to the age of 15 or the completion of Grade 9, whichever comes first. Thus, the Head of Department of a province is expected to find a place in another school for an expelled learner until the learner is beyond the compulsory school-going age. These processes should thus not prevent learners from attending school or infringing on their right to basic education (Joubert, 2015:146).

5.4 THEME 3: UNDERSTANDING OF EDUCATIONAL AND LEGAL PRINCIPLES PERTAINING TO NEGLIGENCE

Multiple participant expressions of their knowledge of the term “negligence” in a school environment are presented in this section.

5.4.1 The Term Negligence as perceived by Educators

It seems that the term negligence is perceived by the participants as the inability to safeguard learners by not fulfilling their legal obligations in terms of their duty of care. Generally, the participants described a similar and comprehensive understanding of the principles of educational negligence. Eberlein (2009:34) argues that negligence in an educational environment can be conceptualised as the “behaviour of an educator, either through some purposive action or failure to act, which fails to measure up to the way a reasonable, prudent or careful person, would conceivably have acted under the same or similar circumstances”. In line with Eberlein, Potgieter (2004:153) refers to

negligent conduct as a person's failure to take precautionary steps in order to prevent harm or injury or damage as a reasonable person, as defined by law.

The participants expressed similar opinions of the causes of negligence in education and recognised the significance of their duty of care obligation to foresee harmful environments, hazardous situations and to be able to make appropriate and responsible decisions. This connects the duty of care of an educator to the need for an educator to not only exercise professional discretion but also to have the liberty to apply that discretion in a learner's best interest.

An educator is expected to provide all learners with the greatest possible care so as not to risk being found negligent. Hence, by having a clear understanding of the concept of negligence, educators may reduce the risk and causes of negligence. Foreseeability and predictability are elements of having a clear understanding of what negligence comprises and highlights the harmful factors. The safety of the learners could further be ensured if educators intentionally recognise and foresee potential risks and hazards.

5.4.2 Causes of Negligence in the Educational Environment

Comments by participants suggested that they are aware that if they fail to safeguard the learners in their care or fail to apply professional discretion, they could be held accountable and/or liable for loss or injury or damage suffered by learners. Babalola (2012:195) highlights three important causes of negligence, namely: lack of supervision, lack of proper instruction and dangerous equipment and facilities that are not well maintained. While these three causes of negligence are prevalent in the data, additional causes have also been identified.

5.4.2.1 Lack of proper equipment and facilities

Participants stressed that owing to unsafe classroom facilities and equipment, many accidents happen. For example, P4 maintains that it is important for educators to report all broken equipment and facilities. Based on the data, educators are expected to report any concerns as it falls under their professional discretion and duty of care towards the learners. It is apparent that if educators fail to report faulty facilities and equipment, they could be held accountable for negligent acts.

Participants emphasised that injuries do occur due to unsafe school equipment and facilities. This is perceived as a major cause of negligence in a school environment. It

is the educators' responsibility to ensure that not only school facilities and equipment are well maintained but also that other equipment including sports equipment, be properly maintained. For example, P16 claims he is aware of an educator who became liable for an injury to a learner owing to a failure to report a broken soccer goal post.

It is regrettable that the faulty equipment and poorly maintained facilities are preventable causes of many incidents in which learners are hurt. This is supported by Squelch (2001:138) who argues that many South African schools are not sufficiently equipped to perform the important function of duty of care and adequate maintenance of school facilities. Squelch (2001:139) blames these unfortunate situations on the failure of SGBs of many schools to design and implement effective school safety policies.

SGBs are expected to ensure that school buildings and facilities do not pose a risk to educational professionals and learners (Joubert, 2007:111). This expectation can be found in Section 20(1) (g) of the Schools Act which obliges the SGB "to keep school buildings in good repair, keep school grounds free of dangerous objects and maintaining equipment in good working order..." (Squelch, 2001:142) and to follow the regulations and standards laid down by legislation (Eberlein, 2009:16).

5.4.2.2 Lack of proper supervision over the learners

It is common knowledge among the participants that learners need to be supervised, whether they are at school in the classroom, on the sport fields or on the playground. A collective understanding that monitoring learners is a way to manage accidents or incidents and to ensure a high standard of care for the learners to prevent negligence, is demonstrated. Although it is not possible to watch over all the learners at the same time, it is legally expected and necessary for educators to exercise their duty of care anywhere in the school environment (Joubert & Prinsloo, 2013:36).

5.4.2.3 Educators neglecting their duty of care: physical harm

The evidence indicates that the majority of the participants are aware of several educators neglecting their duty of care and that it may be seen as acts of negligence. It is the educators' responsibility to ensure learners' safety and not be negligent in doing so. Therefore, it appears that there are educators at the participating schools who have failed to protect the learners from physical harm whilst they were on the school premises. For example, P16 came across an educator who failed to report a

broken soccer goal post, which led to a serious injury. This is an example of an educator neglecting his duty of care by not reporting faulty equipment.

5.4.2.4 Educators neglecting their duty of care: academic negligence

Legal liability it is not restricted to physical injuries, but can also extend to intellectual harm to learners. Educators who neglect their academic duty of care towards learners could be held liable.

Participants' responses provided evidence that they are aware of other educators who can be accused of academic negligence. This resonates with Boote's (2006:465) study which focused on an educator's ability to make decisions with regard to curriculum development. Its relevance lies in the fact that educators who lack certain "competencies" may be found negligent when it comes to their decision-making abilities in terms of the academic performance of learners. Although there has not yet been any litigation in South Africa in this regard, litigation on academic negligence is has been an occurrence in countries like the United States and England. For example, the case of *Peter W v San Francisco Unified School District* (mentioned in Chapter 2) made history in 1979 as one of the first educational malpractice cases in the United States. In this case, the learner sued the school authority for failing to fulfil its duties of providing adequate training, supervision and guidance in basic skills such as reading and writing. Similarly, in the case of *Phelps v London Borough of Hillingdon* (1998) (also mentioned in Chapter 2) an educational psychologist neglected and misdiagnosed a learner.

It is important to remember that the educational/academic well-being of learners is just as important as safety of learners. Educators are being prosecuted for academic malpractice in other parts of the world because educators are legally held responsible for bad learning which leads to low marks in literacy, numeracy and failure to pass tests and examinations. It was noted that an educator who fabricated marks, could be held liable for academic negligence as the educator failed to maintain a high educational standard of care (Joubert & Prinsloo 2013:15; Teh, 2009:138).

5.4.2.5 Being afraid to make decisions can cause negligence

As mentioned earlier, participants indicated that they are at times anxious to make decisions. In crisis situations, educators who are afraid to make decisions are more likely to make mistakes. These mistakes could lead to negligence.

5.4.3 Reducing the Risk of Negligence

Several participants acknowledged that the risk of negligence is always present in the context of education, even if they have all the experience, knowledge and training they need to prevent negligent behaviour. Prinsloo (2005:9) argues the importance of educators being able to use their subject knowledge and their skills together with their knowledge of learner development to the advantage of learners, in order to familiarise themselves with possible dangers to improve their professional duty of care within the parameters of the law. A minority of participants in this study indicated that they commit themselves to lifelong learning and professional development which contributes to the prevention of negligence.

5.4.3.1 Reducing the risk of being negligent through knowledge and experience

It has been proposed that knowledge and experience are generally part of educators' ability to make informed decisions while exercising their professional discretion. Creating a favourable and caring educational environment depends on the amount of professional development and training an educator has undergone. Knowledge and experience will allow educators to exercise suitable professional discretion and prevent negligence. Several participants emphasised that their knowledge and experience will never be enough and the risk for negligence will always be there.

However, although P16 believes he unquestionably has enough experience, environments and situations might change. Therefore, as there is no 'one-size-fits-all' solution to each and every situation, educators, who know how to apply their knowledge and experience in any given situation, will most probably be less likely to be negligent.

5.4.3.2 Professional development and training to reduce the risk of being negligent

The data indicated that educators who have received adequate training, will be confident in their decision-making processes. Teacher training enables educators to identify what is wrong with a learner based on what they have learned about child development and behaviour. This also relates to the type of learner personality. A number of the participants in this study displayed a similar view on how teacher training assists them in making appropriate decisions and reducing the risk of negligence.

However, it was found that some educators do not have adequate educational training, training in their corresponding extracurricular activities, and school policy training. Some of the participants felt that their training was inadequate or that the novice educators who had recently undergone training need more training, especially with regard to creating a safe school environment. Being trained will allow educators to apply appropriate professional discretion. Bremner (2014:84) supports this notion by suggesting that negligence and the different aspects thereof imply that the professional training of educators enables them to be more equipped to deal with various forms of negligence in school situations than other people.

It has been found that the majority of non-fee-paying school participants do not have training for their respective extracurricular activities. They rely solely on their passion and experience. Sport and recreational activities are a massive duty and as indicated by Joubert (2015:180), school sport contains an element of danger for the learners. Because educators are supposed to have a higher standard of care, they must be qualified in the sporting codes for which they are responsible.

It is significant that most of the participants have not received safety policy training. A number of the participants stressed that they would have liked to go for safety training as it would equip them to make better decisions and ensure better safety for the learners.

5.4.4 Preventing Negligence whilst Exercising Professional Discretion

Educators should make correct and responsible decisions by predicting and identifying potentially harmful and dangerous environments and situations. An educator has a care standard and obligation that requires them to take sensible measures to minimise the risk of predictable harm.

5.4.4.1 Foreseeability and preventability measures

Educators should have the duty to foresee harmful environments and dangerous situations and be able to make correct and responsible decisions. In this section, foreseeability and preventability measures relates to the significance within the classroom setting of well-maintained equipment and infrastructure. It can be assumed that learners feel more secure and safe at school when the infrastructure of the school, such as the buildings, classrooms, playground and sanitation needs, is well looked after (Amsterdam, 2010:1). The majority of the participants demonstrate that

it is important to take precautionary measures in order to foresee accidents or incidents that could occur. In addition, Beckmann (1995:67) argues that an educator cannot be held “delictually liable” if he/she had the essential knowledge and skill to foresee harmful events and took appropriate steps to avert such harm. It seems that it is not sufficient for educators to simply warn or educate learners of the dangers but they are also expected to take practical steps such as supervision in order to prevent intellectual or physical harm (Bremner, 2014:80-81). In the light of my study, it seems that if an educator or a person with similar responsibilities does not respond to foreseeable harm, damage or injury, it might be viewed as negligence.

5.4.4.2 The act of a reasonable person

The minority of the participants acknowledged that it is important to make conscious decisions and to act like a reasonable person, when exercising their discretion. It is the reasonable educator’s responsibility to foresee harmful environments, hazardous situations and make the right and accountable decision. It is important to note that the term “reasonable educator” does not exist in law but, Potgieter (2004:153) argues convincingly, that it might be a more appropriate term to use in an educational environment than the term “reasonable person”, because educators are trained and registered professionals. For example, P16 stresses that it is important for an educator to have the ability to foresee dangerous situations. He refers to what actions a reasonable person would take in similar situations to foresee incidents and accidents that could occur. While some of these participants may be able to make decisions as a rational/reasonable person/educator, it may not be something that other participants consider when making decisions, as they were not aware of the concept of behaving like a reasonable person/educator.

The prevention of negligence by educators, therefore, requires greater knowledge and care than that of an “ordinary” person, due to the fact that educators are experts in teaching practice. This argument is supported by Potgieter (2004:153), who argues that the negligence test for a reasonable person should be adapted to a negligent test of a reasonable educator (expert). In line with this, Daniel (2018:7) explains that principals or educational professional are expected to be reasonable persons and must follow three key requirements. Firstly, a principal or educator must act with sincere belief that his/her actions are right. Secondly, educational professionals should have knowledge of the law and apply it cautiously. Lastly, an educational professional

should act within the communities' objectiveness (in other words, what the community expect a reasonable person would do) with regards to the definition of a reasonable person (Daniel, 2018:7).

5.4.4.3 The educators' ability to re-evaluate their actions in order to prevent negligence

Participants' responses indicate that they re-evaluate their decisions and actions after realising they have made a mistake. They either overreact in situations or they do not know the reasons behind a learner's behaviour. To illustrate this, P10 emphasised that he has made decisions without having all the relevant information at hand. Re-evaluating a decision makes it possible for educators to avoid making the same mistakes and will ensure that any other accidents or incidents are avoided because of their reassessment.

5.5 THEME 4: School safety policies

It is sometimes wrongly assumed that regulations, rules and the code of conduct of a school will automatically provide all learners and educators with a protected and secure environment. School safety policies are aimed at creating a secure educational environment that enhances human dignity and the promotion of values.

5.5.1 How Educators Differentiate between Laws and Policies

Policies should adhere to the Constitution of 1996, if they do not, they are invalid. A policy is interlinked with the law (Kiyong, 2014:141). A policy is seen as a guideline which outlines how intended objectives should be achieved and tasks be performed. On the other hand, laws are a set of principles, procedures and standards that must be followed by the society (Kiyong, 2014:141). Laws are administered through the courts and are subjected to the constitutions of countries. Laws are mainly made to ensure that justice is done in society (Joubert & Prinsloo, 2013:2).

The majority of the participants demonstrated a clear understanding of the difference between laws and policies. It is believed that a school's regulations, rules and code of conduct will ultimately provide a safe and secure environment for all learners and educational professionals in schools. Hence, the aim of school safety policies is to create a safe educational environment that respects human dignity and the promotion of values. One participant, P10 (Principal of School B), illustrates the difference between laws and policies by emphasising that laws are rules set out by parliament

that must be followed, whereas policies are created with the intent of guiding educators' discretion. It seems that there is a common understanding that laws and policies should protect and promote democratic principles. P10 clearly does not really understand the difference between laws and policies. As mentioned earlier, laws are set of principles, procedures and standards that society must obey (Kiyong, 2014:141). In other words, laws are enforced by the courts and are passed by the legislative powers (parliaments) of countries. Policies on the other hand, are related to the rule of law and policy is seen as a framework detailing with what a school wants to achieve and how it could be achieved (Kiyong, 2014:141). For this reason, the result is that all policies and laws must be designed based on the notion that democratic principles must be maintained and promoted (RSA, 1996).

P16 claims to understand that the Constitution is not only the nation's highest law, but also the most essential element of our law. It determines the construction and power of the government and how it exercises these powers and functions (Joubert & Prinsloo, 2013:3). It therefore concerns the legal interaction between separate governmental agencies/divisions (for example, between national government and provincial government) as well as the legal connection between public authorities and people (for example, between educational authority and the learner in the situation of expulsion from a school) (Joubert & Prinsloo, 2013:3).

Although the participants demonstrated a clear understanding of the difference between laws and policies, it appears as if they do not actually know the content of their own school policies. This not only increases their risk of being negligent, but undermines their need for greater decision-making autonomy, as discussed earlier in this chapter.

5.5.2 Adapting School Policies to Fit the School Environment

The majority of the participants suggested that school policies should be adapted to the requirements and needs of the particular community served by the school. P11, for example, believes in the uniqueness of policies and that they should not be cast in stone. As environments change continuously, so should policies be changed and adapted accordingly. P16 used the term "revised" to ensure that the policies are "dynamic" and open for an educator to exercise their professional discretion. With regard to adapting safety policies, Eberlein (2009:28) emphasises the significance of

adapting the safety policy of a school to meet the particular needs and specifications of the school. To have a favourable impact on the safety position of the school, the safety policy must be carefully enforced, supervised and regularly revised. Since policies should be based on reality, it appears to remain very difficult to design a safety policy as there are so many influential factors to consider, and every situation or scenario in school safety policy may be different (Joubert, 2007:116).

Hence, school safety problems seem to not always have an unproblematic solution for a specific problem. It seems challenging for the participants to exercise their professional discretion in line with safety policies as there are so many relevant factors to consider. P1 and P16 agree that the risk of injuries and accidents will always be there, regardless of the good intent of school safety policies.

5.5.3 Implementation of School Policies

The participants indicated that they are challenged when implementing their school safety policies. The implementation of school policies can be challenging due to the fact that each school's circumstances differ. Successful and effective implementation is also influenced by the capacity and capability of educators.

The safety policy must be thoroughly implemented, monitored, maintained and be flexible enough to have a positive effect on the school's safety situation. Policy flexibility allows educators to improve their expertise, in this instance, safety policies (Hallsworth *et al.*, 2011:5). Safety policies should hence be amenable to professional discretion (Boote, 2006:474). It is therefore, of the utmost importance to rethink the approach to safety policy development and implementation to comprehend how educators can create safety policies that are more flexible and adaptive to educators' professional discretion and developing growth.

The study by Sethusha (2012:38) reiterates that educators are challenged when implementing policies postulated by policy makers who are not educators themselves and have not dealt with challenging situations within a school environment. This seems to be confirmed in this study. One should also consider that an educator's age, culture, experience, workplace environment and emotional intelligence are all aspects to consider, as they may influence policy making and ultimately the use of professional discretion by the educator (Sethusha, 2012:181).

5.5.4 Educators' Perspective of their Safety Policies

The majority of the participants acknowledged that their school does indeed have a safety policy. However, the participants have differences of opinion about and perspectives in terms of the quality of their safety policies. Some participants believe that their safety policies are sufficient, whilst others believe their safety policies are inadequate. This difference of opinion is illustrated by P11 who believes that their school safety policy is an excellent one and it contributes to his success when exercising his professional discretion whilst P16 believes that his schools' safety policy is not sufficient enough to ensure safety for all the learners and it is not sufficient enough for educators to apply appropriate professional discretion.

Although several participants such as P9 and P20 indicated that they are aware of their schools' safety policy, they have never seen it. Regardless, it is the responsibility of the educator to know what is expected from them, based on their school safety policy. The two above-mentioned participants, who have never seen their school safety policy, are more susceptible to being negligent in the future and it is highly improbable that they will be able to apply appropriate discretion.

5.5.5 The link between the educators' discretionary power and school policies: transportation policy as an example

Some of the participants in this study assumed that they do not have the discretion to intervene when they suspect that a vehicle, which is used to transport learners, is unsafe for the learners to travel in. P3 highlighted the fact that, because they are a non-fee-paying school, they do not have control over which bus company is used by their school. P3's viewpoint is correct, but she has the discretionary power to decide whether or not the learners are transported in the selected bus. Section 8D of the Amended Regulations for Safety Measures (DOE, 2006), specifies that the school must ensure that vehicles transporting learners meet all the requirements set out by the Regulations. P3 also believes that, if their SGB was in a position to pay the bus company, they would have had the power to decide whether the bus was safe or not. Being a non-fee-paying school, limits their discretionary power to ensure the best interests of the learner. This is in contrast to fee-paying schools, who have full discretion with regards to transport used by the school. This is another example of how the socio-economic status of the school community plays a significant role in the ways that educators apply professional discretion.

5.6 CONCLUDING REMARKS

This chapter contains a discussion of the findings emerging from the data collected from twenty (20) participants at the primary and secondary schools both refuted by literature. The participants' responses, which form the data, were based on the participants' lived experience with regard to their experiences of professional discretion with legal and policy requirements in order to prevent negligence. During the interviews and consequently the analysis of data, it was evident that all participants have different understanding, varied experiences and thoughts to relate.

It came to the fore that the participants argue that they have a legal duty to safeguard learners from physical, psychological and intellectual harm. Hence, the participants emphasised that they deem it fit to protect learners in numerous environments such as the playground, school events, transportation of learners, sports activities as well as excursions. The participants illustrated a clear understanding of the notion *in loco parentis* and how it links to their legal obligation to accept responsibility for the learners' safety. The participants acknowledged that they are empowered to be responsible caregivers. It seems that some educators are willing to deviate from laws and policies (act *ultra vires*) for the best interests of the learners. However, the data suggests that participants have conflicting views on whether an educator can justify acting *ultra vires* to ensure that the best interests of learners are served. It seems that the unjust use of professional discretion and misinterpretation of policies may result in educators being negligent.

The data suggests that there were no common descriptions and understandings among the participants of what the word discretion means. It came to the fore that a number of the participants linked the notion of professionalism to professional discretion. Evidence suggests that the majority of the participants did not connect professional discretion to their duty of care.

The participants laid emphasis on the fact that their professional discretion is applied differently to that of other educators because of different personalities and situations in which they find themselves. Generally, the participants apply their professional discretion for learners' educational needs, such as curriculum decisions and promotion of learners to the next grade. However, it appears that some participants are hesitant or afraid to apply discretion. Perhaps these participants are not knowledgeable and do

not have experience or personal instincts when it comes to decision making. As mentioned earlier, participants find it challenging to apply appropriate professional discretion due to internal and external factors influencing their decision-making process.

In general, the participants expressed similar opinions about the causes of negligence in the education environment. The participants acknowledged that they have an obligation to foresee harmful and hazardous environments and should be able to make appropriate and reasonable decisions. This connects an educators' duty of care to exercise professional discretion in the best interests of the learners. Within this study, it came to the fore that faulty equipment and facilities, lack of proper supervision, educators neglecting their duty of care in terms of physical and psychological harm, the fear of making decisions are all seen as causes of negligence. It appears that educators who are afraid to apply professional discretion are more likely to make mistakes in their decision making, which could ultimately increase the risk of being negligent. Educators could reduce the risk of being negligent through experience, knowledge, a duty of care (reasonable person), professional development (training), foreseeability and preventability.

Being knowledgeable of the content of laws and policies could also reduce an educators' risk of being negligent as knowledge could provide educators with confidence to apply appropriate professional discretion. Although the participants are aware of their school safety policies, it seems that they have different viewpoints on the quality of these policies. The quality of a safety policy could also influence the risk of negligence in a school.

The focus in Chapter 6, the final chapter in this research, synthesises the findings, drawing conclusions and offering recommendations using the research questions as a starting point.

CHAPTER 6

FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1 INTRODUCTION

This study aimed to investigate the reach of an educator's duty of care and how professional discretion is used to avoid negligence. Furthermore, the study also probed how primary and secondary school educators reconcile professional discretion with legal and policy requirements in order to prevent negligence and possible liability in the interplay between the law, policy and educators' professional discretion as well as their duty of care and their position in terms of the doctrine of *in loco parentis*.

To remind the reader, the research question are used as a point of reference:

How do primary and secondary school educators reconcile professional discretion with legal and policy requirements in order to prevent negligence?

The main research question above is complemented by the following sub-questions:

- How do educators interpret their 'duty of care'?
- How do educators interpret 'professional discretion'?
- How do educators understand the difference between law and policy?
- In the opinion of educators, what are the standards of professional discretion required to prevent negligence?

This chapter focuses on the summary of the findings, and concludes with discussions of the significance of the study, the limitations of the study and recommendations regarding an educator's professional discretion. Suggestions for further research that could contribute to the body of knowledge, are also made.

6.2 SUMMARY OF THE FINDINGS

This section contains a summary of findings as presented in Chapters 4 and 5.

6.2.1 How do Educators Understand their Duty of Care?

The participants have a general understanding though not in-depth of the concept of duty of care. Participants comprehend that they have both a responsibility and a legal obligation to safeguard learners in their care. They are thus aware of their duty to

protect the learners from physical and psychological harm and ensure a high standard of learners' academic well-being. De Waal (2000:80) indicated that South Africa is focused on ensuring that an educator fulfils his/her duty to provide a safe and caring environment for all learners and it is evident that the participants view their duty of care as transcending teaching in the classroom. Participants acknowledged that they act *in loco parentis* and are expected to provide all learners with the highest quality and best care possible as any reasonable parent would. The participants seemed to comprehend that they are empowered to safeguard the learners in their care and to be reasonable caregivers. Without this knowledge, educators are not able to apply appropriate professional discretion when it comes to the general well-being of the learners.

It seems that a number of participants have conflicting views on whether an educator can justify acting *ultra vires* in order to ensure the best interests of a learner. Some participants, however, indicated that they do indeed act *ultra vires* when they deem it in the best interests of a learner.

There is recognition that educators should apply their professional discretion taking cognisance of the boundaries of policy, as it may reduce the risk of being negligent. Educators may also be found negligent when they do not follow rules and obligations set out by the safety policies due to the lack of skills and knowledge when applying legal principles during their application of professional discretion (Joubert, 2007:117). An issue arises when educators place laws and policies above the well-being of the learners when making decisions, citing their fear of consequences when superseding laws and policies.

It is noticeable that some participants deviate from policy requirements with life or death situations (physical well-being), educational well-being of learners and learners' social well-being. These participants acknowledge that they are aware of the risk element when they contravene policy requirements. However, the problem is that some of the contraventions of policies could possibly have caused some of the participants to be liable, regardless of their good intentions to prioritise the well-being of the learners.

Some participants exhibited signs where the limits of their professional discretion were not in the best interests of learners. This seems to be one of the many reasons why

educators are sometimes found guilty of negligence as they failed to act in the best interests of the learners.

It is imperative to note that an educator cannot apply appropriate professional discretion without maintaining a high standard of care. With regard to the conceptual framework of this study, De Waal (2000:87) indicated that educators not only have to avoid negligence, they also have a duty to reasonably foresee harmful environments, hazardous circumstances and make good and responsible decisions based on their professional discretion. Therefore, it is important that duty of care should be placed in the centre of the 'doughnut' (as discussed in Section 1.6) as it influences an educator's space of autonomy and professional discretion and *vice versa*.

To conclude this section, it is important to note that there was no evidence that participants made decisions to deliberately cause harm to a learner. It appears as if participants make decisions with the best intentions. The participants indicated that they are generally prepared to act in the best interests of the learner even if it means acting *ultra vires* with regard to school policies.

6.2.2 Educators' Perceptions of Professional Discretion

The issue of professional discretion was explored to determine how participants interpreted professional discretion. As indicated in the study, it is essential for an educator to understand what professional discretion is in order to maintain a high standard and duty of care towards the learners and to make appropriate decisions in specific situations. There were no common descriptions and understanding among the participants of what the concept professional discretion means. In addition, the participants focused on the professional aspect rather than the discretionary aspect.

The participants displayed various understandings of professional discretion. Only a few participants had a clear understanding of how their duty of care connects to the concept of professional discretion. One participant explained that professional discretion means that an educator should always be professional when making decisions. It was emphasised that it is of the utmost importance to make decisions with the learners' best interests in mind. One participant made the correct connection between her duty of care and her ability to apply appropriate professional discretion. However, it does not seem to be common knowledge amongst the participants in general.

Some participants perceived the concept of professional discretion to be an ability to make appropriate decisions in specific situations. A number of participants confused the notion of professionalism with professional discretion. Therefore, it appears that some of the participants lack the ability to relate their duty of care to the principle of professional discretion. This could be problematic when educators have to make decisions, since their knowledge and understanding of the concept professional discretion is restricted.

Having a lack of knowledge may limit an educators' professional discretion and could lead him/her to being liable. As suggested by Boote (2006:461), the understanding of professional discretion and conceptualisation of this phenomenon is vital for all educators, as it equips educators to make the best possible decisions concerning their learners.

Participants seem to be hesitant in applying discretion. Perhaps these participants are not confident in their knowledge, experience and personal instincts when it comes to making decisions. The majority of the participants appear to find it challenging to apply discretion due to both internal and external influential factors. This could be ascribed to their own lack of understanding of duty of care and its connection with professional discretion. Educators should therefore be confident and trust their competence when making decisions in order to ensure the well-being of the learners.

6.2.3 The Prevention of Negligence

An educator has a standard of care and obligation that requires him/her to take reasonable and sensible measures to minimise the risk of predictable harm. This section focused on how educators are responsible for predicting harmful environments, hazardous circumstances and making the right and responsible decisions.

It seems that the term negligence is perceived by participants as the inability to safeguard learners by not fulfilling the legal obligations of their duty of care. Generally, the participants described a similar and comprehensive understanding of the principles of educational negligence.

The participants demonstrated similar opinions of the causes of negligence in the education environment and recognised the significance of their obligation to care and foresee harmful environments, hazardous situations and to be able to make

appropriate and responsible decisions. This connects the duty of care of an educator with the need for an educator to not only exercise professional discretion, but also have the liberty to apply that discretion in the best interests of the learner.

Participants stressed that, owing to unsafe classroom facilities and equipment, many accidents happen. This is perceived as a major indicator of negligence in a school environment. It is the responsibility of the SGB and also of the educators to ensure that not only school facilities and equipment are well maintained, but also equipment, including sports equipment.

Educators are expected to report any concerns about facilities and equipment as it falls under their legal obligation, professional discretion and duty of care towards the learners. It is apparent that, if educators fail to report faulty facilities and equipment, they could be held accountable for any acts of negligence.

A collective understanding that supervision of learners is a way to prevent accidents or incidents and to ensure a high standard of care of learners to prevent negligence, is demonstrated. Although it is not possible to watch over all the learners for 24 hours a day, it is legally expected and necessary for educators to supervise learners anywhere in the school environment in a manner that can reasonably be expected of an educator (Joubert & Prinsloo, 2013:36).

The participants are aware of several educators neglecting their duty of care and that this may be constructed as acts of negligence. Therefore, it appears that there are educators at the participating schools who failed to protect the learners from harm whilst they were on the school premises.

Several participants acknowledged that the risk of negligence will always be there even if they have all the experience, knowledge and training to prevent it. As suggested by Prinsloo (2005:9), it is important that educators are able to use their subject knowledge and their skills together with their knowledge of learner development to the advantage of learners, in order to familiarise themselves with possible dangers to improve their professional duty of care within the correct parameters of the law. A minority of participants in this study indicated that they have committed themselves to lifelong learning and professional development which could contribute to the prevention of negligence.

It was suggested that knowledge and experience generally form part of the ability of educators to make informed decisions while exercising their professional discretion. However, several participants emphasised that their experience and knowledge is not quick adequate as the risk for negligence will always present. As a result, there is no 'one-size-fits-all' solution to each and every situation. Educators who know how to apply their knowledge and experience in any given situation, are most probably less negligent.

It was found that some educators do not have adequate school policy training and training regarding their corresponding extracurricular activities. Some of the participants felt that their training was inadequate or that novice educators who had recently joined the profession need more training especially with regard to creating a safe school environment.

The majority of the non-fee-paying school participants had not received training in their respective extracurricular activities. They relied solely on their passion and experience. Sport and recreational activities carry a massive duty and, as indicated by Joubert (2015:180), school sport contains an element of danger for the learners. Because educators are supposed to exercise a higher standard of care than non-educators, they must be qualified in the sporting codes for which they are responsible. It is significant that most participants had not received for any safety policy training. A number of the participants underlined that they would like to undergo such training as it will equip them to make better decisions and ensure better safety for the learners.

The majority of the participants believed that it was important to take precautionary measures in order to foresee accidents or incidents. Educators therefore, need a high and reasonable standard of care in order to protect learners from any potential dangers. It seems that it is not sufficient for educators to simply warn or educate learners of the dangers. They are also expected to also supervise learners and activities in order to prevent intellectual, physical or other harm (Bremner, 2014:80-81). If a reasonable person does not act on a foreseeable danger, then it could be viewed as negligence.

6.2.4 School Safety Policies

The majority of the participants demonstrated a fairly clear understanding of the difference between laws and policies. It is believed that a school's regulations, rules

and code of conduct will ultimately provide a safe and secure environment for all learners and educational professionals in schools. Hence, the aim of school safety policies is to create a safe educational environment that respects human dignity and the promotion of values. Some participants illustrated the difference between laws and policies by emphasising that laws are rules set out by lawmakers that must be followed, whereas policies are created with the intent of guiding educators' discretion. It seems that there is a common understanding that laws and policies should protect and promote democratic principles.

Although the participants demonstrated a reasonable understanding of the difference between laws and policies, it appears they are not acquainted with their own school policies, which not only increases their risk of being negligent, but undermines their need for greater decision-making autonomy.

With regard to adapting safety policies, Eberlein (2009:28) emphasises the significance of adapting the safety policy of a school to meet the particular needs and specifications of the school. To have a favourable impact on safety in a school, the safety policy must be carefully enforced, supervised, evaluated and retained. Since policies should be based on reality, it appears to remain very difficult to design a safety policy as there are so many influential factors to consider as every situation or scenario in school safety policy may be different (Joubert, 2007:116).

School safety problems do not always have a ready and perfect solution. It seems challenging for the participants to exercise their professional discretion in concert with safety policies due to so many factors that need to be considered when the law, educators' duty of care, negligence and possible liability intersect.

Implementing school policies can be challenging due to the fact that each school's circumstances differ. Successful and effective implementation is also influenced by the capacity and capability of educators. The safety policy must be thoroughly implemented, monitored, maintained and be flexible enough to enhance a positive effect on the school's safety situation.

It is of the utmost importance to rethink the approach to safety policy development to ensure that educators implement safety policies that are more flexible and adaptive to educators' professional discretion and developing growth. Participants have different opinions and perspectives in terms of the quality of their safety policies with some

believing that their safety policies are sufficient, whilst others believe their safety policies are inadequate.

Although several participants indicated that they are aware that there is a school safety policy, they have never been exposed to it. Nevertheless, it is the responsibility of educators to know what is expected of them in terms of safety. The participants who have never seen their school safety policy are more susceptible to being negligent in the future and it is highly improbable that they will be able to apply appropriate discretion. Recognition and comprehension of policy criteria thus play a major role in maintaining not only a risk-free school environment, but it also highlights the fact that educators who appropriately apply their professional discretion are those who know the importance of policies and may reduce the risk of being negligent.

6.3 CONCLUSION WITH REGARD TO THE AIMS OF THE STUDY

It is clear that the majority of participants felt restricted in their decision-making and limited in their professional discretion due to the legal and inflexible policy framework regulating their work. It is evident that the understanding and interpretation of certain school policies were dealt with differently by the participants due to their varied levels of experience, knowledge and training. The findings indicated that participants did not fully grasp the concept of professional discretion. In making decisions and exercising judgement, these participants may not be comfortable in their knowledge, experience or personal intuition.

On one hand, it seems that some educators would not hesitate to take matters into their own hands and are prepared to act in contravention of laws and policies in the best interests of learners. On the other hand, it appears that educators, who are afraid to make decisions, are more likely to make mistakes and in turn, become liable. Therefore, educators who are knowledgeable with regard to their duty of care and policy requirements are more equipped to apply and reconcile appropriate professional discretion without being negligent.

When educators exercise their discretion within the boundaries of laws and policies, they may reduce the risk of being negligent. In addition, educators who make decisions in the best interests of learners could be less likely to be liable even if they act in contravention of policy requirements. However, educators who exercise discretion

within policy requirements, could also be liable for damages whenever they misinterpret policies and fail to uphold a high standard of care towards the learners.

Although the participants generally can be regarded as experienced educators, there seems to be a lack of knowledge and confidence in their own abilities to apply discretion. In addition, an educators' capacity and ability to apply discretion is influenced by a number of external and internal factors. These factors restrict an educators' autonomy space, which could ultimately lead to the inability to apply appropriate discretion and could thus lead to a form of paralysis to uphold a high standard of care in dire situations. Therefore, in order to achieve a high standard of care, educators should not only have the ability to apply appropriate discretion, but also have the freedom to do so. The implication is that policies must have an element of flexibility to allow for such freedom and that educators must be competent enough to accept the responsibility and accountability which accompanies such discretionary freedom.

6.4 SIGNIFICANCE OF THE STUDY

Although this is a small scale qualitative study and the findings cannot be generalised the findings can be considered by policy makers at different levels. The study shed light on ways in which educators can achieve and maintain an acceptable balance between their professional discretion and policy requirements to prevent negligence. Educators tend to overstep some boundaries in terms of their professional discretion, which may be unacceptable to the parents and the SGB. This study provides insight into the understanding and application of professional discretion amongst educators, which could be useful to the school, educational professionals, learners and parents as well as the Department Basic Education.

The findings of the study highlight the duty of care, standard of care and professional discretion of educators and school management in South African schools, and their relevance to an educator's professional discretion. The findings of this study could be used by:

- Policy makers and higher educational departments that may, as a result, adapt the training of educators.
- Provincial and National Education Departments and policy makers, who could use the information to change and adapt policies or existing

documentation that would be beneficial to both the learners and the educational professionals.

- Universities, school principals, educational professionals and policy makers, who could work together to minimise potential risk of harm to learners as well as reduce possible court cases against educational professionals.

6.5 LIMITATIONS OF THE STUDY

A small sample of schools was selected as the focus of the research. A cross-section of both fee-paying and non-fee-paying urban schools only was selected. Secondly, the selected schools were all based in the same school district and did not extend to different school districts or different provinces. Thus, the results cannot be regarded as representative of occurrences in all public schools in the country. Even though I selected educators with different post level positions, more attention could be given to inclusion of school principals by creating a different interview schedule. Thirdly, the study also only focused on public schools and did not extend to independent schools. The fairly superficial knowledge and understanding of key concepts by the participants made the task of the researcher challenging in eliciting rich data.

6.6 RECOMMENDATIONS

Not much appears to have been done in South Africa to determine how principals and educators should maintain a balance between professional discretion and policy requirements without being negligent. As such I make the following recommendations:

- i. A module should be offered to all student educators which incorporates compulsory training on educational laws and policies and the application of professional discretion.
- ii. Similarly, professional development workshops that incorporate training on educational laws and policies and the application of professional discretion, should be offered to all current principals and educators.
- iii. A new monitoring system needs to be introduced by the Department of Basic Education (DBE) to ensure that all schools have the necessary policies in place to support educators with decision making and to ensure that safety policies are appropriate and relevant.

- iv. The efficiency and effectiveness of the DBE and schools need to be investigated to ensure that educators develop their professional competency to cope with serious issues such as educational and physical negligence.
- v. A cooperative system of support structures for educators should be created in schools so that educators could exercise their professional discretion during crisis situations with the inputs and support of colleagues.
- vi. Policies drafted by both the DBE and SGB should be more adaptable and flexible to allow educators to apply their professional discretion more effectively.
- vii. A mandatory safety induction for newly-appointed educators should be implemented at all schools.

6.7 SUGGESTIONS FOR FURTHER RESEARCH

Since this study focused on only twenty (20) participants and to a large extent relied on interviews as a method of data collection, its findings cannot be generalised but it has generated a number of issues that require further investigation. A similar study involving more participants, a detailed data collection process and a quantitative research methodology are needed to substantiate my findings or generate generalisable findings. In addition, a study investigating challenges educators and principals face when applying professional discretion should be conducted. This study has found that educators' decision-making processes are influenced by both internal and external factors; thus, further research is needed to explore these factors. This warrants further investigation, particularly in terms of how these factors influence professional discretion. In this regard, the following are suggested:

- A study investigating the factors as perceived by educators, which affect their professional discretion whilst acting *in loco parentis*;
- A study which examines the role that a principal's leadership practice plays in supporting educators with their decision-making processes in terms of their professional discretion;
- A study on the influence of different parenting styles in a school community and how this can influence an educator's professional discretion whilst acting in the best interests of the learners; and finally,
- A study investigating the ways in which novice and experienced educators exercise professional discretion, which could provide insight into the usefulness of training and mentorship programmes for novice teachers.

- A study that compares how different educators in their different positions (post level 1, principals, and SMT members) educators determine their level of professional discretion.

6.8 CONCLUDING REMARKS

In conclusion, it is suggested that educators would be better equipped to apply and align reasonable professional discretion with adequate training and knowledge about duty of care and policy requirements. This could significantly reduce or eliminate the risk of negligence among educators.

It is also suggested that the duty of care is a crucial element when educators apply professional discretion in the best interests of learners. Not only must educators not be negligent, they also have a responsibility to predict dangerous circumstances, unsafe conditions and make the right and rational decisions on the basis of their professional discretion. Duty of care should therefore, be a core component of the educators' decision-making as it affects the autonomy and professional discretion of an educator. It appears that it is challenging for some educators to maintain a high standard of care and act in the best interests of the learners when appropriate professional discretion is not applied. Thus, it seems that if educators do not adequately apply professional discretion, the standard of care of the learners may be jeopardised.

In conclusion, this research has revealed that in order to ensure that schools are a safe environment for learners, conducive to learning, educators need to be equipped with specialised skills and knowledge to make correct and appropriate decisions regarding the best interests and psychophysical safety of learners. Updated and relevant skills and knowledge are noticeably absent and this requires urgent interventions to be implemented to ensure that the law and policy are upheld, taking into account the intersection of duty of care, the notion of negligence, the *in loco parentis* doctrine and the educators' right to make decisions on the basis of their professional discretion. Only then will incidences like pit latrine deaths, stabbings (seven reported in the first six months of 2019), severe sporting injuries (54 serious rugby injuries reported between 2008 and 2011) and rough play injuries be circumvented (Anon., 2020).

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COURT CASES

8.1. South African court cases:

Wynkwart NO v Minister of Education and Another 2004 202 (6) SA 564 (C)

TM Jacobs v The Chairman of the Governing Body of Rhodes High School & Others:
Case no 7953/2004

Rusere v The Jesuit Fathers 1970 (4) SA 537 (RSC)

MEC for Education in Gauteng Rabie v Province 2008 (3203/2005)

Governing Body of the Rivonia Primary School and Another v MEC for Education:
Gauteng Province and Others (161/12) [2012] ZASCA 194; 2013 (1) SA 632 (SCA);
[2013] 1 All SA 633 (SCA) (30 November 2012)

Knouwds v Administrator Cape 1981 (1) SA 544 (K)

Principal of Mbilwi High School v RM 2017 (633/2016)

8.2. United States of America court cases:

Peter W v San Francisco Unified School District 1976 (131) Cal. Rptr. 854 USA

Hoffman v Board of Education 1979 (400) N.E.2d 317 USA

8.3. Great Britain court cases:

Phelps v London Borough of Hillingdon 1998 EWCA Civ 1686

ANNEXURES

Annexure A- Gauteng Department of Education Approval Letter



GAUTENG PROVINCE

Department: Education
REPUBLIC OF SOUTH AFRICA

8/4/4/1/2

GDE RESEARCH APPROVAL LETTER

| | |
|--------------------------------|---|
| Date: | 09 April 2019 |
| Validity of Research Approval: | 04 February 2019 – 30 September 2019 2018/455 |
| Name of Researcher: | Beyers R |
| Address of Researcher: | 8 Mentz Road Pierre van Ryneveld Centurion, 0157 |
| Telephone Number: | 072 846 3559 |
| Email address: | renebeyers.beyers@gmail.com |
| Research Topic: | The professional discretion of educators in preventing negligence in a restrictive regulatory environment |
| Type of qualification | Masters |
| Number and type of schools: | Two Primary and Two Secondary Schools |
| District/s/HO | Tshwane South |

Re: Approval in Respect of Request to Conduct Research

This letter serves to indicate that approval is hereby granted to the above-mentioned researcher to proceed with research in respect of the study indicated above. The onus rests with the researcher to negotiate appropriate and relevant time schedules with the school/s and/or offices involved to conduct the research. A separate copy of this letter must be presented to both the School (both Principal and SGB) and the District/Head Office Senior Manager confirming that permission has been granted for the research to be conducted.

The following conditions apply to GDE research. The researcher may proceed with the above study subject to the conditions listed below being met. Approval may be withdrawn should any of the conditions listed below be flouted:

Making education a societal priority

Office of the Director: Education Research and Knowledge Management

7th Floor, 17 Simmonds Street, Johannesburg, 2001

Tel: (011) 356 0488

Email: Felth.Tshabelole@gauteng.gov.za

Website: www.education.gpg.gov.za

above study subject to the conditions listed below being met. Approval may be withdrawn should any of the conditions listed below be flouted:

1. The District/Head Office Senior Managers concerned must be presented with a copy of this letter that would indicate that the said researcher's has/have been granted permission from the Gauteng Department of Education to conduct the research study.
2. The District/Head Office Senior Managers must be approached separately, and in writing, for permission to involve District/Head Office Officials in the project.
3. A copy of this letter must be forwarded to the school principal and the chairperson of the School Governing Body (SGB) that would indicate that the researcher's have been granted permission from the Gauteng Department of Education to conduct the research study.
4. A letter / document that outline the purpose of the research and the anticipated outcomes of such research must be made available to the principals, SGBs and District/Head Office Senior Managers of the schools and districts/offices concerned, respectively.
5. The Researcher will make every effort obtain the goodwill and co-operation of all the GDE officials, principals, and chairpersons of the SGBs, teachers and learners involved. Persons who offer their co-operation will not receive additional remuneration from the Department while those that opt not to participate will not be penalised in any way.
6. Research may only be conducted after school hours so that the normal school programme is not interrupted. The Principal (if at a school) and/or Director (if at a district/head office) must be consulted about an appropriate time when the researcher's may carry out their research at the sites that they manage.
7. Research may only commence from the second week of February and must be concluded before the beginning of the last quarter of the academic year. If incomplete, an amended Research Approval letter may be requested to conduct research in the following year.
8. Items 6 and 7 will not apply to any research effort being undertaken on behalf of the GDE. Such research will have been commissioned and be paid for by the Gauteng Department of Education.
9. It is the researcher's responsibility to obtain written parental consent of all learners that are expected to participate in the study.
10. The researcher is responsible for supplying and utilising his/her own research resources, such as stationery, photocopies, transport, faxes and telephones and should not depend on the goodwill of the institutions and/or the offices visited for supplying such resources.
11. The names of the GDE officials, schools, principals, parents, teachers and learners that participate in the study may not appear in the research report without the written consent of each of these individuals and/or organisations.
12. On completion of the study the researcher's must supply the Director: Knowledge Management & Research with one Hard Cover bound and an electronic copy of the research.
13. The researcher may be expected to provide short presentations on the purpose, findings and recommendations of his/her research to both GDE officials and the schools concerned.
14. Should the researcher have been involved with research at a school and/or a district/head office level, the Director concerned must also be supplied with a brief summary of the purpose, findings and recommendations of the research study.

The Gauteng Department of Education wishes you well in this important undertaking and looks forward to examining the findings of your research study.

Kind regards



Mr Gumani Mukatuni
Acting CES: Education Research and Knowledge Management

DATE: 12/04/2019

Annexure B- Request to Principal

Letter to the principal requesting informed consent

Dear Principal

PARTICIPATION IN THE STUDY: PROFESSIONAL DISCRETION OF EDUCATORS IN PREVENTING NEGLIGENCE

I am currently enrolled for a Master's degree in Education Management, Law and Policy at the University of Pretoria. Part of the requirements for the awarding of this degree is the successful completion of a significant research project in the field of education. This study builds on and contributes to work in the field of educators' professional discretion and the prevention of negligence.

The title of my approved research study is: *Professional discretion of educators in preventing negligence*. This study will be concerned with two primary- and two secondary schools situated within the jurisdiction of the Gauteng Department of Education, more specifically in Tshwane South.

My project is supervised by Mr André du Plessis, who is a lecturer at the University of Pretoria. The Department of Education has approved my research and a copy of the approval letter is attached to this document. The study has also been approved by the Ethics Committee of the Faculty of Education of the University of Pretoria and has been given the reference number **EM 18/10/02**.

The purpose of this letter is to request you to grant me permission to invite educators in your school to participate in this study.

The aim of this study is to investigate the reach of an educator's duty of care, the ways in which professional discretion is used and how negligence can be avoided. The data will be collected through audio-recorded interviews and document analysis. Each interview will take 30-45 minutes. Only educators who have given their consent will participate in this study. Data collected from this study will be kept strictly confidential, and neither the school nor the participants will be identifiable in any report. The data collected will be used for research purposes only. The educators who are participating may withdraw at any time during the research process without any penalty.

After I have received approval to approach educators in your school to participate in this study I will;

- Obtain informed consent from the educators, and
- Arrange time for data collection in your school (after school hours).

The findings of this study might be useful to Education Practitioners. The research study has the potential to provide insight into Education Management and Policy issues in schools. The research study presents a unique opportunity for you to get involved in the process of research to investigate the reach of an educator's duty of care, the ways in which professional discretion is used and how negligence can be avoided in South African schools.

If you are willing to participate in this study, please sign this letter as a declaration of your consent, i.e. that you are willing to participate in this project willingly, and that you understand that you may withdraw from the project at any time. Under no circumstances will the identity of the interview participants be made known to district or provincial officials or their representatives.

Thank you for taking the time to read this information.

| | | |
|-------------|-----------|-------|
| _____ | _____ | _____ |
| Participant | Signature | Date |
| _____ | _____ | _____ |
| Researcher | Signature | Date |

Yours in service of education,

| | |
|--------------------|---------------------|
| _____ | _____ |
| René Beyers | Mr André du Plessis |
| Student researcher | Supervisor |

Annexure C- Request to Participant

Letter to the principal requesting informed consent

Dear Participant

PARTICIPATION IN THE STUDY: PROFESSIONAL DISCRETION OF EDUCATORS IN PREVENTING NEGLIGENCE

I am currently enrolled for a Master's degree in Education Management Law and Policy at the University of Pretoria. Part of the requirements for the awarding of this degree is the successful completion of a significant research project in the field of education.

It is a great honour and privilege to invite you to become a voluntary participant in this research project. The title of my approved research study is: *Professional discretion of educators in preventing negligence*. This study will be concerned with two primary- and two secondary schools situated within the jurisdiction of the Gauteng Department of Education, more specifically in Tshwane South.

The aim of this study is to investigate the reach of an educator's duty of care, the ways in which professional discretion is used and how negligence can be avoided. It is my intention to gather information I require for this study project as follow:

As part of this research, interviews need to be held with educators at four schools. Within the four schools the principal along with a member of the school management team (deputy-principal or head of department) and three educators will form part of the interviewees. Each of the participants have different legal obligations, discretions, responsibilities and accountabilities as far as negligence is concerned. The educators selected must have at least three years working experience in the selected schools, prior to the research.

Your role as participant in this project will be to respond to questions put to you during the interview, and you may also ask questions of your own, to clarify any issue conceding the interview or a matter that my crop up during the interview.

You will not be asked to reveal information that will allow your identity or that of your school to be established. At no time will either you as an individual or your school be mentioned by name or indeed be allowed to be identified by any manner or means whatsoever in the research report. Where appropriate, pseudonyms will be used. To ensure that you are comfortable with the information you give, you will be provided with a confidential electronic or written transcript of your own interview and will have final approval of both its accuracy and its content. Follow-up interviews might be required to clarify some matters but this will also be voluntary and confidentially will be guaranteed.

I have included here for your information a schedule of the interview questions as part of the information gathering process. I will make an arrangement to interview you after school hours at a venue that is convenient for you.

Please understand that the choice for you to participate is entirely voluntary and that, once you have indicated your willingness to participate, permission for your participation will also be secured from the Gauteng Department of Education.

Please be assured that all the data collected from this study will be kept strictly confidential, with not even the Department of Education having access to the raw data obtained from the interviews. In addition, the data collected will be used for research purposes only. Furthermore, if you decide to participate in this study, you have the right to withdraw at any time during the research process without any penalty.

At the end of the research study you will be provided with a copy of the research report containing both the findings of the study and recommendations on how educators should balance their professional discretion and policy requirements in order to reduce the risk of negligence. I will also be willing, at your request, to present a presentation of the study.

At no time will I be in questioning or purposefully interacting with the learners at your school for either personal or research reasons. The research study presents a unique opportunity for you to get involved in the process of research to investigate the reach of an educator's duty of care, the ways in which professional discretion is used and how negligence can be avoided in South African schools.

If you decide to participate in this research study, kindly indicate this by completing the consent form at the end of this letter.

Yours sincerely

René Beyers

Student researcher

Mr André du Plessis

Supervisor

Annexure D- Consent form

CONSENT FORM

VOLUNTARY PARTICIPATION IN THE RESEARCH PROJECT ENTITLED *PROFESSIONAL DISCRETION OF EDUCATORS IN PREVENTING NEGLIGENCE*

I confirm that I have been informed about the nature of the research and that my rights have been explained to me. I have discussed the project with the researcher René Beyers, who is conducting the project for her MEd Education Management Law and Policy degree who is supervised by Mr André du Plessis in the Department of Education Management and Policy Studies at the University of Pretoria. I understand that if I consent to participate in this project and that I will be interviewed.

I understand that me my school's participation is dependent on granting permission for our participation by the Gauteng Department of Education. I further declare that I understand, as they were explained to me by the researcher, the aim, purpose, scope, benefits and methods of collecting information proposed by the researcher.

I understand that if I participate in this study my contribution will be kept confidential and will not be identifiable in any research report. I also understand that there are minimal risks associated with this study. I understand that I will remain anonymous, my participation is voluntary and willingly participate in this study. I have the right to withdraw from the project at any time during the research project. My withdrawal will not affect me in any way.

I understand that by signing the consent form I am agreeing to participate in this study. I also understand that my contribution will be used primarily for a Research Project for the MEd Education Management Law and Policy degree.

Participant's name: _____

Date: _____

Signature: _____

SCHOOL STAMP

Annexure E- Interview Schedule

PROFESSIONAL DISCRETION OF EDUCATORS IN PREVENTING NEGLIGENCE

Research Question: How do primary and secondary school educators reconcile professional discretion with policy requirements in order to prevent negligence?

Sub-questions

The main research question above is complemented by the following sub-questions:

- How do educators interpret their 'duty of care'?
- How do educators interpret 'professional discretion'?
- How do educators understand the difference between law and policy?
- In the opinion of educators, what are the standards of professional discretion required to prevent negligence?

Time of interview _____ Duration _____

Date _____

Interviewer _____

Interviewee _____ Pseudonym _____

Male/Female _____

School Name _____

Interview Schedule:

Please remember that your answer to all of these questions will be treated in the strictest confidence and that at no time will I allow you or your school to be identified either by name or by implication by any reader of the findings if this research.

1. Please confirm the following basic biographical information about your school:
 - Is your school a fee-paying or non-fee-paying school?
 - the number of learners enrolled:
 - the number of staff members employed at your school:
2. Please confirm the following basic biographical information about yourself:
 - years of experience in education
 - years of experience as a principal (if applicable)
 - years of experience as a deputy-principal (if applicable)
 - years of experience as a Head of Department (if applicable)
3. What are extracurricular activities or sport you are involved in?
4. What training have you received for the specific sport activities? – Name the level of training and years of experience.
5. How do you interpret the concept “professional discretion”?
 - a) How and when do you apply professional discretion?
6. What does the term negligence in a school environment mean to you?
7. How do you understand your duty of care towards the learners?
8. In your opinion, what factors influence your professional discretion?
9. Have you ever deviated from laws and policies whilst making a decision to safeguard learners? – If yes, please elaborate with an example of such case.
10. Do you feel that factors such as your personality, training and experience influence your decision-making in crisis situation? Explain your answer.

11. How do rigid laws and policy inflexibilities influence your decision-making in a crisis situation?
12. Does your school have a safety policy? What is your opinion of the school safety policy, and how does this policy influence your decision-making when it comes to the learners?
 - a) Have you ever come across an educator who has breached their duty of care, in result became liable for injuries or even academic negligence?
 - b) Have you ever felt the need to act in contravention to a policy in order to ensure the best interest of a learner?
 - c) In your experience, have there been any instances where you would re-evaluate your actions by changing or acting differently in certain situations to ensure the best interest of a learner or learners?
 - d) Have you ever made a decision with regards to the learners in your care, which went beyond the requirements of school safety policies for the best interest of the learner? If, yes please elaborate.
13. How do you manage the prevention of accidents or incidents in your classroom or at school?
14. Have you had any sort of training or preparation with regards to school safety policies and requirements of those policies? – Who provided this training?
15. In what way does your teacher training help you with the ability to make decisions with regards to learners' safety?
16. Do you feel that you have enough knowledge and experience to reduce the risk of being negligent? Please explain your answer.
17. What is your understanding of the difference between laws and school policies?
18. In your opinion, what is the greatest NEED your school has with regards to creating a safe and secure school environment?
19. What in terms of policy requirements influences your professional discretion or decision making towards learner safety?

20. Are there any comments, suggestions or general statements regarding education negligence, law and policy requirements, your professional discretion as well as your duty of care in general that you would like to make?