IN THE HIGH COURT OF SWAZILAND

Civ. T.521/91

In the matter of

LOGWAZELA PATRICK KUNENE — Plaintiff

and

DUMISA DLAMINI — 1st Defendant
LUSAKO DLAMINI — 2nd Defendant
MAGONGOLWENI MKHWELI — 3rd Defendant

CORAM : Hull, C.J.
FOR PLAINTIFF : Mr. V. Dlamini
FOR DEFENDANTS : Mr. W. Mthembu

J U D G M E N T
(23/04/93)

Hull, C.J.

The plaintiff, Mr. Kunene, is a shopkeeper in the Lwandle area near Manzini.

During an evening in November of 1990, his shop was broken into. A large number of items were stolen and the door to the premises was damaged.

The three defendants live in the area in rural homesteads in the traditional way. Their homesteads are considerable distances apart from each other's. The defendants are mature men. Each has a large family, still living at home, of several children.

The first defendant has a son who was about 17 at the time of the incident. The second defendant has a son who was

2/.....

then a good deal younger, and the third defendant one who was even younger than that. The second and third defendants were unsure as to the ages of their boys, but from all of the evidence it appears that they were about 14 and 12 respectively at the time, though possibly a little younger.

The plaintiff testified that in a meeting with the Indvuna, at which the boys and their fathers were present, the children admitted that they were the culprits. He also said that the fathers asked him not to cause the boys to be prosecuted but instead to accept compensation from them, and that he agreed to this course. In the event they did not pay him, and he brought this present action to recover damages for the losses and damage suffered by him.

The Indvuna, Mr. Mkhabela, gave evidence for the plaintiff. He testified that there had been a meeting between the parties, in the presence of the children, and that the boys had admitted their role in the break-in. He also said that the fathers had asked the plaintiff not to bring a prosecution but instead to take compensation, and that the plaintiff had accepted that proposal.

The case, for which counsel had originally given an estimate of one day for trial, in the event took longer. It had to be adjourned for a further fixture. The defendants gave evidence in their own behalf this month, several months after the plaintiff's testimony and some time after the Indvuna gave evidence.

The first defendant said that he and his wife slept in one hut in their homestead and their children in several other huts there. It was his habit, after the family had had their evening meal, to check to see that all the children were in their huts before he retired. He had done so on the

3/....

night in question. They were all there. In the morning he had called the son who was involved in the incident to help him. He was saying that in the morning he found the boy at home and that it was not until later that he learned that he was accused of breaking into the shop.

The other defendants gave similar accounts. They said that they slept with their wives in their own huts and that the children slept in other huts within their homesteads. They also said, in effect, that they made sure that the children were in their huts before they themselves retired to bed. The evidence of these two defendants was that their sons shared huts with other children of their respective families.

The defendants' recollection of the events that followed the break-in differed from that of the plaintiff and the Indvuna.

The first defendant testified that after he was informed of the incident, he was called to a meeting at the Chief's kraal. He said that the plaintiff , the Indvuna and the other defendants were present, as well as the children who admitted their actions. He said that they were then told by the Indvuna that the matter would have to be postponed until after the Incwala ceremony. Later he was informed that the defendants had in their absence been fined E672 each. Still later, at another meeting at the chief's kraal he was shown a document - a summons - demanding E4000. He and the other defendants were then told to consult a lawyer, which they did.

He denied that the defendants had ever agreed to compensate the plaintiff. His version of events was that the defendants told the plaintiff that he should prosecute the children but that the latter refused to do so.

The second defendant also said that the matter had been postponed until after the Incwala ceremony. At a subsequent meeting he alone had been present when the defendants were ordered to make payments, and he himself was not permitted to remain when that decision was made. The plaintiff had been present but the Indvuna was not there and he, the second defendant, was informed by the secretary to the Inner Council that compensation had to be paid. He also said that he heard - apparently later - that they had to pay between E600 and E700 each. He said that he refused to do this and told the plaintiff that he should prosecute his son.

The third defendant agreed with the others that the Indvuna had told them that the matter would be postponed until the conclusion of the Incwala ceremony. He said that the only other meeting he had been called to was the one at which the summonses in this present action were served. He denied that he had ever offered to pay compensation.

All three of the defendants testified that their sons had never been in trouble before. They said that they had not in fact paid compensation to the plaintiff.

The plaintiff's particulars of claim do not allege a cause of action based on a settlement or compromise. They do not allege either, in terms, that each of the defendants was negligent in controlling his son. What they do aver in paragraph 7 (having earlier recited the narrative of alleged events) is that the defendants "as parents were duty bound to control their minor children", and in paragraph 8 that they "failed to control their minor children". The defendants asked for and obtained further particulars of these two allegations. In response, the plaintiff said (in respect of paragraph 7) that the defendants "as parents have to exercise parental control over their minor children" and

(in respect of paragraph 8) that they failed to control them "in that their minor children broke into the shop ....". In their plea, the defendants denied the allegations in paragraph 7 and put the plaintiff to "strict proof". They further averred that the plaintiff had not set out sufficient grounds for the liability of the defendants. They repeated the substance of these averments in respect of paragraph 8 of the particulars of claim.

The relevant basis, in the present circumstances, on which a person will be liable for the wrongful act of his minor child is if he is negligent in allowing or affording the child the opportunity of doing mischief: see Mckerron, The Law of Delict 7th Edition at page 82 and the cases there cited at note 42. See also Boberg, The Law of Persons and the Family, at page 677 onwards. A custodial parent must take reasonable steps to prevent his child from causing foreseeable damage, a failure to do so being the basis of the parent's liability.

No issue has been raised in these proceedings as to the jurisdiction of this court. At the close of the plaintiff's case the defendants did apply for absolution from the instance on the basis that the evidence did not disclose a prima facie case against them. Their counsel did not, however, seek to argue orally, then or subsequently, that the plaintiff's pleadings did not disclose a cause of action in law. The case was approached, on both sides, on the basis that in order to succeed the plaintiff had to show that the defendants were negligent in failing to control their children. I propose myself to deal with the matter on the basis that negligence is impliedly alleged in the pleadings: see De Beer v Sergeant 1976 (1) SA 246 T.

The issue, as in the English case of Donaldson v McNiven [1952] 2 All E.R, 691 (CA), cited in McKerron at note 42 on

page 82, is one of supervision. The question here is whether a reasonably prudent parent would have foreseen that his child was likely, if unsupervised, to leave the homestead during the night and break into the store, and would taken reasonable steps to have guarded against that.

I prefer the evidence of the plaintiff and of the Indvuna to that of the defendants as to what occurred after the incident was discovered. The Indvuna is, apparently, an independent witness. The evidence shows that the children, for their part, admitted that they had broken into the shop. In their cross-examination of the plaintiff and his witness, the defendants did not put their version fully. I believe that the truth of the matter is that the fathers did ask the plaintiff not to prosecute their children and did offer to pay him compensation.

But the plaintiff has not brought this action by way of enforcing an alleged compromise or settlement. The question here is whether the fathers were negligent in supervising their sons during the night.

The evidence before me is that the parents did check on their children before they went to sleep, to make sure they were in their huts. It is, as I understand it, a feature of rural life in Swaziland that families live on homesteads on which parents sleep in one hut and children in others. On one view it seemed to me at first that it might be thought that that circumstance imposes on such parents a higher onus to be aware of the possibility that their children may get out during the night and do mischief. An urban dweller taking his family into the country, so it seemed to me, might be more concerned to watch his children more closely while they were by themselves at night in such circumstances. But on consideration, I do not see a greater need for vigilance on the part of rural dwellers. None has

been suggested here by the plaintiff. The homestead, with its separate huts within it for parents and children, is part of the way of life. It is, really, just as easy for a wayward child who is so inclined to slip out of a suburban house during the night to get into trouble. In principle, I do not see any difference between the two settings.

In the present case, on the evidence, the fathers did check that their children were in their huts before they themselves retired. It has not been shown that any of the boys, previously, had cause trouble; on the contrary the defendants say that they had never done so.

The plaintiff's own pleadings suggest something of a difficulty in his case. He avers simply that the defendants did not exercise parental control. Their vicarious liability for their sons' actions is nevertheless not strict. They can only be liable on a basis of negligence in the present context. In his pleadings the plaintiff has not specified the ways in which they were allegedly negligent and in his oral submissions, Mr. Dlamini did not (except in one respect) go beyond bare assertions that there must have been laxity in parental control and that they were not under proper control.

He did submit that there must have been, by inference, a measure of planning involved in the episode, the boys having come together from some distances in order to carry out the break-in. However even assuming, for the argument, that that was the case, it does not in my view give rise - on a balance of probabilities - to a further inference that the fathers therefore had reason to be alert to the fact that something was afoot.

8/.....

I do not consider either that it can be inferred, as a matter of fact, from the offer of compensation made by the fathers that they were thereby acknowledging that they themselves had been negligent in supervising their children. The point of the offer, I think, was to try to avoid the prosecution of their sons.

The circumstances, unlike those in Lewis v Carmathenshire County Council 1953 2 All E.R. 1403 (CA) where a very young child of four, left unattended in a nursery room for a few minutes, wandered on to a road and caused a fatal accident do not give rise to a prima facie inference of liability. The children here were much older. Boys of this age can and do commit misdemeanours, notwithstanding the absence of negligence on the part of her parents.

In the end, although I have a good deal of sympathy for the plaintiff I do not consider that he has succeeded in proving that the defendants were negligent. As Lord Goddard said in Donaldson v McNiven a parent cannot be watching his son all day and every day - a fortiori all night and every night. The fathers' uncontradicted evidence here is that their sons had never previously been in trouble of the kind in point, and that they did check in the evening to make sure that the children were in their huts. In those circumstances, they are not shown to have been negligent in the supervision of their children. Accordingly I give judgment, with costs in their favour, for the defendants.

D. Hull.

David Hull
CHIEF JUSTICE