The potential delictual liability of non-vaccinating parents in South Africa

by

Liesl Hager

Submitted in fulfilment of the requirements for the degree

(LLD)

In the Faculty of Law,

University of Pretoria

Date

(2023 July)

Supervisor : Prof Elsabe Schoeman

Co-supervisor : Prof Emile Zitzke

I DECLARATION OF ORIGINALITY

University of Pretoria

Declaration of originality

Full names of student: Liesl Hager

Student number: 14229634

(1) I understand what plagiarism is and am aware of the University's policy in this regard.

(2) I declare that this LLD THESIS is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

(3) I have not used work previously produced by another student or any other person to hand in as my own.

(4) I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Liesl Hager

27 July 2023

II THESIS SUMMARY

This thesis explores the potential delictual liability of non-vaccinating parents in South Africa for the harm caused to another by failing to have their child vaccinated. The South African common-law delict is explored with specific reference to the five common-law delictual elements, as well as the three historic actions: the *actio iniuriarum*; the Germanic action for pain and suffering; and the *actio legis Aquiliae*.

In Chapter 1, the reader is introduced to the research topic, and specifically the issue of non-vaccination, what it entails for purposes of this thesis, and why the non-vaccination of a child may potentially attract delictual liability. Chapter 2 explores non-vaccination in greater detail, including the importance of vaccination, a short overview of the history of non-vaccination, and why non-vaccination is still regarded as a global health threat. Non-vaccination is considered against a constitutional backdrop in Chapter 3 to establish whether children have an express or implied constitutional right to vaccination and whether or not parents have a corresponding duty to vaccinate their children. Chapter 3 also considers the common-law rights of parents as well as the role of the Children's Act in the constitutional conundrum. Foreign-law considerations regarding the potential civil liability of non-vaccinating parents are considered in Chapter 4 with reference to foreign case law and legislation. The South African common-law delict is explored in Chapter 5 and each delictual element is considered in detail to establish whether non-vaccinating parents could possibly face delictual liability for the harm caused to others by their failure to have their child vaccinated. In Chapter 6 recommendations for statutory reform are made with reference to the consequences of imposing delictual liability and to assist litigants in a delictual suit. Chapter 7 concludes the thesis with a short summary of the chapters and concluding remarks.

Keywords: non-vaccination; anti-vax; delictual liability; children's rights; negligence; torts; duties; breach; best interests; common-law delict; wrongfulness; harm; conduct; causation; fault.

III ACKNOWLEDGEMENTS

FINANCIAL ASSISTANCE ACKNOWLEDGEMENTS

Thank you to the Skye Foundation, its Trustees, and Dr NI Passmore (Deputy Chairman) for your funding towards the costs of this study. The Skye Foundation's funding from 2021 to 2023 is a tremendous privilege and I thank you for your generous financial assistance and continued support throughout the course of completing this degree.

PERSONAL ACKNOWLEDGEMENTS

To my family, friends, and colleagues, thank you for bearing with me throughout this journey and for your patience and love and support. Thank you for entertaining all my legal monologues and debates on non-vaccination, as well as the occasional foreign law titbits and "did you know" talks.

Thank you to my father, Seifert Hager, and Landi. Thank you to my mom, Erika; the twins, Ilona and Gisela; and my fiancé, Ryan. Jean-Marie, my best friend, Lizette Hermann, and Prof Melodie Labuschaigne, thank you too. Your continued support, love, and regular check-ins made this journey extraordinary. Thank you to the Centre for Human Rights, and the Pretoria University Law Press (PULP), for supporting me throughout this journey and Prof Charles Fombad and Prof Frans Viljoen.

A special thank you to Prof Elsabe Schoeman and Prof Emile Zitzke. Your dedication to the law of delict and your support, assistance, and expert guidance during this journey is unmatched. You have sparked a new-found appreciation for legal research and forward-thinking. Prof Zitzke, I now know and understand why "one textbook won't cut it".

DEDICATION

To my father, Seifert Hager, thank you for your unconditional love and support throughout this journey. I dedicate this thesis to you.

TABLE OF CONTENTS

IV LIST OF ABBREVIATIONS AND ACRONYMS

ABAJ	*American Bar Association Journal*
ABQB	Court of Queen's Bench of Alberta
ACDP	African Christian Democratic Party
AD	South African law reports, Appellate Division 1910–1946
AHRLJ	*African Human Rights Law Journal*
AJ	Acting Judge
AJA	Acting Judge of Appeal
AJICL	*Arizona Journal of International and Comparative Law*
AJLM	*American Journal of Law and Medicine*
AJPH	*American Journal of Public Health*
All SA	All South African Law Reports
ALRC	Australian Law Reform Commission
AP	Acting President
BCLR	Butterworths Constitutional Law Reports
BCLR	*Boston College Law Review*
BCMJ	*BC Medical Journal*
BCPC	Provincial Court of British Columbia
BGB	*Bürgerliches Gesetzbuch*
BGH	*Bundesgerichtshof*/German Federal Court of Justice
BoR	Bill of Rights
Bundesgerichtshof	German Federal Court of Justice
Bundesverfassungsgericht	German Federal Constitutional Court
Burgerlijk Wetboek	Dutch Civil Code/BW
BVerfG	Federal Constitutional Court/*Bundesverfassungsgericht*
BW	*Burgerlijk Wetboek*/Dutch Civil Code
CAM	Complementary and alternative medicine
CANSA	Cancer Association of South Africa
CC	Constitutional Court
CCOs	Cancer Control Organisations
CCR	*Constitutional Court Review*
CDC	Centers for Disease Control and Prevention
Ch	Chapter
Children's Act	Children's Act 38 of 2005
CJ	Chief Justice
CJLPP	*Cornell Journal of Law and Public Policy*
CLJ	*Cambridge Law Journal*
CLoSA	Constitutional law of South Africa
Constitution	Constitution of the Republic of South Africa, 1996
COVID-19	Coronavirus disease
CWILJ	*California Western International Law Journal*
DCJ	*Defense Counsel Journal*
DCJ	Deputy Chief Justice
DEP	Department
DJLJ	*De Jure Law Journal*
DJP	Deputy Judge President
DLR	*Drake Law Review*
DNA	Deoxyribonucleic Acid

DoE	Department of Education
DoH	Department of Health
DP	Deputy President
DPP	Director of Public Prosecutions
DSS	Department of Social Services
ECDC	European Centre for Disease Prevention and Control
EJCL	*European Journal of Comparative Law and Governance*
EJE	*European Journal of Epidemiology*
EJP	*European Journal of Psychotraumatology*
EPI	Expanded Programme on Immunisation
EPI-SA	Expanded Programme on Immunisation in South Africa
ERPL	*European Review of Private Law*
EU	European Union
EVIP	European Vaccination Information Portal
FamCA	Family Court of Australia
FamCAFC	Family Court of Australia, Full Court
FC	Final Constitution (Constitution of the Republic of South Africa, 1996)
FTB	Family Tax Benefit
Gerechtshof Den Haag	Hague Court of Appeal
GHAMS	*Gerechtshof Amsterdam*
GHARL	*Gerechtshof Arnhem-Leeuwarden*
GHDHA	*Gerechtshof Den Haag*
GHLEE	*Gerechtshof Leeuwarden*
GHSHE	*Gerechtshof's-Hertogenbosch*
GJPLR	*Global Journal of Politics and Law Research*
Grundgesetz	German Constitution/Basic Law
GVAP	Global Vaccines Action Plan
HC	High Court
HCA	High Court of Australia
HIV	Human Immunodeficiency Virus
HOD	Head of Department
HPCSA	Health Professions Council of South Africa
HR	*Hoge Raad*
HRPS	*Health Research Policy and Systems*
HVI	*Human Vaccines and Immunotherapeutics*
ICJ	*International Commission of Jurists*
IJID	*International Journal of Infectious Diseases*
IJP	*Indian Journal of Psychiatry*
IJTLD	*International Journal of Tuberculosis and Lung Disease*
IMR	*Integrative Medicine Research*
IRLCT	*International Review of Law, Computers and Technology*
J	Judge
J&J	Johnson & Johnson
J. Health Care L. & Pol'y	*Journal of Health Care Law and Policy*
JA	Judge of Appeal
JLME	*Journal of Law, Medicine and Ethics*
JME	*Journal of Medical Ethics*
JML	*Journal of Media Law*
JP	Judge President

LAWSA	Law of South Africa
LOC	Library of Congress
MCC	Medicines Control Council
Med J Aus	*Medical Journal of Australia*
MJLH	*McGill Journal of Law and Health*
MLR	*Michigan Law Review*
MMR	Measles, Mumps, and Rubella
MULR	*Melbourne University Law Review*
NHA	National Health Act 61 of 2003
NICD	National Institute for Communicable Diseases
NIP	National Immunisation Programme
NJLP	*Netherlands Journal of Legal Philosophy*
NSSC	Supreme Court of Nova Scotia
NSW	New South Wales
NSWCA	New South Wales Court of Appeal
OAU	Organisation of African Unity
OJLS	*Oxford Journal of Legal Studies*
ON HSARB	Health Services Appeal and Review Board, Ontario
ONCJ	Ontario Court of Justice, Ontario
ONSC	Superior Court of Justice, Ontario
P	President
PAI	*Pathogens and Immunity*
PAIA	Promotion of Access to Information Act 2 of 2000
PELJ	*Potchefstroom Electronic Law Journal*
PESC	Supreme Court of Prince Edward Island
PHR	*Parket bij de Hoge Raad*
POPIA	Protection of Personal Information Act 4 of 2013
PTSD	Post-Traumatic Stress Disorder
QHLJ	*Quinnipiac Health Law Journal*
RAF	Road Accident Fund
RBDHA	*Rechtbank Den Haag*
RBGEL	*Rechtbank Gelderland*
RBGRO	*Rechtbank Groningen*
RBMNE	*Rechtbank Midden-Nederland*
RBNHO	*Rechtbank Noord-Holland*
RBNNE	*Rechtbank Noord-Nederland*
RBOBR	*Rechtbank Oost-Brabant*
RBROT	*Rechtbank Rotterdam*
Rechtbank Gelderland	Gelderland District Court
RSA Gov	South African Government
RSO	Revised Statutes of Ontario
S	Section
SAFP	*South African Family Practice*
SAGE	Strategic Advisory Group of Experts
SAJBL	*South African Journal of Bioethics and Law*
SAJHR	*South African Journal on Human Rights*
SAJS	*South African Journal of Science*
SALJ	*South African Law Journal*
SAMJ	*South African Medical Journal*
SAPL	*Southern African Public Law*

SAPS	South African Police Service
SCA	Supreme Court of Appeal
SCC	Supreme Court of Canada
SDLR	*San Diego Law Review*
SFCDCP	San Francisco, Department of Public Health
SIDS	Sudden Infant Death Syndrome
SJ	*Speculum Juris*
SKQB	Court of King's Bench for Saskatchewan
SLPS	*Studies in Law, Politics, and Society*
SLR	*Stellenbosch Law Review*
Ss	Sections
STIKO	Standing Committee on Vaccination
TB	Tuberculosis
TECLF	*Tulane European and Civil Law Forum*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TJB	*The Judges' Book*
TLR	*Tulsa Law Review*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
UCLR	*University of Cincinnati Law Review*
UJIEL	*Utrecht Journal of International and European Law*
UK	United Kingdom
ULR	*Utrecht Law Review*
UMKCLR	*University of Missouri-Kansas City Law Review*
UNICEF	United Nations Children's Fund
US	United States
Vax/vaxx	Vaccine(s)/vaccination(s)
VHS	Vaccine hesitancy scale
WCEP	Western Cape Education Policy
WHO	World Health Organisation
WILMAP	World Intermediary Liability Map
Working Group	Working Group on Vaccine Safety
YJBM	*Yale Journal of Biology and Medicine*

V LIST OF FIGURES

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Vaccines are hailed as one of the most successful public health interventions[1] and one of modern medicine's greatest achievements.[2] To understand this it is necessary to understand what a vaccine is. The Centers for Disease Control and Prevention (CDC) defines a vaccine as:

> A preparation that is used to stimulate the body's immune response against diseases. Vaccines are usually administered through needle injections, but some can be administered by mouth or sprayed into the nose.[3]

Vaccination or to vaccinate — on the other hand, refers to the administration of a vaccine and may be described as the "act of introducing a vaccine into the body to produce protection from a specific disease".[4] Immunisation refers to the "process by which a person becomes protected against a disease through vaccination. This term is often used interchangeably with vaccination or inoculation",[5] although strictly speaking it is not the same thing.

For introductory purposes, it suffices to point out that the vaccines — against COVID-19[6] — may prevent serious illness and even death.[7] In essence, vaccines and immunisation are important for the health and safety of individuals, especially children, and society at large. Vaccines and immunisation aim to prevent and control the outbreak and spread of numerous

---

1 See DR Walwyn & AT Nkolele "An evaluation of South Africa's public-private partnership for the localisation of vaccine research, manufacture and distribution" (2018) 16(1) *HRPS* 31; EO Oduwole *et al* "Current tools available for investigating vaccine hesitancy: a scoping review protocol" (2019) 9(12) *BMJ Open* 1.

2 See World Health Organisation (WHO) "Immunisation" (5 December 2019) https://www.who.int/news-room/facts-in-pictures/detail/immunization (accessed 05 June 2022).

3 See CDC "Immunisation: The basics. Definition of terms" (1 September 2021) https://www.cdc.gov/vaccines/vac-gen/imz-baics.htms (accessed 05 June 2022).

4 As above.

5 As above. Although "vaccination" and "immunisation" are often used interchangeably, their meanings are not the same. Vaccination refers to a vaccine that is administered, usually by injection. Immunisation refers to the immune system's reaction to the vaccination. See also NPS Medicine Wise "Vaccines and immunisation" (3 September 2020) https://www.nps.org.au/consumers/vaccines-and-immunisation#:~:text=Vaccination%20%20is%20when%20a%20vaccine,become%20immune%20to%20the%20infection (accessed 30 June 2020).

6 See WHO "Coronavirus disease (COVID-19)" (date unknown) https://www.who.int/health-topics/coronavirus#tab=tab_1 (accessed 30 November 2022): "Coronavirus disease (COVID-19) is an infectious disease caused by the SARS-CoV-2 virus".

7 See CDC "Benefits of Getting a COVID-19 Vaccine" (19 June 2022) https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html#:~:text=COVID%2D19%20vaccination%20helps%20protect,have%20mild%20or%20severe%20illness (accessed 05 July 2022).

infectious, chronic diseases, and certain forms of cancer.[8] They have successfully eradicated certain diseases (e.g., smallpox in 1979) and aim to eradicate other infectious diseases, polio, for example.[9] Vaccines aid in preventing the deaths of especially children, by preventing diseases such as measles and tetanus.[10] Essentially, this allows children the opportunity to grow, attend school (especially where vaccination is an enrolment requirement), and live healthy lives.[11]

Despite the great strides made in modern medicine and science, vaccination uptake is not optimal, and certain individuals still refuse vaccinations. Notably, non-vaccination and anti-vaccine sentiments have recently gained greater traction due to the COVID-19 pandemic and the roll-out of COVID-19 vaccines globally and in South Africa.[12] To illustrate the continued issue of non-vaccination, the World Health Organisation (WHO) listed "vaccine hesitancy" as one of the leading global health threats in 2019,[13] and vaccine hesitancy and non-vaccination may aptly be described as a global social crisis.

Before exploring the vaccine-attitude spectrum or continuum it is important to understand the difference between: (1) vaccine hesitancy; (2) vaccine refusal or resistance; (3) vaccine-attitude spectrum or continuum; (4) anti-vaccination; and (5) my umbrella term "non-vaccination". The purpose of the distinction between anti-vaxxers, vaccine-hesitant parents, and my overarching term, "non-vaccinating parents", is to avoid confusion regarding intent, negligence, and omissions for purposes of establishing common-law delictual liability.

---

8 See WHO "Immunisation" (5 December 2019) https://www.who.int/news-room/facts-in-pictures/detail/immunization (accessed 05 June 2022).

9 See GAVI "The power of vaccination" (date unknown) https://www.gavi.org/vaccineswork/value-vaccination?gclid=Cj0KCQjwxtSSBhDYARIsAEn0thRyiHLDJRFLrlSV-X4aYm1ZJWlZaE4sEqlPAvhGzQmzgfK-65Zn2a0aAv_sEALw_wcB (accessed 05 June 2022).

10 As above.

11 As above.

12 See T Monama "ACDP takes health department to court over COVID-19 vaccine for children" (2021) https://www.news24.com/news24/southafrica/news/acdp-takes-health-department-to-court-over-covid-19-vaccine-for-children-20211109 (accessed 05 June 2022).

13 WHO "Ten threats to global health in 2019" (2019) https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (accessed 10 March 2020). See also WHO "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020). The COVID-19 pandemic and vaccine issues (e.g., misinformation, equitable access) feature on WHO "10 global health issues to track in 2021" (24 December 2020) https://www.who.int/news-room/spotlight/10-global-health-issues-to-track-in-2021 (accessed 04 February 2021).

1.1.1 Vaccine hesitancy

Vaccine hesitancy is defined as a "delay in acceptance or refusal of vaccination despite [the] availability of vaccination services".[14] Vaccine hesitancy more correctly implies the broader range of immunisation concerns. However, as vaccine hesitancy is the term more commonly used, the WHO's Strategic Advisory Group of Experts (SAGE) Working Group on Vaccine Safety (SAGE Working Group) accepted the term "hesitancy" and explored potential factors required in its definition.[15]

1.1.2 Vaccine refusal

Although vaccine refusal is a more extreme form of vaccine hesitancy, it is included in the scope of vaccine hesitancy.[16] The term "vaccine hesitancy" includes vaccine refusal and delay, which together constitute the "vaccine attitude spectrum or continuum".

1.1.3 Vaccine attitude spectrum or continuum

The vaccine attitude spectrum or continuum includes those individuals who accept all vaccines on time (total acceptance) at one end of the spectrum, and those who outright refuse any and all vaccines (complete or outright refusal) at the other end.[17] In the middle are the hesitant individuals who accept certain vaccines but refuse others.[18] "Hesitancy" and "confidence" have been used in the literature to describe those individuals who fall in the middle of "a continuum, ranging from complete refusal to complete acceptance of all recommended vaccines administered at the recommended times".[19] Both vaccine-hesitant and vaccine-confident

---

14 F Verelst *et al* "Drivers of vaccine decision-making in South Africa: a discrete choice experiment" (2019) 37(15) *Vaccine* 2087; Oduwole *et al* (2019) *BMJ Open* 2. See also H Bedford *et al* "Vaccine hesitancy, refusal and access barriers: the need for clarity in terminology" (2018) 36(44) *Vaccine* 6556–6558.

15 K Tull "Vaccine hesitancy: guidance and interventions" University of Leeds Nuffield Centre for International Health and Development, (2019) K4D Helpdesk Report, commissioned by the UK Department for International Development 4.

16 Oduwole *et al* (2019) *BMJ Open* 2.

17 Verelst *et al* (2019) *Vaccine* 2087. See also SAGE "Report of the Sage Working Group on Vaccine Hesitancy" (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 8; WHO "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020).

18 SAGE "Report of the Sage Working Group on Vaccine Hesitancy" (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 8; WHO "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020).

19 Tull (2019) 4. See also SAGE "Report of the Sage Working Group on Vaccine Hesitancy (12 November 2014) https://www.asset-

individuals fall between the two extremes of vaccine acceptance and vaccine refusal as they may accept or reject certain vaccines, but neither completely reject nor completely accept all vaccines. They are sitting on the fence by accepting or rejecting certain vaccines based on confidence and hesitancy.

The SAGE Working Group has identified four vaccination behaviour profiles that slot into the vaccine attitude spectrum: (1) active demand; (2) passive acceptance; (3) vaccine hesitancy; and (4) vaccine refusal.[20]

In summary, the vaccine-attitude spectrum or continuum consists of three main categories: (1) total or complete vaccine acceptance; (2) vaccine hesitancy and confidence; and (3) complete or total vaccine refusal. The first refers to those individuals who accept all vaccines and vaccinations in their entirety and on time (even if they are unsure). The second refers to partial vaccine resistance, delay, refusal, and acceptance. In the second category, there is neither complete acceptance nor complete refusal of vaccines and vaccination. Individuals may accept some vaccines (also referred to as "passive acceptance") while refusing others ("hesitancy") despite the availability of vaccination services. The delay in or failure to vaccinate may be rooted in reasons such as low vaccine supply or personal or religious objections to vaccines and vaccination. This category includes those "non-vaccinating individuals" who accept and reject some vaccines and vaccinations.

The last category refers to complete or total vaccine refusal. This category comprises those individuals who refuse all vaccinations and vaccines in their entirety, also referred to as anti-vaxxers. Non-vaccinating individuals thus fall in either category two or three but not in category one.

To illustrate the vaccine attitude spectrum and the vaccination behaviour categories discussed above, consider the following figure:

scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 8–9.

20 Verelst *et al* (2019) *Vaccine* 2087; SAGE "Report of the Sage Working Group on Vaccine Hesitancy (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 11; Oduwole *et al* (2019) *BMJ Open* 2.

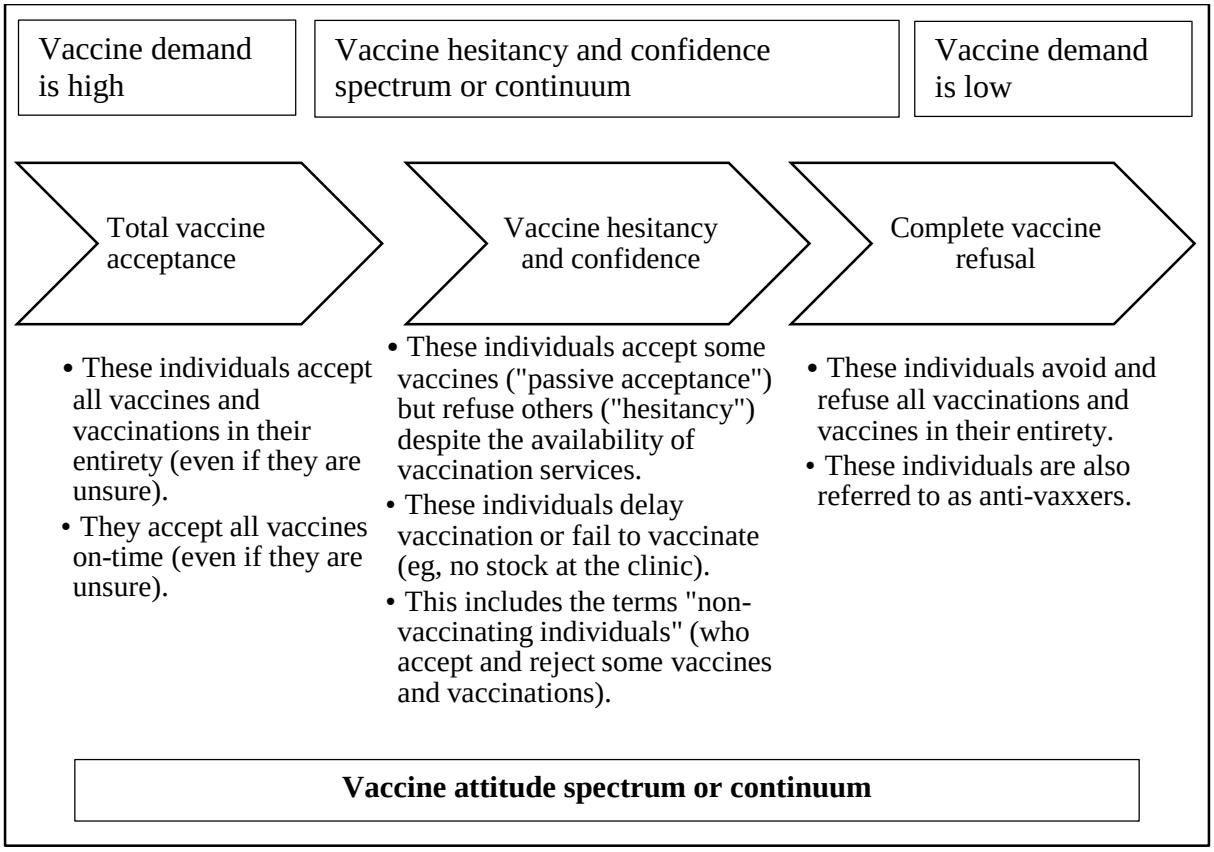

Figure 1: Vaccine continuum or vaccine attitude spectrum.

1.1.4 Anti-vaccination

The term "anti-vaxxers" is generally used to describe the group of individuals who oppose vaccination in its entirety.[21] Notably, "anti-vaxxers" are included in the scope and definition of vaccine hesitancy and fall within the vaccine attitude spectrum. However, not all vaccine-hesitant individuals are necessarily "anti-vaxxers".

1.1.5 Umbrella term "non-vaccination"

For purposes of this thesis, the terms "non-vaccination" and "non-vaccinating" are used and refer to those parents who do not vaccinate their children. Non-vaccinating parents are included in the scope of vaccine-hesitant individuals within the vaccine hesitancy continuum (as indicated in Figure 1).

Although "non-vaccination" includes vaccine hesitancy, the term "hesitancy" is avoided in the general discussion to minimise confusion regarding intent and negligence (forms of fault for purposes of the common-law delict).

[21] A Giubilini *The ethics of vaccination* (2018) 8.

Non-vaccination thus includes parents who intentionally avoid all vaccinations and vaccines (anti-vaxxers), and those who unintentionally fail to vaccinate their children (for whatever reason and regardless of intent, e.g., the clinic does not have the vaccine in stock). The term "non-vaccination" does not include individuals who accept all vaccines on time but covers those individuals who accept or reject some vaccines and those who refuse all vaccines and vaccinations.

Contextualising non-vaccination on the vaccine attitude spectrum or continuum is only the point of departure in understanding non-vaccination. To understand why individuals do not vaccinate, the factors fuelling non-vaccination must be determined by exploring the various cultural and/or religious motivations of these non-vaccination groups. There are various factors or causes that influence non-vaccination.[22] This aspect is explored in Chapter 2. These factors are generally used to formulate an approach to address non-vaccination.

1.1.6 Addressing non-vaccination

The WHO has noted that to address non-vaccination it is important that countries take steps to appreciate the nature of non-vaccination at a local level and that this requires an on-going effort.[23] Furthermore, countries must attempt to increase vaccine acceptance (and vaccine demand) by developing strategies for trust-building, constant community engagement, hesitancy prevention, assessments of concerns on a national level, and effective crisis-response planning.[24]

South Africa has done much to promote vaccine uptake with an extensive vaccination programme known as the Expanded Programme on Immunisation in South Africa (EPI-SA). EPI-SA is a government-funded programme which forms part of the broader health strategy of the National Department of Health. In addition, certain documents are required for the admission of a learner to a public school.[25] A child with a vaccine-preventable disease may be

---

22 This is referred to by the WHO as "vaccine hesitancy". See Oduwole *et al* (2019) *BMJ Open* 2.

23 WHO "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020).

24 As above.

25 Notice No 2432 of 1998 in GG 19377 of 19 October 1998 (National Education Policy Act, 1996 (Act No 27 of 1996) Admission Policy For Ordinary Public Schools) [16]. See also RSA Gov, DoE "Admission of learners to public schools" (date unknown) https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolAdmissions.aspx (accessed 13 June 2020). Upon application for admission, a parent must show proof that the learner has been immunised against the following communicable diseases: polio, measles, TB, diphtheria, tetanus, and hepatitis B. If a parent is unable to show proof of immunisation, the principal must advise the parent on having the learner immunised as part of the free primary health care programme.

denied admission to schools or childcare facilities in South Africa.[26] This is all indicative of South Africa's pro-vaccination attitude.

In South Africa, the average child can expect roughly 28 vaccinations before reaching the age of twelve.[27] But, because the majority of essential vaccines are administered before the age of twelve parental consent is required.[28] A parent or guardian of a child may consent on behalf of the child for the child to undergo medical or surgical treatment. In terms of South African law, all children have a right to access basic health care services.[29] Immunisation or vaccination is regarded as one of the healthcare components that form part of the child's right to basic health care.[30] Against this backdrop, I now consider the problem statement of this thesis.

1.2 PROBLEM STATEMENT

While vaccines may prevent serious illness, disability, or even death, the converse is as true: non-vaccination may cause serious illness, disability, or even death. This is essentially the crux of this thesis, and the problem statement addresses the potential common-law delictual liability that South African non-vaccinating parents may face as a result of not having their child vaccinated.

This research is primarily concerned with the potential common-law delictual liability of non-vaccinating parents (X) towards another child (Y), based on their (Xs') failure to have their own child (XX) vaccinated. The overarching research question is whether non-vaccinating parents (X) can be held delictually liable if their unvaccinated child (XX) causes harm to another child (Y).

---

26 See RSA Gov, DoH "Immunisation key messages" (date unknown) http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-08-29-27/immunization/category/165-immunisation?download=502:key-messages-immunisation (accessed 13 June 2020); P Mahery & W Slemming "Mandatory childhood immunisation in South Africa: what are the legal options?" (2019) 12(2) *SAJBL* 77.

27 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 4. The first set of vaccinations are routinely administered soon after birth.

28 T Boezaart (ed) *Child law in South Africa* (2009) 208. If it is an operation, the child must be assisted by a parent or guardian who must assent to the operation in writing. S 129 of the Children's Act 38 of 2005 (hereinafter Children's Act) states that a child can consent to her own medical treatment at the age of 12, without the requirement of parental consent. Children under the age of 7 are legally incapable of giving consent.

29 See for example the s 27 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) and the Children's Act.

30 See RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020).

The South African courts have as yet not had an opportunity to adjudicate a matter regarding the common-law delictual liability of non-vaccinating parents (X). In addition to a *lacuna* in the case law on this topic, legal scholars are yet to respond to this issue in the South African context and there are currently no academic publications which have addressed the question in South Africa. Uncertainty consequently surrounds the scale of the non-vaccination issue, the reasons for parental refusal, and the lack of effective strategies to address the non-vaccination groups.[31]

Although certain circulars from the National Department of Health suggest that vaccination is a "must",[32] there are no laws in South Africa mandating childhood vaccination. In addition, there exists no case law expressly dealing with the issue of whether a child must be vaccinated or if a failure to do so may ultimately result in delictual liability. The overarching research question is subdivided into more specific questions below.

1.3 RESEARCH QUESTIONS

The overarching research question (can non-vaccinating parents (X) be held delictually liable if their non-vaccinated child (XX) causes harm to another child (Y)?) is divided into the following sub-questions:

(1) What is non-vaccination?
  (1.1) Why is non-vaccination a social crisis?
  (1.2) What is the current South African approach to liability for non-vaccination liability under the common-law delict?
(2) What constitutional factors (rooted in the supreme law) provide the backdrop to the research?
(3) Is there a constitutional duty on parents (X) to have their children (XX) vaccinated?
(4) How have other jurisdictions dealt with the question of delictual/tortious liability for non-vaccination?
(5) How can the South African common-law delict respond to this issue?
(6) What should the way forward be?

---

31 Mahery & Slemming (2019) *SAJBL* 76.

32 See RSA Gov, DoH "What you need to know about vaccinations" (date unknown) http://www.kznhealth.gov.za/vaccinations.pdf (accessed 10 March 2020) at 3; RSA Gov, DoH "Immunisation" (date unknown) https://www.health.gov.za/immunization/ (accessed 05 July 2022).

1.4 AIMS

The potential common-law delictual liability of non-vaccinating parents (X) in South Africa presents a complex problem, one that is yet to receive sufficient academic or judicial attention. The application of existing legislation and common-law delictual principles may assist in reaching legal certainty on this issue. Furthermore, the development of legislation may help address this problem in the future and also assist litigants to navigate the common-law delictual elements before the courts.

The goal of this thesis is, therefore, to illustrate the potential common-law delictual liability that non-vaccinating parents (X) may face in South Africa for failing to vaccinate their child (XX) who as a result causes harm to another child (Y). This common-law delictual liability is examined within the ambit of the extant legislation protecting the rights of children, relevant case law, and the Constitution,[33] in line with the doctrine of adjunctive subsidiarity discussed below.

The approaches adopted by foreign jurisdictions in establishing the potential delictual/tortious liability of non-vaccinating parents may provide valuable insights that can inform the approach to be adopted in the South African common-law delictual context. Assessing the potential common-law delictual liability of non-vaccinating parents necessitates an investigation of the elements of delict under South African common law.

As the various constitutional rights of children (Y and XX), the non-vaccinating parents (X), and third parties (e.g., the public) also arise, several constitutional rights (e.g., the right to life, freedom of religion, belief, and opinion, freedom of association, the refusal of medical treatment (e.g., vaccine administration), the rights to bodily integrity, health and safety, and the best interests of the child as guiding principle) need to be balanced to provide a meaningful contribution to legal scholarship in this area.

Thus, an investigation of the common-law delictual elements envisions a balancing of constitutional rights which is classically undertaken when considering the common-law delictual element of wrongfulness. The issue of common-law delictual liability cannot be addressed without a balancing of constitutional rights, and the importance of the Constitution in the context of the common-law delict is discussed under the heading 1.6 (research methodology).

---

33 Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

1.5 HYPOTHESIS AND ASSUMPTIONS

My first assumption is that vaccines and vaccination are social issues of legal importance. My second is that a common-law delict may briefly be described as a "civil wrong".[34] The three historic actions of the common-law delict are the *Aquilian* action, the *actio iniuriarum*, and the Germanic action for pain and suffering.[35]

I assume that the five elements of the common-law delict are: (1) conduct; (2) wrongfulness; (3) fault; (4) causation; and (5) damage.[36] Each element must be present to constitute a delict. This means that the potential common-law delictual liability of a non-vaccinating parent (X) is based on a factual and normative evaluation of the common-law delictual elements. I assume that if all five elements of the common-law delict are satisfied, a non-vaccinating parent (X) may be held delictually liable for damages.

Furthermore, the parent or guardian (X) of a child (XX) may refuse to consent to the child's (XX's) medical or surgical treatment (including vaccination). I assume that the refusal of a child's vaccination is regarded as a parental right that stems from parental autonomy and the obligation to care for the child and secure their well-being.[37]

However, if a parent (X) refuses the vaccination of their child (XX), the High Court, which has inherent jurisdiction as the upper guardian of all minors, may intervene in certain circumstances.[38] The High Court may make an order that the minor child (XX) receive certain treatment if it considers the treatment to be in the best interests of the minor[39] notwithstanding the refusal by the minor's parents (X) to consent to that treatment.[40]

I assume that this is especially relevant given the purpose of common-law delictual liability and the possibility of an interdict. This means that a delictual action may be circumvented via a mandatory interdict, which, for example, obliges the parents (X) to vaccinate their child (XX). I assume that a mandatory interdict obliging the parents to vaccinate

---

34 F McManus "Introduction" in *Delict essentials* 4ed (2021) 1–4.
35 J Neethling & JM Potgieter *Law of delict* 8ed (2020) 8.
36 Neethling & Potgieter (2020) 25.
37 Boezaart (2009) 217.
38 In *TC v SC* 2018 (4) SA 530 (WCC) [45]: "where necessary, a Court may, in terms of s 173 read with s 39(2) of the Constitution, develop and extend the common law relating to its inherent jurisdiction as upper guardian in order to respect, protect, promote and fulfil the fundamental rights of children". See also *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) [64]: "In South Africa, in addition to s 28 (2) of the Constitution, the common-law principle that the [HC] is the upper guardian of children obliges courts to act in the best interest on the child in all matters involving the child. […] courts have a duty and authority to establish what is in the best interests of children".
39 S 28(2) of the Constitution: "[a] child's best interests are of paramount importance in every matter concerning the child."
40 See, e.g., *Hay v B* 2003 (3) SA 492 (W) (hereinafter *Hay v B*).

their child may essentially prevent the manifestation of harm (for XX and Y), and avoid delictual liability.

However, I also assume that "the best interests of the child do not apply absolutely and will not trump any other competing right or interest every time".[41] This may mean that even if vaccination is regarded as in the child's best interests, it does not automatically mean that the child's best interests (vaccination) will always override other competing rights and/or interests.

This guiding constitutional principle extends beyond the other rights contained in section 28 of the Constitution and should accordingly be considered when any other constitutional right of the child is affected.[42] The general limitation clause (s 36 of the Constitution) applies to section 28 of the Constitution. Therefore, in a situation affecting the child, where the best interests of the child are not regarded as of paramount importance, the limitation imposed on the child's right must be "reasonable" and "justifiable" in an "open and democratic society" as required under section 36 of the Constitution.[43] The best interest of the child is a constitutional principle entrenched in section 9 of the Children's Act[44] which provides that:

> In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

Although this research is not concerned solely with the competing rights and duties of the non-vaccinating parents (X) and the children involved (XX and Y), it is an unavoidable balancing process that must first be examined before considering foreign law, the common-law delictual elements, and our law's possible response to the issue of non-vaccination and liability. This is because the reasons for non-vaccination are often rooted in religious or cultural beliefs and the parents' right to dignity and parental autonomy. Furthermore, the common-law delictual elements cannot be assessed without a proper understanding of the competing rights, duties, and interests at hand.

Despite the reasons underlying non-vaccinating parents' decision not to vaccinate their child (XX), I assume that the common-law delictual requirements must still be met to constitute a delictual wrong for which the non-vaccinating parents (X) may be held liable. I assume that although parents generally have the best interests of their children at heart, the religious and cultural rights of parents may be limited on the basis of the child's rights and best interests. For example, the religious rights of a parent (X) may be limited in cases where the child's right to

41 Boezaart (2009) 440.
42 As above.
43 As above.
44 38 of 2005 (hereinafter the Children's Act).

life is regarded as more important. Furthermore, I assume that in certain instances non-vaccinating parents may even face common-law delictual liability, regardless of their good intentions.

I further assume that even though the common-law delict requires compliance with its five elements in order to constitute a delict, a debate as to the limitation of parental rights is unavoidable. In short, parental rights and responsibilities, including parental autonomy, dignity, and religious and cultural rights, should be balanced against the rights of the children (Y and XX) and in accordance with the best interests of the child principle[45] and public health interests.

In light of the South African common-law delict and case law dealing with the best interests of the child, I assume that non-vaccinating parents (X) may be held delictually liable for not vaccinating their child (XX).[46] If the non-vaccinating parents (X) may face delictual liability for failing to have their child (XX) vaccinated, I assume that this may ultimately lead to a limitation of parental rights and responsibilities, parental autonomy in particular, as parents will be obligated to have their child vaccinated in order to avoid facing delictual liability. This may ultimately lead to a jurisprudential debate as to whether or not the common-law delict, in this context, justifiably limits the rights of the parents.

1.6 RESEARCH METHODOLOGY

As the South African law of delict forms part of the South African common law (and is also referred to as the common-law delict) a transformative constitutional approach (or transformative theory for common law) is used as my first research methodology. My second research methodology is comparative and is explored below in greater detail. I turn first to the transformative constitutional method.

1.6.1 The transformative constitutional method

The transformative constitutional method and its suitability for this thesis are explored with reference to the work of Zitzke. Before I refer to the work of Zitzke and the transformative constitutional method and the common-law delict, I consider what transformative constitutionalism entails in broad strokes.

---

45 Boezaart (2009) 26. The HC, as upper guardian of all minors in its jurisdiction, may be approached to give the required consent in cases where the parent or guardian acts in a disinterested or unreasonable manner.

46 See *Hay v B* where the Witwatersrand Local Division ruled that the child's right to life outweighs a parent's right to religion. See also Boezaart (2009) 218.

From the outset, it is important to point out that defining the concept of "transformative constitutionalism" in juridical terms is challenging.[47] Therefore, for purposes of this thesis, I touch briefly on transformative constitutionalism in the South African context as it informs the transformative constitutional method.

Transformative constitutionalism is one of the fundamental pillars of post-apartheid constitutionalism in South Africa.[48] Pieterse explains how the Preamble to the Constitution, as well as specific provisions in the Bill of Rights (e.g., ss 7, 8, 9, 36, and 39) supplement the Constitution's commitment to transformation.[49] Langa clarifies that the primary goal of transformative constitutionalism is social and political change.[50] Kibet and Fombad explain that transformative constitutionalism is centred on substantive equality and substantive justice, and aims to empower previously-excluded segments of society by protecting socio-economic rights and achieving social justice.[51] Pieterse adds that transformative constitutionalism mandates the achievement of social justice, the "infiltration of human rights norms into private relationships", and the promotion of a "culture of justification" for every exercise of public power.[52] He continues that South African constitutionalism endeavours to transform our society from one "deeply divided by the legacy of a racist and unequal past", into a society based on "democracy, social justice, equality, dignity, and freedom".[53]

Kibet and Fombad explain that the realisation of substantive justice requires the state to act, proactively or progressively.[54] This requires that we look beyond the "narrow" concept of rights and a fixation on procedure and technicalities, to the active realisation of substantive rights.[55] Formalism and legal positivism are superseded by legal reasoning and methods that support an active realisation of substantive rights.[56]

I now shift my focus to the transformative constitutional method. To understand the importance and place of the transformative constitutional method (or transformative theory for common law), it is important first to explore what Zitzke has dubbed "constitutional

---

47 P Langa "Transformative constitutionalism" (2006) 17 *SLR* 351. See also E Kibet & C Fombad "Transformative constitutionalism and the adjudication of constitutional rights in Africa" (2017) 17 *AHRLJ* 353.

48 Kibet & Fombad (2017) *AHRLJ* 341.

49 M Pieterse "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SAPL* 161–163. See also DM Davis & K Klare "Transformative constitutionalism and the common and customary law" (2010) 26(3) *SAJHR* 410.

50 Langa (2006) *SLR* 351.

51 Kibet & Fombad (2017) *AHRLJ* 353; Pieterse (2005) *SAPL* 160.

52 Pieterse (2005) *SAPL* 156.

53 Pieterse (2005) *SAPL* 158.

54 Kibet & Fombad (2017) *AHRLJ* 353; Pieterse (2005) *SAPL* 164.

55 Kibet & Fombad (2017) *AHRLJ* 353.

56 As above.

heedlessness" and "constitutional over-excitement".[57] Zitzke explains that "constitutional heedlessness" is a "business-as-usual" approach to the common law and a "silent circumvention of the Constitution".[58] On the other hand, "constitutional over-excitement" refers to a demotion of established common-law rules which are discarded in favour of a pure application of constitutional principles.[59] To avoid these two polar opposites, Zitzke suggests a transformative theory for common law (or a transformative constitutional method).

The crux of a transformative theory for common law is based on its attention to the values of administrability, predictability, and stability as there are instances "where the common law is constitutionally fine as it stands for the particular facts of a particular case".[60] This notwithstanding, Zitzke argues that "common-law solutions are not timeless" and must be reconsidered and contested in line with changing circumstances.[61] This means that even though the common-law delict and the Constitution are not necessarily at odds in a specific case, this does not exclude the need to revisit and reconsider the common-law delict from a constitutional perspective.

Zitzke also comments on Fagan's notion that "the Constitution will be (and perhaps should be) an unnecessary consideration in most delictual matters".[62] This approach may result in what he terms constitutional "heedlessness". However, if the transformative theory for the common law is applied, this disregard of constitutional heedlessness is avoided. To summarise the transformative theory for the common law, I refer to the following quote from Zitzke:

> [T]he Constitution is always speaking in common and customary law matters, even if we accept that a difference exists between the application and development of those sources. Practically, we end up with an amalgamation of common or customary law and the Constitution, instead of a complete circumvention of the Constitution (constitutional heedlessness) or a complete circumvention of common law and legislation (constitutional over-excitement).[63]

The above accurately describes the balance that must be struck between circumventing either the common law or the Constitution. Zitzke continues to explain that it

---

57 E Zitzke "Constitutional heedlessness and over-excitement in the common law of delict's development" (2015) 7(1) *CCR* 259 & 270.
58 Zitzke (2015) *CCR* 260.
59 Zitzke (2015) *CCR* 259.
60 Zitzke (2015) *CCR* 269.
61 As above.
62 Zitzke (2015) *CCR* 265 with reference to A Fagan "Reconsidering Carmichele" (2008) 125(4) *SALJ* 659. See also A Fagan *Undoing delict: The South African law of delict under the Constitution* (2018) 47.
63 Zitzke (2015) *CCR* 288.

> is desirable for the common law to be infused with constitutional norms for the purposes of ensuring the common law's legitimacy in light of Africanist notions of human rights, that the much needed transformation of private law could be guided by the Constitution's development clauses that aim to map and critique the common law and, that the single-system-of-law principle developed by the Constitutional Court requires that the Constitution be taken seriously even in seemingly uncontroversial issues.[64]

This accurately and convincingly illustrates why a silent circumvention of the Constitution (i.e. constitutional heedlessness) is undesirable and why reference to the Constitution in common-law investigations — like the common-law delict — is necessary. Zitzke argues that there is no insuperable jurisprudential or conceptual obstacle that isolates the common law from the influence of human rights;[65] essentially, there is no convincing reason to avoid the Constitution when exploring the common-law delict. The common-law delict, for example, should not be divorced from a constitutional (and human rights) discussion and investigation as this would ultimately lead to Zitzke's constitutional heedlessness.

However, the adoption of a transformative constitutional method does not mean that the common law is rewritten.[66] This method entails an examination and evaluation of the potential constitutional provisions that influence the common law, specifically the common-law delict.[67]

In this thesis, the transformative constitutional method is applied by infusing the common-law delict with constitutional norms where appropriate. I do not intend to engage in constitutional over-excitement by attempting to restructure the common-law delict and replace it with a pure application of constitutional principles.

Zitzke argues that the Constitution must be taken seriously even in seemingly uncontroversial issues, and I agree with this. The Constitution cannot be circumvented simply because to do so is easier or more convenient. The Constitution applies to the common-law delict, and it is for this and many other reasons as argued by Zitzke and alluded to above, that the Constitution cannot be sidelined when exploring the common-law delict.

For example, in *AK v Minister of Police*,[68] the Constitutional Court (per Tlaletsi AJ for the majority, Theron J concurring) held that the case before it was more than an "ordinary delictual matter" as "the vindication of constitutional rights and the constitutional duties of the [South African Police Service] SAPS" were at play.[69] The Constitutional Court (per

64 Zitzke (2015) *CCR* 281.
65 As above.
66 Zitzke (2015) *CCR* 270.
67 As above.
68 2022 (11) BCLR 1307 (CC) (hereinafter *AK*).
69 *AK* [127].

Ackermann and Goldstone JJ) also applied the Constitution and its values in *Carmichele*[70] to determine the delictual liability of public officials, specifically the police.[71] In *Khumalo v Holomisa*,[72] the Constitutional Court (per O'Regan J) balanced the defence of reasonable publication in a defamation action and the competing values of privacy, dignity, and freedom of expression.[73] O'Regan J upheld the development by the Supreme Court of Appeal of the common law by balancing it against the values of privacy, dignity, and freedom of expression.[74]

Davis and Klare comment on *K v Minister of Safety & Security*[75] and argue that:

> *K v Minister* leads inescapably to the conclusion that the normative framework of the Constitution must infuse a decision to apply as well as a decision to depart from or extend a legal rule.[76]

In addition to the transformative constitutional method, I also use comparative law. Below, I explore the comparative research methodology.

1.6.2 Comparative research methodology

South Africa is a mixed legal system[77] made up of Roman law, Roman-Dutch law, English law, and African customary law.[78] South Africa further has multiple sources of law, such as the Constitution, legislation, judicial precedent, international and foreign law, common law, customary law and custom,[79] and modern scholarly sources.[80] The South African common law is a blend of Roman-Dutch law and English law.[81] South Africa's diverse legal heritage and sources of law allow for fruitful comparison with other jurisdictions.

---

70 *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*) [54]–[56] (Chaskalson P, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ, & Somyalo AJ concurring).

71 See also Davis & Klare (2010) *SAJHR* 413.

72 2002 (5) SA 401 (CC) (hereinafter *Khumalo*).

73 *Khumalo* [43]–[44] (Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, Sachs J, & Skweyiya AJ concurring). See also Davis & Klare (2010) *SAJHR* 420.

74 *Khumalo* [43]–[44].

75 2005 (6) SA 419 (CC) (hereinafter *K*).

76 Davis & Klare (2010) *SAJHR* 428.

77 See *King v De Jager* 2021 (4) SA 1 (CC) [52].

78 F Osman "The consequences of the statutory regulation of customary law: an examination of the South African customary law of succession and marriage" (2019) *PELJ* 7 (fn 32). See also R Zimmermann & D Visser *Southern Cross: civil law and common law in South Africa* (1996) 217; PJ Thomas *et al The historical foundations of South African private law* 2ed (2000) 7.

79 See *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) [54].

80 C Rautenbach "Case law as an authoritative source of customary law: piecemeal recording of (living) customary law?" (2019) *PELJ* 9.

81 Zimmermann & Visser (1996) 217; Rautenbach (2019) *PELJ* 16.

Husa explains that comparative law is "aimed at the legal systems of different states (or state-like formations) or their segments that are significant for research problems".[82] To clarify what "legal systems" mean, Husa explains that this essentially refers to the

> entity of legal norms, which in addition to statutory law and case law includes customary law, established legal practices, legal concepts and a specified way of handling and classifying legal concepts and norms. […] If we use the term 'legal system', we normally mean the more extensive entity that covers the 'legal order' […] and legal thinking as well as including legal cultural dimensions.[83]

To describe comparative law, Husa explains that it is basically legal research that extends beyond national borders to elucidate and assess the reasons for the similarities and differences in various legal systems.[84] Comparative law essentially includes a detailed and meaningful evaluation and inspection of foreign law.

Calzolaio refers to this as the "reflective quality of comparison" which denotes the comparative method enabling the researcher to "make observations and gain insights which would be denied to one whose study is limited to the law of a single country".[85] Husa explains that comparison enables the researcher

> to understand what kind of legal remedies have been referred to in other societies in order to reach social aims that are often rather similar. On the other hand, […] understanding why this is the case is also among the objectives of comparison.[86]

This explains why it is both appropriate and justified to embark on comparative legal research in this thesis. Comparative legal research is used here to investigate not only the remedies available to a victim of non-vaccination, but also to understand the reasoning of foreign courts and their approaches to specific legal issues such as causation and the balancing of competing rights, duties, and interests.

Husa also explores the justifications for comparison which are often rooted in the notion that "the more there are cases of comparison, the more reliable the conclusions".[87] This means that hasty generalisations based on "sporadic or exceptional cases" remain just that — hasty generalisations.[88] Arguably, hasty generalisations should be avoided in comparative research

---

82 J Husa *A new introduction to comparative law* (2015) 19.
83 Husa (2015) 19.
84 Husa (2015) 21; K Zweigert & H Kötz (trans T Weir) *An introduction to comparative law* 3ed (1998) 6.
85 E Calzolaio *Comparative contract law: an introduction* (2022) Ch 1, 1-8, at 1.2.
86 Husa (2015) 21.
87 As above.
88 As above.

as sporadic or exceptional cases do not necessarily or accurately reflect the legal position in a specific foreign jurisdiction. However, including sporadic or exceptional cases enriches the investigation into foreign law and if these cases are not overemphasised and are understood in context they may contribute to the "school of truth" (*une école de vérité*), which is often used to describe comparative law.[89]

Ultimately, the results of the comparison may be used in the formulation of theories, the drafting of legislation, or in finding new legal solutions.[90] Comparative research does not necessarily produce a binding norm for the courts,[91] but the South African Constitution (s 39(1)(*c*)) does authorise the courts to consider foreign law when interpreting the Bill of Rights. This serves as some indication of the value of comparative studies even if they do not bind the courts. This view was accurately expressed by the Constitutional Court in *H v Fetal Assessment Centre*,[92] where Froneman J held that

> [f]oreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.[93]

Husa argues that comparative law is not necessarily state-specific and its results may be used as a part of normative argumentation.[94] To better qualify this assertion, I refer to Gutteridge, who posits that comparative law, viewed as a method, considers both the private- and public-law spheres and applies to any form of legal research and a variety of researchers and beneficiaries, such as historians, economists, jurists, sociologists, practitioners, judges, statesmen, businessmen, administrators, and legal scholars.[95]

Comparative legal research may, therefore, offer valuable insights, suggestions, and guidance on specific legal issues, including non-vaccination. The comparative legal research output is not limited to legal scholars and practitioners, but may also be of value to other persons and in the context of non-vaccination, such as parents, caregivers, the courts, or even the legislature.

Calzolaio asserts that comparative law broadly entails a cognitive process during which the researcher constantly pivots between two (or more) legal systems.[96] Zweigert and Kötz

---

89 As above.
90 Husa (2015) 22.
91 As above.
92 2015 (2) BCLR 127 (CC) (hereinafter *H v Fetal Assessment Centre*).
93 *H v Fetal Assessment Centre* [31] (Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, & Van der Westhuizen J concurring).
94 Husa (2015) 21.
95 HC Gutteridge *Comparative law* (2015) 10; Zweigert & Kötz (1998) 4.
96 Calzolaio (2022) Ch 1, 1-8, at 1.2; Zweigert & Kötz (1998) 34.

warn that merely listing the similarities and differences does not really offer any meaningful contribution.[97] To produce meaningful contributions, the specific method of comparison adopted in this thesis is that of applied comparison.

1.6.2.1 Applied comparative method

Gutteridge refers to "applied comparative law" as the use of the comparative method with a specific aim in view.[98] This means that applied comparative law is something more than merely describing the similarities and differences "between the concepts, rules or institutions of the laws under examination".[99] Applied comparative law has a definitive purpose.[100]

Zweigert and Kötz suggest that the applied method considers how the positive law should perhaps be amended on a specific issue, or how perceived gaps should be filled.[101] It is for this reason that the applied method is used to suggest how the current gaps in the South African common-law delictual liability of non-vaccinating parents may be supplemented.

In addition to the applied comparative law method, I also apply the functional method of comparative law.

1.6.2.2 Functional comparative method

Zweigert and Kötz explain the functional method of comparative law as the process in which the solutions identified in different jurisdictions are divorced from their conceptual context and national doctrinal nuances[102] to reveal a solution or remedy in a purely functional light in an attempt to fulfil a particular legal need.[103]

For purposes of this thesis, this means that the approaches adopted in foreign jurisdictions regarding civil liability for non-vaccination must be "cut loose" from their conceptual context and their functionality must be assessed. For example, if all the foreign jurisdictions address the non-vaccination and liability of non-vaccinating parents (X) in a particular (and similar) way, this may be indicative of the functionality of these approaches in meeting the needs of society.

97 See also Zweigert & Kötz (1998) 43.
98 Gutteridge (2015) 9.
99 As above.
100 As above.
101 Zweigert & Kötz (1998) 11.
102 Zweigert & Kötz (1998) 44.
103 As above.

The first step is to compare the function of the law of delict and torts. Thereafter, the specific elements of the relevant torts are examined to determine how they function and why they address the issue of non-vaccination in a particular way. The result may offer guidance in filling the gaps in the South African common-law delict and current gaps in the delictual liability of non-vaccinating parents.

However, the functional and applied methods alone are insufficient, and the critical comparative method is also applied in this thesis.

1.6.2.3 Critical comparative method

Zweigert and Kötz suggest that a critical evaluation is necessary to prevent a situation where comparative research becomes mere "blocks of stone that no one will build with".[104] Essentially, the comparativist must decide "which of the possible solutions is most suitable and just".[105] This can only be achieved through critical evaluation. However, Zweigert and Kötz acknowledge that there are instances where a comparativist cannot say which solution is better.[106]

To produce meaningful suggestions and recommendations regarding the common-law delictual liability of non-vaccinating parents, the applied, functional, and critical methods of comparative law are synthesised in this thesis. Although the comparability of torts and delict is demanding, it is promising.

> In the words of John F Kennedy, lawyers often choose comparative studies, 'not because they are easy, but because they are hard'.[107]

1.7 MOTIVATION FOR CHOICE OF FOREIGN LEGAL SYSTEMS

Linking to the comparative law discussion above, I now turn to the reasons for my choice of foreign legal systems. Before substantiating my choices, I reiterate that the potential common-law delictual liability of non-vaccinating parents (X) has not yet been decided by the South African courts. In addition, South African legal scholars have also not yet produced meaningful legal research on this specific issue. For this reason, foreign jurisdictions and their jurisprudence on non-vaccination are explored to identify how they have approached delictual/tortious liability when dealing with the liability of non-vaccinating parents (X).

---

104 Zweigert & Kötz (1998) 47.
105 As above.
106 Zweigert & Kötz (1998) 40.
107 Husa (2015) 15.

In this thesis, I investigate and compare both civil-law and common-law jurisdictions. Calzolaio suggests that the distinction between civil-law countries and common-law countries is often over-emphasised[108] and that this traditional distinction is gradually dwindling (e.g., the relationship between case law and statutory law is changing in both civil- and common-law traditions).[109]

Without over-emphasising the difference between the two, it is sufficient to note that civil law refers to those legal systems that share a Roman-law heritage and have adopted civil codes, e.g., Germany and the Netherlands,[110] while common law refers to the English legal tradition and countries such as the United States of America (US), Canada, and Australia. The foreign jurisdictions explored in this thesis are Germany, the Netherlands, Canada, Australia, the US, and the United Kingdom (UK). In my discussion, I indicate whether a country is a civil law or common law jurisdiction for introductory and background purposes, before discussing the specific jurisdiction's approach to the issue of non-vaccination and tortious/delictual liability.

As South Africa is a mixed legal system with roots in Roman, Roman-Dutch, and English law, South Africa's diverse legal heritage allows me to draw inspiration from numerous foreign jurisdictions. Below, I substantiate my choice of foreign law in light of the comparative law methodologies discussed above.

1.7.1 Germany

In recent developments, the German authorities have decided to fine parents up to €2 500 if they fail to have their child vaccinated against measles.[111] Without venturing into criminal law territory, this fine merely indicates the pro-vaccination attitude of the German authorities and the parental duty to vaccinate a child.

---

108 Calzolaio (2022) Ch 1, 1-8, at 1.3.

109 As above.

110 As above.

111 See the *Infektionsschutzgesetz* (Protection Against Infection Act) of 20 July 2000, §73 (fine regulations). See also MJ Mehlman & MM Lederman "Compulsory immunisation protects against infection: what law and society can do" (2020) 5(1) *PAI* 3; Beck Online "*Bundesrat billigt Pflicht zur Masernimpfung*" (Federal Council approves compulsory measles vaccination) (20 December 2019) https://beck-online.beck.de/Dokument?vpath=bibdata%2Freddok%2Fbecklink%2F2015093.htm&pos=6&hlwords=on (accessed 15 June 2020); Deutsche Welle "Germany: law mandating vaccines in schools takes effect" (date unknown) https://www.dw.com/en/germany-law-mandating-vaccines-in-schools-takes-effect/a-52596233 (accessed 15 June 2020); Jurist "Germany makes measles vaccinations compulsory for children" (15 November 2019) https://www.jurist.org/news/2019/11/germany-makes-measles-vaccinations-compulsory-for-children/ (accessed 15 June 2020).

In Germany, measles vaccinations have been required for school registration since 1 March 2020.[112] The law stipulates that kindergartens and schools can only accept new children who have been vaccinated. Initially, this law was passed as an additional set of amendments to the extant *Infektionsschutzgesetz* (Protection Against Infection Act).[113]

The German legislature pointed to the country's failure to meet the WHO's recommended immunisation level of 95% needed for a country to prevent the mass outbreak of a disease.[114] It must be noted that although vaccinations (other than against measles) are not compulsory in Germany they are strongly recommended.[115] Despite the principle that vaccination is not compulsory, parents may still be fined for failing to vaccinate their children against measles, as shown above. In the words of the German Health Minister, Hermann Groehe:

> [N]obody can be indifferent to the fact that people are still dying of measles […] that's why we are tightening up regulations on vaccination.[116]

The *Masernschutzgesetz* (Measles Protection Act)[117] makes measles vaccination, or a medical certificate showing that a person is immune to measles, mandatory for certain groups.[118] An exception is made for persons with a medical contraindication to the vaccine.[119] This Act has been met with strong opposition but the *Bundesverfassungsgericht* (Federal Constitutional

---

112 Deutsche Welle "Germany: law mandating vaccines in schools takes effect" (date unknown) https://www.dw.com/en/germany-law-mandating-vaccines-in-schools-takes-effect/a-52596233 (accessed 15 June 2020); Jurist "Germany makes measles vaccinations compulsory for children" (15 November 2019) https://www.jurist.org/news/2019/11/germany-makes-measles-vaccinations-compulsory-for-children/ (accessed 15 June 2020).

113 Of 20 July 2000 (amended December 2022). See W Wimmer "Information on the Measles Protection Act for admission to a joint institution for children/registration at primary schools" (date unknown) https://www.stadt-muenster.de/fileadmin//user_upload/stadt-muenster/40_schulamt/pdf/Startseite_Anreisser/Anmeldung_Grundschulen_2020/hinweise_masernschutzgesetz_englisch.pdf (accessed 05 July 2022).

114 See Deutsche Welle "Germany: law mandating vaccines in schools takes effect" (date unknown) https://www.dw.com/en/germany-law-mandating-vaccines-in-schools-takes-effect/a-52596233 (accessed 15 June 2020); Homeland Security News Wire "In Germany, vaccine fears spark conspiracy theories" (13 May 2020) http://www.homelandsecuritynewswire.com/dr20200513-in-germany-vaccine-fears-spark-conspiracy-theories (accessed 15 June 2020).

115 See Handbook Germany "Vaccination Schedule in Germany" (date unknown) https://handbookgermany.de/en/live/vaccination.html (accessed 15 June 2020).

116 See O Ohikere "Germany tightens vaccination laws" (26 May 2017) https://world.wng.org/content/germany_tightens_vaccination_laws (accessed 15 June 2020).

117 Of 10 February 2020.

118 See *Masernschutzgesetz*, Art 1: "Children one year or older who attend day-care, school, or similar community facilities; Persons working in those facilities; Persons working in medical facilities; Persons living or working in refugee and asylum-seeker accommodations". See LOC "Germany: new Act makes measles vaccinations mandatory" (2020) https://www.loc.gov/law/foreign-news/article/germany-new-act-makes-measles-vaccinations-mandatory/ (accessed 15 August 2020).

119 *Masernschutzgesetz*, Art 1, no 8(e).

Court) has nonetheless rejected several urgent applications from parents opposing the mandatory measles vaccination.[120] These applications have been rejected on various grounds as illustrated by the following reasoning from the *Bundesverfassungsgericht*:

> The aim of the Measles Protection Act is specifically to protect life and physical integrity, which the state is also required to do by virtue of its fundamental right to protection under Article 2(2) sentence 1 of the Basic Law [*Grundgesetz*].[121]

In this passage, the court expressly links measles vaccination to the protection of the right to life and physical integrity. Although at first glance this may appear insignificant, it is an important statement. If the measles vaccine protects the right to life, the failure to receive a measles vaccination may be construed as threatening or violating the right to life. If the measles vaccine protects the right to physical (or bodily) integrity, the opposite may then also be true: the failure to obtain a measles vaccination may potentially violate the physical integrity of its intended recipient (e.g., an unvaccinated child).

In another case,[122] the *Bundesgerichtshof* (German Federal Court of Justice) considered how a custody dispute between parents over the vaccination of their child should be resolved. The court ruled that the father was better suited to decide on the child's vaccination than its non-vaccinating-oriented mother. The significance of this judgment is that vaccinations are regarded by the German courts as of "significant importance" for a child.[123]

Furthermore, the Standing Committee on Vaccination (STIKO) develops national recommendations for the use of licenced vaccines in Germany.[124] Although STIKO is an independent advisory group and its recommendations are not legally binding, it forms the basis for the Federal States' vaccination guidance and the Federal Joint Committee's vaccination directive.[125]

---

120 See *ECLI:DE:BVerfG:2020:rk20200511.1bvr046920*; Beck Online "*Eilanträge gegen Nachweis der Masernschutzimpfung vor Kita-Besuch erfolglos*" (Urgent applications against proof of the measles vaccination before visiting the daycare centre were unsuccessful) (19 May 2020) https://beck-online.beck.de/Dokument?vpath=bibdata%2Freddok%2Fbecklink%2F2016349.htm&pos=6&hlwords=on (accessed 15 June 2020).

121 *ECLI:DE:BVerfG:2020:rk20200511.1bvr046920* [15].

122 *ECLI:DE:BGH:2017:030517BXIIZB157.16.0*. See also Federal Court of Justice Communication from the press office "*Entscheidungsrecht bei Uneinigkeit der Eltern über Schutzimpfung ihres Kindes*" (Right to decide in the event of disagreement between the parents vaccination of their child) (2017) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&anz=1&pos=0&nr=78383&linked=pm&Blank=1 (accessed 15 June 2020).

123 *ECLI:DE:BGH:2017:030517BXIIZB157.16.0* [a].

124 See Robert Koch Institute "Standing Committee on Vaccination (STIKO)" (29 August 2016) https://www.rki.de/EN/Content/infections/Vaccination/Vaccination_node.html (accessed 15 June 2020).

125 *ECLI:DE:BGH:2017:030517BXIIZB157.16.0* [a].

The *Bundesgerichtshof* ruled, in *ECLI:DE:BGH:2017:030517BXIIZB157.16.0*, that "[t]he STIKO vaccination recommendations have already been recognised by the Federal Court of Justice as a medical standard",[126] and as a medical standard which provides that children must be vaccinated, parents have a duty to present their children for vaccination.

In *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920*, the *Bundesverfassungsgericht* ruled that parents have the right and duty to decide if and how their children are vaccinated in terms of Article 6(2) sentence 1 of the Basic Law (*Grundgesetz* or German Constitution).[127] The court continued that the decision to vaccinate is an essential element of parental health care (which falls within the scope of Article 6(2) sentence 1 of the Basic Law) and that when parents exercise this right, they are inhibited to oppose standards of medical reasonableness.[128] Ultimately, the well-being of the child is the decisive guideline for parental care and upbringing.[129]

I have chosen Germany as a foreign law jurisdiction for my comparative study because of its seemingly pro-vaccination attitude and the German case law that has considered children's vaccination in the face of parental opposition. Furthermore, Germany shares some commonalities with the South African common-law delict,[130] which may also provide valuable insight when considering the common-law delictual elements and approaches South Africa may adopt when deciding whether or not non-vaccinating parents should incur delictual liability.

The fact that measles vaccination is mandatory may also be a deciding factor when considering the delictual liability of non-vaccinating parents, that is if they do not have a valid reason for the non-vaccination (e.g., a medical exemption). The German law of delict is explored in Chapter 4 to establish what insights it may offer regarding the potential delictual liability of non-vaccinating parents.

1.7.2 The Netherlands

In the Netherlands, vaccination is not compulsory but is strongly recommended.[131] Nicole Gommers, a Dutch mother, stated that "[a] parent's right not to vaccinate their child does not

---

126 As above.
127 *Grundgesetz* (Basic Law for the Federal Republic of Germany) of 23 May 1949; *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920* [1]–[2].
128 As above.
129 As above.
130 Fagan (2018) 143.
131 See *Rijksvaccinatieprogramma* "Dutch National Immunisation Programme" (date unknown) https://rijksvaccinatieprogramma.nl/english (accessed 15 June 2022).

override my child's right to life".[132] Gommers made this statement after her infant son contracted measles from a day care facility. It was established that an older child had contracted the disease and infected the infant. The older child had not been vaccinated against measles as her parents were opposed to the vaccination of their children on principle. This and similar cases have recently inspired calls to ban unvaccinated children from day care centres in the Netherlands. In support of this, a social-liberal political party, D66, has recently proposed that childcare centres be allowed to refuse to enrol children who have not been vaccinated.[133]

D66 has already submitted a Bill allowing day care centres to refuse admission to children who do not (fully) participate in the National Immunisation Programme (NIP).[134] Interestingly, the D66 Bill has gained the majority support of both the *Eerste Kamer* and *Tweede Kamer* of the Dutch senate.[135] In the House of Representatives, a majority was in favour of the Bill and passed this law so allowing day care centres to exclude non-vaccinated children.[136] This is similar to the situation in Germany where measles vaccinations are required for school registration, but the Netherlands has gone further and provided that the child must participate fully in the entire NIP.

The Dutch courts have decided numerous cases on whether or not vaccination is in the child's best interests. In *ECLI:NL:GHARL:2019:9402*, the *Gerechtshof Arnhem-Leeuwarden* (Arnhem-Leeuwarden Court of Appeal) upheld the decision of the District Court of the

---

132 See C De Jong "*Mijn zoontje was bijna dood door een kind dat niet ingeënt was*" (My son was almost killed by a child who had not been vaccinated) (06 August 2018) https://eenvandaag.avrotros.nl/item/mijn-zoontje-was-bijna-dood-door-een-kind-dat-niet-ingeent-was/ (accessed 15 June 2020).

133 J De Jong *et al* "*Maatregelen om de vaccinatiegraad in Nederland te verhogen*" (Measures to increase vaccination coverage in the Netherlands) (December 2019) https://www.nivel.nl/sites/default/files/bestanden/1003621.pdf (accessed 12 July 2022) at 14 & 33; *Tweede Kamer der Staten-Generaal* "Parliamentary papers 35049, end text" (18 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D07026 (accessed 15 June 2020).

134 See *Tweede Kamer der Staten-Generaal* "Parliamentary papers 35049, end text" (18 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D07026 (accessed 15 June 2020).

135 De Jong *et al* "*Maatregelen om de vaccinatiegraad in Nederland te verhogen*" (Measures to increase vaccination coverage in the Netherlands) (December 2019) https://www.nivel.nl/sites/default/files/bestanden/1003621.pdf (accessed 12 July 2022) at 14. See also NL Times "Majority support letting daycares refuse un-vaccinated kids" (18 February 2020) https://nltimes.nl/2020/02/18/majority-support-letting-daycares-refuse-un-vaccinated-kids (accessed 15 June 2020); NOS News "*Kamer voor recht kinderdagverblijf om ongevaccineerd kind te weigeren*" (Chamber for right of daycare to refuse an unvaccinated child) (18 February 2020) https://nos.nl/artikel/2323564-kamer-voor-recht-kinderdagverblijf-om-ongevaccineerd-kind-te-weigeren.html (accessed 15 June 2020).

136 See *Tweede Kamer der Staten-Generaal* "Parliamentary papers 35049, second note of amendment" (10 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D05325 (accessed 15 June 2020); *Tweede Kamer der Staten-Generaal* "Parliamentary papers 35049, end text" (18 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D07026 (accessed 15 June 2020).

Northern Netherlands. The Youth Protection Foundation North and Safe Home Groningen was granted replacement permission (also referred to as substitute consent) regarding the necessary medical treatment (in this case, vaccine administration) and the children were vaccinated in accordance with the NIP.

Accordingly, the mother's wish not to vaccinate her children was overruled by this judgment (*ECLI:NL:GHARL:2019:9402*) based on Articles 1:265h and 1:253a of the *Burgerlijk Wetboek* (BW or Dutch Civil Code). The substitution of consent is not a novelty in Dutch law, there have been various cases in which the courts have not directly ordered the parents to vaccinate, but rather transferred the capacity to consent to another party (also referred to as replaced consent).[137]

This means that the consent requirement is manipulated in an interesting manner which avoids forcing non-vaccinating parents to consent to vaccinate their child. In the case of *ECLI:NL:GHARL:2019:10763* the father's consent was substituted with that of the mother to vaccinate the minors fully as required under the NIP.

The *Gerechtshof Arnhem-Leeuwarden* accordingly dismissed the father's appeal as his reasons for non-vaccination were deemed insufficient and not in the best interests of the children by the court.[138] However, not all cases for the replacement of authorisation (consent) for medical treatment (such as vaccine administration) are successful — if it is not necessary it will not be granted.[139] In the case of *ECLI:NL:GHDHA:2019:331*, the *Gerechtshof Den Haag* (Hague Court of Appeal) ordered that vaccination is in the best interests of the child and that the child must be vaccinated as soon as possible.[140]

In another judgment in the *Gerechtshof Den Haag*, the court reiterated that a minor's participation in the NIP is in the child's best interests.[141] Furthermore, in the case of *ECLI:NL:RBGEL:2020:3699*, the *Rechtbank Gelderland* (Gelderland District Court) confirmed that the interests of minors prevail over the right to freedom of religion and that vaccinations serve the child's best interests.[142] This is an interesting approach and may provide valuable insight into the South African context when considering the balancing of the parent's

---

137 See e.g., *ECLI:NL:GHARL:2019:10763*; *ECLI:NL:GHDHA:2020:257*; *ECLI:NL:RBGEL:2020:3699*; *ECLI:NL:RBOBR:2018:4218*; *ECLI:NL:RBOBR:2018:6742*; *ECLI:NL:RBROT:2019:693*.

138 *ECLI:NL:GHARL:2019:10763* [6]–[7].

139 See *ECLI:NL:RBGRO:2009:BK7384* where the request for a replacement authorisation for medical treatment (vaccine administration) was rejected, because vaccination against swine flu was not necessary.

140 *ECLI:NL:GHDHA:2019:331* [6]; the *Gerechtshof Den Haag* in this case granted the father alternative permission, replacing that of the mother, to have the minor vaccinated on a day and time to be determined by Youth Health Care South Holland West.

141 *ECLI:NL:GHDHA:2020:257*.

142 *ECLI:NL:RBGEL:2020:3699* [5.11].

freedom of religion (often supporting non-vaccination) and the child's best interests (usually pro-vaccination).

Germany and the Netherlands are both member states of the European Centre for Disease Prevention and Control (ECDC).[143] The significance of this membership is rooted in the mission of the ECDC which is "aimed at strengthening Europe's defences against infectious diseases".[144]

The European Vaccination Information Portal (EVIP) is an EU initiative.[145] EVIP provides all-encompassing vaccine information, including the importance of childhood vaccines. Although Germany and the Netherlands do not directly address the issue of non-vaccination and delictual liability, the approaches of these jurisdictions to the importance of vaccination may provide valuable insight into the child's rights and best interests and the competing parental rights and interests, as well as the interests of public health and safety.

In addition, South African jurisprudence on non-vaccination may be enriched by the possibility of mandatory vaccination frameworks (including fines for non-vaccination).

I have chosen the Netherlands as a foreign law jurisdiction for my comparative study based on its pro-vaccination approach and the Dutch case law that has considered the vaccination of children despite parental opposition.

Furthermore, the Netherlands shares certain features with the South African common-law delict in that Roman-Dutch law influenced South African common law.[146] This may also provide valuable insight when considering the common-law delictual elements and the approaches that South Africa could adopt in deciding whether or not non-vaccinating parents should face delictual liability.

1.7.3 Canada

In Canada, the province of Ontario requires individuals asserting a religious or philosophical exemption to vaccination to complete an education session at their local public health unit which covers the basic information about immunisation, its safety, its importance for community (public) health, and the law. Only Ontario and New Brunswick require immunisations for school attendance.[147]

---

143 See ECDC "Governance" (date unknown) https://www.ecdc.europa.eu/en/about-us/ecdcs-governance (accessed 15 June 2020).

144 See ECDC "What we do" (date unknown) https://www.ecdc.europa.eu/en/about-uswhat-we-do/ecdcs-mission (accessed 15 June 2020).

145 See EVIP "Vaccination" (date unknown) https://vaccination-info.eu/en/vaccination (accessed 15 June 2020).

146 See Fagan (2018) 168, 185, & 194.

147 Mehlman & Lederman (2020) *PAI* 3.

The Canadian Superior Court of Justice, Ontario, ruled in *CMG v DWS*[148] that "the mother is not to communicate with the child in a manner that would be negative to the child receiving the vaccinations".[149] This case involved the limitation of parental rights (e.g., vaccine decisions and communication with the child about vaccines) and the protection of the child's best interests. In the review of *JW v BJH*,[150] the Health Professions Appeal, and Review Board issued a caution to the respondent. This caution was based on the fact that the respondent had been posting anti-vaccine misinformation on his professional social media accounts (such as Facebook/Meta and Twitter). The court concluded that it was irresponsible, unprofessional, unbalanced, and dangerous for the respondent to promote an anti-vaccine sentiment. This clearly illustrates Canada's pro-vaccination attitude and concern with disseminating the truth as opposed to misinformation.

Another case dealing with the best interests of the child and vaccines is *PW v CM*.[151] In this case, the Supreme Court of Nova Scotia (Family Division) decided the issue of custody and the appropriate level of child support between PW and CM. The court referred to an email from CM to PW on 14 June 2015 regarding health decisions and vaccine issues involving their child.[152] Based on this evidence, the court rejected CM's defence and described her as "somebody who is taking a wait-and-see approach" to vaccination.[153] The court observed that she was steadfast in her position on vaccination.[154] Accordingly, although the court did not order that the child be vaccinated, it did find that it was "clearly […] not in the child's best interest that CM make medical decisions for him".[155] Although CM was awarded primary care of the child, the court ruled that:

> PW will have sole decision making with respect to medical decisions for the child without requiring CM's consent, including vaccinations and doctors' appointments and medical treatment.[156]

In an appeal case, *IB v Kyle*,[157] the appeal against a suspension order was dismissed. In this case, the child had not been vaccinated as required by the Immunisation of School Pupils Act[158]

148 2015 ONSC 2201 (hereinafter *CMG v DWS*).
149 *CMG v DWS* [108].
150 2017 CanLII 50748 (ON HPARB) (hereinafter *JW v BJH*).
151 2017 NSSC 91 (hereinafter *PW v CM*).
152 *PW v CM* [112].
153 *PW v CM* [113].
154 As above.
155 *PW v CM* [115].
156 *PW v CM* [139].
157 2018 CanLII 30998 (ON HSARB) (hereinafter *IB v Kyle*).
158 RSO 1990, c. I.1.

and the parent refused to complete the statement of conscience or religious belief. Section 3(1) of the Immunisation of School Pupils Act describes the duty of a parent as:

> The parent of a pupil shall cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases.

Section 4 of the Act states that:

> Every person who contravenes section 3 is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

Subsection 3(1), however, does not apply to a parent who has completed an immunisation education session with a medical officer of health or with a medical officer of health's delegate, and who complies with the prescribed requirements, if any, and has filed a statement of conscience or religious belief with the proper medical officer of health. In this case, the parent refused to accept the following clause:

> With the decision to delay or refuse vaccines, you are accepting responsibility that you are putting your child's health and even life at risk […].[159]

The Board concluded that the appellant's issues with the "risks of not being vaccinated" portion of the statement did not warrant a removal of the suspension order. It was argued that the statement exists to further ensure that those parents who object to immunisation on grounds of conscience or religious belief, do so on an informed basis. The Board noted that this was reasonable in light of the serious public protection issues raised in this matter.[160]

In the matter of a request for a hearing under section 15 of Immunisation of School Pupils Act, the Health Services Appeal and Review Board stated that:

> It is important to remember that the [Immunisation of School Pupils] Act does not impose mandatory vaccinations for a child to attend school; rather, if a parent of a student decides not to vaccinate the student, the parent must provide a medical exemption or a statement of conscience or religious belief after attending a vaccination education session.[161]

159 *IB v Kyle* [52].
160 *IB v Kyle* [56].
161 *JB & MB v Eastern Ontario Health Unit* 2018 CanLII 31877 (ON HSARB) [48].

In *DRB v DAT*,[162] the Provincial Court of British Columbia ordered that CDB and AJB be vaccinated in accordance with the immunisation schedule.[163] The court noted that the

> current best evidence is that vaccination is preferable to non-vaccination, that it is required in order to protect those who cannot be vaccinated as well as to protect ourselves, and that any adverse reaction the person may have from the vaccine is largely outweighed by the risk of contracting the targeted disease.[164]

Despite claims that some diseases have been eradicated and some are very unlikely to be contracted, the court nonetheless ordered the vaccinations. In *BLO v LJB*[165] the Ontario Court of Justice granted the father's motion that the child should be vaccinated.[166] The court pointed out that decisions about when to have a child vaccinated and what vaccines to administer are important medical decisions.[167] From the evidence, the mother's position was not that there should never be any vaccines; she wanted the child to receive fewer vaccinations and be on a delayed schedule.[168] The court decided that there would be no objections from either parent to MIO receiving the vaccinations based on their own research from internet sources.[169] It ordered that the child receive the usual vaccinations that children receive in Ontario and that a general medical practitioner (Dr Sheppard) should determine what those vaccines are.

Although these cases do not directly address the question of potential tortious liability, they undoubtedly address the balancing of the competing rights, duties, and interests of the parent and the child. I have chosen Canada (including the civil law pocket of Quebec) as a foreign law jurisdiction for my comparative study because of Canada's pro-vaccination attitude and Canadian case law which addresses the issue of children's vaccination despite the opposition of parents.

Furthermore, valuable insight may be drawn from the Immunisation of School Pupils Act and its reference to a "statement of conscience or religious belief". The suitability of potential legislative reform in South Africa and its effect on the common-law delictual elements are explored in Chapters 5 and 6. Another reason for my choice of Canada is the work published by Caplan, Hoke, Diamond, and Karshenboyem[170] in which they consider the hypothetical

---

162 2019 BCPC 334 (hereinafter *DRB v DAT*).
163 *DRB v DAT* [43].
164 *DRB v DAT* [41].
165 2019 ONCJ 534 (hereinafter *BLO v LJB*).
166 *BLO v LJB* [10].
167 *BLO v LJB* [39].
168 *BLO v LJB* [42].
169 *BLO v LJB* [26].
170 AL Caplan, D Hoke, NJ Diamond & V Karshenboyem "Free to choose but liable for the consequences: should non-vaccinators be penalized for the harm they do?" (2012) *JLME* 606.

tortious liability of a non-vaccinating parent (X) towards another child (Y). They present a hypothetical scenario and investigate the potential tortious liability arising from the failure to vaccinate.[171] Caplan *et al* consider the tort of negligence in detail to establish whether the non-vaccinating parent may be held liable in tort for the harm caused to another child due to the non-vaccination of their own child. This serves as proof that the issue of non-vaccination has received some attention from Canadian legal scholars and I explore how they approach the issue of liability. This, in turn, may offer valuable insights into the South African context.

1.7.4 Australia

In *Mains v Redden*[172] a single appeal judge sitting as the Full Court heard an appeal against the decision of a Federal Magistrate to make orders for the immunisation of the parties' child. After considering extensive evidence, the Federal Magistrate ordered that the child be immunised and the court concluded that immunisation was in the child's best interests and that the benefits of immunisation outweighed the likely risk.[173]

In *Rilak v Tsocas*[174] the Family Court of Australia ruled that "the father shall be at liberty to arrange for the child to be vaccinated […] in accordance with the recommendations of Dr Y".[175] Although this matter could have been approached as a question of parental responsibility, both parents sought orders in respect of vaccination.[176] This shows the polarised views on vaccination and that it is a current and relevant issue.

In *Duke-Randall and Randall*,[177] the father sought to be released from restraints (sought by the mother) preventing him from vaccinating and/or immunising their children.[178] The Family Court of Australia ordered that the father was free to immunise the children in accordance with the recommendations of the single expert (or in accordance with the children's treating general practitioner) after consultation with the expert.[179]

Although these cases may appear insignificant, it is important to note the court's view of vaccination as being in the child's best interests. Furthermore, it is noteworthy that the Australian Public Health Act of 2005 deals with the "exclusion of unvaccinated children from

171 Caplan *et al* (2012) *JLME* 606.
172 (2011) FamCAFC 184 (hereinafter *Mains v Redden*).
173 *Mains v Redden* [106] & [127].
174 (2015) FamCAFC 120 (hereinafter *Rilak v Tsocas*).
175 *Rilak v Tsocas* order no 13.
176 *Rilak v Tsocas* [510].
177 (2014) FamCA 126 (hereinafter *Duke-Randall v Randall*).
178 *Duke-Randall v Randall* [498].
179 *Duke-Randall v Randall* [499].

particular services"[180] and that under Australian law refusing to enrol a child for a service or not allowing the child to attend a service based on his or her immunisation status does not amount to unlawful discrimination under the Anti-Discrimination Act of 1991.[181] Furthermore, the Public Health Act does not regard vaccine omission as an offence. Section 143(5) states that:

> A person does not commit an offence against subsection (1) or (2) by merely refusing, or failing, to be vaccinated against a condition for which there is a recognised and reasonably available vaccine.

Although it is not regarded as a statutory offence, this does not mean that non-vaccination cannot attract civil liability. In January 2016, the Australian government passed the "No Jab, No Pay" legislation[182] so implementing a monetary-reward approach to vaccination. From 1 July 2018 families with children who are not immunised in accordance with the Childhood Vaccination Schedule appropriate for the child's age (and do not have an approved exemption), will have their Family Tax Benefit (FTB) Part A child rate reduced for each child who does not meet the immunisation requirements.[183]

In order to be eligible for the full rate of FTB Part A or childcare fee assistance, children need to be: (1) immunised in accordance with the NIP's Childhood Vaccination Schedule; (2) on an approved catch-up schedule; or (3) have an approved exemption.[184]

Although a list of exemptions is provided, "vaccine objection" is not one of them. The grounds that do constitute a valid reason are listed and center, in the main, on valid medical objections to vaccine administration.[185]

Although Australia (like Germany and the Netherlands) does not address the issue of non-vaccination and delictual/tortious liability directly, its legislative approach ("No Jab, No

---

180 Part 2, Contagious conditions, Division 1AA, Exclusion of unvaccinated children from particular services.

181 See Queensland Gov "Childcare immunisation requirements" (2020) https://www.qld.gov.au/health/conditions/immunisation/childcare (accessed 15 June 2022).

182 Federal Register of Legislation "Social Services Legislation Amendment (No Jab, No Pay) Act 2015" (date unknown) https://www.legislation.gov.au/Details/C2015A00158 (accessed 06 July 2022). See also FH Beard, J Leask & PB McIntyre "No jab, no pay and vaccine refusal in Australia: the jury is out" (2017) 206(9) *Med J Aus* 381–383.

183 Australian Gov, DSS "Immunisation and health check requirements for family tax benefit" (6 August 2020) https://www.dss.gov.au/our-responsibilities/families-and-children/benefits-payments/strengthening-immunisation-for-young-children (accessed 15 June 2022).

184 As above.

185 Australian Gov "Immunisation medical exemptions" (21 December 2021) https://www.servicesaustralia.gov.au/individuals/topics/immunisation-medical-exemptions/40531 (accessed 15 June 2022). See also Australian Gov "What are immunisation requirements" (1 July 2022) https://www.servicesaustralia.gov.au/individuals/topics/what-are-immunisation-requirements/35396 (accessed 15 July 2022).

Pay" legislation) may provide valuable insight into the child's rights and best interests, parental duties, and competing parental rights and interests.

It is for this reason that I have chosen Australia as a foreign law jurisdiction for my comparative study. In addition, the South African jurisprudence on non-vaccination may be enriched through reference to the possibility of mandatory vaccination frameworks (such as the forfeiture of a family rebate and non-vaccination discrimination).

1.7.5 United States of America

Before considering US case law on vaccination, it is important first to explore the US Federal government and different state governments. The US has a federal system of government, controlled on two levels. Both state and federal governments consist of three branches: executive, legislative, and judicial.[186]

The Tenth Amendment to the US Constitution holds that "all powers not granted to the Federal Government are reserved for the States and the people".[187] However, certain powers are shared by the federal and state governments, for example, the power to tax, build roads, and establish lower courts.[188] In the context of vaccination, different state governments hold different views with the result that every state government may have different decisions and mandates regarding vaccine requirements and exemptions. For example, 50 US States (including the District of Columbia) mandate certain vaccinations (such as diphtheria, tetanus, pertussis (whooping cough), polio, measles, rubella, and chickenpox).[189] All US States — barring Iowa — mandate immunisation against mumps, while South Dakota and Alabama do not require vaccination against hepatitis B.[190] Only Virginia, Hawaii, Washington DC, and Rhode Island require the HPV shot.[191]

Notably, vaccine mandates are not absolute and vaccine exemptions (based on philosophical or religious reasons) are permitted in certain states but not in others. For example,

---

186 Cornell Law School "Federalism" (date unknown) https://www.law.cornell.edu/wex/federalism (accessed 06 July 2022); The White House "About the White House our government" (date unknown) https://www.whitehouse.gov/about-the-white-house/our-government/ (accessed 06 July 2022).

187 The White House "About the White House our government" (date unknown) https://www.whitehouse.gov/about-the-white-house/our-government/ (accessed 06 July 2022).

188 Cornell Law School "Federalism" (date unknown) https://www.law.cornell.edu/wex/federalism (accessed 06 July 2022).

189 D Desilver "States have mandated vaccinations since long before COVID-19" (8 October 2021) https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/ (accessed 06 July 2022).

190 As above.

191 As above.

all US States (including the District of Columbia) allow for medical exemptions to mandatory vaccination.[192]

In *FF v State of New York*,[193] the Supreme Court of the State of New York (Appellate Division) confirmed the ruling of the Supreme Court of the State of New York, County of Albany,[194] that the legislative repeal of the "religious exemption to compulsory vaccination" and the Public Health Law[195] does not amount to an unconstitutional violation of the plaintiffs' rights — and consequently the revocation of the "religious exemption to compulsory vaccination" does not violate the Free Exercise Clause of the First Amendment of the United States Constitution or the New York State Constitution.[196]

This is an interesting approach to the debate regarding freedom of culture and religion (which are constitutionally protected rights in South Africa), versus the best interests of the child and compulsory vaccination procedures. It serves as a valuable indication of the State of New York's approach to religious exemptions or, rather, their revocation, in a constitutional context. This may provide guidance in the South African constitutional context where the rights of the parent (such as freedom of culture and religion) are balanced against the rights and interests of the child.

In *Brown v Smith*[197] the Court of Appeal of California affirmed the trial court's order dismissing the plaintiffs' challenge to an amendment of Californian law which eliminated the previously existing "personal beliefs" exemption from mandatory immunisation requirements for school children.[198] The court held that since 1905 the courts have recognised the policing power of the state to compel vaccination, as well as the state's interest in protecting the health and safety of children. Accordingly, it ruled that the state's interest in protecting the health and safety of children outweighs the plaintiffs' arguments for the previously existing "personal beliefs" exemptions. Once again, this approach serves to illustrate the courts' approach to

192 M Funakoshi "US state vaccine mandates in schools" (15 September 2021) https://graphics.reuters.com/HEALTH-CORONAVIRUS/BIDEN/zgpombrajpd/ (accessed 15 June 2022).
193 2021 NY Slip Op 01541 (order affirming trial court judgment).
194 *FF v State of New York* 2019 NY Slip Op 29376.
195 New York Consolidated Laws, Public Health Law of 2012, s 2164, as amended.
196 See Supreme Court of the US "Petition — Supreme Court of the United States" (date unknown) https://www.supremecourt.gov/DocketPDF/21/21-1003/207832/20220110152049902_Petition.pdf (accessed 06 July 2022). Justia US Law "FF v State of New York" (2021) https://law.justia.com/cases/new-york/appellate-division-third-department/2021/530783.html (accessed 15 June 2022).
197 B279936 (2 July 2018).
198 Justia US Law "Brown v Smith" (2018) https://law.justia.com/cases/california/court-of-appeal/2018/b279936.html (accessed 15 June 2020). See also *Abeel v Clark* 1890 84 Cal 226; *Jacobson v Massachusetts* 1905 197 US 11.

religious exemptions (and their revocation) from vaccination and the child's best interests. It also shows the role of the state in protecting all children and their health rights and interests.

It is also noteworthy that the Family Court of New York, Kings County, has referred to the state's duty to protect the health and safety interests of children. In *In re Christine M*[199] the Court of New York, Kings County, ruled that not vaccinating a child during a measles outbreak amounted to child neglect:

> [A] parent's knowing failure to have a child immunized against measles in the midst of a measles epidemic or outbreak clearly places that child's physical condition in imminent danger of becoming impaired.[200]

Although this thesis does not address criminal law such as child abuse or neglect, it is still a powerful statement regarding the duties of parents in the context of vaccination. Although child neglect cases fall within the ambit of criminal law in South Africa, a delictual cause of action may be brought independently from the criminal-law case as South African common law protects children against neglect and abuse by providing them with the *actio iniuriarum* (assault, where the harm is caused intentionally) or the Germanic action for pain and suffering (where the harm is generally the result of negligence but can accommodate the intentional infliction of harm).[201]

Currently, the Vaccinate All Children Bill of 2019 has been introduced in the US Congress. The aim of this Bill is to prohibit the Department of Health and Human Services from awarding grants to public state entities for preventive health service programmes unless the state institutes certain vaccination requirements for its public schools.

Once again, vaccination in public schools is at the centre of the non-vaccination debate. The Bill provides that a state must require each student in public elementary or secondary school to be vaccinated in accordance with the recommendations of the Advisory Committee on Immunisation Practices. However, it also provides an exception for students whose health

199 157 Misc 2d 4 (1992) (hereinafter *In Matter of Christine M*).

200 *In Matter of Christine M* [14].

201 See A Friedman *et al* "Chapter 47: children's rights" in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (*CLoSA*) (2ed, RS1, 07-09, 2014) 2, & 22–25: e.g., the South African Schools Act 84 of 1996 gives effect to FC s 28(1)(*d*) in the context of bans on corporal punishment in schools. See also Carstens & Pearmain (2007) 497–500.

in the opinion of a physician conforming to the accepted standard of medical care would be endangered by vaccination.[202] This appears to be the only exemption permitted by the Bill.[203]

The US Congress is currently in the process of introducing another Bill ("The Vaccines Act of 2019") to provide for a national system for surveillance of vaccine rates, authorise research on vaccine hesitancy, and increase public understanding of the benefits of immunisations.[204] Furthermore, the intended Vaccine Access Improvement Act of 2019 has also been introduced in House to modify the excise tax on certain vaccines which "funds the National Vaccine Injury Programme, which compensates people who have been injured by vaccines listed on the table".[205]

The US legislation and draft legislation may provide valuable insight into the intended legislation for compulsory vaccination and accepted exemptions from vaccination. Furthermore, the approach of the US to vaccination exemptions and non-vaccination, as well as the balancing of competing rights, duties, and interests may be useful to potential legislative reform in South Africa.

I have chosen the US (including the civil law pocket of Louisiana) as a foreign law jurisdiction for my comparative study because the law of torts jurisprudence in the US provides a myriad of information on the tortious liability of non-vaccinating parents. Numerous publications have appeared which explore the possibility of holding non-vaccinating parents liable in tort for the non-vaccination of their children. This opens the way for a comparison of the law of torts' approach to non-vaccination with the South African delictual approach to non-vaccination and delictual liability. As mentioned, reconciling and comparing delict and tort is challenging but a detailed analysis of torts (in the context of non-vaccination) may reveal interesting points for comparison. For example, if it is established that a parent may be held tortuously liable for non-vaccination, a parallel may be drawn between the elements of that specific tort and the elements of our common-law delict.

---

202 Congress.Gov "H.R.2527 — Vaccinate All Children Act of 2019" https://www.congress.gov/bill/116th-congress/house-bill/2527?q=%7B%22search%22%3A%5B%22immunization%22%5D%7D&s=7&r=10 (accessed 15 June 2020).

203 California, Maine, Mississippi, New York, & West Virginia currently allow no exemptions except for medical reasons. See GovTrack "H.R. 2527 (116th): Vaccinate All Children Act of 2019" (8 August 2019) https://www.govtrack.us/congress/bills/116/hr2527/summary (accessed 19 June 2020).

204 Congress.Gov "H.R.2862 — Vaccines Act of 2019" https://www.congress.gov/bill/116th-congress/house-bill/2862/text?q=%7B%22search%22%3A%5B%22vaccine%22%5D%7D&r=1&s=1 (accessed 15 June 2022).

205 Congress.Gov "H.R.1973 — Vaccine Access Improvement Act of 2019" https://www.congress.gov/bill/116th-congress/house-bill/1973?q=%7B%22search%22%3A%5B%22vaccine%22%5D%7D&r=2&s=3 (accessed 15 June 2020).

1.7.6 United Kingdom

Case law in the UK has delivered interesting examples of whether or not vaccination serves the best interests of the child. In *Re SL (Permission to Vaccinate)*[206] the High Court of Justice (Family Division) required a seven-month-old child placed in its care to receive certain vaccinations. The child's mother objected based on reported instances of her other children having suffered adverse reactions to vaccination. The court held that immunisation was in the child's best interests and that the benefits of immunisation outweigh the claimed risks. The court held that it would not be intruding on the parents' autonomy by exercising its obligations as the upper guardian of all children.

Another thought-provoking UK case is *F v F*.[207] In this case, a dispute between separated parents arose regarding whether or not their children should be immunised. The High Court of Justice (Family Division) held that it was in the best interests of the children to be immunised despite an objection from the mother. Furthermore, it is interesting to note that in *Re H*[208] the Court of Appeal (Civil Division), on appeal from the High Court of Justice (Family Division), stated that "a failure by parents to obtain vaccinations for their children may feature as one of a series of wider threshold allegations in support of a more generalised case of neglect".[209]

Once again, the issue of child neglect features, and is indicative of the parents' duties in the context of vaccination, similar to the child neglect discussed above under the US case law. Although the UK (like Germany, the Netherlands, and Australia) does not directly address the issue of non-vaccination and delictual/tortious liability, I have chosen the UK as a foreign-law jurisdiction for my comparative study because of its approach to the balancing of competing rights, interests, and parental duties in the context of non-vaccination. Furthermore, English law has influenced the South African common-law delict.[210]

1.8 DELIMITATIONS OF STUDY

This thesis explores the civil (specifically the common-law delictual) liability of non-vaccinating parents (X) towards another child (Y) and not that of non-vaccinating parents (X) towards his or her own child (XX) or an adult. I do not explore the criminal liability of a non-

206 (2017) EWHC 125 (Fam).
207 (2013) EWHC 2683 (Fam).
208 *Re H (A Child: Parental Responsibility: Vaccination)* (2020) EWCA Civ 664 (hereinafter *Re H*).
209 *Re H* [21].
210 Zimmermann & Visser (1996) 57.

vaccinating parent.[211] Although reference is made to the "victim" in the context of the law of delict and torts, this does not extend to discussions on a victim in criminal law. This thesis focuses specifically on the harm that ensues as a result of non-vaccination.

I acknowledge, but do not explore further, the abundance of literature and foreign case law dealing with vaccine-related injuries and product (or manufacturer) liability.

Furthermore, children's consent in the context of vaccination is only referred to in the context of children's rights and not in the context of their participation in data collection or research.

The discussion of children is limited to those children who remain in the custody and care of their parents or caregivers. Because the delictual liability of non-vaccinating parents (X) is explored, it is unnecessary to include emancipated minors.

The responsibilities and/or duties of the state are touched on throughout the thesis, especially with reference to South African and foreign case law. This is because the state is ultimately the upper guardian of all minors and may make decisions to protect their rights. However, the liability of the state as regards non-vaccination falls outside the scope of this thesis. At the same time, I acknowledge that there may be possible state liability in instances where the state has failed to supply sufficient vaccines to a local community. However, this thesis does not explore vaccine supply in the context of the state's failure to meet vaccine supply and demand quotas.

Furthermore, the context of the customary-law of delict is not explored in that the thesis focuses on the common-law delict in South Africa. South African customary law recognises certain delicts such as (1) sexual wrongs (including the defloration of an unmarried girl; the common-law action for seduction or impregnation of an unmarried girl; adultery; and sexual intercourse with, and the impregnation of, a woman in an *ukungena* relationship or a widow or a divorced woman);[212] (2) *ukuthwala* as delict; (3) defamation; (4) delicts regarding property (including damage to property, damage caused by animals, and theft); and (5) assault and causation of death (specifically assault and the culpable causation of the death of a

211 For a discussion of criminal liability in the context of non-vaccination see M Waterman "Indorsing infant immunity: An argument for criminalizing parents' refusal to immunize their children" (2015) 51(1) *TLR* 153–180; SA Ferraiolo "Justice for injured children: a look into possible criminal liability of parents whose unvaccinated children infect others" (2016) 19(1) *QHLJ* 29–54.

212 JC Bekker, C Rautenbach & NMI Goolam *Introduction to legal pluralism in South Africa* (2021) 170–171.

breadwinner).[213] The South African customary law of delict does not generally cover bodily harm, save for assault and the culpable causation of the death of a breadwinner.[214]

1.9 AN OVERVIEW OF THE REMAINING CHAPTERS

Chapter 2 explores the concept of non-vaccination in greater detail. It opens with a short introduction to non-vaccination before elaborating on non-vaccination as a social crisis and global health threat. The chapter identifies the *lacuna* in the application of the South African common-law delict — to date, no cases or academic commentary in South Africa has dealt with the issue of non-vaccinating parents and their potential delictual liability. The views of the now infamous anti-vaxxers are examined and a brief overview is given of the argument that vaccines cause autism, together with other quasi-scientific claims that have built up around vaccination. COVID-19 myths are also briefly explored to provide some insight into why non-vaccinating parents choose not to vaccinate. The essence of Chapter 2 lies in the consequences of non-vaccination, which are especially important in the context of the delictual element of harm. The chapter concludes with an examination of non-vaccination in the South African context.

After an introduction and overview of how non-vaccination fits into the picture and what its drivers and consequences are, Chapter 3 explores the South African constitutional factors that provide the backdrop to the research. As mentioned above, the common-law delict cannot be explored without reference to the Constitution as this would amount to "constitutional heedlessness" as coined by Zitzke. Chapter 3 investigates the doctrine of adjunctive subsidiarity and the constitutional rights at play in the non-vaccination conundrum. The doctrine of adjunctive subsidiarity is used to show how not only the Constitution but also the legislation enacted to realise these rights, come into play in the context of non-vaccination and possible delictual liability.

As this chapter shows, the question is not necessarily whether a child has the right to vaccination, but rather whether parents are duty-bound to vaccinate their children. If there is a parental duty to vaccinate this may ultimately assist in proving the delictual element of wrongfulness which is explored in Chapter 5. Before discussing the common-law delict in South Africa, I explore foreign jurisdictions to establish their approach to the potential liability of non-vaccinating parents.

---

213 As above.
214 As above.

Chapter 4 provides comparative perspectives of tortious/delictual liability in foreign jurisdictions. It opens with a short introduction and overview of the law of torts, specifically the tort of negligence which is the most appropriate point of departure in investigating liability for non-vaccination. The US tort of negligence is then explored in the context of non-vaccination. Before exploring the specific foreign jurisdictions, I refer to my own creation — the "Nonva/Vic" hypothetical. This short set of facts is then used to structure the foreign law arguments on the tortious/delictual liability of Non (a non-vaccinating parent).

The heart of Chapter 4 lies in the application of the Nonva/Vic hypothetical to foreign jurisdictions. For example, the Nonva/Vic hypothetical is explored in Canadian tort law with specific reference to the tort of negligence. It is also explored with reference to the laws of Quebec, Louisiana, the Netherlands, and Germany. Reference to the Australian and UK positions is made throughout Chapter 4. As Chapter 4 is a mix of civil- and common-law jurisdictions, as well as civil-law pockets within common-law jurisdictions, reference is briefly made to the difference between the two, but this distinction is not overemphasised.

The conclusion of Chapter 4 briefly revisits and pulls together all the valuable insights that may be drawn from these foreign jurisdictions and their approach to non-vaccination and civil liability. Only after a thorough analysis of the foreign-law position on this issue do I turn my attention to the South African common-law delict.

Chapter 5 commences with an introduction to the common-law delict in South Africa. The approaches and opinions of various delict scholars are considered to illustrate clearly the controversies surrounding the different elements of delict. Before exploring the law of delict and its elements, I refer to my own hypothetical adaptation of the Nonva/Vic hypothetical — the Filia/Elimele hypothetical. The Filia/Elimele hypothetical differs from the Nonva/Vic hypothetical in Chapter 4, and the facts in the Filia/Elimele hypothetical are adapted to fit the South African context.

The five elements of the common-law delict are then explored with reference to the Filia/Elimele hypothetical. Harm is explored as the first element of the common-law delict, followed by conduct, causation, fault, and wrongfulness. The reasons for this specific structure are explained in Chapter 5. The delictual remedies available to the victim of non-vaccination, specifically in the Filia/Elimele hypothetical, are discussed before the conclusion of Chapter 5. The foreign law lessons of Chapter 4 are alluded to throughout Chapter 5 to produce meaningful insights into the South African common-law delict's approach to the issue of liability for non-vaccination.

Chapter 6 explores the need for statutory reform in the South African context in light of the lessons learned from, specifically, Chapter 5. In Chapter 6, I recommend some avenues for statutory reform, as well as a common-law delictual liability clause. I also consider the viability of a vaccine exemption form in the South African context. Here, the focus is also on legislative reform that may assist litigants to navigate the common-law delictual elements. Chapter 6 also covers avenues for further research.

Chapter 7, the concluding chapter of this thesis, briefly summarises the previous chapters and offers concluding remarks.

CHAPTER 2: NON-VACCINATION

2.1 INTRODUCTION

As mentioned in Chapter 1, our courts are yet to adjudicate a matter concerning the delictual liability of non-vaccinating parents (X). Similarly, South African legal scholars are yet to consider the interaction between the common-law delict and non-vaccination. Currently, there are no clear-cut solutions to address a non-vaccinating parent's delictual liability. It is for this reason that various layers of the law must be considered in conducting this research. These include the Constitution (supreme law), which serves as the backdrop to this research, and foreign law. Ultimately, the constitutional backdrop and foreign law may assist in formulating an approach to the issue of non-vaccinating parents in the South African delictual context.

Before addressing the issue of non-vaccination in the legal context, it is essential to understand non-vaccination within the local and global health context. Accordingly, this chapter briefly explores the factors underlying non-vaccination, the vaccine hesitancy matrix, anti-vaxxers, and the consequences of non-vaccination.

I then consider vaccine myths and quasi-scientific claims as part of the underlying factors fuelling non-vaccination. I refer to the best available scientific information and evidence to address the validity of these vaccine myths. The scientific facts about vaccines and their safety are ultimately considered when exploring the factual questions in the common-law delict (e.g., factual causation and harm).

This is followed by a discussion of vaccination in the South African context with particular attention to South Africa's vaccine policies and the dearth of case law and academic commentaries regarding the delictual liability of non-vaccination. The ultimate purpose of this chapter is to introduce the reader to the world of non-vaccination, its underlying factors, as well as the current legal approach to vaccination and non-vaccination in South Africa.

This background discussion of non-vaccination does not include a direct discussion of the constitutional factors, tort law, or the common-law delict as it is important to understand the underlying factors fuelling parents' decision making, especially the decision not to vaccinate. The factors influencing vaccine decision making are relevant insofar as they influence parents' decisional (parental) autonomy and other constitutional rights, for example, the right to dignity and to practice the religion and culture of their choice.

The scientific facts about vaccination further inform various elements of delictual liability. For example, at the most basic level, if it can be shown scientifically that non-

vaccination leads to bodily harm, the delictual elements of damage (or harm), causation, and negligence can more easily be established. If it can be shown that the conduct of a non-vaccinating parent is unreasonable, this could impact the establishment of other delictual elements like wrongfulness, fault, and possibly legal causation. I park these common-law delictual elements for now and turn to a discussion of non-vaccination.

2.2 NON-VACCINATION

2.2.1 Introduction

Vaccines are lauded as one of the most successful public health interventions, providing universal prophylaxis at a fraction of the cost that would otherwise be incurred following the widespread outbreak of an infectious disease.[1] The substantial contribution of vaccines and vaccinations to the general well-being and health of the human race cannot be overstressed.[2]

Although this research is aimed at investigating the potential common-law delictual liability of non-vaccinating parents (X) in South Africa, it goes without saying that certain vaccination-related facts must be considered if we are adequately to understand the possible delictual implications of non-vaccination in the South African context. This is important especially for purposes of the enquiry into negligence in South African law, in terms of which regard must be had to the available information which the reasonable person would consider, the resulting reasonable foreseeability of damage that may be caused as a result of non-vaccination and the reasonable preventative steps that a reasonable person might consider taking.

Before diving into a discussion of non-vaccination and its consequences, I first briefly recap the terminology explained in Chapter 1:

(1) A vaccine refers to a preparation that is used to stimulate the body's immune response against diseases. According to the WHO, the purpose of a vaccine is to help the body's immune system to recognise and fight pathogens (such as viruses or bacteria),[3] and its administration is commonly referred to as immunisation or vaccination.
(2) The term "non-vaccination" is used in this thesis to avoid confusion regarding intent, negligence, and omission for purposes of establishing delictual liability.

---

1 Walwyn & Nkolele (2018) *HRPS* 31; Oduwole *et al* (2019) *BMJ Open* 1.
2 See Oduwole *et al* (2019) *BMJ Open* 1.
3 See WHO "Vaccines and immunisation" (date unknown) https://www.who.int/topics/vaccines/en/ (accessed 01 April 2020).

(3) "Vaccine hesitancy" is an overarching term that includes various sub-categories that occur on the vaccine attitude spectrum.

(4) The vaccine attitude spectrum stretches from those who accept some vaccines on time, and those who refuse all vaccines.

In the following sections, I explore non-vaccination as a global health threat and the underlying factors that fuel it. Thereafter, the infamous "anti-vaxxers" are explored, with reference to the theories that vaccines cause autism and other quasi-scientific claims about vaccines. The COVID-19 vaccines are also explored with reference to some myths and facts that have built up around them. The consequences of non-vaccination are explored before I conclude this chapter with an examination of vaccination and non-vaccination in the South African context.

2.2.2 A global health threat

Vaccines are provided to individuals, especially children, to keep them healthy and to prevent diseases such as measles, polio, tetanus, diphtheria, meningitis, influenza, typhoid, and cervical cancer.[4] Childhood immunisation is praised as a successful public-health measure aimed at reducing infant morbidity and mortality from vaccine-preventable diseases.[5]

Vaccines have saved more lives than any other health intervention in the last century.[6] According to the WHO, annually more than two million deaths are prevented worldwide as a result of immunisation.[7] To accelerate and strengthen the progress in vaccination coverage over the years, the WHO introduced an Expanded Programme on Immunisation (EPI) in 1974, which is praised as a resounding success in most parts of the world.[8] In an effort to combat non-vaccination, the WHO Global Vaccines Action Plan (GVAP) 2011–2020 was endorsed by 194 member states of the World Health Assembly — including South Africa — in May 2012.[9]

---

4 Verelst *et al* (2019) *Vaccine* 2087. See RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020) at 1.

5 See generally N Massyn *et al District health barometer 2016/17* (2017); Oduwole *et al* (2019) *BMJ Open* 1.

6 See Massyn *et al* (2017) 118.

7 As above. According to Oduwole *et al* (2019) *BMJ Open* 1, it has been estimated that over 3 million deaths and 75 000 disabilities are prevented, annually, by vaccination.

8 Oduwole *et al* (2019) *BMJ Open* 1.

9 See also WHO "Global vaccine action plan 2011–2020" (21 February 2013) https://www.who.int/publications/i/item/global-vaccine-action-plan-2011-2020 (accessed 10 March 2020), where RSA is listed as one of the countries that provided inputs and comments to the GVAP. RSA is listed as one of the WHO member states. See WHO "Alphabetical list of WHO member states" https://www.who.int/choice/demography/by_country/en/ (accessed 10 March 2020). See also Massyn *et al* (2017) 118; RJ Burnett *et al* "Progress towards obtaining valid vaccination coverage data in South Africa" (2019) 115(5/6) *SAJS* 1.

As mentioned in Chapter 1, South Africa has an extensive vaccination programme, often referred to as EPI-SA. In addition to the WHO's EPI and GVAP, the COVAX global alliance was established after the onset of the COVID-19 pandemic.[10] COVAX expressly recognised the development of a COVID-19 vaccine as the most pressing challenge of our time and aimed to "accelerate the development, production, and equitable access to COVID-19 tests, treatments, and vaccines".[11]

However, despite these global efforts, in 2019 the WHO listed "vaccine hesitancy" as one of the top ten global health threats.[12] Although a stable consensus of medical experts (for over two centuries) has held that vaccinations are one of the most cost-effective interventions for the protection of public health, anti-vaxxers have, since the earliest mass-immunisation programmes implemented in the 19th century, rejected this consensus and denied the efficacy or safety of vaccination.[13]

It is no secret that many countries struggle with non-vaccination. Over the last three years, more than 90% of the 194 member states of the WHO have reported vaccine hesitancy (non-vaccination) as a factor influencing their efforts to meet the GVAP's goal.[14] The global increase in non-vaccination is currently threatening the decades of progress made in the control and prevention of infectious diseases.[15]

The increase in anti-vaccination (and anti-vaccine) sentiment is clear when one considers the roll-out of the COVID-19 vaccines.[16] WHO noted that "[i]n another blow, the [COVID-19] pandemic threatens to set back hard-won global health progress achieved over the past two decades — in fighting infectious diseases".[17] Essentially, this means that the non-vaccination issue has not died down; it has recently gained momentum and remains a global and domestic public health issue.

---

10 WHO "COVAX" (date unknown) https://www.who.int/initiatives/act-accelerator/covax (accessed 7 July 2022).

11 As above.

12 WHO "Ten threats to global health in 2019" (2019) https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (accessed 10 March 2020); WHO "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020); Tull (2019) 4.

13 JR Steiner-Dillon "Sticking points: epistemic pluralism in legal challenges to mandatory vaccination policies" (2019) 88(1) *UCLR* 172.

14 Oduwole *et al* (2019) *BMJ Open* 2. See also Tull (2019) 3.

15 Verelst *et al* (2019) *Vaccine* 2079; Tull (2019) 3.

16 F Germani & N Biller-Andorno "The anti-vaccination infodemic on social media: a behavioral analysis" (2021) 16(3) *PloS One* e0247642; S Yousefinaghani *et al* "An analysis of COVID-19 vaccine sentiments and opinions on Twitter" (2021) 108 *IJID* 256–262.

17 WHO "10 global health issues to track in 2021" (24 December 2020) https://www.who.int/news-room/spotlight/10-global-health-issues-to-track-in-2021 (accessed 07 July 2022).

To comprehend the extent of non-vaccination fully it is important to consider the underlying factors that fuel non-vaccinators' decision making. Although this research is not solely concerned with the reasons underlying non-vaccination and the efforts or strategies to combat non-vaccination, it is an important point of departure when investigating non-vaccination. This is because researching the underlying factors fuelling non-vaccination ultimately provides insight into liability-related considerations, for example, for the common-law delictual element of fault where the reasonable-person test is used together with foreseeability (or foresight); as well as the element of wrongfulness, which may be determined with reference to the breach of a legal duty.

The common-law delictual elements in the context of non-vaccination are explored in Chapter 5. For now, the underlying factors fuelling non-vaccination are considered.

2.2.3 Non-vaccination: the underlying factors

A qualitative review from Canada indicates that vaccination decisions are complex and multi-dimensional.[18] Without a doubt, non-vaccination is a very context-specific issue that varies across time, place, and vaccines. Anti-vaxxers are generally a small group in which the majority of non-vaccinating individuals exhibit varying degrees of vaccine acceptance.[19]

Non-vaccination is a reflection of an individual's attitude towards vaccination as opposed to the "health system factors" which impede vaccine uptake.[20] In what follows, the investigation of non-vaccination focuses on the "demand" aspect of vaccination by exploring the acceptance and refusal of vaccination by individuals (for themselves or for their children) in a context where vaccination supply and access are readily available.[21] It is clear, therefore, that vaccine hesitancy is only one of the various factors influencing low or sub-optimal vaccination coverage and uptake.

Shifting the focus from vaccine hesitancy to the supply and availability of vaccines offers a different perspective on why vaccination coverage is low without necessarily considering non-vaccinating individuals. For this reason, it is important to distinguish between vaccine supply and demand as non-vaccination is researched in the context of vaccine demand.

---

18 Tull (2019) 17.
19 Oduwole *et al* (2019) *BMJ Open* 2.
20 As above.
21 As above. See also *Electoral Commission v Minister of Cooperative Governance & Traditional Affairs* 2022 (5) BCLR 571 (CC) [224]: "hesitancy among unvaccinated people in older age groups caused demand to drop".

For purposes of this research, the scope of non-vaccination does not refer to instances where vaccine uptake is low due to poor availability, lack of vaccination services, or the poor distribution of vaccines (vaccine supply).[22] There are various factors influencing or contributing to non-vaccination.[23] According to the WHO, these factors include complacency, convenience, confidence, individual factors, group factors, context, or vaccine-specific issues.[24] To increase or maintain vaccination coverage and address non-vaccination, it is essential to understand the factors which drive individuals in their vaccination-related decisions.[25]

Accordingly, two models have been developed to explore the vaccine hesitancy determinants — the "3C-model" and the Working Group Determinants of Vaccine Hesitancy Matrix. These two models are complementary and enable the development of targeted interventions and community-specific vaccine strategies to expressly battle context-specific non-vaccination (vaccine hesitancy) and increase and maintain vaccination coverage.[26] The following section briefly summarises the determinants of the two models.[27]

2.2.3.1 The "3C-model"

The "3C-model" is a neat and easy-to-grasp model containing the three determinants of non-vaccination (complacency, convenience, and confidence) all starting with the letter "C".[28] These three "C's" may overlap and are not mutually exclusive. Consider the following figure to illustrate this point:

22 See SAGE "Report of the Sage Working Group on Vaccine Hesitancy" (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 7.

23 Oduwole *et al* (2019) *BMJ Open* 2.

24 See WHO "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020); Oduwole *et al* (2019) *BMJ Open* 2.

25 Verelst *et al* (2019) *Vaccine* 2079.

26 Verelst *et al* (2019) *Vaccine* 2087.

27 See SAGE "Report of the Sage Working Group on Vaccine Hesitancy" (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 11–12.

28 As above at 11, s 3E: models of vaccine hesitancy: vaccine hesitancy determinants.

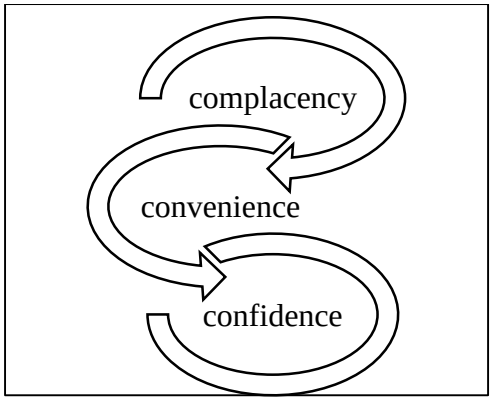

Figure 2: 3C-model illustrating the vaccine hesitancy determinants.

Confidence is defined as trust in: (1) the effectiveness and safety of vaccines; (2) the system that delivers them, including the reliability and competence of the health services and health professionals; and (3) the motivations of the policymakers who decide on the needed vaccines.

Vaccine complacency (regarding a specific vaccine or vaccination in general) generally refers to the attitude that the contraction of vaccine-preventable diseases is unlikely and vaccination is not a necessary preventive action.

Vaccine convenience refers to the physical availability, affordability, willingness to pay, geographical accessibility, ability to understand (language and health literacy), and appeal of immunisation services that affect uptake. The quality of the service (real and/or perceived) and the degree to which vaccination services are delivered at a time and place and in a cultural context that is convenient and comfortable, also affect the decision to be vaccinated and could lead to vaccine hesitancy.

2.2.3.2 Vaccine Hesitancy Matrix

The second model is the Working Group Determinants of Vaccine Hesitancy Matrix, which involves: (1) contextual influences; (2) individual and group influences; and (3) vaccine- or vaccination-specific issues.[29]

Contextual influences arise from historic, socio-cultural, environmental, health system or institutional, economic, or political factors. They include the (1) communication and media environment; (2) influential leaders, immunisation programme gatekeepers, and anti- or pro-vaccination lobbies; (3) historical influences; (4) religion, culture, gender, and/or socio-

[29] Oduwole *et al* (2019) *BMJ Open* 2. See also SAGE "Report of the Sage Working Group on Vaccine Hesitancy" (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022) at 11–12.

economic factors; (5) politics and/or policies; (6) geographic barriers; and (7) perception of the pharmaceutical industry.[30]

Individual and group influences arise from the personal perception of the vaccine or influences of the social or peer environment, and include: (1) personal, family, and/or community members' experience of vaccination, including pain; (2) beliefs and attitudes to health and disease prevention; (3) knowledge and/or awareness; (4) trust in the health system and providers and personal experience; (5) risk and/or benefit (perceived, heuristic); and (6) immunisation as a social norm versus unnecessary and/or harmful.[31]

Vaccine or vaccination-specific issues refer to issues directly related to vaccine or vaccination and include (1) risk and/or benefit (epidemiological and scientific evidence); (2) introduction of a new vaccine or new formulation or a new recommendation for an existing vaccine; (3) mode of administration; (4) design of vaccination programme and/or mode of delivery (e.g., routine programme or mass vaccination campaign); (5) reliability and/or source of supply of vaccine and/or vaccination equipment; (6) vaccination schedule; (7) cost; and (8) the strength of the recommendation and/or knowledge-base and/or attitude of healthcare professionals.[32]

These two models of vaccine hesitancy determinants indicate that non-vaccination is a very complex and context-specific issue that (as mentioned) varies across time, place, and vaccine. They serve only as a basic point of departure from which to examine the determinants of vaccine hesitancy. On closer inspection, it is clear that various diverse and complex contextual factors adversely affect optimal vaccination coverage. Many studies have also suggested that "free-riding" behaviour is a further reason for the decline in vaccination coverage.[33]

2.2.3.3 Free-riding behaviour

Free-riding behaviour refers to where individuals are less inclined to opt for vaccination as they perceive vaccination coverage to be high and, accordingly, expect to benefit from the "free" or "indirect" protection through herd immunity.[34]

---

30 As above.
31 As above.
32 As above.
33 Verelst *et al* (2019) *Vaccine* 2079.
34 As above. See also S Kostal "A vaxxing dilemma: lawyers quarrel over tort liability after the measles outbreak" (2015) 101(7) *ABAJ* 17: a small number of parents from the political and socio-economic spectrum have chosen not to vaccinate their children, as they rely on "herd immunity".

> Those who are not vaccinated may still be protected against disease due to herd immunity, meaning that their chances of exposure are greatly diminished in a population of healthy, vaccinated individuals.[35]

Free-riding behaviour is both a cause of declining vaccination coverage and an effect of high vaccination coverage. It is worth noting that the abundance of information available to parents also contributes to non-vaccination.[36] Studies suggest that parents who seek vaccine information are often overwhelmed by the ambiguity that arises from interpreting this information.[37] In addition to the factors explored in the two models of vaccine hesitancy determinants, it is suggested that the rise in vaccine hesitancy is also influenced by the sheer volume of available information.[38]

It is suggested that the number of people who perceive vaccines as unnecessary or unsafe is increasing due to these very specific and diverse factors.[39] In addition to the two models of vaccine-hesitancy determinants, there are very specific pinpointed factors that enable and support non-vaccination notions and movements. These factors include the strengthening of anti-vaccination messages via social media, the false sense of security based on the decline in vaccine-preventable diseases, and the continued exploitation of Andrew Wakefield's fraudulent paper linking the measles-mumps-rubella (MMR) vaccine to autism.[40]

Although this thesis does not attempt to debunk these vaccination myths, a healthy understanding of them is important to ultimately contextualise non-vaccination in the context of delict. A discussion of non-vaccination divorced from its history may prove to be a futile exercise as it fails to understand the complexity of the social phenomenon of non-vaccination.

2.2.4 The (in)famous "anti-vaxxers"

As mentioned above, not all non-vaccinating individuals (who fail to have themselves or their children vaccinated) are *per se* anti-vaxxers who completely refuse all vaccines. Some individuals acknowledge the safety and effectiveness of vaccines, but for moral, religious, or

35 D Nathanson "Herd protection v vaccine abstention: potential conflict between school vaccine requirements and state religious freedom restoration acts" (2016) 42(2&3) *AJLM* 624.
36 E Wang, Y Baras & AM Buttenheim "'Everybody just wants to do what's best for their child': understanding how pro-vaccine parents can support a culture of vaccine hesitancy" (2015) 33(48) *Vaccine* 6703–6709.
37 Wang *et al* (2015) *Vaccine* 6703–6709.
38 As above.
39 Verelst *et al* (2019) *Vaccine* 2079.
40 As above. See also TS Rao & C Andrade "The MMR vaccine and autism: sensation, refutation, retraction, and fraud" (2011) 53(2) *IJP* 95–96.

other personal reasons choose not to vaccinate.[41] As mentioned above, the anti-vaxxers form part of the vaccine attitude spectrum.

The anti-vaxx movement is described as representing an irrational mistrust of vaccination.[42] The anti-vaxx movement blames vaccines or their ingredients for a range of illnesses.[43] Chillingly, these claims are seldom supported by current, accurate, and contextual scientific research.[44] It is suggested that anti-vaxxers often use inaccurate research to support their emotive arguments and capitalise on the ubiquity of vaccination as a scapegoat for other health issues or phenomena.[45]

Cancer control organisations (CCOs) are often the target of anti-vaxx groups as these CCOs habitually warn the public against potential cancer-causing chemicals but omit to warn of the fact that various vaccines may contain potential cancer-causing (or carcinogenic) chemicals, albeit in minute concentrations.[46] Anti-vaxxers often target these CCOs for this omission. This, in turn, fuels some of the conspiracy theories on which anti-vaxxers rely. One of the most powerful tools used by anti-vaxxers is social media. This is because all theories, opinions, observations, and comments relating to anti-vaxx lobbying can be easily distributed far and wide regardless of the information's factual accuracy. It is no secret that various web pages, blogs, and social media accounts exist for anti-vaxx lobbying. The rise of social media has boosted the spread of anti-vaxx sentiments and anti-vaxx messages are circulated globally, on WhatsApp groups, Facebook/Meta, Twitter, Instagram, and various other platforms.[47]

A plethora of misinformation about vaccines exists on the internet reducing public trust and confidence in vaccines' safety and efficacy. South Africa, too, has several online sources where anti-vaxx petitioning takes place. The influence of internet-based anti-vaxx lobbying in

---

41 Giubilini (2018) 8.

42 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 2. See also *Maarman v The President of the Republic of South Africa* (2022) ZAWCHC 91 [29].

43 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 2: These individuals and groups blame vaccines, or their ingredients (e.g., Formaldehyde) which, in large concentrations, can increase the risk for cancer.

44 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 2.

45 As above.

46 As above.

47 See NE MacDonald *et al* "Addressing barriers to vaccine acceptance: an overview" (2018) 14(1) *HVI* 218–224: "Newer media such Twitter™ and Pinterest™ are also replete with anti-vaccine sentiments and links to anti-vaccine websites and blogs and their impact on vaccine decision making cannot be ignored". See also L Baker "Vaccination saves lives — dare we allow the anti-vaccine lobbyists to prevent it?" (2015) 105(11) *SAMJ* 881–882.

South Africa is unexplored. Consequently, there is an urgent need for research into the South African context to establish the influence of internet-based, anti-vaxx lobbying on the uptake of infant vaccination in the country.[48]

The majority of these web pages claim that vaccines are unsafe or are profit-driven.[49] The bulk of these messages are anonymous and distributed without any content verification.[50] The problem with internet-based, anti-vaxx lobbying is that the majority of these authors are lay persons, alternative medicine practitioners,[51] medical professionals practising alternative medicine, or medical professionals practising only allopathic medicine.[52] Ironically, this may suggest that internet-based, anti-vaxx lobbying is profit-based.[53] For the purposes of this research, it is unnecessary to explore the potential profit motives of anti-vaxx activists in detail. It is sufficient to note that these groups may potentially have a profit motive in addition to their vaccination scepticism. To elaborate further on the potential profit motives of anti-vaxxers may in effect contribute to a conspiracy theory.

Shifting the focus away from conspiracy theories, it is noteworthy that the belief that some vaccinations contain traces of aborted foetuses is not unfounded.[54] Despite the scientific authenticity of the cell lines used to culture vaccines in the post-development phase for human consumption, numerous anti-vaxxers use this as a religious objection to vaccination.[55] However, this thesis is not concerned with the ethics of vaccine development, although vaccine-manufacturing practices, regarded by some as questionable,[56] may be a factor fuelling non-vaccination. Another theory fuelling non-vaccination is the theory that vaccines cause autism.

---

48 RJ Burnett *et al* "A profile of anti-vaccination lobbying on the South African internet, 2011–2013" (2015) 105(11) *SAMJ* 922.

49 As above. According to the RSA Gov "COVID-19 Coronavirus vaccine myths and facts" (date unknown) https://www.gov.za/covid-19/vaccine/myths (accessed 01 June 2021) it is a myth that "big businesses are pushing vaccines to improve profits".

50 Tull (2019) 10.

51 Complementary and alternative medicine (CAM) include herbal remedies.

52 Burnett *et al* (2015) *SAMJ* 922.

53 As above.

54 Nathanson (2016) *AJLM* 636.

55 As above.

56 E.g., North Dakota Health "COVID-19 vaccines & fetal cell lines" (17 August 2022) https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (accessed 26 October 2022); M Wadman "Abortion opponents protest COVID-19 vaccines' use of fetal cells" (2022) https://www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells (accessed 26 October 2022).

2.2.4.1 "Vaccines cause autism"

Andrew Wakefield may be regarded as one of the most influential anti-vaxx supporters. In 1998 *Lancet* published a study led by Wakeford suggesting a link between autism and vaccination. This study suggested a direct link between the MMR vaccine and autism.[57]

The study was later retracted by Wakefield after he had been found guilty of falsifying the research data and stripped of his medical licence.[58] Although it was falsified and inaccurate, this quasi-scientific research resulted in widespread anti-vaxx support.[59] This falsified study still contributes to the erosion of confidence in vaccine safety — particularly that of the MMR vaccine. This has ultimately led to decreased vaccination and consequent outbreaks of measles in the UK, certain parts of Europe (e.g., Austria, Germany, and France), and the US.[60]

Multiple narratives are disseminated of children developing autism after having been vaccinated. It is essential to bear in mind that these chronicles do not constitute scientific proof and consequently do not amount to scientific data supporting the argument that vaccines cause autism.[61]

Scientists reiterate the fact that this correlation does not imply causation, despite the assumptions of many (non-vaccinating) parents.[62] Currently, there is no scientific evidence to suggest or prove that vaccines cause autism.[63] The American Academy of Paediatrics has released a list of more than 40 studies indicating that there is no link whatsoever between vaccines and autism.[64] Scientific evidence indicates that vaccines do not cause autism, multiple sclerosis, diabetes, sudden infant death syndrome (SIDS), or other illnesses.[65]

---

57 Oduwole *et al* (2019) *BMJ Open* 3; Rao & Andrade (2011) *IJP* 95–96.

58 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 3.

59 Oduwole *et al* (2019) *BMJ Open* 3.

60 As above.

61 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 2–3. See also N Belseck "Still no link between MMR vaccine and autism, refuting persistent claims by anti-vaxxers, a new study from Denmark once again disproves the link between the measles, mumps, rubella (MMR) vaccine and autism" (2019) 6 *Medical Chronicle* 6–7.

62 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 2–4.

63 As above.

64 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 4.

65 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 6.

This notwithstanding, after the Disneyland measles outbreak in 2015 a mother refused her daughter's panicked request to be vaccinated based on the vaccine's possible link to autism. Despite the geographic immediacy of the outbreak, the mother refused to allow her daughter to be vaccinated.[66]

The fear that vaccines cause autism, despite the discrediting of Wakefield's falsified paper, has resulted in an "anti-autism" rhetoric. The "anti-autism" activists contend that parents have the right to avoid vaccines to protect their children from autism.[67] Once again, the subjective narrative of non-vaccinating parents is not the focus of this research; it merely provides some background to the potential myriad of factors underlying non-vaccination.

These factors (or rather fears) are often considered by foreign courts to determine whether or not a child must be vaccinated. The notion that vaccines cause autism is widespread in foreign case law dealing with mandatory vaccination. In addition, there are various other quasi-scientific claims raised in support of non-vaccination.

2.2.4.2 Other quasi-scientific claims

There is a notion that vaccines can "overload" a child's immune system.[68] According to the Cancer Association of South Africa (CANSA), this is untrue as most medical experts agree that a child's immune system can handle the immune-stimulating antigens in multiple vaccines.[69]

Another quasi-scientific claim is that "natural immunity" (immunity obtained from infection) is better than vaccine immunity (immunity obtained from vaccination).[70] In this context "natural immunity" refers to the bodily contraction and successful battling of infectious diseases.[71]

Medical research has indicated that although vaccine-immunity and infection-immunity are equally good, vaccine-acquired immunity is unequivocally more desirable as immunity is acquired without the contraction of potentially harmful and dangerous infection.[72] This reasoning is especially important in the context of the law of delict as vaccine-acquired immunity is far safer. For example, infection-immunity brings with it a higher risk of a harmful

66 Nathanson (2016) *AJLM* 628.
67 KL Moore "Disabled autonomy" (2020) 22 *J. Health Care L. & Pol'y* 273.
68 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 4.
69 As above.
70 As above.
71 As above.
72 As above.

and dangerous infection, whereas vaccine-immunity is much safer in that the risks associated with vaccine-immunity are low. Because infection-immunity bears a higher risk, it may affect the common-law delictual elements of factual causation and negligence.

2.2.4.3 COVID-19 vaccine myths and facts

The advent of the COVID-19 pandemic prompted the South African government to update its website to include information regarding the facts and myths of the COVID-19 vaccines.[73] For example, the notions that the COVID-19 vaccines "have the mark of the beast — 666" or "5G networks cause the coronavirus through radiation emissions" have been debunked on the website together with the claims that the vaccine contains a microchip intended to track and control people, or that the vaccine changes your deoxyribonucleic acid (DNA).[74]

These are relevant as they are not addressed in the two models of vaccine hesitancy determinants. Furthermore, this debunking of the COVID-19 vaccine myths and the statement of the facts strongly support the government's pro-vaccination approach.

In 2021, the African Christian Democratic Party (ACDP), Free the Children — Save the Nation NPC, Caring Healthcare Workers Coalition, and COVID Care Alliance (the applicants) displayed their hesitant attitude to the roll-out of the COVID-19 vaccine to children aged 12–17 by filing an urgent interdict in the Pretoria High Court.[75] The applicants argued that the risk of possible side effects outweighed the benefit of protection from COVID-19.[76] Section 27[77] intervened as an *amicus curiae* and argued that the vaccination of children (12–17) allows learners to return to schools and so access sufficient food and basic nutrition.[78] This serves as an indication that the COVID-19 vaccine and its roll-out and administration to children in South Africa are polarised. There is no doubt that non-vaccinating parents exist but the mere existence of non-vaccinating individuals is irrelevant if their actions are without consequence

---

73 See RSA Gov "COVID-19 Coronavirus vaccine myths and facts" (date unknown) https://www.gov.za/covid-19/vaccine/myths (accessed 01 June 2021).

74 As above. See also RSA Gov "Getting to know your Covid-19 Vaccines" (date unknown) https://www.gov.za/sites/default/files/gcis_documents/Covid-19Vaccine-brochure.pdf (accessed 08 July 2022) at 3.

75 Z Sujee & S Ndlela "COVID-19 child vaccinations: promoting children's right to equality, education, food and health" (2022) 15(1) *SAJBL* 1–2.

76 As above.

77 "Section27 is a public interest law centre that seeks to achieve substantive equality and social justice in South Africa". See Section27 homepage, available at https://section27.org.za/ (accessed 21 November 2022).

78 Sujee & Ndlela (2022) *SAJBL* 1–2. See *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) (hereinafter *Equal Education*); Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022).

(especially when no damage has been caused). If non-vaccination had absolutely no consequences (beneficial or detrimental), delictual liability would be a non-issue.

From the above discussion, it is clear that non-vaccination may be rooted in and fuelled by a variety of factors. For example, religious objections to vaccines and vaccination (e.g., the ACDP); issues of freedom of conscience not necessarily rooted in religious notions (e.g., opposition to animal testing and the need for ethical manufacturing); and vaccine misinformation and myths that have no scientific basis.

While the above discussion places non-vaccination and its fuelling factors in a more comprehensible socio-economic, religious, ethical, and even factual context, the following discussion explores the health consequences of non-vaccination. I thus move from the possible reasons fuelling or underlying non-vaccination to its health consequences.

Before considering the consequences of non-vaccination in a legal (specifically delictual) context, the consequences of non-vaccination are first explored in the socio-economic and health context.

2.3 HEALTH CONSEQUENCES OF NON-VACCINATION

Non-vaccination and its detrimental effects pose a threat to global public health.[79] Regardless of the reason for the decision not to vaccinate, the consequences are severe and far-reaching.[80] In recent times, certain disease outbreaks have been attributed, in part, to the delay or outright refusal of individuals to have themselves and/or their children vaccinated, despite the availability, accessibility, and affordability of vaccines.[81]

One of the main effects of non-vaccination is its influence on the supply-and-demand chain. Vaccine hesitancy negatively affects vaccine demand, which in turn contributes to low vaccine uptake and low or sub-optimal vaccination coverage.[82]

Non-vaccination ultimately undermines the success and effectiveness of immunisation programmes.[83] The direct consequences of non-vaccination include the potential reduction in a vaccine-preventable disease which may cause, *inter alia*, illness, paralysis, pain, discomfort,

79 Oduwole *et al* (2019) *BMJ Open* 3.
80 As above.
81 Oduwole *et al* (2019) *BMJ Open* 2.
82 Oduwole *et al* (2019) *BMJ Open* 3.
83 As above.

trauma, amputations, prolonged disability, hearing loss, convulsions; brain damage; and even death.[84]

It is important to note that non-vaccination affects not only the vaccine-hesitant or vaccine-refusing individuals and their dependants, but also poses a danger to the broader society in general when it comes to herd immunity[85] via the so-called "unvaccinated individuals cluster".[86]

This means that the individuals who are too young (e.g., neonates) or too sick (the immune-compromised) to be immunised, are at risk due to inadequate herd immunity.[87] Ideally, herd immunity should be high in order to protect these vulnerable sub-groups who depend on the immunisation of others in their community to protect them from contracting vaccine-preventable diseases.[88] Consequently, when the number of unvaccinated children exceeds a specific threshold, herd immunity is compromised.[89]

As many countries struggle with vaccine hesitancy, the WHO has recommended that vaccine hesitancy should constantly be monitored.[90] In order to monitor vaccine hesitancy in a domestic and international context, the development of tools to detect and measure vaccine hesitancy is essential.[91] These diverse and context-specific factors complicate the process of detecting, measuring, and monitoring vaccine hesitancy.[92] Although not discussed in detail, numerous strategies have been formulated to address non-vaccination. These strategies include, *inter alia*, vaccination campaigns, health strategies, financial incentives, and penalties. The consequences of non-vaccination are detrimental and sometimes deadly. I now turn my attention to non-vaccination in the South African context.

---

84 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 13.

85 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 4; Giubilini (2018) 8; Nathanson (2016) *AJLM* 624; Oduwole *et al* (2019) *BMJ Open* 3.

86 Nathanson (2016) *AJLM* 625.

87 Oduwole *et al* (2019) *BMJ Open* 3.

88 As above.

89 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 4.

90 Oduwole *et al* (2019) *BMJ Open* 3.

91 As above: "there had been several efforts in recent past to develop tools for the detection and measures of vaccine hesitancy, such as parent attitudes about childhood vaccines survey, vaccine confidence scale, global vaccine confidence index and vaccine hesitancy scale (VHS)".

92 Oduwole *et al* (2019) *BMJ Open* 3.

2.4 NON-VACCINATION IN SOUTH AFRICA

Vaccine hesitancy and non-vaccination are fairly unexplored in the South African context, so there is uncertainty regarding the scale of the issue, the reasons for parental refusal, and a lack of effective strategies to address the potential non-vaccination groups.[93] It, however, remains an important factor that cannot be overlooked when assessing and addressing sub-optimal vaccination coverage.[94]

There is an extensive vaccination programme in South Africa that forms part of the broader health strategy of the National Department of Health. EPI-SA was introduced in 1995 to reduce suffering and prevent the death of women and children from vaccine-preventable infectious diseases.[95] EPI-SA is a government-funded programme that provides free vaccines to children.

EPI-SA manufactures all its vaccines in accordance with strict safety requirements which are evaluated by the Medicines Control Council (MCC) to ensure their efficacy and safety before they can be registered and advertised.[96] The EPI-SA vaccines also meet the WHO quality, safety, and efficacy standards.[97] Once a vaccine has been approved for public distribution, its safety is still continuously monitored. Several systems are in place globally to monitor vaccine safety as health officials worldwide regard vaccine safety as of paramount importance.[98] Vaccines are among the most monitored and studied fields in medicine.[99] Producing a new, effective, and safe vaccine generally takes many years[100] and multiple safety tests must be passed long before vaccines are administered to humans.[101]

---

93 Mahery & Slemming (2019) *SAJBL* 76. See also A Green "Anti-vaxxers alive in South Africa; risking children's lives" (2016) https://bhekisisa.org/article/2016-04-27-fear-of-inoculation-will-affect-childrens-health-globally/ (accessed 10 March 2020).

94 NJ Ngcobo *et al* "Human papillomavirus vaccination acceptance and hesitancy in South Africa: research and policy agenda" (2019) 109(1) *SAMJ* 14; Burnett *et al* (2019) *SAJS* 1; Walwyn & Nkolele (2018) *HRPS* 31.

95 DR Walwyn & AT Nkolele "Coordinating health and industrial policy in South Africa; a case study of the vaccine public-private partnership" (2018) 60(4) *SAFP* 42.

96 RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020) at 2; CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 5 & 13.

97 RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020) at 2.

98 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 6.

99 As above.

100 As above.

101 As above.

EPI-SA has increased the number of recommended vaccines and, as a result, children are now protected from more infectious diseases than before.[102] Polio was once the most-feared disease in South Africa, causing death and paralysis across the country, but today, thanks to vaccination, there are no reports of polio.[103] On 24 October 2006, South Africa was officially declared free of the preventable, but incurable, childhood disease of polio.[104] This is an example of the impact that vaccines have. Smallpox has likewise been eliminated.[105]

In South Africa, the average child can expect roughly 28 vaccinations before reaching the age of twelve.[106] The first set of vaccinations is routinely administered soon after birth.[107] In line with my earlier discussion of herd immunity, some children do not receive vaccines at this stage for medical reasons, such as the vaccine being rendered ineffective for some reason — although this is extremely rare.[108]

CANSA has also made various efforts to inform the public about vaccines, and their importance. CANSA has listed five important reasons why every child should be vaccinated.[109] The first is that vaccination can save a child's life.

CANSA warns that although vaccines may involve some side effects at the site of injection, these are minimal compared to the pain, discomfort, and trauma of the diseases they prevent. It further notes that serious side effects following vaccination are very rare, and reiterates the fact that the disease-prevention benefits offered by vaccines far outweigh any possible side effects for almost all children. CANSA further points out that vaccination also protects others[110] by preventing the spread of disease among members of the vaccinated child's family and broader social circle.[111]

---

102 RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020) at 1; CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 5.

103 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 5.

104 As above.

105 As above.

106 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 4.

107 As above.

108 As above.

109 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 5.

110 As above.

111 As above.

In addition to these health benefits, CANSA notes that vaccination saves time and money.[112] Furthermore, certain vaccine-preventable diseases such as liver or cervical cancer may result in prolonged disability which can take a financial toll through medical bills or long-term disability care. On the other hand, vaccination against these diseases serves as a good investment and is generally available free of charge.[113]

Vaccination also protects future generations[114] in that vaccines have reduced, and in some cases even eradicated, many diseases which severely disabled or even killed people only a few generations ago.[115] By vaccinating children against rubella (German measles), the risk of pregnant women transmitting the virus to their foetus or newborn baby has been dramatically reduced. This, in turn, has resulted in South Africa today seldom encountering the birth defects associated with the rubella virus.[116] If vaccination is continued, the parents of the future may be able to trust that some diseases of today will no longer be around to harm their children.[117]

CANSA insists that vaccines are safe, effective, necessary, and offer huge benefits to children's health, throughout their lives.[118] Vaccines are hailed as among the safest tools of modern medicine.[119]

Despite the significant achievements of the EPI-SA and CANSA, in recent years South Africa has struggled to curb outbreaks of vaccine-preventable diseases such as measles and diphtheria.[120] The reason for sub-optimal immunisation coverage in South Africa is not ascribed solely to vaccine hesitancy — the availability of vaccines, supply issues, health worker-related factors, facility-level factors, lack of access to health services, and parental resistance and misinformation about immunisation, all play a part in the sub-optimal immunisation coverage in South Africa.[121]

The South African immunisation landscape and rising global sentiment have sparked a debate about whether or not South Africa should consider making childhood immunisation

---

112 As above.
113 As above.
114 As above.
115 As above.
116 As above.
117 As above.
118 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 6.
119 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 6 & 13.
120 Mahery & Slemming (2019) *SAJBL* 76.
121 As above. Ngcobo *et al* (2019) *SAMJ* 14.

compulsory.[122] Although there are no laws expressly mandating childhood vaccinations, some circulars from the National Department of Health suggest that vaccination is a "must". In the National Department of Health's circular titled "What you need to know about vaccinations" the Department states:

> Does my child need to have all the vaccinations? Yes, your child must have all the vaccinations on the attached schedule. […] ALL PARENTS/GUARDIANS *MUST* VACCINATE THEIR BABIES AND ADHERE TO THE IMMUNISATION SCHEDULE.[123] (My emphasis.)

In addition, the National Department of Health's website expressly states that,

> [c]hildren who have turned 1 year *must* still be taken to the clinic at 18 months for the 2 injections, including the second dose of measles vaccine.[124] (My emphasis.)

Whether or not this is necessarily indicative of a duty to vaccinate is discussed in the following chapter. Another indication of the National Department of Health's pro-vaccination sentiment is observed in its "Immunisation Key Messages" document. The first paragraph of this document states:

> You want to do what is best for your children. One of the best ways to protect your children is to make sure they have all of their vaccinations.[125]

The National Department of Health also explains that "[i]mmunisations can save your child's life" and "[i]mmunisation protects others you care about".[126] In South Africa, certain documents are required for the admission of a learner to a public school.[127] A child with a vaccine-preventable disease can be denied attendance at schools or childcare facilities.[128] In Gauteng Province schools, a child will be conditionally admitted while the parent is permitted

---

122 Mahery & Slemming (2019) *SAJBL* 76. See also T Bärnighausen *et al* "Accounting for the full benefits of childhood vaccination in South Africa" (2008) 98(11) *SAMJ* 844–846.

123 RSA Gov, DoH "What you need to know about vaccinations" (date unknown) http://www.kznhealth.gov.za/vaccinations.pdf (accessed 10 March 2020) at 3.

124 RSA Gov, DoH "Immunisation" (date unknown) https://www.health.gov.za/immunization/ (accessed 05 July 2022).

125 RSA Gov, DoH "Immunisation key messages" (date unknown) http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-08-29-27/immunization/category/165-immunisation?download=502:key-messages-immunisation (accessed 13 June 2020) at 1.

126 As above.

127 See S Woolman "Chapter 36: dignity" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 12-05, 2014) 28.

128 RSA Gov, DoH "Immunisation key messages" (date unknown) http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-08-29-27/immunization/category/165-immunisation?download=502:key-messages-immunisation (accessed 13 June 2020) at 1; Woolman "Chapter 36" in *CLoSA* (2014) 28.

to obtain the necessary documents, including proof of immunisation.[129] If this is not done the conditional admission lapses.[130]

On the other hand, in terms of Western Cape Education Policy (WCEP), if a parent does not wish a child to be immunised he or she must apply to the Head of the Education Department (HOD), and the learner cannot be admitted to the school pending the HOD's decision.[131]According to the Department of Education:

> On application for admission, a parent must show proof that the learner has been immunised against the following communicable diseases: polio, measles, tuberculosis, diphtheria, tetanus and hepatitis B. If a parent is unable to show proof of immunisation, the principal must advise the parent on having the learner immunised as part of the free primary health care programme.[132]

Health Chief of UNICEF South Africa, Dr Mariame Sylla, recently stated that,

> [i]mmunisation is an essential service, even during COVID-19, and is safe and free in all public health facilities in South Africa.[133]

CANSA posits that it is the responsibility of the parents or guardians of children to ensure that their children are healthy and protected from preventable diseases, including certain cancers. Because vaccine-preventable diseases, such as measles, mumps, and whooping cough remain a threat that can result in hospitalisation and death, vaccination is suggested as the proper way to protect all children.[134]

Outbreaks of preventable diseases will occur when children do not continue to be vaccinated.[135] In essence, immunisation forms part of a child's right to basic health care and this is clearly stated by the National Department of Health and EPI-SA:

---

129 Mahery & Slemming (2019) *SAJBL* 77; Woolman "Chapter 36" in *CLoSA* (2014) 28.
130 As above.
131 Mahery & Slemming (2019) *SAJBL* 77.
132 Notice No 2432 of 1998 in GG 19377 of 19 October 1998 [16]. See also RSA Gov "Admission of learners to public schools" (date unknown) https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolAdmissions.aspx (accessed 10 March 2020).
133 UNICEF SA "Immunisation against vaccine-preventable diseases is essential to protect children" (24 April 2020) https://www.unicef.org/southafrica/stories/immunization-against-vaccine-preventable-diseases-essential-protect-children (accessed 10 August 2020).
134 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 13.
135 As above. See also UNICEF SA "Immunisation against vaccine-preventable diseases is essential to protect children" (24 April 2020) https://www.unicef.org/southafrica/stories/immunization-against-vaccine-preventable-diseases-essential-protect-children (accessed 10 August 2020).

> All children have a right to basic health care. NB. Immunisation is one of the health care components.[136]

As mentioned in the introduction to this chapter, the South African judiciary is yet to decide a case dealing with the delictual liability of a non-vaccinating parent. In addition to the lack of case law on this specific issue, there is currently no academic research investigating the delictual liability of non-vaccinating parents. Lastly, there is no legislation in South Africa that mandates vaccination.

Despite these legislative, judicial, and academic gaps, the National Department of Health and CANSA has made some efforts to address vaccination issues. This is, however, not sufficient to address non-vaccinating parents' delictual liability — their efforts do no more than illustrate our government's pro-vaccination attitude.

2.5 CONCLUSION

In light of the above discussion of the terminology, determinants, and consequences of non-vaccination, vaccine hesitancy, delay, and refusal it is clear that this issue is complex and very context-specific.

For example, it has been scientifically proven that the decrease in vaccination coverage is a major concern as it results in a decline in herd immunity which plays a central role in protecting vulnerable individuals, such as the very young and immunity-compromised.[137] Vaccines have been scientifically proven to be safe, effective,[138] and essential in sustaining herd immunity to prevent outbreaks of diseases such as measles.[139] It is also scientifically proven that non-vaccination may potentially lead to the contraction of a vaccine-preventable disease, which may cause, *inter alia*, illness, paralysis, pain, discomfort, trauma, prolonged disability, hearing loss, convulsions, brain damage, amputations, and even death.[140] Despite this scientific proof, some individuals still prefer non-vaccination for various reasons often rooted in religion or freedom of belief and conscience.

---

136 RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020).

137 Verelst *et al* (2019) *Vaccine* 2079.

138 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 5 & 13.

139 Verelst *et al* (2019) *Vaccine* 2079.

140 CANSA "Fact sheet and position statement on vaccines and vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022) at 13.

The question arising is how to balance these conflicting interests. For example, how must children's right to life, bodily integrity, and health be balanced against parental autonomy and freedom of religion, conscience, and belief? This balancing act requires an in-depth examination of various layers of the law, including the Constitution as the supreme law that serves as the backdrop of this research, and the specific laws enacted to give effect to the relevant constitutional rights. In addition, foreign law is considered in the context of non-vaccination as foreign courts have to a certain extent decided on child vaccinations and non-vaccinating parents.

Foreign law, specifically foreign legislation and case law, also provides useful insight and offers suggestions for the way forward in South Africa. Ultimately, the constitutional backdrop and foreign law may pave the way for a South African approach to the issue of non-vaccinating parents in the delictual context. In the next chapter, the constitutional backdrop to this research is explored.

CHAPTER 3: NON-VACCINATION: CONSTITUTIONAL CONSIDERATIONS

3.1 INTRODUCTION

As the Constitution is the supreme law of the country,[1] non-vaccination in the context of the common-law delict cannot be explored without first carefully considering non-vaccination in the constitutional context. The motivation for adopting a transformative constitutional approach or method to the common-law delict is discussed in Chapter 1. Before delving into the common-law delict, and its elements, it is worth noting that constitutional considerations are of paramount importance with specific reference to the element of wrongfulness,[2] as discussed in Chapter 5.

Furthermore, constitutional considerations cannot be side-lined for convenience, as discussed in Chapter 1. The Constitution, and the Bill of Rights in particular, serve as a source of both fundamental rights and fundamental values.[3] Both fundamental rights and fundamental values influence the common-law delict,[4] specifically in the context of wrongfulness (delictual element). In *Loureiro*, the Constitutional Court (per Van Der Westhuizen J) stated that

> [t]he wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on

---

1 See the Constitution, s 2; I Currie & J De Waal *The Bill of Rights handbook* 6ed (2013) 7; M Loubser & R Midgley *The law of delict in South Africa* (2017) 35; S Woolman "Chapter 31: application" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 02-05, 2014) 108.

2 See *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*) [42]; *Loureiro v Imvula Quality Protection* 2014 (3) SA 394 (CC) (hereinafter *Loureiro*) [53]; Loubser & Midgley (2017) 50; D McQuoid-Mason "Chapter 38: privacy" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 12-03, 2014) 3.

3 Loubser & Midgley (2017) 36; Currie & De Waal (2013) 26; L Du Plessis "Chapter 32: interpretation" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 06-08, 2014) 14; Woolman "Chapter 36" in *CLoSA* (2014) 23 with reference to *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC) [21]: "[t]he values enunciated in s 1 of the Constitution […] do not, however, give rise to discrete and enforceable rights in themselves".

4 Loubser & Midgley (2017) 36; Neethling & Potgieter (2020) 18; Currie & De Waal (2013) 31 & 41: horizontal application refers to the application of the BoR between individuals, as opposed to a vertical application (the state and the individual). Hence, the BoR does not generate its own remedies or "override" the ordinary law — the indirect application views the BoR as an "objective normative system" against which legislation and the common law must be interpreted, applied and developed. See D Bhana "The horizontal application of the Bill of Rights: a reconciliation of sections 8 and 39 of the Constitution" (2013) 29 *SAJHR* 351–375; G Ferreira "The direct and indirect application of the Bill of Rights: constitutional imperative or questionable academic innovation?" (2006) 20 *SJ* 241–247; Zitzke (2015) *CCR* 259–290. Bhana, Ferreira, & Zitzke argue that this is a futile distinction as rights and duties infuse the common law in different ways, and the direct/indirect distinction is not very helpful.

> the duty not to cause harm — indeed to respect rights — and questions the reasonableness of imposing liability.[5]

This accurately describes how the wrongfulness enquiry approaches the reasonableness of imposing liability with reference to the legal and policy convictions of the community, constitutionally understood, and that this is based on a legal duty and respect for rights.

The reasonableness of imposing liability (under the element of wrongfulness) is considered in Chapter 5. For present purposes, it suffices to note that wrongfulness may be determined with reference to the infringement of a legally protected right, the breach of a statutory duty, or the breach of a legal duty (such as a duty not to cause harm or a duty to not act negligently).[6] It is for this reason that the following three questions are relevant and structure this chapter:

(1) Does a child have an express or implied constitutional right to vaccination?
(2) Does an express or implied constitutional duty to vaccination exist?
(3) Does this constitutional duty to vaccinate children fall on parents?

To address these questions and formulate responses, the appropriate point of departure is the Constitution, specifically the Bill of Rights, as well as the relevant law enacted to give effect to these fundamental rights. As rights are by nature competitive, contextual, and relational,[7] it is necessary to explore children's rights within this context and the competing parental rights (of autonomous decision making as to how to raise children) which cannot be divorced from any discussion on children's rights. We must, therefore, first identify the competing fundamental rights of the child and those of the parent, weigh these up, and strike a balance.[8]

In *Carmichele*,[9] the Constitutional Court endorsed the judgment in *Minister of Law & Order v Kadir*,[10] and stated that the weighing and striking of a "balance between the interests

---

5 *Loureiro* [53] (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Nkabinde J, & Zondo J concurring).

6 Loubser & Midgley (2017) 186 suggest that to determine the delictual element of wrongfulness, in the case of an omission, it is easier to inspect the breach of a duty as opposed to an infringement of a right. See *Carmichele* [42]: the CC referred to the element of wrongfulness with reference to the "existence of the legal duty to avoid or prevent loss"; the CC [37] warned against the "pre-constitutional test for determining the wrongfulness of omissions in delictual actions" and explored s 39(2) of the Constitution in this regard.

7 Loubser & Midgley (2017) 43: "the existence of one right […] naturally restricts the scope of the other. The extent of such restriction […] depends on the facts of each case […] [and] policy considerations […]". See C Albertyn & B Goldblatt "Chapter 35: equality" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 03-07, 2014) 3: "rights give rise to rules and enforceable claims"; Currie & De Waal (2013) 41, 143, & 565 (fn 6).

8 See *Carmichele* [43]; Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 3.

9 *v Minister of Safety & Security* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*).

10 1995 (1) SA 303 (A) (hereinafter *Kadir*) at 318E–318H.

of parties and the conflicting interests of the community"[11] is a "proportionality exercise with liability depending upon the interplay of various factors",[12] and further that this proportionality exercise must be

> carried out in accordance with the 'spirit, purport and objects of the Bill of Rights' and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom […].[13]

The *Carmichele* case thus indicates how the common-law delictual element of wrongfulness necessitates a weighing and balancing exercise and that this proportionality exercise must be carried out in accordance with the spirit, purport, and objects of the Bill of Rights.[14] Both *Loureiro* and *Carmichele* emphasise the constitutional considerations that impact the wrongfulness enquiry.

In light of *Loureiro* and *Carmichele*, as well as the transformative constitutional approach, this chapter first explores the constitutional considerations which arise in the context of non-vaccination, which are ultimately considered in the wrongfulness enquiry and the balancing action.

This overview of constitutional considerations aims to determine if the child has a constitutional right — either express or implied — to be vaccinated. I also investigate whether a legal duty and its breach — as suggested in *Loureiro* and *Carmichele* — can be established in the context of non-vaccination. On this note, it is important to reiterate that rights and duties are relational.

Therefore, whether a child has the right to be vaccinated is explored together with whether parents are constitutionally obliged to vaccinate their children. If parents are constitutionally duty-bound to vaccinate their children (as the duty is relational to a specific right), a breach of this duty or the infringement of that right may be indicative of the common-law delictual element of wrongfulness. But if there is no constitutional right or duty at play there cannot be a constitutional breach.[15]

---

11 See *Carmichele* [43].

12 As above.

13 As above. See also Woolman "Chapter 36" in *CLoSA* (2014) 24–25 where Woolman explains how the CC in *Carmichele* "found that the value of dignity […] required that the duty of care imposed on the state in delictual actions be expanded […]". See also Currie & De Waal (2013) 282.

14 See Woolman "Chapter 36" in *CLoSA* (2014) 32: in *Carmichele*, the CC "suggested that the courts craft a new test that would impose a duty of care on state actors." See also Currie & De Waal (2013) 282.

15 *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) [20]. See *Carmichele* [30] with reference to "constitutional duty", and [25] for the breach of this duty. See also *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC) [40].

The rights explored in this chapter are important in balancing the competing rights and interests in the wrongfulness determination. Furthermore, in an effort to protect a collection of specific rights, a duty to vaccinate (in an effort to avoid negligence) may be relevant.

It is worth noting that even if a child has a constitutional right to vaccination it is by no means axiomatic that every person has a duty to ensure that the right of the child is realised. Generally, this duty will fall on the state[16] or possibly the parents (which is debatable given the number of rights parents already have). In essence, rights can often be absolute, while the correlating duties are merely relative to specific people. Essentially, parental rights play a role in delineating their duties.

Before turning to the constitutional considerations relevant to this chapter, it is important to consider the doctrine of adjunctive subsidiarity.

3.1.1 The doctrine of adjudicative subsidiarity

Before the constitutional rights of the children (XX and Y) and parents (X) are explored, it is important to consider the application clause in the Constitution.[17] Section 8 is a normative Bill of Rights provision that sets a standard for the interpretation of rights.[18] Section 8(1) provides that the "Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"[19] and section 8(2) provides:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Section 8(2) thus states that a natural person, like a parent, is bound by the provisions in the Bill of Rights to the extent that it is applicable considering the nature of the right and the duty imposed by that right.[20] A court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right in order to give effect to a right in the

---

16 See, for example, Woolman "Chapter 36" in *CLoSA* (2014) 31–32 with reference to *Carmichele*, & *K v Minister of Safety & Security* 2005 (6) SA 419 (CC): "the right to dignity and the right to freedom and security of the person imposed positive duties on the state to prevent, where possible, violations of physical integrity […]." See also Currie & De Waal (2013) 32 & 282.

17 Du Plessis "Chapter 32" in *CLoSA* (2014) 14.

18 As above. See also Currie & De Waal (2013) 31.

19 See *Carmichele* [44] with reference to s 8(1) of the Constitution: "It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection." See Woolman "Chapter 31" in *CLoSA* (2014) 56; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) (hereinafter *Khumalo v Holomisa*) [31]–[32].

20 Woolman "Chapter 31" in *CLoSA* (2014) 154. See also Currie & De Waal (2013) 48; *Khumalo v Holomisa* [31]–[32].

Bill (section 8(3)(*a*)).[21] Lastly, section 8(3)(*b*) provides that the court may "develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) [of the Constitution]".[22]

Zitzke explains that adjudicative subsidiarity refers to a "reading strategy" used by the Constitutional Court in the past to ensure that the Constitution is not "overused" subject to the supremacy of the Constitution.[23] Zitzke is of the view that the doctrine of adjudicative subsidiarity may also be used in the context of delict.[24]

The point of departure is to identify the constitutional right that has possibly been infringed by an alleged wrongdoer.[25] The second step is to identify the existing legislation "that has specifically been promulgated to protect the right concerned".[26] In essence, existing legislation cannot be discarded and reliance placed solely on a constitutional right.[27] However, this does not render the Constitution irrelevant and section 39(2) of the Constitution is, for example, applied when interpreting legislation.[28] If no legislation covers the dispute in question, the third step is to turn to the common and customary law for rules and principles to regulate the matter.[29]

Section 39(2) of the Constitution requires a court to promote the spirit, purport, and objects of the Bill of Rights when developing the common or customary law.[30] Section 8(3) of the Constitution essentially supports the transformative constitutional methodology that involves

> an amalgamation of common or customary law and the Constitution, instead of a complete circumvention of the Constitution (constitutional heedlessness) or a complete circumvention of common law and legislation (constitutional over-excitement).[31]

---

21 See also E Zitzke "The Life Esidimeni arbitration: towards transformative constitutional damages?" (2020) 3 *TSAR* 438; *Khumalo v Holomisa* [31]–[32].

22 See S Woolman & H Botha "Chapter 34: limitations" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 07-06, 2014) 1 for an explanation on why the rights enshrined in the Constitution are not absolute and may be limited. See also Currie & De Waal (2013) 151; *Khumalo v Holomisa* [31]–[32].

23 Zitzke (2015) *CCR* 285.

24 Zitzke (2015) *CCR* 286; Woolman "Chapter 31" in *CLoSA* (2014) 26: "[…] the common law of property, contract and delict are amongst those regimes in need of the greatest reform." See also Currie & De Waal (2013) 369; *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) [178].

25 Zitzke (2015) *CCR* 286.

26 As above with reference to *Bato Star Fishing v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) [25]. See also Currie & De Waal (2013) 180 & 207.

27 Zitzke (2015) *CCR* 286; Woolman "Chapter 31" in *CLoSA* (2014) 154 & 160.

28 Zitzke (2015) *CCR* 287; Woolman "Chapter 31" in *CLoSA* (2014) 84 & 161; Zitzke (2020) *TSAR* 438.

29 Zitzke (2015) *CCR* 287.

30 As above. See also Woolman "Chapter 31" in *CLoSA* (2014) 161; Zitzke (2020) *TSAR* 434.

31 Zitzke (2015) *CCR* 288; Woolman "Chapter 31" in *CLoSA* (2014) 161: "for those committed to a transformative vision of the [FC], FC s 8(1), s 8(2), s 8(3) and s 39(2) support the claim that 'there are no

As children's rights are constitutionally protected, the South African Constitution is the appropriate point of departure for any discussion of children's rights. It is important to mention the relevant constitutional rights before investigating the legislation enacted to protect and vindicate these fundamental rights.[32]

The subsidiarity principle essentially requires a litigant to rely on legislation when enforcing a constitutional right as opposed to circumventing the legislation in favour of a direct application of a constitutional provision.[33] Of course, a constitutional provision may be directly invoked when legislation is challenged based on constitutional inconsistency or invalidity.[34] In addition, this principle also favours reliance on the legislation enacted to protect (and codify) a common-law right, rather than relying directly on the common law.[35]

The common law may, however, be invoked if the legislation does not — either entirely or partially — address or give effect to the right, subject to certain caveats.[36]

In South Africa, there is no single, comprehensive piece of legislation dealing with the child's right to health care.[37] The three primary pieces of legislation regulating children's health care rights indirectly are the National Health Act 61 of 2003, the Mental Health Care Act 17 of 2002, and the Children's Act 38 of 2005. These laws do not provide statutory remedies for the breach of their statutory rights and not one of these Acts mentions the word "remedy". For example, although a child has the right to not be neglected or abused (ss 1, 7, and 18 of the Children's Act) there is no direct statutory remedy in the Children's Act to address a breach of these rights. The Children's Act, for example, aims to protect children from abuse and neglect (s 2), but the Act itself does not provide direct remedies for the breach of these rights.[38] The

---

legal questions left in South Africa to which the BoR is simply and inherently irrelevant.'" See also Currie & De Waal (2013) 180 & 207; Zitzke (2020) *TSAR* 438.

32 M Murcott & W Van der Westhuizen "The ebb and flow of the application of the principle of subsidiarity-critical reflection on Motau and My Vote Counts" (2015) *CCR* 43–44; Currie & De Waal (2013) 253.

33 Murcott & Van der Westhuizen (2015) *CCR* 47; Currie & De Waal (2013) 253.

34 See ss 167 & 172 of the Constitution.

35 Murcott & Van der Westhuizen (2015) *CCR* 48: if legislation has been enacted with the purpose of codifying the common law, such legislation must be preferred. The common law may be used to interpret the legislation, as per s 39(2) of the Constitution. See also Currie & De Waal (2013) 253; Du Plessis "Chapter 32" in *CLoSA* (2014) 14: s 39(2) relates to "norm interpretation […] for it requires, without any specific reference to entrenched rights, judicial interpretation of existing statute, common and customary law to promote certain designated values." See also Zitzke (2020) *TSAR* 438.

36 Murcott & Van der Westhuizen (2015) *CCR* 48 explain that "the common law may be invoked to protect the right only where the legislation does not give effect to the right (or simply does not cater for it), as long as the common law is not inconsistent with applicable constitutional rights or the legislative scheme, and then only where the common law cannot be developed in order to bring it in line with the Constitution".

37 M Büchner-Eveleigh "Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy" (2016) 49(2) *DJLJ* 324.

38 ML Hendricks "Mandatory reporting of child abuse in South Africa: legislation explored" (2014) 104(8) *SAMJ* 550–552.

objectives of the Children's Act, too, do not mention providing remedies but are listed as, *inter alia*, to promote and protect children's constitutional rights.

Therefore, the common law, and specifically the common-law delict, is relied on to address a breach of this right or remedy the breach.[39] For example, some breaches may roll over into the ambit of criminal law, and the criminal justice system will be used to address, for example, cases of child abuse, child neglect, assault, sexual offences, or cases of domestic violence.[40]

The Constitution and the Children's Act are the most relevant pieces of legislation for the purposes of this chapter. But before discussing the Children's Act an overview of children's constitutional rights is necessary. As mentioned, the aim of this investigation is to identify the competing rights of children and parents in order to determine whether the child has an implied right to vaccination which is legally recognised, and, on the other hand, whether parents have a duty to vaccinate their children.

The rights of the child and the parent are clearly set out in the Constitution as well as in legislation enacted to vindicate these rights (i.e., the Children's Act). However, the existing legislation (Constitution, Children's Act, and National Health Act) does not expressly state whether or not vaccination is indeed a healthcare right of the child, nor is there an express statutory right to vaccination. It is for this reason that this chapter explores whether a right to vaccination is implicit in the collective effect of other rights.

If the duty to vaccinate is established, wrongfulness in the context of the common-law delict (and liability for an omission) may be established with reference to a breach of this legal duty, albeit not an express statutory duty. However, it may be argued that an implied duty to vaccinate exists as part of a general duty not to act negligently (for purposes of determining the delictual element of wrongfulness). Regrettably, there is no domestic case law exploring the existence of this legal duty to vaccinate or any case law indicating that the general duty not to act negligently implies a duty to vaccinate. It is thus necessary to turn to foreign law to establish the existence of a legal duty to vaccinate your child. However, before addressing implied rights

---

39 See *Fose v Minister of Safety & Security* 1997 (3) SA 786 [58]; *BE v MEC for Social Development, Western Cape* 2022 (1) SA 1 (CC) [7]–[9] for s 28(1) of the Constitution and the common-law delict as the appropriate remedy. See also *Government of the Western Cape: Department of Social Development v CB* 2019 (3) SA 235 (SCA) [44]–[45]. See generally *Carmichele*; PA Carstens & D Pearmain *Foundational principles of South African medical law* (2007) 537.

40 See Domestic Violence Act 116 of 1998; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Criminal Procedure Act 51 of 1997; Prevention of Family Violence Act 133 of 1993.

and duties, a bird's eye view of the constitutional considerations in the context of non-vaccination is undertaken.

3.2 OVERVIEW: CONSTITUTIONAL CONSIDERATIONS IN THE CONTEXT OF NON-VACCINATION

3.2.1 Section 9: the right to equality

Section 9 of the Constitution protects the right to equality which has been described as the "most difficult of rights"[41] and is both controversial and complex.[42] In addition, equality is not only a right but also a constitutional value.[43] The right to equality must be approached holistically.[44]

Section 9(1) states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".[45] Section 9(2) provides that

> [e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

This means that the child has the right to enjoy all rights and freedoms fully. The section does not limit "all rights and freedoms" to those contained in the Bill of Rights, and "all rights and freedoms" include those rights and freedoms codified in legislation, such as the Children's Act.

Sections 9(3)–(4) expressly prohibit the state (including its organs such as the judiciary) and persons from directly or indirectly[46] unfairly discriminating[47] against anyone on one or more grounds in terms of subsection (3).[48] This means that the non-vaccinating parent's (X) "religion, conscience, belief, culture" (which I have shown tend to support or inform non-

41 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 2.
42 Currie & De Waal (2013) 210 & 213 for a discussion on formal and substantive equality. See also Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 36.
43 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 2.
44 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 15; Currie & De Waal (2013) 214.
45 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 15.
46 See Currie & De Waal (2013) 238 for a discussion on direct and indirect discrimination; Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 47.
47 There is a distinction between "discrimination" and "differentiation". For a detailed discussion see Currie & De Waal (2013) 218; Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 18.
48 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 16: ss 9(3)–(4) provide the main substantive protection afforded by s 9. Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 16: "it is also unlikely, though not logically impossible, for a violation of FC s 9(3) or FC s (4) to be justified under FC s 36." See Currie & De Waal (2013) 217.

vaccination attitudes) are protected under section 9.[49] The right to equality may, however, be limited, and in terms of section 9(5) the *prima facie* unfair discrimination may be shown to be "fair".[50]

The equality conundrum raises the question of if unfair discrimination may be at play when a parent (X) is, for example, denied the opportunity to enrol his or her unvaccinated child (XX) in a public school. Does this amount to unfair discrimination in terms of section 9 of the Constitution? First, vaccination status is not a listed ground in section 9(3) of the Constitution. If vaccination status were a listed ground, it would trigger a presumption of unfairness.[51] Second, as vaccines serve the best interests not only of the child (XX), but also those of the public, it is unlikely that the school's refusal would be regarded as "unfair". For example, in Australia, refusing to enrol a child at or preventing them from attending a service based on his or her immunisation status is not unlawful discrimination under the Anti-Discrimination Act of 1991.[52]

The issue of equality would arise were the state, for example, to enact a law that discriminates against parents based on their religion. Were a state mandates all vaccinations it could be argued that its action amounts to unfair discrimination based on, *inter alia*, religion and this is where the equality analysis comes into play.

Other examples of where the equality analysis is relevant in the context of vaccination are mandatory vaccination policies in the workplace,[53] vaccine access for migrants, refugees, and asylum seekers, and discrimination based on nationality, or citizenship.[54]

However, for purposes of this chapter and X (the non-vaccinating parent) and Y (the third-party child) and the common-law delict, the equality conundrum is not considered as it is not the goal of this chapter to engage exclusively with equality jurisprudence. Rather, for present purposes, the right to equality is considered as a tag-on to other constitutional rights

---

49 Currie & De Waal (2013) 235: religion, culture, language, and conscience and belief are distinct from the rights in ss 30 & 31. However, these rights may "overlap where the discrimination in question flows from the interference with a person's religious or cultural practices". See Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 4 & 72.

50 There exists a presumption of unfair discrimination. See Currie & De Waal (2013) 224; Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 32 & 75.

51 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 49 & 75. See s 9(5) of the Constitution.

52 Queensland Gov "Childcare immunisation requirements" (2020) https://www.qld.gov.au/health/conditions/immunisation/childcare (accessed 15 June 2022).

53 C Rickard "Dismissal of staffer who refused COVID-19 vaccine ruled 'fair'" (27 January 2022) https://africanlii.org/article/20220127/dismissal-staffer-who-refused-covid-19-vaccine-ruled-%E2%80%98fair%E2%80%99 (accessed 22 November 2022).

54 ICJ "The unvaccinated equality not charity in Southern Africa" (2021) https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf (accessed 22 November 2022) at 9–11, & 32.

such as the right to life, dignity, access to healthcare services, etc. The right to equality is far more complex than the discussion above suggests. However, here the discussion of the right to equality is limited to the context of non-vaccination and the common-law delict, especially as non-vaccination does not necessarily involve an equality issue.[55]

The right to dignity (s 10) is, however, an important consideration, especially in the context of non-vaccination and competing rights, and is discussed next.

3.2.2 Section 10: the right to dignity

Section 10 of the Constitution states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".[56] Dignity is not only a right but also a founding value.[57] This indicates the relevance, importance, and versatility of dignity in constitutional, legislative, common-law, and customary-law interpretation and development. Only where dignity is stated as a right does it give rise to a correlative duty and enforceable claims; where it is stated as a value, it is not an enforceable right.[58] Currie and De Waal suggest that human dignity is not only an enforceable right — it is also a "value that informs the interpretation of possibly all other fundamental rights and it is further of central significance in the limitations enquiry".[59]

Notably, both the non-vaccinating parent (X) and the child (Y) have a right to dignity. Currie and De Waal suggest that human dignity is not a clear or concise concept.[60] According to the Constitutional Court in *Le Roux v Dey*[61] (per Brand AJ):

> In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to reputation and his or her

55 See Currie & De Waal (2013) 217 for a discussion on the relationship between ss 9 & 36. See also Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 15–16.

56 Loubser & Midgley (2017) 47; Currie & De Waal (2013) 250: "human dignity" is specifically mentioned in FC s 1. See also Woolman "Chapter 36" in *CLoSA* (2014) 19; Carstens & Pearmain (2007) 29.

57 Woolman "Chapter 36" in *CLoSA* (2014) 19 refers to ss 1(a), 7(1), 36, & 39(1), and *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) (hereinafter *Dawood*) [35] to illustrate how "dignity operates as a first order rule, a second order rule, a correlative right, a value and a *grundnorm* […]." See also Woolman "Chapter 36" in *CLoSA* (2014) 23; Currie & De Waal (2013) 250–252; Carstens & Pearmain (2007) 29.

58 Woolman "Chapter 36" in *CLoSA* (2014) 24–25; Currie & De Waal (2013) 253.

59 Currie & De Waal (2013) 253: the subsidiarity principle also applies to the general right to dignity in s 10, as the "rights in the BoR stem from the value of human dignity and are more detailed elaborations of aspects of the concept". See Woolman "Chapter 36" in *CLoSA* (2014) 61 with reference to *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) (hereinafter *Khosa*) [41].

60 Currie & De Waal (2013) 251.

61 *Le Roux v Dey* 2011 (6) BCLR 577 (CC) (hereinafter *Le Roux v Dey*).

> right to a sense of self-worth. But under our common law 'dignity' has a narrower meaning. It is confined to the person's feeling of self-worth.[62]

In *Jordan*,[63] O'Regan and Sachs JJ, held that

> [o]ur Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body, […].[64]

In essence, human dignity "requires us to acknowledge the value and worth of all individuals as members of society".[65] The Constitutional Court has adopted a contextual understanding of dignity.[66] The broader definition of dignity suggests that "dignity is a group-based concept involving a collective concern for the well-being of others".[67]

This approach to dignity may also be relevant in the context of non-vaccination in that the dignity and well-being of a group of individuals are involved, for example, a group of children too young to receive certain vaccines.

The right to dignity is closely related to the right to equality[68] and Woolman discusses how dignity informs the equality analysis.[69] With reference to *Christian Education South Africa v Minister of Education*,[70] Woolman explains that dignity and equality do "not require that we treat everyone the same way, but that we treat everyone with equal concern and equal respect".[71]

Currie and De Waal suggest that human dignity envisions a person's inherent rights to physical integrity and freedom.[72] The reference to physical integrity (and the right to bodily

---

62 *Le Roux v Dey* [138] (Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J, & Nkabinde J concurring); Currie & De Waal (2013) 251; Woolman "Chapter 36" in *CLoSA* (2014) 7 argues that the court's definitions of dignity only provide a partial theory of dignity.

63 *S v Jordan* 2002 (6) SA 642 (CC) (hereinafter *S v Jordan*) [74] (the criminalisation of prostitution). See Woolman "Chapter 36" in *CLoSA* (2014) 49; Currie & De Waal (2013) 252 (fn 11).

64 *S v Jordan* [74].

65 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (hereinafter *National Coalition*) [29]; Currie & De Waal (2013) 251; Woolman "Chapter 36" in *CLoSA* (2014) 22.

66 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 10; Currie & De Waal (2013) 251–252.

67 As above.

68 Woolman "Chapter 36" in *CLoSA* (2014) 22 with reference to *National Coalition* [30]; Woolman "Chapter 36" in *CLoSA* (2014) 22 with reference to *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (hereinafter *Hugo*) [41]. See also Woolman "Chapter 36" in *CLoSA* (2014) 25; Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 9; Currie & De Waal (2013) 251–252.

69 Woolman "Chapter 36" in *CLoSA* (2014) 26.

70 (2000) (4) SA 757 (CC) (hereinafter *Christian Education 2000*).

71 Woolman "Chapter 36" in *CLoSA* (2014) 40; Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 12; Currie & De Waal (2013) 252.

72 Currie & De Waal (2013) 251; Woolman "Chapter 36" in *CLoSA* (2014) 25 & 32; Carstens & Pearmain (2007) 29.

integrity)[73] is especially important in the context of non-vaccination. Currie and De Waal opine that the right to human dignity also extends to family life and parental autonomy.[74] To understand how dignity extends to family life, and respectively the right to dignity of the child (Y) and parent (X), Woolman's exploration of dignity is essential.

Woolman sets out five definitions of dignity and explains that each encompasses self-governance or autonomy.[75] These are:

(1) Individual as an end-in-herself (Dignity 1);[76]
(2) Equal concern and equal respect (Dignity 2);[77]
(3) Self-actualisation (Dignity 3);[78]
(4) Self-governance (Dignity 4);[79] and
(5) Collective responsibility for the material conditions of agency (Dignity 5).[80]

Woolman explains how these five definitions all involve the recognition that persons are able to govern themselves[81] and that "others are entitled to the same degree of concern and respect that we demand for ourselves",[82] which again links with equality (respecting the dignity of others — e.g., Y).

Bishop and Woolman continue to explain that human dignity essentially confirms that human beings are not commodities, that an infinite worth is attached to all humans, and that human beings are not merely a means to an end, but "ends in themselves" (Dignity 1).[83]

---

73 Currie & De Waal (2013) 252: it is also suggested that human dignity "provides the basis for the right to equality". See Woolman "Chapter 36" in *CLoSA* (2014) 25 & 32.

74 Currie & De Waal (2013) 256 do not elaborate on "family life" and only discussed case law relating to marriages, immigration, and the Dep of Home Affairs. See Woolman "Chapter 36" in *CLoSA* (2014) 40: family is included in the concepts of Dignity 2 & 3.

75 Woolman "Chapter 36" in *CLoSA* (2014) 6; Currie & De Waal (2013) 252 (fn 11) with reference to *S v Jordan* [52]–[53].

76 Woolman "Chapter 36" in *CLoSA* (2014) 7; Currie & De Waal (2013) 251 (fn 9) with reference to *S v Dodo* 2001 (5) BCLR 423 (CC) (hereinafter *Dodo*) [38]; Currie & De Waal (2013) 288 with reference to s 12.

77 Woolman "Chapter 36" in *CLoSA* (2014) 10 (fn 27) with reference to *Hugo* [41]; Currie & De Waal (2013) 252.

78 Woolman "Chapter 36" in *CLoSA* (2014) 11 with reference to Ackermann J in *Ferreira v Levin* 1996 (1) SA 984 (CC) [49]. Currie & De Waal (2013) 385 only refer to "self-actualisation" in the context of s 17 (assembly, demonstration, and petition).

79 Woolman "Chapter 36" in *CLoSA* (2014) 12 with reference to Sachs J in *August v Electoral Commission* 1999 (3) SA 1 (CC) [17]; Currie & De Waal (2013) makes no express mention or link to self-governance and dignity.

80 Woolman "Chapter 36" in *CLoSA* (2014) 14–15 with reference to *Khosa* [74].

81 Woolman "Chapter 36" in *CLoSA* (2014) 18.

82 Woolman "Chapter 36" in *CLoSA* (2014) 17; Currie & De Waal (2013) 252.

83 M Bishop & S Woolman "Chapter 40: freedom and security of the person" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 07-06, 2014) 67 with reference to *Dodo* [38]. See Currie & De Waal (2013) 251 (fn 9), also referring to *Dodo* [38].

Furthermore, the right to dignity also underpins other constitutional rights, for example, the right to privacy as pointed out by the Constitutional Court in *S v Jordan*.[84] In this case, it was held that the right to privacy "serves to protect and foster that dignity."[85] In *Investigating Directorate*[86] the Constitutional Court (per Langa DP) also stated that

> […] privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows […] from the value placed on human dignity by the Constitution.[87]

The constitutional right and value of human dignity underpin and inform other constitutional rights. From the above, it is clear that the non-vaccinating parent (X) has the right to dignity as it relates to self-governance or autonomy and family life, including parental autonomy to make decisions for their children (XX). Similarly, the child (Y) has the right to dignity with specific reference to his or her human body and physical integrity.[88] Lastly, dignity is not only extended to an individual (e.g., X or Y), it is also a value and a right that applies to groups of persons, for example, those too young to be vaccinated. The constitutional right to life (s 11), too, is important to our discussion and to this, we now turn.

3.2.3 Section 11: the right to life

Section 11 of the Constitution states that "[e]veryone has the right to life", a right which Carstens and Pearmain describe as the most important of all human rights.[89] Both the parent (X) and the child (Y) have the right to life. In the context of non-vaccination, the child's (Y's) right to life is investigated, as non-vaccination may pose a threat to the life of the non-vaccinated child (XX) as well as others (e.g., Y).

The right to life encapsulates the right not to be killed.[90] The right to life and killing another person is often investigated in the context of criminal law. However, the right to life for purposes of this thesis is explored in the context of delictual rather than criminal liability.

---

84 *S v Jordan* [81].
85 As above.
86 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors: In re Hyundai Motor Distributors v Smit* 2001 (1) SA 545 (CC) (hereinafter *Hyundai Motor*).
87 *Hyundai Motor* [18].
88 Currie & De Waal (2013) 601 with reference to *S v M* 2008 (3) SA 232 (CC) [18].
89 See also Carstens & Pearmain (2007) 27.
90 Currie & De Waal (2013) 260: see e.g., the death penalty, self-defence, necessity, and arrests. Currie & De Waal (2013) 262: the state has a duty to protect and preserve life. See M Pieterse "Chapter 39: life" in S Woolman & M Bishop (eds) *CLoSA* (2ed, RS3, 05-11, 2014) 1.

It is noteworthy that the right to life and the right to dignity are interrelated.[91] This means that the right to life (s 11) covers an "existence consonant with human dignity".[92] As vaccination serves to protect and preserve human life, I suggest that vaccines directly protect the constitutional right to life (and dignity).

Because the right to life and dignity are entwined, this may indicate that it is not only the right to life (and dignity) of a specific individual (XX) that is protected by vaccines, but it is also the right to life (and dignity) of a collective of individuals (Y and others) or even the public (community or society) at large in that vaccines are aimed at preventing mass outbreaks and maintaining herd immunity, as discussed in Chapter 2.

Based on this reasoning, I suggest that vaccines not only protect the individual's (XX's) right to life (and dignity), but also that of other individuals (Y) who cannot be vaccinated (e.g., for medical reasons).

The right to life (s 11) is an important consideration in the context of non-vaccination in that the consequences of non-vaccination can result in death (as discussed in Chapter 2) which then invokes the rights to life and dignity and their infringement. For present purposes, it suffices to state that the right to life (s 11), like dignity (s 10), is a constitutional consideration that must be balanced when assessing the delictual element of wrongfulness.

The next constitutional right under inspection is the right to freedom and security of the person (s 12).

3.2.4 Section 12: the right to freedom and security of the person

Section 12 of the Constitution deals with the "freedom and security of the person" and protects the right to bodily and psychological integrity[93] which is underscored by dignity as a right and a value.[94] Section 12(2) guarantees a general right to both bodily and psychological integrity.[95]

---

91 Currie & De Waal (2013) 267–268: see *S v Makwanyane* 1995 (6) BCLR 665 (hereinafter *Makwanyane*). Pieterse "Chapter 39" in *CLoSA* (2014) 3 (fn 12), & 21.

92 Currie & De Waal (2013) 267: the authors refer to "the right to a life that is worth living". See Pieterse "Chapter 39" in *CLoSA* (2014) 21; Carstens & Pearmain (2007) 27 with reference to *Makwanyane*.

93 This s relates to decisions concerning reproduction; security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent. Currie & De Waal (2013) 271: s 12 guarantees both procedural and substantive protection. See Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 22: "s 12(1) provides both substantive protection and procedural protection for any deprivation of physical liberty […] s 12(2) extends the domain of freedom secured by the right to specific forms of bodily integrity". For a detailed discussion on the meaning of "freedom" see Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 10 & 32.

94 See also Carstens & Pearmain (2007) 29.

95 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 76; Currie & De Waal (2013) 286; Carstens & Pearmain (2007) 29 & 115.

Section 12(2)(*a*) protects decisions concerning reproduction; section 12(2)(*b*) protects the right to security in and control over the body; and section 12(2)(*c*) protects the right to be free from coercive medical and scientific experimentation.[96] Section 12(2)(*b*) states that "[e]veryone has the right to bodily and psychological integrity, which includes the right to security in and control over their body."[97]

Section 12(2)(*b*) is relevant for purposes of non-vaccination. This section has two components — "security in" and "control over" the body.[98] Notably, these two components are not the same.[99] "Security in" refers to the protection of bodily integrity against intrusions (by the state or others).[100] Bishop and Woolman suggest that the phrase "bodily and psychological integrity" means something more than mere "security in and control over" the body."[101]

"Control over" refers to the protection of bodily autonomy (or self-determination) as regards the use of one's body without interference by others.[102] Currie and De Waal suggest that "integrity", for purposes of bodily and psychological integrity, includes notions of self-determination and autonomy, while the right to control over one's body includes control over one's mind.[103] Bishop and Woolman suggest that section 12(2)(*b*)'s right to exercise "control over" one's body

> may conflict with both well-grounded and ill-founded beliefs of a majority of the population — and its representatives — about ways of being in the world deemed deleterious to the health and the well-being of all of its citizens.[104]

For example, non-vaccinating parents (X) may argue that vaccines intrude on their (or their child's (XX's)) bodily autonomy and integrity and that vaccines are deleterious to their health.

---

96 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 76; Currie & De Waal (2013) 287.

97 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 78: "'psychological integrity' as a self-standing right necessarily goes beyond the protection afforded by 'bodily integrity' and provides fortification from undue stress or shock […] Psychological integrity already receives comprehensive protection in our common law in the form of delictual damages for 'emotional shock'". See also Currie & De Waal (2013) 288.

98 Currie & De Waal (2013) 287; Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 76: "s 12(2)(*b*) tests our ability to give distinct meaning to 'bodily and psychological integrity', on the one hand, and 'security in and control over the body', on the other".

99 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 85; Currie & De Waal (2013) 287.

100 Currie & De Waal (2013) 287 opine that this "is a component of the right to be left alone in the sense of being left unmolested by others". See Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 85 with reference to *Minister of Safety & Security v Gaqa* 2002 (1) SACR 654 (C) at 658H for an example where the court limited s 12(2)(*b*) with reference to s 36.

101 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 76; Currie & De Waal (2013) 288.

102 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 85; Currie & De Waal (2013) 287.

103 Currie & De Waal (2013) 288.

104 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 87.

On the other hand, it may be suggested that vaccines protect bodily integrity and preserve life, as found by the *Bundesverfassungsgericht.*[105]

Although an infant has the right to bodily integrity, it does not have the capacity to make its own medical decisions and the parents are entrusted to protect their child's right to, *inter alia*, bodily integrity,[106] as the law generally recognises the parental right to act on behalf of a child.[107]

Section 12(2)(*b*) "assumes that individuals are capable of taking decisions that are in their own interests and of acting as responsible moral agents".[108] This means that a non-vaccinating parent (X) may protect his or her own interests but must also act as a responsible moral agent, again linking with the right and founding value of human dignity.[109]

Traditionally, a "moral agent" is seen as having the ability to know right from wrong and to be held morally responsible for his or her actions.[110] I suggest that acting as a responsible moral agent in the context of vaccination means acting in the best interests of your child (XX) as well as protecting the interests of others, especially children (e.g., Y).

Vaccination is often in a child's health interests and to a child's benefit (except for immunocompromised children), as well as in the best health and safety interests of society by maintaining herd immunity. I suggest that a vaccinating parent acting in his or her own interests, the best interests of their child, and the interests of public health and safety, is a responsible moral agent for purposes of section 12(2)(*b*).

Vaccination is the responsible and safe option for the child (XX), other children (Y), and public health. For purposes of section 12(2)(*b*), I suggest that acting as a responsible moral agent means vaccinating the child (XX). Furthermore, I suggest that if X does not vaccinate XX, acting as a responsible moral agent means, for example, at least warning or informing others that XX is unvaccinated and has contracted a vaccine-preventable disease. I return to this aspect in Chapter 5. For now, it suffices to say that acting as a responsible moral agent for purposes of section 12(2)(*b*) extends to the duty to vaccinate, as well as other duties in the context of non-vaccination.

---

105 *ECLI:DE:BVerfG:2020:rk20200511.1bvr046920* [15].

106 Similarly, a court may be approached to make, for example, medical decisions on behalf of a person. See Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 90; Currie & De Waal (2013) 286.

107 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 91; Currie & De Waal (2013) 601.

108 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88.

109 Woolman "Chapter 36" in *CLoSA* (2014) 23, & 31–32.

110 P Brey "From moral agents to moral factors: the structural ethics approach" (2014) https://archive.ethicsandtechnology.eu/wp-content/uploads/downloadable-content/Brey-2014-Structural-Ethics.pdf (accessed 21 November 2022) at 1–12.

Section 12(2)(*b*) of the Constitution must also be both exercised and legitimately limited in the context of the underlying principle of "mutual concern and mutual respect for others".[111] I submit that "mutual concern and mutual respect for others" implies that vaccination serves to protect mutual respect and concern for others (Y) in that vaccines are safe and protect individual and public health by sustaining herd immunity, preventing mass outbreaks, and protecting the young and immunocompromised from serious illness or even death (as discussed in Chapter 2).

As the right to and founding value of dignity underpin section 12 of the Constitution,[112] I suggest that vaccination serves to protect mutual respect and concern for others while also promoting the protection of and respect for human dignity. Equality also enters the picture as section 12(2) of the Constitution recognises "that each physical body is of equal worth and is entitled to equal respect".[113] I suggest that this indicates that it is not only the individual's (XX's) bodily and psychological integrity at play and that the bodily and psychological integrity of others (Y) is equally worthy of protection.

As vaccines generally serve the best interests of individuals and society at large, transmitting a serious disease to another (Y) could arguably be seen as a violation of section 12 of the Constitution in that the examples in section 12(2) are not a closed list.

Bishop and Woolman suggest that this reading of section 12(2) of the Constitution "means that bodily integrity affords the individual somewhat more protection than the entitlement — found in FC [section] 9(3)".[114] Clearly, section 9 of the Constitution better serves as a tag-on to section 12, as opposed to invoking section 9 on its own.

I suggest that the pro-vaccination initiatives instituted by the South African government indicate that vaccines serve to protect one's self and society in general. This renders section 12(2)(*b*) of the Constitution open to limitation on the basis of the underlying principle of mutual concern and mutual respect for others. On the other hand, I acknowledge that in terms of section 12(2)(*b*) non-vaccination cannot be limited automatically as the "recognition of a constitutional right to bodily autonomy in an open society means that we must minimise paternalistic forms of intervention in others' lives".[115]

---

111 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88; Currie & De Waal (2013) 251–252.
112 Woolman "Chapter 36" in *CLoSA* (2014) 23, & 31–32.
113 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 77; Currie & De Waal (2013) 251–252.
114 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 77.
115 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88. *S v Huma* 1996 (1) SA 232 (W) (hereinafter *Huma*) at 236I–237B as cited in Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 86–87: regarding "physical integrity", the court in *Huma* linked the intrusion of a person's physical integrity with physical pain and gave the example of drawing blood; "when a blood sample is taken the skin is ruptured and it is accompanied by

This means that, even if vaccines are regarded as being in the best interests of individuals and society (or public health), they cannot necessarily be forced on individuals as the right to dignity is omnipresent when interpreting section 12 of the Constitution via the close link between sections 12 and 10.[116] Furthermore, the right to bodily autonomy aims at the preservation of individual integrity and not necessarily the welfare of the individual.[117]

Therefore, despite the drawbacks of non-vaccination, in the context of section 12(2)(*b*) non-vaccination represents a choice to preserve bodily autonomy in the context of individual integrity. However, as discussed above, it is not only the individual (XX's) right to bodily and psychological integrity at play here, but also the bodily and psychological integrity of others (Y), as underpinned by sections 9 and 10 of the Constitution. Essentially, the competing rights of the parent (X), the child (Y), and society must be balanced when considering this specific right.

As regards bodily integrity, section 12(2)(*b*) must be read with section 12(1)(*c*) — the right to be free from violence.[118] In the context of non-vaccination, the right to be free from violence is not explored as this research is concerned with the omission to vaccinate and not *per se* with implied violence or assault[119] based on non-vaccination. For purposes of this section, the focus is on the non-vaccinating parent (X) who asserts that vaccines violate his or her (or his or her children's) bodily and psychological integrity, and on the other hand, the bodily integrity of Y.

It is interesting to note that Bishop and Woolman refer to US case law (such as *Jacobsen v Commonwealth of Massachusetts* 197 US 11 (1905)) to indicate what a justifiable invasion of bodily integrity entails; one example is that the "intrusion must avoid inflicting unnecessary physical pain or anxiety. It must not run the risk of disfigurement or injury to health".[120]

In the context of non-vaccination, this approach may be used to justify mandatory vaccinations as the physical pain is, arguably, minimal and the benefits of vaccination outweigh the associated health risks. It may also be used to support a mandatory interdict or substitute

---

a small element of pain". See Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 86: "not every action by the state or another party that involves touching another person's body warrants constitutional scrutiny".

116 Woolman "Chapter 36" in *CLoSA* (2014) 23, & 31–32: "dignity, as refracted through the prism of freedom and security of the person, has revolutionised three bodies of law: (a) the common law of delict in the context of state liability for wrongful behaviour […]." See also Currie & De Waal (2013) 252.

117 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 89; Currie & De Waal (2013) 287.

118 Currie & De Waal (2013) 287; Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 51.

119 See Carstens & Pearmain (2007) 500 for a definition of assault in the context of health care services; at 497: "medical treatment without consent can attract a criminal charge of assault."

120 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 87; Currie & De Waal (2013) 287.

consent, mandating that a child (XX) be vaccinated despite the parents' (Xs') objections and reservations to vaccination.

For now, it suffices to say that the right to bodily and psychological integrity extends beyond individual protection to include the bodily and psychological integrity of others (Y) as section 12(2) of the Constitution is underpinned by sections 9 and 10. The next constitutional rights under consideration in the context of non-vaccination are sections 14 and 32 of the Constitution.

3.2.5 Sections 14 and 32: the right to privacy and access to information

Section 14 of the Constitution protects the right to privacy. A distinction is drawn between the common-law understanding of privacy and the constitutional protection of the right to privacy.[121] For purposes of this research, the right to privacy is relevant in the context of human dignity and informational privacy.[122]

Informational privacy[123] is relevant in the context of non-vaccination as the general right to privacy protects the decision to disclose information to the public. This is linked to an expectation that such a decision (to make known or not) will be respected.[124] This is relevant in the context of non-vaccination as parents (X) must often disclose the vaccination status of their children (XX) to, for example, schools or for travel purposes. The right to privacy may also be limited in terms of section 36 of the Constitution.[125]

Woolman explains that dignity is linked to privacy as "the individual is, consequently, entitled to a space within which to define herself without interference by the state or other members of society."[126] The right to dignity and its link to the right to privacy was also alluded to above with reference to *S v Jordan*[127] and *Hyundai Motor*.[128] However, Woolman points out that the "commitment to privacy grounded in individual autonomy would have to yield, […]

---

121 Currie & De Waal (2013) 295 & 296: the common-law right to privacy is an independent personality right and forms part of the component of *dignitas*. For a discussion on the relationship between the common-law and the constitutional right to privacy see: Currie & De Waal (2013) 297; McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 2.

122 McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 6–7.

123 McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 6: "invasions of privacy may be broadly divided into intrusions or interferences with private life, and disclosures and acquisition of information. The latter are sometimes called substantive and informational privacy rights". (Footnotes omitted).

124 Currie & De Waal (2013) 302–303; McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 6–7.

125 McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 20.

126 Woolman "Chapter 36" in *CLoSA* (2014) 43–44; McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 6; Currie & De Waal (2013) 252.

127 *S v Jordan* [81].

128 *Hyundai Motor* [18].

when the greater good so required".[129] For example, public schools may require that the parents (X) disclose the vaccination status of their child (XX) before being admitted to a public school, serving to protect the greater good of public health (which in turn protects children like Y, who are, for example, too young to be vaccinated).[130]

The Protection of Personal Information Act 4 of 2013 (POPIA) is legislation specifically enacted to give effect to section 14.[131] Section 2(1) of the POPIA specifically states that its purpose is to

> give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at —
>
> (a) balancing the right to privacy against other rights, particularly the right of access to information; and
>
> (b) protecting important interests, including the free flow of information within the Republic and across international borders.

From the above, it is clear that this Act aims to regulate the balancing of the right to privacy against other rights, particularly the right to access information. In the context of non-vaccination the personal information of a child (XX), such as vaccination status and other personal health information, may be relevant to the legal proceedings in a civil lawsuit regarding non-vaccination and infection (of Y).

In a civil lawsuit, the parties (X and Y) may rely on the right to privacy (not to disclose personal information) but, on the other hand, they have a right of access to information:

> [A]ccess to information is vital to protecting a person's other rights and interests (including, for example, the constitutional rights to privacy and equality).[132]

For example, section 32(2) of the Constitution "expands the reach of the right of access to information to include information held by *persons other than the state*".[133] In essence, a victim of non-vaccination (Y) may ultimately request (or compel) that the personal information (of XX) be disclosed — e.g., medical records held by a particular hospital — during the civil trial

---

129 Woolman "Chapter 36" in *CLoSA* (2014) 45.

130 See A Hyman "Immunisation cards needed for grade 1 admission in Gauteng, says Lesufi" (01 August 2021) https://www.timeslive.co.za/news/south-africa/2021-08-01-covid-19-immunisation-certificate-needed-for-grade-1-admission-in-gauteng-says-lesufi/ (accessed 2 December 2022).

131 See Preamble of the POPIA.

132 J Klaaren & G Penfold "Chapter 62: access to information" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 2002, 2014) 3.

133 My emphasis. See Klaaren & Penfold "Chapter 62" in *CLoSA* (2014) 2; Currie & De Waal (2013) 344 & 691.

and that it be adduced into evidence. This is in competition with the right to privacy.[134] The national legislation envisaged in section 32(2) of the Constitution is the Promotion of Access to Information Act 2 of 2000 (PAIA).[135]

The PAIA (s 9) aims to give effect to the constitutional right of access to any information held by another person (e.g., X or a hospital) that is required for the exercise or protection of any rights.[136] This Act acknowledges the interplay between the reasonable protection of privacy and the constitutional right of access to information and aims to balance these competing rights.

Essentially, there is tension between the right to privacy and the right to access personal information. In the context of non-vaccination, specifically during litigation, this interplay may be especially relevant.

The next constitutional right under consideration in the context of non-vaccination is the right to freedom of conscience, religion, thought, belief, and opinion (s 15).

3.2.6 Section 15: the right to freedom of conscience, religion, thought, belief, and opinion

Section 15(1) of the Constitution states that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion". Section 15 has two components: (1) free exercise; and (2) equal treatment.[137] This right forms part of the discussion on non-vaccination in the context of parental rights in that parents (X) may decide not to vaccinate their child (XX) on the basis of exercising their constitutionally protected right to freedom of conscience, religion, thought, belief, and opinion. It has been said that section 15 protects "an extremely wide range of world-views".[138] Notably, section 15 may potentially be

> outweighed by other constitutionally protected rights. Religious freedom will conflict with and sometimes give way to rights such as the rights of the child (s 28), the right to freedom of expression

134 See also Carstens & Pearmain (2007) 32 & 981.

135 See Klaaren & Penfold "Chapter 62" in *CLoSA* (2014) 2: "broadly speaking, the [PAIA] provides for access to records held by both public and private bodies, and sets out the grounds on which disclosure must or may be refused and the manner in which such grounds may be overridden in the public interest, as well as mechanisms for the resolution of disputes over access, notably judicial review."

136 See also Carstens & Pearmain (2007) 943.

137 Currie & De Waal (2013) 315: ss 15 & 31 together protect the rights of individuals and communities to freely exercise their religion. See also P Farlam "Chapter 41: freedom of religion, belief and opinion" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 12-03, 2014) 29.

138 Currie & De Waal (2013) 316: the right to religious freedom includes the right to reject religious beliefs. See Farlam "Chapter 41" in *CLoSA* (2014) 13.

> (s 16), the right to dignity (s 10), the right to freedom and security of the person (s12), and the right to equality (s 9).[139] (Footnotes omitted.)

This means that when section 15 competes with other rights (e.g., ss 9, 10, 12, 16, and 28), the latter may outweigh section 15. As mentioned above, section 9(3) of the Constitution prevents the state from discriminating unfairly against any religious group.

This is relevant to non-vaccination as many non-vaccinating parents' decisions are rooted in religious or philosophical reasons.[140] As mentioned, section 15 may also be limited in accordance with section 36 of the Constitution.[141] The limitation of this right in the context of non-vaccination often features in the context of exemptions to mandatory vaccinations as dictated by foreign law.

In *FF v State of New York*,[142] the Supreme Court of the State of New York (Appellate Division) confirmed the ruling of the Supreme Court of the State of New York, County of Albany,[143] that the legislative repeal of the "religious exemption to compulsory vaccination" and the Public Health Law[144] was not an unconstitutional violation of the plaintiffs' rights. It, therefore, violates neither the Free Exercise Clause of the First Amendment of the US Constitution nor the New York State Constitution.[145] This shows that the revocation of religious exemption to compulsory vaccination is not unconstitutional and emphasises the importance of vaccines when weighed against the religious rights of parents.

In the Dutch case, *ECLI:NL:RBGEL:2020:3699*, the *Rechtbank Gelderland* confirmed that the interests of minors prevail over the right to freedom of religion and that vaccinations serve the child's best interests. This is an interesting approach and may provide valuable insight into the South African context when considering the balancing of the parents' (Xs') freedom of religion (supporting non-vaccination) and another child's (Y's) best interests (pro-vaccination).

Regrettably, there is no local case law on the issue of whether mandatory vaccinations (or those mandated via interdict) may justifiably limit the right to freedom of conscience,

---

139 Farlam "Chapter 41" in *CLoSA* (2014) 46.

140 For purposes of s 15 it is irrelevant to debate the term "religion" as different systems of belief (not centred on deity) is protected by s 15. See Currie & De Waal (2013) 316.

141 Currie & De Waal (2013) 320; Farlam "Chapter 41" in *CLoSA* (2014) 41.

142 No 530783 (18 March 2021) (order affirming trial court judgment).

143 *FF v State of New York* No 4108-19 (3 December 2019).

144 S 2164, as amended.

145 See "Petition — Supreme Court of the United States" (date unknown) https://www.supremecourt.gov/DocketPDF/21/21-1003/207832/20220110152049902_Petition.pdf (accessed 06 July 2022). Justia US Law "FF v State of New York" (2021) https://law.justia.com/cases/new-york/appellate-division-third-department/2021/530783.html (accessed 15 June 2022).

religion, thought, belief, and opinion.[146] There is also no local case law indicating the interplay and limitation of section 15 of the Constitution in the context of non-vaccination and other competing rights (e.g., to life, bodily integrity, and dignity). There are, however, indications that the right to life is more important than the right to freedom of conscience, religion, thought, belief, and opinion. In fact, Carstens and Pearmain term the right to life the "most fundamental of all human rights."[147] And, despite the guarantees in section 15 of the Constitution and the law's general acknowledgement of the parental right to act on behalf of a child, the Witwatersrand Local Division (per Jajbhay J) held in *Hay*[148] that the interests of the child are always paramount and the child's right to life should be protected in an emergency situation.[149] The court granted the application to administer a life-saving blood transfusion to the infant.[150]

Although the *Hay* case illustrates the balancing process of the parents' rights against those of the child, it must be distinguished from scenarios where a child's life is in immediate danger versus a healthy unvaccinated child (XX and Y).[151] Notably, the *Hay* case was not considered in the context of the common-law delict as it concerned the urgency of a blood transfusion. Notwithstanding the uncertainty of how section 15 of the Constitution will be applied in the context of non-vaccination and the common-law delict, it is important and a right that forms part of the balancing process when considering the common-law delictual element of wrongfulness.

The next constitutional rights under inspection are sections 30 and 31which deal with the right to participate in the cultural life of one's choice.

3.2.7 Sections 30 and 31: the right to participate in the cultural life of their choice

Section 30 of the Constitution states that everyone (e.g., X) has the right to participate in the cultural life of their choice with the *caveat* that no one exercising these rights may do so in a

146 E.g., the reported cases on vaccines are: *Afriforum v Minister of Police* (2021) ZAGPPHC 882 (procurement and distribution of COVID-19 vaccines); *Afriforum v Minister of Finance* (2021) ZAGPPHC 730 (procurement and distribution of COVID-19 vaccines); *Solidarity v Ernest Lowe* (2022) 43 ILJ 1125 (LC) (labour related issues and vaccine mandates in the workplace); *Electoral Commission v Minister of Cooperative Governance & Traditional Affairs* 2022 (5) BCLR 571 (CC) (postponement of local government election and vaccines); *Makhanda against Mandates v Rhodes University* (2022) ZAECMKHC 5 (application dismissed).

147 See also Carstens & Pearmain (2007) 27.

148 *Hay v B* 2003 (3) SA 492 (W) (hereinafter *Hay*).

149 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 91; Carstens & Pearmain (2007) 922–923.

150 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 91; Currie & De Waal (2013) 317; Carstens & Pearmain (2007) 871.

151 Carstens & Pearmain (2007) 922–923.

manner inconsistent with any provision of the Bill of Rights — and particularly, equality and dignity.[152]

Once again, the interplay of other constitutional rights is relevant when considering a specific right, and for purposes of this right, equality and dignity must be considered. Although "culture" is often difficult to define, Albertyn and Goldblatt suggest that it refers to the practices, values, rules, and behaviour of different social groups.[153]

I submit that non-vaccinating parents (X) may rely on section 30, in addition to their other constitutionally protected rights (e.g., human dignity) to protect their non-vaccination decision(s). Similarly, this right (s 30) may be limited if it is exercised — including by cultural, religious, and linguistic communities — in a manner inconsistent with the Bill of Rights.[154]

Section 31 of the Constitution states that persons belonging to a cultural, religious, or linguistic community may not be denied this right. Section 31(2) of the Constitution functions as an "internal modifier" and prohibits "a person or a group from practising their religion in a manner inconsistent with other provisions of the Final Constitution".[155] For example, if section 28(1)(*d*) of the Constitution is violated, section 31 cannot also be violated.[156] It is noteworthy that section 9 is seldom used to protect the rights in sections 30, 31, and 15 of the Constitution.[157] This may be because, although section 9 protects against unfair discrimination, these specific rights (ss 30, 31, and 15) offer far broader protection.[158]

The next right to be considered is section 16.

3.2.8 Section 16: the right to freedom of expression

Section 16(1)(*b*) of the Constitution states that "everyone has the right to freedom of expression, which includes […] freedom to receive or impart information or ideas". Hence, non-vaccinating parents (X) have the right to receive or impart information or ideas concerning vaccination and non-vaccination.

---

152 Woolman "Chapter 36" in *CLoSA* (2014) 42 (fn 156); Currie & De Waal (2013) 624–625.
153 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 72; Currie & De Waal (2013) 624–625.
154 See Woolman "Chapter 36" in *CLoSA* (2014) 42 with reference to s 31(2): "the [Constitution] makes it clear that cultural practices secure constitutional protection only where they do not interfere with the exercise of other fundamental rights." See also Currie & De Waal (2013) 624–625.
155 Friedman *et al* "Chapter 47" in in *CLoSA* (2014) 22 with reference to *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE), & *Christian Education 2000*. See Currie & De Waal (2013) 323.
156 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 23.
157 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 71–72.
158 As above: the CC "has considered unfair discrimination on the ground of religion in a small number of cases".

"Expression" is not interpreted narrowly and, in essence, "every act by which a person attempts to express some emotion, belief or grievance should qualify as 'expression'".[159] Therefore, non-vaccinating parents (X) have the right to express their non-vaccination beliefs. This includes anti-vaxx lobbying as discussed in Chapter 2. This right may be limited under section 36 of the Constitution[160] and under the internal limitations in section 16(2) which lists categories of expression "not to be regarded as constitutionally protected speech",[161] such as propaganda for war, incitement of imminent violence, or advocacy of hatred based on race, ethnicity, gender, or religion and which constitutes incitement to cause harm.[162]

Woolman explores the link between human dignity and freedom of expression,[163] and highlights that "[t]wo High Courts have recognised that, in a head-to-head contest between expression and privacy, the more important dignity interest might attach to expression".[164]

Freedom of expression is also considered against other countervailing rights and interests such as privacy (s 14) and equality (s 10).[165] Moreover,

> the fundamental value of freedom of expression means that it can only be restricted where harm is actually caused or is likely to occur. Mere speculation of harm is insufficient to warrant overriding this fundamental right.[166]

I suggest that in the context of non-vaccination, this may mean that the freedom of expression of a non-vaccinating individual (X) must be protected. Although the harm posed (to Y) by non-vaccination is real, it cannot be said that the expression of non-vaccination attitudes and beliefs in itself causes harm in the context of section 16 of the Constitution. The choice of a non-vaccinating individual (X) to express his or her vaccine sentiments can only be limited in accordance with the requirements of section 36.

---

159 Currie & De Waal (2013) 341; D Milo *et al* "Chapter 42: freedom of expression" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 06-08, 2014) 8 (fn 30).

160 See Milo *et al* "Chapter 42" in *CLoSA* (2014) 7 with reference to *De Reuck v DPP* 2004 (1) SA 406 (CC) (hereinafter *De Reuck*) [59], & *Phillips v DPP, Witwatersrand Local Division* 2003 (3) SA 345 (CC) [17]. *CLoSA*, Ch 42 explores cases which dealt with, *inter alia*, child pornography, defamation, scandalising the court, and nude dancing. See Milo *et al* "Chapter 42" in *CLoSA* (2014) 9–10 for s 36(1) in this context.

161 Milo *et al* "Chapter 42" in *CLoSA* (2014) 6; Currie & De Waal (2013) 354.

162 See ss 16(2)(*a*)–(*c*). See Milo *et al* "Chapter 42" in *CLoSA* (2014) 11: "if expression falls within these specified categories, there is no room for balancing; free speech always loses." See also Currie & De Waal (2013) 354.

163 Woolman "Chapter 36" in *CLoSA* (2014) 56; Currie & De Waal (2013) 371.

164 Woolman "Chapter 36" in *CLoSA* (2014) 57.

165 Milo *et al* "Chapter 42" in *CLoSA* (2014) 9; Currie & De Waal (2013) 36 & 253.

166 Milo *et al* "Chapter 42" in *CLoSA* (2014) 12.

Furthermore, freedom of expression is arguably linked to the general principles of autonomy (or liberty),[167] equality, self-fulfilment, and the search for truth.[168] Accordingly, everyone must "enjoy liberty of expression unless good reasons are advanced for limiting that liberty".[169] Thus, regardless of vaccine attitudes, a non-vaccinating individual (X) may freely and openly exchange ideas, including anti-vaxx sentiments. For example, "wholly false information can also advance" the search for truth "because it provides an opportunity for the truth to be made more meaningful in exposing the false idea".[170] I suggest that non-vaccinating individuals (X) have the right to express their ideas and beliefs and a blanket prohibition on freedom of expression must be avoided. However, there are foreign cases that indicate that the dissemination of misinformation on vaccines is prohibited.[171] The right to freedom of expression must be qualified in the context of non-vaccination, and this is yet to be done in the South African context.

The next constitutional right under consideration in the non-vaccination context is the right to freedom of association (s 18).

3.2.9 Section 18: the right to freedom of association

Section 18 of the Constitution protects everyone's right to freedom of association.[172] A parent (X) may choose to associate with non-vaccination (or non-vaccinating) social, religious, or cultural groups.[173] Although this right is constitutionally protected, it may also be limited.[174]

It is worth noting the relevance of this right in the context of non-vaccination as many non-vaccinating parents have formed groups, associations, and even organisations to voice their non-vaccination sentiments.[175]

---

167 See Milo *et al* "Chapter 42" in *CLoSA* (2014) 15 for criticism regarding the principle of autonomy as a justification for freedom of expression. See also Currie & De Waal (2013) 252.

168 Milo *et al* "Chapter 42" in *CLoSA* (2014) 16; Currie & De Waal (2013) 364.

169 Milo *et al* "Chapter 42" in *CLoSA* (2014) 15.

170 Milo *et al* "Chapter 42" in *CLoSA* (2014) 16–17; Currie & De Waal (2013) 343.

171 See the Canadian case of *JW v BJH* 2017 CanLII 50748 (ON HPARB) (anti-vaccine misinformation was held to be irresponsible, unprofessional, imbalanced, and dangerous). For vaccine-misinformation see generally DR Reiss & J Diamond "Measles and misrepresentation in Minnesota: can there be liability for anti-vaccine misinformation that causes bodily harm" (2019) 56(3) *SDLR* 531–580.

172 "Freedom of association is one of the most basic rights enjoyed by humans. It ensures that every individual is free to organise and to form and participate in groups, either formally or informally". See Human Rights House "Freedom of association" (date unknown) https://humanrightshouse.org/we-stand-for/freedom-of-association/ (accessed 04 February 2021).

173 Currie & De Waal (2013) 397: see "associations as correlative" and "associational rights […] [protect] religious and cultural attachments from undue state interference."

174 See Currie & De Waal (2013) 402–419; S Woolman "Chapter 44: freedom of association" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 12-03, 2014) 47.

175 See Currie & De Waal (2013) 396–401. Dissociation means that the right to associate includes the right not to associate. See Woolman "Chapter 44" in *CLoSA* (2014) 3 & 30; J Stent "Panda's Nick Hudson opposes

There are, however, two associations that do not enjoy protection — criminal associations and those threatening the constitutional order.[176] Woolman adds that the right to dignity (s 10) justifies "the protection of intimate association".[177] This right is mentioned for the sake of completeness although it is not particularly relevant in the balancing act to determine the element of wrongfulness as discussed in Chapter 5.

The next right under inspection is the right of access to health care services in the context of non-vaccination.

3.2.10 Section 27: the right to have access to health care services

Section 27(1)(*a*) of the Constitution states that everyone has the right to have access to health care services[178] — a right that is linked to the value and right of dignity.[179] Indeed, children (XX and Y) are included in the scope of this section,[180] although children's health rights are set out in greater detail in section 28 of the Constitution.

For purposes of sections 27 and 28 of the Constitution, it is suggested that vaccines form part of basic healthcare services,[181] although the term "health care services" is not defined in the Constitution.[182] For purposes of this thesis, I assume that vaccines are readily accessible and available to all individuals free of charge from public healthcare officials, *inter alia*, at public clinics.[183] As mentioned in Chapters 1 and 2, this research does not focus on the supply aspect in the context of non-vaccination, and state liability is also excluded.

SA's vaccination plan. What he hasn't said is that his company makes alternative medicines" (28 September 2021) https://www.dailymaverick.co.za/article/2021-09-28-pandas-nick-hudson-opposes-sas-vaccination-plan-what-he-hasnt-said-is-that-his-company-makes-alternative-medicines/ (accessed 22 November 2022); N Swart "Nick Hudson of PANDA on recent events indicating that, finally, the tide behind the official COVID-19 narrative may be turning" (24 December 2021) https://www.biznews.com/thought-leaders/2021/12/24/panda-nick-hudson-covid-19 (accessed 22 November 2022).

176 See Currie & De Waal (2013) 401–402; Woolman "Chapter 44" in *CLoSA* (2014) 32.

177 Woolman "Chapter 36" in *CLoSA* (2014) 30; Currie & De Waal (2013) 407.

178 Carstens & Pearmain (2007) 25.

179 Carstens & Pearmain (2007) 43.

180 See Friedman *et al* "Chapter 47" in *CLoSA* (2014) 12 with reference to *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) at 293I–293J: "[s] 28(1)(*c*) creates the right of children to basic nutrition, shelter, basic health care services and social services. There is an evident overlap between the rights created by [ss] 26 and 27 and those conferred on children by [s] 28. Apart from this overlap, the [ss] 26 and 27 rights are conferred on everyone including children while [s] 28, on its face, accords rights to children alone." See also Friedman *et al* "Chapter 47" in *CLoSA* (2014) 18: "s 28 do not contain any internal limitation subjecting them to the availability of resources".

181 RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020).

182 Carstens & Pearmain (2007) 39.

183 See NICD "COVID-19 vaccine rollout strategy FAQ" (date unknown) https://www.nicd.ac.za/covid-19-vaccine-rollout-strategy-faq/#:~:text=DO%20INDIVIDUALS%20HAVE%20TO%20PAY,at%20the%20point%20of%20service (accessed 10 December 2022); RSA Gov, DoH "Immunisation" (date unknown)

In *Soobramoney v Minister of Health, KZN*[184] the Constitutional Court (per Sachs J) commented on the human rights approach to health care and noted that:

> In all the open and democratic societies based upon dignity, freedom and equality […], the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.[185]

From this, it is clear that in keeping with a human rights-based approach, access to life-prolonging resources is regarded as an integral part of our open and democratic society.[186] I suggest that vaccines are a life-prolonging resource (as shown in Chapter 2) that forms an integral part of our open and democratic society based upon dignity, freedom, and equality.

The importance of this right (to have access to healthcare services) is rooted in the fact that a child (XX and Y) has a right to access healthcare services, and that the duty to realise this socio-economic right rests on the state.[187]

As mentioned in Chapters 1 and 2, the focus of this thesis is not on the vaccine demand and supply chain. For purposes of this thesis, it is accepted that vaccines are readily available and the failure of the state to realise access to vaccines is not explored further.

The next right under discussion is the rights of children.

3.2.11 Section 28: the rights of children

Section 28 of the Constitution deals exclusively with the rights of children (XX and Y) and is the primary source of children's rights.[188] Before exploring section 28, it must be noted that section 28 of the Constitution "is not the only section that confers constitutional rights on children",[189] and children also enjoy, for example, the right to dignity, equality,[190] the right to bodily and psychological integrity, access to health care services, and privacy.[191]

---

https://www.health.gov.za/immunization/#:~:text=Immunization%20protects%20young%20children%20against,free%20in%20all%20public%20clinics (accessed 10 December 2022).

184 1998 (1) SA 765 (CC) (hereinafter *Soobramoney*) [52].

185 *Soobramoney* [52] (Langa DP, Ackermann J, Didcott J, Goldstone J, Kriegler J, Mokgoro J, O'Regan J, & Sachs J concur in the judgment of Chaskalson P). See Carstens & Pearmain (2007) 46.

186 Carstens & Pearmain (2007) 27.

187 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 32; Carstens & Pearmain (2007) 38 & 62.

188 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 1.

189 As above.

190 As above with reference to *Christian Lawyers Association v National Minister of Health* 2005 (1) SA 509 (T) (hereinafter *Christian Lawyers*): s 9(3) prohibits discrimination on the basis of age. See also Currie & De Waal (2013) 601.

191 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 2; Currie & De Waal (2013) 601.

Friedman, Pantazis, and Skelton suggest that "children's rights can be broadly categorised as rights of protection and rights of autonomy […] to protect their self-determination".[192] Section 28 of the Constitution provides that:

> (1) Every child has the right —
>
> […]
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation
>
> […]
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.[193]

Section 28(1)(*b*) of the Constitution protects the child's (XX's) right to parental care and is essentially aimed at ensuring that parents (X) care properly for their children (XX).[194] This right is discussed in greater detail below with reference to the legislation enacted to give effect to this right.[195] For now, it suffices to note that "[d]ifferent parents or family members may owe different degrees of care to a child".[196] It is noteworthy that the right to parental care (s 28(1)(*b*)) falls on the parent (X), and that the state has the responsibility to "ensure that there are legal obligations to compel parents (and family) to fulfil their responsibilities in relation to

---

192 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 2: The authors refer to the cases of *MEC for Education, KZN v Pillay* 2008 (1) SA 474 (CC), & *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C). See also Currie & De Waal (2013) 601.

193 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 2: "[s] 28(2) is flexible enough to include rights to autonomy"; at 24: s 28(1)(d) "clearly imposes a positive obligation on the state to prevent harm to children"; at 2: "[s] 28(1) encompasses rights that are predominantly protective in nature"; at 22 & 25: e.g., the South African Schools Act gives effect to FC s 28(1)(*d*) in the context of bans on corporal punishment in schools. Child neglect cases in South Africa fall under the ambit of criminal law. The delictual cause of action arises completely independently from the criminal one, and it basically either an *actio iniuriarum* situation (assault, where the harm is caused intentionally) or pain and suffering (usually where the harm is caused negligently, though intentional harm causing is also accommodated). Indirectly, the common law protects children against neglect and abuse by providing them with *actio iniuriarum* or the action for pain and suffering. See also Carstens & Pearmain (2007) 497–500; Currie & De Waal (2013) 601.

194 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 15; Currie & De Waal (2013) 601.

195 For now, it suffices to mention that the court in *Jooste v Botha* 2000 (2) SA 199 (T) at 208D–208G defined three kinds of care in s 28(1)(*b*). See Friedman *et al* "Chapter 47" in *CLoSA* (2014) 6: "(a) family care is where the child is part of a family, whether nuclear or extended; (b) parental care is where there is no family and only a single parent; (c) alternative care is where the child is removed from the family environment […] [t]his interpretation construes FC s 28(1)(*b*) far too narrowly."

196 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 7.

their children".[197] In essence, legislation and the common law impose obligations on parents (X) to care for their child (XX).[198]

Subsections (*b*) and (*c*) must be read together.[199] In essence, section 28(1)(*b*) defines those responsible to care for the child, and section 28(1)(*c*) lists the various facets of the care entitlement.[200] Friedman, Pantazis, and Skelton suggest that parental care must not be defined narrowly and support the "generous and flexible standards" approach.[201]

Section 28(1) of the Constitution states that every child (XX and Y) has the right to basic health care services. Thus, the child's (XX's) right to access health care services appears twice in the Constitution, once in section 27(1)(*a*) and again in section 28(1)(*c*).[202] Section 28(3) expressly states that in this section a "child" means a person under the age of 18 years.[203]

The topic of non-vaccination invokes certain constitutional rights and responsibilities which ultimately compete with one another in the context of non-vaccination. For example, the child's right to basic healthcare services (s 28(1)(*c*)), parental care (s 28(1)(*b*)), and protection from ill-treatment, abuse, neglect, and degradation (s 28(1)(*d*)) invoke constitutional rights and correlating responsibilities or duties.[204] These rights may, for example, compete with the cultural and religious rights of the parent (X).

The constitutional "best interests of the child" standard as stated in section 28(2) applies in "every matter concerning the child" and the wording of this section indicates that in section 28(2) the best interests of the child are not limited to the matters in section 28(1).[205]

It is suggested that section 28(2) of the Constitution is an independent right,[206] and that it may be used to interpret section 28(1) of the Constitution or *vice versa* as sections 28(1)–(2)

---

197 See Friedman *et al* "Chapter 47" in *CLoSA* (2014) 9, & 15–17 for a discussion of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), and when the state's responsibility would arise. Regarding healthcare, it is suggested (at 16) that "[i]f a parent can afford medicine and the other components of health care, then it is his or her duty to provide them. If the parent cannot, then the child can turn to the state for support, assuming the state has sufficient available resources." See Currie & De Waal (2013) 600.

198 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 9; Currie & De Waal (2013) 600.

199 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 15; Currie & De Waal (2013) 600.

200 As above. S 28(1)(*c*) places a duty on the state and the parents. See also National Health Act 61 of 2003, s 2(*c*)(iii).

201 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 7.

202 Carstens & Pearmain (2007) 77.

203 See also Carstens & Pearmain (2007) 82.

204 Mahery & Slemming (2019) *SAJBL* 76.

205 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 40. For a discussion on long- and short-term interests of the child see 44. See the Canadian case of *OMS v EJS* 2021 SKQB 243 (hereinafter *OMS v EJS*) [81] (with reference to *AC v Manitoba (Director of Child and Family Services)* 2009 SCC 30 [81]): "[t]he application of an objective 'best interests' standard to infants and very young children is uncontroversial."

206 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 41 with reference to *Minister of Welfare & Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) [17].

are read together.[207] I accept that section 28(2) is not only a guiding principle or standard, but that it is an independent right as Goldstone J stated in *Minister for Welfare & Population Development v Fitzpatrick*.[208]

Section 28(2) of the Constitution may be used to "determine the ambit of another right in the Bill of Rights" and may be relevant during the "limitation stage of application analysis of this other right".[209] This means that when the other (perhaps competing) constitutional rights of the child (Y) and the parents (X) are explored and eventually balanced, section 28(2) comes into play.

In the context of non-vaccination, the rights of other children (Y) may also compete with those of the unvaccinated child (XX) and in this instance, the child's best interests may be limited based on the best "interests of other children, or children generally, or of other parties, such as parents or the state".[210]

In 2005 the Children's Act[211] was adopted to give effect to various children's rights guaranteed in the Constitution and it has "codified the common law regarding parental authority".[212] Under the indirect application of the Bill of Rights, there is a duty to interpret legislation (such as the Children's Act) in conformity with the Bill of Rights.[213]

The Children's Act provides that all decisions affecting children (XX and Y) must protect, respect, and fulfil the children's rights as set out in the Bill of Rights.[214] Like section 28(2) of the Constitution, the Children's Act provides that the best interests of the child are paramount.[215] In other words, section 28(2) of the Constitution echoes the common-law standard of the best interests of the child, and this common-law standard is applied by the "High Court in its position as the upper guardian of minor children".[216]

---

207 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 40.

208 2000 (3) SA 422 (CC) (hereinafter *Fitzpatrick*) [17] (Chaskalson P, Langa DP, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J, & Cameron AJ concurring).

209 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 41.

210 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 44. Consider, e.g., that vaccination does not only serve in the child's best interests but also protects others, such as children too young for certain vaccinations or the immunocompromised. See generally Currie & De Waal (2013) 622.

211 38 of 2005. The Child Care Act 74 of 1983 was repealed by the Children's Act. The remaining sections of the Children's Act and the Children's Amendment Act 41 of 2007 came into effect on 1 April 2010, thus completely repealing the Child Care Act. See Currie & De Waal (2013) 600.

212 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 8.

213 Currie & De Waal (2013) 57; Du Plessis "Chapter 32" in *CLoSA* (2014) 138.

214 Büchner-Eveleigh (2016) *DJLJ* 320.

215 See s 9 of the Children's Act.

216 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 40. Similarly, the Canadian Children's Law Reform Act RSO 1990, s 28(1)(*a*)(i), allows the courts to make an order with respect to parental decision-making responsibility, "with the sole factor being the best interest of the child" as quoted in *Campbell v Heffern* 2021 ONSC 5870 [11].

The Children's Act gives expression to the constitutional right (and duty) of parental care as stipulated in section 28(1)(*b*) of the Constitution[217] through the parental responsibilities and rights provisions in section 18 of the Children's Act.[218]

Section 1 of the Children's Act defines "care" and includes the duty to safeguard and promote the child's wellbeing and to protect the child from harm.[219] Accordingly, parental care must be exercised in a way that does not harm the child (XX).[220] Section 12(1) of the Children's Act states that the child has the right to not be "subjected to social, cultural and religious practices which are detrimental to his or her well-being".[221]

Thus, if non-vaccination is regarded as a "social, cultural or religious practice", it must not be detrimental to the well-being of the child. I suggest that this provision is not limited to parents X and child XX, but extends to child Y. My suggestion is, therefore, that non-vaccination as a social, cultural, or religious practice must not be detrimental to the well-being of any child. I support this submission with reference to my argument under section 12(2)(*b*), where I suggest that acting as a responsible moral agent means acting with mutual concern and respect for others,[222] and acting in the best interests of your own child (XX), and other children (Y) generally.

Furthermore, XX's best interests (which according to X are non-vaccination) may be limited based on the best interests of other children (Y), children generally, or other parties.[223] This means that the best interests of children, in general, support my submission that X's social, cultural, or religious practice underscoring non-vaccination must not harm any child.

Although the Children's Act recognises the right of children to be involved in the decision making process on issues relevant to them,[224] it only offers children limited protection regarding healthcare services.[225] The Act does, however, guarantee the right to information on

---

217 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 8: "s 28(1)(*b*) is aimed at the preservation of a healthy parent-child relationship, and guards against intrusions of the family environment by unwarranted executive, administrative and legislative acts."

218 See s 18(2)(*a*) of the Children's Act "responsibility and the right to care for the child"; Mahery & Slemming (2019) *SAJBL* 77; Friedman *et al* "Chapter 47" in *CLoSA* (2014) 8: "these responsibilities and rights are acquired automatically […]. Once such responsibilities and rights are acquired, they must be exercised in accordance with the best interests of the child."

219 Mahery & Slemming (2019) *SAJBL* 77. See also the definition of "care" in s 1 of the Act. See generally Friedman *et al* "Chapter 47" in *CLoSA* (2014) 24–25.

220 Mahery & Slemming (2019) *SAJBL* 77.

221 See also Friedman *et al* "Chapter 47" in *CLoSA* (2014) 26.

222 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88; Currie & De Waal (2013) 251–252.

223 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 44; see generally Currie & De Waal (2013) 622.

224 S 10 of the Children's Act.

225 Büchner-Eveleigh (2016) *DJLJ* 320: the main text of the Children's Act does not specifically refer to the child's right to basic health care services. The Act also does not define the standard of healthcare of children or the concept "basic health care services".

healthcare, and deals extensively with consent to medical treatment (such as vaccine administration)[226] and surgery. Accordingly, children who have reached a certain age and level of maturity are allowed to access particular health services independently.[227]

Sections 129(2)(*a*)–(*b*) of the Act provide that a child over the age of twelve who has a sufficient understanding of the benefits, risks, and other social implications of the proposed treatment or operation, may consent to his or her own medical treatment (such as vaccination). The assistance of the parent is not required in terms of section 129(2). On the other hand, section 129(4)(*a*) states that the parent must consent to the medical treatment (vaccination) of the child if the child is under the age of twelve years.[228]

Although a child (XX and Y) has the right to participate in decisions affecting his or her personal health,[229] this may not apply to the issue of non-vaccination, as routine vaccinations are generally administered at a very early stage in the child's life.[230] Hence, the provision made for a child to consent to his or her own medical treatment is irrelevant in the context of early childhood (non-)vaccination. Accordingly, the choice of routine infant vaccinations lies with the parent (X) and not the child (XX or Y).[231] In terms of section 129(10) of the Children's Act:

---

226 The Children's Act does not define the term "medical treatment". According to foreign law cases (see *ECLI:NL:RBGRO:2009: BK7384*;*ECLI:NL:GHARL:2019:9402; ECLI:NL:GHARL:2019:10763*) medical treatment includes vaccine administration. Although vaccines aim to prevent (as opposed to treat), it is still regarded as a medical procedure, and included in the scope of "medical treatment".

227 D McQuoid Mason "Provisions for consent by children to medical treatment and surgical operations, and duties to report child and aged persons abuse: 1 April 2010" (2010) 100(10) *SAMJ* 646. The requirements of "sufficient maturity" and "mental capacity" indicate that age alone is not the only deciding factor on whether a child may consent to medical treatment. The child must still be sufficiently mature to give informed consent. See also Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 69–70 with reference to *Christian Lawyers* regarding the Choice on Termination of Pregnancy Act 92 of 1996: "the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy." See also Friedman *et al* "Chapter 47" in *CLoSA* (2014) 3; *BCJB v ERRR* 2020 ONCJ 438 [243]: "there is no evidence that this child possess a sufficient level of maturity, and so this decision about vaccines must be made by one of his parents." See generally *Cates v Kendall* 2011 SKQB 225; *In Re W (a minor)* (medical treatment) (1992) 4 All ER 627 (CA); *Gillick v West Norfolk & Wisbech Area Health Authority* (1985) 3 All ER 402 (HL); *OMS v EJS* [95]. See the UK case of *C (Looked After Child) (COVID-19 Vaccination)* (2021) EWHC 2993 (Fam) [13]: "A child of 12 cannot be conclusively presumed to be Gillick competent in relation to a vaccination decision. The decision of a Gillick competent child will not necessarily be determinative and the court may override it." See also Currie & De Waal (2013) 601 (fn 14).

228 See, e.g., the Canadian case of *OMS v EJS* [81]–[82] for a discussion of a "mature minor".

229 Büchner-Eveleigh (2016) *DJLJ* 318; s 10 of the Children's Act.

230 See RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020) at 3; NICD "Vaccine information for parents and caregivers" (2016) https://www.nicd.ac.za/wp-content/uploads/2017/08/NICD_Vaccine_Booklet_D132_FINAL.pdf (accessed 02 June 2021). Children may consent to their own vaccinations at a certain age if they did not receive those vaccinations earlier.

231 The National Health Act 61 of 2003 (hereinafter the NHA) refers to the informed consent of a "user" in s 7. "User" (defined in s 1) means "the person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service, and if the person receiving treatment or using a health

> No parent, guardian or care-giver of a child may […] *withhold consent* in terms of subsections (4) and (5) by reason only of *religious* or other beliefs, unless that parent or guardian can show that there is a *medically accepted alternative* choice to the medical treatment or surgical operation concerned.[232] (My emphasis.)

This section states expressly that a parent may *not* withhold consent to the medical treatment of the child based solely on *religious* or other beliefs, unless that parent or guardian can show that there is a *medically accepted alternative* to the medical treatment or surgical operation involved.[233] These religious grounds may not be a sufficient (legally accepted) exemption to the vaccination administration, as a medically accepted alternative must be proven in terms of section 129(10).[234] Section 129(6) provides that:

> The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of or a surgical operation on a child if —
>
> (a) the treatment or operation is *necessary to preserve the life of the child* or to *save the child from serious or lasting physical injury or disability*.[235] (My emphasis.)

The question of whether or not vaccines serve as a treatment necessary to preserve life or "to save the child from serious or lasting physical injury or disability", is not stipulated in the Act or any South African case law. For this reason, it is not clear whether or not a vaccine may be administered in a hospital with the consent of the superintendent (or the person in charge) only if it is for the sake of preserving the child's life or "to save the child from serious or lasting physical injury or disability".

I suggest that a strong consensus exists that vaccines do preserve life and definitely save children from serious or lasting physical injury, disability, or even death. For this reason, I suggest that vaccines may be administered in a hospital with only the consent of the superintendent (or the person in charge) if it is for the sake of preserving the child's life or to save the child from serious or lasting physical injury or disability.

---

service is (a) below the age contemplated in [s] 39(4) of the Child Care Act [74 of 1983], 'user' includes the person's parent or guardian or another person authorised by law to act on the firstmentioned person's behalf". See Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 96 for the forms of knowledge that are required to constitute informed consent in terms of the NHA.

232 The NHA does not make the same provisions for consent on behalf of the child by the HC, Minister, and superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent, as stipulated in s 129 of the Children's Act.

233 Mahery & Slemming (2019) *SAJBL* 77; McQuoid Mason (2010) *SAMJ* 646.

234 The context of religious exemptions and medically accepted alternatives are discussed in more detail with reference to foreign case law, in the following chapters.

235 In terms of s 129(7)(*a*) the Minister may consent if the parent or guardian of the child unreasonably refuses to give consent.

Section 129(9) of the Act is an important section to consider in the context of non-vaccination. Although this section has not yet been tested in this context, its potential application is striking. Section 129(9) states that,

> [a] High Court or children's court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent.

This section holds the potential for the High Court or Children's Court to consent to the medical treatment (vaccine administration) where consent to this medical treatment has been refused. Unlike section 129(6), section 129(9) does not require the preservation of life or "to save the child from serious or lasting physical injury or disability", and the High Court or Children's Court may intervene in "all circumstances" where the consent cannot be obtained or is refused.

Furthermore, this section does not require the refusal (or withholding) of consent to be "unreasonable" and the High Court or Children's Court has the discretion to make an order that it considers appropriate and in the best interests of the child. Although this section does not automatically interdict the parents from consenting to the treatment, it is useful to note that it offers an avenue for securing substitute consent (as in the Netherlands), as opposed to mandating that the parent (X) consent to the treatment (vaccine administration).[236]

In the next section, I turn my attention to the right to basic education in the context of non-vaccination.

3.2.12 Section 29(1): the right to basic education

Section 27 — a public interest law centre[237] — argues that the COVID-19 vaccination of children aged 12–17 allows learners to return to school and, in turn, have access to sufficient food and basic nutrition.[238] Section 27 notes that

> it is crucial that vaccination of adolescents be permitted to continue so that learners who attend schools with poor and overcrowded infrastructure are protected from the worst effects of COVID-

---

236 See foreign law discussion on substitute consent, e.g., *C (Looked After Child) (COVID-19 Vaccination)* (2021) EWHC 2993 (Fam); and the Dutch cases of *ECLI:NL:GHARL:2019:10763*; *ECLI:NL:GHDHA:2020:257*; *ECLI:NL:GHARL:2019:10763*; *ECLI:NL:RBGEL:2020:3699*; *ECLI:NL:RBOBR:2018:4218*; *ECLI:NL:RBOBR:2018:6742*; *ECLI:NL:RBROT:2019:693*.

237 "Section27 is a public interest law centre that seeks to achieve substantive equality and social justice in South Africa". See Section27 homepage available at https://section27.org.za/ (accessed 21 November 2022).

238 Sujee & Ndlela (2022) *SAJBL* 1–2. See generally *Equal Education*; Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022).

> 19. […] to interdict the rollout of vaccines to teenagers risks jeopardising learners' rights to equality, access to healthcare services, basic education, and section 28(2) of the Constitution.[239]

Essentially, this illustrates the point that the healthcare rights of children (s 27) and their right to basic education (s 29) are closely linked. Vaccination serves to protect these rights as well as the right to equality (s 9, as a tag-on) and dignity (s 10).

Section 29(1)(*a*) of the Constitution secures the right to basic education, and states that "[e]veryone has the right […] to a basic education". Admittedly, it falls to the state to protect and promote the realisation of this right.[240]

For purposes of this thesis, it is worth mentioning that the right to a basic education may be affected by vaccination status, which could be the result of the non-vaccinating parent's (X) decision. For purposes of this brief discussion, I do not touch on instances where non-vaccination is due to the state's inadequate resources or distribution (vaccine supply), but assume that vaccines are readily available and parents (X) still refuse to have their child (XX) vaccinated.

As noted in Chapter 1, certain documents are required for the admission of a learner to a public school.[241] On application for admission, a parent (X) must show proof that the learner (XX) has been immunised against the following communicable diseases: polio; measles; tuberculosis (TB); diphtheria; tetanus; and hepatitis B. If a parent (X) is unable to show proof of immunisation, the principal of the school must advise the parent on having the learner (XX) immunised as part of the free primary health care programme.[242]

In addition to non-vaccination, a child with a vaccine-preventable disease can also be denied attendance at schools or childcare facilities.[243] Notably, this is all part of the state's efforts to protect the public (and children like Y), and not necessarily only the child directly involved (XX).

---

239 Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022).

240 Boezaart (2009) 407.

241 See Notice No 2432 of 1998 in GG 19377 of 19 October 1998.

242 As above [16]. See also RSA Gov, DoE "Admission of learners to public schools" (date unknown) https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolAdmissions.aspx (accessed 13 June 2020).

243 See RSA Gov, DoH "Immunisation key messages" (date unknown) http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-08-29-27/immunization/category/165-immunisation?download=502:key-messages-immunisation (accessed 13 June 2020). See also US DoH & Human Services "Five important reasons to vaccinate your child" (6 May 2022) https://www.hhs.gov/immunization/get-vaccinated/for-parents/five-reasons/index.html (accessed 7 December 2022). See Mahery & Slemming (2019) *SAJBL* 77.

In schools in Gauteng Province, a child will be conditionally admitted while the parent is given an opportunity to obtain the necessary documents, including proof of immunisation. If this is not done then the conditional admission will lapse.

On the other hand, according to Western Cape education policy (WCEP), if a parent does not wish a child to be immunised, he or she must apply to the Head of the Education Department (HOD) and the child cannot be admitted to that school pending the decision of the HOD.

This short discussion aims to indicate how vaccination status may ultimately affect the child's right to basic education, as well as access to sufficient food and basic nutrition accessible at schools.[244] Without delving into the constitutionality of the exclusion of non-vaccinated children, I mention that this is a secondary issue. Boezaart explains that admission requirements must comply with the general limitation clause in section 36 of the Constitution.[245]

However, the right to education is not directly at play in the non-vaccination constitutional context of this thesis. For example, certain schools may not require vaccination as an enrolment condition,[246] or the HOD may have given permission that the child may enrol despite not being vaccinated. Alternatively, the child may be home-schooled. I only mention this to indicate the potentially far-reaching effects of non-vaccination on other constitutional rights.

It is also worth noting that in Australia, refusing a child enrolment or attendance at a service based on their immunisation status is not unlawful discrimination under the Anti-Discrimination Act of 1991.[247] In Germany and the Netherlands, too, efforts are made to exclude non-vaccinated children from schools and day-care facilities in an effort to protect public health. The issues of non-vaccination, and specifically school enrolment and exemptions, are explored in Chapter 4. For now, it suffices that non-vaccination may affect the child's access to basic education, which may in turn prejudice other rights of the child (the right to equality and access to healthcare services, for example).[248] However, school and state

244 Sujee & Ndlela (2022) *SAJBL* 1–2; Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022).

245 Boezaart (2009) 407.

246 See Notice No 2432 of 1998 in GG 19377 of 19 October 1998.

247 Queensland Gov "Childcare immunisation requirements" (2020) https://www.qld.gov.au/health/conditions/immunisation/childcare (accessed 15 June 2022).

248 Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022).

policies may also be challenged in this context — not only the parent's decision not to vaccinate.

The following two lists summarise the constitutional rights of the children (Y and XX) and the parent (X) in the context of non-vaccination. Only the constitutional rights relevant in the context of non-vaccination are listed.[249]

List 1: Constitutionally protected parental rights

(1) Section 9 (equality).
(2) Section 10 (the right to dignity).
(3) Section 14 (the right to privacy).
(4) Section 15(1) (freedom of conscience, religion, thought, belief, and opinion).
(5) Section 16 (freedom of expression).
(6) Section 18 (freedom of association).
(7) Section 30 (participation in the cultural life of choice).
(8) Section 31 (persons belonging to a cultural, religious, or linguistic community may not be denied the right).
(9) Section 32(2) (access to information).

List 2: Constitutionally protected children's rights

(1) Section 9 (equality).
(2) Section 10 (the right to dignity).
(3) Section 11 (the right to life).
(4) Section 12 (freedom and security of the person, specifically section 12(2)(*b*) — bodily and psychological integrity (including the right to security in and control over their body)).
(5) Section 14 (the right to privacy).
(6) Section 27(1)(*a*) (the right of access to health care services).
(7) Section 28(1)(*c*) (basic health care services).
(8) Section 28(1)(*b*) (parental care).
(9) Section 28(1)(*d*) (to be protected from neglect or abuse).
(10) Section 29(1) (the right to basic education).
(11) Section 32(2) (access to information).

Although the constitutional rights of the parent (X) and the child (Y) are listed above, this does not imply a direct application of the Bill of Rights. Instead, the above discussion informs an indirect application of the Bill of Rights where the doctrine of adjunctive subsidiarity comes into play.

[249] The correlating duty to the right is not listed. The rights that are not relevant in the context of non-vaccination are not listed.

This constitutional discussion serves as the constitutional backdrop against which the common-law delict operates. For example, the fundamental rights in sections 10, 11, 12, and 14 of the Constitution have delictual counterparts.[250] From the above lists, it is apparent that some overlaps are likely (e.g., ss 10, 15, 16, and 18 of the Constitution).[251] Loubser and Midgley note that some fundamental rights do not "lend themselves to actions in delict" and list the right to health care, language and culture, and access to information as examples.[252]

In other words, even if there has been a *prima facie* violation of a right (e.g., access to healthcare) the violation does not automatically constitute a delict.[253] All the elements of the common-law delict must be satisfied before damages can be awarded — a mere violation of a fundamental right does not automatically satisfy the elements of a delictual action.[254]

Loubser and Midgley suggest that a fundamental right that co-exists with a subjective right may reinforce the delictual claim.[255] Essentially, many of the common-law rights (e.g., the right of the parent to care for the child) correspond to rights in the Constitution, and so the Constitution-and-common-law interface is easier to navigate. In the following section, I explore the limitations of these constitutional rights in the context of section 36 and non-vaccination.

3.2.13 Section 36: limitation of rights

In terms of section 36(1) of the Constitution, the rights in the Bill of Rights may be limited ("infringed")[256] only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, and taking all relevant factors into account.[257]

---

250 Loubser & Midgley (2017) 42; Woolman "Chapter 36" in *CLoSA* (2014) 31–33; Pieterse "Chapter 39" in *CLoSA* (2014) 13–14; Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 22 & 52; McQuoid-Mason "Chapter 38" in *CLoSA* (2014) 1–3; Currie & De Waal (2013) 282–283, 263 (fn 29), & 295.

251 Loubser & Midgley (2017) 42.

252 Loubser & Midgley (2017) 42–43.

253 See Zitzke (2020) *TSAR* 419–440: Zitzke argues that s 27 does indirectly feature in many medical negligence cases, including, notably, *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC). However, a mere violation of s 27 without any accompanying harm does not constitute a delict. E.g., a mere violation of the access to healthcare services without any accompanying harm does not constitute a delict, although a *prima facie* violation of the right (access to healthcare services) is present.

254 See Zitzke (2020) *TSAR* 419–440; Loubser & Midgley (2017) 43; Currie & De Waal (2013) 201–203.

255 Loubser & Midgley (2017) 43.

256 Currie & De Waal (2013) 151; Woolman & Botha "Chapter 34" in *CLoSA* (2014) 2.

257 These factors include the: (a) nature of the right; (b) importance of the purpose of the limitation; (c) nature and extent of the limitation; (d) relation between the limitation and its purpose; & (e) less restrictive means to achieve the purpose.

In addition, section 36(2) provides that, except as provided in subsection (1) or in any other provision of the Constitution, "no law may limit any right entrenched in the Bill of Rights".[258] This means that for a limitation or "infringement" of a right to be constitutionally valid, it must comply (or be justified) with reference to the criteria in section 36.[259]

Section 36 of the Constitution deals with the limitation of rights and states that:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Before I apply section 36 to the rights in the context of non-vaccination, the four-fold purpose of section 36 must first be briefly mentioned. Woolman and Botha explain that the limitation clause has a four-fold purpose.[260] First, it serves as a reminder that the rights enshrined in the Constitution are not absolute[261] and may be limited where the limitations can satisfy the test set out in the limitation clause.[262] Second, rights may only be limited if the specified purpose underlying the restriction is aimed at reinforcing constitutional values (e.g., openness, democracy, dignity, equality, and freedom).[263] Third, the test in the limitation clause allows for consideration of private interests or public good that the law challenged sets in opposition to the rights and freedoms enshrined in Chapter 2.[264] The fourth purpose of the test in the

---

258 See Currie & De Waal (2013) 151 for a detailed discussion on the limitation of rights; Woolman & Botha "Chapter 34" in *CLoSA* (2014) 2.

259 Currie & De Waal (2013) 151. See Friedman *et al* "Chapter 47" in *CLoSA* (2014) 21 with reference to *Christian Education 2000* for a discussion on ss 15 & 31, and religious doctrine in the context of the constitutionality of the ban on corporal punishment in schools, imposed by the South African Schools Act.

260 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 1; Carstens & Pearmain (2007) 122 also refer to Woolman on this point.

261 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 1 with reference to *De Reuck*, *Dawood*, & *S v Manamela* 2000 (3) SA 1 (CC) (hereinafter *Manamela*). See also *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) [30].

262 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 1–2 with reference to *S v Mamabolo* 2001 (3) SA 409 (CC).

263 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 2 with reference to *Khumalo v Holomisa*, & *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC).

264 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 2 with reference to *Manamela*.

limitation clause relates to the judicial review of laws drafted by branches of government that limit constitutionally protected rights.[265] The four-fold purpose of section 36 gives context to the application of this test to non-vaccination.

I now turn my attention to the application of section 36 and refer to the stages in which this limitation analysis unfolds. The applicant must first show that the exercise of a fundamental right has been limited, infringed, or impaired.[266] If the court finds that the challenged law limits, infringe, or impairs the exercise of the fundamental right, the analysis *may* move to the second stage.[267] The word "may" is used because if a law of general application is, for example, not at play, the investigation will not move to the second stage.[268]

For example, "conduct — public or private — that limits a fundamental right but which is not sourced in a law of general application cannot be justified in terms of FC s 36(1)".[269] Woolman and Botha consider two questions when determining the law of general application in the limitation analysis: is there "any law that authorises the challenged conduct?"[270] If yes, then the question is "whether the law in question is 'law of general application'".[271]

Woolman and Botha suggest, *inter alia*, that most legislation, regulations, and common-law rules meet the four-pronged test for a law of general application.[272]

In the second stage, the party benefiting from upholding the limitation must demonstrate that the limitation, infringement, or impairment of the fundamental right's exercise is justifiable.[273] Section 36 lists five factors to help determine whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, namely: (1) the nature of the right; (2) the importance of the purpose of the limitation; (3) the nature and extent of the limitation; (4) the relationship between the limitation and its purpose; and (5) availability of less restrictive means. This is not a closed list.[274]

---

265 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 2.
266 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 3–4.
267 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 5–6 with reference to *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC).
268 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 6.
269 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 48.
270 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 51. See *Freedom of Religion South Africa v Minister of Justice & Constitutional Development* 2020 (1) SA 1 (CC) (hereinafter *Freedom of Religion*) [76] with reference to the "common-law defence of reasonable and moderate chastisement" (exempting parents from prosecution or conviction). The CC declared that "the common-law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of [ss] 10 & 12(1)(*c*) of the Constitution".
271 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 51.
272 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 48, & 51–52: the four-fold test to determine a law of general application refers to parity, rule of law, preciseness, and accessibility.
273 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 6.
274 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 103.

Below, I briefly touch on what each factor entails, before moving on to the limitations analysis in the context of non-vaccination, the competing rights, and the interests of X and Y, as well as balancing these competing rights and interests.

(1) Nature of the right (s 36(1)(*a*)): the more vital the right is to an "open and democratic society based on human dignity, equality, and freedom", the more convincing and compelling any justification for the limitation of the right needs to be.[275]
(2) Importance of the purpose of limitation (s 36(1)(*b*)): the court must ensure that the purpose of the limitation is not inconsistent with the values of an open and democratic society based on human dignity, equality, and freedom.[276] Woolman and Botha state that the objective or purpose of the limitation "must be directed to 'the realisation of collective goals of fundamental importance'".[277]
(3) Nature and extent of the limitation (s 36(1)(*c*)): the "more invasive the infringement, the more powerful the justification must be",[278] and the level of justification will depend on the extent of the limitation.[279] Consideration is also given to the core values underlying a particular right.[280] The "nature and the extent" analysis determines the "actual impact of the limitation on those deleteriously affected by it".[281] The court may consider the social position of the individuals or groups concerned.[282] The court may also consider if the limitation is temporary or permanent and if it amounts to a whole or a partial denial of the right in question.[283] Lastly, when determining the extent of the limitation, the court may consider whether the limitation is "narrowly tailored to achieve its objective", which links with the final factor listed in section 36(1) — the existence of less restrictive means.[284]
(4) Relationship between the limitation and its purpose (s 36(1)(*d*)): this factor considers if the "means employed to achieve the objective are rationally related to, or reasonably capable of achieving, that objective".[285]

275 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 71.
276 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 74.
277 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 75.
278 *Manamela* [69].
279 As above. See also Woolman & Botha "Chapter 34" in *CLoSA* (2014) 79.
280 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 79.
281 As above.
282 As above.
283 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 82.
284 As above.
285 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 85.

(5) Less restrictive means (s 36(1)(*e*)) refers to the notion that rights should be limited no more than is necessary.[286] Hence, if the limitation can be achieved by less restrictive means, the limitation may be held to be unjustified.[287] However, merely because less restrictive means are available does not automatically render the limitation unjustified and despite the availability of less restrictive means, the court may still find that the limitation is reasonable and justifiable.[288]

I now turn to applying the section 36 limitation analysis to the context of non-vaccination. The issue at play here is that the non-vaccinating parent (X) chose not to vaccinate his or her child (XX) and this choice resulted in harm to another child (Y).

For purposes of this section 36 analysis, the competing constitutional rights and interests of the non-vaccinating parent (X) and the child (Y) are considered, and I attempt to strike a balance between these competing rights and interests.

3.2.13.1 Identifying the competing rights and interests in the context of non-vaccination

The most relevant constitutional rights of the non-vaccinating parent (X) in this context are cultural and religious rights and freedoms (ss 15, 30, and 31) and dignity (s 10). The autonomy of parent X is also considered, as this is a common-law parental right that empowers X to make decisions such as vaccine administration, on behalf of XX.

The most relevant constitutional rights of the child (Y) in this context are human dignity (s 10); the right to life (s 11); freedom and security of the person, including bodily and psychological integrity (s 12); and the rights of children (s 28). The best interests of the child (Y) are also relevant to this limitations analysis[289] and even though the best interests of the child are of paramount importance — an independent right as suggested by the Constitutional Court in *Fitzpatrick*[290] — they may be limited.[291]

---

286 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 87.
287 As above.
288 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 91.
289 *Freedom of Religion* [61]: s 28(2) "wisely anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child".
290 *Fitzpatrick* [17].
291 *Freedom of Religion* [57].

Section 28(2) of the Constitution is used to interpret section 28(1) of the Constitution and to determine the ambit of other rights in the Bill of Rights, or during the limitation stage of application analysis of this other right, as suggested by Friedman, Pantazis, and Skelton.[292]

As these competing rights and interests have been outlined, I move on to the application of section 36.

3.2.13.2 A procedural point: who is the applicant/plaintiff for purposes of section 36?

For purposes of this discussion, Y is the applicant/plaintiff. Non-vaccinating parent X will be the applicant/plaintiff where the exercise of X's fundamental rights is impeded by, for example, the state by enacting legislation mandating childhood vaccinations without providing religious or philosophical exemptions, or where the court mandates X to vaccinate XX against the wishes of X, and X appeals this decision (X will then be the appellant).

It is not the purpose of this section 36 discussion to explore the procedural technicalities (e.g., who is the applicant/plaintiff and who is the respondent/defendant, or how X can appeal a decision of the court to vindicate his or her parental rights). The purpose of this discussion is to discuss the competing rights and interests in the context of non-vaccination and attempt to balance these competing rights and interests. I mention Y as the applicant/plaintiff for the sake of completeness but without detracting from the discussion of the balancing of the rights.

3.2.13.3 Section 36 analysis

First, Y (as the applicant/plaintiff) must show that the exercise of a fundamental right (e.g., ss 10, 11, 12, or 28) has been limited, infringed, or impaired. For example, X's conduct (non-vaccination) limits the fundamental rights of Y because Y's bodily integrity (s 12), dignity (s 10), best interests (s 28(2)), or even right to life (s 11) are limited as a result of X's decision not to vaccinate XX.

As mentioned, if the court then finds that the challenged law (authorising non-vaccination) limits, infringe, or impairs Y's fundamental rights, the court will consider whether a law of general application is at play. I contend that the conduct of parent X in choosing non-vaccination on the child's (XX's) behalf, is authorised by a law of general application (e.g.,

[292] Friedman *et al* "Chapter 47" in *CLoSA* (2014) 41.

parental autonomy under common law, and legislation, i.e. the Children's Act and the Constitution) by allowing parent X to act on behalf of child XX.[293]

As mentioned above, if the conduct (non-vaccination) that limits a fundamental right (of Y) is not sourced in a law of general application, it cannot be justified in terms of section 36(1).[294] Because non-vaccination is permitted by a law of general application, it may potentially (and reasonably and justifiably) limit other rights in the Bill of Rights,[295] like the rights of Y.

As the "law of general application" requirement has been met, I move to the second stage. In the second stage, non-vaccinating parent X (as the party benefiting from upholding the limitation) must show that the limitation, infringement, or impairment of Y's fundamental rights is reasonable and justifiable.

Before addressing this, mention must be made of the hierarchy of rights which is relevant in balancing competing rights. The Constitutional Court (per Jafta AJ) stated in *Johncom Media Investments v M*,[296] that there is no hierarchy of rights in the Bill of Rights.[297] I do not entirely agree with this statement when viewed in the context of section 36. This is because section 36 provides that a limitation must be reasonable and justifiable with specific reference to dignity and equality. This means that when dignity and equality are at play as fundamental rights, the justification for their limitation of these rights must be very compelling.

For purposes of section 36, I suggest that although there is technically no hierarchy of rights, this statement may be misleading, as the limitation of some rights requires more compelling justification than others. This is so because the nature of the right (s 36(1)(*a*)) is considered to assist in establishing whether or not the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. This emerges clearly from Kriegler J's statement in *Ex parte Minister of Safety & Security: In re: S v Walters*,[298] where he states that the right to life (s 11), human dignity (s 10), and bodily integrity (s 12) are

> individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It, therefore,

293 See Woolman & Botha "Chapter 34" in *CLoSA* (2014) 51–53, 65–66, & 58.
294 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 48.
295 *Freedom of Religion* [50].
296 2009 (4) SA 7 (CC) (hereinafter *Johncom*).
297 *Johncom* [19] (Langa CJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J, & Yacoob J concurring). See also Carstens & Pearmain (2007) 114.
298 2002 (4) SA 613 (CC) (hereinafter *Walters*).

> follows that any significant limitation of these rights, would for its justification demand a very compelling countervailing public interest.[299]

Consequently, any limitation of Y's right to life, human dignity, and bodily integrity requires X to show or advance a very compelling justification for the limitation.[300]

The purpose of limiting Y's rights (s 36(1)(*b*)) is rooted in the exercise of X's constitutional and common-law rights and parental autonomy to make vaccination decisions on XX's behalf. X may attempt to prove how non-vaccination and the limitation of Y's rights are consistent with the values of an open and democratic society based on human dignity, equality, and freedom, as X exercises their constitutional rights in sections 15(3)(*b*), 30 and 31(2), which are underscored by the right to dignity (s 10).

However, I argue that non-vaccination and the limitation of Y's rights are not consistent with the values of an open and democratic society based on human dignity, equality, and freedom as Y's right to life, dignity, and bodily integrity are directly affected, whereas X relies only on dignity which we have seen is merely a tag-on to sections 15(3)(*b*), 30 and 31(2).

I suggest that the limitations of Y's rights taken together do not realise collective goals of fundamental importance given that Y's right to life, dignity, bodily integrity, and best interests are at play. It may be difficult for X to show a compelling justification for the limitation of Y's rights.

For purposes of section 36(1)(*c*), the Constitutional Court in *S v Manamela*[301] (minority judgment of O'Regan J and Cameron AJ) stated that the "more invasive the infringement, the more powerful the justification must be",[302] and the level of justification will depend on the extent of the limitation.[303] Consideration is also given to the core values underlying a particular right,[304] for example, Y's right to dignity, which underlies the right to bodily integrity and the right to life, in addition to the best interests of the child which are of paramount importance in every matter concerning the child (s 28).

Based on the above, I suggest that the infringement (or limitation) of Y's rights is invasive and extensive and requires a compelling and powerful justification by X.

---

299 *Walters* [28] (Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ, & Skweyiya AJ concurring). See also Woolman & Botha "Chapter 34" in *CLoSA* (2014) 71.

300 As above.

301 2000 (3) SA 1 (CC) (hereinafter *Manamela*).

302 *Manamela* [69].

303 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 79; *Manamela* [69].

304 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 79.

The actual impact of the limitation of Y's rights is also considered to determine whether it is reasonable and justifiable. However, the Constitutional Court (per Mogoeng CJ) held in *Freedom of Religion South Africa v Minister of Justice & Constitutional Development*[305] that section 28(2) "anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child".[306]

This could mean that the potential prejudice to Y's best interests must be considered in addition to the actual impact of the limitation of Y's rights to establish whether the limitation of Y's rights is reasonable and justifiable. As non-vaccination poses a real prejudice to Y's best interests (especially Y's health, right to life, and bodily integrity), it may be difficult for X to show how the limitation of Y's rights and prejudice of Y's best interests are reasonable and justified.

The court may also consider the social position of the individuals or group(s) concerned.[307] For example, Y is a child who relies on herd immunity to realise his right to life, bodily integrity, and dignity. Y thus forms part of three vulnerable groups that require special protection: children, the immunocompromised, or those too young to be vaccinated. This may be considered in determining the level of justification X must provide.[308]

The court may also consider whether the limitation is temporary or permanent and whether it amounts to a total or partial denial of the right in question.[309] I suggest that Y's rights to bodily integrity, dignity, and life may be permanently denied, depending on the extent of the damage suffered as a result of X not vaccinating XX. For example, if Y sustains a permanent disability as a result of the infection contracted from XX, this is a permanent and total denial of Y's right to bodily integrity and dignity.

I suggest that the relationship between the limitation (Y's rights) and its purpose (to benefit X's exercise of parental autonomy and decision making for child XX) is not closely and rationally sufficiently related to justify limiting Y's rights to life, dignity, bodily integrity, or Y's best interests.

I suggest that the limitation of X's religious and cultural rights is rationally related to protecting and realising Y's rights and that under the circumstances it is more rational and reasonable to limit X's rights than Y's rights. I support this contention with reference to case

---

305 2020 (1) SA 1 (CC) (hereinafter *Freedom of Religion*).
306 *Freedom of Religion* [61] (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ, & Theron J concurring).
307 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 79.
308 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 82.
309 As above.

law illustrating the limitation of parental rights and freedoms in favour of protecting children's health rights and bodily integrity.

In *Christian Education South Africa v Minister of Education*[310] the Constitutional Court, (per Sachs J) held that the limitation of parents' religious rights (relating to the ban on corporal punishment in independent religious schools) was reasonable and justifiable. In this case, the court reiterated the importance of the child's dignity and the physical and emotional integrity of all children, in favour of limiting parental religious rights.[311]

In *Freedom of Religion* the Constitutional Court (per Mogoeng CJ) declared that "the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(*c*) of the Constitution".[312] In this case, the court again reiterated the importance of the child's dignity and the physical and emotional integrity and limited parental religious rights. Similarly, in *Hay v B* (discussed above) the court ruled in favour of protecting the child's right to life and limited the religious and cultural rights of the parents.

Although the South African cases dealing with the competing rights of the child and the parent do not deal with the issue of non-vaccination, they do indicate how parental rights and responsibilities interact with the rights of a child. For more guidance on the balancing of these competing rights, I turn now to foreign jurisdictions.

As we have seen, section 39 of the Constitution permits recourse to foreign jurisdictions and their approaches to balancing conflicts between rights, values, and interests.[313] Foreign courts have often ruled in favour of the child's best interests and ordered that the child's rights be preferred to parental rights and parental autonomy, especially when it comes to vaccination.[314]

I suggest that these foreign-law considerations, as discussed in Chapters 1 and 2, indicate that parental autonomy and religious and cultural rights often take the back seat when weighed against the rights of the child.[315]

---

310 2000 (4) SA 757 (CC) (hereinafter *Christian Education 2000*).

311 *Christian Education 2000* [50] (Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Yacoob J, & Cameron AJ concurring).

312 *Freedom of Religion* [76] (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ, & Theron J concurring).

313 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 68.

314 See *Re SL (Permission to vaccinate)* (2017) EWHC 125 (Fam); *BLO v LJB* [40]; *F v F* (2013) EWHC 2683 (Fam); *Kagen v Kagen* No 318459 (Mich Ct App Jul 14 2015). See also *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920* [1]–[2]; *ECLI:NL:GHARL:2019:9402*; *ECLI:NL:GHARL:2019:10763*; *ECLI:NL:GHDHA:2019:331*.

315 As above.

In *Re SL (Permission to vaccinate)*[316] a local UK authority wanted a seven-month-old child placed in its care to receive certain vaccinations. The child's mother objected based on reported instances of her other children suffering adverse reactions to the vaccines. In this case, the court held that immunisation was in the child's best interests and that the benefits of immunisation outweighed the possible risks.[317] The court held that it would not be intruding on parents' autonomy by exercising its obligations as the upper guardian of all children.[318]

Similarly, in *ECLI:NL:RBGEL:2020:3699*, the *Rechtbank Gelderland* (Gelderland District Court) confirmed that the interests of minors prevail over the right to freedom of religion and that vaccination serves the child's best interests.[319]

In South Africa, the parent's cultural and religious rights are often limited in favour of protecting children's rights, specifically a child's right to dignity and bodily integrity.[320]

3.2.13.4 Conclusions on the limitations discussion

The balancing exercise under section 36 should be undertaken with practical reasoning and good judgement.[321] The limitation of Y's right to life (s 11), human dignity (s 10), bodily integrity (s 12), and best interests (s 28) require X to show or advance a very compelling justification for the limitation of these rights and interests.[322]

Furthermore, sections 15(3)(*b*), 30, and 31(2) require that the exercise of the right in question be consistent with the other rights in Chapter 2.[323] In short, the Constitution makes it clear that X's religious or cultural practices enjoy constitutional protection only where they do not interfere with (or limit) the exercise of other fundamental rights.[324]

On this note, it is worth reiterating that X's right to dignity reinforces X's religious or cultural rights and claims to religious autonomy.[325] X's right to dignity and equality serves more as a tag-on to X's constitutional religious and cultural rights, as well as X's common-law parental rights and autonomy.[326] On the other hand, Y's right to dignity is directly invoked in

316 (2017) EWHC 125 (Fam) (hereinafter *Re SL (Permission to Vaccinate)*).
317 *Re SL (Permission to Vaccinate)* [45] & [50].
318 *Re SL (Permission to Vaccinate)* [49].
319 *ECLI:NL:RBGEL:2020:3699* [5.11].
320 See *Christian Education 2000*, & *Freedom of Religion* discussed above.
321 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 103.
322 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 71.
323 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 32.
324 As above.
325 As above.
326 *Christian Education 2000* [36].

addition to Y's right to life and bodily integrity. The right to dignity in the context of this limitation analysis is essential, as it

> provides a common measure of value which can help bridge the division between equality and freedom, or between negative and positive rights, or between the individual and collective aspects of our autonomy.[327]

I suggest that Y's constitutional rights to life, bodily integrity, and dignity, as well as his best interests as a child cannot be limited and prejudiced in favour of X's religious and cultural rights. There is no compelling justification that X can purport to demonstrate how the limitation of Y's rights is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

Furthermore, the five factors listed in section 36(1)(*a*)–(*e*) support my argument that the limitation of Y's rights is not reasonable and justifiable. I suggest that X's cultural and religious rights, as well as X's parental autonomy, may be reasonably and justifiably limited to promote and protect the rights and best interests of Y.

For purposes of this discussion, I conclude that the limitation analysis will likely prove the limitation of Y's rights to be unreasonable and unjustifiable. Furthermore, I conclude that it is unlikely that X will be able to advance compelling reasons to justify the limitation of Y's rights. Although there is no hierarchy of rights, some rights carry greater weight than others in the limitation analysis. X's cultural and religious rights, as well as X's parental autonomy, must take a back seat to Y's right to life, bodily integrity, dignity, and best interests.[328]

In light of the constitutional backdrop sketched above, the next issue to consider is whether a child has a constitutional right to be vaccinated. As mentioned, if there is a right to be vaccinated there is also a corresponding parental duty to vaccinate which may be used in the determination of wrongfulness.

3.3 DOES A CHILD HAVE A CONSTITUTIONAL RIGHT TO BE VACCINATED?

As mentioned at the beginning of this chapter, children's rights are explored to answer the more overarching question of whether parents (X) have a duty to vaccinate as opposed to the more objective question of whether the child (XX or Y) has a right to be vaccinated.

---

327 Woolman & Botha "Chapter 34" in *CLoSA* (2014) 122.
328 See *Christian Education 2000*; & *Freedom of Religion* as discussed above.

For example, if child XX has the right to be vaccinated, parent X has a corresponding duty to vaccinate XX. The constitutional rights of Y also lay a basis for the duty of parent X to also protect child Y (by vaccinating child XX so sustaining herd immunity and acting as a responsible moral agent).

However, from the discussion above it has emerged that children do not in fact have an express constitutional right to vaccination — there is no constitutional provision that states "a child has the right to vaccination". There are also no provisions in the legislation (like the Children's Act or the National Health Act) that expressly protect the child's right to vaccination. Before turning to foreign law to establish whether a right to vaccination exists there, it is worth pausing to consider the place of the Department of Health's communications discussed in Chapter 2. The Department of Health has made its pro-vaccination attitude abundantly clear in various communications published on its website.[329] Again consider the following example: "[a]ll children have a right to basic health care. NB. Immunisation is one of the health care components".[330]

Based on this, it may appear that vaccination (immunisation) is regarded as a basic health care right. The notion that vaccination is indeed a "right" is implied by the Department of Health's communications suggesting that immunisation forms part of the right to basic healthcare services guaranteed to children. If children have a right to be vaccinated, parents have a corresponding duty to have them vaccinated. In *P v Member of the Executive Council for Health & Social Development (Gauteng)*,[331] the High Court (per Fisher J) stated that "the need for vaccination and adequate childcare is clear. It protects the individual child and the broader public interest."[332]

Essentially, vaccination is necessary to realise adequate childcare. This places a duty on parents (X) to vaccinate their children. The right of the child and the corresponding parental duty go hand-in-hand.

---

329 See RSA Gov, DoH "Immunisation" (date unknown) https://www.health.gov.za/immunization/#:~:text=Parents%20and%20caregivers%2Cprotect%20your,second%20dose%20of%20measles%20vaccine (accessed 1 December 2022) where the DoH's website expressly states that "[c]hildren who have turned 1 year must still be taken to the clinic at 18 months for the 2 injections,including the second dose of measles vaccine". RSA Gov, DoH "What you need to know about vaccinations" (date unknown) http://www.kznhealth.gov.za/vaccinations.pdf (accessed 10 March 2020) at 3: "Does my child need to have all the vaccinations? Yes, your child must have all the vaccinations on the attached schedule. […] ALL PARENTS/GUARDIANS MUST VACCINATE THEIR BABIES AND ADHERE TO THE IMMUNISATION SCHEDULE". See also Western Cape Gov "Immunisation" (29 July 2022) https://www.westerncape.gov.za/service/immunisation (accessed 22 November 2022).

330 RSA Gov, DoH "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020).

331 (2017) ZAGPJHC 101 (hereinafter *P v MEC*).

332 *P v MEC* [48].

The question now arising is do children have an implied right to vaccination? In other words, can the constitutional right to vaccination be inferred from the existing body of rights (such as bodily integrity, life, dignity, to be cared for, the best interests of the child, etc.)?

I suggest that the existing rights and duties of the parent and the rights of the child lend themselves to an implied right to be vaccinated. I agree that section 28(2) is not only a guiding principle or standard, but also a self-standing right as suggested by the Constitutional Court in *Fitzpatrick*.[333] I argue that vaccination is a right in that it serves the child's best interests which is a constitutionally protected right.

This right to vaccination brings with it a corresponding duty on the parents (X) to vaccinate their child (XX) to protect both XX and others (child Y).[334] As emphasised throughout this chapter, my investigation of rights and duties is essential for the establishment of the common-law delictual element of wrongfulness.

We have further seen that there is currently no local case law confirming that a child's constitutional rights extend to an implied right to be vaccinated. In accordance with the prescripts of section 39(1)(*c*) of the Constitution, a court may consider foreign law when interpreting the Bill of Rights.[335]

In the following section, I explore foreign-law considerations to establish whether there is a "right" to vaccination in the jurisdictions considered.

3.3.1 Foreign law and the child's right to be vaccinated

In *BLO v LJB*, the Ontario Court of Justice concluded that it is in the child's best interests to be vaccinated.[336] The court did not expressly conclude that vaccination is a right. However, if section 28(2) of the Constitution is regarded as an independent right, as suggested by the Constitutional Court in *Fitzpatrick*,[337] vaccination is an implied right as it serves the child's best interests and the best interests of the child is a constitutionally protected right.

Another case dealing with the best interests of the child and vaccines is *PW v CM*. Although in this case, the Canadian Supreme Court of Nova Scotia (Family Division) ruled that it would not "order the child to be vaccinated", it stated that "clearly it is not in the child's

333 *Fitzpatrick* [17].
334 *P v MEC* [48].
335 See Du Plessis "Chapter 32" in *CLoSA* (2014) 14.
336 *BLO v LJB* [40]. The court has no hesitation in concluding that it is in MIO's best interests to grant the father's motion respecting the vaccination issue. See also *AC v LL* 2021 ONSC 6530 [32] where the Superior Court of Justice Ontario ruled that vaccinations serve the best interests of the child.
337 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 41 with reference to *Fitzpatrick* [17].

best interest that CM [the mother] make medical decisions for him".[338] Although the mother was awarded primary care of the child, the court ruled that the father was to have sole decision making concerning medical decisions for the child.[339] It must be reiterated that although vaccines usually serve in the child's best interests, there are situations where this is not the case, for example, a child who is immunocompromised or exhibits a severe (or even deadly) reaction to a specific vaccine. Notably, the court in this case did not directly infer a right to vaccination but did reiterate the best interests of the child.

In *Re SL (Permission to vaccinate)* the court held that it would not be intruding on parents' autonomy by exercising its obligations as the upper guardian of all children.[340] It is noteworthy that the court did not elaborate on the other rights of the child or infer a right to vaccination, but ruled in favour of vaccination based on the child's best interests and its obligations as the upper guardian of all children.

Another example from UK case law is *F v F*,[341] where a dispute between separated parents as to whether or not their children should be immunised was decided. In this case, the welfare of the children was the court's paramount consideration, and from a medical perspective, there was no dispute about the benefits of vaccination. The court held that it was in the best interests of the children concerned to be immunised, despite an objection from the mother.[342] However, the court made no express mention of an implied right to vaccination when concluding that vaccination is in the child's best interests.

In the wake of the 1991 measles outbreak in Philadelphia courts in the US frequently ordered vaccination.[343] In this instance, the city's public-health officer received a court order to vaccinate children despite religiously-motivated parental opposition to vaccination.[344] It is, however, suggested that although vaccinating despite parental opposition is possible, it must be limited to high-risk situations and be used only as a last resort.[345] This is in line with the views of Bishop and Woolman that "the recognition of a constitutional right to bodily autonomy in an open society means that we must minimise paternalistic forms of intervention

338 *PW v CM* [115].
339 *PW v CM* [139].
340 *Re SL (Permission to Vaccinate)* [49].
341 (2013) EWHC 2683.
342 See also C Auckland & I Goold "Parental rights, best interests and significant harms: who should have the final say over a child's medical care?" (2019) 78(2) *CLJ* 287–323: "parents disagree over whether their children should receive certain vaccinations. Once the court has intervened in these cases, they must apply a best interests test to determine which, of the different courses of action available, ought to be pursued".
343 DR Reiss "Health law: protecting children when parents choose not to vaccinate" (2018) 2(13) *TJB* 76.
344 As above.
345 As above.

in others' lives".[346] Once again, in exceptional circumstances, the child's vaccination may be ordered as vaccination is generally in the best interests of both the child and society.

In custody disputes in which one parent wishes to vaccinate and the other does not, most US courts have ordered vaccination as being in the best interests of the child. For example, in *Kagen v Kagen*[347] a Michigan Court of Appeals found for a father who wanted his children to be vaccinated. In this case, the court overruled the mother's opposition and ordered that the children be vaccinated on schedule. The court found that vaccination was in the best interest of the children.[348]

In another case, the Court of Appeals in Michigan found that vaccination is in the child's best interests.[349] Lori Matheson (the non-vaccinating mother of X) appealed the decision of the trial court (which ordered child X to be vaccinated) against the wishes of the mother. On appeal, the Michigan Court of Appeals agreed with Lori that vaccines carry some risks and acknowledged that she had shown a history of autoimmune diseases. However, the court ruled that Lori's religious beliefs did not outweigh the fact that vaccination serves the child's best interests and dismissed the appeal. The religious beliefs of parents (such as Lori) may be placed on the back-burner in favour of vaccination as being in the child's best interests.

In *Re H* the Court of Appeal declared that it is lawful and in the best interests of the child to be vaccinated.[350] The court ruled that,

> the current established medical view is that the routine vaccination of infants is in the best interests of those children and for the public good.[351]

The court also ruled that:

> Although vaccinations are not compulsory, the scientific evidence now clearly establishes that it is in the best medical interests of children to be vaccinated in accordance with Public Health England's guidance unless there is a specific contra-indication in an individual case.[352]

---

346 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 86 & 88.

347 No 318459 (Mich Ct App Jul 14 2015). In this case, the court also explored the types of evidence which can be used (in Michigan) regarding vaccine safety, highlighting that anti-vaccine sources are likely insufficient.

348 See also *JF v DF* 2021 NY Slip Op 21327: the Supreme Court, Monroe County Dollinger, held that the best interests of this child are served by participating in the vaccine programme.

349 DR Reiss "Lori Matheson refuses vaccines for child — Michigan Supreme Court disagrees" (2020) https://www.skepticalraptor.com/skepticalraptorblog.php/lori-matheson-refuses-vaccines-child-michigan-court-no/ (accessed 24 August 2020). See also *Lori v Schmitt* No 347022 (Mich Ct App Nov 21 2019).

350 *Re H* [3].

351 *Re H* [34].

352 *Re H* [104].

From this short overview, it is clear that the foreign courts do not expressly refer to the child's "right" to be vaccinated but prefer to base their decision to order vaccination — or occasionally non-vaccination — on the best interests of the child. It is also interesting to note the view that it may be in the child's best interests that the parents also be vaccinated.[353]

A number of cases have found that it is in the best interests of the child to be vaccinated specifically against COVID-19.[354] On the other hand, *JN v CG*[355] illustrates a different approach adopted by the Ontario Superior Court of Justice. The court ruled that the mother (opposed to COVID-19 vaccinations based on safety concerns) will continue to make the vaccine choices for the children (a 14-year-old son and a 12-year-old daughter), as opposed to the pro-vaccination father. The decision of the court was based on the "children's views and preferences which are legitimate and must be respected".[356] The court reiterated that the mother's "cautious approach is compelling" and that she had always acted in her children's best interests and continues to do so with "excellent, informed, and child-focussed decisions".[357]

---

353 See *SWS v RS* 2021 ONCJ 646 [81]: "[t]he father being fully vaccinated will be considered a material change in circumstances affecting the best interests of the children", & [69]: "[h]e has chosen to remain unvaccinated even when faced with the real possibility that his parenting time would be severely restricted." See also *AG v MA* 2021 ONCJ 531 [39]: "his [the father's] partial vaccination status warrants some in-person parenting time [with the child]. However, that in-person parenting time will be subject to certain conditions", & [36]: "[t]he father is not fully vaccinated which exposes him [the father] to a greater risk of contracting COVID-19. The father's increased risk of infection potentially exposes the child to an increased risk of infection." See *LS v MAF* 2021 ONCJ 554 [166]: "[t]he child and the [unvaccinated] father shall wear masks at all times during the father's parenting time. This condition will terminate if the father becomes fully vaccinated. Other than the [unvaccinated] father, the child shall not be exposed to any adult who is not fully vaccinated during the father's parenting time."

354 See *Campbell v Heffern* 2021 ONSC 5870 [5]–[6]: "the Courts have found that it is in the best interest of the children to get their COVID-19 vaccination", and the court referred to the cases of *AC v LL* 2021 ONSC 6530; *Saint-Phard v Saint-Phard* 2021 ONSC 6910; & *OMS v EJS* [142]. See *Sembaliuk v Sembaliuk* 2022 ABQB 62 [26]: the father may "make further COVID-19 vaccination appointments for the child in the future, and to take the child to such appointments despite the absence of the Mother's consent." See *TLM v JTM* 2022 ABQB 109 [76]: "the Mother is authorised to have the Child vaccinated against COVID-19 without the Father's consent". See *TK v JW* 2022 BCPC 16 [36]: "[g]etting the COVID-19 vaccine is in NW's [the child's] best interest". See *LM v CO* 2022 ONSC 0394: the court prohibited the respondent from telling the child anything negative about the COVID-19 vaccine, & [28]: it is in "T's best interests that LM be given sole decision-making authority on the issue of TO's COVID-19 vaccinations […] [and he] is prohibited from showing the child social medica sites, websites, other online information, literature or any other material that calls into question the safety or efficacy of the COVID-19 vaccines or to permit any other person to do so." See also *PR v SR* 2022 PESC 7 [72]: "that it is in the best interests of the children to be vaccinated against the COVID-19 virus". See *RSL v ACL* 2022 BCPC 9: the court ruled in favour of the pro-COVID-19-vaccine mother to make the decision "about whether, how and when AL is to be vaccinated." See also *TRB v KWPB* 2021 ABQB 997 [47]: "[t]he mother is authorized to have the children vaccinated against COVID-19 […]. She has sole decision-making authority for any and all medical and health care decisions relating to COVID-19 vaccination and/or treatment".

355 2022 ONSC 1198 (hereinafter *JN v CG*).

356 *JN v CG* [83].

357 *JN v CG* [84].

This case is unlike the majority of cases where the courts generally rule in favour of vaccination, but it must be borne in mind that child participation (and the possibility of parental influence or interference) was carefully considered by the court in this case. The court pointed out that the COVID-19 vaccine debate is polarised and that this is a "complex, important, and emotional case".[358] However, the court noted that this case did not intend to side with either party and that this judgment cannot apply to every other child, as the facts and circumstances of each case are unique.[359]

The foreign courts do not expressly extend the other rights of children (such as dignity, health, or life) to the right to vaccination. However, this does not negate the argument that there is an implied right to vaccination as inferred by the collective effect of other rights (like Y's right to life, dignity, bodily integrity, and best interests).

The best interests of the child are also a guiding principle used when the balancing of rights takes place,[360] bearing in mind that the best interests of the child principle and right, may also be limited.[361] I suggest that "the best interests of the child" (s 28(2) of the Constitution) is a clear, independent right,[362] and that vaccination as a right can be inferred from this right. Vaccination is an implied right as vaccination serves in the child's best interests and the best interests of the child is a constitutionally protected right. I also suggest that an implied right to vaccination does exist as implicit in the collective effect of other rights like the rights to life (s 11), dignity (s 10), and bodily integrity (s 12).

As mentioned, wrongfulness may be determined with reference to the infringement of a legally protected right (e.g., Y's right to life, dignity, and bodily integrity) or interest (like Y's future earning capacity), or the breach of a legal duty (owed by parent X to child Y). I return to this in Chapter 5.

I now turn to the existence of a legal duty on parents to vaccinate. If a duty to vaccinate is established, this may also help prove the wrongfulness element (as one of the five delictual elements). As mentioned throughout this chapter, rights and duties go hand-in-hand.

---

358 *JN v CG* [71].
359 *JN v CG* [80].
360 It is essential to distinguish constitutional damages from delictual damages. The best interests of the child principle is usually employed when the rights of the child compete with those of another party, e.g., the parents. See also Carstens & Pearmain (2007) 556.
361 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 45.
362 *Fitzpatrick* [17].

3.4 ARE PARENTS CONSTITUTIONALLY DUTY-BOUND TO VACCINATE THEIR CHILDREN?

The focus now shifts from a "right to be vaccinated" (inferred from the relevant constitutional rights) to the "legal duty to vaccinate" (inferred from the relevant constitutional rights). This part of the discussion explores whether parents (X) are constitutionally duty-bound to vaccinate their children. First, however, we must consider child abuse and neglect and their place in the examination of duty.

Section 28(1)(*d*) of the Constitution refers to the protection of children against child abuse and neglect, so reiterating the parental duty to protect the child against abuse and neglect.

Although this research is concerned with the issue of non-vaccination in the context of the common-law delict, the question of non-vaccination in the context of child neglect cannot be overlooked as the protection against child neglect is a constitutionally protected right. Children's rights create parental duties and protection against child neglect is a parental duty.[363]

If non-vaccination amounts to child neglect or abuse, the existence of a parental duty to vaccinate is proven (as the duty to protect the child from abuse or neglect is breached).[364] To investigate the legislative meaning of "abuse" and "neglect", the Children's Act is the appropriate point of departure. The term "abuse" is defined in the Children's Act (s 1) and in relation to a child,

> means any form of harm or ill-treatment deliberately inflicted on a child, and includes —
>
> (a) assaulting a child or inflicting any other form of deliberate injury to a child;
> (b) sexually abusing a child or allowing a child to be sexually abused;
> (c) bullying by another child;
> (d) a labour practice that exploits a child; or
> (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

From a reading of section 1 of the Act, it is clear that specific forms of "child abuse" are listed, although the section also provides that "any form of harm of ill-treatment" that is "deliberately

---

363 In the context of torts, the existence of a legal duty and the breach thereof is often the first point of departure to determine whether a tort is present or not. In the South African context, the breach of a duty does not automatically establish the existence of a delict. For this reason, torts and delicts are distinguished.

364 The breach of a duty in order to establish a tort must be distinguished from the breach of duty in the South African context, as well as the fact that child neglect does not necessarily constitute a delict. The definition and requirements of child neglect in the South African context must be regarded as a separate issue, as the breach of a parental duty towards a child does not automatically constitute a delict, and all the elements of delict must still be complied with. The breach of an established duty in the context of tort law is discussed in detail in the following chapters dealing with tort law and non-vaccination.

inflicted on a child" is child abuse. It may be difficult to argue that non-vaccination amounts to the deliberate infliction of harm on a child as most non-vaccinating parents have the best interests of their child at heart.[365]

It is notable that subsection (*e*) refers only to the "psychological" or "emotional" harm a child may suffer as a result of being exposed (or subjected) to certain behaviour — there is no mention of "physical harm" probably because it is seen to resort under "assault" in subsection (*a*). Even if "physical injury" were listed here it would still need to be "deliberate". It is for this reason that it is unlikely that non-vaccination automatically amounts to child abuse in the South African context. This conclusion is based on a close reading of the definition of "abuse", in section 1 of the Act.

Although this thesis is not directly concerned with criminal-law matters such as child abuse, it remains important in evaluating the duties of parents in the context of vaccination.[366] The question of whether non-vaccination can amount to child neglect has not yet been served before the South African courts. The Children's Act defines neglect in relation to a child as "a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs".[367] It is interesting to note that the child's health needs are not mentioned in the definition of child neglect. Although an argument can be made for the extension of "basic physical, intellectual, emotional or social needs" to health needs, the legislature has not expressly included "health needs" as a parental responsibility in the context of child neglect.

It may be argued that the failure to perform the duty of parental care and provide for the health needs of the child (vaccination) may potentially constitute child neglect (child XX), conflicting with the child's right to be protected against any form of neglect.[368] This notion is supported by foreign case law with the *caveat* that it applies only in the context of an outbreak (or epidemic). For example, in *In re Christine M*,[369] the Family Court of the City of New York,

365 Another avenue for further research may be whether or not the omission to vaccinate (deliberate non-vaccination) may possibly amount to assault on the child, as specified in s 1(a) of the Act defining the term "abuse", with reference to assault.

366 In South Africa, child neglect falls under the ambit of criminal law. The common law indirectly protects children against neglect and abuse by providing them with the *actio iniuriarum* (assault, where the harm is caused intentionally) or the Germanic action for pain and suffering (usually where the harm is caused negligently, though intentional harm causing is also accommodated). For foreign cases on child neglect see *In Matter of Christine M* 157 Misc 2d 4 (1992), & *Re H*.

367 S 1 of the Children's Act.

368 Mahery & Slemming (2019) *SAJBL* 76.

369 157 Misc 2d 4 (1992) (hereinafter *Christine M*).

Kings County, ruled that the non-vaccination of a child during a measles outbreak amounted to child neglect. The court stated that

> a parent's knowing failure to have a child immunised against measles in the midst of a measles epidemic or outbreak clearly places that child's physical condition in imminent danger of becoming impaired.[370]

It is yet to be decided whether the refusal of a COVID-19 vaccine in the face of a global pandemic may qualify as "child neglect" in that it may place the child's physical being in imminent danger of being impaired.[371] In *Re H*, the Court of Appeal (Civil Division), on appeal from the High Court of Justice (Family Division), stated:

> It goes without saying that the giving of consent to having one's child vaccinated is an exercise of *parental responsibility*. It cannot be doubted that it is both reasonable and responsible parental behaviour to arrange for one's child to be vaccinated in accordance with the Public Health England guidelines, there is at present no legal requirement in this country for a child to be vaccinated. By contrast, a failure by parents to obtain vaccinations for their children may feature as one of a series of wider threshold allegations in support of a more generalised case of *neglect*.[372] (My emphasis.)

According to this case, although vaccination is not compulsory it remains a parental responsibility and duty, and the failure to vaccinate may very well support a case of child neglect. The existence of neglect implies the breach of a duty and supports the existence of a parental duty to vaccinate the child.

Moving on from child abuse and neglect, I turn now to the general duties of parents outside of criminal law. In South Africa the child's right to basic healthcare creates a duty, which rests on the parents and caregivers, to consent to and present the child for immunisation once the immunisation becomes necessary and available to children (generally on the basis of age).[373] Parents (X) thus have a duty to care for and provide for the health needs of the child (XX). This duty on parents is further qualified by section 129(10) of the Children's Act. In terms of this section:

---

370 *Christine M* [14].
371 As above.
372 *Re H* [21].
373 Mahery & Slemming (2019) *SAJBL* 76.

> [P]arents cannot refuse a healthcare service [medical treatment or surgical operation] for a child purely on religious grounds, unless they can prove that there is a medically accepted alternative measure.[374]

Based on this reasoning it may be argued that purely religious grounds cannot be used to circumvent the parental duty (of X) to care for the child (XX) and provide for XX's health needs, including vaccination. Furthermore, it may also be argued that purely religious grounds do not serve as an adequate justification for non-vaccination in that a medically accepted alternative must be proven.[375]

As stated in Chapter 1, immunisation is a proven and cost-effective method for controlling and eliminating life-threatening infectious diseases. Consequently one could argue that the conduct of non-vaccinating parents (X) based on "personal reasons" may conflict with the child's (XX's) right to parental care and protection from harm.[376]

When a parent (X) unreasonably objects to the medical treatment (here vaccine administration) of a child (XX), a conflict of interests (and competing rights) arises between the child (XX) and the parent (X). To address this unreasonable refusal of treatment, sections 129(6)–(9) of the Children's Act provides for ministerial or court-ordered consent.[377]

The Constitutional Court has largely avoided basing its decisions directly on section 28(1)(*c*) of the Constitution.[378] As a result, the judicial authority in South Africa on the interpretation of children's right to health care is scarce.[379] In *Hay v B* (discussed above) an urgent application was made for an order authorising a blood transfusion for an infant.[380] The infant's parents, as the first and second respondents, opposed the administration of the transfusion based on their religious beliefs and their concern over the risk of infection associated with blood transfusions.[381] The court relied directly on section 28(2) of the Constitution and reiterated the paramount importance of the child's best interests in every

---

374 Mahery & Slemming (2019) *SAJBL* 77; McQuoid Mason (2010) *SAMJ* 646: "In terms of the Children's Act, a parent or guardian of a child may not: […] (ii) withhold consent for medical treatment or a surgical operation solely on the grounds of religious or other beliefs — unless such parent or guardian can show that there is a medically accepted alternative to the medical treatment or surgical operation concerned".

375 The context of religious exemptions and medically accepted alternatives are discussed in more detail with reference to foreign case law in the following chapters.

376 Mahery & Slemming (2019) *SAJBL* 77.

377 As above. McQuoid Mason (2010) *SAMJ* 646: "however, the [HC] as the upper guardian of all minors may overrule a refusal to consent by children if it is in 'the best interests' of a child patient — but is likely to use this power sparingly. The Minister of Social Development can consent to medical treatment or a surgical operation where the child unreasonably refuses to give consent".

378 Büchner-Eveleigh (2016) *DJLJ* 308; Friedman *et al* "Chapter 47" in *CLoSA* (2014) 13–14 with reference to *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), & *Khosa*.

379 As above.

380 See also Carstens & Pearmain (2007) 922.

381 As above.

matter concerning it. The court confirmed that this is the single most important factor to be considered when balancing or weighing up competing rights and interests involving children.

The court emphasised that, as the upper guardian of all children, the ultimate duty to protect children rests on it.[382] According to the court, its inherent jurisdiction as upper guardian of all minors, together with the best interests of the child applied to deal with the parents' objection to the blood transfusion. [383]

It is interesting to note that the court held that the child's right to life is an inviolable, constitutionally-protected right that could be protected in the infant's best interests.[384] The court's conclusion, therefore, rested on the child's right to life although its point of departure was its inherent jurisdiction as upper guardian which required it to act in the child's best interest. Although the parents' private religious beliefs had to be respected, their beliefs negated the essential content of the infant's right to life.[385]

As indicated earlier, everyone — including the parents — has a right to dignity, privacy, and freedom of conscience and religion. However, these rights may be limited in cases where a child's life is at risk.[386] The court found that although the respondents' concerns were understandable, they were neither justifiable nor reasonable.[387] In the final analysis, the parents' private beliefs did not override the infant's right to life[388] — the child had the right to receive the urgent blood transfusion as a necessary condition to protect and satisfy her right to life which triggered the duty of the parents.

It must be noted that the reasons for the parents' refusal were not ignored.[389] They received due consideration.[390] Ultimately, however, the infant's right to life outweighed the parents' religious reasons for opposing the urgent blood transfusion[391] and the court granted the order to administer the blood transfusion.[392]

---

382 *Hay v B* [49].
383 As above.
384 As above.
385 As above.
386 D McQuoid Mason "Parental refusal of blood transfusions for minor children solely on religious grounds — the doctor's dilemma resolved" (2005) 95(1) *SAMJ* 29: "thus it is no longer necessary for doctors to seek a court order every time parents refuse to allow their children to receive a life-saving blood transfusion solely on religious grounds. In such circumstances the doctors will be acting lawfully if they proceed with a blood transfusion, against the wishes of the parents, in order to save the child's life".
387 *Hay v B* [49].
388 As above.
389 As above.
390 As above.
391 As above.
392 Mahery & Slemming (2019) *SAJBL* 77.

Clearly, various rights need to be balanced when considering a conflict between parental rights and those of the child. Although the *Hay* case illustrates the balancing process of the parents' rights against those of the child, this case must be distinguished from scenarios where a child's life is in immediate danger and cases involving a healthy but unvaccinated child. Notably, the *Hay* case was not considered in the context of delict law, as it concerned the urgency of a blood transfusion.[393]

As mentioned above, immunisation does form part of a child's right to basic health care, which implies that vaccination is a children's right. Vaccination may be construed as a parental duty as well as a basic health care right of children.

As mentioned, the parental duty (vaccination) and its breach are relevant in considering the common-law delictual element of wrongfulness. If it is determined that there is indeed a legal duty to vaccinate it may be easier to navigate the delictual element of wrongfulness by exploring the legal duty and its breach. Notably, the breach of such a legal duty will not automatically constitute a delict as all the elements of the common-law delict must still be proved.

I submit that parents are duty-bound to vaccinate their children on the basis that they must act as responsible moral agents for the purposes of section 12 of the Constitution.[394] My suggestion is that section 12(2)(*b*) encompasses acting as a responsible moral agent with mutual concern and mutual respect for others,[395] and this means acting in the best interests of your own child (XX), and other children (Y) generally. For purposes of section 12(2)(*b*), I suggest that acting as a responsible moral agent means vaccinating your children which serves to protect the right to bodily integrity of the vaccinating partents' child and that of other children and the broader society (e.g. for maintaining herd immunity).

I suggest that a close reading of both the Children's Act and the Constitution support an argument that parents are constitutionally duty-bound to vaccinate their children as vaccination is often regarded as being in the child's best interests and parents have the duty to care for their children (s 28(1) of the Constitution and ss 1, 18(2)(*a*), and 28(1)(*b*) of the Children's Act), and provide them with access to healthcare services (s 28(1)(*c*) of the Constitution), and provide for their healthcare needs (s 129(10) of the Children's Act). These rights create

393 See also *B (R) v Children's Aid Society of Metropolitan Toronto* 1995 CanLII 115 (SCC): the Supreme Court of Canada found that Jehovah's Witness parents could not deny a blood transfusion to their child if it was needed to keep the child alive. The *Hay* case was decided before the enactment of the Children's Act.

394 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88.

395 As above. See also Currie & De Waal (2013) 251–252.

corresponding duties, and I suggest that these existing children's rights justify implying a right to vaccination and the corresponding parental duty to vaccinate.

Parental care must be exercised in a way that does not harm the child, and the child may not be subject to social or religious practices which are detrimental to its well-being (ss 1 and 12(1) of the Children's Act). I submit that these parental duties and responsibilities extend to vaccination in that vaccines are aimed at protecting and preserving life and health.

Section 39(1)(*c*) of the Constitution allows the consideration of foreign law when interpreting the Bill of Rights.[396] In the following section, I explore foreign law to determine whether foreign law recognises a parental duty to vaccinate.

3.4.1 Foreign-law considerations: parental duty to vaccinate

In *CMG v DWS*[397] the Superior Court of Justice (Ontario) referred to the Immunisation of School Pupils Act[398] and emphasised that section 3(1) of the Act places a duty on parents to vaccinate their children.[399] Section 3(1) of the Act provides:

> The parent of a pupil shall cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases.

In this case, the court rejected arguments that vaccines are harmful and ruled that the father would make vaccination decisions for the child[400] as "the benefits [of vaccination] far outweigh the minimal side effect risks".[401] Based on the court's reasoning in this case there is a parental duty to vaccinate, albeit in terms of the Immunisation of School Pupils Act.

In *Tarkowski v Lemieux*[402] the Ontario Court of Justice ruled that the mother would make major decisions about the child's education, religion, culture, language, spirituality, and/or cultural events, and any other major decision and health care, except on the issue of vaccination.[403] The court ruled that the father would make all vaccination-related decisions and his consent alone would be sufficient to authorise the administration of the vaccines, including the COVID-19 vaccine(s).[404] Although the court made no express mention of a parental duty to vaccinate, it did allocate different responsibilities to the parents one of which was the

396 See Du Plessis "Chapter 32" in *CLoSA* (2014) 14.
397 2015 ONSC 2201 (hereinafter *CMG v DWS*).
398 RSO 1990, Ch I.1.
399 *CMG v DWS* [102]–[103].
400 *CMG v DWS* [107].
401 *CMG v DWS* [106].
402 2020 ONCJ 280 (hereinafter *Tarkowski*).
403 *Tarkowski* [17].
404 *Tarkowski* [25].

responsibility to make vaccine decisions for their child. The court's omission of the word "duty" in favour of its synonym "responsibility" does not imply that parental duty and parental responsibility are two different things.

I submit that the meaning of both "duty" and "responsibility" in this case boils down to a parental duty to vaccinate your child. Semantics aside, the court's reasoning and decision are clear — parents must vaccinate their children and vaccination is a parental responsibility or duty.

Similarly, in *BCJB v ERRR*[405] the Ontario Court of Justice ruled that the father may make vaccination decisions for the child but without extending the father's decision making power to the COVID-19 vaccine which did not exist at that time.[406] In essence, the court ruled that it was in the child's best interests for the father to make vaccine decisions, as opposed to ruling that vaccines were in the child's best interests.[407]

The court did not expressly mention a parental duty to vaccinate but it did allude to vaccine decisions as a parental responsibility. Again, the meaning of "duty" and "responsibility" in this case boils down to the parental duty to vaccinate the child. The court's reasoning and decision are clear — parents must vaccinate their children and vaccination is a parental responsibility or duty.

As we saw above under the discussion of child abuse and neglect, the Family Court in *Christine M* ruled that there is a parental duty to vaccinate a child during an epidemic and that failure to comply may constitute child neglect.[408] The same was held by the Court of Appeal (Civil Division) in *R v H*.[409] In order to amount to neglect the breach of a duty is implied so, in effect, confirming the existence of a parental duty to vaccinate the child.

According to the foreign case law examined above, vaccination serves the best interests of the child. It is also clear that during an epidemic (or pandemic), non-vaccination may amount to child neglect. In *M v H (Private Law Vaccination)*[410] MacDonald J referred to *Re H* discussed above and stated:

> A parent's rights, duties, powers, responsibilities and authority insofar as they concern their children are only derived from their obligations as a parent and exist only to secure the welfare of their children. […] Within this context the concept of parental responsibility 'emphasises that the duty

405 2020 ONCJ 438 (hereinafter *BCJB v ERRR*).
406 *BCJB v ERRR* [262a]–[262b].
407 *BCJB v ERRR* [245].
408 *Christine M* [14].
409 *Re H* [21].
410 (2020) EWFC 93 (hereinafter *M v H*).

> to care for the child and to raise him to moral, physical and emotional health is the fundamental task of parenthood and the only jurisdiction for the authority it confers'.[411]

The judge continued to explain how decisions on vaccination which form part of parental responsibilities are also a parental duty. He stated that "the concept of parental responsibility describes an adult's responsibility to secure the welfare of their child, which is to be exercised for the benefit of the child not the adult".[412] He did not conclude that the parental duty is to vaccinate, but rather that the decision to vaccinate (or not) is a parental responsibility that must be exercised to the child's benefit, and that this parental duty (to secure the welfare of the child) is — in this case — to vaccinate the children. MacDonald J accordingly authorised the vaccination of the two children in this case.

Although most foreign cases do not expressly refer to a parental duty to vaccinate, these cases often consider parental responsibilities — e.g., decisions on vaccination — and often find that vaccines are in the child's best interests. Thus, the parental duty to vaccinate is implied in most cases and, where appropriate, the courts often mandate that the child should be vaccinated in its best interests.

Statutory mandates may also indicate that there is a parental duty to vaccinate. For example, the Australian "No Jab, No Pay" legislation creates a statutory duty on parents to vaccinate their children in compliance with the NIP Schedule.[413] In Germany, parents can be fined up to €2 500 for failing to have their child vaccinated against measles.[414] Once again, this is indicative of a statutory duty on parents to vaccinate their children. In addition, children in Germany must be vaccinated against measles before they can attend kindergartens and schools, also indicative of the parental duty to vaccinate.

In the German case *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920*, the *Bundesverfassungsgericht* ruled that although parents have the right and duty to raise their children as they see fit, the overarching best interests of the child must prevail.[415] The court

---

411 *M v H* [33].

412 *M v H* [34].

413 See NSW Gov "No jab no pay immunisation requirements" (24 June 2021) https://www.health.nsw.gov.au/immunisation/Pages/no-jab-no-pay.aspx (accessed 1 December 2022).

414 See the *Infektionsschutzgesetz* (Protection Against Infection Act) of 20 July 2000, §73 (fine regulations). Mehlman & Lederman (2020) *PAI* 3. See also Beck Online "*Bundesrat billigt Pflicht zur Masernimpfung*" (Federal Council approves compulsory measles vaccination) (20 December 2019) https://beck-online.beck.de/Dokument?vpath=bibdata%2Freddok%2Fbecklink%2F2015093.htm&pos=6&hlwords=on (accessed 15 June 2020); Deutsche Welle "Germany: law mandating vaccines in schools takes effect" (date unknown) https://www.dw.com/en/germany-law-mandating-vaccines-in-schools-takes-effect/a-52596233 (accessed 15 June 2020). See also Jurist "Germany makes measles vaccinations compulsory for children" (15 November 2019) https://www.jurist.org/news/2019/11/germany-makes-measles-vaccinations-compulsory-for-children/ (accessed 15 June 2020).

415 *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920* [69].

emphasised its pro-vaccination approach and that vaccination is in the child's best interests. It further pointed out that "parents are less free to oppose standards of medical reasonableness than they would be by virtue of their right to self-determination over their own physical integrity".[416] Thus, the *Bundesverfassungsgericht* focused on the best interests of the child and linked this to the parental duty to vaccinate.

In the Netherlands, day care centres may exclude non-vaccinated children[417] which again points to a parental duty to vaccinate. In the US, 50 states (including the District of Columbia) mandate certain vaccinations (such as diphtheria, tetanus, whooping cough, polio, measles, rubella, and chickenpox).[418] Once again, a parental duty to vaccinate is expressly mandated by these specific states.

Although this statutory duty to vaccinate falling on parents is not necessarily or always structured solely around the child's best interests, it establishes a legal duty to vaccinate, although the aim may be to protect not only the child but also public health (e.g., by preventing mass outbreaks or maintaining herd immunity). Regardless of the aims or scope of these statutory mandates, they clearly include a parental duty to vaccinate.

Reiss comments that in considering whether a child must be vaccinated or not, most of the legal literature on vaccination focuses on the tension between parental autonomy and public health.[419] Even if the focus is on public health interests, and not on the child *per se*, the parents remain legally duty-bound to have their children vaccinated.

The foreign case law and legislation indicate that a parental duty to vaccinate does exist. Reiss also supports the notion that vaccination is a parental duty forming part of the duty to care for the child, and that non-vaccination is a breach of this duty.[420] Diekema suggests that there is a duty to vaccinate, but that "most states provide the opportunity to opt-out of vaccination".[421] Hence, this parental duty to vaccinate is subject to certain legally-recognised exemptions which are discussed in greater detail in the chapters that follow. For now, it is

---

416 *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920* [1]–[3], & [69].

417 See *Tweede Kamer der Staten-Generaal* "Parliamentary papers 35049, second note of amendment" (10 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D05325 (accessed 15 June 2020); *Tweede Kamer der Staten-Generaal* "Parliamentary papers 35049, end text" (18 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D07026 (accessed 15 June 2020).

418 D Desilver "States have mandated vaccinations since long before COVID-19" (8 October 2021) https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/ (accessed 06 July 2022).

419 Reiss (2018) *TJB* 73.

420 Reiss (2018) *TJB* 74.

421 DS Diekema "Choices should have consequences: failure to vaccinate, harm to others, and civil liability" (2009) 107 *MLR* 92.

sufficient to note that these exemptions ultimately hold that a well-grounded and concrete justification is necessary to justify non-vaccination. The pro-vaccination approach is the norm and is widely accepted as being in the best interests of both the child and public health and safety.[422]

For example, non-vaccination may be acceptable or legally justifiable if there are scientific or medical reasons, but religious (or personal belief) exceptions are generally not recognised or permitted by the courts. For example, in *FF v State of New York*,[423] the Supreme Court of the State of New York (Appellate Division) confirmed the ruling of the Supreme Court of the State of New York, County of Albany[424] that the legislative repeal of the "religious exemption to compulsory vaccination" and the Public Health Law was not an unconstitutional violation of the plaintiffs' rights. Accordingly, the revocation of the "religious exemption to compulsory vaccination" does not violate the Free Exercise Clause of the First Amendment of the United States Constitution or the New York State Constitution.[425] The parental duty to vaccinate is not unconstitutional, and cannot be overridden by religious exemptions. In the following section, I offer some concluding remarks on the right and duty to vaccinate.

3.5 CONCLUSIONS ON THE RIGHT AND DUTY TO VACCINATE

The exploration of children's rights has received a lot of judicial and legislative attention in recent years, and the constitutional protection of children's rights in South Africa is extensive. Although the Children's Act is regarded as one of the most important pieces of legislation protecting and promoting children's rights, it does have shortcomings.

The Children's Act is silent on immunisation (vaccination), its importance, as well as the duty of parents to present their children for vaccination. It does not expressly state that vaccination is in the best interests of the child or expressly impose a duty on parents or guardians to vaccinate their children. Furthermore, this Act does not mandate childhood vaccinations, penalise non-vaccination, or regulate mandatory vaccination exemptions.

---

422 The duty to vaccinate operates to protect the health of the child, as well as public health, as alluded to by the Court in *Applying Re K (Forced Marriage: Passport Order)* (2020) EWCA Civ 190. In this case, the Court refered to the public benefit of vaccinations and that children's vaccinations balanced against the interests of the community.

423 2021 NY Slip Op 01541 (order affirming trial court judgment).

424 *FF v State of New York* 2019 NY Slip Op 29376.

425 See "Petition — Supreme Court of the United States" (date unknown) https://www.supremecourt.gov/DocketPDF/21/21-1003/207832/20220110152049902_Petition.pdf (accessed 06 July 2022). Justia US Law "FF v State of New York" (2021) https://law.justia.com/cases/new-york/appellate-division-third-department/2021/530783.html (accessed 15 June 2022).

As has been shown, there is neither an express statutory nor an express constitutional right to vaccination in South Africa. This means that the possibility of an implied right to vaccination must be examined.

I argue that there is indeed an implied right to vaccination implicit in the collective effect of the best interests of the child and the rights to dignity, bodily integrity, and life. The existence of this right to vaccination as inferred from the collective of other rights imposes a corresponding duty as rights and duties are relational.

I argue further that vaccination serves to protect the constitutional rights of all individuals, the public, and specifically children. In this light, I suggest that there is an implied constitutional duty (on parents, e.g., X) to vaccinate their children (XX) in an effort to protect and realise the existing constitutional rights such as the right to life, bodily integrity, dignity, and the best interests of children XX and Y. I also argue that a duty to vaccinate exists in terms of section 12 of the Constitution as parents must act as responsible moral agents and with mutual concern and respect for others.

Furthermore, I suggest that section 129(10) of the Children's Act imposes a duty to vaccinate on parents as a parent may not refuse or withhold consent to the child's medical treatment (e.g., vaccine administration) solely by reason of religious or other personal beliefs unless there is proof of a medically accepted alternative.[426]

As there are no medically accepted alternatives to, for example, COVID-19 vaccination,[427] I suggest that consent cannot be withheld based on purely religious or other beliefs and that the duty to vaccinate is implied in this section of the Children's Act.

I also explored foreign case law and found that although parents are subject to no legal duty to vaccinate, a parental duty to vaccinate forms part of parental responsibilities. It emerged that foreign courts do not always refer directly to a "parental duty to vaccinate"; they do, however, indicate that this duty derives from the parental responsibility to care for the child and make medical decisions in the child's best interests. Only in exceptional circumstances is vaccination not in the child's best interests, for example, in the case of an immunocompromised

---

426 *Soobramoney* [52] with reference to a human rights based approach and access to life-prolonging resources (regarded as an integral part of our open and democratic society).

427 Reference is often made to "complementary and alternative medicine" (CAM). CAMs are often only used to treat the symptoms, and do not as effectively as the vaccine aim to prevent infection and hamper transmission. See SR Jeon *et al* "Complementary and alternative medicine (CAM) interventions for COVID-19: an overview of systematic reviews" (2022) 11(3) *IMR* 100842. See US DoH & Human Services, NCCIH "COVID-19 and 'alternative' treatments: what you need to know" (last updated June 2022) https://www.nccih.nih.gov/health/covid-19-and-alternative-treatments-what-you-need-to-know (accessed 6 December 2022): "there is no scientific evidence that any of these alternative remedies can prevent or cure COVID-19".

child. Even if the parents do not support pro-vaccination sentiments, the foreign courts often order that the child must be vaccinated, once again reiterating the importance of vaccines and that, ideally, parents should vaccinate their children.

Foreign courts have also indicated their pro-vaccination attitude and willingness to intervene and consent to a child's vaccinations (also referred to as substitute consent).[428] Only in exceptional circumstances have the foreign courts allowed the non-vaccination to persist as vaccination in that specific instance was not in the child's best interests.

Furthermore, foreign case law indicates that parents have the legal duty to vaccinate their children during an epidemic. The COVID-19 global pandemic has reinforced the importance of this parental duty to vaccinate. Foreign case law indicates that non-vaccination, especially during an epidemic, may amount to child neglect. The same may certainly hold true during a global pandemic: the failure to vaccinate your child during a global pandemic may amount to child neglect.

Parents have a duty not to neglect their children. The failure to vaccinate during a pandemic is a breach of this parental duty and may amount to child neglect. This reiterates and confirms the parental duty to vaccinate during an epidemic, especially a global pandemic. Once again, the parental duty to care for the child encapsulates the parental duty to vaccinate.

Parents must care for their children and protect them from harm, abuse, and neglect (as expressly stated in the Constitution and the Children's Act). The parental responsibilities captured in the Constitution and the Children's Act create parental duties which include making medical decisions on the child's behalf — such as the decision to vaccinate — in an active effort to protect the child and act in its best interests.

Although there is no express statutory parental duty to vaccinate, the duty to vaccinate forms part of a parent's general responsibilities to care for the child, protect the child, and ensure that the child's health needs are met. I submit that a parental duty to vaccinate is embedded in the child's collective constitutional rights, as well as the parent's constitutional responsibilities and duties.

These constitutional parental responsibilities and duties are reinforced in the Children's Act which also supports an inference that parents have a legal duty to vaccinate their children, based on the child's collective rights in the Children's Act.

---

428 See, e.g., *ECLI:NL:GHARL:2019:9402*.

It is not only in the child's best interest to be vaccinated but also in the public's interest, specifically, public health.[429] For example, during the COVID-19 pandemic, the South African government urged individuals to vaccinate against COVID-19 in an effort to protect themselves and those around them (referred to as herd immunity).[430]

Thus, the parental duty to vaccinate, as implicit from a collective of other rights, essentially rests on two pillars: (1) individual health (like that of the child which forms part of parental duties to care for the child's health, bodily integrity, and dignity); and (2) the protection of others and the interests of public health (acting as a responsible moral agent, mutual concern and respect for others, and the protection of other individuals' constitutional rights, as equals, also worthy of dignity and bodily integrity).

My contention that an implied constitutional duty to vaccinate exists is subject to important qualifications and exceptions. For example, a valid medical exemption from vaccination must be identified and acknowledged (as discussed in Chapter 6). Furthermore, religious and philosophical exemptions must also be qualified in the South African context of the parental duty to vaccinate (as discussed in Chapter 6).

3.6 CONCLUSION

As mentioned in the introduction to this chapter, the Constitution, and in particular the Bill of Rights, serves as a source of both fundamental rights and fundamental values.[431] Both fundamental rights and fundamental values influence the common-law delict,[432] specifically in the context of wrongfulness as a common-law delictual element. In line with the transformative constitutional approach as discussed in Chapter 1, I first offered an overview of the relevant constitutional rights of the non-vaccinating parent (X) and the child affected by that non-

429 RSA Gov "COVID-19 Coronavirus vaccine" (date unknown) https://www.gov.za/covid-19/vaccine/vaccine (accessed 1 December 2022); see also WHO "Immunisation" (date unknown) https://www.afro.who.int/health-topics/immunization (accessed 1 December 2022).

430 RSA Gov "COVID-19 Coronavirus vaccine" (date unknown) https://www.gov.za/covid-19/vaccine/vaccine (accessed 1 December 2022); see also RSA Gov "Getting to know your COVID-19 Vaccines" (date unknown) https://www.gov.za/sites/default/files/gcis_documents/Covid-19Vaccine-brochure.pdf (accessed 08 July 2022).

431 Loubser & Midgley (2017) 36; Currie & De Waal (2013) 26; Du Plessis "Chapter 32" in *CLoSA* (2014) 14: "BoR interpretation is mostly (though not invariably) rights interpretation that 'takes the rights and freedoms [entrenched in the BoR], and the general rules derived from them, as … [a] point of departure for determining whether law or conduct is invalid'". See Woolman "Chapter 36" in *CLoSA* (2014) 23 with reference to *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC) [21]: "[t]he values enunciated in [s] 1 of the Constitution […] do not, however, give rise to discrete and enforceable rights in themselves."

432 Loubser & Midgley (2017) 36; Neethling & Potgieter (2020) 18; Currie & De Waal (2013) 31 & 41; Bhana (2013) *SAJHR* 351–375; Ferreira (2006) *SJ* 241–247; Zitzke (2015) *CCR* 259–290.

vaccination decision (Y). In this chapter, I also explored the Children's Act in detail to outline the rights of the child and the rights and duties of the parent.

The following questions are explored in this chapter: (1) does a child have an express or inferred constitutional right to vaccination? (2) Does an express or inferred constitutional duty to vaccinate exist? (3) Does this constitutional duty to vaccinate children fall on parents?

The existing constitutional and other statutory rights of the child can, in theory, be extended to include an implied right to vaccination as I suggest in this chapter. An implied right to vaccination arguably serves to protect the existing constitutional rights of children (XX and Y).

Despite the absence of an express right to vaccination, there are strong indications that there is an implied right to vaccination and a corresponding duty on parents to vaccinate. This parental duty to vaccinate is based on the child's rights and parental responsibilities to care for the child and protect its health (as provided in the Constitution and the Children's Act).

As vaccination serves to protect the health rights of individuals, it is arguably the duty of parents to vaccinate their children in an active effort to protect their and other children's constitutional rights (such as the rights to life, dignity, and bodily integrity).

I suggest that the failure to vaccinate can be construed as a breach of the parental duty to care for and protect your child. Notably, the failure to vaccinate and the breach of this parental duty can only be actionable in delict once all the common-law delictual elements have been satisfied — the breach of this parental duty to vaccinate is not automatically actionable in delict. Similarly, although children have a right to be protected from harm and neglect, this does not necessarily automatically amount to child neglect (actionable under the ambit of criminal law).

In conclusion, there is a duty to vaccinate which forms part of the broader "duty to act without negligence" which is discussed in detail in Chapters 4 and 5. This legal duty to vaccinate is not limited to protecting a specific right, *per se*, but is rather at protecting a collection of rights (such as the right to life, bodily integrity, health, etc.), as well as public health.

The next chapter investigates the civil liability of non-vaccinating parents in a foreign law context in an effort to shed some light on what the foreign law approach to civil liability for non-vaccination entails.

CHAPTER 4: COMPARATIVE PERSPECTIVES ON TORTIOUS/DELICTUAL LIABILITY FOR NON-VACCINATION IN OTHER JURISDICTIONS

4.1 INTRODUCTION

Although this thesis is concerned with the South African common-law delict, the majority of literature and research on non-vaccination and civil liability is produced in foreign jurisdictions, especially the US and Canada, under the banner of tortious liability.

The word "tort" is derived from the Latin word "*tortum*" commonly translated as "wrong" or "twisted".[1] This chapter explores non-vaccination in the context of tortious and delictual liability and more specifically, the tort of negligence to identify specific approaches in foreign jurisdictions that may assist in the South African non-vaccination and delictual investigation. The approaches adopted by predominantly common-law jurisdictions (US and Canada) are explored.

Civil law pockets like Louisiana (the only civil-law jurisdiction in the US),[2] and the province of Quebec in Canada (the only province with a civil code based on the French Code Napoléon),[3] are also investigated as they may offer valuable insight into how the common-law delict may be applied in similar situations in that "South African delict, not unlike torts, is 'dynamic — it can, and does, develop to meet the needs of a changing society'".[4] This means that the approaches to non-vaccination in these jurisdictions may supplement the dynamic nature of the South African common-law delict. In addition to the US and Canada, the approaches of the UK, Australia, Germany, and the Netherlands are explored in this chapter.

As discussed in Chapter 3, these foreign courts (US, Canada, UK, Australia, Germany, and the Netherlands) have often ruled in favour of vaccination which they have held to be generally in the child's best interests. This indicates some jurisprudential prominence for

---

1 K Barker *et al The law of torts in Australia* 5ed (2012) 2; C Brennan *Tort law concentrate: law revision and study guide* 4ed (2017) 2.

2 See LSU Law Library "French law: home" (11 August 2021) https://libguides.law.lsu.edu/c.php?g=693022#:~:text=Louisiana%20is%20the%20only%20Civil,Civil%20and%20Common%20law%20influences (accessed 29 March 2022).

3 Canada Gov "Where our legal system comes from" (2021) https://www.justice.gc.ca/eng/csj-sjc/just/03.html#:~:text=Quebec%20is%20the%20only%20province,it%20is%20used%20throughout%20Canada (accessed 29 March 2022).

4 CJ Roederer "Working the common law pure: developing the South African law of delict (torts) in light of the spirit, purport and objects of the South African Constitution's Bill of Rights" (2009) 26(2) *AJICL* 428.

vaccination issues in these jurisdictions. This notwithstanding, the issue of non-vaccination and civil liability has not yet been decided by the foreign courts discussed.

Despite the lack of case law on this topic, it is worth investigating the liability-approaches of these seemingly pro-vaccination jurisdictions. South Africa's mixed legal system has features of both civil- and common-law legal families[5] and for this reason, both jurisdictions are considered. The US and Canada have produced more research on this specific topic, and it is for this reason that Civil Law jurisdictions are explored to supplement this chapter, and the main focus remains on Common Law jurisdictions (specifically the US and Canada) where this specific issue has enjoyed some jurisprudential prominence.

First, a short introduction and overview of the law of torts, including the tort of negligence and its requirements. Thereafter, the US tort of negligence is unpacked in the context of non-vaccination with reference to the Nonva/Vic hypothetical, which is used to illustrate the application of the tort of negligence to a hypothetical scenario. As explained below, the Nonva/Vic hypothetical is my own creation formulated to position the non-vaccination issue in a practical context.

The Canadian tort law context, specifically the Canadian tort of negligence is investigated with reference to the Nonva/Vic hypothetical. Thereafter, civil-law pockets like Louisiana (in the US) and the province of Quebec (in Canada) are discussed. For purposes of this chapter, where reference is made to "tort law in the US" it excludes Louisiana unless otherwise indicated. Similarly, where reference is made to "tort law in Canada" it excludes Quebec.

For purposes of this chapter, reference is made to tort law in the US — although the different US States have their own tort rules, the general principles are similar.[6] "Tort law in the US" refers to the general principles across the US (excluding Louisiana). The civil-law jurisdictions of the Netherlands and Germany are also explored.

5 G Wille, F Du Bois (ed) & G Bradfield *Wille's principles of South African law* (2007) 33.
6 J Steele *Tort law: text, cases, and materials* 4ed (2017) 3.

4.2 TORT LAW: A SHORT INTRODUCTION AND OVERVIEW

The law of torts forms part of the law of obligations (to which the law of contract, trusts, and restitution also belong).[7] The law of obligations forms part of civil as opposed to criminal law which means that torts are not crimes and fall outside the ambit of criminal law.[8]

Brüggemeier explains that in the "civilian tradition, a delict is a wrongful injury (*damnum iniuria datum*),[9] whereas, in the common-law tradition (the US and Canada), a tort or wrong is generally approached as the breach of a legal duty.[10]

Steele asserts that, generally, torts are defined as civil wrongs for which the law provides remedies.[11] Notably, there are civil wrongs that are not torts (e.g., a breach of contract).[12] Steele suggests that there is no general or single definition of tort or torts in the US,[13] and Muhametaj posits that in English law it is challenging to define negligence in simple terms.[14] Despite the difficulty of defining torts in specific terms, for introductory purposes it suffices to note that the three main categories of tort are (1) intentional torts; (2) negligent torts; and (3) strict (or vicarious) liability.[15] Each tort has its own set of principles and requirements which explains the casuistic nature of the law of torts favoured by Anglo-American common-law systems.[16]

Tort law is very diverse and has been described as "a mosaic".[17] For example, there are different torts that deal with different types of harm or wrongful conduct.[18] The tort of

---

7 Steele (2017) 4. In Australia, the law of torts forms part of private law. See Barker *et al* (2012) 2; ALRC "The right to sue in tort" (08 December 2014) https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/16-authorising-what-would-otherwise-be-a-tort/the-right-to-sue-in-tort/ (accessed 28 November 2022) at 16.4: "torts are generally created by the common law", i.e., the tort of negligence in Australia.

8 Steele (2017) 4; Barker *et al* (2012) 3; P Tuitt *et al Tort law* (2015) 14–15.

9 G Brüggemeier "The civilian law of delict: a comparative and historical analysis" (2020) 7 *EJCLG* 359.

10 As above.

11 Steele (2017) 3. See also Loubser & Midgley (2017) 5; A Ciolli "Mandatory school vaccinations: the role of tort law" (2008) 81(3) *YJBM* 132.

12 Steele (2017) 3.

13 Steele (2017) 4; Brennan (2017) 2.

14 G Muhametaj "Introduction of the tort of negligence in the UK legislation and jurisprudence" (2017) 5(6) *GJPLR* 30.

15 Y Ronquillo *et al* "Tort" (2022) https://www.statpearls.com/ArticleLibrary/viewarticle/23586 (accessed 1 December 2022); Cornell Law School "Tort" (date unknown) https://www.law.cornell.edu/wex/tort#:~:text=Torts%20fall%20into%20three%20general,products%20%2D%20see%20Products%20Liability (accessed 1 December 2022); K Temple-Mabe & A Weitzman "Tort — the different types of tort" (10 October 2022) https://www.lexisnexis.co.uk/legal/guidance/tort-the-different-types-of-tort (accessed 1 December 2022).

16 Loubser & Midgley (2017) 19.

17 Brennan (2017) 2.

18 As above. See also Tuitt *et al* (2015) 13.

negligence, for example, is a specific form of tort[19] distinct from torts of strict liability and torts requiring intention.[20]

Robbennolt and Hans note that intentional torts cover civil wrongs caused by the intentional acts of others, and in the US constitute only a small (but important) proportion of tort cases.[21] Intentional torts include the tort of battery, assault, false imprisonment, slander and libel, the intentional infliction of emotional distress, violating a person's privacy, trespass on land, trespass on personal property, and conversion.[22] All these torts require intention[23] but do not necessarily require damage as interference alone is sufficient.[24] For example, some torts (like trespass) are actionable *per se*,[25] and torts that are actionable without proof of damage (like false imprisonment) are often linked to the theory of justice.[26]

Barker *et al* refer to strict liability as that category of torts encompassing liability without proof of fault.[27] The categories of strict liability include the possession of certain animals, abnormally dangerous activities, and products liability.[28] For example, products liability (a category of strict liability) involves defective products and the rules that impose liability on the manufacturer.[29] Robbennolt and Hans point out that strict liability is applied in a narrow set of tort cases.[30]

For purposes of this introduction, the takeaway message is that there is only one general tort that depends on negligence[31] — the tort of negligence. In contrast to intentional torts, which make up a small but important proportion of tort cases in the US,[32] the tort of negligence is the largest area of tort law in the US.[33] This discussion illustrates the mosaic nature of tort law.

Germany and the Netherlands follow a more generalised approach as their civil codes contain general principles as opposed to the separate torts of the casuistic approach.[34] Scotland, on the other hand, refers to the law of delict and different categories or types of delict[35] thus

19 Brennan (2017) 2.
20 Steele (2017) 11.
21 JK Robbennolt & V Hans *The psychology of tort law* (2016) 27.
22 As above.
23 Robbennolt & Hans (2016) 28.
24 H Koziol (ed) *Basic questions of tort law from a comparative perspective* (2015) 767.
25 As above.
26 Brennan (2017) 6.
27 Barker *et al* (2012) 12.
28 Robbennolt & Hans (2016) 169
29 As above.
30 As above.
31 Steele (2017) 11.
32 Robbennolt & Hans (2016) 27.
33 E Finch & S Fafinski *Law express: tort law* 8ed (2021) 4.
34 Loubser & Midgley (2017) 19.
35 F McManus *Law essentials delict* 2ed (2013) 5.

presenting a mixture of the generalised and casuistic approaches above. Mosaics and civil codes aside, I now turn my attention to the goals on which tort law is predicated.

English tort law is predicated on the idea that "the loss lies where it falls".[36] Similarly, tort law in the US, according to Reiss, is predicated on the idea that when an actor takes an unreasonable risk and that risk harms others, those harmed should be compensated for their losses.[37] Stated differently, Raz notes that "negligence law allocates [the] risk of liability for damages".[38]

According to Brennan, the aims of tort law are rooted in deterrence, and justice — although the main objective of tort law is compensation.[39] Koziol suggests that compensation "is the principal aim of damages in all Common Law systems" (often expressed as *restitutio in integrum*).[40] The claim for damages is fixed in the idea that damages should return the claimant to the position in which he or she would have been had the tort not occurred.[41] The compensatory function of tort law is an acknowledged fact in the Continental European law of damages and the German legal family.[42]

Deterrence refers to the awareness that possible tort liability arises.[43] This means that as individuals learn that they may face tortious liability, they often act with greater care.[44] Justice refers to the recognition that a wrong has taken place and must be addressed.[45]

Koziol posits that "[t]ort law embodies the principle of corrective justice: one who wrongfully causes another harm should correct that injustice by the payment of compensation".[46] Similarly, Connolly posits that in Australia, tort law is about corrective

---

36 Koziol (2015) 359.
37 DR Reiss "Compensating the victims of failure to vaccinate: what are the options?" (2014) 23(3) *CJLPP* 597.
38 J Raz "Responsibility and the negligence standard" (2010) 30(1) *OJLS* 7.
39 Brennan (2017) 6; Koziol (2015) 380.
40 Koziol (2015) 376; Tuitt *et al* (2015) 14 & 217.
41 Finch & Fafinski (2021) 248–249; Koziol (2015) 376.
42 Koziol (2015) 746-748.
43 Brennan (2017) 6; Koziol (2015) 747–748: "an American tort observer would surely acknowledge that deterrence is not the sole aim of tort law." See also Tuitt *et al* (2015) 217.
44 Brennan (2017) 6; Koziol (2015) 380: "deterrence is mostly viewed as a useful by-product of civil liability, rather than its overriding objective".
45 Brennan (2017) 6 posits that "justice" often refers to torts that are actionable without proof of damage (e.g., false imprisonment).
46 Koziol (2015) 379.

justice[47] — "if you are wronged by another and suffer a loss, the loss ought to be borne by the wrongdoer, not the victim",[48] while Tuitt *et al* refer to this as distributive justice.[49]

The primary remedy offered by the law of torts is damages,[50] especially in cases involving negligence.[51] Other remedies include final and interim injunctions.[52] Koziol notes that "[t]here is no general concept of 'damage' in English tort law, and academic discussions of the topic have been few in number, but damage does play an important role in most torts recognised by English law", for example, the tort of negligence.[53]

In essence, as torts are wrongs, these wrongs are defined based on the relationship between the parties.[54] Connolly advances that every principle of tortious liability has two basic elements: (1) the position of the "victim" of the tortious conduct; and (2) the position of the perpetrator (wrongdoer or injurer) of the tortious conduct.[55] Robbennolt and Hans state that "negligence is at the heart of tort law",[56] and the "reasonable person" is at the heart of negligence.[57] According to Reiss, the tort of negligence in the US serves as the appropriate point of departure and is the most appropriate claim for a child who has suffered injury as a result of his or her parent's or parents' decision not to vaccinate.[58]

As the tort of negligence is the most likely and appropriate claim for non-vaccination, it is explored in greater detail below.

---

47 T Connolly "Where does the tort debate leave us? Views from the bench" (26–28 July 2006) 15th Annual Insurance Law Congress, Sydney at 1; SS Clark & C Harris "Tort law reform in Australia: fundamental and potentially far-reaching change" (2005) 72 *DJC* 16–17: "Australia is a federation of six states and two self-governing territories. […] Australia has both a federal court system and a hierarchy of courts in each of the states and territories. In all cases, the ultimate appellate court is the High Court of Australia, and its decisions are binding on all other Australian courts."

48 Connolly (2006) 5. See also ALRC "The right to sue in tort" (8 December 2014) https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/16-authorising-what-would-otherwise-be-a-tort/the-right-to-sue-in-tort/ (accessed 29 March 2022) at 16.5.

49 Tuitt *et al* (2015) 14 & 217.

50 Koziol (2015) 376–377. See Finch & Fafinski (2021) 248 & 249 for the categories of damages.

51 Brennan (2017) 3; Finch & Fafinski (2021) 248–249, & 252; Ciolli (2008) *YJBM* 132.

52 Brennan (2017) 3; Finch & Fafinski (2021) 252: restraining orders (or injunctions) are also remedies of tort law. See also Finch & Fafinski (2021) 248–249, & 254; Ciolli (2008) *YJBM* 132.

53 Koziol (2015) 385.

54 Steele (2017) 5. See also reference to the salient features approach in Australia.

55 Steele (2017) 4.

56 Robbennolt & Hans (2016) 38.

57 As above

58 R Reiss "Rights of the unvaccinated child" (2017) 73 *SLPS* 80–81. Roederer (2009) *AJICL* 450 comments that the five elements of a delict in South African law, is similar to the "standard formulation in the US for a negligence claim".

4.2.1 The tort of negligence

For purposes of this chapter, it is important to bear in mind that "negligence" means something different from "negligence" as referred to in the context of the law of delict in South Africa. Here, it refers to a specific tort, while in the South African context, it refers to an element of the common-law delict, namely fault.

Brennan explains that the tort of negligence is a relatively new tort that developed in the early 19th century based on "a duty to take care" which found liability for careless acts owed by the defendant to the plaintiff.[59] Brüggemeier also explains that negligence developed into the dominant tort in the common-law family during the 19th century.[60] Furthermore, it is suggested that the tort of negligence provides the greatest source of litigation.[61]

In the landmark case of *Donoghue v Stevenson*,[62] the House of Lords authoritatively established "the existence of negligence as a separate tort in its own right".[63] In the US, negligence generally holds people to a community standard, and if people deviate from that standard they are liable for the harm they cause to another and must compensate the injured party.[64] Raz notes that "[n]egligent conduct is not careless conduct; it is careless conduct for which one is responsible, and where care was due."[65] In other words, "liability for harmful negligence in English Law is based on defendants being responsible for the violation of some duty".[66]

He explains that the negligence standard consists of a combination of a duty of care and a duty not to harm by negligent breach of duties of care.[67] Raz refers to the duty to protect people from negligent harm (or worded differently, the duty not to harm through negligent carelessness) as a moral duty that underscores the negligence standard.[68]

Barker *et al* posit that in Australia, negligence refers to carelessness; "but in a more technical sense it means something like 'failure to take reasonable precautions to avoid foreseeable and significant risks of injury'".[69] They explain that in Australia negligence does not refer to the wrongdoer's state of mind, but rather his or her failure to measure up to the

59 Brennan (2017) 12; Barker *et al* (2012) 12.
60 Brüggemeier (2020) *EJCLG* 358.
61 Brennan (2017) 2.
62 (1932) UKHL 100 (26 May 1932) (hereinafter *Donoghue*).
63 Muhametaj (2017) *GJPLR* 29.
64 Reiss (2014) *CJLPP* 598.
65 Raz (2010) *OJLS* 9–10; Tuitt *et al* (2015) 79.
66 As above.
67 As above.
68 As above.
69 Barker *et al* (2012) 12.

objective standard of reasonable conduct.[70] In Australia, they continue, the objective test for negligence entails "that a person should have behaved differently, regardless of whether they could have behaved differently".[71] Australia has several statutory definitions of negligence, which refer to the failure to exercise reasonable care and skill.[72]

Roederer comments that tort law in the US and the South African common-law delict share the test for negligence which "involves more than the reasonable foreseeability of harm".[73] This is often referred to as the *Kruger v Coetzee*[74] test:

> For the purposes of liability *culpa* arises if —
>
> (a) a diligens paterfamilias in the position of the defendant —
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps.[75]

It is thus important to consider what the reasonable person would have foreseen (standard of care),[76] and the steps that he or she would have taken to avoid causing the harm. The probability of the consequence is used in this determination, and the defendant must avoid "reasonable probabilities".[77]

When considering the tort of negligence in the US, Australia, and the UK, the "duty of care in negligence" is often used (also referred to as the "negligence equation") to determine whether it is appropriate for such a duty to be imposed.[78] The "negligence equation" is the point of departure[79] and refers to a "duty of care" as the first element;[80] if there is no duty, there is no case.[81] To assess the duty of care, two questions are asked. First, is the law of negligence

---

70 As above.
71 Barker *et al* (2012) 13.
72 In New South Wales, South Australia, the Australian Capital Territory and Victoria the term "negligence" has been statutorily defined as "failure to exercise reasonable care and skill". See Mendelson (2004) 11 *JLM* 498 for more examples.
73 Roederer (2009) *AJICL* 451.
74 Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–430G.
75 As above. See Roederer (2009) *AJICL* 451; Tuitt *et al* (2015) 79.
76 Finch & Fafinski (2021) 37 & 45; S Deakin *et al Markesinis and Deakin's tort law* 5ed (2003) 80.
77 Finch & Fafinski (2021) 45.
78 Muhametaj (2017) *GJPLR* 31; Steele (2017) 12 & 36; Barker *et al* (2012) 3. See, e.g., Civil Liability Act 2003 of Queensland, Ch 2, part 1, s 9. J Dietrich & I Field "The 'reasonable tort victim': contributory negligence, standard of care and the equivalence theory" (2017) 41(2) *MULR* 607.
79 Brennan (2017) 11; Raz (2010) *OJLS* 6 refers to this as the "negligence standard".
80 Finch & Fafinski (2021) 5; Muhametaj (2017) *GJPLR* 31.
81 Brennan (2017) 12–13; Raz (2010) *OJLS* 6; Deakin *et al* (2003) 80 with reference to *X (Minors) v Bedfordshire* (1995) 2 AC 633.

applicable to this type of case? Second, was it foreseeable that this specific claimant would be harmed by the defendant's act?[82]

If a duty exists, the second inquiry is whether this duty has been breached. If there is no breach there is no case.[83] If a duty of care exists and there has been a breach of that duty and harm, the last determination is the causation of damage.[84] If there is no causation there is no case.[85] The negligence equation explains the three broad requirements for liability.

According to Muhametaj, referring to the *Donoghue* case, in the UK

> a claim for negligence will succeed if the claimant can prove: a duty of care is owed by the defendant to the claimant; a breach of that duty by the defendant; resulting damage which is not too remote.[86]

Brüggemeier explains that the tort of negligence consists of four basic elements: (1) a duty of care; (2) breach of the duty (fault); (3) injury, damage, or loss; and (4) causation.[87] Reference to the *Donoghue* case above describes the elements of a negligence claim in tort in the US and UK and may be summarised as follows: (1) duty of care (the claimant must prove that a legal duty of care is owed to him or her by the defendant);[88] (2) this duty of care has been breached (fault);[89] (3) the plaintiff has suffered damage as a result of the breach; and (4) causation (factual causation — the "but for" test — and legal causation — remoteness).[90] In the following part, I explore each element in greater detail before considering the facts of my hypothetical scenario.

4.2.1.1 A duty of care

The term "duty of care" must not be confused with "standard of care". A standard of care refers to the breach of a particular duty.[91] A special standard of care exists where the defendant is, for example, a child. The reasonable person test is used to determine the standard of care and refers to the foreseeability or risk of harm and the cost of avoiding the harm.[92] Hence, a standard of

82 Brennan (2017) 12–13
83 Brennan (2017) 12.
84 As above.
85 As above. See also Clark & Harris (2005) *DCJ* 18.
86 Muhametaj (2017) *GJPLR* 30; Tuitt *et al* (2015) 58.
87 Brüggemeier (2020) *EJCLG* 358.
88 Muhametaj (2017) *GJPLR* 31; F Sobczak "Proportionality in tort law. A comparison between Dutch and English laws with regard to the problem of multiple causation in asbestos-related cases" (2010) 18 *ERPL* 1157.
89 Finch & Fafinski (2021) 34; T Levis "Vaccines and the tragedy of the commons: an argument for an alternative liability tort remedy" (2017) 65(4) *DLR* 1070; Sobczak (2010) *ERPL* 1157.
90 Finch & Fafinski (2021) 5, 47, & 68; Sobczak (2010) *ERPL* 1157.
91 See Loubser & Midgley (2017) 167; Tuitt *et al* (2015) 79.
92 Finch & Fafinski (2021) 37 & 45; Deakin *et al* (2003) 80.

care refers to the normal or general practice that the reasonable person would have followed to measure the defendant's conduct.[93] A duty of care is considered in the tort of negligence, and is something that must be present and breached for liability to ensue based on the tort of negligence. Here I am dealing with a duty of care, and not the standard of care.

There are categories of established duties of care. For example, duties of care based on special relationships.[94] These special relationships include those between teachers and students, parents and children; landlord and tenant, therapist and client,[95] road users, employer and employee,[96] manufacturer and consumer, doctor and patient, and solicitor and client.[97] The list of duties of care is not closed and the court may consider if a duty of care exists in cases where it does not fall within one of the established or existing duties of care.[98]

In the US and the UK**,** if the "duty of care consideration" arises in novel cases, three criteria assist the courts to determine whether or not a duty of care exists.[99] In this context, "novel" does not necessarily mean "new facts", but rather refers to the instance where existing duties of care do not answer the question as to whether a duty of care exists in a particular case. These three criteria are: (1) foreseeability; (2) proximity (or neigbourhood); and (3) reasonableness, fairness, and justice.[100] This is also referred to as the "three-stage" or *Caparo* test.[101]

Mulheron explains that under the *Caparo* test, proximity refers to the "degree of closeness or neighbourhood between" the claimant and the defendant, which must be "proven to justify imposing a duty of care" on the defendant.[102]

---

93 See Loubser & Midgley (2017) 167.
94 Robbennolt & Hans (2016) 90; Tuitt *et al* (2015) 57.
95 Robbennolt & Hans (2016) 90–91.
96 Tuitt *et al* (2015) 57.
97 Finch & Fafinski (2021) 6.
98 Finch & Fafinski (2021) 7.
99 Brennan (2017) 11.
100 Muhametaj (2017) *GJPLR* 31; Finch & Fafinski (2021) 7; Brennan (2017) 11. See also *Anns v Merton* (1977) 2 All ER 492: the court adopted a "two-stage" test to determine if a duty of care exists. The first consideration is the establishment of a sufficient relationship of proximity between the wrongdoer and the claimant. If this is established, the second consideration is whether there are any considerations which ought to reduce or limit the scope of the duty. Notably, the *Anns* test has diverged from that as formulated by the court in *Donoghue*. According to Finch & Fafinski (2021) 29, the *Anns* case is relevant in the context of economic loss being recoverable and the *Caparo* test is appropriate to explain the elements of the duty of care. The *Anns/Cooper* test is discussed below in the context of Canadian tort law. See also *Minister of Safety & Security v Van Duivenboden* (2002) 3 All SA 741 (SCA) (hereinafter *Van Duivenboden*) [13]–[14]; McManus (2013) 7; Tuitt *et al* (2015) 21.
101 *Caparo v Dickman* (1990) All ER 568 (hereinafter *Caparo*) at 617H. See Brennan (2017) 11. *Caparo* serves as the most recent authority to establish a duty of care. See R Mulheron *Principles of tort law* 2ed (2020) 44–45; *Van Duivenboden* [13]–[14]; McManus (2013) 8; Tuitt *et al* (2015) 63; *Greatorex v Greatorex* (2000) EWHC 223 (QB) [8].
102 Mulheron (2020) 62; Tuitt *et al* (2015) 58.

The use of the three-stage *Caparo* test to establish a duty of care in negligence was rejected by the Australian High Court in *Sullivan v Moody*,[103] as it "did not represent the law in Australia".[104] In *Sullivan* the High Court rejected the *Caparo* test in favour of "an alternative test for duty — the salient features approach".[105] This means that in novel cases in Australia, "the test for foreseeability of harm to persons, and searching for 'salient features'" is used to establish a duty of care in negligence.[106]

First, the foreseeability of harm in *Sullivan* is similar to that in the *Caparo* test. Second, the court in *Sullivan* refers to salient features which include the (1) relationship (or connection) between the parties,[107] which may, in turn, include (1.1) physical closeness,[108] (1.2) knowledge of the likelihood of harm,[109] and (1.3) vulnerability to harm.[110]

In the following paragraphs, I compare the Australian "salient features" approach to the *Caparo* test to establish how the two differ.

First, "salient features" may refer to physical closeness in the relationship between the parties. In *Caparo*, this is referred to as proximity, which includes the degree of closeness or neighbourhood between the parties. In Australia, reference is made to "factual features linking the parties" instead of proximity (as in *Caparo*),[111] and the court determines whether "sufficient links existed between the parties to justify the imposition of obligations of care".[112] Witting explains that the factual features essentially refer to the

> substantial causal pathways by which a failure in care might have caused harm to the plaintiff. The more substantial the pathways, the greater the potential for harm, and the greater the likelihood that a duty of care will be recognised.[113]

---

103 (2001) HCA 59 (hereinafter *Sullivan*) [589]. See also S Erbacher *Negligence and illegality* (2017) 30.

104 See also *Sutherland Shire Council v Heyman* (1985) HCA 41 at 43–44 where the HC of Australia rejected this test. See C Witting "Tort law, policy and the High Court of Australia" (2007) 31(2) *MULR* 569 & 580: "the [HC] rejected the use of the three-stage test for the duty of care applied in English courts (*Caparo* […])". See also *Van Duivenboden* [13]–[14].

105 Witting (2007) *MULR* 569.

106 Witting (2007) *MULR* 580; Erbacher (2017) 30.

107 Witting (2007) *MULR* 581 refers to *Perre v Apand* (1999) HCA 36, & the HC in *Woolcock Street Investments v CDG* (2004) HCA 16 (hereinafter *Woolcock*) echoed this approach.

108 Witting (2007) *MULR* 581 with reference to *Donoghue*.

109 Witting (2007) *MULR* 581 with reference to *Woolcock*.

110 As above. See Dietrich & Field (2017) *MULR* 607: "negligence […] is judged by reference to (1) the foreseeability (and, in most Australian jurisdictions, the probability) of the risks that have eventuated and (2) the calculus of negligence".

111 Witting (2007) *MULR* 571.

112 As above.

113 As above.

Semantics aside, these two tests (proximity in the *Caparo* test and the Australian "factual features" test) do not differ in that both ultimately consider the degree of closeness or sufficient links between the parties to determine whether or not a duty of care exists.

Second, "salient features" may refer to "knowledge of the likelihood of harm" in the context of the relationship between the parties. The terminology used in the *Caparo* test is foreseeability. The knowledge of the likelihood of harm ultimately refers to the foreseeability of harm.

Third, "salient features" may refer to "vulnerability to harm" in the relationship between the parties. Vulnerability to harm falls under the banner of foreseeability, and proximity under the *Caparo* test and is arguably unnecessary as a separate category as it is covered under foreseeability (and proximity) in the *Caparo* test.

Furthermore, the salient features approach may be criticised in that it fails expressly to consider the third leg of the *Caparo* test: considerations of reasonableness, fairness, and justice (also referred to as policy-based reasoning in duty determinations).[114]

The salient features approach in *Sullivan* favours the consideration of "established policies enshrined in statutes, case law (or doctrine) and judicial values", but rejects formulating policies.[115] Witting explains that the court in *Sullivan* held that policy-based reasoning in duty determinations provides "little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".[116]

Despite this, Witting argues that a policy-based reasoning or approach to establishing a duty of care in negligence and other tort cases "is a logical inevitability".[117] He concludes that the salient features approach of *Sullivan* "has not yielded any great change in the nature of judicial reasoning in negligence and other tort cases".[118]

I contend that the salient features approach is arguably not a true alternative to the three-stage *Caparo* test as it is no more than a rephrased version of the *Caparo* test. The duty of care element also has a very prominent policy component for tort law in the US, Australia,[119] and

---

114 As above.
115 See Witting (2007) *MULR* 581.
116 Witting (2007) *MULR* 571.
117 Witting (2007) *MULR* 590.
118 Witting (2007) *MULR* 583.
119 Witting (2007) *MULR* 571 explores the "conservative view about the role of policy-based reasoning in duty determinations" in the Australian law of torts, as expressed by the court in *Sullivan*. See Dietrich & Field (2017) *MULR* 620.

the UK.[120] Mulheron explains that legal and public policy factors are used to determine whether it is "fair, just, and reasonable to impose a duty of care" on the defendant.[121] He continues that policy factors are assessed in novel-fact scenarios and some policy factors will support a duty of care while other policy factors will not.[122]

In *Greatorex v Greatorex*,[123] the High Court of Justice (Queen's Bench Division) commented on what public policy considerations in this regard entail with reference to *Caparo*.[124] The High Court commented in *Greatorex* on policy considerations limiting the existence and scope of the duty of care and referred to the type of injury and the court's perception of what is reasonable rather than the logical process of analytical deduction.[125]

According to the court in *Greatorex*, with reference to *Caparo*, foreseeability, proximity, and policy considerations serve as convenient labels that enable the court to determine what the law pragmatically recognises as giving rise to a duty of care.[126]

Witting opines that in Australia, generally, the "courts are prepared to recognise a duty of care upon proof of foreseeability and factual features which link the parties to each other."[127] However, foreseeability and factual features (proximity) do not automatically establish a duty of care (a legal obligation to take care) in Australia, and the court must determine if a duty of care exists with reference to policy-based reasoning which may ultimately prove determinative.[128] This approach is analogous to that of *Caparo*, despite the preferred salient features and rejection of policy-based reasoning in *Sullivan*.

Witting refers to the following as the golden rule of negligence in Australia: "the presence of substantial pathways to harm between persons ought, ordinarily, to ground a duty of care", to emphasise the fact that the duty of care analysis seems predicated upon a duty applying where there is the clear potential for the causation of a recognised form of harm by one person to another.[129]

If an established duty of care does not exist in the context of non-vaccination, these criteria in *Caparo* may assist the courts to establish whether the duty exists in this "novel (non-

120 TD Baxter "Tort liability for parents who choose not to vaccinate their children and whose unvaccinated children infect others" (2014) 82(1) *UCLR* 115.
121 Mulheron (2020) 65.
122 As above.
123 (2000) EWHC 223 (QB) (hereinafter *Greatorex*).
124 *Greatorex* [8].
125 *Greatorex* [8]–[12]; Tuitt *et al* (2015) 122.
126 *Greatorex* [8]
127 Witting (2007) *MULR* 571.
128 Witting (2007) *MULR* 571–575 with reference to Kirby J in *Graham Barclay Oysters v Ryan* (2002) HCA 54 at 626–628.
129 Witting (2007) *MULR* 571.

vaccination) case". However, according to Muhametaj, in practice, most negligence cases in the UK are concerned with the breach of a duty (element 2) and causation (element 4),[130] and not with establishing that a duty of care exists (element 1).

The duty must be established, first, in principle, and then in respect of the specific claimants.[131] In the case of omissions (a form of conduct), the duties of care are limited.[132] This is because, in terms of tort law, the traditional rule is that there is no liability for an omission or failure to act.[133]

The general principles of tort law in the US and the law of delict in Germany and Scotland, like that of the common-law delict in South Africa, hold that there is generally no duty to perform an action to prevent harm.[134] In other words, "there is no duty to engage in affirmative actions to prevent the occurrence of harm to another".[135] Carstens and Pearmain also note that in South African law, generally speaking, liability for omissions is more restricted than liability for commissions.[136]

The general rule — that no automatic liability is imposed by tort law for an omission[137] — and the duty of care in the case of omissions are restricted for various reasons, for example, the heavy burden placed on individuals, the indeterminacy of such a duty, and economic inefficiency.[138] In turn, this serves as a control mechanism to restrict the scope of the duty of care and limit liability.[139]

In Australia, a person is not automatically liable in tort for failure or omission to take precautions against a foreseeable risk of harm where the risk is described as "not significant".[140] However, a person may be liable in tort if the reasonable person in similar circumstances would have taken precautions against the (significant) risk(s).[141] Similarly, The Restatement (Third) of Torts (of the US)[142] clearly sets the principle that an actor whose conduct has not created a

130 Muhametaj (2017) *GJPLR* 31.
131 Brennan (2017) 11.
132 As above. See also Carstens & Pearmain (2007) 506.
133 Reiss (2014) *CJLPP* 605–606.
134 C Brennan *Tort law concentrate: law revision and study guide* 5ed (2019) 22; McManus (2013) 34; G Spindler & O Rieckers *Tort law in Germany* 3ed (2019) part 1, Ch 1, §1 [72]. See *Minister van Polisie v Ewels* 1975 (3) SA at 596; Tuitt *et al* (2015) 71.
135 Koziol (2015) 409; Brennan (2019) 22; Finch & Fafinski (2021) 9–11; McManus (2013) 34.
136 Carstens & Pearmain (2007) 506.
137 Brennan (2019) 22; Finch & Fafinski (2021) 9–11; Koziol (2015) 409; Tuitt *et al* (2015) 58.
138 Brennan (2019) 22; Tuitt *et al* (2015) 71.
139 Greatorex [16].
140 Clark & Harris (2005) *DCJ* 18.
141 As above.
142 American Law Institute *Restatement of the law third, torts: liability for physical and emotional harm* (2010–2012).

risk of harm is generally not liable in tort.[143] The opposite may then ring true: an actor, whose conduct has created a risk of harm, may be liable in tort.

Hence, there are some exceptions to the "no duty to act" rule; for example, a duty to act does exist if the plaintiff and defendant have a special relationship, or the defendant's actions create a foreseeable risk of harm to others,[144] an undertaking or promise, and the defendant's role in creating the risk,[145] the defendant's prior creation of a source of danger; and the defendant's undertaking of responsibility for the claimant's welfare.[146]

In other words, there may be tortious liability for an omission in cases where the defendant creates or permits the creation of danger (or the source thereof),[147] or in cases where the defendant fails to remove a source of danger of which he or she is aware.[148]

If there is a relationship between the parties that creates an assumption of responsibility on behalf of the defendant for the safety of the claimant, liability for the omission may be established,[149] similar to the salient features approach in Australia.[150]

These exceptions to the general rule of no liability for an omission indicate that tort law in the US law may allow claimants to sue in negligence for the harm suffered as a result of non-vaccination. Thus, the general rule does not apply if there is, for example, a special relationship between the parties; the defendant's actions create a foreseeable risk of harm to others; or the defendant creates or permits the creation of danger, or fails to remove a source of danger, of which she is aware. In *Donoghue*, the House of Lords highlighted a general duty that

> [y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in

143 Reiss (2014) C*JLPP* 607.
144 Baxter (2014) *UCLR* 129; Reiss (2014) C*JLPP* 607. Additional exceptions may be provided by the courts based on policy considerations.
145 As above.
146 Koziol (2015) 409; Tuitt *et al* (2015) 71–72.
147 Brennan (2019) 23.
148 As above.
149 As above. See also Finch & Fafinski (2021) 11.
150 See, e.g., Civil Liability Act 2003 of Queensland, Ch 2, part 1, s 9(2): "In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things) — the probability that the harm would occur if care were not taken; (b) the likely seriousness of the harm; (c) the burden of taking precautions to avoid the risk of harm; (d) the social utility of the activity that creates the risk of harm."

> contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[151]

In conclusion on this element of the tort of negligence, I reiterate the following points: (1) there are categories of existing or established duties of care; (2) if the court is faced with determining whether a novel duty of care exists it may use the *Caparo* test; (3) the courts rarely concentrate on whether a duty of care exists; (4) the courts are more often concerned with the "breach of a duty" and causation; (5) liability for omissions are restricted; and (6) there is generally no duty to perform an action to prevent harm, but there are exceptions to this general rule.

The duty of care element is considered in greater detail in the Nonva/Vic hypothetical below. For present purposes, this short discussion on the duty of care element suffices. As mentioned above, establishing a duty of care is only one of the elements of the tort of negligence. The breach of the duty (fault), as well as harm (loss or damage), and causation must also be established. I now turn my attention to the breach of the duty.

4.2.1.2 Breach of the duty (fault)

To succeed with a claim based on negligence in the US, Canada, Australia, and the UK the claimant must prove that the defendant was at fault[152] and that the claimant suffered harm as a result of the defendant's negligence.[153]

As mentioned above, the standard of care is referred to in the breach investigation. Here, the standard of care is measured against that of the reasonable person.[154] Fault is concerned with whether the defendant acted unreasonably in the particular circumstances (the defendant breached his or her duty of care), and considerations of foreseeability are involved in this determination.[155] Therefore, the breach of duty is linked to the degree of carefulness expected to avoid causing harm to another.[156]

Barker *et al* state that in Australia the element of fault does not consider the ignorance, lack of resources, inexperience, or lack of skill of the wrongdoer.[157] Finch comments that the position in US tort law is similar.[158]

---

151 *Donoghue* at 580; A Beever *A theory of tort liability* (2016) 189; Tuitt *et al* (2015) 59.
152 Muhametaj (2017) *GJPLR* 31; Koziol (2015) 412; Barker *et al* (2012) 12–13; McManus (2013) 26.
153 Brennan (2017) 2: this is different from e.g. the tort of libel, where the publication of a defamatory statement is sufficient to succeed with the claim, without having to prove damage. Libel is thus *per se* actionable. See Tuitt *et al* (2015) 192.
154 McManus (2013) 34.
155 Muhametaj (2017) *GJPLR* 31; Koziol (2015) 412.
156 Finch & Fafinski (2021) 34.
157 Barker *et al* (2012) 12–13.
158 Finch & Fafinski (2021) 39.

To wit, there are circumstances where the reasonable person (standard of care) is not applied, and special standards of care are applied, for example: where the defendant is a child; the defendant has a particular skill or profession; or in the case of sporting events.[159] When considering the standard of care in the breach conundrum, the courts may also consider the following factors: the extent of the risk; the cost and practicability of prevention; the social value of the defendant's activities; and what the reasonable person would have foreseen.[160]

A plaintiff in the US must prove the breach of this duty on a balance of probabilities.[161] The breach requirement is discussed in greater detail below in the context of the hypothetical and non-vaccination. For introductory purposes, it suffices to reiterate that the duty of care alone is not enough to establish liability for negligence as the breach of this duty is an essential requirement in addition to the other elements such as injury, damage, and causation. Before I explore causation, I first turn my attention to injury, damage, or loss as a requirement for the tort of negligence.

4.2.1.3 Injury, damage, or loss

For the tort of negligence, it is essential that the plaintiff must have suffered some harm or loss as without damage there is no case.[162] Not all damage constitutes an injury for which the law will hold another person accountable — expressed in the Latin maxim *damnum absque injuria*.[163] Brennan posits that tort law does not protect all interests,[164] and the harm suffered must be legally recognised.[165] For example, physical damage to a person or property is the classic type of recoverable harm.[166] Psychiatric injury (or psychological damage including PTSD) resulting from physical harm are also recognised forms of harm.[167]

Finch explains that "economic loss" refers to loss that is not attributable to physical harm caused to the plaintiff and states that pure economic loss which is not consequential

159 Finch & Fafinski (2021) 37.
160 Finch & Fafinski (2021) 42; McManus (2013) 26–29.
161 Finch & Fafinski (2021) 45; Tuitt *et al* (2015) 90.
162 See Tuitt *et al* (2015) 15 for a discussion on conduct that can be actionable even though no damage is suffered.
163 Brennan (2017) 2; Koziol (2015) 360. See Tuitt *et al* (2015) 13: "*damnum sine injuria* means damage without legal injury".
164 Brennan (2017) 2; Koziol (2015) 360.
165 Roederer (2009) *AJICL* 450; Reiss (2017) *SLPS* 80–81; Brennan (2017) 81.
166 R Rodal & K Wilson "Could parents be held liable for not immunizing their children?" (2010) 4(1) *MJLH* 60; Tuitt *et al* (2015) 16.
167 Finch & Fafinski (2021) 19; Tuitt *et al* (2015) 16.

on physical damage to the plaintiff's property is generally not recoverable in tort or the Scots law of delict.[168]

For purposes of torts, "injury" refers to the invasion of any legal right, while "harm" describes a "loss or detriment in fact that an individual suffers".[169] Despite this, the terms "harm" and "injury" are often used interchangeably. Furthermore, there is a difference between damage and damages. Damage refers to the element of harm or injury, and damages refer to a remedy in tort, for example, compensatory damages or punitive damages.[170] The following categories of damages are recognised: compensatory damages; restitutionary damages; exemplary (or punitive) damages; aggravated damages; nominal damages; and contemptuous damages.[171]

For purposes of the tort of negligence in our context, I do not explore the details of injury and damage, and for now, it is sufficient to mention that damage or injury are essential elements for the tort of negligence. When I explore the hypothetical, I deal with this element in greater detail in the specific jurisdiction under discussion. The last element that must be present is causation.

4.2.1.4 Causation

For causation, "a causative link between the breach of duty and the injury or loss" must be established.[172] Causation generally refers to factual causation (also referred to as "cause-in-fact") and legal causation (also referred to as proximate cause).[173]

Factual causation is a question of fact and refers to whether negligence played a part in causing the harm.[174] Maraist explains that the conduct of the actor must be unreasonable, and it must be the cause of the victim's harm — referred to as "the cause in fact".[175]

---

168 Finch & Fafinski (2021) 16–17; McManus (2013) 34; Tuitt *et al* (2015) 22.

169 M Steinitz *The case for an international court of civil justice* (2019) 11; Cornell Law School "Tort" (date unknown) https://www.law.cornell.edu/wex/tort#:~:text=Negligent%20torts%20occur%20when%20the,particular%20result%20or%20harm%20manifested (accessed 1 December 2022).

170 Finch & Fafinski (2021) 248; Cornell Law School "Damages" (date unknown) https://www.law.cornell.edu/wex/damages (accessed 1 December 2022).

171 Koziol (2015) 376–377.

172 Muhametaj (2017) *GJPLR* 31; Sobczak (2010) *ERPL* 1157.

173 Finch & Fafinski (2021) 5, 47, & 68; Sobczak (2010) *ERPL* 1157; Roederer (2009) *AJICL* 450; Reiss (2017) *SLPS* 80–81; Brennan (2017) 81; McManus (2013) 31; FL Maraist & TC Galligan *Louisiana tort law* 2ed (2021) Ch 3, §3.05.

174 Clark & Harris (2005) *DCJ* 18.

175 FL Maraist *Louisiana law of torts: a précis* (2010) Ch 5, 2.

Traditionally, the US (including Louisiana), Dutch, Canadian, Australian, Scottish, and English courts have used the "but for" (or *conditio sine qua non*) test to determine whether the defendant's conduct satisfies the factual causation requirement.[176]

According to this test, the defendant's conduct satisfies causation where the event would not have occurred "but for" his or her conduct.[177] The plaintiff must thus show, on a preponderance of the evidence, that the defendant's conduct caused his or her harm.[178] One of the alternatives to the *conditio sine qua non* test is the material contribution test.[179]

The material contribution test refers to establishing causation based on instances where negligent conduct materially contributed to harm or the risk of harm.[180] In the Australian case of *Amaca v Ellis*,[181] the High Court of Australia also referred to the importance of the material contribution test in the context of cases based on epidemiological risks.[182] In *Bonnington Castings Ltd v Wardlaw*[183] the House of Lords (UK) applied the material contribution test to prove factual causation, instead of the "but for" test.[184] Here, the *House of Lords* concluded that

> causation could be established because the employer's act or omission made a 'material contribution' to the harm which constituted an application of, or an exception to, the 'but for' test.[185]

In *Fairchild v Glenhaven Funeral Homes*[186] the House of Lords did not apply the "but for" test to prove factual causation (because of an evidentiary gap) and preferred a more relaxed approach by considering the material increase in risk.[187] Essentially, the House of Lords departed from the traditional principles for causation to hold all three employers liable.[188]

---

176 Caplan *et al* (2012) *JLME* 609; Sobczak (2010) *ERPL* 1161–1162; McManus (2013) 29; Tuitt *et al* (2015) 89.
177 Caplan *et al* (2012) *JLME* 609.
178 As above.
179 McManus (2013) 29.
180 See Carter Newell Lawyers "The 'but for' test of causation in Australian law" (December 2020) https://www.carternewell.com/page/Publications/2020/the-but-for-test-of-causation-in-australian-law/ (accessed 1 December 2022): Australia's various Civil Liability Acts provide an alternative means of establishing factual causation in "*appropriate*" or "*exceptional*" cases where a breach of duty cannot be established as a necessary condition of the harm.
181 (2010) HCA 5.
182 See also *Seltsam v McGuiness* (2000) NSWCA 29 [59]–[62]; *Woolworths v Strong* (2010) NSWCA 282; *Strong v Woolworths* (2012) HCA 5.
183 (1956) AC 613.
184 V Palmer & E Reid *Mixed jurisdictions compared: private law in Louisiana and Scotland* (2009) 356; Tuitt *et al* (2015) 91; McManus (2013) 29.
185 Tuitt *et al* (2015) 91.
186 (2003) 1 AC 32.
187 See Tuitt *et al* (2015) 92; McManus (2013) 30.
188 See also A Price "Factual causation after Lee" (2014) 131(3) *SALJ* 494; Tuitt *et al* (2015) 92.

Similarly, in *Cook v Lewis*[189] the Supreme Court of Canada (on appeal from the Court of Appeal for British Columbia) was also faced with an evidentiary gap. Price comments that,

> [i]n *Fairchild* and *Cook*, the courts were faced with an evidentiary gap: in both cases, although the plaintiff had been harmed by one of the defendants, it was impossible to establish which defendant's negligence was the factual cause of the plaintiffs harm on a balance of probabilities. It was nonetheless thought appropriate to impose liability on all the negligent defendants.[190]

These cases serve as an indication that the application of the "but for" test is not necessarily always appropriate in determining factual causation, and other methods of proving factual causation may be used. Rodal and Wilson suggest the "material contribution" test as an alternative to the "but for" test in the context of mass outbreaks.[191] In *Resurfice Corp v Hanke*[192] the Supreme Court of Canada ruled that the "material contribution" test may be applied to cases where uncertainty exists as to which of several defendants is responsible for the injury[193] — as in the case of a mass outbreak. I now turn my attention to legal causation.

According to Maraist, legal causation is generally considered to be an issue of law, but may also be a jury issue "where the resolution turns upon the facts of the particular case".[194] In the US, Dutch, Australian, and English law, proximate (legal) causation limits liability based on remoteness or on unexpected and unforeseen consequences.[195] Remoteness in the context of legal causation means that the "claimant must establish that the damage which was suffered is not regarded in law as too remote".[196]

Finch and Fafinski reiterate that "the correct test for remoteness is reasonable foreseeability of the kind or type of damage in fact suffered by the [plaintiff]."[197] In Scots law, this is referred to as the "foreseeability test" under legal causation, the other test being the "direct consequences test".[198]

189 1951 CanLII 26 (SCC).
190 Price (2014) *SALJ* 494.
191 Rodal & Wilson (2010) *MJLH* 51.
192 2007 SCC 7 (hereinafter *Resurfice*).
193 *Resurfice* [17]–[29]; Rodal & Wilson (2010) *MJLH* 51.
194 Maraist (2010) Ch 5, 2.
195 Caplan *et al* (2012) *JLME* 609; Finch & Fafinski (2021) 65; Sobczak (2010) *ERPL* 1162; McManus (2013) 31.
196 Muhametaj (2017) *GJPLR* 31; McManus (2013) 34.
197 Finch & Fafinski (2021) 69.
198 McManus (2013) 31.

Muhametaj and Mulheron comment that foresight (or foreseeability) which is considered in relation to a duty of care[199] and breach of duty,[200] is also considered in establishing causation and the remoteness of damage.[201] Mulheron explains that during the assessment of remoteness, the foreseeability test is at its narrowest and refers to whether the type of harm suffered by the claimant was reasonably foreseeable by the defendant.[202]

In Australia, legal causation is referred to as the "scope of liability" and involves the normative question of whether the wrongdoer should be held liable.[203] Mulheron explains that traditionally proximity is proven with reference to a combination of factors like geographical proximity; temporal proximity; relational proximity; and causal proximity.[204] However, Mulheron mentions that no particular proximity factor has a "clinching" status.[205]

Legal causation with reference to remoteness and proximity is explored below in greater detail, but for purposes of the present discussion it suffices to reiterate that causation is an element of the tort of negligence and without causation, liability cannot be established. The relevance of a *novus actus interveniens* is also considered in the causation enquiry a *novus actus* is a new act that intervenes and breaks the chain of events.[206]

A *novus actus interveniens* may render the end result too remote.[207] Intervening factors that link with contributory negligence may make it difficult to establish what was foreseeable and what was not.[208] For purposes of this chapter, I accept that there are no intervening factors (*novus actus interveniens*) that sever the chain of liability.

The above discussion serves as a brief introduction to the tort of negligence and its elements. In summary on the tort of negligence as discussed above, the defendant owes the plaintiff a duty of care, and the defendant breaches this duty (element of fault). This breach must be the cause in fact as well as the proximate cause of the legally recognised harm suffered by the plaintiff.[209]

---

199 Mulheron (2020) 52 explains the "differing tests of foreseeability in negligence" and mentions that at the duty of care stage, the foreseeability test is wide, "was some type of harm reasonably foreseeable?"

200 Mulheron (2020) 52 asserts that during the breach analyses the foreseeability test is narrower and refers to reasonable foreseeability and precautionary steps.

201 Muhametaj (2017) *GJPLR* 32; Mulheron (2020) 52.

202 Mulheron (2020) 52.

203 Clark & Harris (2005) *DCJ* 18.

204 Mulheron (2020) 62.

205 As above.

206 Finch & Fafinski (2021) 65; McManus (2013) 33.

207 Rodal & Wilson (2010) *MJLH* 48; Tuitt *et al* (2015) 97.

208 As above.

209 Roederer (2009) *AJICL* 450; Reiss (2017) *SLPS* 80–81; Brennan (2017) 81. The Court of Appeals of Maryland listed the traditional elements of a cause of action in negligence in *BN V KK* 538 A2d 1175 (Md 1988) as a duty (obligation) recognised by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks; a failure on the person's part to conform to

The theoretical discussion of the tort of negligence above is applied to a non-vaccination hypothetical below (Nonva/Vic hypothetical) to illustrate how the tort of negligence (specifically in the US and Canada) might be applied to hold a non-vaccinating parent liable in negligence. The Netherlands and Germany, as well as the civil law pockets in the US (Louisiana) and Canada (Quebec), are discussed thereafter. The Nonva/Vic hypothetical below is explored, in the main, with specific reference to the US tort of negligence.

4.3 NONVA/VIC HYPOTHETICAL AND THE US TORT OF NEGLIGENCE

As mentioned, this thesis is focused on the common-law delict in the South African context. An investigation of tort law is useful in that it provides insight to deal with non-vaccination and certain elements of delictual liability. For this reason, tort law in its entirety is not discussed in detail but is limited to the tort of negligence.

An interesting hypothetical is suggested by Caplan, Hoke, Diamond, and Karshenboyem.[210] The authors pose a hypothetical scenario investigating the potential tortious liability for the failure to vaccinate.[211] Caplan *et al* use an example of measles and the MMR vaccine. I have adapted their scenario by changing the names of the parties and instead of measles, COVID-19 is used, and instead of the MMR vaccine the COVID-19 vaccine is used in my adapted hypothetical (the Nonva/Vic hypothetical) based on Caplan *et al*'s hypothetical.

In my adapted hypothetical, Nonva's parent, Non, suspects that the COVID-19 vaccine is a 6G microchip that alters the deoxyribonucleic acid (DNA) of its recipients. For purposes of this hypothetical, it is assumed that the COVID-19 vaccine is a prerequisite for day care attendance (for children from the age of five).[212] Despite this, Non relies on the state-legislated philosophical exemption to escape the state's mandatory vaccination requirement, based on a conscientiously held belief. Non signs a vaccination exemption form as part of the state-legislated philosophical exemption and also attends a mandatory information session with Nonva's paediatrician. The paediatrician informs Non of the benefits of vaccination and the

---

the standard required: a breach of the duty; a reasonably close causal connection (causation) between the conduct and the resulting injury; and actual loss or damage resulting to the interests of another.

210 AL Caplan, D Hoke, NJ Diamond & V Karshenboyem "Free to choose but liable for the consequences: should non-vaccinators be penalized for the harm they do?" (2012) *JLME* 606.

211 Caplan *et al* (2012) *JLME* 606.

212 See WHO "Coronavirus disease (COVID-19): Vaccines" (17 May 2022) https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-(covid-19)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=Cj0KCQiAorKfBhC0ARIsAHDzslv61nXBwAP0vYVwEEAN2usLptT-atUt1Ee4nIWYKzWqyaNALArd5zIaArghEALw_wcB (accessed 16 February 2023).

serious dangers that non-vaccination poses not only for Nonva (Non's daughter), but also for others.

Non's daughter, Nonva (five-years-old), does not receive the COVID-19 vaccine(s). All the other children attending the day care's vaccinations are up to date.

On 10 January 2023, at the age of five, Nonva travels to South Africa with Non. On returning to the US on 24 January 2023, Nonva develops a sore throat and runny nose. Non takes Nonva to a paediatrician who confirms that Nonva has the Omicron ((B.1.1.529): SARS-CoV-2) variant.[213] Despite this, Nonva attends day care as Non believes that COVID-19 is a conspiracy theory and Nonva merely has seasonal flu. In addition, Non believes that all children are in any event at risk of contracting childhood diseases, and sending your child to day care is a voluntary assumption of that risk.

Approximately one week later, Vic, a two-year-old day care classmate of Nonva develops a severe illness. Although Vic is too young to receive the COVID-19 vaccine(s) or booster shots,[214] his parents intend to have him vaccinated. All of Vic's routine vaccinations are up to date.

A paediatrician determines that Vic also has the Omicron variant. After being hospitalised, it is established that Vic has suffered permanent damage to his right lung, and the lung is surgically removed. Vic's parents learn that Nonva had previously had the COVID-19 Omicron variant and also that Non is strongly opposed to all vaccination, but especially that against COVID-19.

For purposes of this hypothetical, I accept that there are no intervening factors (*novus actus interveniens*) that sever the chain of liability. In addition, I assume that there is no contributory negligence on the part of Vic (or Vic's parents).[215] If Vic is, in whole or in part, to blame for his own infection, his contributory negligence may reduce or eliminate his claim. For example, if the plaintiff is unvaccinated due to medical reasons or is aware that he has no

---

213 See WHO "Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern" (26 November 2021) https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern (accessed 19 January 2022).

214 For purposes of this hypothetical, it is assumed that children under the age of five are too young to receive any COVID-19 vaccination or booster shot and that the COVID-19 vaccine may be administered to a child from the age of five. See WHO "Coronavirus disease (COVID-19): Vaccines" (17 May 2022) https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-(covid-19)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=Cj0KCQiAorKfBhC0ARIsAHDzslv61nXBwAP0vYVwEEAN2usLptT-atUt1Ee4nIWYKzWqyaNALArd5zIaArghEALw_wcB (accessed 16 February 2023).

215 Baxter (2014) *UCLR* 140.

immunity to certain diseases, the plaintiff (specifically Vic's parents) must take reasonable precautions.[216]

The following figure illustrates the unbroken chain of events in the Nonva/Vic hypothetical.

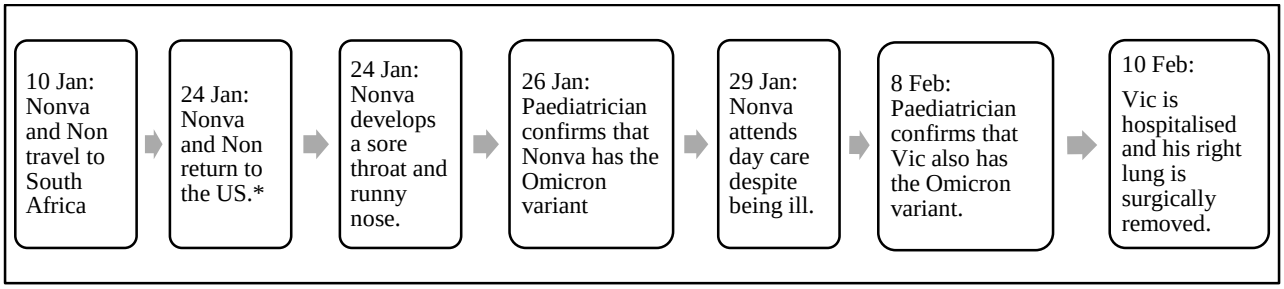

Figure 3: Nonva/Vic timeline.

Caplan *et al* submit that it appears that there are no cases that correspond factually to the Nonva/Vic hypothetical.[217] The Nonva/Vic hypothetical raises the question of whether Non can be held legally liable (in tort, and more specifically, negligence) for the harm caused to Vic by failing to have Nonva vaccinated.[218]

Although the US courts have not yet addressed tort claims in this (Nonva/Vic) context, judgments in other cases involving the negligent transmission of contagious disease support the conclusion that public policy favours tortious liability.[219] Baxter also supports this view.[220]

According to Baxter, public policy considerations as regards non-vaccination and tortious liability are undoubtedly the most complex.[221] He discusses, in detail, the components that complicate public policy considerations in the US context of non-vaccination and tortious liability.[222] The discussion revolves around the impact of allowing injured persons to pursue claims against non-vaccinating parents, the limitation of their rights, parental autonomy, the obligation to vaccinate (or not), using unvaccinated children as scapegoats for disease outbreaks, and public policy considerations.[223]

---

216 As above.
* Excluding Louisiana.
217 Caplan *et al* (2012) *JLME* 608.
218 Caplan *et al* (2012) *JLME* 606.
219 Baxter (2014) *UCLR* 140–141; Caplan *et al* (2012) *JLME* 608 with reference to *Smith v Baker* July 5, 1884 (Circuit Court, SD New York), where the court held a parent liable for negligently taking his children, who were infected with whopping cough, to the plaintiff's boarding house.
220 Baxter (2014) *UCLR* 128.
221 Baxter (2014) *UCLR* 115.
222 As above.
223 As above.

Reiss proposes holding parents (Non) whose unvaccinated children (Nonva) spread a preventable disease negligent under tort law, and specifically the tort of negligence, under US law.[224] Caplan *et al* submit that tortious negligence may provide a cause of action to hold Non liable for her failure to have Nonva vaccinated[225] against COVID-19.

To establish a *prima facie* case for tortious negligence in the US, the plaintiff (Vic) must show that:

(1) the defendant (Non) owed Vic a legal duty to conform to a certain standard of conduct for the protection of others against unreasonable risks (vaccination);
(2) the defendant (Non) has breached that duty;
(3) the breach of that duty was both the direct and proximate cause of the harm suffered; and
(4) the plaintiff (Vic) suffered damage.[226]

Vic must prove these elements on a preponderance of the evidence, meaning that Vic need not exclude every possible explanation.[227] Instead, the reasonable person may conclude that Non's conduct (non-vaccination [omission] and the return of Nonva to day care [positive act/commission]) was a substantial cause of the harm suffered by Vic.[228]

Caplan *et al* first explore causation in this hypothetical — Vic must prove that Nonva infected him with the Omicron variant of COVID-19.[229] The reason for first exploring causation is perhaps that causation is arguably the most difficult element to prove.

If it can be proven that Nonva infected Vic with the Omicron variant of COVID-19, are there legal grounds for tort liability? Caplan *et al* note that if there is insufficient scientific evidence to prove transmission from Nonva to Vic, causation cannot be established and there will be no viable legal case.[230] For introductory purposes, it suffices to say that causation is a tricky element to which I return later. For now, I first explore the legal duty and breach conundrum.

---

224 Kostal (2015) *ABAJ* 17.
225 Caplan *et al* (2012) *JLME* 608. As mentioned, the authors use measles in the original example.
226 As above.
227 As above; and Baxter (2014) *UCLR* 114.
228 Caplan *et al* (2012) *JLME* 608; Finch & Fafinski (2021) 42.
229 Caplan *et al* (2012) *JLME* 606.
230 As above. The authors mention that there is adequate scientific capability to determine with a great deal of confidence, though not absolute certainty, that one person transmitted the measles virus to another. Despite the ability to prove transmission, there is not much scientific literature that directly addresses the question of causation for the measles.

As mentioned in the introduction to this chapter, the existence of a legal duty is a question of law which must be determined by the court. To establish the existence and scope of an individual's legal duty, the foreseeability of harm is crucial.[231]

Accordingly, "a duty of care is owed if the claimant is a reasonably foreseeable victim".[232] Stated differently, a duty to act exists if the defendant's (Non's) conduct creates a foreseeable risk of harm to others (Vic).

Baxter suggests that the choice of a non-vaccinating parent (Non) does not as a rule create a foreseeable risk of harm, although this can happen under certain circumstances.[233] As an example, Baxter cites situations in which the unvaccinated child (Nonva) travels to another country (South Africa), contracts a vaccine-preventable disease (Omicron variant), shows symptoms, and the parent (Non) takes the child (Nonva) to places where she (Nonva) is in contact with others (Vic at day care).[234] This behaviour might give rise to a duty to warn, or otherwise to act for the protection of others.[235]

With reference to, *inter alia*, the US case of *John B v Superior Court*,[236] Caplan *et al* contend that the courts have long held that individuals with hazardous or contagious diseases have a legal duty to protect others from the danger of infection.[237] This means that Non has a duty to protect others (Vic) from Nonva's contagious disease. They refer to the Maryland Court of Appeals, which has held that one who knows he or she has a highly infectious disease (COVID-19) can readily foresee the danger that the disease may be transmitted to others.[238]

The foreseeability of harm includes either actual or constructive knowledge.[239] Constructive knowledge refers to a range of possible mental states, such as "one who is deliberately indifferent in the face of an unjustifiably high risk of harm", or "one who merely should know of a dangerous condition".[240]

Vic must thus show that Non acted with either actual or constructive knowledge.[241] A parent in Non's position could foresee that her unvaccinated child (Nonva) is more likely to

231 Caplan *et al* (2012) *JLME* 608.
232 Finch & Fafinski (2021) 20.
233 Baxter (2014) *UCLR* 131.
234 As above.
235 As above.
236 38 Cal4th 1177 (Cal 2006).
237 Caplan *et al* (2012) *JLME* 608. See *BN v KK* 538 A2d 1175 (Md 1988) (hereinafter *BN v KK*); *RAP v BJP* 428 NW2d 103 (Minn Ct App 1988); *Skillings v Allen* 143 Minn 323 173 NW 663 (1919).
238 Caplan *et al* (2012) *JLME* 609. See *BN v KK* [142].
239 Caplan *et al* (2012) *JLME* 608.
240 As above
241 Caplan *et al* (2012) *JLME* 609.

contract COVID-19 (as opposed to a vaccinated child),[242] and is more likely to spread the disease (creating a foreseeable risk of harm to others).

I suggest that Non could reasonably foresee that vulnerable children (who are too young to be vaccinated or are immunocompromised) attend day care and that the non-vaccination of Nonva, and Nonva's contraction of the Omicron variant, may cause harm to others (reasonable foreseeability). This is based on the premise that non-vaccinating parents (Non) generally do their own extensive research in support of non-vaccination (which inherently includes debunking vaccine facts and promoting vaccine myths).

Non is also in all likelihood aware of the dangers of non-vaccination as disseminated by health authorities and global and local vaccination campaigns. Non's paediatrician also informed her of the dangers of non-vaccination and the factual benefits of vaccination. Lastly, Non is aware of the dangers of non-vaccination as stated in the statutory vaccine exemption form she signed.

Baxter adds that the strong policy reasons for preventing the spread of contagious diseases, in addition to preventing them by vaccination, may imply that a lesser degree of foreseeability is required.[243] Regardless of the foreseeability threshold, the court may also consider the steps that non-vaccinating parents took to educate themselves on the benefits, risks, and contraction of vaccine-preventable diseases, their symptoms, and their transmission.[244]

Baxter identifies the following possible duties that the courts may rely upon, concerning the nature and scope of the non-vaccinating parent's duty:[245]

(1) a duty to vaccinate;[246]
(2) a duty to avoid contact with vulnerable persons if the unvaccinated child presents a risk to others;[247]

---

242 As above.
243 Baxter (2014) *UCLR* 133.
244 Baxter (2014) *UCLR* 134.
245 As above.
246 Diekema (2009) *MLR* 92 suggests that there is a duty to vaccinate and that "these laws suggest that a duty exists, even though most states provide the opportunity to opt out of vaccination on the basis of personal beliefs." According to Baxter (2014) *UCLR* 134 there exists no mandatory vaccination without certain exemptions in the US. In *Jacobson v Massachusetts* 1905 197 US 11 the courts found that a duty to vaccinate exists if there has been a publicised outbreak of a vaccine-preventable disease and the unvaccinated child is in regular contact with others. This duty to vaccinate may then also extend to non-vaccinating parents (relying on personal, philosophical or religious exemptions). Exemptions based on medical conditions would not found liability for the failure to vaccinate, but a duty to avoid contact with others during the outbreak may be justified.
247 Baxter (2014) *UCLR* 136: e.g., the paediatrician's office, hospitals, and schools. As it is difficult to determine exactly who falls into one of these categories of vulnerable persons. Baxter argues that these non-vaccinating

(3) a duty to protect others against highly infectious or contagious diseases;[248]

(4) a duty to warn others (that a child is unvaccinated and has or may have been exposed to a vaccine-preventable disease);[249] and

(5) a duty to be informed (of the places where vaccine-preventable illnesses are still present, how those diseases are transmitted, how to identify symptoms in an unvaccinated child, and how to protect the unvaccinated child and others from the transmission of disease).[250]

It may be easier for Vic to establish foreseeability in that Non was aware that Nonva had been exposed to a vaccine-preventable disease and knowingly exposed Nonva to others (Vic).[251] For example, Non attended the compulsory information session with Nonva's paediatrician and signed the vaccination exemption form, all proof that Non knew of the dangers of non-vaccination.

Non has a duty to take reasonable precautions to avoid transmitting the disease.[252] This means that Non has a duty to take reasonable precautions to prevent Nonva from contracting the disease (by vaccination), and if Nonva has contracted the disease, Non has a duty to take reasonable precautions to prevent Nonva from spreading it to others (warning and informing others, and the self-isolation of Nonva).

Vic must show that a reasonable person in Non's position has a duty to take further steps, especially regarding the ramifications of Nonva being unvaccinated and ill.[253] These reasonable precautions may include warning and informing other parents of Nonva's infection, informing the school, and keeping Nonva home from day care to avoid exposing others to the variant (self-isolation).

Accordingly, if the parent of an unvaccinated child: (1) fails to disclose that the child is unvaccinated; (2) is at risk of contracting or transmitting a vaccine-preventable disease; and

---

parents have a duty to avoid contact with anyone (if their unvaccinated child has been exposed to a vaccine-preventable disease, or is showing symptoms of such a disease).

248 See *John B v Superior Court* 38 Cal4th 1177 (Cal 2006).

249 Baxter (2014) *UCLR* 135–136: the non-vaccinating parent may be required to warn medical personnel, school officials, family members or third parties. It is in the discretion of the court to decide whether the duty is triggered by the mere possibility of exposure, or if evidence that the unvaccinated child poses a specific risk to others is required.

250 Baxter (2014) *UCLR* 136–137 suggests that non-vaccinating parents have a duty to learn the symptoms of the vaccine-preventable diseases; monitor any signs of symptoms; and take precautions to avoid infecting others. This overall duty to be informed may require parents to consult reasonably reliable information sources.

251 Baxter (2014) *UCLR* 132: proving foreseeability (risk of harm) in cases where the infected child exhibited no symptoms of the vaccine-preventable disease may be more burdensome, although not impossible.

252 Caplan *et al* (2012) *JLME* 608.

253 Caplan *et al* (2012) *JLME* 609.

(3) fails to take steps to avoid putting others at risk of infection, he or she will have breached a duty owed to those infected by the unvaccinated child.[254]

In addition, other relevant factors are considered to determine the breach of duty, such as "the magnitude of the risk" and the "cost and practicability of precautions."[255] Kostal notes that the risk of an unvaccinated child, for example, contracting measles is far greater than the chance of the vaccine causing injuries.[256]

Finch and Fafinski refer to the "magnitude of risk" as an additional factor to consider when determining if a duty has been breached.[257] In the context of the global COVID-19 pandemic, it may be argued that non-vaccination poses a greater risk of damage (in the pandemic context). The likelihood that harm may occur and the seriousness of the harm are considered in determining the magnitude of risk.

From Chapter 2 it emerged that vaccines are often cost-effective and offer benefits that outweigh any potential harm or side effects.[258] The court may consider this in its determination of a breach of duty. Despite the sincerity of Non's belief that she is acting in Nonva's best interests, her choice may be regarded as unreasonable from the risk-benefit approach favoured by Reiss.[259] For example, the risks of non-vaccination far outweigh the benefits of vaccination.

If Vic successfully shows that a duty of care exists, it is clear that Non should have taken reasonable precautions to reduce the potential risk (of Nonva acting as a vehicle for the spread of an infectious disease).[260] Reasonable precautions may include notifying those with whom Nonva regularly comes into contact (including the school) that Nonva is unvaccinated as well as the reasonable concern that Nonva has become infected. Failure to take reasonable precautions to reduce the potential risk may indicate that Non has breached this duty of care in that her conduct created a foreseeable risk of harm to others.

One difficulty raised in this hypothetical scenario is the reliance on a statutory exemption,[261] in addition to Non's defence of *volenti non fit injuria* (voluntary assumption of risk). Before exploring the reliance on a statutory exemption, it is worth briefly mentioning the defence of *volenti non fit injuria*, as recognised in English tort law.[262]

---

254 Caplan *et al* (2012) *JLME* 608; Baxter (2014) *UCLR* 114.
255 Finch & Fafinski (2021) 41.
256 Kostal (2015) *ABAJ* 18.
257 Finch & Fafinski (2021) 42; Caplan *et al* (2012) *JLME* 608.
258 Steiner-Dillon (2019) *UCLR* 172.
259 Reiss (2014) *CJLPP* 604.
260 Caplan *et al* (2012) *JLME* 609.
261 Caplan *et al* (2012) *JLME* 608.
262 Rodal & Wilson (2010) *MJLH* 61; Deakin *et al* (2003) 768; Tuitt *et al* (2015) 105. Other defences to negligence include contributory negligence, and *ex turpi causa non oritur actio* (illegality).

Rodal and Wilson argue that it is reasonable to accept that parents assume some level of risk by sending children to a public school that allows vaccination exemptions for non-medical reasons.[263] Rodal and Wilson note that this is, however, a difficult defence to meet as an express or implied agreement between the parties must be proven, in addition to the plaintiff's consent and acceptance of both the physical and legal risk of injury arising from the defendant's negligence.[264]

Rodal and Wilson posit that it is rare to find a plaintiff who willingly abandons the right to sue in negligence.[265] For this reason, it is very unlikely that Non will succeed with this defence. I explore this defence in greater detail in Chapter 5 in the context of the South African common-law delict.

On the other hand, the philosophical or religious exemption offered may render it more difficult to establish a legal duty and its breach — but this is not impossible. Case law indicates that individuals who knowingly have a communicable disease must take reasonable precautions to prevent its spread[266] regardless of statutory exemptions to vaccination.

It is suggested that the religious or philosophical exemption only serves as an initial line of defence for Non.[267] Although she may rely on the statutory protection afforded by a philosophical exemption, Vic may assert that such an exemption does not negate the fundamental duty to act reasonably in preventing the spread of disease to others.[268]

Non-vaccination may be a legitimate (state-sanctioned) choice, but this does not exempt the non-vaccination parent from the consequences of that choice.[269] Although some US States still permit religious and philosophical exemptions, this does not create complete protection against liability for the adverse consequences of the non-vaccination choice.[270] Non-vaccination choices have consequences that are sometimes deadly.[271] Ultimately, the courts must determine whether such exemptions provide complete protection against liability, regardless of negligence, risk, or indifference.[272] A scientific and legal foundation for bringing charges against non-vaccinators for the harm they cause does exist.[273]

---

263 Rodal & Wilson (2010) *MJLH* 61.
264 As above.
265 As above.
266 Caplan *et al* (2012) *JLME* 608.
267 Caplan *et al* (2012) *JLME* 609.
268 As above. See also DR Reiss "Decoupling vaccine laws" (2017) 58(E) *BCLR* 14.
269 Caplan *et al* (2012) *JLME* 609.
270 Caplan *et al* (2012) *JLME* 610.
271 As above.
272 As above.
273 As above.

Reiss argues that exemptions from school immunisation requirements in the US do not limit the child's available protection based on a decision not to vaccinate.[274] Reiss continues to explain that the religious or philosophical exemptions from school immunisation requirements are not based on "any in-depth consideration of the rights of the child".[275] The rationale supporting school immunisation requirements are generally based on the public good and not the individual health of unvaccinated children.[276]

Reiss continues to explain that as children's interests have historically not formed part of the school vaccination jurisprudence, using exemptions to deny children compensation from tort liability is inappropriate.[277] She suggests that although school vaccine requirements were passed to protect public health, this does not mean that they exclude the individual protection afforded to the child by providing access to life-saving vaccines.[278]

Furthermore, according to Reiss, these exemptions were not intended to protect non-vaccinating parents who deny their children vaccines despite available scientific evidence.[279] This notwithstanding, however, vaccination exemptions are often construed as a justification for non-vaccination.[280]

Reiss concludes that when parents, in the absence of a *bona fide* medical contra-indication, choose not to vaccinate they are choosing the greater risk.[281] According to her logic, it is suggested that Non's reliance on a state-sanctioned exemption does not negate her duty to act reasonably and does not exempt her from liability.

I now consider the scenario where Non does not claim a philosophical exemption to the vaccination mandate but merely fails to vaccinate Nonva.[282] As the statutory "protection" afforded by the philosophical exemption is absent, it is easier for Vic to prove the existence of a legal duty to protect against the reasonably foreseeable consequences of the non-vaccination choice.[283]

Given the combination of constructive knowledge and the foreseeability (that Nonva was at risk of contracting COVID-19 and transmitting it to others), Non failed to act in accordance

274 Reiss (2017) *SLPS* 11.
275 As above.
276 As above.
277 Reiss (2017) *SLPS* 14 refers to her previous work and that there is no presumption that the legislature intended to shield such parents from tort liability.
278 Reiss (2017) *SLPS* 15.
279 As above.
280 As above.
281 Reiss (2017) *SLPS* 17.
282 Caplan *et al* (2012) *JLME* 609.
283 As above.

with what can be expected of the reasonable person by taking no further precautions to prevent harm to others.[284]

Karako-Eyal comments that the hurdle in tort litigation lies in the difficulty of proving causation.[285] Causation may be the most difficult element to prove in this scenario and Caplan *et al* suggest that epidemiology is perhaps the most appropriate method by which to prove factual causation.[286]

Causation must be considered to establish, as a factual matter, if Non's conduct directly contributed to producing Vic's injury.[287] Traditionally, the US (including Louisiana), Dutch, Canadian, Australian, and English courts have used the "but for" (or *conditio sine qua non*) test to determine whether the defendant's (Non's) conduct satisfies the causation requirement.[288] According to this test, the defendant's conduct satisfies causation where the event would not have occurred "but for" her conduct.[289] Vic must thus demonstrate, on a preponderance of the evidence, that Non's conduct caused his infection and removal of his right lung.[290]

Proving causation in this hypothetical may be a product of laboratory testing supported by an epidemiological inquiry and presented in expert affidavits.[291] It is suggested that the most useful method of establishing factual causation in this context is epidemiology (to satisfy the "but for" test and causation) as opposed to laboratory methods.[292]

Bonita *et al* explain that epidemiology, in its modern form, "is a relatively new discipline and uses quantitative methods to study diseases in human populations, to inform prevention and control efforts".[293] They define epidemiology as "the study of the distribution and determinants of health-related states or events in specified populations, and the application of this study to the prevention and control of health problems".[294]

---

284 As above.
285 N Karako-Eyal "Increasing vaccination rates through tort law: theoretical and empirical insights" (2017) 86(1) *UMKCLR* 26. See also Levis (2017) *DLR* 1069: the problem with a vaccine preventable disease, such as measles, is that it reproduces at a very high rate and identifying a single cause of the plaintiff's harm may be very difficult.
286 Caplan *et al* (2012) *JLME* 609.
287 As above.
288 As above; Sobczak (2010) *ERPL* 1161–1162.
289 Caplan *et al* (2012) *JLME* 609.
290 As above.
291 As above.
292 Caplan *et al* (2012) *JLME* 607. See Carter Newell Lawyers "The 'but for' test of causation in Australian law" (December 2020) https://www.carternewell.com/page/Publications/2020/the-but-for-test-of-causation-in-australian-law/ (accessed 1 December 2022).
293 R Bonita, R Beaglehole, T Kjellström & WHO *Basic epidemiology* (2006) 1.
294 Bonita *et al* (2006) 2.

Accordingly, an investigation may be undertaken to present the timeframe of symptom onset in both children.[295] If it cannot be proven with 100% certainty that Nonva infected Vic with the Omicron COVID-19 variant,[296] experts may, however, indicate a preponderance of the evidence that Nonva infected Vic with the Omicron COVID-19 variant.[297] The scientific evidence would then strongly support the claim that Nonva was, in fact, the source of Vic's debilitating disease,[298] so satisfying the "but for" test — "but for" Non's conduct Nonva would not have contracted Omicron and infected Vic.

Vic must prove that more likely than not, Non's conduct caused his harm.[299] Non's conduct satisfies causation where the event (Vic's infection) would not have occurred "but for" her conduct (non-vaccination of Nonva and Vic's infection and harm).

There must thus be sufficient evidence to support the causal explanation of Non's (tortious) conduct which renders it the most "plausible suggested explanation".[300] Notably, epidemiology may be used to satisfy the "but for" test and establish factual causation. Epidemiology is only one avenue for satisfying the "but for" test for causation and other ways to prove causation include the material contribution test[301] (which is arguably better suited in the context of mass outbreaks, as discussed above), or "substantial factor" test, as used in Louisiana (discussed below).

In addition to proving factual causation, Vic must also prove that "intervening factors" did not break the chain of liability.[302] As mentioned above, I accept that there are no intervening factors that sever the chain of liability.

In the US, Dutch, Australian, and English law context, proximate (legal) causation limits liability based on remoteness or unexpected and unforeseen consequences.[303] To satisfy

---

295 Caplan *et al* (2012) *JLME* 607.
296 Caplan *et al* (2012) *JLME* 608.
297 As above.
298 Caplan *et al* (2012) *JLME* 609.
299 See Reiss (2014) *CJLPP* 619; DR Reiss "Legal responsibilities in choosing not to vaccinate" (12 September 2013) https://shotofprevention.com/2013/09/12/legal-responsibilities-in-choosing-not-to-vaccinate/ (accessed 19 January 2022).
300 Levis (2017) *DLR* 1070.
301 See Carter Newell Lawyers "The 'but for' test of causation in Australian law" (December 2020) https://www.carternewell.com/page/Publications/2020/the-but-for-test-of-causation-in-australian-law/ (accessed 1 December 2022).
302 Baxter (2014) *UCLR* 139. For purposes of this discussion it is assumed that there is no *novus actus interveniens*.
303 Caplan *et al* (2012) *JLME* 609; Finch & Fafinski (2021) 65; Sobczak (2010) *ERPL* 1162; Clark & Harris (2005) *DCJ* 18: "The Ipp Report also attempts to provide some guidance to Australian courts in relation to causation. There are two elements to causation in Australia, with the plaintiff bearing the burden of proof: (1) factual causation, which concerns the factual issue of whether the negligence played a part in bringing about the harm; and (2) the scope of liability, which is a 'normative question' about whether the defendant ought to be held liable to pay damages for that harm."

proximate causation, Vic must show that Non's actions were a substantial factor in bringing about his infection and subsequent right-lung removal.[304] In other words, Vic must prove that the damage is not too far removed from Non's negligence.[305]

Thus, the courts will consider whether Non could have (reasonably) foreseen Vic's injuries.[306] The foreseeability of harm principle is justified by the scope of the duty of care; if the harm suffered by Vic falls outside of Non's duty then it is not considered generally (or reasonably) foreseeable.[307]

Muhametaj and Mulheron suggest that foresight (or foreseeability) which is considered in relation to a duty of care[308] and breach of duty,[309] is also considered to determine causation and remoteness of damage.[310] It is not necessary for Non to have foreseen that Vic's lung would collapse (a specific type of harm) and it is sufficient if Non foresaw that harm might occur (risk of harm). Reiss posits that "contracting a vaccine-preventable disease is the natural and foreseeable result of not vaccinating the child, fulfilling the element of proximate cause".[311] Furthermore, Reiss suggests that it is foreseeable that an unvaccinated child is at higher risk of contracting and transmitting a vaccine-preventable disease.[312]

The court will weigh the risks of Non's failure to vaccinate Nonva, her failure to warn and/or inform others with whom she regularly came into contact, and her failure to withhold her child from day care when she was ill knowing potentially vulnerable children were present.[313]

In the US, the court will establish whether a reasonable person in Non's position would have anticipated the risk of Vic's injuries and if the failure to vaccinate Nonva (and bringing her in contact with vulnerable children) was a substantial factor in bringing about Vic's injuries.[314]

Assuming that the first three elements of the *prima facie* case have been established, Vic may easily prove that he has suffered actual harm.[315] Vic may be able to recover non-patrimonial damages (to compensate for pain and suffering) and patrimonial damages (to

304 Caplan *et al* (2012) *JLME* 609.
305 Sobczak (2010) *ERPL* 1162.
306 Caplan *et al* (2012) *JLME* 609; Finch & Fafinski (2021) 69.
307 Finch & Fafinski (2021) 69.
308 Mulheron (2020) 52.
309 As above.
310 Muhametaj (2017) *GJPLR* 32; Mulheron (2020) 52.
311 Reiss (2018) *TJB* 74.
312 Reiss (2014) C*JLPP* 609.
313 Caplan *et al* (2012) *JLME* 609.
314 As above.
315 Caplan *et al* (2012) *JLME* 610.

compensate for quantifiable expenses incurred in treating his COVID-19 infection and surgery to remove his right lung).[316]

Laboratory and epidemiological understanding of a disease — such as COVID-19 — may establish a persuasive causal link between the decision not to vaccinate, and the failure to take appropriate precautions (such as isolating an unvaccinated child who may have been exposed from highly vulnerable persons).[317] Liability may certainly exist if Non simply chooses not to vaccinate Nonva and a serious injury or even death results.[318]

Whether or not parents should be held liable in tort (or delict) for failing to vaccinate their children has attracted increasing public attention in recent years.[319] Despite this attention, the legal research output (scholarly writings and commentaries) on the topic is in its infancy.[320]

Responses to whether or not non-vaccination parents should be held liable in tort are varied.[321] Various approaches have been formulated in an attempt to answer whether non-vaccinating parents should face tortious liability for their choice(s).[322]

The potential causes of action for those infected by an unvaccinated child in tort law are most likely premised on claims of negligence.[323] Notably, if the non-vaccinating parents know that their child has been exposed to a vaccine-preventable disease (such as measles or COVID-19) and is showing symptoms (Nonva) but nevertheless bring the child into contact with other children (or adults who care for vulnerable children) the non-vaccinating parents (Non) may be held liable on the basis of the theory of fraudulent concealment.[324]

---

316 As above.
317 As above.
318 As above.
319 Karako-Eyal (2017) *UMKCLR* 9.
320 As above.
321 As above.
322 The different models of liability ("no liability model"; "liability model", & "intermediate approach") must not be confused with different torts.
323 Baxter (2014) *UCLR* 112–113 also mentions the fraudulent concealment of facts (a tort separate from the tort of negligence).The five elements of fraudulent concealment are: (1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages. Baxter posits that a claim based on fraudulent concealment is possible if the fraudulent concealment of the facts led to the infection of another. Regarding non-vaccination, this cause of action would only apply in limited circumstances as the injured party must base their claim on the *intentional* concealment of the defendant's infection. For vaccine-misinformation see generally Reiss & Diamond (2019) *SDLR* 531–580.
324 Baxter (2014) *UCLR* 113 posits that similar claims have been considered in cases involving sexually transmitted diseases. These cases are premised on the consent to sexual intercourse and the risk concealment (of infection with a venereal disease). Although the nature of the concealed risk in sexually transmitted disease is very different from the transmission of vaccine-preventable diseases, the risks and consequences are analogous. The infected person (or the person's parent) conceals information about a contagious disease from someone who is vulnerable to contracting the disease. Additionally, the transmission is preventable as

Baxter illustrates this with an example where a plaintiff may bring a tort suit based on the defendant's alleged representations that his or her child had been vaccinated or had not been exposed to a vaccine-preventable disease if the defendant-parent (Non) knew that those representations were false.[325] This may arise in situations where a non-vaccinating parent makes such a false claim to enrol the child in a state school that does not allow for personal belief exemptions. If the non-vaccinated child (Nonva) then transmits a vaccine-preventable disease to another child (Vic) that child may be able to prove all the elements of fraudulent concealment.[326]

Apart from claims of negligence or fraudulent concealment, Baxter suggests that the negligent transmission of a contagious[327] (vaccine-preventable) disease is a more appropriate cause of action for someone who has been infected by an unvaccinated child.[328] Baxter explains that the courts in some US jurisdictions have found negligence in cases where one person contracts a contagious disease from another person.[329] Although the transmission from an unvaccinated child does not involve the same intimate contact as sexually-transmitted-disease cases, Baxter argues that the same general negligence principles apply.[330]

According to Baxter,

> under either theory [negligence, fraudulent concealment of facts, or negligent transmission of a contagious disease], liability [may] exist regardless of why the parent chose not to vaccinate the child.[331]

Ultimately, no liability can be imposed without a recognised duty of care regardless of which tort theory is adopted.[332] Consequently, Non's failure to warn or protect others constitutes negligence only if there is a duty on her to act. Non arguably had a duty to act and her failure to do so constitutes negligence.

---

the infected person (or their parent) can disclose the infection or risk of transmission and allow others to avoid contact leading to infection.

325 Baxter (2014) *UCLR* 113.

326 As above.

327 Infectious diseases that spread from person to person (as opposed to animal to person) are said to be "contagious". See Nemours Children's Health "What's the difference between infectious and contagious?" (date unknown) https://kidshealth.org/en/teens/contagious.html (accessed 1 December 2022). COVID-19 and measles are both a contagious disease, see SFCDCP "Infectious Diseases A to Z" (date unknown) https://www.sfcdcp.org/infectious-diseases-a-to-z/ (accessed 1 December 2022).

328 Baxter (2014) *UCLR* 113–114.

329 As above.

330 As above.

331 Baxter (2014) *UCLR* 112.

332 Baxter (2014) *UCLR* 114.

In conclusion, to succeed with a claim grounded in the tort of negligence in the US, Vic must demonstrate that a duty of care exists and that Non breached this duty. As discussed above, Vic may satisfy the causation requirement — specifically the "but for" test — by relying on epidemiology. Vic must also prove that he suffered some harm or loss as without damage there is no case. Vic may possibly succeed with a claim in negligence — and specifically the tort of negligence — in the US as he is able to prove all the elements of the tort of negligence. Below, I consider the Nonva/Vic hypothetical in the context of Canadian tort law.

4.4 CANADIAN TORT LAW CONTEXT: NONVA/VIC HYPOTHETICAL

For purposes of this discussion, it is accepted that on 24 January 2023, Nonva and Non returned to Canada and not the US (as in the original set of facts). Before exploring the Canadian tort law context, it is worth noting that the Canadian legal system is largely based on the common law,[333] save for the province of Quebec.[334] Quebec is the only Canadian province with a civil code based on the Napoleonic Code.[335] Quebec is excluded from our discussion unless otherwise indicated.

Rodal and Wilson have considered the liability of non-vaccinating parents in the Canadian tort law context.[336] They state that the issue of whether parents (Non) could be held liable in negligence for failure to vaccinate their child (Nonva), is a novel issue in law.[337] Using parental rights and their limitation as their point of departure,[338] the authors explain that as vaccines are aimed at protecting societal interests and public health, overriding parental objections are often justified.[339] This is similar to Reiss's argument where she rejects parental immunity in favour of a reasonable-parent standard for tortious liability.[340]

---

333 Canada Gov "Where our legal system comes from" (2021) https://www.justice.gc.ca/eng/csj-sjc/just/03.html#:~:text=Quebec%20is%20the%20only%20province,it%20is%20used%20throughout%20Canada (accessed 29 March 2022).

334 Á Fuglinszky "Civil liability in a mixed jurisdiction: Quebec and the network of ratio communis" (2013) 28 *TECLF* 11.

335 Canada Gov "Where our legal system comes from" (2021) https://www.justice.gc.ca/eng/csj-sjc/just/03.html#:~:text=Quebec%20is%20the%20only%20province,it%20is%20used%20throughout%20Canada (accessed 29 March 2022).

336 Rodal & Wilson (2010) *MJLH* 47.

337 As above.

338 As above. See *B (R) v Children's Aid Society of Metropolitan Toronto* 1995 CanLII 115 (SCC) (Jehovah's Witness parents, & child's blood transfusion).

339 Rodal & Wilson (2010) *MJLH* 47.

340 Reiss (2018) *TJB* 74.

Rodal and Wilson's submission also resonates with the German case of *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920* where the *Bundesverfassungsgericht* ruled that although parents have the rights and duties to raise their children as they see fit, the overarching best interests of the child must prevail and this demands that the parental duty to vaccinate must be met.[341] Rodal and Wilson opine that state intervention (such as mandating vaccination) is often perceived as a "coercive and heavy-handed" approach.[342] Without any further investigation into parental autonomy and the jurisprudence on state-sanctioned limitations of parental rights, the authors suggest an examination of private-law consequences in the context of non-vaccination.[343]

Rodal and Wilson point out that one of the basic principles of tort law is *restitutio in integrum*.[344] On the other hand, Brennan and Reiss posit that restitution is arguably a secondary objective of tort law and that its main aim is compensation.[345] In the context of non-vaccination, I agree that compensation is more appropriate, as restitution (in the strict sense of the term) cannot be achieved in that in our example Vic's right lung cannot be restored.

Rodal and Wilson state that to succeed with a claim of negligence in tort, Vic must prove five elements to establish liability for the harm he suffered:

(1) the injury was not too causally distant from the tortious conduct;
(2) the injury was caused by negligent conduct;
(3) that it breached an accepted standard of care;
(4) that a duty of care was owed to Vic specifically; and
(5) that the damages are recoverable.[346]

The authors first explore remoteness to establish whether decisions (not to vaccinate, the failure to self-isolate, and the failure to warn and inform others) which led to the adverse event (harm or damage) are sufficiently connected to the outcome to be considered compensable (as the recovery is limited to those injuries that were reasonably foreseeable as a result of the negligence).[347] Thus, if the resulting harm to Vic was reasonably foreseeable, Non is liable to the extent of that damage.[348]

---

341 *ECLI:DE:BVerfG:2022:rs20220721.1bvr046920* [1]–[3], & [69].
342 Rodal & Wilson (2010) *MJLH* 47.
343 As above.
344 As above.
345 Brennan (2017) 6; Koziol (2015) 380; Reiss (2014) C*JLPP* 597; Reiss (2017) *SLPS* 14.
346 Rodal & Wilson (2010) *MJLH* 47–48.
347 Rodal & Wilson (2010) *MJLH* 47.
348 Rodal & Wilson (2010) *MJLH* 48.

To assess remoteness in the context of non-vaccination one must ask whether Non's decision is sufficiently related to the development of a vaccine-preventable condition.[349] Rodal and Wilson suggest that the decision not to vaccinate (with the resulting transmission and illness) is sufficiently foreseeable.[350] This supports the arguments under our discussion of the US that Non could reasonably have foreseen that the non-vaccination of Nonva might cause harm (or a risk of harm) to others, Vic, for example.

Rodal and Wilson posit that the extent of foreseeability requires a detailed examination of causation, including the epidemiology of vaccine-preventable diseases.[351] As mentioned, to establish liability, Vic must prove a causal link between Non's negligent conduct and his subsequent injury.[352] Once again it is suggested that epidemiology is likely the most appropriate and viable way to prove factual causation in the context of non-vaccination and the Nonva/Vic hypothetical and to satisfy the "but for" test.

Rodal and Wilson point out that the use of the "but for" test in mass outbreaks may raise problems of proof.[353] For purposes of this hypothetical, I do not address a mass outbreak, but it is worth briefly noting how causation will likely play out in a mass outbreak scenario.

Rodal and Wilson criticise the "but for" test for non-vaccination and a mass outbreak in that the outbreak involves a "collective of individuals" and the outbreak of the disease resulting in damage depends on the "but for" the actions of all of them.[354] Consequently, the fault for the outbreak cannot be pinned down on any particular individual under the logic of the "but for" test.[355] As mentioned earlier, the material contribution test may serve as an alternative to the "but for" test in the context of mass outbreaks.[356]

A single individual would not ordinarily be held causally responsible for a mass outbreak.[357] It would be impossible to identify which unvaccinated individual either transmitted the virus to a vaccinated child or was responsible for the breakdown of herd immunity.[358] According to Rodal and Wilson, for successful person-to-person transmission of

349 As above.
350 As above.
351 As above.
352 As above.
353 Rodal & Wilson (2010) *MJLH* 48–49.
354 Rodal & Wilson (2010) *MJLH* 51.
355 As above.
356 As above.
357 Rodal & Wilson (2010) *MJLH* 61.
358 As above.

the virus (and so for mass outbreaks to occur) a distinct portion of the population must be unvaccinated.[359] If such a group is readily identifiable, recovery may be possible.[360]

According to the Supreme Court of Canada in *Resurfice* the "material contribution" test may be applied (instead of the "but for" test) when two criteria are met:[361]

(1) It must be impossible for Vic to prove that Non's negligence caused his injury using the "but for" test. The impossibility must be due to factors beyond the plaintiff's control; for example, current limits of scientific knowledge; and
(2) It must be clear that Non breached a duty of care owed to Vic, thereby exposing Vic to an unreasonable risk of injury which Vic must then have suffered. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.

The court in *Resurfice* ruled that the "material contribution" test may be applied to cases where it is uncertain which of several defendants is responsible for the injury[362] — as in the context of a mass outbreak. One of the defendants must be the cause of Vic's injuries and all of the defendants must be negligent. Only then may the "material contribution" test be used to impose liability as the "but for" test renders it impossible.[363]

Accordingly, the "material contribution" test may allow a victim (Vic) to recover damages from a "discrete group of defendants" (non-vaccinating parents).[364] If there is more than one possible cause of harm, Vic need not prove that Non's breach of duty was the only (or even the main) cause of his harm.[365] He need only prove (on a balance of probabilities) that Non's breach of duty "materially contributed" to the harm.[366] Accordingly, the "material contribution test" may be applied in determining factual causation. There are however certain *caveats* as we saw in the earlier discussion of *Resurfice*.[367] If Non's breach of her duty

359 As above.
360 As above.
361 *Resurfice* [25]. See also Rodal & Wilson (2010) *MJLH* 51. See Carter Newell Lawyers "The 'but for' test of causation in Australian law" (December 2020) https://www.carternewell.com/page/Publications/2020/the-but-for-test-of-causation-in-australian-law/ (accessed 1 December 2022).
362 *Resurfice* [17]–[29]; Rodal & Wilson (2010) *MJLH* 51.
363 As above.
364 Rodal & Wilson (2010) *MJLH* 51–52. See Ciolli (2008) *YJBM* 132–133 for a discussion of class action law suits (and its requirements) in the context of non-vaccination. See also E Jamrozik *et al* "Victims, vectors and villains: are those who opt out of vaccination morally responsible for the deaths of others?" (2016) 42 *JME* 764 for a discussion of collective action.
365 Rodal & Wilson (2010) *MJLH* 53; Finch & Fafinski (2021) 59.
366 As above.
367 As above.

materially increases the risk of harm, this may also be considered in the context of factual causation[368] — Non may be liable for materially increasing the risk of harm.[369]

On the other hand, Reiss suggests that a suit against a community of non-vaccinating individuals conflicts with the operation of the tort system.[370] Torts focus on individual accountability, not collective responsibility. Similarly, the South African common-law delict may not be the appropriate vehicle with which to litigate against a community of non-vaccinating parents. Although the South African common-law delict provides for joint wrongdoers, a delictual suit brought against a class or group (or community)[371] of individuals may be well neigh impossible (for various reasons, such as practicability, litigation costs, evidence, and policy considerations) and falls outside the scope of this research.

Rodal and Wilson continue to explain that the identification of a recognised standard of care[372] and the (individual or collective group) breach thereof, is a particularly challenging hurdle.[373] Although vaccination is often presented as an individual choice in Canada, it is not clear whether non-vaccinating parents could be held liable due to the lack of clarity regarding the standard of care.[374]

Wrongdoing is often assessed based on an objective standard as the "reasonable person avoids creating a foreseeable risk of injury to others".[375] As mentioned above, the foreseeability of injury is determined by assessing Non's conduct and establishing whether it was objectively reasonable to expect that this specific danger (non-vaccination and sending Nonva to day care) will cause harm or injury to others (Vic). Rodal and Wilson argue that it is foreseeable that the non-vaccination of a child (Nonva) could result in the contraction of an otherwise preventable disease.[376] They however posit that it is unclear whether the non-vaccinating parent (Non) could foresee that the decision (non-vaccination) may potentially place other children (Vic) at risk.[377]

To address this doubt, Rodal and Wilson suggest that the creation of risk is only negligent if it is a substantial risk likely to result in harm, especially serious harm. This, of course, links

368 Finch & Fafinski (2021) 60.
369 As above. See Levis (2017) *DLR* 1072–1073 for a discussion of "alternative liability" in the situation where it cannot be established that which actor (one of multiple defendants) caused the harm but it is certain that one of the defendants is the cause of the harm.
370 Reiss (2014) *JLPP* 599.
371 See Rodal & Wilson (2010) *MJLH* 61; Ciolli (2008) *YJBM* 132–133; Finch & Fafinski (2021) 61.
372 Finch & Fafinski (2021) 37.
373 Rodal & Wilson (2010) *MJLH* 53.
374 Rodal & Wilson (2010) *MJLH* 61–62.
375 Rodal & Wilson (2010) *MJLH* 53; Baxter (2014) *UCLR* 131.
376 Rodal & Wilson (2010) *MJLH* 53.
377 As above.

to foreseeability (risk of harm).[378] Rodal and Wilson note that although the "probability of injury is small, a loss will be recoverable where the extent of harm is so great" if it were to materialise, that the "reasonable person would act to prevent it".[379]

Baxter confirms this notion and states that the US courts often agree that "the risk of harm to others is foreseeable in certain circumstances despite a parent's [Non's] subjective belief that immunisations are dangerous or unnecessary."[380] Thus, Non's subjective belief that immunisations are dangerous or unnecessary is immaterial and the risk of harm to others is reasonably foreseeable.

Rodal and Wilson indirectly refer to the risk-benefit equation to determine whether a risk is reasonable by assessing how advantageous the act (i.e., vaccination) is, compared to the negative effects associated with taking the risk (i.e., non-vaccination).[381] As vaccination is scientifically proven to be more beneficial than harmful, it can be argued that Non's reliance on "a non-medical exemption to routine vaccination is not a beneficial activity, neither for the child nor for society".[382] Rodal and Wilson go so far as to suggest that "it can in fact be considered a harmful activity, as non-vaccinated children increase the risks of disease exposure and transmission".[383] They suggest that the advantages and benefits of vaccination and the immense risk of non-vaccination may even support a stricter standard of care.[384]

Interestingly, Rodal and Wilson limit the risk-benefit equation to non-medical exemptions to routine vaccination, arguably implying that medical exemptions must be allowed as being beneficial for the child and society. This notion correlates with the "liability model" referred to by Karako-Eyal.[385] Rodal and Wilson's suggestion supports one branch of the

---

378 As above.
379 As above.
380 Baxter (2014) *UCLR* 133.
381 Rodal & Wilson (2010) *MJLH* 53–54.
382 As above.
383 As above.
384 Rodal & Wilson (2010) *MJLH* 57; Finch & Fafinski (2021) 37.
385 Karako-Eyal (2017) *UMKCLR* 9–10: the other schools of thought include the "no liability model" and the "intermediate approach". The "no liability model" fails to address issues of compensation and merely suggests that no parents should be held liable in tort for failing to vaccinate their children. These scholars propose that other tools be employed to address non-vaccination. This approach fails to recognise that deterrence is not necessarily the main goal of tort litigation in the context of non-vaccination and offers no alternative methods of compensation. These authors merely suggest that public education and trust building of vaccines will contribute to the development of an ethic of solidarity. The "intermediate approach" scholars suggest that it is appropriate to impose non-vaccination costs on non-vaccinating parents. However, they suggest that tort litigation is not the only, exclusive, appropriate mechanism to achieve this goal. Accordingly, these scholars suggest that multiple mechanisms must be considered and implemented. One such mechanism includes the suggestion of an *ex ante* costs penalty, imposed on non-vaccinating parents. This *ex ante* cost penalty is inspired by opt-out fees, taxes, or deprivation of financial benefits. See, e.g., the forfeiture of the family rebate (in Australia) as discussed in Ch 2.

"liability model" where scholars argue that liability must be imposed on parents like Non who rely on philosophical or religious exemptions but not on parents relying on medical exemptions.[386]

The identification and establishment of a duty of care are generally considered the primary mechanisms to determine the extent of negligence liability.[387] Hence, proving that damage occurred is not enough — Vic must also prove that Non owed him a duty.[388] As noted earlier, duties of care are limited, especially in the case of omissions, and Rodal and Wilson note an important *caveat* to the tort analysis as the duty of care usually relates to malfeasance (acting wrongfully) as opposed to nonfeasance (failure to act).[389] Reiss suggests that non-vaccination is a negligent omission (as opposed to nonfeasance).[390] However, there is a growing list of exceptions that give rise to positive (affirmative) duties in certain special relationships.[391] An example is the case of *Childs v Desormeaux*.[392]

In this case, the Supreme Court of Canada considered the imposition of a positive duty of care upon three classes of defendant: (1) those who create risks and invite others to participate in them; (2) those who exercise a "paternalistic relationships of supervision and control"; and (3) those who "offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk".[393]

Rodal and Wilson suggest that non-vaccination (failure to vaccinate) falls within the first "creation of risk" class.[394] This duty, as stated in *Childs*, arises from Non's "causal relationship to the origin of the risk of injury faced by the plaintiff" (Vic), and here the causal chain runs

386 Karako-Eyal (2017) *UMKCLR* 10: the scope of liability (of the "liability model") is debated amongst scholars. According to one approach, parents failing to vaccinate their children should carry the resulting costs of non-vaccination through tort liability. Some scholars persist that tort liability should only apply to the parents relying on a philosophical exemption, excluding parents relying on religious exemptions. Another view holds that in cases where a child is not vaccinated due to lack of access to healthcare services or a vaccine shortage, no liability is to be imposed on the parents. A group of scholars, adopting a more narrow or rigid approach, suggest that liability must be imposed on non-vaccinating parents, regardless of the reasons for failing to vaccinate their child.

387 Rodal & Wilson (2010) *MJLH* 57.

388 As above.

389 Rodal & Wilson (2010) *MJLH* 59.

390 Reiss (2014) *JLPP* 608: "nonfeasance" refers to the failure to perform an act that is required by law.

391 Rodal & Wilson (2010) *MJLH* 59.

392 2006 SCC 18 as referred to in Rodal & Wilson (2010) *MJLH* 59.

393 Rodal & Wilson (2010) *MJLH* 59.

394 As above. In some cases, there is a duty to rescue others from situations of danger. Thus, one possible future direction for this area is the imposition of a duty to act, to receive vaccinations or mitigate exposure, thus "rescuing" others from infectious disease. The courts are, however, reluctant to impose an obligation of rescue. In the court's analysis, it would be relevant to examine the degree of risk posed to the defendant in taking this action, including the risk of adverse effects from the vaccine, and the degree of uncertainty attached to the scientific knowledge, before concluding that such a duty to rescue exists.

from Non's failure to vaccinate (and Non's failure to self-isolate Nonva and warn or inform others) to Vic's subsequent infection and removal of his right lung.[395]

Although the reasonable non-vaccinating person, like Non, believes that she is acting in the best interests of her child (Nonva), she must also avoid creating or causing harm or (substantial) risks of harm to other children.[396] This is because the reasonable person is independent of the "idiosyncrasies of the particular defendant in question" — Non's personal or subjective views on vaccination are thus irrelevant.[397] Therefore, Non had a duty of care to avoid creating or causing harm or (substantial) risks of harm to other children (Vic). This duty of care may include: vaccinating Nonva, self-isolating Nonva while she was ill, or at least warning and/or informing others of Nonva's illness.

Parents, like Non, are expected to know that infectious diseases are transmittable.[398] Rodal and Wilson posit that even though a non-vaccinating parent (Non) may disagree she was nevertheless informed by her healthcare providers or through the exemption form she was required to sign, that the non-vaccination of Nonva placed her at a greater risk of developing vaccine-preventable disease and transmitting it to others.[399]

As under tort law in the US, to establish liability for negligence Vic's harm must be actual and compensable by damages — the classic type of recoverable harm.[400] Rodal and Wilson suggest that the category of children relying on herd immunity for protection from dangerous childhood diseases could suffer significant damages which are compensable.[401]

As in certain US States, in Canada, the defence of statutory authority may serve as an initial line of defence when deciding a case of exposure within schools.[402] Although Ontario's Immunisation Act requires certain immunisations (according to a prescribed schedule) for attendance at school, there are exceptions available to those non-vaccinating parents like Non who file a statement of medical exemption or a statement of conscience or religious belief.[403]

The defence of statutory authority holds that a defendant (Non) cannot be held liable in negligence for her actions (commission or omission) if there is a legal authorisation (e.g.,

395 Rodal & Wilson (2010) *MJLH* 59.
396 Rodal & Wilson (2010) *MJLH* 53.
397 As above.
398 Rodal & Wilson (2010) *MJLH* 58.
399 As above.
400 Rodal & Wilson (2010) *MJLH* 60.
401 As above.
402 As above.
403 Rodal & Wilson (2010) *MJLH* 60–62.

statutory exemptions) for the action or non-action in question unless that action or non-action was executed negligently.[404]

The defence of statutory authority protects non-vaccinating parents (Non) if they base their decision on personal or medical beliefs and follow the correct procedure. Non-vaccinating parents are not penalised for simply relying on an exemption, as the exemption is an acceptable statutory choice.[405]

It is important to note that if the exemption is taken but the non-vaccinating parent (Non) acts negligently, the possibility of an action in negligence remains.[406] Therefore, if Non has acted negligently, the statutory authority defence will not apply.[407] I suggest that Non's negligence negates any protection offered by the statutory authority defence.

As mentioned, although parents, like Non, are not forced to vaccinate their child (Nonva), the absence of a vaccine mandate and allowance made for non-vaccination does not absolve Non from all the consequences of her choice not to vaccinate.[408]

In conclusion, to succeed with a claim grounded in the tort of negligence in Canada, as in the US, Vic must show that a duty of care exists and that Non breached this duty. Vic may satisfy the causation requirement, and specifically the "but for" test, by calling on epidemiology. Vic must also prove that he suffered some harm or loss and that the damages are recoverable as without damage there is no case. In Canada, Vic may possibly succeed with a claim in negligence, and specifically the tort of negligence, as he is able to prove all the elements of the tort of negligence. Furthermore, it is suggested that the material contribution test is better suited in the context of mass outbreaks, as discussed above, and that state-sanctioned immunisation exemptions do not automatically absolve non-vaccinating parents from tortious liability.

I now turn to two civil law pockets within common-law jurisdictions. Zweigert and Kötz characterise Louisiana and Quebec as "fascinating models of a symbiosis of Civil Law and Common Law".[409] First, the province of Quebec in Canada is explored followed by the State of Louisiana in the US.

404 As above.
405 As above.
406 As above.
407 Rodal & Wilson (2010) *MJLH* 61.
408 Baxter (2014) *UCLR* 140; Rodal & Wilson (2010) *MJLH* 61.
409 Zweigert & Kötz (1998) 115 & 118.

4.5 CIVIL-LAW POCKETS AND THE NONVA/VIC HYPOTHETICAL: QUEBEC AND LOUISIANA

4.5.1 Quebec

For purposes of this discussion, it is accepted that on 24 January 2023, Nonva and Non returned to Quebec and not the US (as in the original set of facts). The question of non-vaccination and civil liability is yet to be decided by the judiciary of Quebec. Despite this *lacuna* in the case law on this specific issue, it is worth investigating the tort law of Quebec to enrich this discussion and provide insight into the South African approach.

Baudouin explains that in Quebec the "intentional or unintentional character of the act or omission is immaterial"[410] in determining whether civil liability exists and that "compensation of the victim for the damage suffered is due, whether it was caused intentionally or not".[411] This means that Non's liability is not restricted to intention-based conduct and her unintentional (perhaps negligent) conduct (non-vaccination and sending Nonva to day care while ill without at least warning and/or informing others) may attract liability in the province of Quebec. This correlates with the observation by Reiss above that the sincere belief of the non-vaccinating parent that the conduct (non-vaccination) is reasonable, is immaterial.[412]

Baudouin posits that,

> unlike traditional common law, which is reluctant to impose liability unless there exists a positive duty to act, the Quebec civilian system has always been of the view that fault can result both from an act or omission. The legal duty to act may arise either from a specific legislative provision […] or from a more general standard, according to which a person is at fault if not acting would be contrary to the standard of conduct that one might expect from a reasonable person under similar circumstances.[413] (Footnotes omitted.)

From the above, it is clear that in the province of Quebec, the "duty of care" approach is not necessarily adopted to establish liability — as happens in other Canadian provinces and the

410 JL Baudouin *Tort law in Quebec* (2018) Ch 1, [41].

411 Baudouin (2018) Ch 1, [41]–[42]: however, if the fault is proven to be *intentional*, the plaintiff "will not, as a rule, have to prove the causality between the act and the loss suffered" as it is presumed. Baudouin [43] explains that the traditional degrees of fault as adopted in Roman law (*culpa levis*, *culpa levissima*, & *culpa lata*) has never formed part of the law of Quebec. However, gross negligence "which represents a conduct close to intentional behaviour involving total and wanton disregard for others, is recognised by both the Code and case law and has a legal impact".

412 Reiss (2014) *JLPP* 598 & 604.

413 Baudouin (2018) Ch 1, [40].

US. Rather, reference is made to a "duty to act" to establish the element of fault with reference to the conduct of a reasonable person.

According to Baudouin, in Quebec there are four basic conditions in establishing civil liability: (1) imputability (culpability or capacity to act);[414] (2) fault; (3) which "must have brought about a compensable harm or loss"; and (4) "there must be an adequate causal connection between the fault of the defendant and the damage caused to the plaintiff".[415]

Thus, Non must have the capacity to act, which is assumed in the Nonva/Vic hypothetical. Vic must prove Non's fault (second element) and that her fault was the cause (fourth element) of his compensable harm or loss (third element). According to Baudouin, fault is measured by an objective (reasonable person) standard as deduced from legislation or case law in which the courts "identify unacceptable forms of behaviour".[416]

The expected standard in fault is that of "a person reasonably prudent and diligent" and Baudouin refers to this as an "abstract model" that the courts use to compare the conduct of the defendant to that of the reasonable person.[417] A person (Non) may be at fault if her conduct departs "from the standard of the model of a normally prudent and reasonable person acting under similar circumstances".[418] This is similar to the test in *Kruger v Coetzee* discussed above.

Baudouin explains that fault may include the "breach of a minimal norm of behaviour generally acceptable in human relationships".[419] Whether or not vaccination *per se* is regarded as a "minimal norm of behaviour generally acceptable in human relationships" is not clear, nor has it been decided whether non-vaccination amounts to a breach of this minimal norm of behaviour. I suggest that it is not *per se* the non-vaccination of Nonva which may amount to the "breach of a minimal norm of behaviour". I suggest further that the failure to vaccinate alone does not automatically extend to the conclusion that non-vaccination itself is a breach of the minimal norm of behaviour generally acceptable in human relationships.

I suggest that the "breach of the minimal norm of behaviour generally acceptable in human relationships" in the context of this hypothetical extends beyond the act of non-vaccination to the act of exposing others to the risk of infection, failure to warn or inform them, and the failure to self-isolate Nonva. Therefore, the "breach of a minimal norm of behaviour" refers to Non's conduct in sending Nonva to day care whilst she was ill, her failure to self-

414 Fuglinszky (2013) *TECLF* 17.
415 Baudouin (2018) Ch 1, [23].
416 Baudouin (2018) Ch 1, [31]–[32].
417 Baudouin (2018) Ch 1, [31] & [46].
418 As above.
419 Baudouin (2018) Ch 1, [31].

isolate Nonva whilst she was ill, and Non's failure at least to warn or inform others that Nonva was ill.

I suggest that the minimal norm of behaviour generally acceptable in human relationships includes the expectation that Non must act in the best interests of Nonva, but also that Non must act in the best interests of other children (Vic).

I suggest that Canada's pro-vaccination sentiments are clear from their public health communications and their case law (indicating that vaccination is generally in the best interests of both the child and the public at large). Canada's pro-vaccination attitude illustrates how important vaccines are for the benefit of individuals as well as the protection of others (Vic).

For now, however, Vic must still prove that Non's failure to act as the normally prudent and reasonable person under similar circumstances caused the harm he suffered. However, fault is not enough, and Vic must still prove damage (third element) and causation (fourth element). Vic must prove that there is a "causal connection between the fault and the damage"[420] and Baudouin emphasises that the "existence of an adequate causality is absolutely necessary" to establish liability in Quebec.[421] In *Laferrière v Lawson*[422] Gonthier J indicated that,

> [c]ausation in law is not identical to scientific causation, and must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume. Statistical evidence may be helpful as indicative but is not determinative. Even where statistical and factual evidence do not support a finding of causation on the balance of probabilities with respect to death or sickness, such evidence may justify a finding of causation with respect to lesser damage, such as shorter life or greater pain. If, after consideration of all the factors, a judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any real damage, then recovery should be denied.[423]

In the context of non-vaccination, and specifically the Nonva/Vic hypothetical, this means that the epidemiological evidence (as suggested by Rodal and Wilson above) may support the existence of a causal link, but this is not decisive or determinative in Quebec. According to *Laferrière v Lawson* above, even if the scientific or statistical evidence is insufficient to support a finding of causation on the balance of probabilities, it may be indicative of, for example, a shorter lifespan which the court may take into account to determine causation in law.

Baudouin states that the mere fact that a person complies with statutory norms in Quebec "does not necessarily mean that they can always escape civil liability" as the "intensity of the

---

420 Baudouin (2018) Ch 1, [44].
421 As above.
422 1991 CanLII 87 (SCC) (on appeal from the Court of Appeal for Quebec) (hereinafter *Laferrière*).
423 *Laferrière* at 609.

duty imposed by courts can, in certain circumstances, be higher than the minimum standard set forth by the legislator".[424] This rings true in the context of non-vaccination.

For example, the mere fact that Non signed an exemption form (in compliance with statutory norms) does not mean that she is automatically exempt from liability that may arise on the basis of her decision not to vaccinate Nonva. In fact, Non's statutory compliance (signing the exemption form) may place an even greater duty on her as she has accepted that she is placing Nonva, and others (Vic) in danger by not vaccinating Nonva and exposing others to infection.

Although facts similar to the Nonva/Vic hypothetical have not yet been decided by the courts of Quebec, some interesting observations from this province may provide valuable insight into the context of non-vaccination, for example, the court's approach to causation in *Laferrière*. Considering the *Laferrière* case, causation in law and scientific causation are not synonymous, and even if the statistical or scientific evidence is insufficient conclusively to support a finding of causation on the balance of probabilities, it may still be considered to determine causation in law with reference to, for example, a shorter lifespan. However, as emphasised by the court in *Laferrière*, Vic must still prove on a balance of probabilities that Non's fault caused real damage, otherwise recovery should be denied.

In conclusion, Vic must still satisfy all the elements of civil liability in Quebec: (1) imputability; (2) fault; (3) damage; and (4) causation if Non is to be held accountable in Quebec. Although Vic need not prove that Non breached a duty of care (as in the other Canadian provinces and the US), Vic must prove that Non's failure to act as a reasonable person would cause his harm, with specific reference to the "breach of a minimal norm of behaviour generally acceptable in human relationships." The next civil law pocket under investigation is Louisiana.

4.5.2 Louisiana

For purposes of this discussion, it is accepted that on 24 January 2023, Nonva and Non returned to specifically Louisiana in the US. As mentioned above, Louisiana is the only civil-law jurisdiction in the US.[425] Maraist posits that the majority of tort cases in Louisiana revolve

424 Baudouin (2018) Ch 1, [45].

425 See LSU Law Library "French law: home" (2021) https://libguides.law.lsu.edu/c.php?g=693022#:~:text=Louisiana%20is%20the%20only%20Civil,Civil%20and%20Common%20law%20influences (accessed 29 March 2022): "Louisiana is the only Civil law jurisdiction in the United States. Louisiana gets its Civil law legal system from its colonial past as a possession of two Civil law countries, Spain and France. It may be better to think of Louisiana's legal system as a hybrid consisting of both Civil and Common law influences." See also Zimmermann & Visser (1996) 3.

around negligence.[426] Accordingly, the Louisiana Civil Code, specifically Article 2315 (2022), is the appropriate point of departure for a general understanding of "fault" in the context of negligence in Louisiana.[427] Article 2315 states that:

> A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.[428]

With reference to the above, Maraist and Galligan explain that, in general, negligence refers to the "failure to exercise reasonable care under the circumstances" and "a person is [generally] negligent if [she] fails to exercise reasonable care to avoid a foreseeable risk, and that failure causes damage to another".[429] Accordingly, Vic must prove that, under the circumstances, Non failed to exercise reasonable care to avoid a foreseeable risk (his infection) which caused him harm. In the Nonva/Vic hypothetical it may be argued that non-vaccination poses a foreseeable risk — as argued by Reiss, and Rodal and Wilson above. Furthermore, it is not only the non-vaccination that poses a foreseeable risk but also exposing others (Vic) to the infected child (Nonva).

According to Maraist and Galligan, negligence may involve "careless action or inaction [omission] under circumstances in which the law requires action".[430] For purposes of the Nonva/Vic hypothetical, this would mean that Non's conduct (non-vaccination and sending ill Nonva to day care) is regarded as careless conduct when the law required action (e.g., vaccination, keeping Nonva home whilst ill (self-isolating), and warning or informing other parents that Nonva was ill). Essentially, this boils down to what the reasonable person would have done in similar circumstances.

Maraist explains that the crux of the negligence enquiry in Louisiana is concerned with whether the wrongdoer (Non) acted "as a reasonable person under the circumstances".[431] This resonates with the *Kruger v Coetzee* test discussed above. To determine if Non acted as the reasonable person, the judge and/or jury must compare Non's conduct to that of the fictional

---

426 Maraist (2010) Ch 5, 1.
427 Maraist & Galligan (2021) Ch 3, §3.01.
428 LA Civ Code, Art 2315 (2022) available at Justia US Law https://law.justia.com/codes/louisiana/2022/civil-code/article-2315/ (accessed 13 February 2023).
429 Maraist & Galligan (2021) Ch 3, §3.01. See also Maraist (2010) Ch 5, 1: Maraist refers to the Restatement (Second) of Torts (§282), which defines negligence as "conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm."
430 Maraist & Galligan (2021) Ch 3, §3.01.
431 Maraist (2010) Ch 5, 1–3, explains that the reasonable person possesses the "perception, memory, knowledge, intelligence and judgment" of a reasonable person. See also Maraist & Galligan (2021) Ch 3, §3.07.

reasonable person.[432] The reasonable person test is only one facet of the negligence investigation.

Maraist and Galligan suggest that the negligence enquiry, at common law, civil law, and in Louisiana, generally consists of five elements or requirements.[433] In the Nonva/Vic hypothetical, Vic must prove that:

(1) Non owes him a duty to exercise reasonable care;[434]
(2) Non breached that duty;
(3) cause-in-fact or factual cause of his (Vic's) injuries;[435]
(4) proximate cause or legal cause;[436] and
(5) that he (Vic) suffered injury or harm (damage).[437]

Maraist explains that if it is proven that the "conduct was the cause in fact" then it must be determined whether "the duty to avoid the conduct extends to the harm sustained". This is a question of law and is generally answered without "much, if any, evidence".[438] Maraist explains that in Louisiana, "proximate cause" and "legal cause" are often used interchangeably but "the most common term for this inquiry is duty/risk"; in other words, "did the defendant's duty to act reasonably extend to this harm?"[439]

Maraist and Galligan clarify that Non, for example, can only be technically negligent if all five of the above elements are satisfied.[440] They warn further that the "breach" and "duty" elements should not be merged and that it is better to refer to the "general duty to exercise reasonable care".[441]

---

432 Maraist (2010) Ch 5, 3.
433 Maraist & Galligan (2021) Ch 3, §3.01.
434 Maraist & Galligan (2021) Ch 3, §3.02 (fn 5) explain that that which appears to be rules for "certain categories of recurring fact patterns" are often "merely detailed reiterations of reasonable care."
435 See Maraist (2010) Ch 5, 2.
436 As above.
437 Maraist & Galligan (2021) Ch 3, §3.01, posit that the plaintiff must sustain actual damages, but it need not be pecuniary. According to Maraist & Galligan (2021) Ch 3, §3.01 (fn 5), pecuniary damages usually describe "out-of-pocket losses to the victim, such as medical expenses and lost earnings. The term 'actual damages' usually includes pecuniary damages and other proved losses, such as pain and suffering and mental anguish. However, pain and suffering and mental anguish and other nonpecuniary damages sometimes are awarded without proof of actual loss, these 'presumed' damages are more in the nature of punitive damages. Negligence requires proof of either pecuniary or actual damages."
438 Maraist (2010) Ch 5, 2.
439 As above.
440 Maraist & Galligan (2021) Ch 3, §3.01, §3.02, & §3.06. Damages are "essential to the negligence tort" and that this element may be "subdivided into two parts: (1) can the victim recover these particular types of damages, and, (2) if so, what is the measure (amount) of such damages?"
441 Maraist & Galligan (2021) Ch 3, §3.01 & §3.02.

Maraist explains in simple terms that in Louisiana the negligence enquiry generally unfolds as follows: "duty, breach, cause-in-fact, legal/proximate cause" and "any disqualifying conduct of the plaintiff (referred to as 'special risks' that do not form part of negligence)".[442]

However, in a negligence case, the order of the negligence enquiry may be altered, and Maraist asserts that the first question in this enquiry pertains, as a rule, to whether the "alleged wrongful conduct was the cause in fact", whereafter the duty owed by the defendant extends to the specific risk of harm (legal cause).[443]

Maraist explains that the reason for this reshuffle is that causation is in fact ordinarily straightforward and if this requirement is not satisfied the negligence enquiry ends.[444] Maraist continues to explain that if the duty to avoid the conduct does not extend to the harm sustained then the negligence enquiry ends and negates an investigation into the "time-consuming" analysis of reasonableness.[445]

For purposes of the Nonva/Vic hypothetical, it is assumed that Vic did not contribute to his own injuries or harm and that there is no disqualifying conduct on his part. As regards the first element (duty to exercise reasonable care) Maraist and Galligan explain that

> under Louisiana law, there is an almost universal duty on the part of the defendant in a negligence action to use reasonable care to avoid injury to another.[446] Of course, the plaintiff must allege and prove particular acts which are allegedly negligent.[447] (Own footnote inserted.)

This observation is reminiscent of the general duty described by the House of Lords in the *Donoghue* case. Maraist and Galligan continue to explain that under the

> traditional approach, one person owes a duty to another if he can 'foresee' an unreasonable risk of harm to the other arising from his conduct.[448]

Maraist explains that if the wrongdoer's conduct does not fall within foreseeable harm the enquiry into negligence ends.[449] He continues to explain that in Louisiana the chief factors

---

442 Maraist (2010) Ch 5, 2.
443 As above.
444 As above.
445 As above.
446 See Maraist (2010) Ch 5, 1 with reference to §3 of The Restatement (Third) of Torts: the failure to "exercise reasonable care under all the circumstances". See also §7 of The Restatement (Third) of Torts: (a) "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical injury".
447 Maraist & Galligan (2021) Ch 3, §3.01 (fn 2).
448 Maraist & Galligan (2021) Ch 3, §3.02: "normally there is a duty whenever there is a foreseeable risk of physical harm unless exceptional reasons exist in a 'class' of cases, not the particular case before the court." See also Maraist (2010) Ch 5, 1–3.
449 Maraist & Galligan (2021) Ch 3, §3.02; Maraist (2010) Ch 5, 1–3.

considered in evaluating the conduct include the (1) "foreseeable likelihood of harm"; (2) "foreseeable severity of harm"; (3) and the "burden of precautions to eliminate or reduce the risk of harm".[450]

So far, it is clear that foreseeability is used to determine the existence and scope of the duty to exercise reasonable care. In Louisiana, Non owes Vic an "almost universal duty" to avoid injury to Vic by using reasonable care, and according to the traditional approach, Vic may assert that Non could have foreseen an unreasonable risk of harm arising from her conduct. The arguments of Reiss and Rodal and Wilson support the view that there is a foreseeable risk of physical harm due to non-vaccination, and Vic may argue that this foreseeability supports the existence of a duty to exercise reasonable care to avoid harm or injury in the context of non-vaccination.

Maraist and Galligan explain that the enquiry into breach (second element) examines what Non did rather than what she could have done to avoid harm to Vic,[451] and that the element of breach is a "mixed question of law and fact, and traditionally is a question for the jury or the judge as factfinder (in a non-jury trial) if reasonable minds could differ".[452] On this point, the judge and/or jury may consider what Non could have done to avoid the harm, for example, keeping Nonva home from day care (self-isolating) or at least informing other parents or the school that she had tested positive for the Omicron variant. Non could also have warned others that Nonva was ill in an effort to avoid harm and protect a wider group.

Maraist and Galligan reiterate that "cause" (elements 3 and 4) consists of two separate elements: (1) cause-in-fact; and (2) legal cause (scope of duty or proximate cause).[453] Maraist posits that the "alleged negligence of the defendant must be within the scope of the defendant's duty to the plaintiff", and that this "common sense evaluation of circumstantial evidence [referred to as *res ipsa loquitur*] is firmly established in Louisiana law".[454]

The cause-in-fact enquiry is a factual enquiry (although policy may also be considered) and the "but for" test or the "substantial factor" test is applied.[455] The "substantial factor" test is applied when the

450 As above.
451 Maraist & Galligan (2021) Ch 3, §3.03.
452 As above.
453 Maraist & Galligan (2021) Ch 3, §3.04; Maraist (2010) Ch 5, 5.
454 As above.
455 Maraist & Galligan (2021) Ch 3, §3.04 (fn 1); Maraist (2010) Ch 5, 2; Palmer & Reid (2009) 363–364.

> defendant's negligence was a causal factor in the plaintiff's injury but not a 'but for' cause, and the court nevertheless finds cause-in-fact by using the broader 'substantial factor' test, asking whether the defendant's conduct was a substantial factor in bringing about the plaintiff's injuries.[456]

Vic may prove cause-in-fact by satisfying either the "but for" test or the "substantial factor" test. The substantial factor test may be satisfied if Vic proves that Non's conduct was a substantial factor in causing his injuries, which is similar to the material contribution test and materially increasing the risk of injury.[457]

Legal cause or "scope of the risk question is really about fairness or bizarreness in the particular case".[458] Maraist and Galligan explain that this generally refers to the "community's sense of fairness, which is often impossible to explain".[459] Essentially, Non's liability may be limited based on the community's sense of fairness.

Maraist and Galligan add that the jury must also deal with "intriguingly vague concepts as that of 'intervening causes.'"[460] This means that Vic must prove that no intervening factors severed the causal chain of events — but for purposes of this hypothetical, it is assumed that there was no *novus actus interveniens*.[461]

The authors also refer to the "Learned Hand" (or Hand) formula,[462] as adopted by Louisiana courts to explain the relevant factors in the negligence enquiry. Roederer posits that

> the second part of the [*Kruger v Coetzee*] test is sometimes answered using the Learned Hand test from *United States v Carroll Towing Co* which only applies liability if the probability of harm multiplied by the degree of harm outweighs the burden on the defendant to avoid the harm.[463]

---

456 As above.
457 Palmer & Reid (2009) 367.
458 Maraist & Galligan (2021) Ch 3, §3.05.
459 Maraist & Galligan (2021) Ch 3, §3.05 (fn 2): from "1962 to 1988, Louisiana used the 'duty/risk' terminology and methodology to solve the 'this plaintiff/these damages/this manner' question. […] initially used the term 'proximate cause,' then converted to a 'duty/risk' analysis, and, then also embraced 'legal cause' terminology [and that the] legal landscape remains confused." See also Maraist (2010) Ch 5, 2.
460 Maraist & Galligan (2021) Ch 3, §3.05 (fn 1): "[i]f the intervening cause is deemed 'superseding,' then the defendant's carelessness is not a proximate cause of the plaintiff's injuries, but if the intervening cause is not superseding but merely intervening, then the defendant's action is deemed a proximate cause of the plaintiff's injuries."
461 A *novus actus interveniens* in the context of non-vaccination (specifically the Nonva/Vic hypothetical) is explored in greater detail in Ch 5 of this thesis. See also Carstens & Pearmain (2007) 514.
462 Maraist & Galligan (2021) Ch 3, §3.07: this is also referred to as the "learned hand" approach or "risk/utility test"; and Maraist & Galligan (fn 3) suggest that: "any risk/utility test is a variant of the Hand formula". See also Maraist (2010) Ch 5, 3.
463 Roederer (2009) *AJICL* 451.

In the Nonva/Vic hypothetical the Learned Hand formula requires an examination of:

(1) the likelihood of the harm that could result from Non's conduct;
(2) the severity of that harm (to Vic); and
(3) the cost of avoidance (e.g., Non could have vaccinated Nonva to avoid exposing others to harm).[464]

According to Maraist, to determine the cost of avoidance, the judge considers the

> social utility of the actor's conduct and that of the victim, and the extent to which the harm could have been prevented by the other conduct by the actor which does not cost too much from the standpoint of social utility.[465]

The Hand formula represents an "alternative way to understand the concept of negligence"[466] and may be used to define breach or allocate fault in a case of comparative negligence.[467] Essentially, the Hand formula holds that

> one is negligent if the burden (B) of avoiding a risk, or package or risks, is less than the probability (P) of that risk occurring, times the gravity or severity of the anticipated harm should the risk arise (L).[468]

Maraist and Galligan suggest that Louisiana has produced its own "tailored version of the Learned Hand risk/utility formula"[469] and when determining if the conduct represents an unreasonable risk of harm, the Louisiana Supreme Court has articulated and applied the following factors:

(1) the utility of the thing or conduct (vaccination versus non-vaccination);
(2) the likelihood and magnitude of the harm (due to non-vaccination) including the open and obvious nature of the risk (e.g., sending Nonva to day care while ill);

---

464 Maraist & Galligan (2021) Ch 3, §3.07; Maraist (2010) Ch 5, 3.
465 Maraist (2010) Ch 5, 3.
466 Maraist & Galligan (2021) Ch 3, §3.07.
467 As above. The formula "is a distillation of elements from the general common law approach, and at Common Law the jury decides whether conduct was reasonable or unreasonable." This means that the formula is applied by the jury, as the application thereof also requires factual considerations and conclusions, "which point in the direction of the jury".
468 Maraist & Galligan (2021) Ch 3, §3.07. Put algebraically, "one is negligent if B & PL." B = the direct cost of avoidance and the losses the defendant incurs "in discovering the risk". PL = *ex ante* cost of the risk. Maraist (2010) Ch 5, 3: if there is some "level of foreseeable harm" then the court decides if the likelihood and severity of the harm outweigh the "cost of what the actor must do to avoid the harm."
469 Maraist & Galligan (2021) Ch 3, §3.07.

(3) the cost of preventing the harm (vaccines are usually free, and informing other parents of Nonva's illness is not a costly process); and
(4) the nature of the wrongdoer's activity (non-vaccination and sending ill Nonva to day care).[470]

Considering these factors, I suggest that the conduct of Non represents an unreasonable risk of harm in that: (1) vaccines are usually free; (2) the danger posed by non-vaccination and exposing others (Vic) is real and poses a high likelihood of harm; (3) the magnitude of the harm is great (highly probable); and (4) the nature of the risk is obvious (non-vaccination usually leads to infection, non-vaccination exposes your child to risks, and exposing an ill child to others increases the likelihood of harm).

This approach (Learned Hand risk/utility formula) is similar to the description of negligence by Schwartz and Reiss discussed above and may be used to prove Non's negligence, in addition to the other elements that Vic must prove (duty, breach, cause-in-fact, scope of the risk, and damage). Essentially, under Louisiana law, Non's negligence refers to her failure to exercise reasonable care under the circumstances, specifically her failure to exercise reasonable care to avoid a foreseeable risk, and that her failure caused damage to another (Vic).[471]

In conclusion, the virtually universal duty to use reasonable care to avoid injury to another and the use of foreseeability in Louisiana correlate with the classic case of *Donoghue*. Vic must still allege and prove that Non owed him a duty to exercise reasonable care, and that she breached that duty so causing his damage. Notably, factual causation may be proven by Vic by satisfying either the "but for" test or the "substantial factor" test, and the Learned Hand approach may also assist Vic in proving Non's negligence.

In the next section, I explore Dutch law in the context of civil liability for non-vaccination.

4.6 DUTCH LAW AND THE NONVA/VIC HYPOTHETICAL

For purposes of this discussion it is accepted that on 24 January 2023, Nonva and Non returned to the Netherlands and not the US (as in the original set of facts). The Netherlands is also a civil-law jurisdiction, similar to Louisiana and Quebec. Under Dutch law liability for Non's

470 As above.
471 Maraist & Galligan (2021) Ch 3, §3.01; Maraist (2010) Ch 5, 1.

wrongful conduct requires that she (the defendant) commits an unlawful act which can be attributed to her.[472]

Unlawful acts in the Netherlands are regulated by Article 6:162 of the *Burgerlijk Wetboek* (Dutch Civil Code or BW) in Book 6 of the BW.[473] As mentioned in the introduction to this chapter, Germany and the Netherlands follow a more generalised approach as their respective civil codes (like the Dutch BW) include the general principles for liability as opposed to separate torts (as under the casuistic approach).[474]

The BW is the appropriate point of departure for an investigation into delictual liability in the Netherlands. Book 6 of the BW contains the "*algemeen gedeelte van het verbintenissenrecht*", which loosely translates as the "general principles of the law of obligations".[475] Title 3 deals with unlawful acts (*onrechtmatige daad*).[476] Article 6:162 defines an unlawful act in three parts, and reads:

> (1) A person who commits an unlawful [or tortious[477]] act against another, which can be attributed [or imputed[478]] to him, is obliged to compensate [or repair[479]] the damage suffered by the other as a result [thereof.[480]]
>
> (2) An [unlawful] or tortious act can either consist of a violation of someone else's right (entitlement) or an act or omission in violation of a duty imposed by written law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.[481]

---

472 E Van Schilfgaarde "Negligence under the Netherlands Civil Code — an economic analysis" (1991) 21(2) *CWILJ* 272.

473 M Dyson *Comparing tort and crime: learning from across and within legal systems* 9ed (2015) Ch 8, 317.

474 As above.

475 See DCL "BW: Book 6 The law of obligations" (date unknown) http://www.dutchcivillaw.com/civilcodebook066.htm (accessed 29 March 2022).

476 As above.

477 Dyson (2015) Ch 8, 321.

478 See WILMAP "Article 6:162 Dutch Civil Code" (14 June 2018) https://wilmap.stanford.edu/entries/article-6162-dutch-civil-code (accessed 5 December 2022). See also A Verheij "The right to be forgotten a Dutch perspective" (2016) 30(1–2) *IRLCT* 34.

479 Dyson (2015) Ch 8, 321.

480 Van Schilfgaarde (1991) *CWILJ* 272; Verheij (2016) *IRLCT* 34. For an alternative translation of Art 6:162(1) see DCL "BW: Book 6 The law of obligations" (date unknown) http://www.dutchcivillaw.com/civilcodebook066.htm (accessed 29 March 2022): "A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof."

481 Dyson (2015) Ch 8, 321. For an alternative translation of Art 6:162(2) see DCL "BW: Book 6 The law of obligations" (date unknown) http://www.dutchcivillaw.com/civilcodebook066.htm (accessed 29 March 2022): "As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour." See also Verheij (2016) *IRLCT* 34.

> (3) An unlawful act can be imputed [attributed] to the perpetrator [tortfeasor] if it is due to his fault or [from] a cause for which he is responsible [accountable] by virtue of the law or generally accepted standards [or principles].[482] (Own footnotes inserted.)

Therefore, Article 6:162(2) distinguishes three types or categories of wrongful conduct or unlawful acts and the three criteria for unlawfulness, and these categories and criteria may overlap.[483] The three overlapping categories of unlawfulness in Article 6:162(2) of the BW are interpreted by the courts.[484] An act or omission that falls within either one or more of these three categories is considered to be unlawful unless there is a ground for justification (*rechtvaardigingsgronden*),[485] like consent[486] and defence.[487]

The first category refers to the infringement of a right or the breach of a legal right (e.g., property or personal rights).[488] The second category refers to an act or omission in violation of a legal obligation (or breach of statutory duty).[489] Categories 1 and 2 require interpretation by the courts,[490] and over time,

> case law has set out more or less specific rules for unfair competition, defamation cases, liability in sports, traffic liability, employers liability, professional liability and other cases. It shows that this approach allows tort law to react in a made-to-measure fashion, with an opportunity to use 'local' knowledge and experience to identify and formulate the relevant standard of care on a case-by-case basis.[491]

The third category refers to an act or omission contrary to what is regarded as appropriate, customary, or proper in society in terms of unwritten law.[492] The third category refers to the breach of a duty of care framed with specific reference to the individual facts and circumstances of the case at hand and proper social conduct.[493] This third category indicates the dynamic

---

482 See Dyson (2015) Ch 8, 321. For an alternative translation of Art 6:162(2) see DCL "BW: Book 6 The law of obligations" (date unknown) http://www.dutchcivillaw.com/civilcodebook066.htm (accessed 29 March 2022): "A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)". See also Verheij (2016) *IRLCT* 34.

483 See S Taekema "Private law as an open legal order: understanding contract and tort as interactional law" (2014) 43(2) *NJLP* 144 (fn 20); Dyson (2015) Ch 8, 323.

484 Dyson (2015) Ch 8, 328.

485 As above.

486 *ECLI:NL:GHAMS:2017:4424* [3.6].

487 *ECLI:NL:RBGEL:2020:7665* [4.3.1]; *ECLI:NL:GHLEE:2009:BJ7903* [5].

488 Dyson (2015) Ch 8, 323.

489 As above. When considering Art 6:162 the courts referred to the *zorgplicht*.

490 Dyson (2015) Ch 8, 324.

491 As above.

492 Dyson (2015) Ch 8, 323.

493 As above.

character of the Dutch law of delict and how it evolves through the work of the courts.[494] Although the courts do not readily refer to the categories as described above, the categories serve as an understanding and interpretation of Article 6:162. In the following discussion, I turn my attention to the duty of care conundrum in the context of Article 6:162.

To determine if the conduct is unlawful, the *Gerechtshof's-Hertogenbosch* in *ECLI:NL:GHSHE:2018:2793* considered the "*zorgplicht*" (duty of care) of the wrongdoer.[495] In this case, the *Gerechtshof's-Hertogenbosch* considered what could be expected of the owner of a tree, and found that the failure of the tree's owner to maintain and periodically prune it, rendered his conduct unlawful in that he had breached his duty of care.[496] Hence, the existence of a *zorgplicht* and its breach rendered the conduct unlawful.

In the case of *ECLI:NL:RBNNE:2021:2160*, the *Rechtbank Noord-Nederland* referred to the "*maatschappelijke zorgvuldigheidsnormen*" (social due-care standard) in the context of Article 6:162 of the BW and the storage of mercury at schools.[497] The *Rechtbank* noted that the standard in question is intended to protect the children from accessing this toxic substance and that social due-care standards are context related.[498] Other established and recognised duties of care include that of a municipality,[499] employers and employees,[500] leaseholders and tenants,[501] road authorities,[502] and parents.

Therefore, the parental duties of parents (as outlined in Article 1:247(1) of the BW) may also be considered in the application of Article 6:162 of the BW. For example, in the case of *ECLI:NL:RBDHA:2021:13985*, the *Rechtbank Den Haag* referred to the rights and duties of parents under Article 1:247(1) of the BW and held that parents have the right and duty to care for and educate their minor children.[503] The *Rechtbank* explained that this parental right and duty includes the care and responsibility for the safety of the child, and the protection of the child from danger.[504] Furthermore, it is the parent's duty to determine which risks are acceptable and which are not.[505] The *Rechtbank* continued to explain that although the judge has to respect the discretion of the parent, this does not mean that the parent's choice cannot

494 Dyson (2015) Ch 8, 324.
495 *ECLI:NL:GHSHE:2018:2793* [6.4.17].
496 As above.
497 *ECLI:NL:RBNNE:2021:2160* [4.5].
498 As above.
499 See *ECLI:NL:GHARL:2020:3428*; *ECLI:NL:RBROT:2021:4841*.
500 See *ECLI:NL:RBROT:2020:4462*; *ECLI:NL:RBNHO:2021:10079*.
501 See *ECLI:NL:RBROT:2020:4462*.
502 See *ECLI:NL:RBGEL:2020:6342*.
503 *ECLI:NL:RBDHA:2021:13985* [4.4].
504 As above.
505 As above.

be wrongful as regards the child.[506] In conclusion, the *Rechtbank* referred to the due-care standard in the context of wrongful conduct towards the child.[507]

Although the courts in the cases considered do not refer to the categories I mentioned above, these categories serve to promote an understanding of and approach to the wrongful conduct or unlawful acts for purposes of Article 6:162(2). The Nonva/Vic hypothetical may fall within either the first, second, or third category of wrongful conduct described in Article 6:162(2).

The first category is relevant in the context of wrongful conduct that infringes a right. For example, non-vaccination may be regarded as wrongful or unlawful conduct for purposes of Article 6:162(2) if it amounts to the infringement of a right. In the Nonva/Vic hypothetical, this would mean that Non's conduct is wrongful if it violates Vic's right to, for example, health or bodily integrity (Article 11 of the Dutch Constitution).[508] However, Verheij notes that Article 6:162 of the BW "is of a general nature in the tradition of the French Civil Code and does not identify the interests that are protected".[509] This is an important consideration, especially in the context of non-vaccination, as the Dutch courts have not yet decided a case with facts similar to the Nonva/Vic hypothetical.

Gillaerts notes that:

> Where judges have the possibility to create (or acknowledge the existence of) new rights, e.g. by means of the open tort law norms like an infringement of a subjective right or a general standard of care (e.g. Article 6:162(2) (Dutch) BW […] they contribute to the creative function and allow tort law to fulfil a dynamic and offensive function.[510] (Footnotes omitted.)

I suggest that this means that there is room for judicial creativity when it comes to non-vaccination and the establishment of non-vaccination as a category of wrongful conduct as it infringes a right (first category) or a general standard or duty of care (*zorgplicht*), or even the social due-care standard (*maatschappelijke zorgvuldigheidsnormen*). Furthermore, I suggest that this extends to the recognition of specific rights (and their infringement in the context of non-vaccination), specific standards of care, or even the express recognition of a parental duty to vaccinate.

---

506 As above.
507 As above.
508 Constitution of the Kingdom of the Netherlands of 22 September 2008.
509 See Verheij (2016) *IRLCT* 34.
510 P Gillaerts "Instrumentalisation of tort law: widespread yet fundamentally limited" (2019) 15(3) *ULR* 27–43, & 39.

This judicial creativity and development of non-vaccination as a category of wrongful conduct may be supported by the rights and duties of parents listed under Article 1:247(1) of the BW as elaborated by the *Rechtbank Den Haag* in *ECLI:NL:RBDHA:2021:13985*.

As mentioned throughout this chapter, it is scientifically proven that vaccines protect the health of children and are often in their best health interests. I suggest that according to this logic, to care for the physical welfare and safety of a child (under Articles 1:247(1)–(2)) would mean to vaccinate the child as vaccination is generally in the child's best interests. This, in turn, means that Non had a duty to vaccinate Nonva which she breached. However, this leaves Vic out of the equation. To extend the duty/breach conundrum from Non to Vic, I refer to the legal obligation Non owed Vic under the social due-care standard, or that which is customary in society according to unwritten law (as mentioned in Article 6:162(2) of the BW).

In *ECLI:NL:RBOBR:2018:4414* the *Rechtbank Oost-Brabant* noted that certain dangers may arise in the context of Article 6:162 of the BW. The *Rechtbank* pointed out that when determining if a wrongdoer (Non) created or allowed a dangerous situation to continue, the following is considered: (1) the wrongdoer's failure to take certain safety measures; and (2) if this failure was contrary to the due care that is customary in society with regard to another person or property.[511] The degree of the probability that harm will occur as a result of the failure to take vigilant and prudent safety measures is considered together with the seriousness of the consequences of the failure to take those expected safety measures.[512]

In *ECLI:NL:PHR:2021:517* the *Parket bij de Hoge Raad* referred to endangerment and creating or allowing a danger to continue in the context of (un)written law (Article 6:162 of the BW).[513] First, the unlawfulness of causing damage by creating or allowing danger to continue is assessed on the basis of all the circumstances of the case.[514] The *Hoge Raad* continued to explain that in cases of endangerment social care is required, and this social care entails that one does not expose another person to a greater risk than is reasonably justified under the given circumstances.[515] The *Hoge Raad* reiterated that not every case of endangerment is automatically unlawful and unlawfulness depends on whether the wrongdoer took more risks than were reasonably justified.[516] To assume unlawfulness, the wrongdoer must or should have

511 *ECLI:NL:RBOBR:2018:4414* [4.2].
512 As above.
513 *ECLI:NL:PHR:2021:517* [2.3].
514 As above.
515 *ECLI:NL:PHR:2021:517* [2.4]
516 As above.

known of the danger that she was creating as well as its imminent realisation (referred to as the knowledge requirement).[517]

The *Hoge Raad* noted that social care does not extend where the wrongdoer did not know or had no reason to believe that any danger existed.[518] It justified limiting the social care standard here because individuals cannot reasonably be expected to accommodate unknown dangers.[519] Hence, the social care standard acts as a limitation of liability. Commenting on carelessness, the *Hoge Raad* noted further that the wrongdoer's knowledge must include: (1) the danger, and the chance of it being realised; (2) the harmful consequences of realising the danger; and (3) the interests of the potential victims.[520] Even if the wrongdoer did not *actually* foresee the harm, the court may use two devices to establish unlawfulness: objectification, and generalisation.[521]

Objectification refers to the average or comparable person and entails an objective standard.[522] Here, the subjective knowledge of the wrongdoer is tested against an objective standard to determine if the wrongdoer *should have known* (objective knowledge or generalisation) that her conduct involved a certain risk.[523] Generalisation refers to the absence of specific knowledge about the risk created,[524] similar to constructive knowledge discussed above under the US tort of negligence.

Unlawfulness is then based on what the wrongdoer actually knew (subjective knowledge) or should have known (objective knowledge or generalisation) *in a general sense* about the risks associated with her conduct (similar to constructive knowledge under the US tort of negligence). Based on that general (objective) knowledge, the wrongdoer should have adjusted her behaviour and acted differently.[525]

Hence, Non's conduct may be unlawful according to the guidance provided by the *Hoge Raad* in *ECLI:NL:PHR:2021:517* as she created or allowed a dangerous situation to continue. Even had Non not been aware that her conduct (non-vaccinating and exposing others) posed a danger or risk to others, she *should have known* (based on objectification or generalisation).

I suggest that the social care standard (the due care customary in society with regard to another person) applies here as Non created a source of danger by failing to vaccinate Nonva,

---

517 As above.
518 As above.
519 As above.
520 As above.
521 *ECLI:NL:PHR:2021:517* [2.5].
522 *ECLI:NL:PHR:2021:517* [2.6].
523 As above.
524 *ECLI:NL:PHR:2021:517* [2.7].
525 As above.

sending her to day care while she was ill, failing to self-isolate her, and failing to warn or inform others that Nonva was ill.

Non's failure to take safety measures breached a social care standard (i.e., the due care that is customary in society with regard to another person) and created a dangerous situation, where the probability of harm was high and posed serious health consequences. Non further allowed this dangerous situation to continue which amounted to the endangerment of others, especially Vic.

To prove that Non's conduct was wrongful Vic must demonstrate that Non breached a legal duty owed to him for which there was no justification (category 2 distilled from Article 6:162(2)). This duty may be a duty to warn or inform others that Nonva was ill; self-isolating her while she was ill; or a duty to vaccinate Nonva in that it serves the best interests of the child and public health and safety. I suggest that Non's failure to act created a dangerous situation, which amounted to the breach of a legal duty.[526]

I also contend that Non's conduct was contrary to what is appropriate (customary) in society in terms of unwritten law or "the norms of care in society"[527] (category 3 distilled from Article 6:162(2)).

The norms of care in society in category 3 (or what is appropriate (customary) in society according to unwritten law) refer to Non's moral and social responsibility not to create a dangerous situation and her social responsibility to be careful.[528] This moral and social responsibility is linked to social and moral expectations.[529] For example, the social and moral expectation is that parents act in the best interests of their children and that vaccination is in the best interests of the child. Vaccination is therefore the socially and morally responsible choice. Taekema also refers to the "normal ways of doing things in certain circles and social life more generally" as an indication of what the unwritten law or the norms of care in society entail.[530]

Arguably, vaccination may be the "normal" way as it is widely accepted by the majority of persons in the Netherlands, as opposed to the minority of groups that oppose vaccination.[531] Van Schilfgaarde explains that,

---

526 *ECLI:NL:RBGEL:2020:6342*.
527 Taekema (2014) *NJLP* 144.
528 As above. See also *ECLI:NL:RBNNE:2021:2160* [4.5].
529 Taekema (2014) *NJLP* 144.
530 As above.
531 H Yousuf *et al* "Dutch perspectives toward governmental trust, vaccination, myths, and knowledge about vaccines and COVID-19" (30 December 2021) https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787606 (accessed 5 December 2022): "the

> tort liability requires a two-step analysis. First, it must be established that the act [non-vaccination and sending Nonva to daycare] was wrong. Second, it must be established that the actor [Non] was wrong. To establish negligence liability, the requirement of unlawfulness qualifies the act, and the requirement of fault or attribution qualifies the actor [Non].[532]

In the above discussion, reference is made to the foreseeability and preventability of harm to determine the social care standard (i.e., the due care that is customary in society with regard to another person). With reference to the social due care standard discussed above, I conclude that the element or requirement of wrongfulness or unlawfulness[533] has been satisfied.

Even if it is proven that the conduct is unlawful, it must still be attributed to Non under Article 6:162.[534] Van Schilfgaarde explains that under Dutch negligence law fault or attribution is not *per se* a separate requirement for liability,[535] as once "it is established that the act violated due care and is thus unlawful, the actor will be liable for the wrongful conduct".[536] This does not mean that fault or attribution is not a requirement — Article 6:162 expressly requires it — it only means that fault or attribution can be assumed in certain instances, and does not necessarily constitute a separate enquiry.

For example, Non's unlawful conduct can be imputed or attributed to Non as Non's unlawful conduct is the cause for which she is responsible by virtue of the law and generally accepted standards of due care discussed above.

Even though fault or attribution is not investigated as a separate requirement (and may be assumed), it does serve the function of refining or modifying the "assessment of due care to match the specific circumstances of the case, or rather of the defendant at hand".[537] Van Schilfgaarde mentions that the wrongdoer (Non) is liable if the unlawful act can be attributed her either: "(1) by the actor's fault; (2) by virtue of a statute; or (3) by virtue of the views current in society".[538]

---

current 66.5% vaccination rate in the Netherlands compares favorably with the provaccination percentage presented herein"; NL Times "Bible Belt vaccination rate increasing after COVID outbreaks" (11 November 2021) https://nltimes.nl/2021/11/11/bible-belt-vaccination-rate-increasing-covid-outbreaks (accessed 5 December 2022); P Cluskey "Dutch government relieved as anti-vax movement fails to ignite" (6 September 2021) https://www.irishtimes.com/news/world/europe/dutch-government-relieved-as-anti-vax-movement-fails-to-ignite-1.4666521 (accessed 5 December 2022); JG Sanders *et al* "Understanding a national increase in COVID-19 vaccination intention, the Netherlands, November 2020–March 2021" (2021) 26(36) *Euro surveillance* 2100792.

532 Van Schilfgaarde (1991) *CWILJ* 272.

533 Van Schilfgaarde (1991) *CWILJ* 273; MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022).

534 *ECLI:NL:HR:2022:115* [4.2.2].

535 Van Schilfgaarde (1991) *CWILJ* 288.

536 As above.

537 Van Schilfgaarde (1991) *CWILJ* 288–289.

538 Van Schilfgaarde (1991) *CWILJ* 281.

Fault is objective in nature and considers the (1) possibility of knowledge, and (2) capability of avoidance (cost of care).[539] This is similar to the reasonable foreseeability and preventability of harm in the South African common law as explored in Chapter 5. Furthermore, under Dutch law, the precise awareness of the probability of harm is not required and it suffices if the Non knew or should have known that her conduct creates a general risk, which can result in damage to another.[540] This is similar to the reasonable person standard discussed above with reference to the test in *Kruger v Coetzee*.

Furthermore, avoiding the resulting harm must be possible and a person cannot "be considered to be careless for not avoiding harm if such avoidance was not possible".[541] In the previous parts of this chapter, I touch on the foreseeability and preventability of harm in the Nonva/Vic hypothetical and it is not repeated here.

I submit that the harm suffered by Vic was preventable and foreseeable and that this suffices for attribution in the form of fault. In this context, attribution refers to Non's fault.[542]

Negligence liability under Dutch law requires an assessment of whether Non acted wrongfully, i.e., contrary to what was required of her,[543] and it must be proven by Vic that the violated norm was intended to protect the damaged interest (relativity).[544] The relativity principle is enshrined in Article 6:163 of the BW and holds that: "no obligation to pay compensation shall exist if the norm infringed is not designed to offer protection against the loss suffered by the aggrieved party."[545] Article 6:163 of the BW states that:

> There is no obligation to repair the damage on the ground of a tortious act if the violated standard of behaviour does not intend to offer protection against damage as suffered by the injured person.[546]

I contend that Non's wrongful conduct violated the general standard or duty of care (*zorgplicht*) and the "social due care standard" (*maatschappelijke zorgvuldigheidsnormen*) which Non was

539 Van Schilfgaarde (1991) *CWILJ* 284.
540 As above.
541 As above.
542 Van Schilfgaarde (1991) *CWILJ* 272; MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022): attributability exists if the perpetrator's actions are his fault or if the unlawful act lies within the range of risks falling on him. An unlawful act that is attributable to the perpetrator is also known as "a fault".
543 Van Schilfgaarde (1991) *CWILJ* 269.
544 Van Schilfgaarde (1991) *CWILJ* 272; MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022).
545 MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022); R Rijnhout "Mothers of Srebrenica: causation and partial liability under Dutch tort law" (2021) 36(2) *UJIEL* 129 suggests that "a protected interest" is also an element that must be proven. This presumably forms part of the relativity principle.
546 Dyson (2015) Ch 8, 321; MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022); Rijnhout (2021) *UJIEL* 129.

required to exercise. The standard/duty of care or standard of behaviour is designed and intended to protect Vic. As the violated norm or standard of behaviour intends to protect Vic, I suggest that the relativity principle has also been satisfied and that Non has an obligation to repair the damage Vic suffered. Attribution and relativity aside, the element of causation must also be proven.[547]

Rijnhout suggests that under Dutch tort law "two causation questions can arise".[548] First, it must be established that the wrong is a *conditio sine qua non*, ("but for") "as a prerequisite for the damage",[549] and "is a requirement in establishing the liability of the alleged tortfeasor".[550] In the case of *ECLI:NL:HR:2022:115*, the *Hoge Raad* referred to the *conditio sine qua non* test as grounded in Article 6:162(1) of the BW.[551]

As in the other jurisdictions discussed above, Vic must under Dutch law also satisfy the "but for" test.[552] Rijnhout continues to explain that if a *conditio sine qua non* cannot be proven the claim will usually fail.[553] I do not repeat the *conditio sine qua non test* as discussed above here. For purposes of this discussion, I assume that the *conditio sine qua non* test has been satisfied with reference to epidemiological evidence and that there is no *novus actus interveniens* present.

Second, Rijnhout explores legal causation, and posits that "in assessing the damages, the question of the scope of causation rises: is it fair and reasonable to attribute the damage to the potentially liable party?"[554]

This is also referred to as the standard of reasonable imputation.[555] The question of remoteness is labelled as a question of legal causation under Dutch law.[556] Accordingly, the court must decide if it is fair and reasonable to attribute the damage to Non.

---

547 MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022): the causal link is the link between the cause (the unlawful act) and the consequence of the loss.

548 Rijnhout (2021) *UJIEL* 129.

549 As above.

550 As above.

551 *ECLI:NL:HR:2022:115* [3.2.1].

552 Rijnhout (2021) *UJIEL* 129 with reference to Art 150 of the BW. Notably, "in principle the burden of proof under Dutch tort law falls upon the plaintiffs". Rijnhout (2021) *UJIEL* 130 posits that Dutch evidence law "offers opportunities such as shifting the burden of proof and presuming the presence of a [*conditio sine qua non*] therefore placing the onus of having to adduce counter-evidence on the shoulders of the defendant."

553 However, Rijnhout (2021) *UJIEL* 130 lists some exceptions "to prevent an unreasonable outcome of denial of a claim in the interests of justice", including, e.g., (1) alternative causation; (2) hypothetical causation; (3) cooperating causation; and (4) the implausibility of causality. Despite these alternatives, causation must still be proven to succeed with a claim in negligence.

554 Rijnhout (2021) *UJIEL* 129: this question of remoteness is labelled as a question of legal causation under Dutch tort law.

555 Dyson (2015) 333 with reference to *Hoge Raad* 20 March 1970, NJ 1970, 251.

556 Rijnhout (2021) *UJIEL* 129.

Policy considerations play an important role, and "the social and factual context is decisive for awarding a claim about an alleged tort."[557] This is similar to the consideration of legal causation in the South African common-law delict which is discussed in Chapter 5.

Article 6:162 of the BW offers the primary redress offered to the victim and allows the victim to claim compensation for the unlawful behaviour of the wrongdoer, which also serves the public interest.[558]

Damages based on Article 6:162 of the BW can be claimed if five conditions are met: (1) unlawful act (wrong); (2) fault or attributability (the attribution of the wrong); (3) damage;[559] (4) causation (factual and legal); and (5) relativity.

Articles 6:162–3 of the BW lay down the basic requirements for liability attached to the legal consequences of the acts or omissions of a natural person and/or legal person.[560] It is interesting to observe that the Dutch approach to wrongfulness essentially entails an examination of the conduct and that Article 6:162 distinguishes three types of wrongful conduct: the infringement of a right; an act or omission in violation of a legal obligation; or an act or omission contrary to what is appropriate (customary) in society in accordance with unwritten law.

The "infringement of a right" approach in determining the element of wrongfulness is explored in the South African context in Chapter 5 together with the determination of wrongfulness with reference to the breach of a duty. For now, it is worth noting that both these approaches to determining the common-law delictual element of wrongfulness have been debated in the South African context. I explore this in detail in Chapter 5 under the common-law delictual element of wrongfulness.

In conclusion, for Vic to succeed in his claim against Non in the Netherlands, he must prove: (1) Non's unlawful act (or wrong); (2) the attribution of the wrong to Non (also known as fault); (3) damage or harm suffered; (4) causation; and (5) relativity. I suggest that Vic is likely to succeed in his claim under Dutch law as the respective delictual elements discussed above have been satisfied. In the following section, I turn to the jurisdiction of Germany.

---

557 Taekema (2014) *NJLP* 144.
558 Dyson (2015) Ch 8, 327.
559 In *ECLI:NL:RBMNE:2022:2947* the *Rechtbank Midden-Nederland* distinguished material damage (lost income) and immaterial damage (fear of health damage).
560 Dyson (2015) Ch 8, 320.

4.7 GERMANY AND THE NONVA/VIC HYPOTHETICAL

For purposes of this discussion it is accepted that on 24 January 2023, Nonva and Non returned to Germany and not the US (as in the original set of facts). Brüggemeier refers to the *Bürgerliches Gesetzbuch* (BGB or German Civil Code) 1896 as "the last grand codification of 19th century Europe".[561] Spindler and Rieckers explain that in German law sections 823–853 of the BGB distinguish different causes of action.[562] On an introductory note, Germany has no general delictual liability clause, but rather three clauses governing fault-based liability — sections 823(1), 826, and 823(2) of the BGB.[563] German private law also recognises instances of strict liability.[564] For purposes of this discussion, I focus on fault-based liability (where delictual liability requires fault) based on the principle of fault (*verschuldensprinzip*).[565]

According to section 823(1) of the BGB, governing general fault-based liability,

> [o]ne who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or [another right of another person][566] has an obligation to the injured party to compensate the resulting damage.[567] (Own footnote inserted.)

Section 823(1) of the BGB holds that the wrongdoer is liable even if she acted negligently (intent is thus not a requirement).[568] Yet, to be liable for the particular damage, it must flow or result from injury to one of the specific (absolute) rights set out — life, body, health, freedom, property, or another right of another person.[569] For section 823(1) of the BGB, it is thus essential to establish the (1) injury of an absolute right, and (2) a resulting loss.[570]

Markesinis and Unberath explain that "body" in section 823(1) of the BGB refers to external bodily injuries, like a severed finger or broken leg, and that "health" in section 823(1)

---

561 Brüggemeier (2020) *EJCLG* 346; BS Markesinis & H Unberath *The German law of torts: a comparative treatise* 4ed (2002) 23.
562 Spindler & Rieckers (2019) Ch 1, §6 [55].
563 P Hellwege & P Witting "Chapter 4: delictual and criminal liability in Germany" in Dyson (2015) 142–143.
564 Dyson (2015) 155.
565 As above.
566 Hellwege & Witting "Chapter 4" in Dyson (2015) 142 explain that it is unclear what "another right of another person" exactly entails. See 143: "life, body, health, freedom and property are so called absolute rights and the words 'another right' are understood to include only other absolute rights, e.g., the *allgemeines persönlichkeitsrecht* (general right to privacy) and the *recht am eingerichteten und ausgeübten Gewerbebetrieb* (right of an established and operating business enterprise), but not the assets."
567 See Brüggemeier (2020) *EJCLG* 346; Markesinis & Unberath (2002) 43; Hellwege & Witting "Chapter 4" in Dyson (2015) 142–143.
568 Hellwege & Witting "Chapter 4" in Dyson (2015) 143.
569 As above; Spindler & Rieckers (2019) Ch 1, §6 [56].
570 Hellwege & Witting "Chapter 4" in Dyson (2015) 143.

of the BGB refers to the inner body, like infections.[571] For example, the transmission of the human immunodeficiency virus (HIV) is actionable under section 823(1) of the BGB.[572]

Brüggemeier explains that the grounds of liability (under s 823(1) of the BGB) are structured in three tiers and that "the negligence delict has a simple two-stage structure".[573] The first stage refers to three objective elements: (1) conduct, including acts or omissions; (2) injury or infringement of a right or legally protected interest;[574] and (3) causation.[575] The second stage concerns unlawfulness (or wrongfulness); and fault (intention in the form of both *dolus directus* and *dolus eventualis*, and negligence).[576]

For purposes of section 823(1) in the context of the non-vaccination hypothetical, Vic's body and health (absolute) rights are relevant, and liability for Vic's specific damage must flow from the injury to one of these specific (absolute) rights. Spindler and Rieckers and Koziol comment that although there is a tradition of defining the protected interests in "separate boxes" the possibility of opening protection to some unlisted interests does exist.[577]

The door, therefore, remains open for acknowledging other rights and interests worthy of protection in the context of non-vaccination, for example, the rights and interests of third "vulnerable" parties (e.g., future earning capacity). For now, however, the reference to Vic's absolute rights (to his body and health) does not necessitate an expansion or development of "other rights", as his body and health are primarily at play here.

The second section dealing with fault-based liability is section 826 of the BGB which states that a "person who, in a manner contrary to good morals, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage".[578] Hence, under section 826 negligence is not enough — intent is required.[579]

---

571 Markesinis & Unberath (2002) 45.

572 As above with reference to the case of BGH 30 April 1991, NJW 1991, 1948 (contaminated blood transfusion). See also *Strafgesetzbuch* (German Criminal Code) of 13 November 1998, Arts 223 & 224.

573 Brüggemeier (2020) *EJCLG* 369.

574 Brüggemeier (2020) *EJCLG* 347.

575 Brüggemeier (2020) *EJCLG* 369–370: "for injuries more remote in space and time, causation is a necessary, but not a sufficient ground for liability. In addition, the remote damage of interests must here be attributable to the acting person or enterprise. It must be 'within the risk', i.e. be connected with the typical risks of the respective action or activity."

576 Brüggemeier (2020) *EJCLG* 347 suggests that it is fault, and not the damage caused, which obliges compensation. Brüggemeier (2020) *EJCLG* 348: intention and negligence are strictly separated in practice and doctrine. Spindler & Rieckers (2019) Ch 1, §2 [74]: "the [BGB] distinguishes between negligent and wilful injuries. An injury is considered wilful if it was caused knowingly and intentionally (*dolus directus*)." See Markesinis & Unberath (2002) 84.

577 Spindler & Rieckers (2019) Ch 1, §6 [56]; Koziol (2015) 76.

578 Hellwege & Witting "Chapter 4" in Dyson (2015) 143.

579 As above.

For purposes of the Nonva/Vic hypothetical, this means that for section 826 of the BGB to apply Non must have acted intentionally.[580] As mentioned at the beginning of this chapter, I do not focus on intentional conduct by Non but concentrate on negligence which is more likely and accurately applicable to the hypothetical. However, if Non did act intentionally and this is proven, liability under section 826 of the BGB may result. If section 826 of the BGB (where intent is required) is applied the injury of an absolute right is not required,[581] and all that causation requires is a nexus between the wrongdoer's act and the damage.[582]

The last section dealing with fault-based liability is section 823(2) of the BGB, which states that:

> The same duty [the duty to make compensation] is held by a person who commits a breach of a statute [i.e. statutory provision] that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.[583]

Section 823(2) of the BGB thus necessitates the breach of a statutory provision that is intended to protect another person. And although the breach itself may be without fault, the imposition of liability requires fault (in the form of intent or negligence).[584] Notably, sections 823(2) and 826 allow for the recovery of pure economic loss, but section 823(1) does not.[585] For purposes of this hypothetical I do not explore pure economic loss.

In light of the above overview, the focus for the remaining discussion on German law is on sections 823(1)–(2), as intent is required for section 826. In the following sections, I explore negligence under section 823(1) in the context of the Nonva/Vic hypothetical.

Negligence (as a form of fault) is defined in section 276(2) of the BGB and applies to the laws of delict and contract.[586] Section 276(2) states that a "person who fails to observe the ordinary care, which is required in everyday life, is guilty of negligence".[587] This has an objective ring to it as negligence refers to a person who fails to exercise reasonable care (*im verkehr erforderliche sorgfalt*).[588] *Verkehr* broadly translates as "interacting with everything

580 As above.
581 Hellwege & Witting "Chapter 4" in Dyson (2015) 150.
582 As above.
583 Hellwege & Witting "Chapter 4" in Dyson (2015) 144.
584 As above.
585 Hellwege & Witting "Chapter 4" in Dyson (2015) 143.
586 Dyson (2015) 157.
587 Markesinis & Unberath (2002) 84.
588 Dyson (2015) 157; Koziol (2015) 477.

externally".[589] During this interaction, care is required (*erforderlich*).[590] Brüggemeier explains that "negligent conduct" refers to not taking due care in the given circumstances.[591] Spindler and Rieckers posit that negligence refers to the "unintentional failure to provide the necessary care in order to avoid an injury."[592] This test for negligence (as a form of fault or *verschulden*) refers to the reasonable person and what he or she would (or would not) have done and is akin to the English and American objective standard[593] and the *Kruger v Coetzee* test. For example, in BGH 9 June 1967, VersR 1967, 808 the *Bundesgerichtshof* considered the vision impairment of a driver who collided with a cyclist and held that the driver was *prima facie* negligent due to his lack of sufficient care (he drove with dimmed lights despite his vision impairment). The visually impaired motorist is not treated differently from a motorist with perfect vision,[594] and the reasonable person test was used to establish negligence in this case.

In Germany, the standard of care to determine fault is objective and does not take into account individual deficiencies or defects.[595] Again, this resonates with the observations of Reiss that the intentions of the non-vaccinating parent are immaterial.[596] Furthermore, negligence considers the objective foreseeability and preventability of harm.[597] Hence, Non will be liable for damages if another person in her position would have been able to foresee and avoid the resulting harm.[598] Non will not be able to escape delictual liability by arguing that subjectively she was not able to foresee the injury to the other party.[599]

According to Brüggemeier, there are three variants of the "negligence delict" in Germany: (1) "the direct injury of protected interests through negligent human conduct

589 Dyson (2015) 157 & 155.
590 Dyson (2015) 157.
591 Brüggemeier (2020) *EJCLG* 348 with reference to §276 [2].
592 Spindler & Rieckers (2019) Ch 1, §2 [74]: "German civil law basically distinguishes between ordinary negligence […] and gross negligence […]".
593 Markesinis & Unberath (2002) 84; Dyson (2015) 155.
594 Markesinis & Unberath (2002) 507.
595 Koziol (2015) 482; Markesinis & Unberath (2002) 85; Dyson (2015) 155.
596 Reiss (2014) *JLPP* 598 & 604.
597 Dyson (2015) 156.
598 As above.
599 As above.

(positive act)";[600] (2) omissions; and (3) negligently caused remote harm.[601] Notably, causation is a requirement of all three types.[602]

Type 2 is the most appropriate for the Nonva/Vic hypothetical as omissions are described as a separate category[603] that requires an affirmative duty to act.[604] As mentioned, Non's conduct essentially concerns a series of omissions — her non-vaccination of Nonva, her failure to self-isolate Nonva, and her failure to warn or inform others of Nonva's infection. The only commission involved was that Non sent Nonva to day care while she was ill. It was this commission, coupled with the omissions that caused Vic's harm.

If Non created a source of danger (non-vaccination and sending Nonva to day care while ill) she has a duty to set in place "relevant protective measures to make it [the danger she created] safe."[605] Markesinis and Unberath refer to this as the "*verkehrssicherungspflichten*", in terms of which the person whose activity (or property) creates a source of potential danger in everyday life which is likely to affect the rights and interests of others, has a duty to ensure that others are protected from the risks he or she has brought about.[606]

In German law, a violation of a legally protected interest via an omission is not automatically unlawful,[607] and according to Spindler and Rieckers, there is no general duty to protect others from damage.[608] This is similar to the position in the South African common-law delict.[609]

---

600 Brüggemeier (2020) *EJCLG* 359.

601 Brüggemeier (2020) *EJCLG* 359–360: "duty of care falls under this category. It determines the personal, spatial and temporal scope of liability, which in turn results in problems of distinction from the criterion of proximity/proximate cause. When understood as instrument to determine the scope of protection (*Palsgraf* doctrine), the doctrinal device of duty of care is identical to that of proximity." Brüggemeier (2020) *EJCLG* 370: "it must be stressed again in this civil law context that negligence in everyday accidents does not require any duty of care. This only applies in cases of remote injuries. And there, it has nothing to do with unlawfulness or negligence as fault, but with the imputation of remote consequences to a specific action (*Palsgraf* doctrine)."

602 Brüggemeier (2020) *EJCLG* 360.

603 Brüggemeier (2020) *EJCLG* 359.

604 As above: "negligence is merely concerned with the question whether the measures, which were due but not taken, remained avoidably undone. However, this affirmative duty to act has nothing to do with a duty of care. In this respect, e.g., the German law differentiates between affirmative duties to procure safe spaces (*verkehrssicherungspflichten*) and duties of care (*verkehrspflichten*)."

605 Brüggemeier (2020) *EJCLG* 359: "certain groups of people are under such duties to act because of their profession — doctors, police, pool attendants — which does not apply to others."

606 Markesinis & Unberath (2002) 86.

607 Spindler & Rieckers (2019) Ch 1, §3 [76].

608 Spindler & Rieckers (2019) Ch 1, §1 [72].

609 *Minister van Polisie v Ewels* 1975 (3) SA at 596.

In German law, not all damage resulting from the breach of a duty of care results in compensation as section 823(1) of the BGB requires the breach of the duty of care to have infringed an absolute right.[610]

Hence, Non is guilty of negligence (as a form of fault) under section 276(2) of the BGB in that she failed to take due care in the circumstances or to observe the ordinary care required in everyday life as regards the foreseeability and preventability of harm. This is so because the reasonable person in Non's circumstances, interacting with everything externally (*verkehr*), would have exercised the care (*erforderlich*) required in everyday life to prevent the harm. This may include, for example, vaccinating Nonva, not sending Nonva to day care while ill, self-isolating Nonva while ill, or warning or informing others of Nonva's infection. Arguably, Non failed to exercise sufficient care and so established negligence for purposes of sections 276(2) and 823(1) of the BGB. This is because, according to Reiss as discussed earlier, it is reasonably foreseeable that exposing your non-vaccinated and ill child to others, places them at risk of harm. Non's fault (negligence) refers to her "incapability to meet the expected standard of care".[611]

Vic, on the other hand, must prove fault in the form of negligence. He must therefore prove that Non failed to show "the care that was objectively appropriate in the concrete situation in the given circumstances".[612]

The degree of fault has no influence on the extent of damages, save when dealing with damages for pain and suffering, which is said to depend on the degree of fault.[613] Non will be liable to compensate for the full loss, and nothing more, irrespective of whether she acted negligently or with intent.[614] However, section 826 of the BGB requires intent.[615]

Even if negligence and the violation of a legally protected interest are shown to exist, this remains insufficient to establish liability under German tort law as the conduct (acts or omissions) must qualify as unlawful (or wrongful).[616] Unlawfulness (or wrongfulness) and fault are distinct elements and both must be satisfied if the wrongdoer (Non) is to be held accountable.[617] Unlawfulness (or wrongfulness) broadly refers to the failure to conduct oneself

---

610 Dyson (2015) 153.
611 Spindler & Rieckers (2019) Ch 1, §1 [69], & §2 [73]: "as a general rule, liability for tortious conduct is dependent on whether the tortfeasor acted with fault."
612 Brüggemeier (2020) *EJCLG* 369; Spindler & Rieckers (2019) Ch 1, §2 [75]: "a preceding hazardous activity can give rise to a duty of care."
613 Dyson (2015) 155.
614 As above.
615 As above.
616 Spindler & Rieckers (2019) Ch 1, §1 [69].
617 As above: except for cases of strict liability these two prerequisites must be met.

within the boundaries set by the law.[618] There are two variants of wrongfulness under German law: (1) wrongfulness of the result (*erfolgsunrecht*); and (2) wrongfulness of the conduct (*verhaltensunrecht*).[619]

Wrongfulness (*iniuria* or *rechtswidrigkeit*), according to Brüggemeier, refers to the negligent manner of the harmful conduct.[620] Brüggemeier suggests that the doctrine of *erfolgsunrecht* (wrongfulness of the result) applies to intentional delicts and that of *verhaltensunrecht* (wrongfulness of the conduct) to negligent delicts.[621] This means that for purposes of the Nonva/Vic hypothetical, in the German context, the wrongfulness of the conduct is investigated (*verhaltensunrecht*)[622] as this examines negligence (and not necessarily intent). However, Spindler and Rieckers criticise this distinction or separate approach as it distorts the "clear distinction between unlawfulness and fault".[623]

Spindler and Rieckers suggest that regardless of the "theoretic differences, both ways to determine unlawfulness [wrongfulness of the result or the conduct] usually lead to the same results".[624] Regardless of what approach is adopted, it is essential that Non's conduct must qualify as unlawful, and unlawfulness refers to Non's failure to conduct herself within the boundaries of the law.[625]

To determine whether Non's omission is unlawful, the court may consider the "probability and predictability of an injury, the seriousness of the potential harm, and the necessary prevention costs".[626] This is similar to the Learned Hand formula of Louisiana which considers: (1) the utility of the thing or conduct (vaccination versus non-vaccination); (2) the likelihood and magnitude of the harm (due to non-vaccination), including the open and obvious nature of the risk (e.g., sending Nonva to day care while ill); (3) the cost of preventing the harm (vaccines are generally free as is informing other parents of Nonva's illness); and (4) the nature of the wrongdoer's activity (non-vaccination and sending the sick Nonva to day care).

---

618 Spindler & Rieckers (2019) Ch 1, §1 [69].
619 Brüggemeier (2020) *EJCLG* 369–370.
620 Brüggemeier (2020) *EJCLG* 348.
621 Brüggemeier (2020) *EJCLG* 369–370: in German law of delict, the following are especially wrongful acts: (1) intentional-unlawful or negligent injury of protected interests and rights of others, (2) culpable breach of statutory duty, and (3) intentional and immoral causation of losses.
622 Brüggemeier (2020) *EJCLG* 369 posits that *damnum culpa datum* "is the delict of negligence in a nutshell. […] Under no circumstances is any form of unlawfulness of the infringement of interests a requirement of this delict." See Spindler & Rieckers (2019) Ch 1, §1 [70]: "consequently, only those interferences with protected interests that also violate a duty of care are treated as unlawful."
623 Spindler & Rieckers (2019) Ch 1, §1 [71].
624 As above.
625 Spindler & Rieckers (2019) Ch 1, §1 [69].
626 Spindler & Rieckers (2019) Ch 1, §3 [76]; Markesinis & Unberath (2002) 86.

This means that the German court will assess the probability and predictability of Vic's injury or injuries, as well as the seriousness of the potential harm arising from Non's conduct and the necessary prevention costs to establish whether Non's omission was unlawful.

In civil law countries (like Germany and the Netherlands) the "normative standard of due care is determined *in casu* by the professional judge".[627] Markesinis and Unberath note that the duties of care conundrum aim to delineate the relationships protected by careless interference, as well as to limit the persons who can be held liable for a particular harmful result.[628] It is for this reason that Markesinis and Unberath opine that it is irrelevant under which category (unlawfulness or fault) the duty of care is considered, as practically the result is not very different, and it remains a judicial consideration.[629]

If Non's factual injurious conduct falls short of this normative standard of due care a case of negligence may be proven (as she cannot prove that she meets the normative standard of due care). Vic must prove that his injuries were foreseeable and "not a completely improbable consequence of the conduct or activity" of Non.[630] However, to succeed in his claim Vic must prove all the delictual elements. For example, causation must also be proven by Vic. Causation in German law, according to Markesinis and Unberath, refers to the condition (*bedingung*) linking the harm to the conduct.[631] The authors explain that the causation enquiry entails, first, a causative investigation (referred to by American scholars as "cause-in-fact") followed by a normative and policy-orientated one.[632] Under section 823(1) of the BGB, two forms of causation are distinguished: (1) liability-generating causation (*haftungsbegründende kausalität*) which refers to the nexus between the wrongdoer's conduct and the injury; and (2) liability fulfilling causation (*haftungsausfüllende kausalität*) which refers to the nexus between the injury and the damage.[633]

Markesinis and Unberath explain that the "but for" test (or the *äquivalenztheorie*) is used to determine causation.[634] Essentially, the question asked is "would the plaintiff's harm have occurred but for the defendant's conduct?"[635]

627 Brüggemeier (2020) *EJCLG* 369; Markesinis & Unberath (2002) 86.
628 Markesinis & Unberath (2002) 86.
629 As above.
630 Brüggemeier (2020) *EJCLG* 370.
631 Markesinis & Unberath (2002) 103.
632 As above. Hellwege & Witting "Chapter 4" in Dyson (2015) 149.
633 Hellwege & Witting "Chapter 4" in Dyson (2015) 149–150.
634 Markesinis & Unberath (2002) 103; Hellwege & Witting "Chapter 4" in Dyson (2015) 149.
635 Markesinis & Unberath (2002) 103.

When dealing with omissions, the elimination exercise as suggested by the *conditio* test is replaced with the substitution of an act that the defendant omitted.[636] Markesinis and Unberath continue to explain that a strict application of the *conditio* test does not always yield fair results.[637] Objective attribution (*objektive zurechnung*) is also suggested as an alternative where the *äquivalenztheorie* fails.[638]

The "substantial factor test" (similar to that employed in Louisiana) may also be used by German judges.[639] Markesinis and Unberath also refer to the "multiple sufficient causes" test, which refers to a situation where each cause (for example a simultaneous act and omission) is sufficient to produce the harmful result.[640]

Markesinis and Unberath explain that for purposes of legal causation, the adequacy theory (or adequate cause) has proved inefficient and that the normative theory of causation is preferred.[641] On this note, they recognise that the adequate causation theory tends to produce results similar to the foreseeability theory, which is preferred in the common-law system.[642] However, the foreseeability test is refined to the scope of the remoteness of damage (for the tort of negligence).[643] For purposes of this discussion, I do not repeat the "but for" test and assume that epidemiology, as discussed in detail above, will suffice for purposes of proving causation.

The requirement of fault, according to Dyson,[644] restricts the application of the *äquivalenztheorie* (under *haftungsbegründende kausalität*) as "an injury of one of the named protected legal interests which [were] neither foreseeable nor avoidable will not lead to any liability."[645]

Markesinis and Unberath refer to the "scope of the rule" theory, which entails that "there should be no recovery if the harm in suit is not within the protective purpose of the rule in question".[646] This is similar to the relativity principle enshrined in Article 6:163 of the BW. Under the "scope of the rule" theory, the judge has a quasi-legislative function to decide what

636 Markesinis & Unberath (2002) 104. This is similar to the *conditio cum qua non* theory as discussed in Ch 5 of this thesis.
637 Markesinis & Unberath (2002) 105.
638 Hellwege & Witting "Chapter 4" in Dyson (2015) 149. This must not be confused with objectification as discussed under Dutch law above.
639 Markesinis & Unberath (2002) 105.
640 As above.
641 Markesinis & Unberath (2002) 108.
642 Markesinis & Unberath (2002) 113.
643 As above.
644 Hellwege & Witting "Chapter 4" in Dyson (2015) 150–151.
645 As above.
646 Markesinis & Unberath (2002) 108.

damage will be compensated in light of reasons of policy or expedience counting for or against the imposition of liability.[647] They cite the "protective purpose of the duty" as a more flexible approach that considers policy considerations whilst maintaining a legal tone.[648] However, Dyson mentions that this "protective ratio of the infringed norm" is unclear in the context of the *äquivalenztheorie*.[649] Koziol comments that under German law there is a "limitation of the causal consequences for which the tortfeasor should pay damages".[650] Brüggemeier explains that in

> international practice, this attribution happens by establishing a duty of care. Germanic laws also applied such terms as the 'protective purpose of the norm' (*Schutzzweck der Norm*) or 'context of unlawfulness' (*Rechtswidrigkeitszusammenhang*).[651]

In conclusion, fault (according to Dyson),[652] the protective purpose of the norm, and unlawfulness all act as liability brakes. Hence,

> a result is not attributable to the wrongdoer if it was, for example, objectively unforeseeable, objectively unavoidable or if it was not covered by the protective ratio of the infringed norm.[653]

For purposes of this hypothetical, I suggest that Non is delictually liable because the harm was objectively foreseeable, objectively avoidable, or preventable, and the harm suffered by Vic is covered by the protective ratio of the infringed norm.

I suggest that Non may face delictual liability for the harm caused to Vic under section 823(1) of the BGB as the damage Vic suffered is a result of an injury to one of the specific (absolute) rights set out (Vic's life, body, and health rights). He suffered external bodily injuries and health injuries (the infection) for purposes of section 823(1) of the BGB.

Here, negligence suffices, and intent is not required. Under German law, the duty (or expected standard of care) conundrum remains a judicial consideration, irrespective of if it is considered under wrongfulness or fault (in the context of negligent omissions referred to as the "duty to act")[654] and the test for negligence remains an objective test.

---

647 Markesinis & Unberath (2002) 109.
648 As above.
649 Hellwege & Witting "Chapter 4" in Dyson (2015) 151.
650 Koziol (2015) 150.
651 Brüggemeier (2020) *EJCLG* 370: "whatever the label, what the judge is in effect doing is deciding on the personal, spatial, and objective scope of protection".
652 Hellwege & Witting "Chapter 4" in Dyson (2015) 150–151.
653 Hellwege & Witting "Chapter 4" in Dyson (2015) 149.
654 Markesinis & Unberath (2002) 86.

In conclusion on the German law of delict and the Nonva/Vic hypothetical, Non is liable under section 823(1) of the BGB for her negligence. This is because Non failed to observe or exercise the ordinary or reasonable care (*im verkehr erforderliche sorgfalt*) which everyday life demands (s 276(2) of the BGB). Despite the theoretic differences between *erfolgsunrecht* and *verhaltensunrecht*, the elements of wrongfulness and fault are satisfied in this hypothetical as Non failed to conduct herself within the boundaries of the law. I support this with reference to the seriousness of the potential harm arising from Non's conduct and the necessary prevention costs.

Furthermore, regarding the reasonable foreseeability and preventability of harm in this hypothetical, Non had an affirmative duty to act (*verkehrssicherungspflichten*) — she was duty-bound to ensure that others, like Vic, were protected from the risks created by her negligent conduct.

4.8 CONCLUSION

In this chapter, I first explored the law of torts in general before zooming in on the tort of negligence. As mentioned, the tort of negligence is explored in the US and Canadian contexts, excluding their respective civil-law pockets (Louisiana and Quebec). First, I plot the general requirements for the tort of negligence, i.e., a duty of care, breach, damage, and causation.

After exploring these elements in theory, I turn to the Nonva/Vic hypothetical and the tort of negligence in the US. In this discussion, I explore Non's different duties and their breach. I also touch on the defence of *volenti non fit injuria* recognised in English tort law. I also comment on vaccination exemptions and note that although non-vaccination may be a legitimate (state-sanctioned) choice this does not exempt the non-vaccination parent from the consequences of their choice, with specific reference to the works of Reiss. As vaccines are aimed at protecting societal interests and public health, overriding parental objections is often justified as illustrated with reference to German case law in this chapter.

The crux of the US and Canadian tort of negligence pivots on the issue of causation. To address this I refer to epidemiology and its role in satisfying the *conditio sine qua non* test. As illustrated in the Nonva/Vic hypothetical, the current advances in science may assist Vic to establish causation and satisfy the "but for" test through reference to epidemiology. Although causation may be difficult to prove it serves as a necessary safeguard to ensure that random non-vaccinating parents are not held liable for their mere non-vaccination choice. Only when this specific choice (non-vaccination) results in harm may liability be imposed.

I turn then to Canada. Here, I plot the general requirements for the tort of negligence in the Canadian context before applying them to the Nonva/Vic Hypothetical. Under this discussion, I reiterate that epidemiology is likely the most appropriate and viable way to prove factual causation in the context of non-vaccination. With reference to case law, I also point out that the material contribution test is better suited in scenarios dealing with mass outbreaks. I also comment on the defence of statutory authority and the role of exemptions in negligence claims and comment that parental immunity or statutory authority should not shield parents from tort claims brought by their unvaccinated children or third parties.

In this hypothetical scenario tortious liability provides a direct avenue for Vic to seek recovery for the harm he suffered.[655] From the above discussion, it is clear that the tort of negligence in the US and Canada is the most appropriate claim for a child who has suffered injury as a result of a non-vaccinating parent's decision not to vaccinate.

When exploring the Nonva/Vic Hypothetical in the context of Quebec, I point out that here the focus is on the "duty to act" to establish the element of fault with reference to the conduct of a reasonable person — similar to the *Kruger v Coetzee* test. I also explore the minimal norm of behaviour generally acceptable in human relationships in the context of non-vaccination. In this discussion, I reiterate that exemption does not automatically shield a non-vaccinating parent from liability. I then turn to Louisiana and focus specifically on the Learned Hand formula to explain the relevant factors in the negligence enquiry and how it interacts with the *Kruger v Coetzee* test.

When exploring the law of delict under Dutch and German law, I first consider their respective civil codes to plot out the requirements for a successful delictual claim in the context of non-vaccination. Here, I focus on case law to examine some of the elements and their application. Under Dutch law, I specifically focus on what is appropriate (customary) in a society's unwritten law. I conclude that vaccination may be the "normal" way as vaccination is widely accepted by the majority of persons in the Netherlands, as opposed to the minority of groups that oppose vaccination.

Under German law, I explore the elements of delictual liability and focus on the German approaches to wrongfulness which are of importance in Chapter 5. The law of delict under German and Dutch law respectively also provides a direct avenue for Vic to claim damages for the harm suffered as a result of another parent's decision not to vaccinate their child.

655 Caplan *et al* (2012) *JLME* 608.

In conclusion, despite the theoretical differences between the tort of negligence and the law of delict, Vic will likely succeed in a tortious or delictual claim against Non. Of course, the respective requirements for liability must be satisfied. This conclusion is of particular importance because, as mentioned in Chapter 1, the goal of comparative law is not merely to compare different jurisdictions. The goal here is to establish whether and how these jurisdictions are likely to apply the law to a set of facts similar to the Nonva/Vic hypothetical.

The foreign law explored in this chapter indicates that Vic may be able to succeed with a tortious or delictual claim against Non if the elements for liability are satisfied. This chapter illustrates how these elements of tortious or delictual liability may support such a claim and how they will pan out in a set of facts similar to the Nonva/Vic hypothetical. In theory, the US (including Louisiana); Canada (including Quebec); the Netherlands, and Germany all allow Vic's claim to succeed if he is able to satisfy the requirements.

I conclude that Vic's claim is likely to succeed as it resonates with the aims or goals of the law of torts and the law of delict: liability in this hypothetical does not aim to make vaccinations mandatory or alienate concerned (non-vaccinating) parents;[656] the goal of tortious or delictual liability is to internalise the costs of the choice not to vaccinate.[657]

Allowing victims (infected by unvaccinated children) to pursue tortious and delictual claims in the context of non-vaccination reaffirms the duty of non-vaccinating parents to exercise ordinary care to prevent the causing of harm to others.[658] Non-vaccinating parents are not absolved from their duty to exercise ordinary care to prevent causing harm to others,[659] and the sincere belief that the conduct (non-vaccination) is reasonable is immaterial, and tortious or delictual liability may arise regardless of why the parent chose not to vaccinate the child.

The foreign law discussion in this chapter may aid the South African common-law delictual investigation when trickier elements, like causation and wrongfulness, are navigated. It may also indicate that the South African common-law delict, as in the foreign jurisdictions discussed in this chapter, is also an appropriate avenue for a child (Vic) to recover damages from a non-vaccinating parent (Non).

---

656 See Baxter (2014) *UCLR* 115: some schools of thought argue that imposing liability on non-vaccinating parents may further alienate these non-vaccinating parents from medical establishments and possibly further jeopardise their children's health.

657 See Ciolli (2008) *YJBM* 135: "assigning responsibility for injuries that arise in social interaction" and "providing recompense for victims with meritorious claims". See Levis (2017) *DLR* 1068–1069: the US tort system "is used to compensate victims of other communicable diseases and it could be extended to vaccine-preventable diseases as well".

658 Baxter (2014) *UCLR* 140.

659 See Ciolli (2008) *YJBM* 132.

The next chapter explores the South African common law of delict as applied to the problem of non-vaccination in light of constitutional and comparative law canvassed above and in the previous chapters. Chapter 5 deals with the controversies surrounding elements in considerable detail. The discussion of the common law of delict is limited to the context of non-vaccination. Chapter 5 aims to explore the issue of non-vaccination and liability in the context of delict as informed by constitutional and comparative law.

CHAPTER 5: THE COMMON LAW OF DELICT IN SOUTH AFRICA IN THE CONTEXT OF NON-VACCINATION

5.1 INTRODUCTION

> Our [South African] common law of delict spans many centuries and the debate regarding delictual liability, its elements and their relationship to one another, remains lively.[1]

The purpose of this chapter is to provide an overview of the South African common law of delict in the context of non-vaccination in light of the constitutional and comparative law canvassed above. The chapter explores the controversies surrounding the elements of delict in greater detail. From the outset, it is important to note that in this chapter reference is made to the narrow and wide definitions of the common law of delict and its elements. Before this investigation is conducted, it is important first briefly to summarise the origin and reception of the law of delict in South Africa.

The South African common-law delict is firmly rooted in Roman law[2] and is classified under the law of obligations of private law[3] as in the Netherlands.[4] The law of obligations involves personal rights against a specific person in terms of an obligation.[5] The law of delict, like torts, aims to shift the responsibility to pay damages for harm caused to another.[6] As in tort, the common-law delict is premised on the general rule or "overriding philosophy" that "the loss of the thing is to the prejudice of the owner, the damage rests where it falls, the owner is primarily responsible for damage" often referred to as *res perit domino*.[7] Similarly, in Germany, the maxim *casum sentit dominus* (the loss lies where it falls) applies.[8]

---

1 *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) (hereinafter *Carmichele*) [58].
2 PHJ Thomas *et al Historical foundations of South African private law* (2000) 213; R Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1996) 857.
3 J Neethling & JM Potgieter *Law of delict* 8ed (2020) 4; Roederer (2009) *AJICL* 469; M Loubser & R Midgley *et al The law of delict in South Africa* 3ed (2017) 5.
4 Book 6 of the *Burgerlijk Wetboek* (Dutch Civil Code/BW).
5 Thomas *et al* (2000) 213; Neethling & Potgieter (2020) 3–7: the purpose of private law is generally to "regulate relations between individuals in a community". Private law is directed at the protection of an individual's (private) interests, while public law is directed at upholding the public interest.
6 Roederer (2009) *AJICL* 469; Loubser & Midgley (2017) 9.
7 HB Klopper *Damages* (2017) 1; Neethling & Potgieter (2020) 3; JR Midgley *Delict* 3ed vol 15 in *Law of South Africa* (*LAWSA*) (2016) 26.
8 Dyson (2015) 130.

Delictual liability, like tortious liability, serves as an exception to the general *res perit domino* rule — "that one is responsible for her or his own self only".[9]

Before considering the functions of the law of delict as suggested by different authors, the various definitions of "delict" as posited by various authors, are explored. This is to show that the law of delict and its elements, as in the quotation above from the Constitutional Court judgment in *Carmichele*, comes in for lively debate. This points to the ongoing relevance of the law of delict and emerges clearly from attempts at formulating a definition of a "delict".

It is interesting to note that different authors posit different definitions of delict, all rooted in the common law and not necessarily statutory liability.[10] For purposes of this discussion, and the common-law delict in general, I support the argument that statutory compensation schemes (or regimes) do not form part of the common-law delict. As suggested by Loubser and Midgley, I agree that although the law of delict may refer to instances of no-fault liability, statutory compensation regimes do not fall within its ambit.[11] This said, I turn now to the various definitions of delict.

Van der Merwe and Olivier, writing in Afrikaans, define a delict as an "*onregmatige daad*":

> *onder 'n onrregmatige daad word verstaan 'n onregmatige en skuldige handeling wat aan 'n ander skade of persoonlikheidsnadeel veroorsaak. Tot die gebied van die reg insake die onregmatige daad behoort al die reels wat die privaatregtelike aanspreeklikheid van 'n persoon bepaal waar hy op onregmatige skuldige wyse skade of persoonlikheidsnadeel aan 'n ander veroorsaak het.*[12]

Essentially, Van der Merwe and Olivier regard a delict as a

> wrongful and culpable act that causes another harm or infringes another's personality interest. Within this realm of the law of delict belong all the rules that determine the private-law liability of a person who has caused harm or a personality infringement to another in a wrongful and culpable way.[13]

In this definition, Van der Merwe and Olivier have neatly summarised the elements or *essentialia* of delict: wrongfulness; fault; conduct; harm; and causation. This definition also

9 Roederer (2009) *AJICL* 469; Loubser & Midgley (2017) 6 refer to a system of "personal liability" and that there can be no liability without fault.
10 Loubser & Midgley (2017) 7 & 9.
11 Loubser & Midgley (2017) 21.
12 NJ Van der Merwe & PJJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 1.
13 Van der Merwe & Olivier (1989) 1 as translated by Loubser & Midgley (2017) 8.

situates the law of delict within the private-law realm. Boberg summarises a delict as a civil wrong.[14] According to Boberg, a delict is

> an infringement of another's interests that is wrongful irrespective of any prior contractual undertaking to refrain from it — though there may also be one. It entitles the injured party to claim compensation in civil proceedings — though criminal proceedings aimed at punishing the wrongdoer may also ensue. A single act may give rise to both delictual and contractual, or delictual and criminal, liability.[15]

Neethling and Potgieter criticise Boberg's definition of "infringement of another's interests", as being incomplete and misleading in that makes no mention of either the fault requirement or of "legally protected interests".[16] Essentially, Boberg's definition may suggest that the infringement of any interest is actionable in delict, as opposed to legally protected interests only as suggested by Neethling and Potgieter.

However, Boberg continues to explain that delictual liability is generally fault-based,[17] and no-fault liability is included in the scope of delictual liability as "the essential character of the law of delict is that it compensates for unlawfully inflicted injury, not that it usually requires fault before doing so."[18]

This is similar to the German law of delict discussed in Chapter 4, where delictual liability may be either strict or grounded on the principle of fault (*verschuldensprinzip*).[19] However, to borrow from Neethling and Potgieter, this *may* be misleading as fault is a necessary requirement for the South African common-law delict. The mere fact that a person has caused another to suffer damage is insufficient to constitute a delict for which the wrongdoer may be held liable[20] as the element of fault is not satisfied.

However, for purposes of this introduction, it suffices merely to note that common-law delict recognises a form of fault-based liability and no-fault liability, which may be what Boberg is suggesting when he says that the law of delict may provide compensation even if the element of fault is absent.

Notably, Loubser and Midgley posit that no-fault liability in the context of the law of delict is restricted to certain instances, such as vicarious liability, *actio de pastu*, *actio de*

14 PQR Boberg *The law of delict vol 1 Aquilian liability* (1984) 1.
15 As above.
16 Neethling & Potgieter (2020) 4 (fn 8).
17 Boberg (1984) 16.
18 As above.
19 Dyson (2015) 155.
20 Neethling & Potgieter (2020) 4–5.

pauperie, and constitutional remedies.[21] For introductory purposes, it suffices merely to note that for Loubser and Midgley the law of delict is not limited to instances of fault-based liability but also provides for no-fault liability[22] — a point echoed by Boberg and Neethling and Potgieter.[23]

Boberg explains that the fault requirement limits delictual liability.[24] I must point out, however, that Boberg fails to mention that it is essentially the elements of legal causation and even wrongfulness that limit delictual liability. This is discussed in greater detail below. This may pen Boberg to further criticism and it may be problematic to claim that fault limits liability, after stating that fault is not a necessary requirement for delictual liability. If fault is not required, how can it be used to limit delictual liability? I suggest that whether delictual liability is, according to Boberg, either fault-based or not fault-based (e.g., strict liability), it is essentially the elements of legal causation and wrongfulness that limit liability.

Neethling and Potgieter posit that a delict "is a wrongful and culpable act which has a harmful consequence",[25] and define it as "the act of a person that in a wrongful and culpable way causes harm to another."[26] From this definition, the authors attempt to include the five traditional elements of a delict. Like Van der Merwe and Olivier, Neethling and Potgieter refer to an act, wrongfulness, fault, causation, and harm.

Neethling and Potgieter explain that all five elements must be present to constitute a delict, and if all five elements are not present, the conduct complained of cannot be classified as a delict.[27] They do not, however, expressly spell out that if the five elements are present delictual liability may arise.

On the other hand, Van der Merwe and Olivier do state that the law of delict gives rise to private-law liability, while Boberg explains how civil liability may manifest in addition to criminal liability.

---

21 Loubser & Midgley (2017) 21.

22 Loubser & Midgley (2017) 21 explain this with reference to a figure illustrating the conceptual structure of the law of delict and the interrelationship of the various loss-allocation components.

23 Neethling & Potgieter (2020) 433.

24 Boberg (1984) 16. Loubser & Midgley (2017) 8 summarise Boberg's definition of a delict. Boberg's definition criticises the definition of Van der Merwe & Olivier, as according to Boberg (16) Van der Merwe & Olivier "regard fault as an essential characteristic of delictual liability, so that instances of no-fault liability […] are in their view not delictual […]. For the same reason an interdict (which can be obtained without showing fault) does not seem to them a delictual remedy […]" — Boberg criticises this curtailment of the ambit of a delict as unwarranted.

25 Neethling & Potgieter (2020) 255.

26 Neethling & Potgieter (2020) 4.

27 As above.

Van der Walt and Midgley define a delict as a "civil wrong"[28] (a wide or broad definition) and posit that a narrow definition of delict (e.g., that of Neethling and Potgieter) regards a delict as "the act of a person that in a wrongful and culpable way causes harm to another".[29] Merely summarising a delict as a "civil wrong" — as suggested by Van der Walt and Midgley and Boberg — also leaves the question of what a delict essentially is unanswered. The narrow definition of Van der Walt and Midgley better clarifies that the elements of a delict (conduct, wrongfulness, fault, harm, and causation) must be present for there to be a delict. Like Neethling and Potgieter, Van der Walt and Midgley do not indicate what form of liability is essentially present — i.e., delictual liability.

Before I explain what the common-law delict entails for the purposes of this thesis, it is essential to note that a delict may be explained or defined with reference to three broad approaches: the generalising approach; the casuistic approach; and the hybrid approach. Neethling and Potgieter refer to the generalising approach and the casuistic approach,[30] and Neethling, Potgieter, and Visser suggest a third hybrid approach to the law of delict.[31] Below I explore each of these broad approaches to the law of delict.

5.1.1 Approaches to the common-law delict

Neethling and Potgieter explain that the generalising (continental) approach sets out the general principles or requirements that regulate delictual liability and which apply irrespective of the individual interest impaired or how the impairment is caused.[32]

This is similar to the Dutch and German approaches to delictual liability discussed in Chapter 4, where the civil codes of these jurisdictions set out the general requirements for delictual liability and there are no "categories" of delict.[33] The benefit of the generalising approach, as adopted in South African law, is that, unlike the casuistic approach, the common-law delict can readily accommodate changing circumstances and new situations. However, the drawback of the generalising approach is that it fails to acknowledge from the outset that there are different historic actions that essentially form separate delicts.

---

28 JC Van der Walt & R Midgley *Principles of delict* 3ed (2005) [2].
29 As above. See also Neethling & Potgieter (2020) 4.
30 Neethling & Potgieter (2020) 4–5. See also Loubser & Midgley (2017) 18–19.
31 Loubser & Midgley (2017) 20–21 refer to the third approach of Neethling & Potgieter. See Neethling & Potgieter (2020) 4 (fn 14) & 5 (fn 15): the blend of "specific" and "general" constitutes our law of delict's hybrid character.
32 Neethling & Potgieter (2020) 4–5.
33 Dyson (2015) Ch 8, 317.

The casuistic approach to the law of delict styles the law of delict according to different groups or separate sets of delicts, each more or less with its own rules.[34] Scots law, which refers to the law of delict and different categories or types of delict, is an example.[35] The benefit of this approach to South African law is that it acknowledges, from the outset, the three historic actions in the South African common-law delict. The liability of the wrongdoer will depend on the requirements of a specific delict.[36] In the South African context, the casuistic approach essentially holds that there are broadly three different delicts rooted in three historic actions:

(1) the *actio legis Aquiliae* (for patrimonial harm or *damnum iniuria datum*);
(2) the Germanic action for pain and suffering (for non-patrimonial harm relating to actual pain and suffering, disfigurement, psychiatric injury, and loss of amenities of life associated with bodily injury); and
(3) the *actio iniuriarum* (for non-patrimonial harm relating to a personality interests (*iniuria*)).[37]

The difference between patrimonial and non-patrimonial harm is discussed in greater detail with reference to case law under the delictual element of harm. These different actions, which are arguably different delicts, are discussed in greater detail below.

According to Neethling and Potgieter, the South African law of delict follows a generalising approach as opposed to the casuistic approach (as followed in the English or Anglo-American tradition).[38] Loubser and Midgley also adopt a continental (or generalising) approach to delict and suggest that this is the best approach if we are to apply our law consistently and clearly.[39] In *Perlman v Zoutendyk*,[40] Watermeyer J noted that:

> Roman Dutch Law approaches a new problem in the continental [generalising] rather than the English [casuistic] way, because in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).[41]

The court in *Perlman* thus supported the notion that in terms of Roman-Dutch law, the continental or generalising approach must be applied to the law of delict, in preference to the

34 Neethling & Potgieter (2020) 4; Loubser & Midgley (2017) 18–19.
35 McManus (2013) 5.
36 Neethling & Potgieter (2020) 4–5.
37 Loubser & Midgley (2017) 17.
38 Neethling & Potgieter (2020) 4–5 (fn 14).
39 Loubser & Midgley (2017) 21.
40 *Perlman v Zoutendyk* 1934 CPD 151 (hereinafter *Perlman*) at 155.
41 As above.

casuistic approach followed in the Anglo-American tradition. Despite adopting a generalising approach, the three different historic actions still exist as part of our common-law delict. Regardless of the approach adopted, these three historic actions remain alive and well — the approach will depend on how these three historic actions are regarded, for example, as separate delicts (casuistic approach) or as overlaps or exceptions (hybrid approach) to the general notions of delict (continental or generalising approach). In his work, *Aquilian liability in the South African law of delict*, Fagan favours the casuistic approach.[42]

As we saw above, in addition to the two approaches above, there is also a hybrid approach to the common-law delict.[43] This approach recognises that the generalising (continental) approach is supplemented by secondary characteristics of the casuistic approach.[44] This hybrid approach acknowledges the benefits and importance of torts and that in our law of delict specific forms of delict have evolved, each with its own specific rules.[45]

In this chapter, I adopt a hybrid approach to the common law of delict. This means that I acknowledge the three historic actions and that they are essentially different delicts. I also acknowledge that there are some overlaps between these actions, specifically the *actio legis Aquiliae* and the Germanic action for pain and suffering, due to their shared origins. It is for this reason that I approach these three delicts with reference to their commonalities and differences, without adopting a purely casuistic approach or a purely generalising approach — the hybrid approach is adopted.

The role of constitutional damages is explored in the final part of this chapter. Zitzke suggests that it is only when "the common law cannot be stretched far enough to live up to the constitutional aspirations" that "constitutional damages could step in and save the day."[46] He continues to explain that "constitutional damages would act as a safety net that catches those disputes where delict is hopeless",[47] but that because the common law of delict is continuously

---

42 A Fagan *Aquilian liability in the South African law of delict. A textbook for students* (2019).

43 Loubser & Midgley (2017) 20–21 refer to the third approach of Neethling & Potgieter. See Neethling & Potgieter (2020) 4 (fn 14) & 5 (fn 15).

44 Loubser & Midgley (2017) 20–21 refer to the third approach of Neethling & Potgieter. Neethling & Potgieter (2020) 5 (fn 15): it is a secondary characteristic of our law of delict that specific forms of delict with their own specific rules have evolved to promote the practical utility of general principles in given fields of delictual liability, and to promote legal certainty.

45 Neethling & Potgieter (2020) 5 (fn 15).

46 Zitzke (2020) *TSAR* 436, see also J Brickhill & A Friedman "Chapter 59: access to courts" in S Woolman & M Bishop (eds) *CLoSA* (2ed, OS 11-07, 2014) 24 with reference to *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC) (hereinafter *Modderklip*). See also Brickhill & Friedman "Chapter 59" in *CLoSA* (2014) 101 with reference to *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA). See also Currie & De Waal (2013) 203 with reference to *Modderklip*. See Price (2014) *SALJ* 498.

47 Zitzke (2020) *TSAR* 436; Currie & De Waal (2013) 201 with reference to *Fose v Minister of Safety & Security* 1997 (3) SA 786 (hereinafter *Fose*).

being reimagined, "it is generally not hopeless and can usually meet the needs of a constantly changing society".[48] For purposes of this chapter, I approach constitutional damages as a safety net and do not consider it as forming part of the hybrid approach.

Despite these different approaches (generalising/continental, casuistic, and hybrid) there is at least consensus on the *essentialia* of a common-law delict as emerges from the different definitions of delict above. The five elements or requirements of a common-law delict must all be present for the conduct complained of to constitute a delict and found delictual liability. These same five elements features in the *actio legis Aquiliae*, the *actio iniuriarum*, and the Germanic action for pain and suffering.[49]

Generally speaking (and according to the generalising approach), if one of the five requirements is not present there is no delictual liability.[50] Below, I briefly discuss the *essentialia* of a common-law delict.

5.1.2 *Essentialia* of the common-law delict

Neethling and Potgieter list the elements of delict in the following order: (1) conduct; (2) wrongfulness; (3) fault; (4) causation; and (5) damage.[51] The order of these elements reflects their positioning on the timeline of events. Loubser and Midgley take a different approach and list harm as the first element of liability, followed by (2) conduct; (3) causation; (4) fault; and (5) wrongfulness.[52]

Harm is explored first here as it is the core or trigger prompting the delictual investigation rather than the conduct *per se*. Loubser and Midgley explain that the element of harm sets the stage for delictual problem-solving.[53] They continue that, in broad terms, the elements of delict fall into two categories: (1) mainly factual elements; and (2) mainly normative elements.[54]

It is for this reason that harm is explored first, as harm, conduct, and factual causation are, in the main, factual elements while legal causation, fault, and wrongfulness are principally normative elements. It makes practical sense to investigate the factual elements first before engaging with the normative elements.

---

48 Zitzke (2020) *TSAR* 436.
49 Loubser & Midgley (2017) 29–32.
50 Neethling & Potgieter (2020) 4–5, see 433 for "forms of liability without fault".
51 Neethling & Potgieter (2020) 4–5. Notably, it is according to these elements which Neethling & Potgieter define a delict. Their definition does not make reference to no-fault liability.
52 Loubser & Midgley (2017) 25, see 197 for a discussion on whether wrongfulness or fault should be determined first.
53 Loubser & Midgley (2017) 22.
54 Loubser & Midgley (2017) 76.

This is similar to the approach adopted in German law, where the first stage refers to the three objective (or factual) elements: conduct; harm or injury;[55] and causation,[56] and the second stage involves wrongfulness and fault[57] as normative elements.

Without further ado, I now turn to the functions of the common-law delict as noted by Loubser and Midgley. This is an important part of the introduction and background to the common-law delict, as without a proper understanding of the law of delict's functions, it cannot be determined whether and how non-vaccination fits into the common-law delict.

5.1.3 Functions of the common-law delict

The common-law delict generally serves the following principal functions:

(1) Compensation and/or satisfaction for harm suffered or an interest that is infringed is the main function of the law of delict,[58] similar to that of tort law[59] and the law of delict in Germany.[60]
(2) Protection of certain interests, which include intangible interests such as the psyche and mental health (generally or in the form of pain and suffering in relation to physical injury), purely economic interests, and personality interests (such as privacy, dignity, and identity).[61]
(3) Promotion of social order and cohesion.[62]
(4) Education and reinforcement of values.[63]
(5) Provision of socially acceptable compromises between conflicting moral views. Here, the authors refer to competing rights (such as dignity) and suggest that the law of delict does not intend to deny either party their rights, but rather to balance these competing rights in a socially acceptable manner.[64]

---

55 Brüggemeier (2020) *EJCLG* 347: "any direct injury of a protected interest leads to a presumption of unlawfulness. This does not apply if the injurious act was in some way justified (self-defence, consent, etc.)".
56 Brüggemeier (2020) *EJCLG* 369–370.
57 Brüggemeier (2020) *EJCLG* 347–348; Spindler & Rieckers (2019) Ch 1, §2 [74]; Markesinis & Unberath (2002) 84.
58 Loubser & Midgley (2017) 9; Neethling & Potgieter (2020) 255; Klopper (2017) 2 refers to the compensatory objective of the law of delict.
59 Brennan (2017) 6; Koziol (ed) *Basic Questions* (2015) 380; Reiss (2014) *CJLPP* 598.
60 See Hellwege & Witting "Chapter 4" in Dyson (2015) 129.
61 Loubser & Midgley (2017) 10–11, & 22.
62 Loubser & Midgley (2017) 11.
63 Loubser & Midgley (2017) 12.
64 Loubser & Midgley (2017) 12 & 22: delict intends to reconcile the competing interests of the plaintiff, defendant and society in general.

(6) Deterrence, warning,[65] and prevention,[66] similar to tort law.[67]

(7) Reallocation and apportionment of losses,[68] which is referred to as corrective justice in Australia[69] and means "if you are wronged by another and suffer a loss, the loss ought to be borne by the wrongdoer, not the victim."[70]

In the context of non-vaccination, I agree that the common-law delict may serve to provide compensation for the quantifiable harm suffered and internalise the costs of the choice (non-vaccination).[71] Notably, satisfaction is included as a function of the common-law delict. The difference between these concepts is explored in greater detail below; for now, it suffices to note that they are rooted in monetary awards.

I also agree that the common-law delict may protect the interests of a victim harmed by non-vaccination, although it cannot be suggested that retribution (as a function or aim of the common-law delict) is necessarily possible.[72] For example, an amputated leg cannot be "restored" but satisfaction may play a role.[73] Neethling and Potgieter suggest that the general compensatory function of the common-law delict implies that there must be some loss or damage for which the law makes compensation available.[74]

This raises the question of whether an apology has a place in the structure of the common-law delict. The Constitutional Court (per Mokgoro J) stated in *Dikoko v Mokhatla*[75] that *amende honorable* has a place in the South African law of defamation,[76] speaking to the notion (and African philosophy) of ubuntu,[77] but did not extend the discussion of an apology and the notion of ubuntu beyond the scope of defamation.

---

65 Loubser & Midgley (2017) 12. See Ch 4 of this thesis where the law of tort and deterrence is discussed. See also Loubser & Midgley (2017) 11 where the authors refer to the threat of accountability as a means of delict protecting personal and property interests.

66 See Hellwege & Witting "Chapter 4" in Dyson (2015) 129.

67 Brennan (2017) 6; Koziol (2015) 380.

68 Loubser & Midgley (2017) 13; Tuitt *et al* (2015) 14.

69 Connolly (2006) 1; Clark & Harris (2005) *DCJ* 16–17.

70 Connolly (July 2006) 5; ALRC "The right to sue in tort" (8 December 2014) https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/16-authorising-what-would-otherwise-be-a-tort/the-right-to-sue-in-tort/ (accessed 29 March 2022) at 16.5. See Hellwege & Witting "Chapter 4" in Dyson (2015) 130.

71 Reiss (2014) *JLPP* 598.

72 As above.

73 See JM Potgieter *et al Visser and Potgieter: law of damages* 3ed (2012) 35–36 for a discussion of "imperfect compensation".

74 Neethling & Potgieter (2020) 255.

75 2006 (6) SA 235 (CC) (hereinafter *Dikoko*).

76 *Dikoko* [67].

77 *Dikoko* [69]. See A Mukheibir "Ubuntu and the amende honorable — a marriage between African values and medieval canon law" (2007) 28(3) *Obiter* 583; J Neethling & JM Potgieter "Herlewing van die amende honorable as remedie by laster: Mine Workers Investment Company (Pty) Ltd v Modibane 2002 (6) SA 512 (W)" (2003) 66 *THRHR* 329.

In *Media 24 v SA Taxi Securitisation*,[78] the Supreme Court of Appeal (per Nugent JA) referred to the value of an apology in defamation cases (falling under the *actio iniuriarum*) and stated that

> [t]he Constitutional Court recently reminded us of that again in *Le Roux v Dey*, in which it said that the Roman-Dutch law was a 'rational, enlightened system of law, motivated by considerations of fairness', a feature that is 'sometimes lost from view in pursuit of doctrinal purity', and that the restriction of remedy in defamation to damages is 'an unacceptable state of affairs'. Referring to the value of apology and retraction it said that 'it is time for our Roman-Dutch common law to recognise the value of this kind of restorative justice', and it indeed did so in that case.[79] (Footnotes omitted.)

There is a plethora of literature on the notion of ubuntu, but for the purposes of this brief discussion, it is sufficient to mention that ubuntu denotes that to be human is to recognise the humanity of others.[80] I suggest that the monetary incentives underlying the functions of the common-law delict must be supplemented with a remedy based on ubuntu so emphasising restorative rather than retributive justice. I do not suggest that the common-law delict abandon its current functions, but I believe that in the context of non-vaccination, a remedy based on ubuntu must also be considered. This is because retributive justice alone does not speak to the notions of ubuntu and restorative justice.[81] I touch on this suggestion below under the heading of delictual remedies.

Although the promotion of social order and cohesion is suggested as a function of the common-law delict, I contend that it is doubtful whether litigation will promote social order and cohesion in the context of non-vaccination. For example, regardless of potential delictual liability, non-vaccinating parents may still continue to pursue non-vaccination (as they often believe that they are acting in their child's best interests), and delictual liability cannot necessarily secure the promotion of social order and cohesion by deterring non-vaccination *per se*.

I acknowledge that the common-law delict may educate and reinforce values, especially constitutional values. This links with the function of the common-law delict to produce a

---

78 2011 (5) SA 329 (SCA) (hereinafter *Media 24 v Taxi*).

79 *Media 24 v Taxi* [74]. See also *Mineworkers Investment Company v Modibane* (2002) ZAGPHC 6 [16]; *Young v Shaikh* 2004 (3) SA 46 (C) at 57E–57F; *Le Roux v Dey* 2011 (6) BCLR 577 (CC) (hereinafter *Le Roux v Dey*) [197]–[202] for the minority judgment of Froneman J.

80 See N Ndeunyema *Re-invigorating ubuntu through water: A human right to water under the Namibian Constitution* (2021) 65: "Ubuntu's most common formulation is *umuntu ngumuntu ngabantu*, an isiZulu expression of the Nguni people of South Africa that proximately translates to the laconic phrase 'a human being is a human being through (the otherness of) other human beings'."

81 See M Schoeman "Chapter 14: The African concept of Ubuntu and restorative justice" in T Gavrielides & V Artinopoulou (eds) *Reconstructing restorative justice philosophy* (2013) 291.

socially acceptable compromise between conflicting moral views without denying any party their rights. This is especially important in the non-vaccination context. The common-law delict cannot aim to force a pro-vaccination agenda on anyone.

The common-law delict must, however, identify and balance the competing rights and interests in a meaningful way that does not deny any party their rights. This will perhaps be the most difficult outcome to meet in a non-vaccination delictual lawsuit; but it is essential. Respecting the rights, traditions, personal beliefs, and convictions of not only the parties, but the community as a whole is important. Lastly, reallocating and spreading the losses for the harm suffered is also important in the non-vaccination context.

It is notable that Loubser and Midgley do not mention transformation, reform, or development as goals of the common-law delict. In the context of non-vaccination, I suggest that these are also a function that the common-law delict must fulfil. A non-vaccination case before our courts will present an opportunity to, for example, effect legislative reform (of existing legislation) or perhaps the development of new legislation or policies to address certain gaps in our law.

The non-vaccination issue may even prompt the development of our common-law delict, as well as our customary law of delict, as permitted under section 39 of the Constitution. By suggesting this goal, I am not engaging in what Zitzke dubs “constitutional over-excitement”, but rather pointing to how our common-law delict currently rather reflects “constitutional heedlessness”.

For example, if the common-law delict only aims to compensate or satisfy aggrieved or harmed parties — without addressing gaps in our law — the common-law delict will merely serve as a common-law compensation mechanism without making any meaningful contribution to legal development or transformation. As mentioned in Chapter 1, I follow the transformative constitutional method, and true to this approach I regard transformation as a valid role and function of the common-law delict. By this, I am not suggesting that the common-law delict must always aim to develop the common law, or that the Constitution must be drawn into every delictual dispute. I do, however, warn that the goal of development and transformation must not be sidelined based on convenience or legal tradition.

Adjudicating the issue of non-vaccination must be seen as an opportunity to address the gaps in our law; it must be approached as an opportunity to engage meaningfully with competing rights and interests, how they should be balanced, and why this is necessary. Mere satisfaction or compensation is not enough. I return to these points in Chapter 6.

In light of the above introduction and the definitions of the common-law delict, it is time to venture into an analysis of the delictual elements and how they play out in the context of non-vaccination. For purposes of this chapter, the Filia/Elimele hypothetical which is similar to the Nonva/Vic hypothetical in Chapter 4 but adapted for the South African context and with changed names to avoid confusion, is used to explore the elements of liability. As indicated in Chapter 4, both hypotheticals are my unique adaptations of the hypothetical of Caplan, Hoke, Diamond, and Karshenboyem.[82] I use this specific scenario to explore the elements of the common-law delict as the issue of non-vaccination is too broad to discuss without some guidelines or set of facts. The hypothetical aims to structure the arguments to flow more coherently, where certain points or topics fall outside the parameters of the hypothetical, I indicate this.

Consider the following hypothetical.

5.2 FILIA/ELIMELE HYPOTHETICAL

Filia's parent, Anti,[83] suspects that the COVID-19 vaccine is a government money-making initiative aimed at the deliberate infection of individuals and that it alters the deoxyribonucleic acid (DNA) of its recipients. For purposes of this hypothetical, it is assumed that the COVID-19 vaccine is strongly recommended for crèche attendance (for children from the age of five).[84] Despite this recommendation, Anti decides not to vaccinate Filia against COVID-19.

Filia accordingly receives no COVID-19 vaccines. Only ten children attend a crèche with Filia and all the children — but Filia — have received their routine vaccinations, including COVID-19 vaccinations, and their vaccinations are up to date.

---

82 See Caplan *et al* (2012) *JLME* 606.

83 The name "Anti" is used to denote the parent's anti-vaccination (essentially non-vaccination) attitudes. For purposes of this hypothetical, similar to that in Ch 4, there is only one parent, and for purposes of this discussion joint wrongdoers and contributory negligence is excluded.

84 See WHO "Coronavirus disease (COVID-19): Vaccines" (17 May 2022) https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-(covid-19)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=Cj0KCQiAorKfBhC0ARIsAHDzslv61nXBwAP0vYVwEEAN2usLptT-atUt1Ee4nIWYKzWqyaNALArd5zIaArghEALw_wcB (accessed 16 February 2023); RSA Gov, DoH "The use of COVID-19 Pfizer Vaccine for children between 5 and 11 years of age who are at risk of severe COVID-19 infection & complications" (15 August 2022) https://sacoronavirus.co.za/wp-content/uploads/2022/12/A43_Recommendation-for-vaccinating-children-5-11-years-old-with-COVID-19-vaccines.pdf (accessed 16 February 2023); R Cloete "Government plans to vaccinate children against COVID-19" (12 December 2022) https://www.careersportal.co.za/news/government-plans-to-vaccinate-children-against-covid-19 (accessed 22 January 2023).

On 10 March 2023, at the age of five, Filia travels to the Western Cape with her parent, Anti. Upon returning to Pretoria on 24 March 2023, Filia develops a sore throat and runny nose. Anti takes Filia to a paediatrician who confirms that she has the Omicron ((B.1.1.529): SARS-CoV-2) variant. The paediatrician informs Anti that Filia and Anti must both self-isolate for 14 days, and that Filia may not attend crèche for at least 14 days.

Anti believes that the existence of COVID-19 is a conspiracy theory and that Filia merely has seasonal flu. Anti sends Filia to crèche, despite her being ill and despite the recommendations of the paediatrician that she be kept at home and avoid contact with others for at least 14 days. Filia attends crèche and comes into contact with the other nine classmates. Anti believes that all children are in any event at risk of contracting childhood diseases, and sending your child to crèche is a voluntary assumption of that risk.

Approximately one week later, Elimele, a two-year-old crèche classmate of Filia falls seriously ill. Although Elimele is too young to receive the COVID-19 vaccine(s) or booster shots,[85] his parents intend to have him vaccinated. All of Elimele's other routine vaccinations are up to date. A paediatrician establishes that Elimele also has the Omicron variant. After being hospitalised, it is discovered that Elimele has suffered permanent damage to his right lung, and the entire right lung is surgically removed.[86] Elimele's parents learn that Filia previously had the COVID-19 Omicron variant and know, from a prior conversation with Anti, that Anti is strongly against all vaccination but especially the COVID-19 vaccine(s).[87]

During this time, all the other children, Filia excepted, were in good health and displayed no symptoms. For purposes of this hypothetical it is accepted that none of the children was asymptomatic.

Because Elimele's right lung was surgically removed, Elimele experiences constant discomfort, shortness of breath, and poor tolerance of exercise even after recovering from the operation. He cannot run, participate in sports, or enjoy a healthy (physically active) childhood because of the removal of his right lung. Elimele also has a large scar across his chest as a result of the surgery.

---

85 As above. For purposes of this hypothetical it is assumed that children under the age of five are too young to receive any COVID-19 vaccination(s)/booster shot(s). See RSA Gov, News "COVID-19 vaccine for kids aged between 5 and 11 next year" (9 December 2022) https://www.sanews.gov.za/south-africa/covid-19-vaccine-kids-aged-between-5-and-11-next-year (accessed 22 January 2023)

86 This procedure is referred to as a "pneumonectomy", see Hopkinsmedicine "What is a pneumonectomy?" (date unknown) https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/pneumonectomy#:~:text=A%20pneumonectomy%20is%20a%20type,through%20a%20series%20of%20tubes (accessed 19 January 2022); Caplan *et al* (2012) 606.

87 Caplan et *al* (2012) 606.

The infection and surgery caused Elimele physical pain. However, after recovering from the surgery, Elimele experiences discomfort related only to shortness of breath. A psychiatrist has determined that Elimele now suffers from depression and post-traumatic stress disorder (PTSD) as a result of the infection and surgery.[88]

In an effort to facilitate his recovery and post-operative healing process, Elimele also receives physiotherapy and attends special schooling to accommodate his disability, depression, and PTSD. Elimele also regularly visits the psychologist to receive therapy for his depression and PTSD.

Elimele's medical (hospital) bills for the surgery and treatment of the infection are only one financial aspect that his parents must bear. In addition, they must foot the bill for special schooling, therapy, post-operative physiotherapy, health check-ups with a specialist, and medication for his depression and PTSD.

I introduce the Filia/Elimele hypothetical above to set the stage for a discussion of the three actions in delict and their place in this chapter.

5.3 THREE ACTIONS IN DELICT AND THEIR PLACE IN THIS CHAPTER

According to Loubser and Midgley, harm or threatened harm is the core element of liability as without it there is no cause of action.[89] The elements of delictual liability are discussed below in the following order (1) harm; (2) conduct; (3) causation; (4) fault; and (5) wrongfulness in the context of the Filia/Elimele hypothetical. As mentioned, a hybrid approach is adopted in this chapter and I acknowledge and explain the potential overlap between the *Aquilian* action and the Germanic action. I also acknowledge that the *actio iniuriarum* is a different kettle of fish where some elements are not even necessary (arguably, causation).

Before exploring the delictual elements under separate headings, I first provide a short overview of the three different delictual actions: the *actio legis Aquiliae*, the *actio iniuriarum*, and the Germanic action for pain and suffering.[90]

---

88 See A Simonelli "Posttraumatic stress disorder in early childhood: classification and diagnostic issues" (2013) *EJP* 1–11; M Blank "Posttraumatic stress disorder in infants, toddlers, and preschoolers" (2007) 49(3) *BCMJ* 133–138.

89 Loubser & Midgley (2017) 25 cite *FNB of SA v Duvenhage* (2006) 4 All SA 541 (SCA) in support of the harm-first investigation into fault liability. In *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) [65] the CC referred to "harm causing conduct" and not harm alone.

90 See also Zitzke (2020) *TSAR* 424.

5.3.1 The *actio legis Aquiliae* and the Germanic action for pain and suffering

The Germanic action for pain and suffering did not originate in Roman law and no compensation could be claimed under Roman law for negligently causing bodily injuries.[91] However, the influence of Germanic customary law on Roman-Dutch law held that "pain, suffering, and bodily disfigurement as a result of physical injuries founded an action".[92] Hence, there is a strong correlation between the elements as they both feature in the *actio legis Aquiliae* and the Germanic action for pain and suffering.

The Germanic action for pain and suffering,[93] which is concerned, in the main, with bodily integrity, provides satisfaction (solace or *solatium*)[94] for non-patrimonial harm or loss relating to actual pain and suffering, disfigurement, psychiatric injury, and loss of amenities of life associated with bodily injury has developed in conjunction with the *actio legis Aquiliae* as an action that is "primarily intended to provide compensation (in contrast to satisfaction in terms of the *actio iniuriarum*)".[95]

Conduct, fault, wrongfulness, and causation must be proven in the same way for the *actio legis Aquiliae* and the Germanic action for pain and suffering. Notably, only the type of harm differs. For both the *actio legis Aquiliae* and the Germanic action for pain and suffering the following delictual elements overlap:

(1) conduct may take the form of a positive act, an omission, or a statement;
(2) factual causation (*conditio sine qua non*) and legal causation;
(3) fault may take the form of either intent or negligence;[96] and
(4) wrongfulness.[97]

---

91 Neethling & Potgieter (2020) 16–17.
92 As above. See also Zitzke (2020) *TSAR* 424.
93 Damages for pain and suffering are refered to as "*schmerzensgeld*" and "*geldentschädigung*", see Dyson (2015) 131.
94 *Hoffa v SA Mutual Fire & General Insurance* 1965 (2) SA 944 (C) at 954–955. See also Dyson (2015) 131: "*genugtuungsfunktion*" is used to refer to personal satisfaction in German law.
95 Neethling & Potgieter (2020) 258; *The Premier of the Western Cape Provincial Government v Rochelle Madalyn Kiewitz* 2017 (4) SA 202 (SCA) (hereinafter *Kiewitz*) [6].
96 See also Zitzke (2020) *TSAR* 426.
97 Loubser & Midgley (2017) 29-31. See *Media 24 v Taxi* [10]: "the four well-known elements of an *Aquilian* action, namely, (a) a wrongful act or omission, (b) fault (in the form of either *dolus* or *culpa*), (c) causation and (d) patrimonial loss".

As mentioned, the type of harm differs:

(1) Harm or loss for the *actio legis Aquiliae* is patrimonial (*damnum iniuria datum* or loss wrongfully caused) arising from physical damage to property or the person, or pure economic loss.[98] The court in *Matthews v Young*[99] confirmed that patrimonial damages must be claimed under the *actio legis Aquiliae*. Pure economic loss and damage to property are also included in the scope of *lex Aquilia*.[100]
(2) Harm or loss for the Germanic action for pain and suffering is non-patrimonial relating to actual pain and suffering, disfigurement, psychiatric injury, and loss of amenities of life associated with bodily (physical) injury.[101]

The difference between patrimonial and non-patrimonial harm is discussed in greater detail with reference to case law under the delictual element of harm. Fagan defines *Aquilian* liability in the following terms:

> If a person committed a legally recognised wrong against another, by intentionally or negligently causing harm to her person or property in breach of a legally recognised non-contractual duty owed to her not to [cause harm], and, by committing such wrong, caused the victim of the wrong to suffer loss which was not too remote, then he owes the victim of the wrong a legal duty to compensate her for that loss.[102]

The essence of the "non-contractual duty not to cause harm" is explored below under the banner of the delictual element of wrongfulness. For now, it suffices to note that the required harm differs for the *actio legis Aquiliae* and the Germanic action for pain and suffering. However, Elimele may claim both patrimonial and non-patrimonial damages arising from one damage-causing event in a single lawsuit.

98 Loubser & Midgley (2017) 29–31; Fagan (2019) ix; see *MEC for Health & Social Development, Gauteng v DZ* 2018 (1) SA 335 (CC) [37].
99 1922 AD 492 (hereinafter *Matthews v Young*) at 503–505.
100 Loubser & Midgley (2017) 29–31; Fagan (2019) ix; *Union Government v National Bank of SA* 1921 AD 121 at 128.
101 Loubser & Midgley (2017) 29–31; *Bester v Commercial Union Versekeringsmaatskappy van SA* 1973 (1) SA 769 (A) per Botha JA at 779; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 569E–571F; *Van Zijl v Hoogenhout* (2004) 4 All SA 427 (SCA) [8]–[12].
102 Fagan (2019) ix.

5.3.2 *Actio iniuriarum*

In *NM v Smith*[103] the Constitutional Court (per O'Regan J) neatly summarises the *actio iniuriarum* in the following terms:

> This cause of action, recognised since the classical Roman period, protects a range of personality rights under the Latin terms *corpus*, *fama* and *dignitas* which can loosely be translated respectively, as physical and mental integrity, good name and dignity understood in a broad sense. […]. The elements of the *actio injuriarum* are the intentional and wrongful infringement of a person's *dignitas*, *fama* or *corpus*.[104] (Footnotes omitted.)

This means that the *actio iniuriarum* establishes liability for the infringement of *dignitas*, *fama*, and *corpus*, which are referred to as personality rights.[105] The *actio iniuriarum* rests on "wounded feelings rather than patrimonial loss".[106] For injury to personality rights, non-patrimonial damages are claimed under the *actio iniuriarum*[107] as "the loss has no demonstrable money value".[108]

In *Dikoko v Mokhatla* the Constitutional Court (per Mokgoro J) declared that the *actio iniuriarum* aims

> to afford personal satisfaction for an impairment of a personality right and became a general remedy for any vexatious violation of a person's right to his dignity and reputation.[109] (Footnotes omitted.)

In *De Klerk v Minister of Police*[110] the Constitutional Court (per Theron J) noted that:

> When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered.[111]

The action for defamation in our law is derived from the *actio iniuriarum* as confirmed by the Constitutional Court (per Brand JA) in *Media 24 v Taxi*,[112] and in *NM v Smith* the Constitutional Court (per O'Regan J) pointed out that "[t]he most common use of the *actio injuriarum* in our

---

103 2007 (5) SA 250 (CC) (hereinafter *NM v Smith*).
104 *NM v Smith* [151].
105 *Media 24 v Taxi* [84].
106 *Media 24 v Taxi* [17]–[21].
107 *Van der Merwe v RAF* 2006 (4) SA 230 (CC) [39].
108 *Media 24 v Taxi* [84].
109 *Dikoko* [62]. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC) (hereinafter *Khumalo v Holomisa*) [17].
110 2021 (4) SA 585 (CC) (hereinafter *De Klerk*).
111 *De Klerk* [13].
112 [17].

law is in relation to defamation".[113] Notably, the same set of facts cannot give rise to more than one *actio iniuriarum* as explained by the Constitutional Court (per Brand AJ) in *Le Roux v Dey*.[114]

In *NM v Smith* the Constitutional Court (per Madala J) explained the requirements for the *actio iniuriarum* in the context of the invasion of privacy as follows:

> For the common law action for invasion of privacy based on the *actio iniuriarum* to succeed, the following must be proved:
>
> (a) Impairment of the applicant's privacy;
>
> (b) Wrongfulness; and
>
> (c) Intention (*animus iniuriandi).*
>
> Negligence is as a rule, therefore, insufficient to render the wrongdoer liable.[115]

Notably, the court made no reference to the element of causation as a requirement to succeed in the *actio iniuriarum*. For purposes of the *actio iniuriarum*, causation is not *strictly speaking* an essential element.[116] Furthermore, there is no case law indicating that causation is a requirement for assault under the *actio iniuriarum*. Notably, the Constitutional Court in *NM* above states that intent is a requirement for the *actio iniuriarum*.[117]

In *Le Roux v Dey*, the Constitutional Court included intent when defining *iniuria*.[118] Intent is a requirement for purposes of the *actio iniuriarum*, and in *NM v Smith* Constitutional Court reiterated that "[n]egligence is as a rule, therefore, insufficient to render the wrongdoer liable [under the *actio iniuriarum*]."[119]

The element of intent is explored in greater detail below under the heading of fault. For now, it is important to note that the *actio iniuriarum* requires intent, and the other two actions (Germanic action for pain and suffering and the *actio legis Aquilia*) do not require intent as a form of fault. Knobel notes that the intention requirement of the *actio iniuriarum* can be seen as a penal relic in our law of delict.[120]

---

113 *NM v Smith* [151].
114 *Le Roux v Dey* [140]–[142] (Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J, & Nkabinde J concurring).
115 *NM v Smith* [55] (Moseneke DCJ, Mokgoro J, Nkabinde J, Skweyiya J, Yacoob J, & Van der Westhuizen J concurring).
116 See Loubser & Midgley (2017) 31–32 with reference to *Delange v Costa* (1989) 2 All SA 267 (A).
117 Hellwege & Witting "Chapter 4" in Dyson (2015) 143. In Germany, under s 826 of the BGB, negligence is not enough, and intent is required.
118 *Le Roux v Dey* [141].
119 *NM v Smith* [55].
120 JC Knobel "Thoughts on intention, consciousness of wrongfulness and negligence in delict" (2012) 75 *TSAR* 488.

On this point, it is also worth mentioning that under the *actio iniuriarum*, the element of wrongfulness differs from that under the Germanic action for pain and suffering. This is because if intent is a requirement, wrongfulness may be easily proven with reference to the rebuttable presumption that it is *prima facie* wrongful for a person to cause physical injury to another by positive conduct (commission)[121] — this has been accepted by our courts.[122] The opposite is also true — an omission that causes harm is not *prima facie* wrongful.[123] Without further discussion of this point, it is important to note that the elements of fault, wrongfulness, and causation under the *actio iniuriarum* differ from the other two actions discussed above.

I turn now to the elements of the common law of delict with specific reference to the Filia/Elimele hypothetical.

5.4 ELEMENTS OF COMMON-LAW LIABILITY IN DELICT: FILIA/ELIMELE HYPOTHETICAL

5.4.1 Harm (damage): actual or potential

For Elimele to benefit from the general compensatory function of the common-law delict (and the compensatory nature of damages),[124] there must be some harm (loss or damage) resulting from the violation of Elimele's interests.[125] Harm, as the core element of delict, is fundamental to a delictual action for damages and is, according to Loubser and Midgley, the first point of departure in the delictual enquiry.[126] Similarly, in the foreign law discussion above, harm is an

121 See Fagan *Undoing delict* (2018) 1; Zitzke (2020) *TSAR* 425.

122 See *Lillicrap v Pilkington Brothers* 1985 (1) SA 475 (A) at 497B–497C as endorsed by the SCA in *Indac Electronics v Volkskas Bank* 1992 (1) SA 783 (AD). See *Minister of Safety & Security v Van Duivenboden* (2002) 3 All SA 741 (SCA) (hereinafter *Van Duivenboden*) [12] per Nugent JA: "where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful"; *Sea Harvest Corporation v Duncan Dock Cold Storage* (2000) 1 All SA 128 (A) (hereinafter *Sea Harvest*) [19] per Scott JA (Smalberger JA, Howie JA, & Marais JA concurring): "in many if not most delicts the issue of wrongfulness is uncontentious as the action is founded upon conduct which, if held to be culpable, would be *prima facie* wrongful."

123 See *Van Duivenboden* [12] per Nugent JA: "where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission."

124 Klopper (2017) 6; Neethling & Potgieter (2020) 255–256: the compensatory function may be in the following specific forms: compensation for damage or "damages" refers to the monetary equivalent intended as the equivalent of damage. "Damages are a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as future damage." Satisfaction refers to damage which is incapable of being compensation. Satisfaction may refer to effecting retribution for the wrong; or satisfying the plaintiff's sense of justice. Satisfaction include the ordering for the payment of a monetary sum, in proportion to the wrong inflicted on him.

125 Loubser & Midgley (2017) 75; Neethling & Potgieter (2020) 255.

126 As above.

essential element for tortious (specifically the tort of negligence) or delictual liability, and without harm or injury, there can be no case.[127]

I agree that harm is what triggers the delictual investigation, and I explore harm as the first element of the common-law delict. For now, it is unnecessary to explore, for example, the other delictual elements to define and establish whether the delictual element of harm is present.

Neethling and Potgieter describe the concept of damage with reference to harm in connection with someone's patrimony and/or personality.[128] The concept of harm includes patrimonial (pecuniary) as well as non-patrimonial (non-pecuniary) loss.[129] Patrimonial and non-patrimonial harm are the two broad categories of harm,[130] and are particularly important when deciding what delictual action to pursue (the *actio legis Aquilia*, *actio iniuriarum,* or the Germanic action for pain and suffering) as well as the assessment of damages.[131] Both patrimonial and non-patrimonial harm refers to the "utility or quality of an interest protected by law is infringed (the plaintiff loses something for which he receives money as compensation)".[132]

Notably, only harm in respect of legally recognised non-patrimonial (non-pecuniary) and patrimonial (pecuniary) interests of a person qualify as harm.[133] In other words, Elimele has an interest that the law of delict protects, and this (legally protected) interest is violated in a negative (legally reprehensible) way.[134] Elimele may claim patrimonial and non-patrimonial damages arising from a single damage-causing event in one lawsuit. Below, I briefly explain what is meant by patrimonial and non-patrimonial harm with reference to case law.

5.4.1.1 Patrimonial harm

As mentioned above, patrimonial harm is the form of harm or loss required for the *lex Aquilia* and non-patrimonial harm is required for the Germanic action for pain and suffering as well as

127 See Tuitt *et al* (2015) 15 for a discussion on conduct that can be actionable even though no damage is suffered.
128 Neethling & Potgieter (2020) 259.
129 Neethling & Potgieter (2020) 256–257.
130 Loubser & Midgley (2017) 80; Neethling & Potgieter (2020) 229: there exists no clearly defined line between them.
131 Klopper (2017) 6.
132 Neethling & Potgieter (2020) 259.
133 Neethling & Potgieter (2020) 256.
134 Loubser & Midgley (2017) 76: the second inquiry refers to the appropriate delictual action. E.g., patrimonial harm may be compensated by the *lex Aquillia*; if the plaintiff experienced pain and suffering, the Germanic remedy's elements must be met; and the *actio iniuriarum* applies for the violation of personality interests. These actions are not mutually exclusive and may be simultaneously claimed as remedies.

the *actio iniuriarum*. In the 1911 case *Union Government (Minister of Railways & Harbours) v Warneke*,[135] the AD (per Innes J) explored what patrimonial harm is in the context of the *lex Aquilia* and explained it as follows:

> […] the compensation recoverable under the *lex aquilia* was only for patrimonial damages, that is, loss in respect of property, business or prospective gains.[136]

The purpose of an *Aquilian* claim is to compensate a victim in monetary terms for any loss suffered.[137] *Warneke* thus described patrimonial harm as a loss in respect of property, business, or prospective gains. However, in 1921 the Appellate Division in *Union Government v National Bank of SA*[138] (per Grosskopf AJA) noted that "[i]t is clear that in our law *Aqullian* liability has long outgrown its earlier limitation to damages arising from physical damage or personal injury".[139] Pure economic loss and damage to property are also included within the scope of the *lex Aquilia*.[140] In *Evins v Shield*[141] the court noted that:

> It is true that the *universitas* concept does underlie the *Aquilian* action and that according to current theories […] the plaintiff's patrimonial loss is measured by the diminution of that *universitas*.[142]

Consequently, patrimonial harm is according to the court in *Evins*, essentially a diminution of a person's *universitas*. Patrimonial harm includes personal injury; damage to property; and pure economic loss, and the extent of the patrimonial loss can be established with greater accuracy than the degree of non-patrimonial loss.[143] Prospective loss or damage is explored in more detail below after patrimonial and non-patrimonial harm.

Elimele's patrimonial harm thus refers to the diminution of his patrimony or *universitas* and may take the form of:

(1) hospital bills;
(2) cost of caregivers;
(3) cost of special schooling;
(4) cost of medication (for pain, depression, and PTSD);

135 1911 AD 657 (hereinafter *Warneke*).
136 *Warneke* at 665.
137 *Kiewitz* [6].
138 1921 AD 121 (hereinafter *Union Government v National Bank*).
139 *Union Government v National Bank* at 128.
140 Loubser & Midgley (2017) 29–31; Fagan (2019) ix; *Union Government v National Bank* at 128.
141 (1980) 2 All SA 40 (A) (hereinafter *Evins*).
142 *Evins* at 840–841.
143 Neethling & Potgieter (2020) 260.

(5) cost of post-operative check-ups with a specialist; and
(6) cost of physiotherapy.

In the above examples, I only refer to the loss or harm already sustained (*damnum emergens*), and not future or prospective harm or loss. Prospective loss is explored below in greater detail. For now, it suffices to note that future loss must be claimed together with damages already sustained, in compliance with the once-and-for-all rule. This is explored below in greater detail and with reference to case law.

As mentioned above, in *Matthews v Young* the Appellate Division also noted that patrimonial damages must be claimed under the *actio legis Aquiliae*.[144]

Other forms of patrimonial harm, not specifically applicable to Elimele, include loss of income and reduced earning capacity. As mentioned, Elimele may claim both patrimonial and non-patrimonial damages arising from one damage-causing event in one lawsuit, and I now turn to non-patrimonial harm.

5.4.1.2 Non-patrimonial harm

The Constitutional Court in *Van der Merwe v RAF*[145] (per Moseneke DCJ) explained that

> [b]esides bodily integrity, our law recognises and protects other personality interests such as dignity, mental integrity, bodily freedom, reputation, privacy, feeling, and identity. A wrongful reduction of the quality of these personality interests or rights entitles the victim to non-patrimonial [or general] damages.[146] (Footnotes omitted.)

According to the above, non-patrimonial harm or loss is at most only indirectly measurable in money based on an equitable estimate in that there is no true relation between money and injury.[147] Non-patrimonial damages may include pain and suffering (physical pain, disfigurement, disability, psychiatric lesions, and loss of amenities of life), and the infringement of personality interests (bodily integrity, dignity, privacy, identity, or reputation).[148] Thus, non-patrimonial harm in the form of pain and suffering, disfigurement, and loss of amenities of life involves the diminution or deterioration of the victim's bodily and

144 *Matthews v Young* at 503–505.
145 2006 (4) SA 230 (CC) (hereinafter *Van der Merwe v RAF*).
146 *Van der Merwe v RAF* [40] (Langa CJ, Mokgoro J, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J, & Yacoob J concurring).
147 Neethling & Potgieter (2020) 259–260.
148 Loubser & Midgley (2017) 86. See also Finch & Fafinski (2021) 19: "psychiatric injury must be medically recognised."

personality interests.[149] However, in *Makhubele*[150] the High Court (per Van der Schyff AJ) warned that

> [w]hen the quantification of a claim for non-pecuniary [non-patrimonial] loss is undertaken it is important to remember that the mere physical injury does not *per se* constitute non-patrimonial loss.[151]

The above is true for the Germanic action for pain and suffering under which mere physical injury will not *per se* constitute non-patrimonial loss. For example, non-patrimonial loss associated with assault (the intentional infringement of bodily integrity), is recovered in terms of the action for pain and suffering.[152] For purposes of the *actio iniuriarum*, the (wrongful and intentional) violation of the plaintiff's psycho-physical integrity may constitute non-patrimonial loss.[153]

Usually, mere physical injury or harm constitutes patrimonial harm, such as medical or hospital and medical expenses, which are claimed under the *actio legis Aquiliae*.[154] However, physical harm may also give rise to non-patrimonial harm, as explained by Schreiner JA in *Sigournay v Gillbanks*: "[i]njuries may leave after-effects and may cause mental anxiety but they are not themselves pain".[155] These "after-effects" are essentially non-patrimonial in nature and may be claimed under the *actio iniuriarum* (if inflicted intentionally) or the Germanic action for pain and suffering.

In both *Van der Merwe v RAF*, and *Hoffa v SA Mutual Fire & General Insurance*[156] the courts explained that even though non-patrimonial damages are not directly measurable in money, non-patrimonial damages "ultimately assumes the form of a monetary award"[157] or satisfaction. For example, "slight pain or a slight loss of amenities attracts slight compensation and vice versa".[158]

---

149 See *Administrator General for South-West Africa v Kriel* (1988) 2 All SA 323 (A) (hereinafter *Kriel*) [24]; Klopper (2017) 10–11.
150 *Makhubele v RAF* (2017) ZAGPPHC 805 (hereinafter *Makhubele*).
151 *Makhubele* [5].
152 J Neethling *et al Neethling on personality rights* (2019) 169.
153 See Neethling *et al* (2019) 143 & 168.
154 Neethling *et al* (2019) 170.
155 1960 (2) SA 552 (A) (hereinafter *Sigournay*) at 571.
156 1965 (2) SA 944 (C) (hereinafter *Hoffa*).
157 *Van der Merwe v RAF* [41].
158 *Hoffa* at 954.

Arguably, the removal of Elimele's right lung may constitute pain and suffering as the surgery, post-operative care, and recovery may be physically painful, and the pain caused by the infection (and the removal of his right lung) is subjectively and actually experienced.[159]

Consider another viewpoint: does the infection (alone) caused by Filia (unvaccinated child) who transmitted the disease (COVID-19) to Elimele constitute physical injury? In other words, what if Elimele's right lung had not been removed, but he suffered only the symptoms of the infection? Are the symptoms suffered as a result of the infection sufficient to constitute "physical harm" in the context of pain and suffering?

I argue that the transmission (of a virus, like COVID-19) may possibly constitute physical injury (for purposes of pain and suffering) if the symptoms of the infection give rise to physical pain and discomfort. For example, in *Schmidt v RAF*[160] the High Court (per Van Oosten J) referred to the "physical injuries sustained by the plaintiff" under separate headings, one of which was "Methicillin Resistant Staphylococcus Aureus (MRSA) Infection".[161]

The pain and suffering caused by the infection were considered by the High Court in its award of general (non-patrimonial) damages claimed for pain and suffering disability, disfigurement, and loss of amenities of life.[162] Clearly, the court was of the opinion that an infection alone and the pain caused by that infection were sufficient for the purposes of the action for pain and suffering.

Similarly, in *N v MEC for Health, Gauteng*[163] the High Court (per Bertelsmann J) awarded "R 300 000, 00 in respect of the child's pain and suffering" linked to an infected wound that took three months to heal.[164] The court referred to the "pain and discomfort" experienced as a result of the infection.[165] In *Bester v Commercial Union Versekeringsmaatskappy van SA*[166] Botha JA explained the importance of the brain and nervous system in the context of physical injury (for purposes of pain and suffering):

159 Loubser & Midgley (2017) 83; *Sigournay* at 569E–571F.
160 (2007) 2 All SA 338 (W) (hereinafter *Schmidt v RAF*).
161 *Schmidt v RAF* [5].
162 See also *Ngubane v South African Transport Services* 1991 (1) SA 756 (AD); *Masemola v RAF* (2017) ZAGPPHC 1202 [23]; *M v RAF* (2017) ZAGPPHC 247 [38].
163 (2015) ZAGPPHC 645 (hereinafter *N v MEC*).
164 *N v MEC* [8], [15], & [28].
165 As above.
166 1973 (1) SA 769 (A) (hereinafter *Bester*).

> *Die senu- en breinstelsel is, in iedere geval, net so 'n deel van die fisiese liggaam as wat 'n arm of been is, en 'n besering aan die senu- of breinstelsel is net so 'n besering van die fisiese organisme as wat 'n beseerde arm of been is.*[167]

According to Botha JA, the brain and nervous system are just as much a part of the physical body as an arm or a leg, and an injury to the brain or nervous system is as much an injury of a physical organism as an injury to an arm or leg.

Based on the above, I argue that the transmission of a disease (such as a virus) may cause "physical injury" if physical signs of infection (as a result of the transmission) materialise. I suggest that the physical signs (or consequences) of infection which cause physical pain may be considered a physical injury although it is not, in the traditional sense, a scrape on the knee or a broken rib, but rather "a scrape" on a microscopic (cellular) level — constituting pain and suffering (linked to a physical injury because of the infection caused by transmission).[168]

On the other hand, I suggest that mere transmission alone is not enough to constitute "physical injury" for purposes of pain and suffering.[169] Consider a scenario where Elimele is asymptomatic,[170] has no symptoms, and his right lung was never removed. In this case, Elimele is unlikely to succeed in a claim of pain and suffering as he experienced no physical pain or loss of amenities of life.[171] This approach is in line with that of Schreiner JA in *Sigournay v Gillbanks*, where the judge referred to pain "actually experienced" in contrast to pain not actually experienced due to anaesthesia, for example.[172]

In addition to pain and suffering and disfigurement, compensation may be claimed for emotional or nervous shock, fear, anxiety, trauma, mental distress,[173] and loss of (or reduced) life expectancy, and amenities of life and health, as these are also recognised as injuries to personality insofar as the psychological or mental injury is equated with physical (bodily)

---

167 *Bester* per Botha JA at 779. See also Zitzke (2020) *TSAR* 424–425.

168 See *Saki v MEC of the Department of Health, Eastern Cape Government* (2020) ZAECGHC 107 [47]: in this case the HC considered the "the pain and suffering from the associated infection"; [7]: "it was not disputed that the Appellant had to endure severe pain and suffering as a result of the wound having become infected."

169 The transmission of HIV may constitute attempted murder (as it is currently incurable), see *Phiri v S* 2014 (1) SACR 211 (GNP): although this is a criminal law case the arguments purported by the court (regarding *dolus eventualis*, the intentional transmission of an infectious (and incurable) disease, and a shortened lifespan) may apply in the context of non-vaccination.

170 See Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/asymptomatic (accessed 24 November 2022).

171 See Loubser & Midgley (2017) 84: risk to the plaintiff's life is not included in the concept of pain and suffering. The transmission of a disease by an asymptomatic child is excluded from the scope of this thesis.

172 *Sigournay* at 569E–571F.

173 Loubser & Midgley (2017) 83–84.

injury.[174] However, our courts have moved beyond the "physical (bodily) injury" hurdle, and accept that "the negligent causing of emotional shock (even without any physical injury or illness) is regarded as a cause of action".[175]

Botha JA in *Bester* mentioned that to recover damages for negligible emotional (or nervous) shock the shock must have had a material effect on the well-being of the person or give rise to a recognised psychiatric injury (e.g., PTSD).[176]

The Supreme Court of Appeal also found in *RAF v Sauls*[177] (per Olivier JA) that shock and emotional trauma can result in chronic PTSD,[178] and confirmed that "claims in respect of negligently caused shock and emotional trauma resulting in a detectable psychiatric injury are actionable".[179] To prove his PTSD (a form of psychiatric injury) and depression, Elimele will have to provide expert evidence as indicated by the Supreme Court of Appeal in *Media 24 v Grobler*.[180]

Notably, emotional shock may fall under the action for pain and suffering (as in *Bester*), and if was inflicted intentionally, it may fall under the *actio iniuriarum* (as in *Els E v Bruce; Els J v Bruce*).[181] However, even if the emotional shock is intentionally inflicted, the action for pain and suffering may still be used in preference to the *actio iniuriarum* (as in *Boswell v Minister of Police*[182] and *Els E v Bruce; Els J v Bruce*).[183] This is because emotional shock falls under the banner of non-patrimonial harm and gives rise to non-patrimonial damages which may be claimed under either the *actio iniuriarum* or the action for pain and suffering.[184] As

---

174 Neethling & Potgieter (2020) 16. See also Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 79: "s 12(2)'s guarantee of psychological integrity also reinforces aspects of the *actio iniuriarum*'s protection against insults and invasion of privacy".

175 Neethling *et al* (2019) 145 (fn 116); JM Potgieter *et al Visser and Potgieter: law of damages* 3ed (2012) 509. See also Finch & Fafinski (2021) 19: "psychiatric injury must be medically recognised." In *RAF v Sauls* 2002 (2) SA 55 (SCA) [7] the SCA also referred to *Bester* and confirmed that there is no "reason in our law why somebody who, as the result of the negligent act of another, has suffered psychiatric injury with consequent indisposition should not be entitled to compensation" and referred to the notion in *Bester* that "psychological or psychiatric injury is 'bodily injury'".

176 *Bester* per Botha JA at 777. See the English translation of Neethling & Potgieter (2020) 301; *Bester* per Botha JA at 779: "*Ek verwys hier nie na niksbeduidende emosionele skok van kortstondige duur wat op die welsyn van die persoon geen wesenlike uitwerking het nie, en ten opsigte waarvan genoegdoening gewoonlik nie verhaalbaar sou wees nie*". See also Finch & Fafinski (2021) 19; *RK v Minister of Basic Education* 2020 (2) SA 347 (SCA).

177 2002 (2) SA 55 (SCA) (hereinafter *Sauls*).

178 *Sauls* [5] (Hefer ACJ, Streicher JA, Navsa JA, & Conradie AJA concurring).

179 *Sauls* [13]. See also *Van Zijl v Hoogenhout* (2004) 4 All SA 427 (SCA) [9]; *N v T* 1994 (1) SA 862 (C) at 864G.

180 2005 (6) SA 328 (SCA) [56]–[61]. See also *Komape v Minister of Basic Education* (2019) ZASCA 192 (hereinafter *Komape*) [47]–[48].

181 1922 EDL 295 at 298–299. See Loubser & Midgley (2017) 365.

182 1978 (3) SA 268 (E).

183 See Loubser & Midgley (2017) 365.

184 Neethling *et al* (2019) 104, & 144–145. See *Komape* [7], [32], [45], & [48].

mentioned above, intent is a requirement for the *actio iniuriarum* but not for the action for pain and suffering. If the psychiatric injury or emotional shock results in patrimonial loss, the *actio legis Aquiliae* must be used.[185]

Elimele's physical injury (infection by Filia) leads to a loss of amenities of life and a reduced life expectancy. Potgieter, Steynberg, and Floyd explain that reduced life expectancy falls within the ambit of loss of amenities of life (for purposes of assessing damages).[186]

To explain what the loss of amenities of life means, Hoexter JA in *Administrator General for South-West Africa v Kriel*[187] referred to the English case of *H West & Son v Shephard*[188] where Lord Devlin described the loss of the amenities of life as "a diminution in the full pleasure of living." Hoexter JA explains that

> [t]he amenities of life may further be described, I consider, as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent.[189]

The above clearly illustrates why the consideration of the loss of the amenities of life is vital in the context of non-vaccination as it speaks directly to many of the consequences of non-vaccination and subsequent infection(s). Elimele is not able to enjoy a healthy body; he cannot run, participate in sports, or enjoy a healthy childhood because his right lung has been removed and this is included in the concept of loss of amenities of life.[190]

The general concept of dignity is alluded to by Hoexter JA above, but this must not be confused with dignity under the *actio iniuriarum*. For purposes of the *actio iniuriarum*, dignity relates to the violation of a personality interest, for example, civil assault or defamation.[191]

As mentioned, for the *actio iniuriarum* intent is required.[192] Hoexter JA's reference to dignity may be more appropriate in the context of non-vaccination and constitutional rights and

185 Loubser & Midgley (2017) 516.
186 Potgieter *et al* (2012) 512.
187 (1988) 2 All SA 323 (A) (hereinafter *Kriel*) [24]. See also Zitzke (2020) *TSAR* 425.
188 (1963) UKHL 3 at 636G–636H.
189 *Kriel* [24]–[25]. Loubser & Midgley (2017) 85 list more examples from case law which are included in the scope of loss of amenities of life, such as lengthy periods of hospitalisation, not being able to participate in sport, being wheelchair-bound, not being able to procreate, or even listen to music.
190 *Kriel* [24]; Loubser & Midgley (2017) 84. See also Zitzke (2020) *TSAR* 425.
191 See also Zitzke (2020) *TSAR* 426.
192 *De Klerk* [13].

values, as the consequence of non-vaccination may impede a person's dignity — but not in the sense of the *actio iniuriarum* where it is about a feeling of self-worth or reputation only.

For now, I park the discussion of dignity falling outside the context of the *actio iniuriarum*. It suffices to note that non-vaccination and its harmful consequences may arguably extend into the realm of constitutional rights, like dignity. I now turn to prospective loss or damage as part of the concept of harm or damage.[193]

5.4.1.3 Prospective loss or damage

Before exploring what prospective damage is and how it fits into the common-law delictual element of harm, it is important first to understand that damage may be actual or prospective. Klopper explains that damage

> is not confined to actual losses and expenses (*damnum emergens*) but include prospective damage (*lucrum cessans*) in the form of deprivation of financial benefits that would otherwise have occurred.[194]

Clearly, damage as explained by Klopper includes a claim for both actual and future damages. Notably, a claim for prospective damages may take the form of prospective patrimonial loss or prospective non-patrimonial loss.[195]

Potgieter, Steynberg, and Floyd explain that prospective patrimonial loss refers to the non-realisation or "delay of future profit or income as well as the possibility or acceleration of future expenses".[196] Klopper explains that "[f]uture non-patrimonial loss may result from continued prejudicial and detrimental personality consequences caused by the damage-causing event".[197] Neethling and Potgieter list the following forms of prospective loss recognised in practice:

(1) future expenses on account of a damage-causing event;
(2) loss of future income;
(3) loss of business profit and professional profit;
(4) loss of prospective support; and
(5) loss of a chance to gain benefit.[198]

---

193 Neethling & Potgieter (2020) 257.
194 Klopper (2017) 14.
195 Potgieter *et al* (2012) 130.
196 As above. See also Klopper (2017) 94.
197 Klopper (2017) 94.
198 Neethling & Potgieter (2020) 269.

The Appellate Division in *Oslo Land v The Union Government*[199] (per Watermeyer JA) stated that:

> In the Courts in South Africa, it has certainly been the practice to claim all damages resulting from a negligent act in one action whether such damages have already accrued [actual] or are still prospective.[200]

The court in *Oslo* essentially referred to the "once-and-for-all" rule. Klopper explains that this rule

> is a recognised rule of our law that compels a plaintiff to, after experiencing a wrongful act, institute a single action based on whatever remedies the law presents for all past [actual or accrued] and future [prospective] damages caused by such wrongful act even if such damages manifest or only become capable of assessment after the conclusion of the original action.[201]

In *Evins*, the court explained that the "once-and-for-all" rule is understood together with the principle of *res judicata*,[202] which was confirmed by the Constitutional Court in *MEC for Health & Social Development, Gauteng v DZ*.[203]

The Supreme Court of Appeal (per Brand JA) confirmed in *Prinsloo v Goldex*[204] that the expression *res iudicata*

> literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again.[205]

Van Winsen AJA in *Custom Credit v Shembe*[206] explained the once-and-for-all rule in conjunction with the principle of *res judicata* as follows:

> The law requires a party with a single cause of action to claim in one and the same action ["once and for all" rule] whatever remedies the law accords him upon such cause. This is the ratio that underlines the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause of action for

199 1938 AD 584 (hereinafter *Oslo*).
200 *Oslo* at 591.
201 Klopper (2017) 32.
202 *Evins* at 835.
203 2018 (1) SA 335 (CC) (hereinafter *MEC v DZ*) [16] & [78], Froneman J (for the majority) [1]–[60] & Jafta J (concurring) [61]–[98].
204 2014 (5) SA 297 (SCA) (hereinafter *Goldex*).
205 *Goldex* [10] (Cachalia JA, Mhlantla JA, Wallis JA, & Boruchowitz AJA concurring).
206 1972 (3) SA 462 (A) (hereinafter *Shembe*).

> the same relief can be met by an exception *rei judicatae vel litis finitae*. […] The rule has its origins in considerations of public policy which require that there should be a term set to litigation and that an accused or defendant should not be twice harassed upon the same cause.[207]

In *Symington v Pretoria-Oos Privaat Hospital*[208] the Supreme Court of Appeal (per Brand JA) referred to the *Evins* case and confirmed that in delict, the plaintiff (Elimele) must in a single action claim all damages, both those already sustained (accrued or suffered) and prospective (or future) damages flowing from the same cause of action.[209] The Supreme Court of Appeal, in *Truter v Deysel*[210] (per Van Heerden JA) also confirmed the once-and-for-all rule,[211] as did the Constitutional Court (per Froneman J for the majority) in *MEC v DZ.*[212]

In essence, Elimele must claim accrued damages (for all damage already sustained) and prospective damages (expected future damage) in so far as it is based on a single cause of action and in accordance with the once-and-for-all rule.[213]

To determine if the future or prospective loss will manifest, reference is often made to the "sufficient degree of probability" or "reasonable likelihood" that there will be loss in the future, and this is determined on a balance of probabilities. To briefly explain how future loss is determined, I cite Klopper's explanation:

> Future damages or loss are deemed to be legally recoverable and may be described as damages caused by the damage-causing event, which at the time of the assessment of the already materialised or past damages have not fully manifested, but are with a sufficient degree of probability reasonably likely to materialise in future. The reasonable likelihood of future damages is determined on a balance of probabilities.[214]

As mentioned, Elimele must thus prove on, a balance of probabilities, that there is a reasonable likelihood or sufficient degree of probability that future loss will manifest. In *Michael v Linksfield Park Clinic*[215] the Supreme Court of Appeal stated that,

> [i]t must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses, in this case, had to be diverted from doing so and were

---

207 *Shembe* at 472.
208 (2005) 4 All SA 403 (SCA) (hereinafter *Symington*).
209 *Symington* [26] (Scott JA, Streicher JA, Cameron JA, & Ponnan JA concurring). See also Potgieter *et al* (2012) 153; Neethling & Potgieter (2020) 268.
210 2006 (4) SA 168 (SCA) (hereinafter *Truter*).
211 *Truter* [21] (Harms JA, Zulman JA, Navsa JA, & Mthiyane JA concurring). See also *Kiewitz* [8]–[9].
212 *MEC v DZ* [16].
213 Potgieter *et al* (2012) 153; Neethling & Potgieter (2020) 268; *MEC v Zulu* (2016) ZASCA 185 (hereinafter *Zulu*) [7]–[11]; *MEC v DZ* [16].
214 Klopper (2017) 91; Neethling & Potgieter (2020) 268; Potgieter *et al* (2012) 129.
215 (2002) 1 All SA 384 (A) (hereinafter *Linksfield*).

> invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on.[216]

In the context of non-vaccination, scientific evidence may assist in proving the likelihood of future loss, and according to the Supreme Court of Appeal in *Linksfield*, witnesses may be invited to express the prospect of an event's occurrence to help assess the probability that future harm will occur or manifest. The Supreme Court of Appeal stated that this may be, for example, expressed as "a greater or lesser than fifty per cent chance". Potgieter, Steynberg, and Floyd explain that although

> prospective loss is literally damage which will only manifest itself in money or otherwise fully in future, its basis is to be found in the impairment of the plaintiff's present interests.[217]

In light of the above, I raise the following two questions: (1) Is it enough that there is an impairment of the plaintiff's present interests, without any actual (present) damage? (2) Can a plaintiff like Elimele claim for prospective loss alone, without having suffered or sustained any actual damage at the date of the trial?

Potgieter, Steynberg, and Floyd posit that "prospective loss alone constitutes no cause of action because it is not regarded as 'actual' damage".[218] In *Jowell*[219] the Supreme Court of Appeal commented on the *dictum* of Gardiner JP in *Coetzee v SA Railways & Harbours*.[220] He held that

> [t]he cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they [prospective damages] have no separate, independent force as ground of action.[221]

Hence, Gardiner JP in *Coetzee* essentially held that prospective damages may be claimed in addition (or ancillary) to accrued damages to avoid a multiplicity of actions and in line with the once-and-for-all rule.[222] According to the court in *Coetzee*, prospective damages alone

---

216 *Linksfield* [40] (coram: Howie JA, Farlam JA, & Chetty AJA).
217 Potgieter *et al* (2012) 131.
218 Potgieter *et al* (2012) 137.
219 *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) (hereinafter *Jowell*).
220 1933 CPD 565 (hereinafter *Coetzee*).
221 *Coetzee* at 576 (Watermeyer J concurring).
222 See *Zulu* [7]–[11].

cannot be claimed without claiming accrued damages, as prospective damages "have no separate, independent force as [a] ground of action". In *Jowell*,[223] the Supreme Court of Appeal acknowledged the legal certainty provided by the approach adopted in the *Coetzee* case. However, in *Jowell*[224] (per Scott JA) the court held that:

> If an action for loss which is prospective is completed only when the loss actually occurs, prescription will not commence to run until that date and a plaintiff will generally be in a position to quantify his claim. To the extent there may be additional prospective loss the court will make a contingency allowance for it. On the other hand, if the completion of an action for prospective loss entitling a person to sue is to depend *not* upon the loss occurring *but* upon whether what will happen in the future *can* be established on a balance of probabilities, it seems to me that the inevitable uncertainty associated with such an approach is likely to prove impractical and result in hardship to a plaintiff particularly in so far as the running of prescription is concerned. However, it is unnecessary to finally decide the point.[225]

In *Jowell*, the Supreme Court of Appeal did not decide whether one can claim prospective loss (probable future loss) alone without claiming the accrued loss. The above extract does, however, create the impression that the courts may be open to entertaining a claim based on prospective loss alone. From the above, it is clear that the Supreme Court of Appeal in *Jowell* did not conclusively decide whether prospective loss alone may be claimed — a point which it found a final decision unnecessary.

In *Jowell* Supreme Court of Appeal did, however, acknowledge the uncertainty, impracticality, and hardship associated with proving, on a balance of probabilities, "what will happen in the future".[226] Neethling and Potgieter also mention that there is no "empirical knowledge available about future events", which essentially contributes to the practical problems surrounding this speculative process.[227]

If Elimele has not yet suffered any (actual or accrued) harm, but there is a 30% chance that he may suffer harm, the question is now whether he may claim for probable (future) losses alone based on the 30% chance that he may become ill in the future.[228]

---

223 *Jowell* [22] (Vivier JA, Nienaber JA, Plewman JA, & Farlam AJA concurring).

224 As above.

225 *Jowell* [22]. For "contingency allowance" see Loubser & Midgley (2017) 502: contingencies are "uncertain future events that could affect the amount of damages awarded and so, once courts have calculated compensation in respect of future losses, they adjust the amounts for contingencies." See also generally *Minister of Defence v Jackson* 1991 (4) 23 (ZSC); *Van der Plaats v South African Mutual Fire* 1980 (3) SA 105 (A) at 114F–115; *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A).

226 As above. See also PJ Visser & JM Potgieter *Law of damages through the cases* 3ed (2004) 16 & 37.

227 Neethling & Potgieter (2020) 268.

228 See JJ Buchanan "Prospective damages in actions for damages for bodily injury" (1960) 77(2) *SALJ* 187–192.

Potgieter, Steynberg and Floyd,[229] and Neethling and Potgieter[230] explain that in our law, it is certain that where a person is exposed to radiation, for example, and there is a 30% chance that the exposure may result in him or her developing an illness, he or she may only institute an action if the 30% possibility materialises and he or she falls ill. Thus, the materlialisation of the harm is a prerequisite for the cause of action and claim for damages. However, if there is, for example, a 60% chance of the person exposed falling ill, Buchanan, Corbett, and Gauntlett assert that it is

> difficult to see why a wrongful act together with prospective damage, which can be established as a matter of reasonable probability, should not be sufficient to constitute a cause of action.[231]

Arguably, where prospective loss alone is claimed, the probability that the loss will occur must be established as it is essential that the plaintiff prove the *damnum* (as part of the cause of action). It may be argued that if the prospective loss which will occur in the future can be proven on a balance of probabilities the claim should be allowed. On the other hand, it may be argued that the claim should not succeed as no harm has been suffered and the delictual element of harm has not been met.

Loubser and Midgley argue that a plaintiff like Elimele cannot claim prospective damages alone as an independent or separate ground of action[232] and that a premature action must be avoided if the delictual element of harm has not been satisfied. A premature action must also be avoided because the principle (or exception) of *res judicata* and the once-and-for-all rule may hamper Elimele to claim damages in the future based on the same cause of action.

It may be argued that Elimele will not be able to succeed with a claim if no damage has been sustained, seeing as the delictual element of harm is not met. However, in *Jowell*, the Supreme Court of Appeal did not decide this point, and it is unclear whether Elimele will be able to succeed in a claim based on prospective harm alone without claiming the accrued loss.

I suggest that Elimele should avoid a premature delictual action and only claim for damages once the damage has been suffered, as opposed to claiming for prospective harm alone (without claiming accrued loss) and forfeiting a future claim based on the principle of *res judicata* and the once-and-for-all rule.

---

229 Potgieter *et al* (2012) 138.
230 Neethling & Potgieter (2020) 270.
231 JL Buchanan, MM Corbett & JJ Gauntlett *The quantum of damages in bodily and fatal injury cases (general principles)* 3ed (1985) 9–11; RG McKerron *The law of delict: a treatise on the principles of liability for civil wrongs in the law of South Africa* 7ed (1971) 138 (fn 91) shares this opinion.
232 See Loubser & Midgley (2017) 82.

If Elimele claims prematurely (where, e.g., he has not yet suffered the damage, or the court makes a final decision[233] not to award a claim based on prospective harm alone without claiming an accrued loss, or Elimele under-claims and is awarded lower damages or his claim is dismissed), he will only be able to appeal the judgment — if leave to appeal is granted — but will not be able to re-litigate on the same cause of action. It may also be difficult to adduce new evidence on appeal,[234] for example, evidence of new or increased damage or a recalculation of an increase in prospective loss.

Res judicata means that even if Elimele then suffers damage (after claiming only prospective harm without accrued loss) or if he suffers additional damage in the future than that which he claimed in court, he cannot claim these damages on this same cause of action if the court has made a final decision. Even if Elimele attempts to relitigate on the same cause of action, Anti may raise the exception or denfence of *res judicata*[235] or *issue estoppel* (as an extension of *res judicata*).[236] *Issue estoppel* covers instances where a party (Anti) can "successfully plead that the matter at issue has already been finally decided even though the common law requirements of *res judicata* have not all been met".[237]

This is all indicative that Elimele must avoid a premature action that may result in his claim being dismissed or the amount awarded in damages being considerably lower than Elimele claimed. Next, I explore the common-law delictual element of conduct.

5.4.2 Conduct

Conduct is a requirement for common-law delictual liability and is a factual element that must be proved by evidence.[238] For purposes of the common law of delict, conduct is defined as a "voluntary human act or omission".[239]

---

233 See *Al-Kharafi & Sons v Pema* 2010 (2) SA 360 (W) as referred to by the HC in *Technical Systems v RTS Industries* (2021) ZAWCHC 35 (hereinafter *Technical Systems*) [11].

234 S 19(b) of the Superior Courts Act 10 of 2013 empowers the SCA or a division exercising appeal jurisdiction to "receive further evidence". For case law dealing with the issue the admission of new evidence on appeal see *PAF v SCF* (2022) ZASCA 101 [9] with reference to *Rail Commuters v Transnet* 2005 (2) SA 359 (CC) [41]–[43]: "the power to receive further evidence on appeal should be exercised 'sparingly' and that such evidence should only be admitted in 'exceptional circumstances'"; *O'Shea v Van Zyl* 2012 (1) SA 90 (SCA) [9]: "one of the criteria for the late admission of the new evidence is that such evidence will be practically conclusive and final in its effect on the issue to which it is directed".

235 See *Blaikie-Johnstone v P Hollingsworth* 1974 (3) SA 392 (D) as referred to by the HC in *Technical Systems* [9].

236 See *Ascendis Animal Health v Merck Sharpe Dohme Corporation* (2019) ZACC 41 [114].

237 *Gold Circle v Maharaj* (2019) ZASCA 93 [19].

238 Loubser & Midgley (2017) 95.

239 See, e.g., *S v Johnson* 1969 (1) SA 201 (A) at 204; Neethling & Potgieter (2020) 27–28; Loubser & Midgley (2017) 95 for the behaviour of an animal. See Neethling *et al* (2019) 168: "where compensation is claimed for bodily injuries caused by domestic animals where the *actio de pauperie* may be instituted liability is not

Neethling and Potgieter regard conduct as a general prerequisite for delictual liability, as conduct is the damage-causing event.[240] For purposes of this discussion, voluntariness denotes a voluntary event — one that "is susceptible to control by [Anti's] will".[241]

Voluntariness, in the context of conduct, is not concerned with what Anti willed or wished to achieve with her conduct.[242] Neethling and Potgieter explain that voluntariness is not concerned with what is rational or explicable but relates to sufficient mental ability to control one's muscular movements.[243] This means that Anti's conduct (non-vaccination and sending Filia to crèche whilst ill) is voluntary, regardless of how irrational or inexplicable it may be.

For example, involuntariness may refer to the inability to control one's bodily movements as a result of an epileptic fit, *vis absoluta* (absolute compulsion), sleep, fainting, unconsciousness, reflex movements, hypnosis, serious intoxication, hypoglycaemia, hysterical dissociation, or a heart attack.[244] This may establish the defence of automatism (the conduct is not voluntary).[245] For purposes of the above hypothetical, I assume that Anti's conduct (non-vaccination and sending Filia to crèche whilst ill) is voluntary for which there is no defence.[246]

Conduct may be either a positive act (active conduct or a commission) or failure to perform a positive act (omission).[247] As discussed in Chapter 4, commissions and omissions are distinguished as liability for omissions is limited.[248] In *F v Minister of Safety & Security*[249] the Constitutional Court (per Mogoeng J) stated that

> [b]oth the commission and the omission had an equally important role to play in finding the state liable for what had happened to the rape victim.[250]

---

based on any culpability of the owner of the animal, but is strict" (footnotes omitted). See also J Scott "The actio de feris — phoenix from the ashes or vain chimera? — Van der Westhuizen v Burger (February 1, 2019)" (2018) 81 *THRHR* 510–527.

240 Neethling & Potgieter (2020) 27.

241 Neethling & Potgieter (2020) 28.

242 As above.

243 As above.

244 Neethling & Potgieter (2020) 29. See also M Loubser *Tort law in South Africa* (2020) §1 [79].

245 Neethling & Potgieter (2020) 28. See also R Ahmed "The influence of reasonableness on the element of conduct in delictual or tort liability — comparative conclusions" (2019) *PELJ* 1–34. See Loubser (2020) §1 [79].

246 E.g., the defence of automatism is excluded from the scope of this discussion.

247 Neethling & Potgieter (2020) 27.

248 For the tort of negligence, this is generally considered under the elements of a duty of care and the breach conundrum.

249 2012 (1) SA 536 (CC) (hereinafter *F*).

250 *F* [70] (Moseneke DCJ, Cameron J, Khampepe J, Nkabinde J, Skweyiya J, & Van der Westhuizen J concurring).

For example, in *AK v Minister of Police*[251] the Constitutional Court (per Tlaletsi AJ for the majority) stated that delictual conduct includes omissions.[252] In this case, the court clearly distinguished the positive conduct and omissions (negative conduct) of the SAPS. This is indicative of the fact that the distinction between positive conduct and omission is not a mere academic invention but a distinction used by the courts.

Notably, the foreign jurisdictions explored in Chapter 4 also distinguish between commissions and omissions — a distinction regarded as important, especially for the element of wrongfulness.[253] However, Neethling and Potgieter suggest that the distinction between a positive act (commission) and an omission should not be overemphasised.[254]

On the other hand, Loubser and Midgley suggest that the distinction is essential as it speaks to wrongfulness;[255] and for Carstens and Pearmain, "generally speaking liability for omissions [is] more restricted than liability for commissions".[256] This resonates with the discussion of foreign law in Chapter 4 and the general rule that "there is no duty to engage in affirmative actions to prevent the occurrence of harm to another",[257] and liability for omissions is restricted.[258]

It is suggested that where the activity is continuous it may be more difficult to distinguish between a positive act and an omission.[259] The conduct of a wrongdoer may simultaneously be a commission and an omission. For example, in *K v Minister of Safety & Security*[260] the state's vicarious liability and its simultaneous commission and omission were considered. In *K*, the Constitutional Court (per O'Regan J) held that "the conduct of the policemen which caused harm constituted a simultaneous commission and omission".[261] In *F*, the Constitutional Court (per Mogoeng J) referred to the "role of the simultaneous act of the policeman's commission of rape and omission to protect the victim".[262]

---

251 2022 (11) BCLR 1307 (CC) (hereinafter *AK*).
252 *AK* [5] (Khampepe J, Madlanga J, Majiedt J, Mhlantla J, & Theron J concurring).
253 Art 6:162 of the BW refers to three types of wrongful conduct, and mentions acts or omissions. See Brüggemeier (2020) *EJCLG* 359.
254 Neethling & Potgieter (2020) 32.
255 Loubser & Midgley (2017) 96. Wrongfulness is a separate element for delictual liability. The existence of this legal duty regarding an omission is a question of wrongfulness.
256 Carstens & Pearmain (2007) 506.
257 Koziol (2015) 409; Brennan (2019) 22; Finch & Fafinski (2021) 9–11; McManus (2013) 34.
258 Brennan (2019) 22; Finch & Fafinski (2021) 9–11; Koziol (2015) 409; Tuitt *et al* (2015) 58.
259 Loubser & Midgley (2017) 99.
260 2005 (6) SA 419 (CC) (hereinafter *K*).
261 *K* [53] (Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Sachs J, Skweyiya J, Van der Westhuizen J, & Yacoob J concurring).
262 *F* [52].

This is indicative that conduct (for purposes of the common-law delict) may consist of a positive act (commission) or omission and that these two forms of conduct may simultaneously be present. Applied to our hypothetical, Anti's conduct is not necessarily one continuous activity, and the different commissions and omissions can be distinguished:

(1) Anti failed to have Filia vaccinated (omission — a form of conduct);
(2) Anti sent Filia to crèche while infected (positive act — a form of conduct);
(3) Anti failed to warn or inform others of Filia's infection (omission — a form of conduct);[263] and
(4) Anti failed to keep Filia home (self-isolate) to prevent harm to others (omission — a form of conduct).

Anti's conduct may simultaneously constitute a commission and an omission — it may be argued that Anti's failure to vaccinate (omission) and her actions in exposing Filia to others are simultaneously a positive act (exposure) and an omission (failure to warn, inform, or prevent harm).[264] A further example is sending Filia to school while ill is simultaneously a positive act (sending her to school) and an omission (failure to keep her at home to avoid contact with others).

As mentioned above, the distinction between commissions and omissions should not be overemphasised but it can have important consequences. For example, Anti's positive conduct (sending Filia to crèche while she was infected) may be regarded as *prima facie* wrongful. Anti's omissions, in the context of wrongfulness, are *prima facie* lawful (as there is no general duty to prevent harm to others). However, this does not mean that Anti's conduct is simultaneously *prima facie* wrongful and *prima facie* lawful. Although the conduct may simultaneously be a commission and an omission, the element of causation considers the remoteness and the conduct that is most closely related to the harm suffered. It is also easier to prove wrongfulness for a commission as liability for an omission is more limited than for a positive act (commission). However, the omission(s) may be regarded as wrongful if certain requirements are met as discussed below under the heading of wrongfulness. Merely because an omission is *prima facie* lawful does not mean it cannot also be shown to be wrongful too.

For now, it suffices to note briefly that liability for the harmful effects of an omission is imposed only in special circumstances where there is a duty to prevent harm (explored under

263 Loubser & Midgley (2017) 95.
264 Loubser & Midgley (2017) 99.

the element of wrongfulness). For purposes of our current discussion of conduct, it is clear that Anti's conduct consists of commissions and omissions. Anti's conduct was voluntary and qualifies as conduct for purposes of this element of delictual liability. Next, the common-law delictual element under consideration is causation.

5.4.3 Causation

A causal nexus between conduct and damage (harm or loss) is regarded as an essential element or requirement for the existence of a common-law delict.[265] Similarly, in the Canadian province of Quebec, Germany, and the Netherlands, causation is required before liability can be imposed.[266]

Generally, no liability exists if the wrongdoer's conduct has not caused damage.[267] As mentioned above, in *NM v Smith*, the Constitutional Court explained the requirements for the *actio iniuriarum* and, strictly speaking, they do not include causation.[268] However, causation is a requirement for the *actio legis Aquiliae* and the Germanic action for pain and suffering. Fagan lists causation as the primary condition for *Aquilian* liability and states that the last condition is that the loss "must not have been too remote".[269]

In *Lee v Minister for Correctional Services*[270] the Constitutional Court (per Nkabinde J) explained that

> [t]he point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation.[271] (Footnotes omitted.)

From the above, it is clear that causation consists of factual causation and legal causation. The Constitutional Court in *Lee* also explained that if there is no factual causation "that is the end

---

265 Neethling & Potgieter (2020) 215.
266 See Van Schilfgaarde (1991) *CWILJ* 272; MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022); Brüggemeier (2020) *EJCLG* 369–370; Baudouin (2018) Ch 1, [44].
267 Loubser & Midgley (2017) 101.
268 *NM v Smith* [55].
269 Fagan (2019) ix. In Ch 4 of this thesis I explore remoteness under the tort of negligence, specifically the elemet of causation.
270 2013 (2) SA 144 (CC) (hereinafter *Lee*).
271 *Lee* [38] (Moseneke DCJ, Froneman J, Jafta J, & Van der Westhuizen J concurring).

of the matter".[272] If there is factual causation, then legal causation comes into play. In *Minister of Police v Skosana*[273] the Appellate Division (per Corbett JA for the majority) held that

> [c]ausation in the law of delict gives rise to two rather distinct problems. The first is a factual one [factual causation] and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio* (the question falls). If it did [if there is factual causation], then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This [legal causation] is basically a juridical problem in which considerations of legal policy may play a part.[274] (Footnotes omitted.)

According to *Skosana* and *Lee*, causation consists of factual and legal causation, and factual causation is first explored before moving on to legal causation. Determining whether there is a causal *nexus* (causation) is a question of fact that is always investigated with reference to the available evidence and relevant probabilities under the circumstances.[275]

Factual causation demands a factual enquiry, as explained in *Lee* and *Skosana* above.[276] In the context of non-vaccination and factual causation, the question is: did Anti's negligent act or omission cause or materially contribute to the harm suffered by Elimele, giving rise to the claim?[277] If the answer is yes, legal causation is then considered.

As explained in *Lee* and *Skosana* above, legal causation considers sufficient closeness and remoteness, and legal causation "is basically a juridical problem in which considerations of legal policy may play a part".[278] Similarly, in the US (including the State of Louisiana), the cause-in-fact enquiry is a factual enquiry although policy may also be considered.[279]

Legal causation examines whether the harm suffered by Elimele is sufficiently closely or directly connected to Anti's conduct for legal liability to ensue.[280] Thus, legal causation asks: is the factual causation strong enough and should liability be limited?[281] In the following sections, I first explore factual causation before turning to legal causation in the specific context of the Filia/Elimele hypothetical.

---

272 As above.
273 1977 (1) SA 31 (A) (hereinafter *Skosana*).
274 *Skosana* at 34F–34G. See also Carstens & Pearmain (2007) 509.
275 Loubser & Midgley (2017) 102.
276 *Lee* [38]; *Skosana* at 34F–34G; Loubser & Midgley (2017) 102.
277 As above.
278 *Skosana* at 34F–34G.
279 Maraist & Galligan (2021) Ch 3, §3.04.
280 *Lee* [38]; *Skosana* at 34F–34G; Loubser & Midgley (2017) 103.
281 Loubser & Midgley (2017) 102–103; Neethling & Potgieter (2020) 216.

5.4.3.1 Factual causation

Before considering factual causation in the Filia/Elimele hypothetical, it is important to outline the history of factual causation in the South African common law of delict. This history cannot be overlooked as it is essential to understand how factual causation has developed and interacts with the other common-law delictual elements.

As for the tort of negligence as discussed in Chapter 4, the *conditio sine qua non* theory ("but for" test) is most often used as the initial point of departure in establishing whether a factual causal nexus exists between the wrongful conduct and the harmful consequence.[282] Fagan explains that *conditio sine qua non* means "necessary condition".[283] In essence,

> [a] successful delictual claim entails the proof of a causal link between a defendant's actions or omissions [conduct], on the one hand, and the harm suffered by the plaintiff, on the other hand. This is in accordance with the 'but-for' [*conditio sine qua non*] test.[284] (Footnotes omitted.)

In 1977, Corbett JA stated in *Skosana* that causation is generally determined by applying the "but for" test.[285] In 1984 he confirmed this in *Siman v Barclays National Bank*,[286] and again in 1989 in *International Shipping Company v Bentley*.[287]

However, Corbett JA (in *Siman* at 915 and *Skosana* at 35) explained that there are possibly only two exceptions where the "but for" test will not be applied — i.e., instances of supervening causation and concurrent causation (which we discuss later). In *Bentley*, Corbett CJ stated that

> [t]he enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such [a] hypothesis [the] plaintiff's loss would have ensued or not. If it would, in any event, have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful

---

282 Traditionally, the US (including Louisiana), Dutch, Canadian, Australian and English courts have employed the "but for" (or *conditio sine qua non*) test. See Loubser & Midgley (2017) 103; Neethling & Potgieter (2020) 217; Fagan (2018) 216; Fagan (2019) 297.

283 Fagan (2019) 297.

284 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC) [35]; see also *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) (hereinafter *Gore*) [32].

285 *Skosana* at 35.

286 1984 (2) SA 888 (A) (hereinafter *Siman*) at 914–915.

287 (1990) 1 All SA 498 (A) (hereinafter *Bentley*) [65]–[66].

> act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.[288]

The "but for" test differs for commissions and omissions, as explained by Nkabinde J in the Constitutional Court case of *Lee*:

> In the case of 'positive' conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but-for [*conditio sine qua non*] test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts [also referred to as hypothetical substitution].[289] (Footnotes omitted.)

The Constitutional Court's approach to causation in the case of a negligent omission in *Lee* was confirmed in the Constitutional Court case *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*.[290] Notably, Neethling and Potgieter suggest that in the case of omissions, we are not dealing with a true application of the *conditio sine qua non* test in that the *conditio sine qua non* test requires the elimination of something (in the mind) and not the inclusion of hypothetical positive conduct in the given facts.[291]

Despite this criticism, our courts endorse the use of the *conditio cum qua non* test[292] in cases of omissions, which refers to the insertion of a hypothetical course of lawful conduct. In *Oppelt* Molemela AJ explained that

> [w]hile it may be more difficult to prove a causal link in the context of a negligent omission than of a commission, *Lee* explains that the 'but-for' test is not always the be-all and end-all of the causation enquiry when dealing with negligent omissions. The starting point, in terms of the 'but-for' test, is to introduce into the facts a hypothetical non-negligent conduct of the defendant and then ask the question [of] whether the harm would have nonetheless ensued. If, but for the negligent omission, the harm would not have ensued, the requisite causal link would have been established [also referred to as hypothetical substitution]. The rule is not inflexible.[293]

---

288 *Bentley* [64]–[65]. See also *mCubed International v Singer* (2009) ZASCA 6 [23]; *Gore* [32].

289 *Lee* [41] (Moseneke DCJ, Froneman J, Jafta J, & Van der Westhuizen J concurring); Loubser & Midgley (2017) 104: hypothetical substitution in the case of an omission is necessitated as one cannot remove an act which is absent or does not exist (omission). Removing an omission, which is the obvious cause of harm to demonstrate the existence of factual causation is impractical and inconclusive.

290 2016 (1) SA 325 (CC) (hereinafter *Oppelt*) [47].

291 See Neethling & Potgieter (2020) 223–226: the criticism of "inserting" the (hypothetical) reasonable conduct of the wrongdoer into the set of facts cannot be overlooked.

292 See Neethling & Potgieter (2020) 224 (fn 58); A Fenyves *et al Tort law in the jurisprudence of the European Court of Human Rights* (2011) 460 & 499; *Lee* [40, fn 72].

293 *Oppelt* [48].

Thus, Corbett CJ in *Bentley*, Molemela AJ in *Oppelt*, and Nkabinde J in *Lee*, explain that the "but for" test entails the mental elimination of the wrongful conduct (commission) or the substitution of a hypothetical course of lawful conduct in the case of an omission (also referred to as the *conditio cum qua non* test) similar to the approach in Germany.[294]

Similarly, in *Siman* the court also referred to the "hypothetical enquiry" required by the "but for" test.[295] A hypothetical investigation is thus conducted to determine what probably would have happened "but for" the wrongdoer's wrongful conduct.[296] The "but for" test is regarded as the starting point in establishing factual causation. However, there are also other methods or tests to prove factual causation.

Before I explore alternatives to the *conditio sine qua non* approach, I must briefly consider the difference between "wrongful conduct" (as in *Bentley*) and "negligent conduct" (as in *Lee* and *Skosana*). As noted above, conduct is a factual element and refers to voluntariness and may for purposes of the common law of delict take the form of an act (positive conduct) or an omission or may simultaneously consist of an act and omission.

In the South African common-law delict, negligence is a form of fault and to brand conduct as negligent implies that the element of fault is present. If reference is made to negligent conduct, it means that intent is excluded and the *actio iniuriarum*, which requires intent, cannot be used.

Negligence as a form of fault refers to the reasonable person as described by Holmes JA in *Kruger v Coetzee.*[297] Negligence is thus concerned with the reasonable person (or *diligens paterfamilias*) in the position of the defendant/wrongdoer; reasonable foreseeability (of what the reasonable person in the position of the wrongdoer would reasonably have foreseen); reasonable preventative steps (that the reasonable person in the position of the wrongdoer could have taken); and the failure to take such reasonable steps (the reasonable person in the position of the wrongdoer would have taken such steps).[298]

If fault (in the form of negligence) is present (i.e. by referring to negligent conduct), this may affect the causation enquiry, specifically legal causation, as the element of negligence is

294 Markesinis & Unberath (2002) 104.
295 *Siman* at 915B; Fagan (2019) 297.
296 *Bentley* [65]–[66]; *Siman* at 915B; Fagan (2019) 297.
297 1966 (2) SA 428 (A) (hereinafter *Kruger v Coetzee*).
298 *Kruger v Coetzee* at 430E–430G; Fagan (2019) 8–13, & 15: this test is firmly entrenched in our law.

proven (e.g., reasonable foreseeability) which may overlap with considerations of remoteness[299] and foreseeability[300] in the legal causation enquiry.

Wrongful conduct refers to the element of wrongfulness which, as discussed below, refers to whether it is reasonable to impose liability. Branding conduct as wrongful means that it is unreasonable and without lawful justification. If the conduct is described as wrongful, it may overlap with the legal causation enquiry in that both act as liability-brakes.[301] Similarly, in Dutch law, both wrongfulness (social care standard) and causation (standard of reasonable imputation) act as liability brakes.[302]

In *De Klerk*, the Constitutional Court stated that "[o]nly if wrongfulness is established will it still be necessary to enquire into the normative issue of legal causation".[303] This may lead to some confusion as wrongfulness is not a prerequisite for considering legal causation, but the element of wrongfulness may help when establishing legal causation. This is so because legal causation and wrongfulness overlap. However, despite these overlaps, they remain distinct and separate delictual elements.

In *Nohour v Minister of Justice & Constitutional Development*,[304] Dlodlo JA held that even if the conduct is

> found to have been *wrongful* (or even *negligent*, for that matter), a court may still find, for other reasons of public policy, the harm flowing therefrom to have been too remote for the imposition of delictual liability.[305]

In *Bergrivier Municipality v Van Ryn Beck*[306] the Supreme Court of Appeal (per Navsa AP) stated that for purposes of considering causation, it may be convenient to assume both wrongfulness and negligence in order to consider the element of causation first.[307]

For purposes of this discussion on causation, branding the conduct as wrongful refers to the assumption that wrongfulness is present in order to consider causation as highlighted by Navsa AP in *Bergrivier*. Because the element of wrongfulness assesses the reasonableness of imposing liability (as discussed below), I assume for purposes of this thesis that branding the

---

299 Loubser & Midgley (2017) 124 & 126; Neethling & Potgieter (2020) 233; Fagan (2019) 375.
300 *De Klerk* [25]; *Esorfranki Pipelines v Mopani District Municipality* 2022 (2) SA 355 (SCA) [81]; Fagan (2019) 375.
301 *Nohour v Minister of Justice & Constitutional Development* (2020) ZASCA 27 [15].
302 *ECLI:NL:PHR:2021:517* [2.4].
303 *De Klerk* [121].
304 (2020) ZASCA 27 (hereinafter *Nohour*).
305 *Nohour* [16] (Petse DP & Van der Merwe JA concurring).
306 2019 (4) SA 127 (SCA) (hereinafter *Bergrivier*).
307 *Bergrivier* [44] (Zondi JA, Mathopo JA, Mocumie JA, & Eksteen AJA concurring).

conduct as wrongful under the causation enquiry does not automatically assume that it is reasonable to impose liability (for purposes of wrongfulness) and it is for this reason that I analyse the element of wrongfulness as the last delictual element in detail.

In conclusion on this point, even if the elements of fault (specifically negligence) and wrongfulness are proven, factual and legal causation (under the common-law delictual element of causation) must still be proven.[308] If these elements are assumed for purposes of considering causation first, they must be revisited and proven as they remain distinct delictual elements and their assumption here does not automatically satisfy their proof — assuming that they are present merely allows me to inspect causation before inspecting fault and later wrongfulness.

I now return to the supplementary approaches to the *conditio sine qua non* approach. The following approaches have been used by our courts, often in addition to the *conditio sine qua non* test and not as mutually exclusive alternatives. These supplementary approaches to the *conditio sine qua non* approach includes:

(1) The application of common sense,[309] logic,[310] and reference to human experience and knowledge.[311]
(2) The material contribution test.[312]
(3) Increasing risk of harm and/or creating opportunities for the occurrence of harm.[313]

In the following sections, I briefly explain how our courts have referred to the above approaches to determine factual causation. In *Minister of Safety & Security v Van Duivenboden*[314] Nugent JA explained what is meant by "the ordinary course of human affairs":

> [a] plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.[315]

308 *Nohour* [15] (per Dlodlo JA. Petse DP & Van der Merwe JA concurring).
309 *Nohour* [18] (per Dlodlo JA. Petse DP & Van der Merwe JA concurring); *Lee* [45]–[50]; *Gore* [33]; *Oppelt* [46].
310 *Lee* [45]–[50].
311 *Van Duivenboden* [25]; *Gore* [33].
312 *Skosana* at 34F–34G; *Nohour* [17].
313 *Lee* [79]; *NVM v Tembisa Hospital* (2022) ZACC 11 [62].
314 (2002) 3 All SA 741 (SCA) (hereinafter *Van Duivenboden*).
315 *Van Duivenboden* [25].

Thus, the plaintiff need not establish a factual link with certainty; it is sufficient if he or she merely establishes that the wrongful conduct was probably the cause of the harm. This approach was confirmed by the Constitutional Court in *Oppelt*.[316]

A "sensible retrospective analysis" is used to determine what would probably have occurred. Once again the "but-for" test is alluded to, and the mental elimination of the defendant's wrongful conduct is used to determine whether the plaintiff would still have suffered the harm "but for" the wrongful conduct of the defendant.

The Constitutional Court confirmed in *NVM v Tembisa Hospital*[317] that "[i]t is trite that the enquiry into factual causation asks the question whether the wrongful conduct or omission was a factual cause of the loss",[318] and that "[i]n applying this [*conditio sine qua non*] test, no mathematical or scientific exactitude is required."[319]

Furthermore, factual causation cannot always be answered by strict adherence to logic; and common sense must at times prevail.[320] Common sense was referred to by the Supreme Court of Appeal in *Minister of Finance v Gore*:

> Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense based on the practical way in which the ordinary person's mind works against the background of everyday life experiences.[321]

This approach of the court in *Gore* was confirmed by the Constitutional Court in *Oppelt*,[322] where it stated that "[u]ltimately, it is a matter of common sense whether the facts establish a sufficiently close link between the harm and the unreasonable omission."[323]

The minority judgment in *Siman* also emphasised the importance of applying common-sense standards to the facts of the case and that this should not be overlooked when applying the "but for" test.

As mentioned above, the court in *Skosana* referred to material contribution to determine factual causation and held that factual causation "relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim".[324]

---

316 *Oppelt* [45].
317 (2022) ZACC 11 (hereinafter *NVM*).
318 *NVM* [56].
319 *NVM* [57].
320 *Lee* [45]–[50].
321 *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) (hereinafter *Gore*) [33].
322 *Oppelt* [46].
323 *Oppelt* [48].
324 *Skosana* at 34F–34G.

As mentioned in Chapter 4, epidemiology is only one avenue by which to meet the "but for" test for factual causation.[325] Other (perhaps more flexible) ways of proving causation include the material contribution test or "substantial factor" test, as used in Louisiana, which is similar to the material contribution test, and "materially increasing the risk of injury" approach.[326]

The "substantial factor" test as applied in Louisiana, considers whether the defendant's conduct was a substantial factor in bringing about the plaintiff's injuries, although it was not a "but for" cause.[327] In *Bonnington Castings v Wardlaw*[328] the House of Lords applied the material contribution test to prove factual causation in preference to the "but for" test. Similarly, in the Canadian case of *Resurfice Corp v Hanke*[329] the Supreme Court of Canada noted that the material contribution test may be applied in preference to the "but for" test.

Likewise, in the Australian case of *Amaca v Ellis*[330] the High Court of Australia referred to the importance of the material contribution test in the context of cases based on epidemiological risks.[331] As mentioned in Chapter 4, in the case of mass outbreaks the "material contribution" test is suggested as an alternative to the "but for" test. We also saw in Chapter 4 that in *Fairchild v Glenhaven Funeral Homes*[332] the House of Lords did not apply the "but for" test to prove factual causation (because of an evidentiary gap) but preferred a relaxed approach to establish factual causation. Essentially, the House of Lords departed from the traditional principles of causation to hold all three employers liable.[333]

In the South African case of *Petropulos v Dias*[334] the Supreme Court of Appeal referred to a "substantial factor" to "find a direct and probable chain of causation" and establish factual causation.[335] In the Constitutional Court, Cameron J's minority judgment in *Lee* noted the "risk of harm" in factual causation, and advised that "our law should be developed to compensate a claimant negligently exposed to [the] risk of harm, who suffers harm".[336] Cameron J however

325 Caplan *et al* (2012) *JLME* 609.
326 V Palmer & E Reid *Mixed jurisdictions compared: private law in Louisiana and Scotland* (2009) 367.
327 Maraist & Galligan (2021) Ch 3, §3.04 (fn 1); See Maraist (2010) Ch 5, 2.
328 (1956) AC 613. See Palmer & Reid (2009) 366.
329 2007 SCC 7.
330 (2010) HCA 5.
331 See also *Seltsam v McGuiness* (2000) NSWCA 29 [59]–[62]; *Woolworths v Strong* (2010) NSWCA 282; *Strong v Woolworths* (2012) HCA 5.
332 (2003) 1 AC 32.
333 See Price (2014) *SALJ* 494.
334 2020 (5) SA 63 (SCA) (hereinafter *Petropulos*).
335 *Petropulos* [53] with reference to *Regal v African Superslate* 1963 (1) SA 102 (A). See Reiss (2018) *TJB* 74.
336 *Lee* [79].

opined *obiter dictum* that "it is not possible to infer probable factual causation from an increase in exposure to risk by itself".[337] He continued to explain, again *obiter dicta,* that

> [t]o infer probable factual causation merely from increased likelihood of harm is to suggest that probable factual causation follows from every finding of negligence. But increased likelihood, or an overall increase in risk, still does not tell us whether the negligent conduct was more probably than not the cause of the specific harm.[338]

According to the above *obiter* remarks from the minority judgment of *Lee*, it is not possible to infer probable factual causation from an increase in exposure to risk on its own and every finding of negligence does not necessarily support or infer probable factual causation based on an increased likelihood of harm. However, despite these *obiter* remarks by Cameron J, in *NVM* the Constitutional Court endorsed the majority judgment in *Lee* and stated that

> [t]he question is whether factual causation is established where probable cause is shown, or whether it is enough to show that there is an increase in risk. As stated, *Lee* suggests that it is enough to prove contribution to risk to establish factual causation.[339]

Essentially, the *conditio sine qua non* may be avoided (in circumstances discussed below), as suggested by the Constitutional Court in *Lee* and *NVM v Tembisa* simply by proving an increase in risk or contribution to risk to establish factual causation. The *Lee* case is explored in greater detail below, but for now it suffices to say that the "but for" test is often used by our courts to establish factual causation but that additional or supplementary tests may also be used such as the material contribution test, common sense, human experience and knowledge, increasing risk, and creating opportunities for the occurrence of harm.

Despite these alternative or additional approaches, Loubser and Midgley still suggest that the *conditio sine qua non* approach serves as the most intelligible and simple method to determine the existence of a causal link.[340] Similarly, in *Petropulos*, the Supreme Court of Appeal also suggests that the "*causa sine qua non* (the 'but for' test) is ordinarily applied to determine factual causation".[341] On the other hand, Neethling and Potgieter posit that the

> characterisation by many judges of the method employed as *conditio sine qua non* or the 'but for' test is usually merely lip-service. Van der Walt and Midgley correctly state that '[t]he

337 *Lee* [106].
338 *Lee* [107].
339 *NVM* [62].
340 Loubser & Midgley (2017) 118.
341 *Petropulos* [47].

> application of the 'test' amounts in substance to a particular formulation of an a priori conclusion based upon knowledge and experience of causal processes'.[342] (Footnotes omitted.)

Factual causation in the South African common law of delict was relatively uncontentious (and arguably straightforward) until the advent of the *Lee* cases. Fagan warns that although the Constitutional Court's majority judgment in *Lee* "had a lot to say about causation, much of what it said was mistaken".[343] Before engaging in the criticism of the majority judgment in *Lee* it is worth noting that this case is relevant in the context of non-vaccination as it dealt with the element of (factual) causation in the context of a communicable disease, namely TB.

TB is an airborne communicable bacteria that spreads easily in confined and overcrowded spaces.[344] Although there is a vaccine for TB, it is not explored in this context and this case.[345] This discussion of *Lee* relates to the context of TB, a communicable disease, and the test for factual causation. To understand the criticism of the *Lee* cases, the background of these cases is important, and I provide a brief summary below.

Dudley Lee was incarcerated in Pollsmoor Prison in 1999 at a time when he was TB-free. Lee was temporarily out on bail for two months in 2000 and tested positive for TB in 2003. After his release in 2004, Lee claimed damages from the Minister of Correctional Services for having contracted TB. In the High Court Lee succeeded, but in the Supreme Court of Appeal Lee's claim failed based on the absence of factual causation. The Supreme Court of Appeal SCA reasoned that Lee "did not know the exact source of his infection", meaning that it could not be proven that he had contracted TB in prison.

The Supreme Court of Appeal also found that Lee could not prove that a non-negligent alternative (or "reasonable systemic adequacy") in the prison would have "altogether eliminated the risk of contagion". For these reasons, Lee could not, according to the Supreme Court of Appeal, prove that the prison (and its negligence) was the factual cause of his harm. Lee then appealed to the Constitutional Court.

In the Constitutional Court *Lee* argued that the Supreme Court of Appeal had not properly followed the rules laid down in *Van Duivenboden* or, alternatively, that the law of factual

---

342 Neethling & Potgieter (2020) 223.

343 Fagan (2019) 317.

344 See CDC "How TB Spreads" (3 May 2022) https://www.cdc.gov/tb/topic/basics/howtbspreads.htm (accessed 25 November 2022). See also CB Beggs *et al* "The transmission of tuberculosis in confined spaces: an analytical review of alternative epidemiological models" (2003) 7(11) *IJTLD* 1015–1026.

345 See CDC "Tuberculosis (TB) Vaccines" (3 May 2022) https://www.cdc.gov/tb/topic/basics/vaccines.htm#:~:text=TB%20Vaccine%20(BCG),protect%20people%20from%20getting%20TB (accessed 25 November 2022): Bacille Calmette-Guérin is a vaccine for TB.

causation needed to be developed.[346] The Supreme Court of Appeal's decision was overturned by the majority of the Constitutional Court. The Supreme Court of Appeal had adopted the "but for" test and this is what the Constitutional Court explored in its majority judgment. The Constitutional Court noted that our law does not require such an "inflexible" approach to factual causation as that adopted by the Supreme Court of Appeal. The Constitutional Court stated that,

> the rule regarding the application of the [but for] test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility.[347]

Thus, a flexible application of the *conditio sine qua non* test is applied if a strict application would result in an injustice.[348] The Constitutional Court advocated a "flexible" application of the "but for" test and stated that "[t]his flexibility has a long history, and has never been discarded".[349] However, Fagan points out that in this case, the Constitutional Court failed to support this statement with any case law reflecting the notion that our law has a long history of supporting this flexible approach[350] and in fact court misinterpreted certain cases to support its view.[351] The Constitutional Court in *Lee* continued to advocate flexibility by asserting that,

> [o]ur existing law does not require, as an inflexible rule, the use of the substitution of notional, hypothetical *lawful* conduct for *unlawful* conduct in the application of the but-for test for factual causation.[352] (Footnotes omitted, own emphasis added.)

Notably, the flexible approach supported by the majority in *Lee* essentially refers to "but for the conduct" instead of "but for the negligent conduct".[353] Price explains that the essentially held

> that in applying the but-for test, the court need not always ask itself whether the harm would hypothetically have been suffered had the defendant acted reasonably; that is, the court need not always substitute hypothetical *reasonable* conduct for the defendant's actual conduct. Instead, in

346 *Lee* [37]–[75].
347 *Lee* [41].
348 *Lee* [45]–[50].
349 *Lee* [45].
350 Fagan (2019) 320.
351 Fagan (2019) 320–323.
352 *Lee* [50].
353 Fagan (2019) 335.

> appropriate cases, the court may decide the issue of factual causation simply by asking whether the defendant's *conduct per se* caused the harm.[354] (Own emphasis added.)

Price continues to explain that

> [t]hese are significant developments. To my knowledge, before *Lee* no South African court had ever held that delictual liability should be imposed merely upon proof that (1) the defendant's negligent and wrongful conduct increased a risk of particular harm and (2) the plaintiff suffered that harm. Nor had any South African court held that factual causation is established merely by proving that but for the defendant's *conduct per se*, the harm would not have occurred. On either new approach, it is far easier to establish factual causation and the boundaries of delictual liability are accordingly widened.[355]

Based on the Constitutional Court's judgment in *Lee*, it can be argued that there is a new test for factual causation (referred to as the "*Lee* test" by the Constitutional Court in *NVM* [59]), and as suggested by Price above, this "new test" holds that if the wrongdoer's *negligent* and *wrongful* conduct has increased the risk of harm, this is sufficient to establish factual causation; or if the wrongdoer's conduct alone (regardless of the wrongfulness or unlawfulness) caused the harm (so satisfying the but-for test), it may establish factual causation. However, Price concludes that

> [b]ecause the majority did not wholly jettison the test, but instead merely emphasised its flexibility, it seems likely that in most cases the traditional test will still be applied (including in cases of a specified negligent act or omission). But it may be relaxed in future cases involving concurrent and supervening causes, as well as in cases involving evidentiary gaps of the kind faced in *Fairchild* and *Cook*.[356]

In *NVM*, the Constitutional Court acknowledged that "[t]he question of whether and how the flexible test for factual causation should be applied still does not yield answers that are clear and consistent".[357] It continued,

> [i]n *Lee*, this Court emphasised that the test is not inflexible and had to make provision for situations where 'the use of the substitution of notional, hypothetical *lawful* conduct for *unlawful* conduct in the application of the 'but for' test for factual causation' may lead to an injustice. This Court held that in some circumstances factual causation would be established where the plaintiff has proved

354 Price (2014) *SALJ* 493.
355 As above.
356 Price (2014) *SALJ* 497. *Fairchild* & *Cook* are explored in Ch 4 of this thesis.
357 *NVM* [47].

> that, but for the *negligent* conduct, the risk of harm would have been reduced.[358] (Footnotes omitted, own emphasis added.)

In *NVM* the Constitutional Court appears to support the notion that if the wrongdoer's *negligent* conduct has increased the risk of harm (or "but for the *negligent* conduct, the risk of harm would have been reduced") that is sufficient to establish factual causation. In *NVM* the Constitutional Court continued to explain that,

> [i]n *Mashongwa*, this Court explained that *Lee* never sought to replace the pre-existing common law 'but for' approach to factual causation, but rather to recognise the flexibility in the 'but for' test. It held that where the traditional 'but for' test was adequate to establish causation, it may be unnecessary to resort to the *Lee* test.[359] (Footnotes omitted.)

Evidently, the "*Lee* test" should, according to the Constitutional Court in *NVM*, only be applied when the traditional "but for" test is inadequate to establish causation. According to the *Lee* case, the traditional "but for" test should also be applied in a "flexible" manner if "a strict application of the rule would result in an injustice".[360] If the traditional "but for" test is adequate to establish causation and does not result in an injustice it is unnecessary to resort to the "*Lee* test".[361]

The "*Lee* test" is most likely more appropriate in cases dealing with concurrent causation and supervening causation,[362] as well as those involving evidentiary gaps, as suggested by Price.[363] As mentioned above, Corbett JA explained that there are possibly only two exceptions where the "but for" test will not be applied and these are cases of supervening causation and concurrent causation.[364] For example, robbers A and B simultaneously (but independently) fire shots at C. A's bullet destroys C's head; B's bullet destroys C's chest — C dies![365] Price offers another example: A poisons C's coffee. After C has drunk the poisoned coffee but before the poison is absorbed into his bloodstream, B decapitates C — C dies (yet again!).[366]

---

358 *NVM* [58].
359 *NVM* [59].
360 *Lee* [41].
361 For a much more detailed discussion of the *Lee* cases, see Fagan (2018) 216–245; Fagan (2018) 317–322; Price (2014) *SALJ* 491–500.
362 As mentioned above, Corbett JA (in *Siman* at 915, & *Skosana* at 35) explained that there are possibly only two exceptions where the "but for" test will not be applied (i.e., supervening causation & concurrent causation).
363 Price (2014) *SALJ* 497.
364 *Siman* at 915; *Skosana* at 35.
365 Price (2014) *SALJ* 493.
366 As above.

In both these scenarios the traditional "but for" test may yield the conclusion that neither A nor B caused C's death, and it is for this reason that the traditional application of the "but for" test is not sufficient to establish factual causation, in these scenarios dealing with multiple (or cumulative) causes.[367] For purposes of this discussion, contributory negligence and joint wrongdoers are excluded and it is accepted that there are no multiple or cumulative causes.

5.4.3.1.1 Factual causation in the Filia/Elimele hypothetical

I now apply the theory above to the Filia/Elimele hypothetical. To illustrate the importance of factual causation in practice I refer to the cases discussed above when applying the law to the facts of the Filia/Elimele hypothetical. I also assess whether it is necessary to resort to the "*Lee* test" in the Filia/Elimele hypothetical.

As shown in Chapter 4, epidemiology is one avenue through which to satisfy the test for factual causation[368] and specifically the "but for" test.[369] Caplan *et al* suggest that epidemiology[370] is the most appropriate method for proving factual causation.[371] Epidemiology aims to identify the causes of health-related events[372] and may support establishing factual causation in this hypothetical in that epidemiology considers causal assessments.[373] The causal assessments used in epidemiology aim to understand if there is any alternative explanation for the current set of facts, and what is the more likely cause of the effect.[374]

For example, the "epidemiologic triangle" (a traditional model used in epidemiology) may help prove factual causation as it considers the agent, host, environment, and time to determine the source of infection in the causal assessment.[375] The criteria for causality in epidemiology include, the strength of association, biological plausibility, and consistency with

---

367 Loubser & Midgley (2017) 111; Fagan (2019) 327.
368 Caplan *et al* (2012) *JLME* 609
369 Caplan *et al* (2012) *JLME* 607. See M Brookes *et al* "The 'but for' test of causation in Australian law" (December 2020) https://www.carternewell.com/page/Publications/2020/the-but-for-test-of-causation-in-australian-law/ (accessed 25 November 2022).
370 R Bonita, R Beaglehole, T Kjellström & WHO *Basic epidemiology* (2006) 1: "epidemiology in its modern form is a relatively new discipline and uses quantitative methods to study diseases in human populations, to inform prevention and control efforts"; at 2: epidemiology is defined as "the study of the distribution and determinants of health-related states or events in specified populations, and the application of this study to the prevention and control of health problems".
371 Caplan *et al* (2012) *JLME* 609.
372 RM Merrill *Introduction to epidemiology* 7ed (2017) 4.
373 M Shimonovich *et al* "Assessing causality in epidemiology: revisiting Bradford Hill to incorporate developments in causal thinking" (2021) 36(9) *EJE* 873–887.
374 As above.
375 Merrill (2017) 178; CDC "Understanding the epidemiologic triangle through infectious disease" (date unknown) https://www.cdc.gov/healthyschools/bam/teachers/documents/epi_1_triangle.pdf (accessed 24 November 2022).

existing medical knowledge and other studies.[376] The "strength of association" to support a causal inference refers to the statistical association.[377] Biological plausibility is also considered to determine whether the causal association is consistent with existing medical knowledge (e.g., the biological transmission of the virus).[378]

If a causal agent (like Filia) is suspected of having caused Elimeme's infection the incubation period may support (or dispel) this suspicion.[379] Direct transmission, as suspected in the Filia/Elimele hypothetical, is referred to as "direct causal association", which denotes the immediate and direct transfer of the virus from Filia (the host) to Elimele (the susceptible host or, for purposes of this discussion, the victim).[380]

In the Filia/Elimele hypothetical, the *conditio sine qua non* test and epidemiology may be applied to establish factual causation. Anti sent Filia to crèche while she was infected, which is a positive act (commission). Would Elimele have fallen ill had Anti not sent Filia to crèche while Filia was COVID-19 positive? Hence, the positive conduct of Anti (sending Filia to crèche) is "thought away" to establish whether there is factual causation arising from Anti's commission.

Had Anti not sent Filia to school (eliminating the commission), Elimele would most likely not have been infected. This conclusion may be supported with reference to the epidemiological evidence discussed above — epidemiological evidence may prove with a specific degree of certainty that Filia was the source of Elimele's infection. If Anti's commission (sending Filia to crèche while COVID-19 positive) is thought away it is determined that Anti's conduct is the most likely or sole cause of Elimele's infection and the resulting harm.

As noted, determining whether there is a causal *nexus* is a question of fact that is always investigated with reference to the available evidence and relevant probabilities in the circumstances.[381] Although epidemiology may not be able to prove with 100% certainty that a causal association exists,[382] it can assist the court in making an informed decision on the probability of Filia having infected Elimele as a result of Anti's commission.

I now turn to Anti's omissions. As we saw above, for Anti's omissions, a hypothetical positive course of lawful conduct or act is "inserted" into the particular set of facts to establish

376 Merrill (2017) 268.
377 Merrill (2017) 320.
378 Merrill (2017) 310.
379 Merrill (2017) 103.
380 Merrill (2017) 312.
381 Loubser & Midgley (2017) 102.
382 Merrill (2017) 4.

whether Anti's conduct caused Elimele harm. Hypothetical substitution ("but for" test in the case of omissions) may be applied to the Filia/Elimele hypothetical to determine factual causation for Anti's omissions.

Consider again Anti's various omissions: (1) Anti failed to have Filia vaccinated; (2) Anti failed to warn others of Filia's infection; and (3) Anti failed to keep Filia home to prevent harm to others. When determining factual causation in a case of an omission, the court will consider what Anti could have done in the circumstances to prevent the relevant consequence (hypothetical substitution).[383] A legal duty and reasonable conduct are only considered if it is clear that Anti could have (in the circumstances) acted positively to change the factual course of events.[384] Thus, factual causation is considered before legal causation and the element of wrongfulness. Anti's failure to have Filia vaccinated may be substituted by the hypothetical positive (lawful) conduct of vaccination (hypothetical substitution).

The question now arises whether Elimele would still have suffered harm had Filia been vaccinated? Elimele would most probably not have suffered any harm as it is scientifically proven that vaccines are highly effective and prevent the spread of commutable diseases like COVID-19. Once again, epidemiology may come into play here to support this assertion with scientific studies, facts, and statistics. For example, COVID-19 may still be contracted and spread, even though a person is vaccinated. However, the chances of that happening are very slim.

Although the vaccine cannot prevent the contraction and spread of the virus with 100% certainty, it can prevent the contraction and spread of the disease and reduce the chance of infection and spread by up to 90%.[385] Once again, according to the court in *Duivenboden* and *Gore*, it is not necessary to prove this as an exact science, and a "sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs" is sufficient.

According to this reasoning of "common sense based on the practical way in which the ordinary person's mind works", it is more probable than not that if Filia had been vaccinated, she would not have contracted COVID-19 and Filia would not have infected Elimele.

383 Neethling & Potgieter (2020) 223–224.
384 Neethling & Potgieter (2020) 230.
385 See P Olliaro *et al* "COVID-19 vaccine efficacy and effectiveness — the elephant (not) in the room" (2021) 2(7) *The Lancet* e279–e280 for the reported efficacy and relative risk reduction: "95% for the Pfizer–BioNTech, 94% for the Moderna–NIH, 91% for the Gamaleya, 67% for the J&J, and 67% for the AstraZeneca–Oxford vaccines."

I now turn to Anti's failure to warn others of Filia's infection. Anti's failure to warn others of Filia's infection may be replaced with the hypothetical positive (lawful) conduct of warning the school and the parents with whom Filia comes into contact. The question is now would Elimele still have suffered harm had Anti warned others of Filia's infection?

It may be argued that it is more probable that Elimele's parents would not have sent him to school if they had known that an ill child was present at the school. Alternatively, the school may claim that had they known that Filia was infected they would not have allowed her to access the school in an effort to protect other children. Alternatively, the school could have isolated Filia had they known in an effort to protect other children.

If the school and Elimele's parents had known of the risks they could have made an informed decision. However, the "but for" test in the context of Anti's failure to warn and inform others does not clearly satisfy factual causation as there are other variables at play — for example, would the school have taken steps? Would Elimele's parents have prevented contact between him and Filia?

The hypothetical substitution of Anti's failure to warn with the positive (lawful) conduct of warning others does not as clearly (as in the case of hypothetical substitution of non-vaccination with vaccination, or eliminating the positive conduct of sending Filia to crèche), indicate that the harm would have been avoided "but for" Anti's failure to warn others.

Anti's omission to follow the paediatrician's advice to keep Filia home whilst she was ill may be substituted by the hypothetical positive (lawful) conduct of, for example, keeping Filia home. The hypothetical substitution of Anti's failure to keep Filia home with the positive conduct of keeping Filia home may prove factual causation in that had Filia not been at school, Elimele would most likely not have contracted COVID-19 as Filia was the only child of the ten children at the crèche who was ill. The "but for" test in these scenarios (actively sending Filia to school and failing to keep her home) are indicative of factual causation.

As mentioned above, the (1) application of common sense,[386] logic,[387] and reference to human experience and knowledge;[388] (2) the material contribution test;[389] and (3) increasing risk of harm and/or creating opportunities for the occurrence of harm[390] may also be employed to establish factual causation and are not mutually exclusive alternatives to the *conditio sine qua non* test, but rather supplementary.

386 *Nohour* [18]; *Lee* [45]–[50]; *Gore* [33]; *Oppelt* [46].
387 *Lee* [45]–[50].
388 *Van Duivenboden* [25]; *Gore* [33].
389 *Skosana* at 34F–34G; *Nohour* [17].
390 *Lee* [79]; *NVM* [62].

Although epidemiology and the *conditio sine qua non* and *conditio cum qua non* above may prove factual causation, I consider these supplementary tests for the sake of completeness to show how these supplementary tests for proving factual causation may play out in this hypothetical.

For example, did Anti's failure to vaccinate Filia (omission) increase the risk of harm or create an opportunity for the occurrence of harm? According to Reiss, a non-vaccinating parent (Anti) either creates a risk by failing to vaccinate Filia or substantially increases an existing risk.[391] I suggest that Anti's failure to vaccinate Filia created an opportunity for the occurrence of harm and also increased the existing risk of harm; as this happened during a global pandemic, a risk of harm already existed. However, Anti increased that existing risk of harm by failing to have Filia vaccinated.

Similarly, Anti's failure to keep Filia home (to self-isolate) whilst Filia was ill, in compliance with the recommendations of the paediatrician (omission), arguably increased the risk of harm or created an opportunity for the occurrence of harm. Diekema suggests that a non-vaccinating parents' decision not to vaccinate their child may place others at risk if the child becomes infected and exposes others to the disease,[392] as happened in the Filia/Elimele hypothetical. Reiss posits that "non-vaccinating parents make a deliberate and conscious choice that at least exacerbates the risk to the plaintiff, if not actually creating it".[393]

Consequently, by failing to vaccinate and self-isolate Filia and sending her to crèche, Anti increased the risk of harm by exposing and infecting others (Elimele). Lastly, Anti's failure to warn and inform others of Filia's infection arguably increased the risk of harm, or created the opportunity for the occurrence of harm as Elimele's parents or the school could have taken preventative steps to safeguard Elimele had Anti warned or informed them. As they were not warned or informed this arguably increased the risk of harm or created an opportunity for the occurrence of harm.

It is worth noting that if Anti's negligent conduct increased the risk of harm (or "but for" Anti's negligent conduct, the risk of harm would have been reduced), this is enough to establish factual causation (as alluded to by the Constitutional Court in *Tembisa*) and Anti's conduct is thus the factual cause of Elimele's harm.

---

391 Reiss (2014) *JLPP* 607. Finch & Fafinski (2021) 42 refer to the "magnitude of risk" as an additional factor to consider when determining if a duty was breached in tort law.
392 Diekema (2009) *MLR* 90.
393 Reiss (2014) *JLPP* 607.

As mentioned above, increasing the risk of harm or creating an opportunity for the occurrence of harm approach is generally only used as supplementary issues to prove factual causation where the traditional methods do not readily or adequately support the establishment of factual causation.

The material contribution test may also be used as a supplementary test to the *conditio sine qua non* or *conditio cum qua non* tests, and as seen in Chapter 4, in the case of mass outbreaks the "material contribution" test is suggested as an appropriate alternative to the "but for" test. For material contribution, the question is: did Anti's failure to (1) vaccinate; (2) self-isolate Filia; or (3) warn or inform, materially contribute to Elimele's harm? It may be argued that Anti's omissions all contributed materially to Elimele's harm.

The court in *Skosana* referred to material contribution in determining factual causation, and noted that factual causation "relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim".[394]

In *Amaca v Ellis*[395] the High Court of Australia also referred to the importance of the material contribution test in the context of cases based on epidemiological risks. For example, as herd immunity is essential to prevent the spread of the virus and protect individual health and herd-immunity, every non-vaccinating decision (like that of Anti) contributes materially to the spread of the virus and the likelihood of infection which would otherwise probably not have happened.[396]

Hence, Anti's failure to vaccinate Filia contributed materially to the spread of the virus, to Elimele's infection, and to the harm giving rise to the claim. The same reasoning may be applied to Anti's failure to self-isolate Filia or warn or inform others of her infection: Anti's failure to self-isolate Filia or warn or inform others contributed materially to the spread of the virus and Elimele's infection — it contributed materially to the harm on which the claim is based.

For factual causation, it is generally sufficient if Anti's wrongful conduct has in any way contributed to the damage (*Skosana*) — it need not be the only cause, or the main cause, or a direct cause of the damage (*Van Duivenboden*).[397]

Epidemiological evidence may support the contention that Anti's omissions contributed materially to the harm giving rise to the claim. If Anti's omissions materially contributed to

394 *Skosana* at 34F–34G.
395 (2010) HCA 5.
396 Rodal & Wilson (2010) *MJLH* 51–52.
397 Neethling & Potgieter (2020) 230.

Elimele's harm then Anti's conduct is the factual cause of Elimele's harm, and factual causation will have been established.

As mentioned above, the material contribution test serves as a supplementary approach to the "but for" test and will most likely only be called into play where the "but for" test fails adequately to support a finding of factual causation. For example, only in situations where there is more than one possible wrongdoer or defendant (e.g., mass outbreaks) may the "material contribution" test be used to impose liability as the "but for" test is unable to achieve this.[398]

Using common sense and human experience and knowledge may also be used as a supplementary test in addition to the *conditio sine qua non* or *conditio cum qua non* tests. Here, the question is: did Anti's failure to (1) vaccinate; (2) self-isolate Filia; or (3) warn or inform cause Elimele's harm with reference to common sense and human experience and knowledge? Elimele's harm may have been avoided or prevented "but for" Anti's failure (1) vaccinate; (2) self-isolate Filia; or (3) warn or inform others, based on common sense, and human experience and knowledge. The employment of common sense, human knowledge, and experience may dictate that Anti's conduct is the factual cause of Elimele's harm.

For example, in *Van Duivenboden* Nugent JA explained that when inspecting factual causation a sensible retrospective analysis of what would probably have occurred is conducted with reference to the ordinary course of human affairs.[399] This does not negate the need for evidence which must still support the finding of what would probably have occurred and what could have been expected to occur in the ordinary course of human affairs.[400]

For purposes of this approach, strict adherence to logic is circumvented in favour of common sense.[401] Hence, the focus is not on metaphysics, philosophy, mathematics, or scientific exactitude,[402] but rather on common sense, the ordinary course of human affairs "based on the practical way in which the ordinary person's mind works against the background of everyday life experiences".[403]

I submit that the use of common sense in this hypothetical is best suited together with the *conditio sine qua non* or *conditio cum qua non* approaches (as suggested in *NVM* and *Gore*).[404]

The Filia/Elimele hypothetical is unique as it deals with the transmission of a commutable disease and proving factual causation may be more difficult. As discussed in

398 Rodal & Wilson (2010) *MJLH* 51.
399 *Van Duivenboden* [25].
400 As above.
401 *Lee* [45]–[50].
402 *NVM* [57].
403 *Gore* [33].
404 *NVM* [57]; *Gore* [33].

Chapter 4, Karako-Eyal notes that causation is perhaps the biggest hurdle in establishing liability in the context of non-vaccination.

It is appropriate briefly to return to *Lee* which dealt with the transmission of TB in prison[405] which is similar to the Filia/Elimele hypothetical in that factual causation must be established in the context of a communicable disease. As mentioned above, the Constitutional Court in *Lee* mentioned that if the "substitution exercise" is correctly applied it establishes probable factual causation.[406]

However, the Constitutional Court criticised the Supreme Court of Appeal's notion that Mr Lee did not know the source of his infection and the Supreme Court of Appeal held this as a requirement for the establishment of a causal link.[407] Notably, in the Filia/Elimele hypothetical the source of Elimele's infection is known,[408] and epidemiology, as suggested by Caplan *et al* may be used to satisfy the "but for" test and establish factual causation.

In this hypothetical, the traditional "but for" test (supplemented by additional approaches) yields adequate results to establish factual causation and it is unnecessary to resort to the *Lee* test.[409] It is, therefore, unnecessary to explore the *Lee* case in greater detail for purposes of the current hypothetical — especially considering the valid criticism to which it has been subject. It may also be inappropriate to invoke the *Lee* test as this hypothetical excludes concurrent and supervening causation[410] as well as cases involving evidentiary gaps.[411]

For purposes of this hypothetical, factual causation is established with reference to the traditional "but for" test and epidemiology[412] and supplementary tests like the material

---

405 A Fagan "Causation in the Constitutional Court: Lee v Minister of Correctional Services" (2013) (5) *CCR* 106: the plaintiff had proved that "but for" his incarceration he probably would not have contracted TB. He also had proved that "but for" the defendant's negligent failure to maintain an adequate system for the management of TB, the risk of his contracting TB would have been reduced.

406 *Lee* [41]–[43].

407 As above. For a detailed discussion of *Lee*, refer to Fagan (2013) (5) *CCR* 104. Fagan argues that, the court in *Lee* has changed the common law and Fagan considers the CC's approach to the common-law rules. Fagan also criticises the enquiry into factual causation with an enquiry into negligence.

408 If the source of Elimele's infection is unknown, it may be impossible to prove factual causation, unless the approach in *Lee* is followed where the state is held liable for its failure to maintain an adequate system for the management of COVID-19. See Loubser & Midgley (2017) 112–113: according to *Lee* [56] it is not necessary to conduct a "control sample in scientific investigation".

409 *NVM* [59].

410 As mentioned above, Corbett JA (in *Siman* at 915, & *Skosana* at 35) explained that there are possibly only two exceptions where the "but for" test will not be applied (i.e., supervening causation & concurrent causation).

411 Price (2014) *SALJ* 497.

412 In *Laferrière* (as discussed in Ch 4 of this thesis, under Quebec) it was suggested that if epidemiology is insufficient to support a finding of causation it may be indicative of, e.g., a shorter lifespan, which the court may take into account to determine causation in law.

contribution test, using common sense, human experience and knowledge, and increasing the risk of harm or creating an opportunity for the occurrence of harm. For purposes of this hypothetical, it is established that Anti's conduct is the factual cause of Elimele's harm.

Factual causation is only one part of the causation enquiry — Anti will only be liable if the consequences are closely (directly or sufficiently) enough linked to Anti's conduct, and this is referred to as legal causation.[413] As stated in *Bentley*:

> […], demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second inquiry then arises. That is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part.[414]

This means that factual causation alone is insufficient to establish delictual liability and legal causation must be assessed to establish whether legal liability should ensue. In the next section, I explore legal causation.

5.4.3.2 Legal causation

As mentioned above in *Lee* and *Skosana*, legal causation considers sufficient closeness, remoteness, and legal causation and "is basically a juridical problem in which considerations of legal policy may play a part".[415] Legal causation is a normative enquiry and involves weighing different policy considerations and factors (such as reasonableness, fairness, and justice)[416] to determine whether the link between the conduct and consequences is sufficiently strong for liability to arise.[417]

Thus, legal causation inspects if the harm suffered by Elimele is sufficiently closely or directly connected to Anti's (wrongful) conduct, for legal liability to ensue. In very simple terms, legal causation asks: is the factual causation strong enough and should liability be limited?[418] Below, I explore what legal causation entails with reference to case law before applying the theory and law to the facts of the Filia/Elimele hypothetical.

---

413 Loubser & Midgley (2017) 123.
414 *Bentley* [65]–[66].
415 *Skosana* at 34F–34G.
416 Loubser & Midgley (2017) 124 & 126; Neethling & Potgieter (2020) 233.
417 Loubser & Midgley (2017) 103 & 132; *Lee* [38]; *Skosana* at 34F–34G.
418 Loubser & Midgley (2017) 102–103.

In *De Klerk*, the Constitutional Court emphasised the considerations of remoteness, and foreseeability by stating that

> [t]his [legal causation and remoteness] entails an enquiry into whether the wrongful act is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that is too remote from the conduct concerned or harm that was not [reasonably] foreseeable.[419] (Footnotes omitted.)

This is similar to the law of delict in Scotland, where the direct consequences and the foreseeability tests are used to determine legal causation.[420] In *Esorfranki Pipelines v Mopani District Municipality*[421] the Supreme Court of Appeal stated that

> [t]he test for legal causation is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play a part.[422]

This flexible approach to legal causation must not be confused with the "flexible test" in *Lee* (for factual causation). The Supreme Court of Appeal explained in *Esorfranki* that the flexible approach considers the direct consequences (or proximate cause) and reasonable foreseeability, together with legal policy, reasonability, fairness, and justice.[423] Accordingly, legal causation considers the following traditional elements, tests, or approaches: (1) reasonable foreseeability; (2) directness/proximity (direct consequences or proximate cause); (3) the absence or presence of a *novus actus interveniens*; (4) legal policy, reasonability, fairness, and justice; and (5) remoteness.

The "remoteness of damage" (or legal causation) is used as one of the mechanisms, to limit the liability of the wrongdoer.[424] Similarly, the question of remoteness is termed a question of legal causation under Dutch law.[425] Neethling and Potgieter add that the *novus actus interveniens* theory may also be used to establish legal causation, and essentially refers to a new intervening cause or independent event which either causes or contributes to the

419 *De Klerk* [25].
420 McManus (2013) 31.
421 2022 (2) SA 355 (SCA) (hereinafter *Esorfranki*).
422 *Esorfranki* [81] (coram: Petse AP, Nicholls JA, Mbatha JA, Goosen AJA, & Poyo-Dlwati AJA).
423 *Esorfranki* [81].
424 Neethling & Potgieter (2020) 230.
425 Rijnhout (2021) *UJIEL* 129.

consequences concerned.[426] Thus, if a *novus actus interveniens* breaks the causal chain of events this may limit liability in the context of legal causation.[427]

In Chapter 4, I explain that the tort of negligence also considers the impact of a *novus actus interveniens* in the causation enquiry, which may break or sever the chain of events[428] and render the end result too remote.[429] A *novus actus* may be relevant in both the direct consequences theory ("proximate cause" test), as well as the reasonable foreseeability theory.[430] Neethling and Potgieter explain that according to the direct consequences theory, "an actor is liable for all the 'direct consequences' of his negligent conduct".[431] This means that reasonable foreseeability is not considered in this approach and the "consequence need not follow the cause immediately in time and space to be a 'direct consequence' thereof".[432]

Fagan explains that some case law supports the approach that remoteness depends on a *novus actus* to some degree.[433] In simple terms, the direct consequences (or proximate cause) test may also consider if there is a *novus actus* that renders the loss caused by the wrongdoer's conduct, too remote,[434] similar to that under the tort of negligence.

On the other hand, remoteness may also rely on reasonable foreseeability, as Fagan explains.[435] According to the reasonable foreseeability test the harm must not be too remote, and the general nature of the harm actually suffered must have been reasonably foreseeable.[436] The foreign-law considerations in Chapter 4 indicate that foreseeability is at play in the remoteness enquiry. For example, in the US, Dutch, Australian, and English law context, proximate (legal) causation limits liability based on remoteness or unexpected and unforeseen consequences.[437] Finch and Fafinski also reiterate that "the correct test for remoteness is reasonable foreseeability of the kind or type of damage in fact suffered by the [plaintiff]".[438]

The cases of *Esorfranki* and *Skosana* both allude to the fact that legal causation has regard to policy considerations to guard against stretching the wrongdoer's liability beyond the

426 Neethling & Potgieter (2020) 250.
427 Neethling & Potgieter (2020) 238–239.
428 Finch & Fafinski (2021) 65. See also McManus (2013) 33.
429 Rodal & Wilson (2010) *MJLH* 48.
430 Neethling & Potgieter (2020) 238–239.
431 As above.
432 Neethling & Potgieter (2020) 239.
433 Fagan (2019) 369.
434 As above.
435 Fagan (2019) 375.
436 As above. See Loubser & Midgley (2017) 175.
437 Caplan *et al* (2012) *JLME* 609; Finch & Fafinski (2021) 65; Sobczak (2010) *ERPL* 1162; McManus (2013) 31.
438 Finch & Fafinski (2021) 69.

boundaries of reasonableness, equity, and fairness. For example, in Louisiana, the wrongdoer's liability may be limited based on the community's sense of fairness.[439]

In *De Klerk*, the Constitutional Court confirmed that legal causation functions to "ensure that liability on the part of the wrongdoer does not extend indeterminately".[440] Dlodlo JA in *Nohour* describes what legal causation entails in the following terms:

> Legal causation entails an enquiry into whether the alleged wrongful act (wrongful omission to disclose deviations) is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that is too remote from the conduct alleged or harm that was not foreseeable. Remoteness of damage operates along with the requirement of wrongfulness as a measure of judicial control in respect of the imposition of delictual liability. It, therefore operates as a 'long stop' in cases where most right-minded people will regard the imposition of liability in a particular case as untenable despite the presence of all other elements of delictual liability.[441] (Footnotes omitted.)

In addition to the traditional elements listed by the court in *Esorfranki* above, Dlodlo JA in *Nohour* emphasises the consideration of remoteness. Dlodlo JA also pointed out that wrongfulness also refers to public policy, and that the delictual elements of legal causation and wrongfulness may overlap but they still remain separate and distinct delictual elements.[442] In *De Klerk*, the Constitutional Court confirmed that

> [l]egal causation is resolved with reference to public policy. As held by the Supreme Court of Appeal in *Fourway Haulage SA*, although this implies that the elements of legal causation and wrongfulness will overlap to a certain degree as both are determined with reference to considerations of public policy, they remain conceptually distinct. Accordingly, even where conduct is found, on the basis of public policy considerations to be wrongful, harm factually caused by that conduct may, for other reasons of public policy, be found to be too remote for the imposition of delictual liability.[443] (Footnotes omitted.)

In *Nohour* Dlodlo JA continued to explain that

> [t]he result is that even if conduct is found to have been wrongful (or even negligent, for that matter), a court may still find, for other reasons of public policy, the harm flowing therefrom to have been too remote for the imposition of delictual liability. The traditional tests for determining legal

439 Maraist & Galligan (2021) Ch 3, §3.05 (fn 2); Maraist (2010) Ch 5, 2.
440 *De Klerk* [26].
441 *Nohour* [15].
442 *Nohour* [16].
443 *De Klerk* [28].

> causation (reasonable foreseeability, adequate causation,[444] proximity of the harm etc.) remain relevant as subsidiary determinants. These traditional tests should be applied in a flexible manner. They should be tested against considerations of public policy as infused with constitutional values. Insofar as legal causation is concerned, every matter must be determined on its own facts. The consideration of legal causation or wrongfulness, public policy considerations, infused with the norms of our constitutional dispensation dictate that even if the prosecutor suffered from negligent omission, legal liability may ensue if the harm was foreseeable and is not too remote.[445] (Original footnotes omitted, own footnotes inserted.)

According to Dlodlo JA, the traditional elements listed in *Esorfranki*, are "subsidiary determinants" to establish legal causation (and wrongfulness), and should be applied in a flexible manner and tested against the considerations of public policy as infused with constitutional values. The Constitutional Court in *De Klerk* explained why the reference to constitutional values is important in the legal causation enquiry:

> Grounding public policy in constitutional values accordingly offers an opportunity to infuse the common law with the values of the Constitution. The determination of remoteness entails applying the traditional factors, ascertaining their implications, and testing those implications against considerations of public policy as infused with Constitutional values.[446]

The Constitutional Court in *De Klerk* noted that

> [l]egal causation involves a flexible test that may consider a myriad of factors. […] The traditional criteria are, among others, reasonable foreseeability, adequate causation,[447] whether a *novus actus interveniens* intrudes and directness. But each of these tests was not without its problems and could lead to results contrary to public policy, reasonableness, fairness and justice. Hence in *Mokgethi*, the then Appellate Division adopted an 'elastic' approach to legal causation. This approach is sensitive to public policy considerations and aims to keep liability within the bounds of reasonableness, fairness, and justice. In *Smit*, the Appellate Division held in the context of delict that the rigid application of legal causation to delineate the imposition of legal liability across all sets of facts is irreconcilable with the flexible approach followed in our law. Any attempt to detract

444 See Neethling & Potgieter (2020) 203–204: "according to this theory, a consequence which has in fact been caused by the wrongdoer is imputed to him if the consequence is 'adequately' connected to the conduct." The theory of adequate causation has been subject to sharp criticism but nevertheless enjoys support in criminal law. Loubser & Midgley (2017) 131 refer to *S v Daniëls* 1983 (3) SA 275 (A) and argue that the "adequate cause" theory has not been aptly employed in South African law.

445 *Nohour* [16]. See also *Mashongwa v PRASA* 2016 (3) SA 528 (CC) (hereinafter *Mashongwa*) [68].

446 *De Klerk* [31]; *Mashongwa* [68].

447 See Neethling & Potgieter (2020) 203–204: "according to this theory, a consequence which has in fact been caused by the wrongdoer is imputed to him if the consequence is 'adequately' connected to the conduct." See also Loubser & Midgley (2017) 131.

> from the flexibility of the test for legal causation should accordingly be resisted.[448] (Original footnotes omitted, own footnotes inserted.)

Thus, a flexible approach to legal causation, according to the extracts above, still considers the direct consequences (proximate cause) test; the reasonable foreseeability test; and *novus actus interveniens* against the backdrop of policy considerations (grounded in the Constitution and its values), reasonableness, fairness, and justice.

Although Dlodlo JA in *Nohour* labelled the traditional tests as "subsidiary", he still pressed for a flexible approach where these traditional tests are not actually subsidiary, but rather informed by "considerations of public policy as infused with constitutional values".[449] Dlodlo JA did not elaborate on the meaning of constitutional values in this context, nor did he refer directly to any constitutional values or public policy considerations when inspecting legal causation in this case. Dlodlo JA only stated that "legal liability may ensue if the harm was foreseeable and is not too remote" when exploring public policy considerations infused with the norms of our constitutional dispensation.[450]

In *De Klerk* the Constitutional Court mentioned that the traditional considerations (or existing criteria) should be applied flexibly[451] and acknowledged that when establishing remoteness, the traditional factors (direct consequences test; the reasonable foreseeability test; and *novus actus interveniens*) are used against the backdrop of "considerations of public policy as infused with constitutional values".[452]

Theron J (for the majority) in *De Klerk* considered the deprivation of liberty through arrest, detention, and procedural fairness[453] to conclude that when

> determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest.[454]

448 *De Klerk* [29].
449 *Nohour* [16].
450 As above.
451 *De Klerk* [29]–[30].
452 *De Klerk* [31].
453 *De Klerk* [62].
454 *De Klerk* [81].

Mogoeng CJ (dissenting) in *De Klerk* disagreed and added that "public policy is about much more than what individuals [like Constable Ndala] know or do not know".[455] Mogoeng CJ concluded that:

> In this context, considerations of public policy based on our constitutional norms and values demand a commitment to the fulfilment of constitutional obligations, especially those that affect the liberties of individuals, the respect for and observance of separation of powers and the need for courts to make just and equitable orders.[456]

In light of the above, the circumstances known to the wrongdoer at the time of the wrongful conduct may be used to determine if it is reasonable, fair, and just to hold him or her liable. However, during this determination of whether it is reasonable, fair, and just to hold the wrongdoer liable, the commitment to the fulfilment of constitutional obligations, and the need for courts to make just and equitable orders must be considered.

In *Fourway Haulage v SA National Roads Agency*,[457] the Supreme Court of Appeal endorsed a flexible approach holding that

> the existing criteria of [reasonable] foreseeability, directness, *et cetera*, should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.[458]

It is only in *mCubed International v Singer*[459] that the Supreme Court of Appeal (per Brand JA) stated that

> [t]he issue of legal causation or remoteness is determined by considerations of policy. It is a measure of control. It serves as a 'longstop' where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability.[460]

---

455 *De Klerk* [182]: Mogoeng CJ (dissenting) in *De Klerk* commented on what public policy is, and mentioned the following public policy considerations: the doctrine of separation of powers [166]; the supremacy of our Constitution, the rule of law (legality) and accountability; [168] the fundamental right "not to be deprived of freedom arbitrarily or without just cause"; [170] s 2 of the Constitution; [171] arbitrariness or absence of just cause depriving the right to liberty; [172] the abuse of power, arbitrariness or unjust cause relating to the arrest and detention; [175] spirit, purport or object of the Constitution; [183] the need for courts to make just and equitable orders.

456 *De Klerk* [183].

457 2009 (2) SA 150 (SCA) (hereinafter *Fourway Haulage*).

458 *Fourway Haulage* [34]. See also *Freddy Hirsch Group v Chickenland* 2011 (4) SA 276 (SCA) (hereinafter *Freddy*) [44]; *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) (hereinafter *Cape Empowerment*) [36]–[37].

459 (2009) ZASCA 6 (hereinafter *mCubed*).

460 *mCubed* [27] (Streicher JA, Mhlantla JA, Leach AJA, & Bosielo AJA concurring). *De Klerk* [27] also refers to *mCubed*.

However, in this case, Brand JA did not find that factual causation was present and stated that even if factual causation were present, legal causation would fail.[461] Brand JA continued that even if it did consider factual causation to be present, and considered legal causation, the court could rely directly on fairness, justice, reasonableness, and policy considerations to trump an application of the direct consequences and/or reasonable foreseeability tests. According to Brand JA factual causation is then a measure by which to limit liability by reference to policy considerations.

Brand JA in *mCubed* also emphasised that even if all the other elements of delictual liability are present, legal causation may prevent the imposition of liability. As mentioned above, the Supreme Court of Appeal in *Nohour* and the Constitutional Court in *De Klerk* explained that legal causation and wrongfulness may overlap but remain distinct delictual elements. However, in *Fourway Haulage*, the Supreme Court of Appeal took one step further and asserted that

> [b]roadly speaking, wrongfulness — in the case of omissions and pure economic loss — on the one hand, and remoteness [legal causation] on the other, perform the same function. They are both measures of control. They both serve as a 'longstop' where most right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability.[462]

I submit that the statement by the Supreme Court of Appeal in *Fourway Haulage* that legal causation and wrongfulness perform the same function, must be approached with caution and perhaps criticism. I posit that although these elements may overlap, as acknowledged by the Supreme Court of Appeal in *Nohour* and the Constitutional Court in *De Klerk*, these two delictual elements are still two separate and distinct delictual elements. Yes, they may both limit liability, but how they approach the issue of whether liability should be imposed differs. I suggest that the element of wrongfulness may limit liability but that merging these two distinct delictual elements into one broad "liability limiting" category may add to confusion and doubt.

As mentioned earlier, Fagan suggests that remoteness is a separate element for *Aquilian* liability.[463] He explains the different tests for legal causation in the following categories: (1) the direct consequences test; (2) the reasonable foreseeability test; and (3) fairness, justice,

461 *mCubed* [27].
462 *Fourway Haulage* [31].
463 Fagan (2019) 339. See also Brüggemeier (2020) *EJCLG* 370.

reasonableness, and policy considerations.[464] Notably, tests (1) and (2) are the two traditional tests for legal causation as was shown in the case law above.

However, Fagan is not convinced that the two traditional tests are now placed on the back burner and argues that our courts still use them and refer to the third test only in certain cases or scenarios.[465] He suggests that reference to fairness, justice, reasonableness, and policy is often only used if the direct consequences test and/or the reasonable foreseeability test "produces contradictory remoteness determinations".[466]

I agree with Fagan. Upon a review of the case law above dealing with legal causation and delictual liability, it is clear that our courts often rely on the direct consequences test and/or the reasonable foreseeability test without necessarily referring to fairness, justice, reasonableness, and policy considerations.[467]

It is only in *mCubed* where Brand JA stated, *obiter*, that a reliance on fairness, justice, reasonableness, and policy considerations may be used to trump an application of the direct consequences and/or reasonable foreseeability test. To wit, the legal causation issue in *mCubed* was hypothetical.

These traditional tests have not been discarded and still form part of the flexible approach to determining legal causation. For example, the Supreme Court of Appeal in *Esorfranki* neatly explains that the flexible approach considers the direct consequences, reasonable foreseeability, and also legal policy, reasonability, fairness, and justice.[468] Dlodlo JA in *Nohour* and the Constitutional Court in *De Klerk* both emphasised remoteness and reasonable foreseeability and did not discard it solely for considerations of fairness, justice, reasonableness, and policy considerations like the court in *mCubed*. Before applying the law to the facts of my hypothetical, I summarise the essence of legal causation as discussed above. In summary, the traditional tests (direct consequences (or proximate cause) test; the reasonable foreseeability test; and *novus actus interveniens*):[469]

(1) must be applied in a flexible manner (*Esorfranki*, *De Klerk*);
(2) should not be applied dogmatically (*Fourway Haulage*);[470]

---

464 Fagan (2019) 367.
465 Fagan (2019) 386.
466 As above.
467 Fagan (2019) 385.
468 *Esorfranki* [81].
469 Loubser & Midgley (2017) 125.
470 See also *Freddy* [44]; *Cape Empowerment* [36]–[37].

(3) must be used, against the backdrop of "considerations of public policy as infused with Constitutional values" (*Nohour*, and *De Klerk*);
(4) must be sensitive to public policy considerations and aims to keep liability within the bounds of reasonableness, fairness, and justice (*De Klerk*);
(5) must consider policy considerations to guard against stretching the wrongdoer's liability beyond the boundaries of reasonableness, equity, and fairness (*Esorfranki* and *Skosana*);
(6) may overlap with the delictual element of wrongfulness, but remain separate and distinct delictual elements (*Nohour*, *Fourway Haulage*, and *De Klerk*); and
(7) should not adopt a rigid application and a flexible approach must be adopted (*De Klerk*).

5.4.3.2.1 Legal causation in the Filia/Elimele hypothetical

In light of the above, I now turn to an application of the law and theory on legal causation to the Filia/Elimele hypothetical. First, it is clear that legal causation (like the element of wrongfulness) may limit liability. Thus, Anti's liability is limited to those consequences that can be fairly attributed to her, as Anti is not liable for an endless chain of harmful consequences that her conduct may have caused.[471]

Before exploring the tests or theories of direct consequences and reasonable foreseeability, I first consider the relevance of a *novus actus interveniens* in this hypothetical. As mentioned above, a *novus actus interveniens* may be a relevant consideration in both the direct consequences and reasonable foreseeability tests or theories.[472] Whether something is regarded as a *novus actus interveniens* depends on reasonable foreseeability; for example, if the event is reasonably foreseeable it is not an intervening or independent act.[473]

In the Filia/Elimele hypothetical an example of a *novus actus interveniens* would be when on the way to the hospital (to treat Elimele's COVID-19 infection and remove his collapsed lung) Elimele is involved in a motor accident which leads to the amputation of his legs. Anti could not reasonably foresee this consequence (car accident and amputation), and this event cannot (reasonably or justifiably) be linked to Anti's non-vaccination of Filia. For this reason, the causal chain of events has been broken as

471 Loubser & Midgley (2017) 123. See also *De Klerk*; *Esorfranki*; & *Skosana* as discussed above.
472 Neethling & Potgieter (2020) 216.
473 Loubser & Midgley (2017) 134.

> an independent, unconnected and extraneous factor or event [car accident] which is not [reasonably] foreseeable and which actively contributes to the occurrence of harm after the defendant's original conduct has occurred.[474]

This example of a *novus actus* serves to illustrate how it may operate within both the direct consequences theory and the reasonable foreseeability test. This *novus actus* breaks the causal chain of events and may limit liability.

It is important to distinguish a *novus actus* from the *talem qualem* rule ("thin skull" or "egg skull" rule).[475] In theory, these two can be clearly distinguished but in the context of non-vaccination it may be more difficult to do so. Consider, for example, that Elimele had leukemia and as a result of the leukemia and chemotherapy, Elimele has a weakened immune system and an especially weak heart. As a result of his COVID-19 infection, Elimele also suffers permanent heart damage. Are Elimele's leukemia and chemotherapy a *novus actus*?

According to the *talem qualem* rule, Anti takes her victim as she finds him, and if Anti generally foresees the nature of the harm but causes more harm due to a pre-existing condition (leukemia and chemotherapy), she is liable for the full extent of the harm,[476] or "all the harm within the general category of harm (bodily injuries)".[477] Hence, the *talem qualem* rule is premised on a pre-existing condition and is not an intervening factor that breaks the causal chain of events.[478] Anti may be liable for the harm that one would not normally expect from her conduct based on a pre-existing condition.

As mentioned above, reasonable foreseeability refers to those consequences Anti should have reasonably foreseen as a result of her conduct.[479] If Anti could reasonably have foreseen that her conduct (non-vaccination and sending Filia to crèche) would cause another (Elimele) harm, the reasonable foreseeability test (applied in a flexible manner) may establish legal causation.[480]

It is not necessary for Anti to have actually foreseen the specific or full extent of the harm (Elimele's lung collapsing and being removed) it suffices that she reasonably foresaw the

---

474 See Loubser & Midgley (2017) 134 with reference to JR Midgley & JC Van Der Walt *Principles of delict* 4ed (2016) [184].
475 Loubser & Midgley (2017) 133; McManus (2013) 32.
476 Loubser & Midgley (2017) 133–134; Carstens & Pearmain (2007) 509.
477 Loubser & Midgley (2017) 134.
478 Loubser & Midgley (2017) 133–134; Carstens & Pearmain (2007) 509. See generally *Konstanz Properties v WM Spilhaus* 1996 (3) SA 273 (SCA); *Botha v Fick* 1995 (2) SA 750 (AD); *Smit v Abrahams* (1994) 4 All SA 679 (AD).
479 Loubser & Midgley (2017) 129.
480 As above.

general (and not precise) type of harm that occurred,[481] such as that a child too young to be vaccinated (Elimele) could contract a vaccine-preventable disease (COVID-19) from her unvaccinated and ill child (Filia), whom she sent to crèche whilst ill.

As stated in *Nohour* and *De Klerk*, "considerations of public policy as infused with constitutional values" may limit Anti's liability and prevent her liability from being stretched beyond the boundaries of reasonableness, equity, and fairness (*Esorfranki* and *Skosana*).

The public policy considerations, as discussed by Mogoeng CJ (dissenting) in *De Klerk*, refer to the

> constitutional norms and values of separation of powers, the supremacy of the Constitution, legality, accountability and the constitutional command that 'the obligations imposed by it must be fulfilled'.[482]

Mogoeng CJ continued in *De Klerk* to explain that public policy considerations do "not allow the principles of the law of delict to be applied as if the Constitution is not the supreme law of the Republic".[483] This means that the relevant "constitutional principles cannot just be mentioned, acknowledged and then be essentially left out of meaningful consideration or made to have no impact on principles of delict".[484] Thus, in line with the dissenting arguments of Mogoeng CJ, to prevent legitimising an injustice[485] reference must be made to the constitutional norms and values such as the supremacy of the Constitution and legality.

Mogoeng CJ insisted that public policy considerations hold that the "Constitution always dictates the direction in which our jurisprudence must develop, regardless of how settled a common-law principle might be".[486] This also speaks to the transformative methodology I use in this thesis as explained in Chapter 1. As discussed in Chapter 3, constitutional values (openness, democracy, dignity, equality, and freedom) inform the delictual enquiry. This means that Anti's constitutional and common-law rights and duties, as discussed in Chapter 3, are relevant here (as well as in the wrongfulness enquiry, which also considers public policy considerations).

Erbacher explains that considerations of public policy (such as consistency (legal coherence); preventing the claimant from profiting from his or her own wrong; deterrence;

---

481 Loubser & Midgley (2017) 130. See generally *Standard Chartered Bank of Canada v Nedperm Bank* 1994 (4) SA 747 (AD); *Da Silva v Coutinho* 1971 (3) SA 123 (A); *Smit v Abrahams* (1994) 4 All SA 679 (AD).
482 *De Klerk* [177]. See also Erbacher (2017) 46.
483 *De Klerk* [177].
484 As above.
485 *De Klerk* [175].
486 *De Klerk* [174].

promoting and protecting the rule or law infringed by the wrongdoer; and maintaining the integrity of the legal system)[487] must be considered and balanced against the "relative merits of the parties and the proportionality of the claim and the loss" to ensure that the outcome reached is just and fair.[488]

This means that merely identifying the relevant public policy considerations is not enough, they must be balanced and weighed against the merits of each party's case as well as the proportionality of the claim and the loss. In essence, it must be fair, reasonable, and just to burden the wrongdoer with liability[489] within the context of public policy considerations of reasonableness, fairness, and justice as infused with constitutional values.

Against the backdrop, it may be argued that Anti should be held liable for the reasonably foreseeable harmful consequences of her conduct (Elimele's infection and removal of his right lung).

According to the direct consequences (or proximate cause) test, liability is not limited to reasonable foreseeability or probable consequences, and it is enough to impute liability to Anti if the consequences (harm) result directly from her conduct.[490] According to the direct consequences theory, Anti is liable for all the direct consequences of her negligent conduct,[491] and reasonable foreseeability is not considered in this approach.[492] Furthermore, the consequences need not follow the cause immediately in time and space to qualify as a direct consequence.[493] If Anti's wrongful act is sufficiently closely linked to the harm, legal liability may ensue (*Nohour* and *De Klerk*). However, it is important to bear in mind that the direct consequences test alone may yield "exceptionally wide liability" and it is for this reason that the test is often limited to the direct physical consequences.[494]

Cachalia JA in *Guardrisk Insurance Company v Cafe Chameleon*[495] commented on what proximate cause or direct consequences are and found that for purposes of causation, it is irrelevant which term ("the proximate or actual or effective cause") is used.[496] The court continued to explain that proximate cause or direct consequences refer to the "real or dominant

487 Erbacher (2017) 62–63.
488 Erbacher (2017) 63.
489 *Petropulos* [57].
490 Loubser & Midgley (2017) 129.
491 Neethling & Potgieter (2020) 238–239.
492 As above.
493 Neethling & Potgieter (2020) 239; *Guardrisk Insurance Company v Cafe Chameleon* 2021 (2) SA 323 (SCA) [40].
494 Loubser & Midgley (2017) 129.
495 2021 (2) SA 323 (SCA) (hereinafter *Guardrisk*).
496 *Guardrisk* [40] (Saldulker JA, Mbha JA, Ledwaba JA, & Eksteen JA concurring).

cause" of the loss where there is no break in the chain of causation.[497] Cachalia JA also referred to remoteness in determining legal causation, and stated that this involves considering whether the "loss is too remote for the factual cause to also be the legal cause".[498] If it is not too remote liability may arise.[499] A consequence may thus be described as direct if there is no *novus actus* and if the consequence is the real or dominant cause of the harm.

It must be borne in mind that the direct consequences test should not be applied dogmatically (*Fourway Haulage*)[500] and is generally used in conjunction with the reasonable foreseeability test.[501] Furthermore, the direct consequences test is also subject to the public policy considerations of reasonableness, fairness, and justice as infused with constitutional values. As stated by Cachalia JA in *Guardrisk*, in delict "policy considerations are applied to guard against attaching 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'."[502]

In the absence of a *novus actus*, and according to a flexible application of both the direct consequences and the reasonable foreseeability tests against the backdrop of policy considerations of reasonableness, fairness, and justice as infused with constitutional values, legal causation is established in this hypothetical as: (1) the harm suffered by Elimele was reasonably foreseeable by Anti; (2) the harm flowed as a direct (or proximate) consequence of Anti's conduct; and (3) this harm is not too remote and is sufficiently and closely enough linked to Anti's conduct.

Based on the above, it appears unlikely that the approach followed in *mCubed* will yield satisfactory results in this hypothetical. Abandoning the direct consequences test, the reasonable foreseeability test, and the considerations of a *novus actus interveniens* in favour of pure policy considerations will most likely prove unsatisfactory as it will not consider a flexible application of the traditional elements to establish legal causation.

As factual and legal causation has been established, I now move on to the delictual element of fault.

497 As above. See also Fagan (2019) 367–374.
498 *Guardrisk* [41]. See also Fagan (2019) 367–374.
499 As above.
500 See also *Freddy* [44]; *Cape Empowerment* [36]–[37].
501 Loubser & Midgley (2017) 129.
502 *Guardrisk* [42].

5.4.4 Fault

Fault, in a wide sense, is a general requirement for common-law delictual liability.[503] This also applies in Germany and the Netherlands where fault (also referred to as attribution) is an essential requirement for delictual liability, as discussed in Chapter 4.[504]

Before moving on to what precisely the common-law delictual element of fault entails, I first briefly consider the sequence or order of the common-law delictual elements as explored in this Chapter. In *Sea Harvest Corporation v Duncan Dock Cold Storage*[505] the Supreme Court of Appeal (per Scott JA) first considered the issue of fault before moving on to the element of wrongfulness. He stated that

> [i]f the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of *dolus* or *culpa*, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful […]. It is convenient to deal first with the issue of negligence both on the part of the first respondent and Portnet. In the absence of negligence the issue of wrongfulness does not arise.[506]

This means that it is easier to assess negligence (a form of fault) before the element of wrongfulness since if there is no negligence it is unnecessary to investigate wrongfulness. In *Mkhatswa v Minister of Defence*[507] the Supreme Court of Appeal stated that,

> [t]he question of negligence (i.e. the failure to comply with the standard of conduct of a reasonable person) is the logical starting point to any enquiry into the defendant's liability, for without proof of negligence the plaintiff cannot succeed in his action and considerations of wrongfulness and remoteness (legal causation) will not arise.[508]

However, in *Local Transitional Council of Delmas v Boschoff*[509] the Supreme Court of Appeal considered wrongfulness before moving to the element of fault and stated that

503 Neethling & Potgieter (2020) 155; Loubser & Midgley (2017) 138.
504 Spindler & Rieckers (2019) Ch 1, §1 [69], & §2 [73]. See also Van Schilfgaarde (1991) *CWILJ* 272; Art 6:162 of the BW; *ECLI:NL:HR:2022:115* [4.2.2].
505 (2000) 1 All SA 128 (A) (hereinafter *Sea Harvest*).
506 *Sea Harvest*) [19]–[20] (Smalberger JA, Howie JA, & Marais JA concurring).
507 (2000) 1 All SA 188 (A) (hereinafter *Mkhatswa*).
508 *Mkhatswa* [18] (coram: Smalberger JA, Vivier JA, Howie JA, Streicher JA, & Melunsky AJA).
509 2005 (5) SA 514 (SCA) (hereinafter *Boschoff*).

> [i]t is not wrongful when the law, for reasons of legal policy, affords an immunity against liability for such an omission, whether negligent or not. In these circumstances the question of fault does not even arise.[510]

For purposes of practicality and logic, I explore the common-law delictual element of fault before wrongfulness, as supported by *Mkhatswa* and *Sea Harvest* above. However, Nugent JA in *Duvenhage*[511] stated that

> [w]hatever sequence doctrinal logic dictates the human mind is sufficiently flexible to be capable of enquiring into each element separately, in any order, with appropriate assumptions being made in relation to the others, and that is often done in practice to avoid prolonging litigation.[512] (Footnotes omitted.)

I now briefly consider what the element of fault entails. Fault is to a large extent concerned with a person's attitude or disposition, and the test for negligence is objective as discussed below.[513] According to the Supreme Court of Appeal in *Sea Harvest*, fault may take the form of either intent (*dolus* or *animus iniuriandi*) or negligence (*culpa*).[514] Similarly, in Germany, fault may take the form of intention (*dolus directus* and *dolus eventualis*) or negligence.[515]

In Quebec, as mentioned in Chapter 4, the "intentional or unintentional character of the act or omission is immaterial"[516] when determining if civil liability exists, and "compensation of the victim for the damage suffered is due, whether it was caused intentionally or not".[517]

In the South African common-law delict, either intention or negligence suffices for liability under the *actio legis Aquiliae* and the action for pain and suffering, but for the *actio iniuriarum* negligence alone is insufficient, and intent is generally required.[518]

---

510 *Boschoff* at 522B–522C, & 523F–523H.
511 *FNB of SA v Duvenhage* (2006) 4 All SA 541 (SCA) (hereinafter *Duvenhage*).
512 *Duvenhage* [2].
513 See *Eskom Holdings v Hendricks* (2005) 3 All SA 415 (SCA) [15]: "capacity, was subjective, while the second, ie as to fault, was objective. In other words, once a child was found to have the necessary capacity, its negligence or otherwise, was to be determined in accordance with the standard of the ordinary (adult) reasonable person." See also Neethling & Potgieter (2020) 164–165; Baudouin (2018) Ch 1, [31]–[32].
514 *Sea Harvest* [19].
515 See Brüggemeier (2020) *EJCLG* 347–348; Spindler & Rieckers (2019) Ch 1, §2 [74]; Markesinis & Unberath (2002) 84.
516 Baudouin (2018) Ch 1, [41].
517 Baudouin (2018) Ch 1, [41]–[42].
518 Neethling & Potgieter (2020) 163; Friedman *et al* "Chapter 47" in *CLoSA* (2014) 6 with reference to *Jooste v Botha* 2000 (2) SA 199 (T) 208D–208E: "an 11-year-old boy born out of wedlock sued his father for delictual damages for injuria and emotional distress based on his father's failure to acknowledge him and to love him. (No claim for maintenance or support was made in the instant case)".

Generally, fault refers to the legal blameworthiness of someone who has acted wrongfully.[519] There can be no fault if a person lacks accountability at the relevant time,[520] and accountability can be seen as the basis of fault.[521] A person is *culpae capax* (accountable) if she or he has the necessary ability to distinguish between right and wrong and can also act in accordance with that appreciation.[522] In *Eskom Holdings v Hendricks*[523] the Supreme Court of Appeal held that *culpae capax* refers to "the necessary capacity to incur delictual liability"[524] and is usually referred to in the context of the wrongdoer's conduct.[525]

A person may be *culpae incapax* where one of the following factors is present: youth;[526] mental disease or illness; intoxication or a similar condition induced by a drug; and anger due to provocation.[527] For purposes of this thesis it is accepted that Anti is *culpae capax* and provocation, intoxication, and youth are not explored further here.[528]

As mentioned in Chapter 1, the term "non-vaccination" is used and includes those parents who refuse all vaccines and those who accept only some vaccinations for their children. It may be suggested that some non-vaccinating parents act with intent, whereas some non-vaccinating parents (usually vaccine-hesitant) parents act negligently. For example, some non-vaccinating parents may not vaccinate their children due to their own negligence. Other non-vaccinating parents may intentionally choose not to vaccinate despite being aware of the detrimental consequences of non-vaccination. For now, it suffices to mention that the difference between intent and negligence relates, in the main, to the appropriate cause of action and the determination of wrongfulness.[529] Intent *may* also be relevant in the context of legal

519 Neethling & Potgieter (2020) 155; Loubser & Midgley (2017) 138 & 144; *S v Coetzee* 1997 (3) SA 527 (CC) [162] & [182].
520 Neethling & Potgieter (2020) 157; Loubser & Midgley (2017) 139–144; *S v TNS* 2015 (1) SACR 489 (WCC) [17].
521 As above.
522 Neethling & Potgieter (2020) 157; Loubser & Midgley (2017) 139–144; *Weber v Santam Versekeringsmaatskappy* 1983 (1) SA 381 (A) at 403; *Jones v Santam* 1965 (2) SA 542 (A); *Eskom Holdings v Hendricks* (2005) 3 All SA 415 (SCA) [15].
523 (2005) 3 All SA 415 (SCA) (hereinafter *Eskom Holdings*).
524 *Eskom Holdings* [2]
525 *Eskom Holdings* [15].
526 *Botha v The Governing Body of the Eljada Institute* (2016) ZASCA 36 [44]: "a person with a mental age of an *infans* is also *culpae incapax*".
527 Neethling & Potgieter (2020) 157–159; Loubser & Midgley (2017) 139–144.
528 As above.
529 If it is, e.g., *dolus eventualis*, proving wrongfulness may be easier as opposed to proving wrongfulness in the case of an omission (legal duty and breach thereof).

causation.[530] Next, the two forms of fault are explored in case law and according to their relevance in the Filia/Elimele hypothetical.

5.4.4.1 Intention

Intent (*animus iniuriandi*, or *dolus*) refers to an accountable person acting intentionally by directing his or her will at achieving a result that he or she causes while being aware of the wrongfulness of his or her conduct.[531] In criminal law reference is often made to the term *mens rea* which denotes a "guilty mind".[532] In *Le Roux v Dey* the Constitutional Court noted that "*animus iniuriandi* is the subjective intent to injure or defame. It is the equivalent of *dolus* in criminal law".[533]

Fagan explains that there are instances where intent (*animus iniuriandi*) is a necessary condition for wrongfulness.[534] However, the discussion of non-vaccination does not consider either of these scenarios and they are excluded from the scope of this discussion. As mentioned, intent (*animus iniuriandi*) is required for the *actio iniuriarum* and negligence alone is not sufficient.[535] Either intent (*animus iniuriandi*) or negligence suffices for the fault requirement for purposes of the *actio legis Aquiliae* and the Germanic action for pain and suffering.

Both Neethling and Potgieter and Loubser and Midgley suggest that intent (*animus iniuriandi*) has two elements or constituents: (1) direction of the will; and (2) knowledge of wrongfulness.[536] Fagan, on the other hand, argues that for *Aquilian* liability consciousness of wrongfulness is not an element or constituent of the intent requirement.[537] In *Dantex v Brenner*[538] the Supreme Court of Appeal (per Grosskopf JA) stated that "it is now accepted that *dolus* encompasses not only the intention to achieve a particular result, but also the

530 See Loubser & Midgley (2017) 132 for a discussion of intent in the context of legal causation, with reference to *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA).
531 Neethling & Potgieter (2020) 159–160; Loubser & Midgley (2017) 145.
532 See *Attorney-General, Cape v Bestall* (1988) ZASCA 48 [11]–[12]: "an accused can only be blameworthy if (depending upon which form of mens rea applies) he knows, or ought reasonably to know, his conduct to be unlawful. He must have the necessary guilty state of mind in respect of the element of unlawfulness, in addition to the other elements of of the offence." See *S v Mbatha* 2012 (2) SACR 551 (KZP) [43].
533 *Le Roux v Dey* [129].
534 Fagan (2019) 104: these include interference with a contractual relationship; injurious falsehood; incorrect decisions made during the adjudication process; or failures to comply with administrative justice in the award of a tender.
535 Neethling & Potgieter (2020) 163.
536 Neethling & Potgieter (2020) 159–160; Loubser & Midgley (2017) 145. The defences that exclude intention speak to the elements of intention, see Loubser & Midgley (2017) 151.
537 Fagan (2019) 137.
538 (1989) 1 All SA 411 (A) (hereinafter *Dantex*).

consciousness that such a result would be wrongful or unlawful".[539] Grosskopf JA, however, acknowledges that in certain instances,

> there may be policy considerations in certain cases falling under the extended *lex Aquilia* why a plaintiff, who relies on fault in the form of *dolus*, should not be required to prove consciousness of unlawfulness.[540]

For purposes of this discussion I accept that (in broad terms) intent (*animus iniuriandi*) has two elements or constituents: (1) direction of the will; and (2) knowledge (or consciousness) of wrongfulness as found by Grosskopf JA, in *Dantex* above.[541]

The three forms of intent are: (1) direct intent (*dolus directus*); (2) indirect intent (*dolus indirectus*); and (3) intention by acceptance of foreseen result (*dolus eventualis*). Below, I discuss each of these briefly.

Direct intent (*dolus directus*) is present where the wrongdoer actually desires a specific consequence of his or her conduct[542] and he or she acts in accordance with that desire. Whether the wrongdoer is certain that the consequence will definitely, probably, or possibly result is irrelevant.[543] An example is where the wrongdoer decides to shoot and kill the victim. The direct intent of the wrongdoer (to kill) accompanies the execution of this plan.[544]

Dolus indirectus, or indirect intent, is present where a wrongdoer directly intends one consequence of his or her conduct but simultaneously is aware that another consequence will inevitably or unavoidably also occur.[545] Indirect intent accompanies the causing of the second consequence, which she or he did not actively desire or which was not his or her immediate objective.[546] The wrongdoer thus has intent regarding the second consequence.[547] This can be illustrated by the example above where the wrongdoer desires to shoot and kill the victim who is behind a closed window. The bullet aimed at the victim first shatters a window pane and then fatally wounds the victim. It is clear that the wrongdoer has the direct intent to kill the victim, although he or she had no specific desire to break the window. Despite the lack of desire to damage the window, the wrongdoer understood that it was a necessary or inevitable

539 *Dantex* [10]–[11] (coram: Rabie ACJ, Hoexter JA, Botha JA, Van Heerden JA, & Grosskopf JA).
540 *Dantex* [12].
541 See also *Le Roux v Dey* [137].
542 Neethling & Potgieter (2020) 160; Loubser & Midgley (2017) 145.
543 As above.
544 As above. See *DPP, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) (hereinafter *Pistorius* SCA) [26]: "in the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased."
545 Neethling & Potgieter (2020) 160.
546 As above.
547 As above.

consequence of his or her action.[548] Accordingly, indirect intent is present regarding the damage to the window.[549]

The last form of intent is *dolus eventualis*, and *dolus eventualis* is present where the wrongdoer does not necessarily desire a specific result but foresees the possibility that his or her action may cause a certain result and reconciles her- or himself with that fact.[550] Despite this reconciliation with the possibility that he or she may cause a certain result, the wrongdoer nevertheless performs the act which then brings about the consequence.[551]

The wrongdoer thus foresees a consequence, reconciles him- or herself with the possibility of that consequence materialising, and despite this realisation and reconciliation, proceeds to perform the conduct.[552] On this note, it is important to remember that negligence involves an objective investigation into what was reasonably foreseeable, and *dolus eventualis* involves the subjective foreseeability of what the wrongdoer actually subjectively foresaw.[553] In *S v Humphreys*[554] Brand JA pointed out that:

> For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference.[555]

In the criminal case *DPP, Gauteng v Pistorius*,[556] the Supreme Court of Appeal (per Leach JA) explained that *dolus eventualis* consists of two parts: "(1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility".[557] Fagan also mentions that there is uncertainty as to whether *dolus eventualis* is a sufficient form of intent for *Aquilian* liability.[558] Even if *dolus eventualis* is insufficient for *Aquilian* liability, it may nonetheless be sufficient under the *actio iniuriarum*.

---

548 As above.
549 As above. See also Loubser & Midgley (2017) 145–146.
550 Neethling & Potgieter (2020) 161.
551 As above.
552 As above.
553 As above. See *Pistorius* SCA [27]–[28], with reference to *S v Sigwahla* 1967 (4) SA 566 (A) at 570C–570E: "the distinction between subjective foresight and objective foreseeability must not become blurred."
554 2013 (2) SACR 1 (SCA) (hereinafter *Humphreys*).
555 *Humphreys*) [13] (coram: Brand JA, Cachalia JA, Leach JA, Erasmus AJA, & Van der Merwe AJA).
556 2016 (2) SA 317 (SCA) (hereinafter *Pistorius* SCA).
557 *Pistorius* SCA [26] (Mpati P, Mhlantla JA, Majiedt JA, & Baartman AJA concurring).
558 Fagan (2019) 129-132.

For now, it is unnecessary to engage in the debates around whether *dolus eventualis* is sufficient for *Aquilian* liability; we may merely note that this form of intent (*dolus eventualis*) may be sufficient to establish the element of fault for purposes of delictual liability in general, and specifically intent (as a form of fault) for the *actio iniuriarum*.[559] In *Le Roux v Dey* the Constitutional Court (per Brand AJ) confirmed that *animus iniuriandi*

> does not require that the defendant was motivated by malice or ill-will towards the plaintiff. It [*animus iniuriandi*] includes not only *dolus directus* but *dolus eventualis* as well.[560]

In summary, for purposes of the common-law delict in general, intent (*animus iniuriandi*) includes the three forms of intent discussed above. A defendant may raise the absence of *animus iniuriandi* as a defence which he or she must then establish on a preponderance of probabilities.[561] In the following sections, I explore the application of the above theory to the Filia/Elimele hypothetical.

Dolus directus will be present where Anti actually desired Elimele to become ill (intentional infection), and she acted on the basis of this desire (she did not vaccinate Filia and sent her to crèche while infected) and Elimele falls ill. In this situation, *dolus directus* may be present. However, for purposes of this hypothetical, it is accepted that Anti did not have direct intent.

Indirect intent (*dolus indirectus*), on the other hand, may be present where Anti directly intends one consequence (to infect Filia) but simultaneously has knowledge that another consequence will inevitably or unavoidably also occur (Elimele's infection).[562] Indirect intent accompanies the causing of the second consequence (Elimele's infection) which Anti did not actively desire or which was not her immediate objective.[563] For purposes of this hypothetical, it is accepted that Anti also did not have indirect intent.

The last form of intent for purposes of this hypothetical is *dolus eventualis*. For purposes of *dolus eventualis* in the Filia/Elimele hypothetical, the question is whether Anti actually subjectively foresaw the possibility of the consequence[564] (Elimele's infection) and reconciled herself with that consequence (Elimele's infection). As mentioned above in *Pistorius*, there are

559 *Minister van Polisie v Van der Vyver* (2013) ZASCA 39 [21].
560 *Le Roux v Dey* [129] (Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J, & Nkabinde J concurring).
561 *Le Roux v Dey* [130].
562 Neethling & Potgieter (2020) 160.
563 As above.
564 Neethling & Potgieter (2020) 161; Loubser & Midgley (2017) 146; *Pistorius* SCA [28].

two constituents to *dolus eventualis*: (1) foresight of the harm occurring; and (2) reconciliation with that foreseen possibility.

In the Filia/Elimele hypothetical, *dolus eventualis* could indeed be present in that although not desiring a specific result (Elimele's infection and his right lung being removed), Anti subjectively foresaw the possibility that her conduct (Filia's non-vaccination and sending infected Filia to crèche) might result in harmful consequences (for Filia and others such as Elimele) and Anti reconciled herself with this subjectively foreseen possibility.[565] In the hypothetical, I mention that Anti does not believe that COVID is real. The question arising is whether or not subjective foreseeability is still present? Anti did not believe in COVID, let alone its deadly consequences, and Anti subjectively and actually believed that Filia had seasonal flu. Although Anti *should* reasonably *have* foreseen that Filia may infect others, she did not *actually* foresee it as she did not believe in the existence of COVID. The test for *dolus eventualis* is what Anti *actually* subjectively foresaw, and not what she should reasonably have foreseen.

To determine what was actually foreseen by Anti, the objective foreseeability test may be used to provide evidentiary material.[566] In *Van Schalkwyk*, the Supreme Court of Appeal stated that "[s]ubjective foresight, like any other factual issue, may be proved by inference".[567] However, in *Pistorius* the Supreme Court of Appeal reiterated that the distinction between subjective foresight and objective foreseeability must not become blurred.[568] As explained above in *Humphreys*, there is a difference between what Anti ought to have foreseen and what she actually (subjectively) foresaw.

If Anti alleges that she did not foresee the reasonably foreseeable consequences, she must indicate factual circumstances supporting her allegation as being reasonably acceptable.[569] If Anti did subjectively foresee the possibility of harm, but did not subjectively reconcile herself with that consequence, *dolus eventualis* is not present as both elements of *dolus eventualis* must be present: (1) foresight of the harm occurring; and (2) reconciliation with that foreseen possibility.

Anti may raise the absence of *animus iniuriandi* as a defence but she then bears the onus of establishing that defence (absence of *animus iniuriandi*) on a preponderance of

565 Neethling & Potgieter (2020) 161.
566 As above.
567 *Van Schalkwyk v S* 2016 (2) SACR 334 (SCA) [12]; see also *Pistorius* SCA [34].
568 *Pistorius* SCA [28].
569 Neethling & Potgieter (2020) 162.

probabilities.[570] For purposes of this hypothetical, *dolus eventualis* is not present as Anti did not subjectively foresee the harm and did not reconcile herself with that possibility.

Despite the distinctions between the different forms of intent (direct, indirect, or *eventualis)*, it is generally irrelevant which one is present in a particular case.[571] A particular form of intent does not attract specific consequences[572] although it may be relevant when investigating the delictual element of wrongfulness or when considering the appropriate action.

As mentioned, intent is a requirement for the *actio iniuriarum*. For now, it is sufficient to note that if intent is present the delictual element of fault will have been proven which opens the way for an investigation into wrongfulness. For purposes of the hypothetical there is no fault in the form of intent. Anti had no direct intent (*dolus directus*), indirect intent (*dolus indirectus*), or (3) intention through acceptance of foreseen result (*dolus eventualis*). However, as we saw earlier, fault may also take the form of negligence, and it is to this that I now shift my focus.

5.4.4.2 Negligence

In *Sea Harvest*, the Supreme Court of Appeal (per Scott JA; Smalberger JA, Howie JA, and Marais JA concurring), held that

> [i]t should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person.[573]

The Supreme Court of Appeal in *Sea Harvest* called on the reasonable person test to establish the element of negligence and continued to explain that the reasonable person test is used as a guideline. Similarly, in the Canadian province of Quebec, Germany, England, Australia, and the US the element of fault (specifically negligence) is measured against an objective (reasonable person) standard.[574] Holmes JA in *Kruger v Coetzee* famously defined negligence (or *culpa*) as a form of fault in the following terms:

---

570 *Le Roux v Dey* [130].
571 Neethling & Potgieter (2020) 162.
572 As above.
573 *Sea Harvest* [21]–[22].
574 Baudouin (2018) Ch 1, [31]–[32]; Koziol (2015) 482; Markesinis & Unberath (2002) 85; Dyson (2015) 155; Koziol (2015) 787–788; Dietrich & Field (2017) *MULR* 605.

> For the purposes of liability *culpa* arises if —
>
> (a) a *diligens paterfamilias* in the position of the defendant —
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps.[575]

As a starting point, negligence is concerned with the reasonable person (or *diligens paterfamilias*) in the position of the defendant/wrongdoer; reasonable foreseeability (of what the reasonable person in the position of the wrongdoer would have reasonably foreseen); reasonable preventative steps (that the reasonable person in the position of the wrongdoer could have taken); and the failure to take such reasonable steps (the reasonable person in the position of the wrongdoer would have done so). Notably, the negligence enquiry, as described by Holmes JA above, refers to patrimonial loss which is claimed under the *actio legis Aquiliae*.

Holmes JA continued to explain that whether or not the reasonable person (in the position of the wrongdoer) "would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case".[576] Therefore, the negligence enquiry weighs the conduct of the wrongdoer against the standard of the reasonable person (*diligens paterfamilias*).[577] As mentioned, the negligence enquiry thus consists of three parts: (1) reasonable foreseeability that the conduct would cause harm; (2) reasonable preventability of the harm; and (3) if the wrongdoer took such reasonable steps, or not.

If the wrongdoer did take reasonable preventative steps (where the harm was reasonably foreseeable and preventable) then he or she did not act negligently in that she or he acted as the reasonable person. As mentioned in Chapter 4, Roederer comments that both the tort law in the US and the South African law of delict share the test for negligence which "involves more than the reasonable foreseeability of harm",[578] with reference to the *Kruger v Coetzee* test quoted above.

In the following sections, I refer to case law better to explain the concept of a "reasonable person" in the context of negligence. Thereafter, I explore reasonable foreseeability and reasonable preventability in the context of the Filia/Elimele hypothetical.

---

575 *Kruger v Coetzee* at 430E–430G. See also Fagan (2019) 8–13, & 15.
576 *Kruger v Coetzee* at 430E–430G.
577 See Fagan (2019) 19.
578 Roederer (2009) *AJICL* 451.

The Court in *Cape Town Municipality v Paine*[579] stated that

> [i]t has repeatedly been laid down in this Court that accountability for unintentioned [negligent] injury depends on *culpa* — the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law — the average prudent person.[580]

The court therefore describes the reasonable person as an "average prudent person" and states that the reasonable person standard is used in the negligence enquiry to establish fault.[581] In the Canadian province of Quebec, reference is also made to the "normally prudent and reasonable person acting under similar circumstances" to determine whether fault is present by comparing the conduct of the defendant with that of the reasonable person.[582] Similarly, the crux of the negligence enquiry in Louisiana is whether the wrongdoer acted "as a reasonable person under the circumstances."[583]

In *Paine,* the court also referred to the "degree of care". For purposes of this discussion, the "degree of care" should not be confused with the English "duty of care" doctrine.[584] Although negligence (as a form of fault) is often determined with reference to the test of the reasonable person this is not always so.[585] Our courts have on occasion preferred to apply the English law "duty of care" doctrine.[586] This doctrine investigates whether the defendant (Anti) owed the plaintiff (Elimele) a duty of care and a duty not to harm by negligent breach of duties of care.[587] Once the duty of care has been established, the court must determine whether the duty has been breached.[588] If a duty of care exists and it was breached negligence is said to be present.[589]

For purposes of this discussion, it is also important to bear in mind that reference to negligence refers to a form of fault, and should not be confused with the "tort of negligence"

---

579 1923 AD 207 (hereinafter *Paine*).
580 *Paine* at 216.
581 This has been cited with approval in *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490F, and *South African Railways & Harbour v Estate Saunders* 1931 AD 276 at 283. See also Fagan (2019) 19.
582 Baudouin (2018) Ch 1, [31] & [46].
583 Maraist (2010) Ch 5, 1–3; Maraist & Galligan Ch 3, §3.07.
584 See *Van Duivenboden* [13]–[14].
585 Neethling & Potgieter (2020) 188.
586 As above. See Loubser & Midgley (2017) 167 for a discussion of the standard of care. Notably, a standard of care must not be confused with a duty of care. A standard of care refers to the normal or general practice which the reasonable person would have followed, to measure the defendant's conduct and not the "duty of care" doctrine.
587 Raz (2010) *OJLS* 9–10.
588 Neethling & Potgieter (2020) 188; Raz (2010) *OJLS* 9–10.
589 As above.

or the duty of care doctrine, as discussed in Chapter 4.[590] As mentioned in Chapter 4, when considering the tort of negligence in the US, Australia, and the UK, the "duty of care in negligence" (also referred to as the "negligence equation") is often used to establish whether it is appropriate for such a duty to be imposed.[591] This resonates with the Dutch approach to liability, and reference to the *zorgplicht* (duty of care)[592] and the *maatschappelijke zorgvuldigheidsnormen* (social due care standard)[593] expected of the reasonable person, as well as the failure to exercise reasonable care (*im verkehr erforderliche sorgfalt*).[594]

Before returning to what the "reasonable person" concept entails, it is worth briefly noting that the "duty of care" doctrine is foreign to the principles of Roman-Dutch law which form the basis of our law of delict.[595] It is thus suggested that the application of this doctrine should be rejected[596] — all the more so as it is at times incorrectly applied by our courts as "a synonym for the legal duty used to determine wrongfulness".[597]

Wrongfulness is a separate common-law delictual element and is discussed below in greater detail. Similarly, in Germany, wrongfulness and fault (*verschuldensprinzip*) are separate elements.[598] For now, the discussion focuses on the "reasonable person" and reasonable foreseeability and preventability in the context of negligence (as an element of fault). In *S v Bochris Investments*[599] Nicholas AJA stated that:

> Negligence [form of fault] is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have 'prophetic foresight'. […]. In *Overseas Tankship* […] Viscount Simonds said at 424:
>
> 'After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.'[600] (References and footnotes omitted.)

590 Brüggemeier (2020) *EJCLG* 359–360: "duty of care falls under this category [negligently caused remote harms]" under German law.
591 Muhametaj (2017) *GJPLR* 31; Steele (2017) 12 & 36; Barker *et al* (2012) 3; Dietrich & Field (2017) *MULR* 607.
592 See *ECLI:NL:GHSHE:2018:2793* [6.4.17].
593 See *ECLI:NL:RBNNE:2021:2160* [4.5].
594 Dyson (2015) 157; Koziol (2015) 477.
595 Neethling & Potgieter (2020) 188. This doctrine, to determine negligence, must not be confused with parental duties of care towards children.
596 Neethling & Potgieter (2020) 188. In addition, in our law this doctrine, in its traditional form, is unnecessary as the reasonable person test for negligence may be applied.
597 Neethling & Potgieter (2020) 188.
598 Spindler & Rieckers (2019) Ch 1, §1 [69].
599 (1988) 4 All SA 207 (AD) (hereinafter *Bochris*).
600 *Bochris* [20]–[21]. This is endorsed by the SCA in *Sea Harvest* [27]. See also Carstens & Pearmain (2007) 510.

As we saw above, negligence as a form of fault is not established by proving what happened or how it could have been prevented. Only the conduct (commissions and omissions) causes the consequences or damage. Negligence as a form of fault refers to the reasonable person as described by Holmes JA in *Kruger v Coetzee* above.

Nicholas AJA in *Bochris* stated that the reasonable person does not have "prophetic foresight" — it is, therefore, the reasonable foresight (and reasonable preventability) of the reasonable person that informs the negligence enquiry. In *Herschel v Mrupe*[601] Van Den Heever JA explained that the reasonable person (*bonus paterfamilias*) concept

> is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.[602]

In *Mukheiber v Raath*[603] the Supreme Court of Appeal confirmed that

> [i]n our law, the standard of conduct expected from all members of society is that of the *bonus paterfamilias*, *i.e.* the reasonable man or woman in the position of the defendant. An act which falls short of this standard and which causes damage unlawfully is described as negligent; *i.e.* it is tainted with *culpa*.[604]

According to *Mukheiber*, the standard against which negligence is established is essentially that of the reasonable person in the position of the wrongdoer. Negligence is said to be present when the wrongdoer fails to act as the reasonable person would. The court also referred to the *Kruger v Coetzee* test for negligence and stated the three components as: (1) reasonable foreseeability of the general kind of harm that actually occurred; (2) reasonable foreseeability of the general kind of causal sequence by which that harm occurred; and (3) would have taken steps that would have been taken to guard against the occurrence of the harm; which the wrongdoer failed to take.[605]

Despite the Supreme Court of Appeal rephrasing of the *Kruger v Coetzee* test for negligence in *Mukheiber*, the three components are similar: (1) reasonable foreseeability that the conduct would cause the harm;[606] (2) reasonable preventability; and (3) whether or not the

---

601 1954 (3) SA 464 (A) (hereinafter *Herschel*).
602 *Herschel* at 490E–490F. The "cost and practicability of precautions" as discussed in Ch 4 of this thesis are used to determine the breach of duty. See Finch & Fafinski (2021) 41.
603 (1999) 3 All SA 490 (A) (hereinafter *Mukheiber*).
604 *Mukheiber* [31].
605 As above.
606 See Witting (2007) *MULR* 580.

wrongdoer took these reasonable steps to prevent the occurrence of the harm.[607] *Mukheiber* makes no mention of a causal sequence as found in the *Kruger v Coetzee* test for negligence.

It is worth noting that there are two approaches to the nature of the foreseeability aspect of negligence.[608] The first is the abstract (or absolute) approach.[609] In terms of this approach whether the wrongdoer acted negligently must be answered by determining whether harm to others was, in general, reasonably foreseeable.[610] Thus, did the wrongdoer's conduct, in general terms, create an unreasonable risk of harm to others?[611] Under the abstract approach, it is sufficient if the defendant should reasonably have foreseen the possibility of some harm to another.[612] The extent of the damage and the specific consequences that actually occurred are not considered as this approach assumes that whether the wrongdoer is liable for a specific consequence is explored under the element of legal causation.[613] According to Neethling, Loubser, and Midgley, this view of negligence enjoys little support among academics and is not generally accepted by our courts.[614]

The second approach is the concrete (or relative) approach[615] in which the test for foreseeability is based on the premise that a person's conduct may only be "described as negligent in respect of a specific [kind of] consequence or consequences".[616] In other words, "it must have been reasonably foreseeable that harm of the kind actually suffered by the plaintiff would be caused by the defendant's conduct".[617] The court in *Mukheiber* worded this as the foreseeability of the general kind of harm that actually or specifically occurred.[618] However, as noted by Nicholas AJA in *Bochris*, the reasonable person does not have "prophetic foresight" and it is not necessary that the exact or precise harm that occurred should have been

---

607 This approach shares some similarities to the *Caparo* test, discussed in Ch 4 of this thesis. See Muhametaj (2017) *GJPLR* 31; Finch & Fafinski (2021) 7; Brennan (2017) 11; *Van Duivenboden* [13]–[14].

608 Neethling & Potgieter (2020) 177; Loubser & Midgley (2017) 158. Fagan (2019) 46–47 explains this in more detail, with reference to the harm-sufferer; the harm suffered; the manner in which the harm occurred; and the extent of the harm.

609 Neethling & Potgieter (2020) 177; Loubser & Midgley (2017) 158.

610 As above. According to this approach, it is sufficient if the damage (in general) was reasonably foreseeable, and liability for a specific consequence is assessed with reference to legal causation (as opposed to negligence).

611 Neethling & Potgieter (2020) 176–177.

612 Loubser & Midgley (2017) 158.

613 Neethling & Potgieter (2020) 177.

614 Fagan (2019) 76 suggests that our law adopts an abstract approach to the harm suffered. See also Neethling & Potgieter (2020) 177; Loubser & Midgley (2017) 158.

615 Loubser & Midgley (2017) 158.

616 Neethling & Potgieter (2020) 177; Fagan (2019) 63 suggests that our law adopts a relative approach to the harm-sufferer.

617 Fagan (2019) 68 refers to *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) where the SCA expressly rejected the relative approach and adopted the abstract approach.

618 *Mukheiber* [31].

foreseeable; it is sufficient if the wrongdoer reasonably foresaw a specific kind of consequence or general kind of harm that actually occurred as a result of his or her conduct.

Loubser and Midgley suggest that it is irrelevant which approach (abstract or relative) is adopted and that the key question is whether there was reasonable foreseeability of the general type of harm that occurred.[619] These authors suggest that irrespective of which approach is followed, the fundamental factor to consider is the nature or magnitude of risk.[620] They pose the following questions to assess the magnitude of the risk of harm (linking to reasonable foreseeability of harm):

> 1. How strong is the possibility that the harm will occur?
> 2. How serious will the damage be if the risk materialises?[621]

According to the Supreme Court of Appeal in *Sauls*, the foresight of a mere possibility of harm is not enough — a reasonable possibility of harm is required.[622] In *Gouda Boerdery v Transnet*[623] the Supreme Court of Appeal stated that

> [t]he courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into [the delictual element of] wrongfulness and, after finding that there was a legal duty to act[624] reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence [form of fault] and wrongfulness [separate delictual element].[625] (Own footnote inserted.)

In *Gouda* the Supreme Court of Appeal acknowledged that the issue of foreseeability may overlap with the delictual element of wrongfulness but despite this approach, the distinction between negligence (a form of fault) and wrongfulness (a separate delictual element) should not be lost sight of. In *MTO Forestry v Swart*[626] the Supreme Court of Appeal warned that:

> It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of

---

619 Loubser & Midgley (2017) 159; Fagan (2019) 49.
620 Loubser & Midgley (2017) 159. In the foreign law discussion in Ch 4 of this thesis the magnitude of the risk is used to determine the breach of a duty. See Finch & Fafinski (2021) 41.
621 As above.
622 *Sauls* [8]–[9]; Fagan (2019) 24; Reiss (2014) *JLPP* 598; Finch & Fafinski (2021) 36: the reasonable person test is an objective test and refers to what the reasonable (average) person would have foreseen in this situation (and not the specific defendant).
623 (2004) 4 All SA 500 (SCA) (hereinafter *Gouda*).
624 In Ch 4 of this thesis the jurisdiction of Quebec is explored with reference to the "duty to act" to establish the element of fault with reference to the conduct of a reasonable person.
625 *Gouda* [12].
626 2017 (5) SA 76 (SCA) (hereinafter *MTO Forestry*).

> the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, I think the time has now come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.[627]

For now, the element of wrongfulness is not explored, and the element of fault, specifically negligence, is under consideration. However, it is worth mentioning that reasonable foreseeability is used to determine legal causation (under the delictual element of causation), as discussed above, as well as the element of fault currently under consideration. In conclusion on this point, the foreseeability of harm is confined to the rubrics of negligence and causation.

For purposes of this discussion of fault — specifically negligence — it is sufficient to note that: (1) foreseeability *may* be considered in the wrongfulness enquiry but it is not a requirement (*Gouda*); (2) foreseeability of harm should not be taken into account in the determination of wrongfulness (*Forestry*); (3) foreseeability plays a role in both legal causation and negligence (*Gouda*; *Forestry*); and (4) this overlap must not blur the lines between these distinct delictual elements.

I now move to the issue of reasonable preventability. As mentioned in *Ngubane v South African Transport Services*,[628] once reasonable foreseeability has been established for purposes of the negligence enquiry, the next question relates to reasonable preventability.[629] In *Ngubane* the Supreme Court of Appeal stated:

> The contributor (Prof J C van der Walt) in 'The Law of South Africa' *sub yoce* 'Delict' (Vol 8 para 43 page 78) comments in this regard that:
>
> 'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.'[630]

Accordingly, the following factors must also be considered when assessing the measures to prevent the occurrence of the foreseeable harm (reasonable preventability): (a) the degree,

627 *MTO Forestry* [18].
628 1991 (1) SA 756 (A) (hereinafter *Ngubane*).
629 *Ngubane* [36]; see also Fagan (2019) 26.
630 *Ngubane* [36]; see also *City Council of Pretoria v De Jager* (1997) 1 All SA 635 (A) [26]–[27]; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) (hereinafter *Graham*) [7]; Fagan (2019) 26.

extent, or nature of the risk created by the actor's conduct;[631] (b) the gravity, or seriousness, of the possible consequences (damage) if the risk of harm materialises (and damage follows);[632] (c) the utility of the actor's conduct (or the object/relative importance of the actor's conduct);[633] and (d) the burden, cost, or difficulty of eliminating the risk of harm or taking precautionary steps.[634] These factors considered to determine the reasonable preventability of harm are similar to those of the Learned Hand test[635] used in Louisiana and discussed in Chapter 4.

As mentioned, the Hand formula represents an "alternative way to understand the concept of negligence",[636] and considers factors like: (1) the utility of the thing or conduct; (2) the likelihood and magnitude of the harm; (3) the cost of preventing the harm; and (4) the nature of the wrongdoer's activity.[637] This is similar to the risk-benefit approach favoured by Reiss,[638] and Rodal and Wilson as discussed in Chapter 4.

Rodal and Wilson refer indirectly to the risk-benefit equation to determine whether a risk is reasonable by assessing how advantageous the act is (utility of the conduct and the cost of preventing the harm) compared to the negative effects associated with taking the risk (likelihood and magnitude of the harm).[639] For example, if the risk is great (that infection is likely to occur) and the cost of prevention (vaccination, self-isolation, or warning or informing others) is low, then negligence may be present since the benefits of the prevention (vaccination) far outweigh the risk (non-vaccination). If the risk is, for example, very unlikely and the cost of prevention is high, then it may indicate that negligence is not present. The relationship between these elements is assessed to help in understanding whether or not negligence is present. Foreign courts often consider the risk-benefit approach to vaccination when assessing vaccination in the context of the child's best interests and not *per se* the negligence of the non-vaccinating parent.

631 *Graham* [7]–[16]; see also *Herschel* at 477A–477C; *De Jager* [26]–[27].
632 See *Lomagundi Sheetmetal & Engineering v Basson* 1973 (4) SA 523 (RA); *Ngubane* [36]; *Khupa v South African Transport Services* 1990 (2) SA 627 (W) at 630D–630E.
633 See *Minister of Safety & Security v Mohofe* 2007 (4) SA 215 (A) [12]; *Crown Chickens v Rieck* 2007 (2) SA 118 (SCA) [14].
634 *McIntosh v Premier of the Province of KZN* 2008 (6) SA 1 (SCA) [14]; *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) [23]–[39]; *Enslin v Nhlapo* 2008 (5) SA 146 (SCA) [5]–[9]; *Avonmore Supermarket v Venter* 2014 (5) SA 399 (SCA) [10]–[22]; Neethling & Potgieter (2020) 181.
635 Roederer (2009) *AJICL* 451 posits that the second part of the *Kruger v Coetzee* test (reasonable preventability of harm) is sometimes answered using the Learned Hand test.
636 Maraist & Galligan (2021) Ch 3, §3.07.
637 As above. See also Maraist (2010) Ch 5, 3.
638 Reiss (2014) *JLPP* 604.
639 Rodal & Wilson (2010) *MJLH* 53–54: the perceived dangers associated with vaccination have not been substantiated.

In *City Council of Pretoria v De Jager*[640] the Supreme Court of Appeal stated that "[i]n general, the inquiry whether the reasonable man would have taken measures to prevent foreseeable harm involves a balancing of considerations (a) and (b) with (c) and (d)".[641]

Essentially, reasonable foreseeability and reasonable preventability are used to determine if negligence (as a form of fault) is present. As mentioned above, the reasonable preventability determination includes some additional factors, and reasonable foreseeability is determined with reference to the relative approach in a hybrid form.

Before applying the law to the facts of the hypothetical, it is important to note that an omission (a form of conduct) can be performed intentionally or negligently (two forms of fault).[642] A positive act (commission as a form of conduct) can also be negligent (a form of fault). It is critical to note that an omission (failure to take reasonable steps to prevent foreseeable harm as part of the test for negligence under the element of fault) must not be confused with an omission as a species of conduct (which is a separate delictual element).

As mentioned above, negligence in the context of common-law delictual liability refers to Anti's blameworthy attitude or careless, thoughtless, or imprudent conduct. Negligence can only be found if Elimele can prove that Anti failed to adhere to the legally required standard of care, that being the reasonable person in the same situation or circumstances as Anti.[643] To establish whether Anti has acted carelessly and thus negligently, the objective standard of the reasonable person is used.[644]

The reasonable person test dictates that Anti is negligent if the reasonable person in her position would have acted differently as regards reasonable foreseeability and reasonable preventability. What would the reasonable person in Anti's position have foreseen and done?[645] If it is established that Anti's conduct does not conform to the reasonable person standard then her conduct is blameworthy in law and she is at fault.[646] If Anti's conduct was reasonable she cannot be said to have acted negligently.[647]

---

640 (1997) 1 All SA 635 (A) (hereinafter *De Jager*).
641 *De Jager* [27].
642 Neethling & Potgieter (2020) 155–156; see generally *Municipality of Cape Town v Bakkerud* (2000) 3 All SA 171 (A).
643 Neethling & Potgieter (2020) 164–165; Loubser & Midgley (2017) 154. In Germany, fault also refers to the "incapability to meet the expected standard of care." See Spindler & Rieckers (2019) Ch 1, §1 [69], & §2 [73]; Dietrich & Field (2017) *MULR* 605.
644 Neethling & Potgieter (2020) 164–165; Fagan (2019) 96.
645 Loubser & Midgley (2017) 154.
646 As above.
647 See Loubser & Midgley (2017) 154 for a detailed discussion of the characteristics of a reasonable person.

In this hypothetical, Elimele must prove Anti's negligence with reference to the reasonable person — specifically as regards reasonable foreseeability and reasonable preventability as the two pillars of the test for negligence formulated in *Kruger v Coetzee*. I now consider these two pillars in the Filia/Elimele hypothetical starting with the reasonable foreseeability of harm.

5.4.4.2.1 Reasonable foreseeability that the conduct of Anti would cause Elimele's harm

As mentioned, the reasonable person does not have prophetic foresight and it is insufficient merely to prove what happened and how it could have been prevented. It is thus necessary to consider what the reasonable person in Anti's position would have foreseen before considering reasonable precautionary steps.

So, would the reasonable person in Anti's position foresee that the non-vaccination of Filia and sending Filia to crèche whilst she was ill (Anti's conduct) would probably harm another (Elimele)? According to Reiss (as discussed in Chapter 4) it is a natural foreseeable result that non-vaccination places others at risk of harm.[648] It is therefore foreseeable that harm may likely occur as a result of non-vaccination in that vulnerable children are present at the crèche (such as those too young to be vaccinated or immunocompromised children). In Chapter 4, I argue that the reasonable person would have either vaccinated the child or would not have sent an ill child to crèche, as it is reasonably foreseeable that bringing an infected child into contact with others may cause them harm.[649]

In this specific hypothetical, it may also be argued that the paediatrician informed Anti that Filia must self-isolate to prevent infecting others. Would the reasonable person in Anti's position, being informed and advised by a paediatrician, still have acted as Anti did? Would the reasonable person ignore the advice of the paediatrician? I suggest that the reasonably prudent person would reasonably have foreseen that sending his or her ill child to crèche could cause harm to others (Elimele) and that it is reasonably foreseeable that sending an ill child to crèche will transmit the disease to others.

However, must Anti have foreseen that Elimele's lung would collapse and be removed? Or, is it sufficient that Anti foresaw that Elimele could contract the disease and suffer some harm related to that infection? I address these questions below.

---

648 Reiss (2018) *TJB* 74.
649 As above.

First, the occurrence of a particular consequence (such as infection) must be reasonably foreseeable. Thus, Anti is only negligent with reference to a specific consequence (infection) if that consequence — and not merely damage in general — was reasonably foreseeable.[650]

Secondly, the foresight of a mere possibility of harm is not enough; there must be foresight of a reasonable possibility of harm.[651]

Third, it is not necessary that the exact or precise harm that occurred should have been foreseeable (i.e., that Elimele's lung would collapse and be removed), and it is sufficient if Anti reasonably foresaw a specific kind of consequence or general kind of harm that actually occurred (like infection), as a result of her conduct (see *Bochris*). It is thus unnecessary that Anti must have reasonably foreseen that Elimele's right lung would collapse and be removed.

Sending an ill child to crèche creates a possibility for the transmission and infection of other children and this transmission and infection is very likely (reasonable possibility) as COVID-19 is highly contagious.

It is broadly accepted that the foreseeability of harm depends on the degree of "probability of the manifestation of the harm".[652] As mentioned above, Loubser and Midgley refer to the magnitude of the risk of the harm to assess the reasonable foreseeability of harm, and ask two questions in this regard: (1) How strong is the possibility that the harm will occur?[653] (2) How serious will the damage be if the risk materialises?[654]

There is a great likelihood that the harm (infection of others) will occur and this renders it reasonably foreseeable. It may thus be easier to establish that the harm was reasonably foreseeable as a great possibility that damage would occur existed.[655] Furthermore, the damage may be very serious if the risk (transmission and infection) materialises as COVID-19 may cause serious illness or even death. Thus, it is reasonably foreseeable that the virus will spread and there is a strong possibility that the harm of a serious nature will occur.

Accordingly, in this hypothetical, I suggest that the harm is reasonably foreseeable according to the concrete or relative approach, as well as with reference to the magnitude of the risk of the harm and the probability of its manifestation. I contend that it is reasonably foreseeable that the specific harm (infection) actually suffered by Elimele would be caused by Anti's conduct (non-vaccination and sending Filia to crèche whilst ill).

650 See Neethling & Potgieter (2020) 177 with reference to the concrete approach.
651 *Sauls* [8]–[9]; Fagan (2019) 24; Reiss (2014) *JLPP* 598; Finch & Fafinski (2021) 36.
652 Neethling & Potgieter (2020) 179.
653 Loubser & Midgley (2017) 159.
654 As above.
655 Neethling & Potgieter (2020) 179.

It must be stressed that as far as the application of the foreseeability test is concerned, it "is not possible to lay down hard-and-fast rules as the circumstances of each case are decisive".[656] Merely establishing that the harm was reasonably foreseeable is not enough to prove negligence. Elimele must also prove that the reasonable person would have taken reasonable precautionary or preventative steps to prevent the reasonably foreseeable harm and that Anti failed to do so. I now turn my attention to the reasonable preventability of harm.

5.4.4.2.2 Reasonable preventability of the harm

As mentioned in Chapter 4, Reiss posits that it is reasonably foreseeable that non-vaccination places others at risk. According to Reiss, it is then accepted that the reasonable person would either vaccinate or take steps to prevent the reasonably foreseeable harm to others.

In this hypothetical, I suggest that Anti could have avoided the harm as the reasonable person in Anti's position would have taken adequate or reasonable steps to prevent the materialisation of harm as the harm was reasonably foreseeable.[657] The court will assess whether the reasonable person in Anti's position would have taken precautionary steps to prevent the damage from occurring.[658] I refer to the four factors described above in *Ngubane*, which are relevant to the preventability inquiry of the test for negligence:

(1) The degree or extent of the risk created by Antis's conduct (non-vaccination and sending Filia to crèche whilst she was ill) creates a great risk of harm (risk of infection), especially as COVID-19 is highly contagious and can easily be transmitted from one person to another. I contend that the reasonable person in Anti's position would have taken adequate or reasonable steps to prevent this risk of harm.
(2) The gravity of the possible consequences, if the risk of harm materialises, is serious, as COVID-19 may cause serious illness or even death, and the reasonable person in Anti's position would have taken adequate or reasonable steps to prevent these serious consequences (as a result of infection) which were likely to materialise as a result of the conduct.
(3) The utility (or social usefulness) of Anti's conduct is small or non-existent. The interest (or purpose) served by Anti's conduct does not outweigh the risk of harm and the reasonable person in Anti's position would have taken steps to prevent the harm.

656 As above.
657 Loubser & Midgley (2017) 161; Fagan (2019) 25.
658 See Fagan (2019) 26.

(4) The burden, cost, and difficulty of eliminating the risk of harm are small, the harm could have been avoided by merely vaccinating Filia, or self-isolating Filia and not sending her to the crèche, or at least warning or informing others of Filia's infection. Taking precautionary measures, such as vaccination, and self-isolating could have eliminated or reduced the risk of harm without substantial problems, prejudice, or costs. The reasonable person in Anti's position would have taken precautionary measures to prevent the harm.

Anti's conduct created the possibility that grave and extensive harm might occur and the reasonable person in Anti's position would arguably have taken steps to prevent such harm.[659] The harm could have been avoided at low or no cost as vaccines are generally free and self-isolating Filia could have completely eliminated the risk of grave and extensive harm. Not only did Anti's conduct create a serious risk of harm to others, but the manifestation of that harm could also cause serious illness and even death. It is not only likely that Anti's conduct would place others at risk because the disease is easily transmissible but Anti's conduct also created a risk of harm in that transmission may cause serious illness and even death.

It is not only the transmission but also the harm resulting from the transmission which would prompt the reasonable person to take preventative steps. If Anti creates a source of danger (non-vaccination and sending Filia to crèche whilst ill), she is responsible for "arranging the relevant protective measures to make it safe".[660] This Anti failed to do.

Elimele must prove (on a balance of probabilities) that Anti acted negligently.[661] In this hypothetical, the court will assess if the reasonable person in Anti's position would have acted differently by determining if the unlawful causing of harm to Elimele, was reasonably foreseeable and reasonably preventable, whether the reasonable person in Anti's position would have taken precautionary steps to prevent the harm from occurring.[662]

All the relevant circumstances of a case are considered when deciding on the negligence of Anti's conduct. This includes the danger posed to children when Anti knew that vulnerable children were present at the crèche. Loubser and Midgley posit that greater care and caution must be exercised when children are involved.[663] Rodal and Wilson suggest that the advantages

---

659 As above.
660 Brüggemeier (2020) *EJCLG* 359.
661 See *Ntsala v Mutual & Federal Insurance* 1996 (2) SA 184 (T) at 190E–190F.
662 See Roederer (2009) *AJICL* 451. See Loubser & Midgley (2017) 155 with reference to *Kruger v Coetzee*. In *Jones v Santam* 1965 (2) SA 542 (A) at 551 the test for negligence is described without reference to foreseeability and preventability of damage. The court noted that "a person is guilty of *culpa* if his conduct falls short of that of the standard of the *diligens paterfamilias*".
663 See Loubser & Midgley (2017) 169 with reference to a standard of care (not to be confused with a duty of care).

and benefits of vaccination and the immense risk of non-vaccination may even support a stricter standard of care.[664]

The reasonable person in Anti's position would reasonably have foreseen the possibility of harm arising from her conduct and would have taken steps to prevent the harm from occurring. The harm is not only foreseeable but is reasonably preventable. As mentioned, Anti took no preventative steps. Arguably, Anti's failure to comply with these precautionary steps, and in light of the reasonable foreseeability and reasonable preventability of harm, may establish negligence and satisfy the element of fault for purposes of delictual liability. This is especially true under the *actio legis Aquilia* and the Germanic action for pain and suffering where negligence is sufficient and intent is not required.

The delictual element of wrongfulness is considered next as the last element for delictual liability.

5.4.5 Wrongfulness (or unlawfulness)

Just because an act or omission is negligent, does not mean it is automatically wrongful.[665] Wrongfulness is a separate common-law delictual element that must be satisfied in addition to all the other delictual elements required to establish delictual liability. The last common-law delictual element under investigation is the element of wrongfulness.

As mentioned in the introduction to this chapter, wrongfulness is an essential element that must be satisfied for delictual liability[666] — as is the case in the Netherlands and Germany.[667] The concept of wrongfulness and how it should be established has engendered considerable debate. For purposes of this discussion of the element of wrongfulness, it is unnecessary to address all these debates — Fagan has explored these issues extensively in his work *Undoing delict*.[668] For now, it suffices to note that the "common law understanding of wrongfulness […] has been developed by our courts over many years".[669]

---

664 Rodal & Wilson (2010) *MJLH* 57; Finch & Fafinski (2021) 37.

665 Harms JA in *Telematrix v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) (hereinafter *Telematrix*) [12]: "the fact that the act is negligent does not make it wrongful".

666 Fagan (2018) 1; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) (hereinafter *Country Cloud*) [20].

667 See Art 6:162 of the BW, which refers to an unlawful act (wrong) as one of the elements to claim for damages (under the BW). In Germany, unlawfulness (or wrongfulness) is also a separate requirement to claim damages, see Brüggemeier (2020) *EJCLG* 348; Spindler & Rieckers (2019) Ch 1, §1 [70].

668 Fagan *Undoing delict: the South African law of delict under the Constitution* (2018).

669 See *Carmichele* [38] & [42] for a short discussion on wrongfulness as it developed in our common law prior to the operation of the Interim Constitution 200 of 1993.

In this discussion, I draw on South African case law to show how our courts have approached the element of wrongfulness in the common law of delict.

The legal convictions of the community "must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution" as pointed out by the Supreme Court of Appeal in *Van Duivenboden*.[670] This serves as an indication that wrongfulness is not *per se* a matter of the reasonableness (or wrongfulness) of the conduct or the result (as it is in the Netherlands and Germany)[671] but rather considers the reasonableness of imposing liability. This was confirmed by the Constitutional Court in *Le Roux v Dey*.[672] In *Lee*, the Constitutional Court confirmed that

> [t]he general criterion of 'reasonableness' in the wrongfulness enquiry concerns the reasonableness of imposing liability on the defendant and not the reasonableness of the defendant's conduct, which is an element of the separate negligence enquiry.[673] (Footnotes omitted).

In *Loureiro v Imvula Quality Protection*,[674] the Constitutional Court stated that

> [t]he enquiries into wrongfulness [delictual element] and negligence [element of fault] should not be conflated. […] The wrongfulness enquiry focuses on the [delictual element of] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm — indeed to respect rights — and questions the reasonableness of imposing liability.[675]

From this, the two components of wrongfulness are, according to the CC in *Loureiro*: (1) an inspection of the conduct; and (2) the policy and legal convictions of the community, constitutionally understood. This means that in establishing wrongfulness the court first considers the specific form of conduct, i.e., a positive act (commission) or an omission. On this note, it is important to recall that in the common law of delict there is a rebuttable presumption

---

670 *Van Duivenboden* [17].

671 Under Dutch law, as discussed in Ch 4 of this thesis, the element of unlawfulness qualifies the act or conduct. Similarly, in Germany wrongfulness in negligence refers to the negligent manner of the harmful conduct. As mentioned in Ch 4, in Germany the wrongfulness of the conduct is investigated (*verhaltensunrecht*). See Brüggemeier (2020) *EJCLG* 348 & 369; Spindler & Rieckers (2019) Ch 1, §1 [70].

672 *Le Roux v Dey* [122]; Fagan (2018) 15.

673 *Lee* [53]. See also *South African Hang & Paragliding Ass v Bewick* 2015 (3) SA 449 (SCA) (hereinafter *Bewick*) [6].

674 2014 (3) SA 394 (CC) (hereinafter *Loureiro*).

675 *Loureiro* [53].

that it is *prima facie* wrongful for a person to cause physical injury to another by positive conduct (commission)[676] — this has been accepted by our courts.[677]

I submit that looking at the conduct, as suggested by the Constitutional Court in *Loureiro,* involves *prima facie* wrongfulness and not necessarily the reasonableness of the conduct. The nature of the conduct may also be indicative of a legal duty in the case of omissions, but I submit that it is not the *reasonableness of the conduct* under consideration in the wrongfulness enquiry. I explain this in detail below under the heading "Other approaches to wrongfulness".

In Germany, it is also accepted that "[a]ny direct injury of a protected interest leads to a presumption of unlawfulness",[678] and the violation of a legally protected interest via an omission is not automatically unlawful.[679] The same applies in the South African context — a negligent omission that causes harm is not *prima facie* wrongful.[680]

Wrongfulness (like legal causation) also involves a normative enquiry that limits liability by considering policy considerations such as fairness, reasonableness, justice,[681] legal convictions of the community, and society's *boni mores*.[682] This is the second of the *Loureiro* components.

The *boni mores* test as formulated in *Bakkerud*[683] and *Van Duivenboden* is an objective test and is not dependent on the court's personal views of what the community's legal convictions ought to be. The legal convictions of the community and policy considerations (constitutionally understood) may be called on to determine whether there is a duty not to cause harm (or not to act negligently, or to respect rights) and this ultimately explores the reasonableness of imposing liability. Khampepe J in *Country Cloud Trading v MEC, Department of Infrastructure Development*[684] held that wrongfulness

676 See Fagan (2018) 1; Fagan (2019) 31.
677 See *Lillicrap v Pilkington Brothers* 1985 (1) SA 475 (A) at 497B–497C (as endorsed by the SCA in *Indac Electronics v Volkskas Bank* 1992 (1) SA 783 (AD)); *Van Duivenboden* per Nugent JA [12]; *Sea Harvest* [19].
678 Brüggemeier (2020) *EJCLG* 347.
679 Spindler & Rieckers (2019) Ch 1, §3 [76].
680 *Van Duivenboden*, per Nugent JA, [12]: "where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission." See also *Country Cloud* [22]; *Bewick* [5]; Fagan (2019) 31.
681 See Loubser & Midgley (2017) 132 & 180 with reference to *Country Cloud*.
682 *Country Cloud* [25]; Loubser & Midgley (2017) 180 & 183: the legal convictions of the community refers to if the community regards the harm caused as wrongful for purposes of delictual liability and the legal convictions of the community does not refer to "socially, morally, ethically or religiously right or wrong."
683 *Municipality of Cape Town v Bakkerud* (2000) 3 All SA 171 (A) (hereinafter *Bakkerud*).
684 2015 (1) SA 1 (CC) (hereinafter *Country Cloud*) (primarily concerned with a situation of pure economic loss).

> functions to determine whether the infliction of culpably [with fault] caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.[685]

In *Country Cloud*, the Constitutional Court also states that wrongfulness acts as a brake on liability, with reference to the reasonableness, desirability, and burden of imposing liability, as well as the social, economic, and other costs. Khampepe J continued to explain that,

> [t]he statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: 'that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages', notwithstanding his or her fault.[686]

Accordingly, even if the element of fault is present, the element of wrongfulness may be used to limit liability based on public or legal policy considerations. The general understanding of our courts and their approach to wrongfulness is alluded to above with reference to *Van Duivenboden*, *Country Cloud*, and *Loureiro*. Fagan observes that reference to policy considerations such as fairness, reasonableness, justice, the legal convictions of the community, and society's *boni mores*, is only made in novel (or borderline) cases.[687] Thus, if the case before the court does not require any "judicial discretion" — as there is no absence of precedent and it is not a borderline or novel case — reference to legal and policy considerations is according to Fagan, unnecessary.[688]

For example, in *Country Cloud*, the Constitutional Court stated that

> [w]rongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful.[689]

The Constitutional Court thus indirectly acknowledges that if it is an "uncontentious" case, wrongfulness is considered with reference to, for example, *prima facie* wrongfulness, and not

685 *Country Cloud* [20].
686 *Country Cloud* [21].
687 Fagan (2018) 264.
688 As above.
689 *Country Cloud* [22]. This was quoted with approval in *Mashongwa v PRASA* 2016 (3) SA 528 (CC) (hereinafter *Mashongwa*) [19].

necessarily legal and public policy considerations. However, in *Lee*, the Constitutional Court found that

> the legal convictions of the community demand that the *omission* should be considered wrongful. This open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in *all* cases, *not* only *omission* cases. The imposition of wrongfulness under this enquiry is determined with reference to considerations of public and legal policy, consistent with constitutional norms.[690] (Footnotes omitted.)

According to the Constitutional Court in *Lee*, the "considerations of public and legal policy, consistent with constitutional norms" are not reserved for cases of omissions and must also be considered in the wrongfulness determination of, by implication, commissions. Simply because a commission may be *prima facie* wrongful does not necessarily negate an investigation into the reasonableness of imposing liability with reference to considerations of public and legal policy consistent with constitutional norms.

In *Fourway Haulage* and *Bewick*,[691] the Supreme Court of Appeal stated that if the court is dealing with a case that is not *prima facie* wrongful (e.g., causing pure economic loss or a negligent omission causing harm) "wrongfulness depends on the existence of a legal duty".[692] This "legal duty" is a matter for judicial determination which involves the criteria of public or legal policy consistent with constitutional norms.[693]

Thus, when dealing with a scenario in which the conduct is not *prima facie* wrongful (e.g., harm caused by a negligent omission), the conduct (omission) can only be regarded as wrongful (and actionable) with reference to a legal duty[694] as informed by "public or legal policy considerations [which] require that such conduct, if negligent, should attract legal liability for the resulting damages".[695]

This is similar to the approach under Dutch law where wrongfulness is determined with reference to the general standard or duty of care (*zorgplicht*) and the "social due care standard" (*maatschappelijke zorgvuldigheidsnormen*) and its breach rendering the conduct unlawful. When considering the wrongfulness (and reasonableness of imposing liability) for an omission (as a form of conduct) it is thus necessary to explore the existence of a legal duty and its breach

690 *Lee* [53].
691 *South African Hang & Paragliding Ass v Bewick* 2015 (3) SA 449 (SCA) (hereinafter *Bewick*).
692 *Fourway Haulage* [12]; *Bewick* [5].
693 *Fourway Haulage* [12].
694 *Bewick* [5].
695 *Fourway Haulage* [12].

as noted by the court in *Fourway Haulage* and *Bewick*.[696] For purposes of this discussion, I agree with Fagan, and reserve policy considerations such as fairness, reasonableness, justice, the legal convictions of the community, and society's *boni mores* to novel cases, where there is no precedent.

Because a rebuttable presumption of wrongfulness exists for positive conduct causing harm and not for negligent omissions causing harm, there are two broad categories under which the element of wrongfulness are explored in this thesis: (1) positive conduct (commissions) that causes harm to the victim's property or body (*prima facie* wrongful); and (2) a negligent omission that causes harm to the victim's property or body (not *prima facie* wrongful). To wit, the negligent causation of pure economic loss, as the third category, is not *prima facie* wrongful.[697] The element of wrongfulness in the context of pure economic loss is excluded from the scope of this discussion as the issue of non-vaccination (omission and commission) is under inspection.

I now turn my attention to the determination of wrongfulness in the context of commissions and omissions respectively.[698]

5.4.5.1 Determining wrongfulness in the case of commissions

In *Country Cloud*, the Constitutional Court stated the following regarding *prima facie* wrongfulness,

> [t]o say that conduct is '*prima facie* wrongful' means that to prove the fact of conduct alone is sufficient, absent indications to the contrary, to establish wrongfulness. In other words, wrongfulness need not be positively established by the plaintiff; wrongfulness is presumed, but may be rebutted by the defendant.[699]

In *Bewick*, the Supreme Court of Appeal noted the following on the presumption of wrongfulness:

> As has by now become well established, negligent conduct manifesting itself in the form of a positive act which causes physical injury raises a presumption of wrongfulness.[700]

---

696 *Bewick* [5]. See Spindler & Rieckers (2019) Ch 1, §1 [70]; Brüggemeier (2020) *EJCLG* 359–360.
697 *Telematrix* [13].
698 In A Fagan "Further reflections on wrongfulness in the law of delict" (2018) 135(1) *SALJ* 19, Fagan kicks off his discussion on wrongfulness with reference to the distinction between an omission and commission and the importance of this distinction in the context of determining wrongfulness.
699 *Country Cloud* [22] (fn 9).
700 *Bewick* [5].

Similarly, in *Van Duivenboden* the Supreme Court of Appeal confirmed that "[w]here the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful [or wrongful]".[701] In *Sea Harvest*, the Supreme Court of Appeal (per Scott JA) noted that,

> in many if not most delicts the issue of wrongfulness is uncontentious as the action is founded upon conduct which, if held to be culpable [negligent as a form of fault], would be *prima facie* wrongful [or unlawful].[702]

The above confirms the notion that wrongfulness in cases of commissions is largely uncontentious as noted by the court in *Sea Harvest* and again in *Country Cloud*. For purposes of non-vaccination, I am first dealing with the commission, i.e., the transmission of an infectious disease. Our courts have held that the intentional transmission of HIV establishes criminal liability.[703] In *Phiri*, the High Court (per Makgoka J and Baloyi AJ) dealt with the criminal liability of the intentional transmission of HIV. It is, however, unfortunate that in *Phiri*[704] the court did not take the opportunity to address the issue of wrongfulness in the context of the intentional transmission of HIV.

Furthermore, in *Lee*, the Constitutional Court, too, failed directly to address the issue of *prima facie* wrongfulness in the context of the transmission of a communicable disease. Despite the lack of case law dealing with the question of wrongfulness in the case of the negligent transmission of a disease (like HIV or TB), the existing precedent is clear: there is a presumption of *prima facie* wrongfulness where a positive act (commission) causes physical harm (*Van Duivenboden* and *Bewick*).

The question is now whether Anti's negligent commission (positive conduct) resulting in physical harm is *prima facie* wrongful? The commission here is that Anti sent Filia to crèche while she was infected (positive act or commission — a form of conduct). This negligent commission then caused the physical harm or injury that Elimele suffered. I suggest that Anti's positive conduct (sending Filia to crèche while infected) is *prima facie* wrongful as Anti caused Elimele's physical injury by her negligent positive conduct (commission).[705]

However, this is a rebuttable presumption of *prima facie* wrongfulness (*Country Cloud*). Anti may, for example, offer a defence to rebut this presumption of wrongfulness. Before I

---

701 *Van Duivenboden* [12]. See also Zitzke (2020) *TSAR* 431.
702 *Sea Harvest* [19] (Smalberger JA, Howie JA, & Marais JA concurring).
703 Similarly, the transmission of HIV is actionable in German law under §823(1) of the BGB.
704 *Phiri v S* 2014 (1) SACR 211 (GNP) (hereinafter *Phiri*).
705 *Country Cloud* [22] (fn 9); *Van Duivenboden* [12]; *Sea Harvest* [19].

conclude as to whether Anti's positive conduct is *prima facie* wrongful, I first consider whether Anti has a defence to rebut this presumption of wrongfulness.

5.4.5.2 Grounds of justification for wrongfulness

There are various grounds of justification which constitute special circumstances in which the (negligent) conduct that appears to be wrongful is rendered lawful.[706] In Germany and the Netherlands, there are also specific grounds of justification that render the apparent unlawful conduct lawful (e.g., self-defence and consent).[707]

The traditional grounds of justification in the South African common law of delict include: (1) self-defence; (2) necessity; (3) provocation; (4) consent; (5) statutory authority; (6) public authority and official command; (7) and the power to discipline.[708] In the context of non-vaccination the only plausible defence or ground of justification appears to be consent by the assumption of risk.

As discussed in Chapter 4, it is doubtful whether consent by the assumption of risk (*volenti non fit iniuiria* as recognised in English law)[709] will constitute a successful ground of justification in the context of non-vaccination (for Anti), as the child (Elimele) is incapable of meeting the requirements of consent in terms of the law of delict.[710] Consent entails that

> [w]here a person [Elimele] legally capable of expressing his will gives consent to injury or harm, the causing of such harm will be lawful.[711]

The two forms of consent are: (1) consent to injury; and (2) consent to (or acceptance of) the risk of injury.[712] Regarding consent to injury, the injured party (Elimele) consents to specific harm.[713] Regarding consent to the risk of injury, the injured party (Elimele) consents to the risk of harm caused by the conduct of the defendant (Anti).[714]

---

706 Neethling & Potgieter (2020) 106.
707 Brüggemeier (2020) *EJCLG* 347.
708 Neethling & Potgieter (2020) 106–145; Loubser & Midgley (2017) 203.
709 Rodal & Wilson (2010) *MJLH* 61; Deakin *et al* (2003) 768.
710 See Loubser & Midgley (2017) 206. The defence of *volenti non fit injuria* is also recognised in English law, see Deakin *et al* (2003) 768. Steele (2017) 12 & 36: consent serves as a valid defence against most torts of intention. Torts of intention are not necessarily relevant in the case of non-vaccination, except for in the case of possibly *dolus eventualis*.
711 Neethling & Potgieter (2020) 128.
712 As above.
713 As above.
714 As above.

Consent to injury is a unilateral act of which the defendant need not be aware.[715] In addition to the other characteristics of consent as a ground of justification,

> [a]s a rule, the prejudiced person himself [Elimele] must consent, only in exceptional circumstances may consent to prejudice be given on behalf of someone else.[716] (Footnotes omitted).

The case law on this point specifies parents or the High Court consenting to medical procedures on behalf of a child[717] and the assumption of the attendant risk. For purposes of this hypothetical, I assume that Elimele is too young legally to consent to injury or the risk of injury as he is an infant (under the age of seven).[718]

On this basis, I assume that Elimele's parents acted on his behalf for purposes of exploring this defence of consent. In addition to the preceding characteristics of consent as a ground of justification, the law sets specific requirements for valid consent:[719]

(a) Consent must be given freely or voluntarily. Should the prejudiced person be forced in some way to "consent" to the prejudice, valid consent is absent.

(b) The person giving the consent must be capable of volition (expressing his will). This does not mean that he must have full legal capacity to act, but that he must be intellectually mature enough to appreciate the implications of his acts and that he must not be mentally ill or under the influence of drugs that hamper the functioning of his brain.

(c) The consenting person must have full knowledge of the extent of the (possible) prejudice. It is important that the requisite knowledge is present, especially where consent to the risk of harm is concerned. In such cases, the consenting person must have full knowledge of the nature and extent of the risk in order to consent to it.

(d) The consenting party must realise or appreciate fully what the nature and extent of the harm will be. Mere knowledge of the risk or harm concerned is therefore not sufficient; the plaintiff must also comprehend and understand the nature and extent of the harm or risk.

(e) The person consenting must in fact subjectively consent to the prejudicial act.

[…]

(f) The consent must be permitted by the legal order; in other words, the consent must not be *contra bonos mores*.[720] (Footnotes omitted.)

---

715 Neethling & Potgieter (2020) 129.
716 Neethling & Potgieter (2020) 130.
717 See generally *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC); *Kotze v Kotze* 2003 (3) SA 628 (T).
718 Boezaart (2009) 20. Infants are 0 (birth) to 7 years of age.
719 Neethling & Potgieter (2020) 131.
720 Neethling & Potgieter (2020) 131–134.

In light of the above, I refer specifically to requirements (c) and (d). For purposes of the defence of *volenti non fit iniuria* (a willing person is not wronged) Elimele's parents must have: (1) had full knowledge of the extent of the (possible) prejudice; (2) had full knowledge of the nature and extent of the risk in order to consent to it; and (3) comprehended and understood the nature and extent of the harm or risk.

In the hypothetical set of facts, Anti argued that sending your child to school is a voluntary assumption of risk. Although this may be true, it is an unqualified statement for the purposes of justifying wrongfulness as an element of the common-law delict. For purposes of negating wrongfulness, parents (like Elimele's parents) must consent to a specific injury or specific risk of injury.[721] It is not sufficient to argue that there are "some risks" involved when sending your child to crèche and that you accept these risks — the consent must be to a specific injury or specific risk of injury.[722]

In *Hattingh v Roux*[723] the High Court (per Fourie J) considered the risk of injury associated with a rugby game. The court ruled that the defence (*volenti non fit iniuria*) could not succeed as the risk was "not the normal type of risk that a participant in a scrum would have consented to".[724] The victim did not "consent to the risk of being injured in this manner".[725]

I employ this as an analogy to the hypothetical: sending your child to crèche may have some attendant risks (e.g., scraping a knee on the playground) but the defence of consent cannot succeed as the harm suffered by Elimele is not "the normal type of risk" one would expect from sending your child to crèche. Even if Elimele's parents accepted the risks normally associated with sending him to crèche, they did not consent to Elimele being injured in the way he was. The mere knowledge of the risk or harm concerned is therefore not sufficient. Elimele's parents had no knowledge of the risk or harm concerned as Anti neither informed nor warned anyone at the school or the school itself, of Filia's infection. Anti's failure to warn and inform, coupled with the requirements for the defence of consent, renders it highly unlikely — in fact, well nigh impossible — for Anti to succeed with this ground of justification and so exclude wrongfulness.

The consent defence is a recognised defence to prove the absence of wrongfulness. But in this hypothetical, there is another possibility. Should a defence of parental autonomy perhaps

---

721 See *Santam Insurance v Vorster* 1973 (4) SA 764 (A) at 79B–79C; *Seti v SA Rail Commuter Corp* (2013) ZAWCHC 109 [23].
722 As above.
723 2011 (5) SA 135 (WCC) (hereinafter *Hattingh v Roux*).
724 *Hattingh v Roux* [74]. See Tuitt *et al* (2015) 106 for *volenti non fit iniuria* in sporting activity.
725 As above.

be recognised as a valid defence by which to negate wrongfulness in the context of non-vaccination? Do the *boni mores* (constitutionally understood) perhaps require that a defence of parental autonomy be recognised in the context of non-vaccination? This is an interesting question and there is no indication of whether the *boni mores* in fact favour it as a defence that may negate wrongfulness in the context of non-vaccination. Even if the *boni mores* hold parental autonomy in high esteem, I suggest that it must still rather be considered under the banner of wrongfulness and the reasonableness of imposing liability, and not as a fully-fledged defence against wrongfulness or a distinct and independent ground of justification.

If a defence of parental autonomy is developed as an independent ground of justification, it must then still be informed by the *boni mores*, constitutionally understood. I suggest that the question of "legal duty" and its breach must also play a role. Thus, developing this defence may be a repetition of the reasonableness of imposing liability exercise rather than an independent ground of justification.

For example, in *Re SL (Permission to Vaccinate)*[726] the High Court of Justice (UK Family Division) held that it would not be intruding on parents' autonomy by exercising its obligations as the upper guardian of all children. Reiss suggests that in the US parental immunity "offers a defence to negligence claims regarding, among other things, medical decisions for the child".[727] According to Reiss, only a minority of states (including California) have rejected parental immunity in favour of a reasonable-parent standard for tortious liability.[728] She argues that "parental immunity should not shield parents from tort claims brought by their unvaccinated children".[729] In the Canadian context, Rodal and Wilson explain that as vaccines are aimed at protecting societal interests and public health, overriding parental objections are often justified.[730]

This may be some indication that parental autonomy should not serve as a fully-fledged defence against non-vaccination, or against wrongfulness for that matter.

Developing the grounds of justification in the context of non-vaccination is perhaps more appropriately left in the hands of the legislature. With this, I mean that legislation should be developed to make express statutory provision for non-vaccination. A parent who then complies with the statutory requirements may raise this statutory compliance as a valid ground of justification to negate wrongfulness.

---

726 (2017) EWHC 125 (Fam) [49].
727 Reiss (2018) *TJB* 74.
728 As above.
729 As above.
730 Rodal & Wilson (2010) *MJLH* 47.

As we saw above, the breach of a statutory duty resulting in the harm is *prima facie* wrongful. The opposite is then also true: the compliance with a statutory duty (resulting in harm) is not *prima facie* wrongful. I return to this recommendation in Chapter 6.

The wrongfulness requirement must thus be developed on a statutory level, as opposed to promoting the development and incorporation of a new "parental autonomy" defence. This statutory development will consider the legal duty conundrum, its breach, constitutional provisions, and the *boni mores*. The statutory development route is, in my view, far better suited to addressing the issue of wrongfulness in the context of non-vaccination. This will avoid a repetition of the reasonableness of imposing liability exercise, and arguably create much-needed legal certainty on this issue. Exactly what statutory development should entail is briefly explored in Chapter 6 with reference to foreign law.

In conclusion, I suggest that Anti's negligent positive conduct (sending Filia to crèche while she was infected) is *prima facie* wrongful as Anti caused Elimele's physical injury by negligent positive conduct (commission).[731] Furthermore, there is no defence (e.g., *volenti non fit iniuria*) available to Anti to rebut this presumption of wrongfulness.

If the court in this hypothetical accepts that Anti's negligent conduct is *prima facie* wrongful, Elimele's claim for patrimonial damages under the *actio legis Aquilia* may succeed. Furthermore, if *prima facie* wrongfulness is not rebutted by Anti, Elimele's claim for non-patrimonial damages under the Germanic action for pain and suffering could also succeed. Only if intent is proven, may Elimele claim for non-patrimonial damages under the *actio iniuriarum* for the infringement of his personality rights.

The *lex Aquilia* originally dictated that a victim (Elimele) could only pursue a claim in delict against a wrongdoer (Anti) for positive conduct that causes physical harm. However, the Supreme Court of Appeal found in *Union Government v National Bank of SA*[732] (per Grosskopf AJA) that it "is clear that in our law *Aqullian* liability has long outgrown its earlier limitation to damages arising from physical damage or personal injury".[733]

Pure economic loss and damage to property are also included in the scope of the *lex Aquilia*,[734] and as seen in the introduction to this chapter, patrimonial damages must be claimed under the *actio legis Aquiliae*.[735]

731 *Country Cloud* [22] (fn 9); *Van Duivenboden* [12]; *Sea Harvest* [19].
732 1921 AD 121 (hereinafter *Union Government v National Bank*).
733 *Union Government v National Bank* at 128.
734 Loubser & Midgley (2017) 29–31; Fagan (2019) ix.
735 See *Matthews v Young* 1922 AD 492 at 503–505.

As we saw in our analysis of conduct, commissions and omissions may overlap or even present simultaneously.[736] It is for this reason that I also explore the wrongfulness of Anti's omissions. Furthermore, the issue of non-vaccination is more focused on omissions because non-vaccination is essentially an omission, which may then overlap with a commission (sending Filia to crèche while infected which I argue is *prima facie* wrongful).

Wrongfulness in the case of negligent omissions is explored below, before applying the law to the hypothetical set of facts.

5.4.5.3 Determining wrongfulness in the case of a negligent omission

Although the Constitutional Court warned in *Loureiro* above that "[t]he enquiries into wrongfulness [delictual element] and negligence [element of fault] should not be conflated",[737] I refer to a negligent omission rather than simply "an omission" because the addition of "negligent" indicates that the element of fault has been satisfied and that I am now dealing with wrongfulness.

As explained earlier, if the delictual element of fault is not satisfied it is unnecessary to consider the element of wrongfulness. Hence, the use of the term "negligent omission" denotes the fulfilment of the fault requirement for the purposes of this discussion.

In Chapters 3 and 4, I explored the existence of a legal duty and its breach, which may be indicative of wrongfulness. As seen in Chapter 4, the general principles of tort law in the US and delict in Germany hold that there is no general duty to act positively to prevent harm to another.[738] However, there are exceptions to this rule. The South African situation appears similar if one considers *Minister van Polisie v Ewels*,[739] where Rumpff CJ held that

> [a]s point of departure it is accepted that there generally is no legal duty on a person to prevent someone else from suffering harm, even if such person easily could prevent the harm from being suffered and even if it could be expected of such person, on purely moral grounds, that he act positively to prevent the harm. But it is also accepted that in certain circumstances [as an exception to the general rule] there is a legal duty on a person to prevent someone else from suffering harm. If he fails to carry out [or breaches] that duty, there arises a wrongful omission which can result in a claim for damages.[740]

---

736 *K* [53]; *F* [52].
737 *Loureiro* [53].
738 Brennan (2019) 22; Spindler & Rieckers (2019) Ch 1, §1 [72]. See *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596.
739 1975 (3) SA 590 (A) (hereinafter *Ewels*).
740 *Ewels* at 596, as translated by Fagan (2018) 135(1) *SALJ* 40. The original quote is in Afrikaans and reads as follows: "*As uitgangspunt word aanvaar dat daar in die algemeen geen regsplig op 'n persoon rus om te*

Consequently, a legal duty may be classified as an exception to the general rule in certain circumstances when one is establishing wrongfulness. The "legal duty" approach has been endorsed by our courts for establishing wrongfulness in cases of negligent omissions.[741] In Ewels the Supreme Court of Appeal refers to the "legal duty" of a person to prevent harm and the breach of that duty, and in *Loureiro*, the same court refers to the "duty not to cause harm".

The "duty" referred to here is a duty to act without negligence (fault).[742] The Supreme Court of Appeal in *Van Duivenboden* referred to a "legal duty to avoid negligently [with fault] causing harm",[743] and Fagan suggests that this implies the duty to act without negligence (fault).[744] Similarly, in *Oppelt*, the Constitutional Court referred to "a legal duty to avoid negligently causing harm",[745] which essentially means a duty to act without negligence, as suggested by Fagan. In *Oppelt*, the Constitutional Court held that a negligent omission is only wrongful if there is a legal duty to avoid negligently causing harm (legal duty to act without negligence).[746] Loubser and Midgley reiterate that "liability based on negligence depends on an obligation not to be negligent".[747] Fagan, however, points out that our courts do not always refer directly to the duty to act without negligence (fault) at times referring to it as the "duty to act reasonably" or "exercise (reasonable) care".[748] A legal duty to act positively to prevent harm may thus be described as a duty to act without negligence, as suggested by Fagan.

For purposes of this discussion on wrongfulness, I refer to a "legal duty", and this encapsulates the legal duty to prevent harm (*Ewels*); duty not to cause harm (*Loureiro*); duty to act without negligence; duty to act reasonably; or the duty to exercise reasonable care. This is similar to the discussion under German law in Chapter 4 where reference was made to *verkehrssicherungspflichten*: the person whose activity (or property) creates a source of potential danger in everyday life, which is likely to affect the rights and interests of others, is

verhinder dat iemand anders skade ly nie, al sou so 'n persoon maklik kon verhinder dat die skade gely word en al sou van so 'n persoon verwag kon word, op suiwer morele gronde, dat hy daadwerklik optree om die skade te verhinder. Ook word egter aanvaar dat in sekere omstandighede daar 'n regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly. Versuim hy om daardie plig uit te voer, ontstaan daar 'n onregmatige late wat aanleiding kan gee tot 'n eis om skadevergoeding."

741 See, e.g., *Sea Harvest* [19]; *Van Duivenboden* [12]; *Minister of Justice & Constitutional Development v X* 2015 (1) SA 25 (SCA) [13].

742 Fagan (2018) 16.

743 *Van Duivenboden* [12].

744 Fagan (2018) 19; Fagan (2019) 158.

745 *Oppelt* [51].

746 As above.

747 Loubser & Midgley (2017) 190.

748 Fagan (2018) 19; Fagan (2019) 158.

responsible to ensure that others are protected from the risks he or she has created.[749] This also resonates with Dutch law and the responsibility to be careful.[750]

As mentioned above, not all omissions are branded wrongful and this regulates liability.[751] Notably, the element of wrongfulness does not only regulate liability in the case of omissions, as stated by the Supreme Court of Appeal in *Sea Harvest*; it also regulates liability for positive acts.

Wrongfulness and the regulation of liability are especially important in the case of omissions to prevent a situation where persons are held liable for their omissions on an unreasonable basis. It is for this reason that the circumstances of the omission are investigated to determine if liability should be imposed, and this is often labelled the "reasonableness of imposing liability", which is determined with reference to a legal duty to act without negligence.

To label the "legal duty" investigation as merely limiting liability could arguably render it a pointless delictual element as this is already the role of legal causation. The "legal duty" approach serves to offer an understanding of wrongfulness[752] and informs the reasonableness of imposing liability conundrum and not the reasonableness of the conduct.[753] It is true that this "legal duty" investigation acts as a liability brake (as does legal causation), but it does so in a way that differs from that of legal causation (which also limits liability).

For example, this "legal duty" investigation serves as an exception to the general rule that there is no legal duty to prevent someone else from suffering harm (*Ewels*) which is not considered under the element of legal causation. This is how the "legal duty" investigation acts as a liability brake which differs from that of legal causation. As we saw earlier, legal causation considers the reasonable foreseeability; directness/proximity (direct consequences or proximate cause); the existence or otherwise of a *novus actus interveniens*; legal policy, reasonability, fairness, justice; and remoteness.

On the other hand, the element of wrongfulness considers the reasonableness of imposing liability, and this is an objective test[754] that should not, according to our courts, have regard to foreseeability.[755] Furthermore, wrongfulness is a question of law on which the courts do not,

749 Markesinis & Unberath (2002) 86.
750 Taekema (2014) *NJLP* 144. See also *ECLI:NL:RBNNE:2021:2160* [4.5].
751 *Sea Harvest* [19]. As mentioned in *MTO Forestry* [14], per Leach JA, the "legal duty" concept is essentially a liability-limiting yardstick. Similarly, in the case of omissions, the duties of care are limited. See also *Country Cloud* [20]–[21]; *Van Duivenboden* [12]; Brennan (2017) 11.
752 Fagan (2018) 22.
753 *Bewick* [6]; *Le Roux v Dey* [122]; *Lee* [53].
754 See *Loureiro* [53]: "the subjective state of mind is not the focus of the wrongfulness enquiry".
755 *MTO Forestry* [18].

as a rule, hear evidence[756] as it is a matter for judicial determination deduced from the plaintiff's factual allegations.[757] Clearly, wrongfulness and legal causation do overlap, but they remain distinct and separate delictual elements.[758] As we saw above, wrongfulness may be established with reference to the breach of a statutory duty,[759] or the breach of a legal duty (such as a duty not to cause harm or a duty to not act negligently).[760]

I now turn to the legal duty consideration. As stated in the introduction to wrongfulness, in *Fourway Haulage* the Supreme Court of Appeal held that when the court is dealing with a case that is not *prima facie* wrongful (e.g., a negligent omission causing harm) "wrongfulness depends on the existence of a legal duty".[761]

The judicial determination[762] of whether a legal duty exists may be established by a careful analysis of the relevant constitutional provisions and other relevant constitutional norms.[763] Furthermore, to determine wrongfulness with reference to whether a legal duty exists (and if it was breached), the court may consider the following factors:

(1) Proportionality of the risk of harm and the cost of prevention,[764] also termed the reasonable measures to avoid the prejudice or harm,[765] their cost, and their proportionality to the damage.[766]

(2) Vulnerability to the risk of damage.[767]

---

756 Loubser & Midgley (2017) 182: wrongfulness is alleged in the plaintiff's particulars of claim (PoC) in addition to facts indicating that the harm caused was wrongful and facts that substantiate the relevant policy considerations. If these allegations are not in the plaintiff's PoC, the defendant may raise an exception (that the pleadings do not disclose a cause of action).

757 Loubser & Midgley (2017) 182 & 184: similarly, "the courts do not hear evidence on the content of the legal convictions of the community or the *boni mores*." See *Bewick* [6]: "[s]ince wrongfulness is not presumed in the case of an omission, a plaintiff who claims on this basis must plead and prove facts relied upon to support that essential allegation."

758 *Nohour* [16].

759 See *Rust v Coetzee* (2022) ZAWCHC 88 (hereinafter *Rust*) [24.6].

760 Loubser & Midgley (2017) 186 suggest that to determine the delictual element of wrongfulness, in the case of an omission, it is easier to inspect the breach of a duty as opposed to an infringement of a right. See *Carmichele* [42]: the CC referred to the element of wrongfulness with reference to the "existence of the legal duty to avoid or prevent loss". The CC [37] warned against the "pre-constitutional test for determining the wrongfulness of omissions in delictual actions" and explored s 39(2) in this regard.

761 *Fourway Haulage* [12].

762 As above; *Bewick* [5]; *Oppelt* [51].

763 *Rail Commuters Action Group v Transnet* 2005 (2) SA 359 (CC) [78] as quoted with approval in *Mashongwa* [24].

764 Loubser & Midgley (2017) 194. See also *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (AD) (hereinafter *Administrateur v Van der Merwe*) at 361H–362B, & 363C; *Pro Tempo v Van der Merwe* 2018 (1) SA 181 (SCA) (hereinafter *Pro Tempo*) [18] & [21].

765 Loubser & Midgley (2017) 195. See also *Van Vuuren v Ethhekwini Municipality* 2018 (1) SA 189 (SCA) [29].

766 Loubser & Midgley (2017) 194. See also *Administrateur v Van der Merwe* at 361H–362B, & 363C.

767 *Bewick* [33]; Neethling & Potgieter (2020) 84.

(3) Prior conduct creating a danger (also referred to as the *omissio per commissionem* rule).[768]

(4) The nature of the defendant's conduct.[769] Here I suggest that it is not the reasonableness of the conduct but rather its nature which may be indicative of a legal duty.

(5) Negligent failure to prevent harm[770] or the omission to take reasonable steps to prevent the risk from materialising.[771]

(6) The different interests of the parties.[772]

(7) Control over a dangerous object or situation.[773]

(8) Rules of law (common law or statute).[774]

(9) An awareness of the danger.[775]

(10) The social consequences of imposing liability.[776]

(11) The public's notion of what justice demands.[777]

(12) Reasonableness, policy, and (where appropriate) constitutional norms.[778]

(13) The relationship between the parties.[779] and

(14) Other factors (e.g., professional knowledge; a particular office; a contractual undertaking; and the creation of the impression that the interests of a third party will be protected).[780]

In *Bergrivier* the Supreme Court of Appeal noted that a number of factors may play a part in determining the existence of a legal duty.[781] Hence, the factors listed above are not mutually

---

768 The prior conduct (*omissio per commissionem*) rule was partially rejected by the SCA in *Ewels*. See Fagan (2019) 199; Neethling & Potgieter (2020) 68-69. It is no longer a requirement that "a negligent omission could be wrongful *only* if there had been prior conduct or control of property". See *Pro Tempo* [18], & *Carelse v City of Cape Town* (2019) 2 All SA 125 (WCC) where the SCA and HC endorsed the prior conduct rule.

769 Loubser & Midgley (2017) 196; *Le Roux v Dey* [122].

770 See *Za v Smith* 2015 (4) SA 574 (SCA) (hereinafter *Za v Smith*) [21].

771 *Pro Tempo* [18].

772 Loubser & Midgley (2017) 194; *Administrateur v Van der Merwe* at 361H–362B, & 363C.

773 See Neethling & Potgieter (2020) 69–71. See *Rust* [24.4] with reference to *Bakkerud*, & *Roux v Hattingh* 2012 (6) SA 428 (SCA). For control over property see generally *Za v Smith*.

774 Neethling & Potgieter (2020) 74. A breach of a statutory duty resulting in harm is *prima facie* wrongful. See Neethling & Potgieter (2020) 90.

775 Neethling & Potgieter (2020) 73 refer to this as "knowledge and *foresight* of possible harm".

776 Loubser & Midgley (2017) 194. See also *Administrateur v Van der Merwe* at 361H–362B, & 363C.

777 *Bakkerud* [17].

778 *Gouda* [12].

779 Loubser & Midgley (2017) 194. See also *Administrateur v Van der Merwe* at 361H–362B, & 363C; Neethling & Potgieter (2020) 79 mention the relationship between a parent and a child.

780 Loubser & Midgley (2017) 194; Neethling & Potgieter (2020) 81–83.

781 *Bergrivier* [51] (fn 16).

exclusive and may be used in addition to one another to determine whether legal duty exists for purposes of establishing wrongfulness in the case of an omission.

Above, I have explored the most recent developments affecting the element of wrongfulness. It is worth also noting other — perhaps outdated — approaches to wrongfulness before applying the law to the facts of the Filia/Elimele hypothetical. First, I briefly examine the "wrongfulness as the infringement of a right" approach — a popular academic construction of the wrongfulness enquiry — before arguing why it should be rejected.

5.4.5.4 Other approaches to wrongfulness

As emerged from the previous chapters, under the South African common law of delict the element of wrongfulness may be established with reference to the infringement of a legally protected interest or right[782] — as also accepted in the Netherlands and Germany.[783] This is generally in the context of the rebuttable presumption of *prima facie* wrongfulness where the negligent positive conduct of the wrongdoer infringes the legally protected right of the plaintiff[784] and causes harm or damage.

However, the "new approach" to wrongfulness (reasonableness of imposing liability) does not necessitate an investigation of whether a right has been infringed to determine wrongfulness. Arguably, the infringement of a right or legally protected interest is explored under the delictual element of harm, and it is unnecessary to repeat the exercise under the wrongfulness enquiry. Despite this contention, authors like Neethling and Potgieter still suggest that the "infringement of a right" approach is the suitable way of determining wrongfulness[785] and persist that the "[v]iolation of a legal norm must therefore be present; a harmful consequence in itself is insufficient to constitute wrongfulness",[786] and that "the law of delict is only concerned with the legal permissibility of infringements of individual interests".[787] The authors support their preference for this approach with reference to

782 Loubser & Midgley (2017) 184–185; Neethling & Potgieter (2020) 51 & 55.
783 E.g., in the Netherlands, an unlawful act refers to the infringement of a right. See Art 6:162 of the BW; Van Schilfgaarde (1991) *CWILJ* 273. In Germany, "the direct injury of protected interests through negligent human conduct (positive act)" may constitute wrongfulness. See Brüggemeier (2020) *EJCLG* 359.
784 Art 6:162 of the BW refers to the "violation of a legal obligation" in addition to the "infringement of a right" as unlawful or wrongful conduct.
785 Neethling & Potgieter (2020) 36, 51, & 55.
786 Neethling & Potgieter (2020) 36. This assertion is similar to that followed in Germany where the context of unlawfulness is determined with reference to the protective purpose of the norm. See Brüggemeier (2020) *EJCLG* 370.
787 Neethling & Potgieter (2020) 45.

Universiteit van Pretoria v Tommie Meyer Films.[788] However, it should be noted that this case was overturned on appeal without mention of the two-pronged approach.[789]

I disagree with Neethling and Potgieter's preference for this approach. I also disagree with their contentions that the "new approach" (wrongfulness with reference to the reasonableness of imposing liability) as discussed above and endorsed by our highest courts, is unacceptable, misguided, under-developed, and vague.[790] I cannot agree that the new approach "can safely be left aside" based on the notion that it is vague and creates uncertainty.[791] Despite my reservations about this (infringement of a right) approach of wrongfulness, it is worth briefly mentioning what it entails and why I do not endorse it in this work.

5.4.5.4.1 Wrongfulness as the infringement of a right

In Chapter 4, I explained the Dutch approach to determining wrongfulness and noted that one method of establishing wrongfulness is with reference to the infringement of a right (Article 6:162 of the BW). Similarly, in Germany, there is a presumption of unlawfulness if there is a direct injury to a protected interest (without justification).[792]

Loubser and Midgley explain that the rights-based approach generally refers to instances where the *prima facie* wrongfulness scenarios, as explored above.[793] They identify the following categories of rights on which this approach relies: (1) real rights; (2) personal rights; (3) personality rights; and (4) immaterial property rights.[794] However, Loubser and Midgley explain that this is not a closed list and may include rights or interests such as earning capacity, access to information, and the right to privacy.[795] The authors conclude with a statement that the mere infringement, interference, or disturbance of a right is not enough and that the *boni mores* criterion must be applied to balance competing rights and interests to determine wrongfulness under this approach.[796]

---

788 Neethling & Potgieter (2020) 59. See Neethling & Potgieter (2020) 36, 55–56 with reference to *Universiteit van Pretoria v Tommie Meyer Films* 1977 (4) SA 376 (T).
789 *Universiteit van Pretoria v Tommie Meyer Films* 1979 (1) SA 441 (A).
790 Neethling & Potgieter (2020) 102.
791 As above.
792 Brüggemeier (2020) *EJCLG* 347.
793 Loubser & Midgley (2017) 185. Rijnhout (2021) *UJIEL* 129 suggests that "a protected interest" must be proven. See Art 6:163 of the BW: "no obligation to pay compensation shall exist if the norm infringed is not designed to offer protection against the loss suffered by the aggrieved party." This forms part of the "relativity principle" under Dutch law.
794 Loubser & Midgley (2017) 185; Neethling & Potgieter (2020) 57–58.
795 As above.
796 Loubser & Midgley (2017) 185; Neethling & Potgieter (2020) 40–41.

Wrongfulness as the "infringement of a right" approach, as described by Neethling and Potgieter, essentially holds that "[a] subjective right is therefore infringed when the relationship between the holder of a right and the object of the right has been infringed in a legally reprehensible manner."[797]

To determine wrongfulness in this approach, Neethling and Potgieter first refer to an investigation of whether the subject-object relationship has been disturbed (infringement of a subjective right) and then consider whether the infringement complained of took place in a legally reprehensible way with reference to the *boni mores*.[798]

As mentioned above, this approach to wrongfulness essentially duplicates the investigation of the element of harm where the right or interest is identified to determine the type of harm. For example, under the element of harm, I explore what rights are relevant to patrimonial and non-patrimonial harm, especially for purposes of the three historic actions.

This "infringement of a right" approach also refers indirectly to the element of conduct, to establish whether there has been an infringement or disturbance of the right or interest and appears to focus on commissions and exclude omissions from its ambit. Furthermore, it is important to distinguish the elements of harm (or damage) and wrongfulness as confirmed by the Supreme Court of Appeal in *RAF v Mtati*.[799]

The only notion of wrongfulness according to this "infringement of a right" approach, essentially centres on whether the disturbance or interference can be regarded as legally reprehensible. To determine this reference is had to the *boni mores*.[800] However, reference to constitutional considerations as demanded by our courts, appears not to feature at all.[801]

As mentioned above, even if a *prima facie* case of wrongfulness is established (for negligent commissions), public and legal policy consistent with constitutional norms must still be considered (*Lee*).[802] This is not necessarily "constitutional over-excitement" but rather a liability-limiting mechanism that this "infringement of a right" approach to wrongfulness fails to recognise.

Even if this approach is applied to cases of *prima facie* wrongfulness, it still fails to refer to constitutional values and norms, essentially contributing to constitutional heedlessness as the *boni mores* are only used to determine whether the infringement of a right is legally

797 Neethling & Potgieter (2020) 59. See also Neethling & Potgieter (2020) 36, & 55–56 with reference to *Universiteit van Pretoria v Tommie Meyer Films* 1977 (4) SA 376 (T).
798 Neethling & Potgieter (2020) 58–59.
799 (2005) 3 All SA 340 (SCA) [35].
800 Neethling & Potgieter (2020) 55; Loubser & Midgley (2017) 185.
801 *Van Duivenboden* [17]; *Lee* [53]; *Nohour* [9].
802 *Lee* [53].

reprehensible. Reference to the *boni mores* limited to the scope of what is "legally reprehensible" is insufficient to justify the reasonable imposition of liability. To determine what is reasonable in the context of wrongfulness, reference must be made to the existence of a legal duty on which wrongfulness depends.[803] Furthermore, to determine what is reasonable looks beyond the *boni mores* in the context of what is legally reprehensible, and considers, *inter alia*, the "social, economic and others costs" of imposing liability;[804] public and legal policy, consistent with constitutional norms; and "fairness, morality, policy and the court's perception of the legal convictions of the community".[805]

If the social, economic, and other costs are "too high to justify the use of the law of delict for the resolution of the particular issue", or if it is "undesirable or overly burdensome to impose liability" then the element of wrongfulness acts as a brake on liability.[806] I suggest that this indicates how "wrongfulness as the infringement of a right" fails to act as an appropriate liability brake in that it does not consider the reasonableness of imposing liability.

Furthermore, I contend that this approach fails to consider factors in addition to the *boni mores* such as fairness, morality, public and legal policy, consistency with constitutional norms, social, economic, and other costs of imposing liability; and whether it is undesirable or overly burdensome to impose liability. This approach assumes that the unreasonable infringement of a right is automatically wrongful without considering that it may be unreasonable to impose liability, based on considerations of reasonableness.

I suggest that this two-pronged "infringement of a right" approach may help in understanding what wrongfulness is about, but as a determinant of wrongfulness, it proves inadequate. For example, it is insufficient to determine wrongfulness for a negligent omission and fails to consider the importance of a legal duty as there is not always a clear subjective right in a given scenario.

For purposes of the Filia/Elimele hypothetical and the discussion in Chapter 2, I clearly outline Elimele's rights (e.g., the right to life, bodily integrity, dignity, and the best interests of the child). If the "infringement of a right" approach to wrongfulness, despite my criticism, is applied to the Filia/Elimele hypothetical, wrongfulness will be established as Elimele's constitutional rights to life, bodily integrity, and dignity have been infringed in a legally reprehensible manner, and Anti has no legal defence with which to rebut this presumption of

803 *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA); *Le Roux v Dey* [122].
804 *Country Cloud* [20].
805 *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) (hereinafter *Bogoshi*) [8]–[9].
806 *Country Cloud* [20]–[21].

wrongfulness. A consideration of the *boni mores* would then arguably support this finding of wrongfulness as, under this approach, the *boni mores* is used solely to establish whether the *infringement* itself was reprehensible or unreasonable.

The legal convictions of the community, as canvassed by local and foreign law, favour the protection of children as a vulnerable group. Foreign law suggests that the legal convictions of the community would regard the infringement of Elimele's rights as *contra bonos mores*, in that Elimele is a child and Anti should act as a responsible moral agent and respect the rights of others, especially children.

Under the "infringement of a right" approach this would be the end of the investigation, with no reference to the *reasonableness of imposing liability* and the duty to not act negligently or cause harm, and to respect rights.[807] I contend that this application of the "infringement of a right" approach shows how it fails to act as a liability brake, how it fails to consider the duty Anti owes to Elimele, and why Anti should be held liable in delict.

I submit that the focus of the wrongfulness enquiry leans more towards the reasonableness of imposing liability than merely focusing on the existence of rights and their "legally reprehensible" infringement. The new approach accommodates both commissions and omissions and can be used even in the face of *prima facie* wrongfulness — although this may not be necessary.

The new approach better explains why liability should be imposed with reference to the reasonableness of imposing liability, a legal duty, and the breach thereof, against the backdrop of constitutional, policy, and legal considerations.

The "infringement of a right" approach to wrongfulness does not provide any greater clarity or credence than the "new" reasonableness of imposing liability approach. Lastly, this approach enjoyed little support in case law — in all likelihood for the reasons advanced above.

I now briefly turn to another approach in which the reasonableness of the conduct is analysed to establish wrongfulness.

5.4.5.4.2 Reasonableness of the conduct itself

Neethling and Potgieter also suggest that the reasonableness of the defendant's conduct should be assessed to determine wrongfulness.[808] This reflects both the German approach where the wrongfulness of the conduct is investigated (*verhaltensunrecht*),[809] and the Dutch approach to

807 *Loureiro* [53].
808 Neethling & Potgieter (2020) 41–43.
809 Brüggemeier (2020) *EJCLG* 369; Spindler & Rieckers (2019) Ch 1, §1 [70].

wrongfulness which essentially entails an examination of the conduct. The authors further suggest that reasonable foreseeability and subjective foreseeability may be used to determine the reasonableness of the defendant's conduct[810] — as in German law discussed in Chapter 4.[811]

In *Loureiro*, the Constitutional Court stated that the "wrongfulness enquiry focuses on the *conduct* and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable".[812] According to the Constitutional Court wrongfulness may then be determined with reference to both the conduct and the reasonableness of imposing liability.

However, in *MTO Forestry* the Supreme Court of Appeal concluded that "foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation".[813]

I suggest that the nature of the conduct[814] may be indicative of a legal duty, linking to the reasonableness of imposing liability and not *per se* the reasonableness of the conduct itself. I suggest that when reference is made to the defendant's conduct under the wrongfulness enquiry, the conduct is examined to determine whether it involves a legal duty and not its reasonableness *per se*.

The other case law discussed above indicates that in the wrongfulness enquiry it is not the reasonableness of the conduct that is considered but rather the reasonableness of imposing liability.[815] Furthermore, the foreseeability consideration is more appropriate in the context of fault, specifically negligence.[816] Although the foreseeability consideration *may* be considered in the wrongfulness determination,[817] I suggest that it fits better under the element of fault and should ideally not be repeated under the element of wrongfulness.

Despite clear indications from case law that the "reasonableness of the defendant's conduct" approach should not be followed, it is worth examining *why* the reasonableness of the conduct should arguably not be considered during the wrongfulness enquiry.

Consider the scenario where Anti's negligent conduct caused Elimele's infection. Consider that Elimele still went to the hospital and during the surgery, the doctors detected

---

810 Neethling & Potgieter (2020) 41 & 73.
811 Under German law, the court may determine the element of unlawfulness by considering the "probability and predictability of an injury". See Spindler & Rieckers (2019) Ch 1, §3 [76].
812 *Loureiro* [53].
813 *MTO Forestry* [18].
814 *Le Roux v Dey* [122].
815 *Bewick* [6]; *Le Roux v Dey* [122]; *Lee* [53].
816 Loubser & Midgley (2017) 189.
817 Loubser & Midgley (2017) 201.

blood cancer (leukemia) in Elimele. Consider now the wrongfulness of Anti's negligent conduct with reference to the *reasonableness of the conduct*. Is it still wrongful with reference to the *reasonableness of the conduct*? Anti's negligent conduct has caused the early detection of leukemia in Elimele. Arguably, Anti's negligent conduct has had an unforeseen and unforeseeable usefulness.[818] Does this utility now render Anti's negligent conduct reasonable? My short answer is no. I support this contention with reference to Fagan, who posits that

> [t]hough a wrongfulness requirement that turned on the *ex post facto* reasonableness of conduct would, on occasion, have an impact on liability, it would have the wrong impact: it would allow negligent harm-doers to escape liability when they should not.[819]

It is for this reason that I, in support of Fagan, also accept that wrongfulness must rather be determined with reference to the reasonableness of imposing liability as accepted by our courts.[820] This unforeseen and unforeseeable "benefit" cannot be used to escape liability. For example, the unforeseen and unforeseeable benefit arising from Anti's negligent conduct may be nullified by the fact that Elimele visits the doctor annually to check specifically for leukemia because this cancer runs in his family. There is no way of knowing or proving that Anti's negligent conduct is the only way that Elimele's leukemia would have been detected as early as it was and as a result of the unforeseeable usefulness of Anti's negligent conduct.

If Anti's negligent conduct had never caused Elimele to be infected and his right lung to be removed, it may still be probable that Elimele's leukemia may have been detected early. Even if it was not probable and Anti's negligent conduct undeniably had an unforeseeable benefit for which Elimele's parents are grateful, this cannot be used to negate wrongfulness. Although the Constitutional Court hinted in *Loureiro* that wrongfulness may then be determined with reference to both the conduct and the reasonableness of imposing liability, I suggest that the reasonableness of the conduct is arguably not an adequate method by which to establish wrongfulness, and the reasonableness of imposing liability should be preferred.

If the "reasonableness of the conduct" approach is applied as the preferred approach it is important to note that it remains an objective enquiry and, as held by the Constitutional Court in *Loureiro*, "the subjective state of mind is not the focus of the wrongfulness enquiry".[821]

---

818 *Fourway Haulage* [28]: "the issue of foreseeability should more appropriately be considered under the rubric of legal causation and not as part of determining wrongfulness."

819 Fagan (2018) 38; Fagan (2019) 95 suggests that "our law concerns itself with the *ex ante* rather than the *ex post facto* reasonableness of conduct".

820 *Bewick* [6]; *Le Roux v Dey* [122]; *Lee* [53].

821 *Loureiro* [53].

In the following section, I explore the wrongfulness of Anti's negligent omissions in light of the "reasonableness of imposing liability" approach discussed above.

5.4.5.5 Wrongfulness in the Filia/Elimele hypothetical

As we saw above our case law indicates that wrongfulness (for negligent omissions) is determined with reference to the reasonableness of imposing liability, and essentially refers to a duty (to not act negligently)[822] and the breach of such a duty.[823] As mentioned, these policy considerations may also be relevant for purposes of determining the wrongfulness of Anti's negligent commission (*Lee*).

Fagan comments that this judicial determination (reasonableness of imposing liability) is essentially a value judgment that the court makes,[824] and that policy considerations and value judgments (relating to such as fairness, reasonableness, justice, the legal convictions of the community, and society's *boni mores*) are often only employed in novel cases where there is no precedent.[825] For purposes of this discussion "novel cases" does not necessarily mean "new facts" it rather refers to instances where the set of facts do not fit the current laws and precedents, and it is then necessary to turn to public and legal policy consistent with constitutional norms.

This does not mean that the Constitution is circumvented in favour of constitutional heedlessness, it only means that policy considerations and value judgements (consistent with constitutional norms) are used as a last resort where the existing precedent cannot provide answers as to the existence of a legal duty and the reasonableness of imposing liability.

Fagan's suggestion that policy considerations and value judgements (relating to such as fairness, reasonableness, justice, the legal convictions of the community, and society's *boni mores*) where there is no precedent must not be understood as meaning that the Constitution is completely disregarded unless it is a novel case. Constitutional values and norms are canvassed throughout the wrongfulness enquiry. For example, when inspecting the *boni mores*, constitutional considerations must be deliberated, as demanded by our courts.[826] Furthermore,

---

822 Also expressed as: "duty not to cause harm" (*Loureiro*); "duty to respect rights" (*Loureiro*); "not to act negligently"; "duty to act without negligence"; "legal duty to avoid negligently causing harm" (*Van Duivenboden*, & *Oppelt*); "legal duty to act positively to prevent the harm" (*Minister of Justice & Constitutional Development v X*); "legal duty to act" (*Sea Harvest*).

823 See also Baxter (2014) *UCLR* 114: similarly, no liability can be imposed if a recognised duty of care is absent — regardless of which tort theory is pursued.

824 Fagan (2018) 135(1) *SALJ* 32; *Van Duivenboden* [13].

825 Fagan (2018) 264.

826 *Van Duivenboden* [17]; *Lee* [53].

when the interests of the parties are considered to determine if there is a legal duty, reference is also made to constitutional rights, duties, and interests. Only where there is no precedent will it be necessary to rely on pure policy.

Although the issue of non-vaccination has not yet landed on the doorsteps of the South African courts, existing laws, case law, and rules can be applied analogously to determine wrongfulness. If these considerations are still not enough to establish whether a legal duty is present for purposes of determining wrongfulness, then it may be necessary to fall back on pure policy.

I now turn to the factors our courts consider to determine if there is a legal duty (to act reasonably, exercise reasonable care, or not cause harm negligently) to determine wrongfulness. The factors discussed below are not mutually exclusive and numerous factors may be employed to determine the existence of a legal duty.[827]

5.4.5.5.1 Proportionality of the risk of harm and the cost of prevention

The court may consider the proportionality of the risk of harm and the cost of prevention to determine if there is a legal duty.[828] This is also referred to as the reasonable measures to avoid prejudice or harm,[829] and their cost and proportionality to the damage.[830] Based on the risk-benefit point of view (supported by Reiss),[831] vaccines outweigh the potential associated risks and the risks of non-vaccination outweigh any risks associated with the vaccine itself.

I suggest that the cost of prevention (vaccination) is low as the COVID-19 vaccine(s) are free. Furthermore, the risk posed by the non-vaccination of Filia is high. According to the proportionality of the risk of harm and the cost of prevention factor, I suggest that this is indicative of a legal duty on Anti to act reasonably, exercise reasonable care, or not negligently cause harm.

827 *Bergrivier* (fn 16).
828 Loubser & Midgley (2017) 194; *Administrateur v Van der Merwe* at 361H–362B, & 363C; *Pro Tempo* [18] & [21].
829 Loubser & Midgley (2017) 195; *Za v Smith* [17]; *Van Vuuren v Ethhekwini Municipality* 2018 (1) SA 189 (SCA) [29].
830 Loubser & Midgley (2017) 194; *Administrateur v Van der Merwe* at 361H–362B, & 363C; *MEC for the Department of Public Works, Roads & Transport v Botha* (2016) ZASCA 20 [3].
831 Reiss (2014) *JLPP* 604.

5.4.5.5.2 Vulnerability to risk of harm

The court may consider the vulnerability to risk of harm or damage[832] to determine if there is a legal duty in the wrongfulness consideration. I suggest that Elimele is vulnerable for two reasons: first, Elimele is a child, and second, Elimele is too young to receive the COVID-19 vaccine(s) and relies on herd immunity. Because of this, Elimele is vulnerable to the risk of damage. I suggest that this indicates that Anti had a legal duty to act reasonably, exercise reasonable care, or not negligently cause harm. Greater care and caution must be exercised when children are involved to prevent harm to children.[833] For example, to determine wrongfulness, the *Rechtbank Noord-Nederland*, in the Dutch case of *ECLI:NL:RBNNE:2021:2160*, referred to the *maatschappelijke zorgvuldigheidsnormen* (social due care standard) and noted that the standard in question is intended to protect children from accessing this toxic substance and that social due care standards are context-related.[834]

5.4.5.5.3 Prior conduct creating a danger

The court may consider Anti's prior conduct creating a danger (also referred to as the *omissio per commissionem* rule).[835] For example, in *ECLI:NL:RBOBR:2018:4414*, the *Rechtbank Oost-Brabant* commented on creating a danger and states that when determining whether a wrongdoer (Anti) created a dangerous situation or allowed one to continue, the following is considered: (1) Anti's failure to take certain safety measures; and (2) whether her failure is contrary to the due care that is customary in Dutch society with regard to another person or property.[836] Similarly, under German law, if Anti creates a source of danger (non-vaccination and sending Filia to crèche whilst ill) she is responsible for "arranging the relevant protective measures to make it safe".[837]

I suggest that Anti's prior conduct (not vaccinating Filia, sending her to crèche whilst ill, and failing to warn and/or inform others) created a danger. Based on Anti's prior conduct in creating the danger, I suggest that this is indicative of Anti's legal duty to act reasonably, exercise reasonable care, or not negligently cause harm.

---

832 *Bewick* [33]; *Neethling & Potgieter* (2020) 84.
833 See Loubser & Midgley (2017) 169 with reference to a standard of care (not to be confused with a duty of care).
834 As above.
835 Fagan (2019) 199; Neethling & Potgieter (2020) 68–69.
836 *ECLI:NL:RBOBR:2018:4414* [4.2].
837 Brüggemeier (2020) *EJCLG* 359.

5.4.5.5.4 Negligent failure to prevent harm

The court may consider the negligent failure to prevent harm,[838] or the omission to take reasonable steps to prevent the risk materialising,[839] to determine if there is a legal duty. Anti failed to prevent harm to Elimele by, for example, failing to warn and inform others that Filia was ill, as well as Anti's failure to vaccinate Filia (as mentioned under proportionality of the risk of harm and the cost of prevention and Anti's prior conduct creating a danger).

Although one may be tempted to invoke the duty to warn and inform, it must be borne in mind that these considerations fall under the element of negligence and the reasonable foreseeability and preventability of harm.[840]

It is for this reason that I have accepted that negligence is present for purposes of this discussion on wrongfulness, and it is accepted that Anti's conduct is negligent. It is thus not necessary to repeat a discussion of foreseeability and preventability in an effort not to unnecessarily merge or confuse these two distinct delictual elements (fault and wrongfulness), as cautioned by the court in *Loureiro*.

I suggest that Anti's negligent failure to prevent the harm is indicative of a legal duty to act reasonably, exercise reasonable care, or not cause harm negligently (for purposes of wrongfulness).

5.4.5.5.5 Control over a dangerous object or situation

The court may consider control over a dangerous object or situation[841] to determine whether Anti was subject to a legal duty. However, the mere fact that the wrongdoer had control over a dangerous object or situation does not automatically establish a duty to take precautionary measures. Control over a dangerous object or situation is considered when determining the existence of such a duty.[842]

---

838 *Za v Smith* [21].
839 *Pro Tempo* [18]
840 See *Minister: Western Cape Department of Social Development v E* (2020) ZASCA 103 [17] where the pleadings made reference to the "reasonable steps be taken to ensure the safety of children" which "formed the basis for the legal duty on which the case was based". In *Stedall v Aspeling* (2017) ZASCA 172 [33]–[34] reasonableness and foreseeability of harm (involving children) was considered under the issue of negligence — not wrongfulness.
841 See *Rust* [24.4] with reference to *Bakkerud*, & *Roux v Hattingh* 2012 (6) SA 428 (SCA).
842 See Neethling & Potgieter (2020) 69–71.

This consideration generally relates to control over fires or slippery ice,[843] a dangerous staircase,[844] or a swimming pool.[845] For example, under German law, if Anti creates a source of danger (non-vaccination and sending Filia to crèche whilst ill) then Anti is responsible for "arranging the relevant protective measures to make it safe".[846] Caplan *et al* contend that the courts have long held that individuals with hazardous or contagious diseases have a legal duty to protect others from the danger of infection.[847]

I suggest that Anti had control over a dangerous situation, analogous to that of fire, as Anti controlled the Filia's movements and her contact with others whilst she was ill. As with fires or slippery ice, Anti had a duty to self-isolate Filia, or at least warn or inform others of this dangerous situation — Filia's contagious infection — to prevent harm. I suggest that Anti's control over this dangerous situation is indicative of a legal duty.

5.4.5.5.6 Rules of law and the different rights and interests of the parties

The court may also consider the rules of law (the common law or statute)[848] and the different interests of the parties to establish the existence of a legal duty.[849] Below, I consider the rules of law and how they relate to the different (competing) rights and interests of the parties.

The law generally recognises Anti's parental right to act on behalf of Filia.[850] Anti has the responsibility and the right to care for Filia,[851] and the right to (and duty of) parental care (s 28(1)(*b*) of the Constitution) falls on Anti as well as the common-law duty to care for Filia.[852] Anti has the right to make medical decisions for Filia (vaccination) as Filia is too young to consent to any vaccination procedure.[853]

Anti's right to dignity (s 10 of the Constitution) extends to "family life" (or parental autonomy).[854] Anti has the right to dignity as it relates to self-governance or autonomy and family life, including the parental autonomy to make decisions for Filia.

---

843 Neethling & Potgieter (2020) 69.
844 Neethling & Potgieter (2020) 70 with reference to *Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD) [13].
845 See Neethling & Potgieter (2020) 70 (fn 287) for a myriad of case law in this regard.
846 Brüggemeier (2020) *EJCLG* 359.
847 Caplan *et al* (2012) *JLME* 608. See also *John B v Superior Court* 38 Cal4th 1177 (Cal 2006).
848 Neethling & Potgieter (2020) 74 & 90.
849 Loubser & Midgley (2017) 194.
850 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 91; Currie & De Waal (2013) 601.
851 Children's Act, s 18(2)(*a*). S 1 of the Children's Act defines "care" and includes the duty to safeguard and promote the child's wellbeing, and to protect the child from harm.
852 Friedman *et al* "Chapter 47" in *CLoSA* (2014) 9; Currie & De Waal (2013) 601.
853 Children's Act, s 129(4)(*a*): the parent may consent to the medical treatment of the child if the child is under the age of 12 years. See also Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 91.
854 Currie & De Waal (2013) 256; Woolman "Chapter 36" in *CLoSA* (2014) 40.

Anti also has the right to participate in the cultural life of her choice (s 30 of the Constitution) which includes the cultural choice or decision of non-vaccination. Anti has the right to freedom of conscience, religion, thought, belief, and opinion (s 15(1) of the Constitution) and this includes the choice or decision of non-vaccination. Anti also has the right to privacy (s 14 of the Constitution).

In conclusion, Anti's rights and interests as regards non-vaccination include, *inter alia*, Anti's: right to dignity (self-governance or autonomy and family life); right to participate in the cultural life of her choice (s 30 of the Constitution); right to freedom of conscience, religion, thought, belief, and opinion (s 15(1) of the Constitution); right to privacy (s 14 of the Constitution); and the right to act on behalf of Filia and make medical decisions on Filia's behalf.

I now turn to Elimele's rights and interests. Elimele has the right to dignity (s 10 of the Constitution) which underpins the fundamental dignity of the human body and physical integrity (s 12(2)(*b*) of the Constitution).[855] Section 12(2) of the Constitution recognises "that each physical body is of equal worth and is entitled to equal respect".[856]

Section 12(2)(*b*) of the Constitution "assumes that individuals are capable of taking decisions that are in their own interests and of acting as responsible moral agents."[857] In Chapter 3, I suggest that acting as a responsible moral agent in the context of vaccination means acting in the best interests of your child, as well as protecting the interests of others. A responsible moral agent is a vaccinating parent in that vaccination is often in a child's best interests (except for immunocompromised children), as well as in the best interests of society as vaccination maintains herd immunity and is the responsible and safe option for the child and other children.

Section 12(2)(*b*) of the Constitution must be both exercised and legitimately limited with reference to the underlying principle of "mutual concern and mutual respect for others".[858] This means that Anti may protect her own interests (e.g., parental autonomy, cultural rights, and freedom of conscience, religion, thought, belief, and opinion) but must still act as a responsible moral agent with mutual concern and mutual respect for others (Elimele), once again linking with the right and founding value of human dignity (s 10 of the Constitution).[859]

Elimele's dignity (s 10 of the Constitution) and bodily integrity (s 12(2)(*b*) of the Constitution) have been impaired as a result of the infection and injuries he sustained.

---

855 *S v Jordan* 2002 (6) SA 642 (CC) [74].
856 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 77; Currie & De Waal (2013) 251–252.
857 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88.
858 As above. See also Currie & De Waal (2013) 251–252.
859 Woolman "Chapter 36" in *CLoSA* (2014) 23, & 31–32.

I suggest that as vaccines serve the best interests of individuals and society at large, transmitting a severe disease to another could arguably be seen as a violation of section 12 of the Constitution as vaccines protect bodily integrity and preserve life.[860]

Elimele has the right to life (s 11 of the Constitution) which is "entwined" with the right to dignity (s 10 of the Constitution).[861] Human dignity "requires us to acknowledge the value and worth of all individuals [like Elimele] as members of society";[862] and "dignity is a group-based concept involving a collective concern for the well-being of others" like Elimele.[863]

Although Anti has the right to participate in the cultural life of her choice (s 30 of the Constitution) she may not exercise this right in a manner that is inconsistent with any provision in the Bill of Rights "in particular, equality and dignity".[864] Section 15 of the Constitution may be potentially outweighed by

> rights such as the rights of the child (s 28), the right to freedom of expression (s 16), the right to dignity (s 10), the right to freedom and security of the person (s12), and the right to equality (s 9).[865]

Furthermore, the "commitment to privacy grounded in individual autonomy would have to yield, […] when the greater good so required."[866]

As vaccinations serve to protect and preserve human life, I contend that they can be seen to directly protect the constitutional right to life, dignity, and bodily integrity of a collective of individuals or even the public at large. The consequences of non-vaccination sometimes lead to death, serious injury, disfigurement, and even disability. As mentioned, human dignity is not only an enforceable right — it is also a value that informs the interpretation of possibly all other fundamental rights and is central to the limitations enquiry.

Considering the rules of law and the different rights and interests of the parties, I suggest that Anti had a legal duty to act reasonably, exercise reasonable care, or not negligently cause harm. In addition, I suggest that Anti had a legal duty to vaccinate (as inferred by the collective of other rights) which she breached so causing Elimele's harm. I now consider the relationship between the parties.

---

860 See *ECLI:DE:BVerfG:2020:rk20200511.1bvr046920* [15]; Reiss (2014) *JLPP* 605.
861 Currie & De Waal (2013) 267. See *S v Makwanyane* 1995 (6) BCLR 665; Pieterse "Chapter 39" in *CLoSA* (2014) 3 (fn 12), & 21.
862 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 [29]; Currie & De Waal (2013) 251; Woolman "Chapter 36" in *CLoSA* (2014) 22.
863 Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014) 10; Currie & De Waal (2013) 251–252.
864 Woolman "Chapter 36" in *CLoSA* (2014) 42 (fn 156); Currie & De Waal (2013) 624–625.
865 Farlam "Chapter 41" in *CLoSA* (2014) 46.
866 Woolman "Chapter 36" in *CLoSA* (2014) 45.

5.4.5.5.7 Relationship between the parties

As we have seen, the court may also consider the relationship between the parties[867] to establish whether a legal duty exists. Recognised relationships that may be indicative of a legal duty include: contractual relationships; citizen and a policeman; employer and an employee; doctor and a patient; public carrier and passenger; and the relationship between parent and child.[868]

The parent-child relationship does not apply here as it refers to the relationship between Anti and Filia and not Anti and Elimele. I suggest that this does not mean that there is no relationship at all. Indeed I suggest that there is a relationship that may be indicative of a duty in that Anti (as a parent and responsible moral agent) must act in the interests not only of her own child, Filia, but also other children, Elimele. I support this argument with reference specifically to section 12 as discussed above.

I suggest that the parent-child relationship in this hypothetical extends to Elimele on the basis of section 12 of the Constitution and the fact that, as a child, Elimele is particularly vulnerable — greater care and caution must be exercised when dealing with harm to children.[869]

This relationship (between a morally responsible agent and a child) may be indicative of a legal duty to act reasonably, exercise reasonable care, or not negligently cause harm.

5.4.5.5.8 Social consequences of imposing liability

The social consequences of imposing liability may also be considered to determine whether there is a legal duty.[870] First, I explore the "floodgates" argument. In the context of non-vaccination, and specifically this hypothetical, the floodgates question is: will the successful delictual action against Anti (a non-vaccinating parent) open the floodgates to litigation? Is the floodgates argument sufficiently serious to render the imposition of liability unreasonable?

Holding Anti liable in delict may potentially open the floodgates to litigation. However, I suggest that the floodgates argument is not a sufficient reason to refrain from imposing liability in that similar cases will still require proof of all the delictual elements if delictual liability is to be imposed. This means that even if the floodgates are opened it will not

867 Loubser & Midgley (2017) 194; Neethling & Potgieter (2020) 79.
868 See Neethling & Potgieter (2020) 79–80.
869 See Loubser & Midgley (2017) 169.
870 Loubser & Midgley (2017) 194.

automatically render all persons in positions similar to that of Anti liable in delict as each case will require individual consideration of all the delictual elements.

Admittedly, the floodgates argument may, under the banner of wrongfulness, act as a liability brake as it may render it unreasonable to impose liability despite the presence of all the other delictual elements. I counter the floodgates argument by noting the cost of litigation in South Africa.[871] Even if the floodgates were to open, this will not necessarily mean that the courts will be flooded with cases of this kind — prohibitive costs would block the flow. Wallis J notes that "[t]here can be no doubt that legal services are expensive and out of the reach of most people in South Africa".[872]

Furthermore, although the South African common law of delict provides for joint wrongdoers, I submit that a delictual suit brought against a class or group (or community)[873] of individuals may be well neigh impossible for various reasons like practicability, litigation costs, evidence, evidentiary gaps, issues of fault and causation, and policy considerations. Reiss also suggests that a suit against a community of non-vaccinating individuals conflicts with the operation of the tort system.[874]

It is thus not plausible to bring a group action in delict against non-vaccinating parents as a discrete group as the delictual elements — causation and fault in particular — will be extremely difficult to prove in addition to the practical issues and costs associated with a group action of this magnitude. Hence, I submit that the floodgates argument in the context of group actions against non-vaccinating parents is not really at play here and is unlikely to succeed. For these reasons, the floodgates argument cannot be used to negate wrongfulness and the imposition of liability for Anti.

As we have seen, even if litigation of this kind (against an individual in a similar position as Anti) is pursued, the common-law delictual elements must still be complied with before liability can be imposed and an award for delictual damages be granted. Holding Anti liable in delict will not automatically render all other non-vaccinating parents similarly liable. I submit that the floodgates argument does not negate the imposition of liability on Anti. It cannot be said with certainty that one successful suit in delict will open the floodgates to litigation, and even if it does, there are numerous hurdles that hamper litigation of this kind.

---

871 K Ramotsho "High cost of civil and criminal litigation is one of the main barriers to accessing justice" (2022) *De Rebus* (online); M Wallis "Some thoughts on the commercial side of practice" (2012) 25(1) *Advocate* 35.

872 Wallis (2012) 25(1) *Advocate* 35.

873 See Rodal & Wilson (2010) *MJLH* 61; see Ciolli (2008) *YJBM* 132–133 for a discussion of class action law suits (and its requirements) in the context of non-vaccination. See also Finch & Fafinski (2021) 61.

874 Reiss (2014) *JLPP* 599.

Perhaps a more important consideration under the social consequences of imposing liability is the limitation on parental autonomy issue. Reiss suggests that imposing liability on a non-vaccinating parent is inevitably a restriction of parental autonomy.[875] A successful claim for delictual damages against a non-vaccinating parent will essentially "punish" that parent for exercising his or her parental autonomy. This is because the exercise of that form of parental autonomy (non-vaccination of the child) will have resulted in harm to another which the law of delict may recognise and for which damages may be awarded. This raises the question: does the limitation of parental autonomy render it reasonable to impose liability?

I argue that it does, since all the other delictual elements have been met together with other factors indicating a legal duty. This makes it reasonable to impose liability, under the element of wrongfulness. Furthermore, when considering and balancing the competing rights and interests of the parties, it is clear that the limitation of parental autonomy is reasonable, as is the imposition of liability. Reiss argues that "parental immunity should not shield parents from tort claims brought by their unvaccinated children".[876]

Third, the question of deterrence must be considered as a social consequence of imposing liability. Torts are, according to Reiss, not a viable measure by which to combat and deter non-vaccinating parents and should not be used as such.[877] Although the same may be said of the common-law delict in this context, deterrence may be an inevitable consequence if a non-vaccinating parent (Anti) is successfully held delictually liable for the non-vaccination of her child.[878] This social consequence may be considered by the court when determining whether there is a legal duty to impose liability and whether it is reasonable to do so.

I suggest that although these social consequences may not be ideal (e.g., limiting parental autonomy or punishing a non-vaccinating parent), they are necessary as Elimele has no legal right of recourse other than the law of delict. Reiss argues that "[s]omeone who causes harm in defiance of the consensus of science, health and government authorities should bear those costs".[879] In agreement with Reiss, I suggest that it is not undesirable or overly burdensome to impose liability on Anti in light of the social consequences of imposing liability as discussed above.

875 Reiss (2014) *JLPP* 610; see also Reiss (2018) *TJB* 73.
876 Reiss (2018) *TJB* 74.
877 Reiss (2014) *JLPP* 598; Karako-Eyal (2017) *UMKCLR* 12.
878 See Ciolli (2008) *YJBM* 135 who holds that tort still deters those non-vaccinating individuals. See also Karako-Eyal (2017) *UMKCLR* 12.
879 Kostal (2015) *ABAJ* 17.

5.4.5.5.9 Novel or borderline cases

As mentioned, Fagan[880] and the court in *Minister of Law & Order v Kadir*[881] suggest that policy considerations and value judgements (relating to, e.g., fairness, reasonableness, justice, the legal convictions of the community, and society's *boni mores*) are often only used in novel (or borderline) cases where there is no precedent.[882] Thus, if the case before the court does not require any "judicial discretion" as there is no absence of precedent and it is not a borderline or novel case, reference to legal and policy considerations, is according to Fagan, unnecessary.

Similarly, the "three stage" (also refered to as the *Caparo*) test is used to establish the existence of a duty of care in novel cases in foreign law[883] and includes: (1) actual or reasonable foreseeability of harm; (2) proximity; (3) and whether it is "fair, just, and reasonable to impose a duty of care" in light of public policy considerations. It is also regarded as the primary test for novel negligent scenarios involving personal injury or property damage.[884]

If the court is of the view that the above considerations do not adequately establish a duty in the Filia/Elimele scenario it will then turn to pure policy considerations, similar to the *Caparo* test which asks whether it is "fair, just, and reasonable to impose a duty of care" in light of public policy considerations.

However, in the South African context and in novel cases, merely suggesting that there was a legal duty that was breached is not enough. It must still be reasonable to impose liability with reference to legal, policy, and constitutional considerations. The *Caparo* test only deals only with whether it is reasonable to impose a *duty* and not with whether it is reasonable to impose liability.

For the sake of completeness, I now briefly consider the public's notion of what justice demands[885] as well as the notions of reasonableness, policy, and (where appropriate) constitutional norms.[886]

Baxter states that public policy considerations as regards non-vaccination and tortious liability (e.g., the limitations of rights, parental autonomy, and the obligation to vaccinate or

---

880 Fagan (2018) 135(1) *SALJ* 32.
881 1995 (1) SA 303 (A) (hereinafter *Kadir*) at 318E–318H.
882 Fagan (2018) 264.
883 See heading 4.2.1.1 in Ch 4 above. The "three stage" or *Caparo* test is applied in the UK and the US when considering the "duty of care consideration" arises in novel cases. The *Caparo* test was rejected by the Australian High Court in *Sullivan v Moody* in favour of the "salient features" approach. See heading 4.2.1.1 in Ch 4 above: I contend that the salient features approach is arguably not a true alternative to the three-stage *Caparo* test as it is no more than a rephrased version of the *Caparo* test.
884 Brennan (2017) 11.
885 *Bakkerud* [17].
886 *Gouda* [12].

not) are "by far the most complicated component".[887] Admittedly, the legal convictions of the community are also a somewhat grey area, as acknowledged by the Supreme Court of Appeal in *Kadir*. There are, however, some indications that the South African community is pro-vaccination.[888] On the other hand, there are strong indications that the South African community is more pro-option,[889] meaning that they want the option to choose — not only the option to choose whether they are vaccinated or not, but also the option to choose between vaccines.[890]

Furthermore, policy considerations may favour minimising paternalistic forms of intervention in the lives of others.[891] For example, even if vaccines are regarded as in the best interests of individuals and society (or public health), they cannot necessarily be forced onto individuals (Anti) as the right to dignity is omnipresent when interpreting section 12 of the Constitution and as sections 12 and 10 of the Constitution are closely linked.[892]

This is exactly what the Supreme Court of Appeal refers to in *Kadir* as "the conflicting interests of the community".[893] These conflicting interests relate not only to the COVID-19 vaccines but may also indicate if it is reasonable to impose liability based on the legal convictions of the community. This means that society's notions of what justice demands, constitutionally understood, must be considered by the court in novel cases to establish whether it is reasonable to impose liability, in addition to all the other considerations in establishing a legal duty.

In the criminal law case of *Phiri*, the High Court ruled that intentionally infecting another with HIV is attempted murder. Although this is a criminal case, it may be relevant in the context of non-vaccination as it also addresses the spread of a virus. It may suggested that not only is the intentional transmission of a deadly virus *contra bonos mores*, but that its negligent

887 Baxter (2014) *UCLR* 115.

888 See COVID-19 South African Online Portal "I Choose #VacciNation" (date unknown) https://sacoronavirus.co.za/category/i-choose-vaccination/ (accessed 28 November 2022).

889 I have intentionally omitted the use of the word "pro-choice" (often used in the context of abortion).

890 E.g., for COVID-19 the following vaccines have been developed: Pfizer/BioNTech Comirnaty vaccine; SII/COVISHIELD & AstraZeneca/AZD1222 vaccines; Janssen/Ad26.COV 2.S vaccine (developed by Johnson & Johnson); Moderna COVID-19 vaccine (mRNA 1273); Sinopharm COVID-19 vaccine, etc. See WHO "Coronavirus disease (COVID-19): Vaccines" (17 May 2022) https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-(covid-19)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=CjwKCAjw7IeUBhBbEiwADhiEMQE7gJM_oDx8FsqqM7r7d9hfFQxEnbKvSqPFVf0y93AKRcfba1_usRoCTzIQAvD_BwE# (accessed 28 November 2022).

891 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 86–88.

892 Woolman "Chapter 36" in *CLoSA* (2014) 23, & 31–32.

893 *Kadir* at 318E–318H.

transmission is likewise *contra bonos mores*.[894] However, it is yet to be determined what South Africa's societal notions in this specific context of non-vaccination entail.

In terms of the foreign case law discussed in Chapter 4, it can be suggested that those foreign jurisdiction communities and societies favour the imposition of liability in certain circumstances. In foreign jurisdictions like the US, Australia, and the UK legal and public policy factors are used to determine whether it is "fair, just, and reasonable to impose a duty of care" and, ultimately, liability on the defendant.[895]

However, the Filia/Elimele hypothetical has not yet been decided by foreign courts although these courts have indicated that the interests of protecting public health may warrant the imposition of liability on a person (Anti) who negligently places others — especially children (Elimele) — in danger and that Anti must face liability for the harm that her non-vaccination has caused.

For example, in *Jacobson*[896] the US court found that a duty to vaccinate exists if there has been a publicised outbreak of a vaccine-preventable disease and the unvaccinated child is in regular contact with others. This duty to vaccinate may then also extend to non-vaccinating parents (relying on personal, philosophical, or religious exemptions).

According to Dutch case law, the interests of minors (e.g., their health and safety) prevail over the right to freedom of religion.[897] In *Brown v Smith* the California Court of Appeal ruled that the state's interest in protecting the health and safety of children outweighs the plaintiffs' arguments for the previously existing "personal beliefs" exemptions. In *DRB v DAT*[898] the Canadian Provincial Court of British Columbia reiterated that vaccination is preferable to non-vaccination as it is required to protect those who cannot be vaccinated as well as to protect ourselves, and that any adverse reaction the person may have to the vaccine is largely outweighed by the risk of contracting the targeted disease.[899]

---

894 See also the Canadian case of *R v Cuerrier* 1998 CanLII 796 (SCC) which dealt with the intentional transmission of HIV and consensual sex, which was ruled (by the Supreme Court of Canada) to be aggravated assault. See also the unreported South African case of *S v Nyalungu* 2005 JOL 13254 (T).

895 Mulheron (2020) 65; Witting (2007) *MULR* 571; Dietrich & Field (2017) *MULR* 620; Baxter (2014) *UCLR* 115.

896 *Jacobson v Massachusetts* 197 US 11 (1905).

897 *ECLI:NL:RBGEL:2020:3699* [5.11].

898 2019 BCPC 334 (hereinafter *DRB v DAT*).

899 *DRB v DAT* [41]–[43].

These foreign-law considerations all indicate that the protection of individual and public health outweighs personal or religious beliefs, that vaccination is arguably a parental duty, and that failure to comply with this duty may even suggest child neglect.[900]

It may be argued that the *boni mores* favours the imposition of liability according to foreign law.[901] Reiss suggests that the US courts also acknowledge negligent infection as a cause of action.[902] For example, a parent who knows that their child has a communicable disease could be liable for unreasonably exposing others to the child.[903] However, there are two caveats to this statement: (1) the parent must have known; and (2) the parent must have unreasonably exposed others. Reiss concludes that it is "not fair to force others to pay for your own unreasonable choices".[904]

Baxter also suggests that in the US the negligent transmission of a contagious (vaccine-preventable) disease constitutes a cause of action for an individual who has been infected by an unvaccinated child.[905]

5.4.5.6 Conclusions on wrongfulness in the Filia/Elimele hypothetical

To establish the reasonableness of imposing liability a balance must be struck in accordance with what the court conceives to be society's notions of what justice demands. This must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people. In this balancing ac, the following considerations must be assessed and weighed to establish the reasonableness of imposing liability:

(1) The rights, duties, and interests of the parents — in particular parental autonomy and the right/duty to make decisions on behalf of their child.
(2) The rights and interests of the child, for example, the child's right to life and bodily integrity. and

900 See *In Matter of Christine M* 157 Misc 2d4 (NY Fam Ct 1992). See also *Re H (A Child: Parental Responsibility: Vaccination)* (2020) EWCA Civ 664 [21].
901 Reiss (2014) *JLPP* 605; Baxter (2014) *UCLR* 113–114; Kostal (2015) *ABAJ* 17. The foreign courts (US, Canada, England, Australia, Germany, and the Netherlands) have often ruled in favour of vaccination, and that it is usually in the child's best interests.
902 Reiss (2014) *JLPP* 605.
903 As above.
904 Kostal (2015) *ABAJ* 17.
905 Baxter (2014) *UCLR* 113–114.

(3) Legal and policy considerations[906] (constitutionally understood), and the interests and legal convictions of the community (constitutionally understood) — e.g., the protection of public health.[907]

I conclude that Anti has the legal duty to act reasonably, exercise reasonable care, or not negligently cause harm to others (Elimele) and that Anti breached this duty. Furthermore, Anti has a legal duty to respect the constitutional rights of others (Elimele's right to dignity — s 10 of the Constitution) which includes Elimele's physical or bodily integrity (s 12(2)(*b*) of the Constitution)[908] and that Anti breached this duty. As a result, Elimele's dignity (s 10 of the Constitution) and bodily integrity (s 12(2)(*b*) of the Constitution) have been violated.

With reference to *Oppelt*,[909] *Loureiro*,[910] and *Minister of Justice & Constitutional Development v X*[911] discussed above, I suggest that Anti did have a legal duty to act without negligence for purposes of the wrongfulness enquiry. How Anti's duty is irrelevant and our courts have termed it a duty not to cause harm; a duty to act reasonably; a duty to respect rights;[912] a legal duty to act positively to prevent the harm;[913] or a duty to exercise (reasonable) care.[914]

It emerges from the discussion above that in the context of a negligent omission, wrongfulness is established with reference to whether a legal duty (to act reasonably, exercise reasonable care, or not negligently to cause harm) exists and its breach. With reference to the reasonableness of imposing liability, I submit that it would not be fair to penalise a non-vaccinating parent for his or her mere non-vaccinating choice, but if this choice causes compensable harm and the common-law delictual elements are met, this parent must face delictual liability.

Non-vaccinating parents whose non-vaccination decisions do not cause harm should not be subject to the same scrutiny as those non-vaccinating parents held liable in delict. I contend that it would not be fair to penalise non-vaccinating parents for their mere choice not to

906 Mulheron (2020) 65; Witting (2007) *MULR* 571; Dietrich & Field (2017) *MULR* 620; Baxter (2014) *UCLR* 115.
907 Reiss (2017) *SLPS* 11.
908 Loubser & Midgley (2017) 47; Currie & De Waal (2013) 250–251; Woolman "Chapter 36" in *CLoSA* (2014) 19.
909 *Oppelt* [51].
910 *Loureiro* [53].
911 *Minister v X* [13].
912 *Loureiro* [53].
913 *Minister v X* [13].
914 Fagan (2018) 19; Fagan (2019) 158.

vaccinate. However, if this choice results in compensable harm the parents must face delictual liability.

If Anti has a valid defence (ground of justification) that negates the element of wrongfulness, her conduct will not be wroungful and she will arguably not be held liable. As noted in the introduction to this section on wrongfulness and the grounds of justification, it is doubtful whether one of the recognised defences (grounds of justification) against wrongfulness will apply in this hypothetical.

In conclusion, I suggest that it is reasonable to impose liability, and Anti may be held liable for negligently causing Elimele's harm, as all five common-law delictual elements have been met and there is arguably no recognised ground of justification which could negate wrongfulness.

In the following sections, I briefly consider the delictual remedies available to Elimele in the circumstances.

5.5 DELICTUAL REMEDIES

Under the Uniform Rules of Court which apply to civil litigation in the High Court, Rule 33(4) allows the parties to enter into a written agreement that the points of law (i.e., the delictual elements) should first be heard and judged, and that the quantum of damages is a separate issue for which a separate trial is required.[915] This is often referred to as the "separation of issues".[916] For purposes of this brief discussion, the focus is on the delictual remedies available to Elimele.

It is important to distinguish damage (or harm) from damages. In *Kiewitz*[917] the Supreme Court of Appeal noted that "[d]elictual damages have been defined as the 'monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage.'"[918]

First, "damage" refers to the delictual element of harm, and "damages" refers to the monetary award or compensation.[919] So, a person may suffer "damage" but cannot suffer "damages" — in short, damages are to be enjoyed not suffered! In the following section, I

---

915 See the Uniform Rules of Court (updated to 1 December 2020) http://www.saflii.org/images/superiorcourts/Uniform%20Rules%20of%20Court%20[F].pdf (accessed 29 November 2022). An order for the separation of issues (in appropriate cases) may also be made notwithstanding the absence of agreement by the parties thereto (see Rule 37A of the Uniform Rules of Court).

916 See Rule 37A dealing with judicial case management, specifically (12)(f).

917 *The Premier of the Western Cape Provincial Government v Rochelle Madalyn Kiewitz* 2017 (4) SA 202 (SCA) (hereinafter *Kiewitz*).

918 *Kiewitz* [4] with reference to Potgieter *et al* (2012) 185.

919 TJ Scott "Damage(s): reflections on the misuse of legal terminology" (2016) 113(4) *SALJ* 716.

explore delictual remedies with reference to the three historic actions identified in the introduction to this chapter.

However, this discussion does not include the quantum of damages. For purposes of this thesis, and this chapter in particular, the question is whether a non-vaccinating parent may potentially face delictual liability and not necessarily the quantum of damages.

In *Van der Merwe v RAF* the Constitutional Court (per Moseneke DCJ) skilfully expressed what is meant by non-patrimonial damages:

> […] non-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general [non-patrimonial] damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include 'pain and suffering', 'disfigurement', and 'loss of amenities of life.'[920] (Footnotes omitted.)

Moseneke DCJ, equally neatly, also summarised what is meant by patrimonial damages:

> Thus patrimonial damages, which in practice are also called special damages,[921] aim to redress,[922] to the extent that money can, the actual or probable reduction of a person's patrimony [*universitas*] as a result of the delict or breach of contract. In this sense patrimonial [or special] damages are said to be a 'true equivalent' of the loss. Ordinarily they are calculable in money. Well-settled examples in bodily injury claims are past and future medical expenses, past and future loss of income, loss of earning capacity, and loss of support.[923] (Original footnotes omitted, own footnotes inserted.)

Patrimonial damages are often expressed in money based on objective criteria reflecting the genuine or true equivalent of the harm.[924] Financial rights and obligations that may arise in the future are included in this concept.[925]

---

920 *Van der Merwe v RAF* [39].

921 Loubser & Midgley (2017) 487: the term "special damages" refers to those damages that are "specially pleaded and proven, in other words, those items of loss that one can specify, list and quantify."

922 Klopper (2017) 6 (fn 31) refers to the word "redress" to mean "the money paid is incapable of actually or really compensating for the harm caused", and is usually referred to in the context of non-patrimonial harm.

923 *Van der Merwe v RAF* [38].

924 Neethling & Potgieter (2020) 259–260; *Van der Merwe v RAF* [38].

925 Loubser & Midgley (2017) 80–81. See *Jowell* for a discussion on a claim on prospective loss alone. See Loubser & Midgley (2017) 81 for a discussion of *Jowell* and the possibility of a contingency allowance in the context of the "once and for all" rule and prescription.

As noted above, the Germanic action for pain and suffering and the *actio iniuriarum* provide satisfaction (solace, *solatium*, or *genoegdoening*)[926] for non-patrimonial harm or loss, while the *actio legis Aquiliae* is primarily intended to provide compensation.[927]

Elimele may claim non-patrimonial damages under the Germanic action for pain and suffering if it is linked to physical (bodily) injury — falling ill and the removal of his right lung.

The Constitutional Court stated in *Van der Merwe v RAF* that an award for general damages aims to "redress a breach of a personality right" and "also accrues to the successful claimant's patrimony"[928] as

> the primary object of general damages too, in the non-patrimonial sense, is to make good the loss; to amend the injury. Its aim too is to place the plaintiff in the same position she or he would have been but for the wrongdoing.[929]

The above assertion is open to criticism in that non-patrimonial damages cannot necessarily restore the *status quo ante* (before the harm-causing event) — i.e., the plaintiff is placed in the position in which he or she was before suffering the non-patrimonial harm. For example, a monetary award will not give Elimele his right lung back or restore him to the position before he sustained PTSD and depression.

Damages may be claimed by means of the *actio legis Aquiliae* (compensation for non-patrimonial loss); the Germanic action for pain and suffering (reparation for infringements of physical-mental integrity); and the *actio iniuriarum* (satisfaction for personality right infringements).[930] As indicated above, pain and suffering are not as easily quantifiable as patrimonial damages in that they have no market value.[931] It is for this reason that the damages awarded for non-patrimonial loss may also be referred to as "general damages" (estimated lump sum). However, the term "general damages" may also refer to patrimonial loss and is not reserved for non-patrimonial loss only.[932]

The negative interest or sum-formula approach (or abstract comparative method) may be used to assess and quantify patrimonial damages (under *Aquilian* liability),[933] which are

926 *Hoffa* at 954–955 (cited with approval by the SCA in *Dikoko* [62]). See also *Administrator of Natal v Edouard* 1990 (3) SA 581 (AD) [41].
927 Neethling & Potgieter (2020) 258; *Kiewitz* [6].
928 *Van der Merwe v RAF* [41].
929 As above.
930 Loubser & Midgley (2017) 486; Zitzke (2020) *TSAR* 424.
931 Neethling & Potgieter (2020) 260.
932 Loubser & Midgley (2017) 487.
933 See *Transnet v Sechaba Photoscan* (2004) ZASCA 24 [15]; Neethling & Potgieter (2020) 266.

specially pleaded and proven. In short, the sum-formula method considers the difference between the person's current patrimonial position (after the delict) and the hypothetical patrimonial position that the person would have been in if the delict was not present.[934]

In *Kiewitz* the Supreme Court of Appeal stated that "[t]he purpose of an *Aquilian* claim is to compensate a victim in money terms for any loss suffered".[935] In *MEC v DZ* the Constitutional Court also confirmed that "[t]he purpose of an *Aquilian* claim is to compensate the victim in money terms for his loss".[936]

From the above, it is clear that compensation is the purpose of *Aquilian* liability. On the other hand, the award for non-patrimonial damages (for pain and suffering or under the *actio iniuriarum* where intent is required) serves as a symbolic restoration, solace, satisfaction, or reparation, and not compensation.[937] Notably, pain and suffering have no market value and the court has a wider discretion in assessing these damages and substantiating its award. In *RAF v Marunga*[938] the Supreme Court of Appeal stated that

> [the] court should at the very least state the factors and circumstances it considers important in the assessment of damages. It should provide a reasoned basis for arriving at its conclusions.[939]

According to the above, during the assessment of damages the court considers all the relevant circumstances and factors to substantiate its award. In *Southern Insurance Association v Bailey*,[940] the Supreme Court of Appeal held that an award for general damages should be approached in a flexible manner.[941] This means that all the relevant circumstances of the case are considered (as in *Marunga* above) and that the function served by the award may also be considered.[942]

According to the Supreme Court of Appeal in *Bailey*, the judge's notion of what is fair also plays a part in the quantification of an award for general damages.[943] In *Protea Assurance v Lamb*[944] the Supreme Court of Appeal stated that when general damages are awarded for pain and suffering, permanent disability, disfigurement, and loss of amenities of life the judge has a wide discretion to determine what fair and adequate compensation will be. The court continued

---

934 Neethling & Potgieter (2020) 266.
935 *Kiewitz* [6].
936 *MEC v DZ* [14].
937 Loubser & Midgley (2017) 488.
938 (2003) 2 All SA 148 (SCA) (hereinafter *Marunga*).
939 *Marunga* [33] (coram: Marais JA, Navsa JA, & Heher AJA).
940 1984 (1) SA 98 (A) (hereinafter *Bailey*).
941 *Bailey* at 119.
942 *Bailey* at 119F–120A.
943 *Bailey* at 114.
944 1970 (1) SA 530 (A) (hereinafter *Lamb*).

to explain that comparable cases may be used as a tool to guide the court in what is generally awarded in similar cases, but that comparable cases do not "fetter upon the court's general discretion" and these comparable cases also do not fix the amount to be awarded.[945]

The once-and-for-all rule has been explored above and is not repeated here. However, Elimele must comply with the once-and-for-all rule when claiming damages.

An interdict is also a delictual remedy which may be relevant in addition to the delictual claim for damages. The two interdicts relevant in this context are: (1) prohibitory and (2) mandatory interdicts. The mandatory interdict mandates a person to do something, for example, it requires positive action from the wrongdoer.[946] The prohibitory interdict prohibits a person from doing something, for example, requiring that the wrongdoer desists from wrongful conduct or continuing wrongful conduct.[947]

Notably, interdicts may also be final (permanent) or temporary (pending the outcome of another hearing).[948] In *Hotz v University of Cape Town*[949] the Supreme Court of Appeal confirmed the requirements for an interdict as follows:

> The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.[950]

Thus, for Elimele to obtain an interdict against Anti, he will have to prove the above requirements. However, it is not necessary to prove a delict to obtain an interdict. For example, as soon as it came to light that Filia had COVID-19, the school could have obtained an interdict to prevent Filia from entering the school premises in an effort to protect those present. The requirements for an interdict must however be satisfied. A mandatory interdict may, for example, order Anti to vaccinate Filia. Once again, the requirements for the interdict must be met before an interdict of this nature will be granted.

It is worth noting that the court may mandate Anti to vaccinate Filia without relying on an interdict as the court is the upper guardian of all minors and may mandate vaccination if it court deems it to be in Filia's best interests.

---

945 *Lamb* at 534H–536B.
946 Loubser & Midgley (2017) 525.
947 As above.
948 As above.
949 2017 (2) SA 485 (SCA) (hereinafter *Hotz*).
950 *Hotz* [29].

In the previous chapters, I discussed substitute consent (or replacement permission), and the role that it may play in the context of non-vaccination.[951] However, substitute consent is not a delictual remedy as the court may order a child to be vaccinated without the elements of the tort of negligence being satisfied. Similarly, if the High Court, as upper guardian of all minors, orders that a child must be vaccinated it can do so without the requirements of the common-law delict having been proved.[952]

As stated in the introduction to this chapter, a delictual remedy based on ubuntu, emphasising restorative rather than retributive justice may also be considered. In the context of non-vaccination, a remedy based on ubuntu may promote a

> face-to-face encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community.[953]

This may be aimed at creating "conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted".[954] Although an apology is often a delictual remedy for defamation,[955] I argue that there is no reason why it cannot be offered in addition to the claim for damages under the *actio legis Aquilia* and the Germanic action for pain and suffering. For example, a monetary award of damages will not restore Elimele's right lung, but an apology, in line with the notions of ubuntu, may very well achieve symbolic restoration and perhaps restore harmony within the community. In *Dikoko v Mokhatla*, Mokgoro J stated:

> Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of ubuntu emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence. It is an area where courts should be proactive, encouraging apology and mutual understanding wherever possible.[956] (Footnotes omitted.)

---

951 See the Dutch cases, as discussed in the previous chapters, e.g.: *ECLI:NL:GHARL:2019:10763*; *ECLI:NL:GHDHA:2020:257*; *ECLI:NL:RBGEL:2020:3699*; *ECLI:NL:RBOBR:2018:4218*; *ECLI:NL:RBOBR:2018:6742*; *ECLI:NL:RBROT:2019:693*.

952 See s 129(9) of the Children's Act.

953 *Dikoko* [116].

954 As above.

955 D Milo "'It's hard for me to say I'm sorry': apology as a remedy in the South African law of defamation" (2012) 4(1) *JML* 11–16; see generally *Le Roux v Dey*; *Reddell v Mineral Sands Resources* (2022) ZACC 38; *Media 24 v Taxi*; *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC).

956 *Dikoko* [68]–[69].

Sachs J (concurring with Mokgoro J) continued to explain:

> Although *ubuntu-botho* and the *amende honorable* are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. Both are directed towards promoting face-to-face encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures the centre-piece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted.[957]

This also correlates with the constitutional values (and rights) of equality, human dignity, and freedom. A delictual remedy based on the philosophy of ubuntu reinforces these constitutional values and recognises that the wrongdoer is also worthy of equality, human dignity, and freedom. The wrongdoer and the victim have an opportunity to acknowledge each other and reconcile their differences. It is not intended to punish the wrongdoer, but rather to restore the harmony between the parties and the community, aiding as a form of therapy and symbolic restoration.

Damages alone do not directly address these constitutional values but a remedy based on the African philosophy of ubuntu may speak to these constitutional values and reinforce their importance on an interactive and personal level. I do not suggest that this remedy based on ubuntu is one that can necessarily be forced as it must be sincere. However, there must be some accommodation for a form of apology founded on an ubuntu-based remedy.

This suggestion does not seek to override or replace the traditional functions and remedies of the common-law delict. It merely aims to supplement the already existing delictual remedies and perhaps create room for the development of the common law of delict's functions in line with the constitutional values of equality, human dignity, and freedom.

Before concluding this chapter, it is also worth briefly considering the procedural issue of prescription.

> Prescription commences to run as soon as the debt is due and this occurs from the moment all the elements of a delict are present, provided also that the creditor has knowledge (or ought reasonably to know) of the identity of the wrongdoer and the facts from which the debt arises. But a creditor shall be deemed to have such knowledge if he could have acquired it by reasonable care. The ending of prescription may be suspended or interrupted.[958] (Footnotes omitted.)

957 As above.
958 Neethling & Potgieter (2020) 318.

The prescription of a delictual debt prescribes three years after it originated.[959] However, in the case of minors, sections 3(1)(*a*)–(c) read with section 13(1) of the Prescription Act 68 of 1969 provides prescription will only commence once the minor reaches the age of majority (18 years).[960] In terms of section 13(1), Elimele must bring his claim within one year after turning 18. This is so because section 13(1)(*i*) states that

> the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) [i.e. creitor is a minor] has ceased to exist [i.e. creitor turns 18], the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

In the following section, I briefly touch on constitutional damages in the context of non-vaccination.

5.6 CONSTITUTIONAL DAMAGES AND NON-VACCINATION

Section 38 of the Constitution provides that when a right has been infringed or threatened an effective remedy must follow with the granting of appropriate relief.[961] At common law, the expression is *ubi ius ibi remedium* (wherever there is a right there must be a remedy).

Loubser and Midgley posit that the infringement of a constitutional right invokes a constitutional remedy.[962] Currie and De Waal suggest that constitutional remedies are only available when the Bill of Rights is directly applied.[963] Constitutional remedies include: (1) declarations of rights; (2) declarations of invalidity; (3) interdicts (mandatory and prohibitory); and (4) constitutional damages.[964]

However, this assertion is subject to some important qualifications. Zitzke suggests that it is only when "the common law cannot be stretched far enough to live up to the constitutional aspirations" that "constitutional damages could step in and save the day".[965] He continues to

---

959 Potgieter *et al* (2012) 155.

960 See s 3(1)(*a*): "If the person against whom the prescription is running is a minor […] the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (*c*)." See also *Combrink v RAF* (2015) ZAGPPHC 760; Loubser & Midgley (2017) 249, 252–253.

961 Brickhill & Friedman "Chapter 59" in *CLoSA* (2014) 9.

962 Loubser & Midgley (2017) 36.

963 See Currie & De Waal (2013) 26.

964 Currie & De Waal (2013) 180. See also Price (2014) *SALJ* 498: "the remedy of constitutional damages, first recognised in […] *Modderklip* […], remains relatively under-developed in South African law […]". See also Carstens & Pearmain (2007) 556.

965 Zitzke (2020) *TSAR* 436, see also Brickhill & Friedman "Chapter 59" in *CLoSA* (2014) 24 with reference to *Modderklip*, and Brickhill & Friedman at 101 with reference to *MEC for the Department of Welfare v Kate*

explain that "constitutional damages would act as a safety net that catches those disputes where delict is hopeless",[966] but that because the common law of delict is continuously reimagined, "it is generally not hopeless and can usually meet the needs of a constantly changing society".[967]

It is for this reason that the common-law delict is explored in this thesis and not constitutional damages. As mentioned, the elements of the common-law delict must be satisfied before delictual damages may be claimed. In the context of non-vaccination, the common-law delict appears to have the potential of meeting the needs of a constantly changing society and it would be unnecessary to consider constitutional damages in this context. Although the Constitution is considered in the delictual context, this does not extend to an automatic award of constitutional damages.

As mentioned, constitutional values, norms, and rights are considered in the common-law delictual context to avoid "constitutional heedlessness" as coined by Zitzke. The avenue for pursuing further research on the point of constitutional damages in the context of non-vaccination remains open but is not explored in this thesis.[968]

5.7 CONCLUSION

In the introduction to this chapter, I indicated how different scholars debate the definition of the law of common-law delict, as well as the debates on the order in which the common-law delictual elements must be investigated.

In the context of non-vaccination, the common-law delictual element of harm is perhaps the most important preliminary element to consider. The element of damage is important in the context of non-vaccination as it is the element that sets the common-law delictual investigation in motion. For example, if Anti's non-vaccination caused no harm there would be no common-law delict or compensable harm. This may seem obvious in light of the common-law delictual elements discussed above, but it is important to reiterate why this is so important. The element of harm is essential because it prevents situations where non-vaccinating parents are subjected to scrutiny based on their mere decision not to vaccinate. The mere non-vaccination decision itself cannot support a common-law delictual action. Non-vaccinating parents cannot be

2006 (4) SA 478 (SCA). See also Currie & De Waal (2013) 203 with reference to *Modderklip*. See also Price (2014) *SALJ* 498.

966 Zitzke (2020) *TSAR* 436. See also Currie & De Waal (2013) 201 with reference to *Fose*.

967 Zitzke (2020) *TSAR* 436.

968 See Price (2014) *SALJ* 498–500 for a discussion of the potential benefits of constitutional damages. See also Carstens & Pearmain (2007) 556.

prejudiced based simply on non-vaccinating decisions. It is only when this decision causes harm that an investigation into potential delictual liability arises. It is for this reason that the element of harm is explored as the first delictual element in this chapter.

As explored above, Elimele may claim patrimonial damages (under the *actio legis Aquiliae*) and non-patrimonial damages (under the Germanic action for pain and suffering and the *actio iniuriarum* if intent is present) if all of the elements of the specific action have been satisfied. Prospective damages may be claimed in addition to damages already sustained but it is uncertain whether Elimele can claim for prospective loss alone without claiming for damages already sustained. I suggest that a premature delictual action must be avoided where Elimele has not yet suffered harm. For purposes of this chapter, it is accepted that Elimele has suffered both patrimonial and non-patrimonial harm.

Regardless of the preferred definition of the common-law delict or the order of investigation, the common-law delict may serve as an appropriate vehicle to compensate a victim of non-vaccination. The three historic actions are of importance in the context of non-vaccination, especially in considering the delictual elements of harm, causation, and fault.

In this chapter, the element of conduct is explored after the element of harm, and it is accepted that Anti's conduct is voluntary and there is no defence to exclude its voluntariness. The element of conduct, in the context of non-vaccination, may take the form of a commission, an omission, or both. As seen in this chapter, the form of conduct (commission or omission) dictates the tests for causation and wrongfulness.

As was shown, for purposes of the *actio iniuriarum* causation is, strictly speaking, not a requirement but intent is. However, causation is a requirement for the *actio legis Aquiliae* and the Germanic action for pain and suffering. Once again, the interplay between these three historic actions may influence the five general elements of the common-law delict. In this chapter, factual causation is established with reference to the *conditio sine qua non* theory, as well as the material contribution test; the employment of common sense; reference to human experience and knowledge; and increasing risk and/or creating opportunities for the occurrence of harm.

Legal causation considers whether the harm suffered by Elimele is sufficiently closely or directly connected to Anti's (wrongful) conduct for legal liability to ensue. Legal causation is determined in a flexible manner with reference to constitutional values. When determining remoteness, the traditional factors (direct consequences test; the reasonable foreseeability test; and *novus actus interveniens*) are used against the backdrop of "considerations of public policy

as infused with Constitutional values". For purposes of this chapter, it is accepted that legal causation is established, and the element of fault is considered next.

As we established, either intention or negligence suffices for liability under the *actio legis Aquiliae* and the action for pain and suffering, but for the *actio iniuriarum* negligence alone is insufficient and intent is generally required. It is accepted that Anti is *culpae capax*. The possibility of *dolus eventualis* was explored, and if *dolus eventualis* is present it may suffice for purposes of the *actio iniuriarum*. Negligence, as a form of fault, was explored in detail with reference to the reasonable foreseeability and preventability of harm, and whether Anti took appropriate reasonable steps. It was concluded that Anti acted negligently and that her negligence is a sufficient form of fault for purposes of the *actio legis Aquilia* and the Germanic action for pain and suffering.

The last delictual element explored is wrongfulness. This delictual element has been the subject of recent debate and is explored in detail in the context of non-vaccination. First, the element of wrongfulness was explored with reference to Anti's commission, and thereafter her omissions. Findings of *prima facie* wrongfulness may be rebutted by Anti. As mentioned, the focus of the wrongfulness enquiry is centred on Anti's negligent omissions and the reasonableness of imposing liability. Depending on which of these elements are present, a claim for damages may be brought under any one of the three historic actions.

In terms of tort law, the traditional rule is that there is no liability for failure to act. This correlates with the common-law delict which generally holds that there is no liability for an omission. The failure to vaccinate (non-vaccination) itself is thus insufficient to establish liability for the tort of negligence[969] or the common-law delict. All the elements of the common-law delict must be satisfied before a person, like Elimele, may hold a non-vaccinating parent, like Anti, liable in delict. For both the tort of negligence and the common-law delict the elements must be complied with before damages can be claimed. This, in itself, serves as a liability regulator. The mere choice of non-vaccination does not automatically result in delictual damages.

Delict, like tort, aims to shift the responsibility to pay damages for the harm to another[970] based on the underlying principle of *res perit domino.* Thus, the common-law delict may internalise the costs of the choice (non-vaccination),[971] and reallocate and spread the loss caused by non-vaccination.

969 Reiss (2014) *JLPP* 605–606.
970 Roederer (2009) *AJICL* 469; Loubser & Midgley (2017) 9.
971 Reiss (2014) *JLPP* 598.

As was shown, the common-law delict protects the interests of the plaintiff (Elimele), the defendant (Anti), and society in general,[972] and the common-law delict attempts to reconcile a conflict of these interests in an optimal way.[973] Based on this reasoning, it may also be appropriate to consider a remedy based on the philosophy of ubuntu, aimed at symbolic restoration, as opposed to merely penalising a non-vaccinating parent for the harm their choice has caused. Imposing delictual liability on a non-vaccinating parent inevitably places a limit on parental autonomy[974] and on the non-vaccinating parent's constitutional rights.[975]

Zitzke suggests that the doctrine of adjudicative subsidiarity is the most appropriate "conceptual machinery to strike a balance between" constitutional heedlessness and constitutional over-excitement discussed in Chapter 1.[976] The Constitution and its role in the delictual enquiry cannot be overlooked. The Constitution and its values must be carefully used and woven into the delictual enquiry.

As mentioned, the interests of society are of great importance and the common-law delict is not like a tennis match where a back-and-forth between two parties is the only consideration. The delictual investigation is closer to a game of three-dimensional chess where the careful analyses of all the pieces are important, and their specific role, function, placement, and how they interact and outweigh each other. I mention three-dimensional, because the constitutional dimension changes the traditional landscape and approach to the common-law delict and prompts further thinking, analyses, and approaches to delictual issues and solutions.

For example, the delictual element of wrongfulness is underpinned by constitutional considerations which inform the reasonableness of imposing liability. The reasonableness of imposing liability will essentially determine whether a non-vaccinating parent like Anti may be held delictually liable for a choice which caused harm to another.

According to foreign law, specifically that of the US, Germany, and Australia, the sincere belief (of the non-vaccinating parent) that the conduct (non-vaccination) is reasonable, is immaterial[977] and the applicable standard is objective — what would the reasonable person do?[978] As discussed, this resonates with the Dutch approach to liability, and reference to the *zorgplicht* (duty of care)[979] and the *maatschappelijke zorgvuldigheidsnormen* (social due care

---

972 Loubser & Midgley (2017) 22.
973 As above.
974 Reiss (2014) *JLPP* 610; see also Reiss (2018) *TJB* 73.
975 Baxter (2014) *UCLR* 116–121.
976 Zitzke (2015) *CCR* 259–260.
977 Reiss (2014) *JLPP* 598; Finch & Fafinski (2021) 39; Barker *et al* (2012) 12–13; Koziol (2015) 482.
978 Reiss (2014) *JLPP* 598; Finch & Fafinski (2021) 36; Koziol (2015) 787–788; Barker *et al* (2012) 12–13; Dietrich & Field (2017) *MULR* 605.
979 *ECLI:NL:GHSHE:2018:2793* [6.4.17].

standard)[980] expected of the reasonable person, as well as the failure to exercise reasonable care (*im verkehr erforderliche sorgfalt*).[981] Similarly, in the South African delictual context, the best intentions of the non-vaccinating parent do not excuse his or her failure to act as a reasonable person in similar circumstances.

Although the reasonable non-vaccinating person believes that she is acting in the best interests of her child, she must also avoid creating or causing harm or (substantial) risk of harm to other children.[982] This resonates with the approach to delictual liability under German law, which holds that when interacting with everything externally (*verkehr*)[983] care is required (*erforderlich*).[984]

If this harm materialises, and all the elements of the common-law delict are satisfied, a non-vaccinating parent may be held delictually liable for their non-vaccinating choice which has caused another harm. This is similar to negligence in the US, which generally holds people to a community standard. If people deviate from that standard they are liable for the harm they cause to another and are required to compensate the injured party.[985]

Holding a non-vaccinating parent liable for delictual damages still does not adequately address the issue of non-vaccination. The common-law delict is arguably not a suitable mechanism for addressing the social issue of non-vaccination and sub-optimal vaccination rates, and legislative intervention is required to address the issue of non-vaccination directly.

In the next chapter, I offer recommendations and suggestions for legislative reform inspired by foreign law. This legislative reform will not only address the social issue of non-vaccination but will also inform the delictual investigation and aid litigants to navigate the trickier common-law delictual elements like causation and wrongfulness.

980 *ECLI:NL:RBNNE:2021:2160* [4.5].
981 Dyson (2015) 157; Koziol (2015) 477.
982 Rodal & Wilson (2010) *MJLH* 53.
983 Dyson (2015) 157 & 155.
984 Dyson (2015) 157.
985 Reiss (2014) *JLPP* 598.

CHAPTER 6: IS THERE A NEED FOR STATUTORY REFORM?

6.1 INTRODUCTION

In Chapter 5, I explored the potential delictual liability of non-vaccinating parents and concluded that they may be held delictually liable for the non-vaccination of their child and the harm it causes another, only if the elements of the common-law delict are met. However, this does not address the social issue of non-vaccination.

In this chapter, I consider the need for statutory reform in the context of non-vaccination and specifically the common law of delict. First, I elaborate on the consequences of imposing delictual liability on non-vaccinating parents and how these consequences necessitate statutory reform. I also explore how statutory reform may aid the delictual investigation with specific reference to the delictual elements where statutory reform will play a role (e.g., causation, fault, and wrongfulness).

The goal of this chapter is, therefore, to propose statutory reform that will assist litigants to navigate the delictual elements in their quest to hold a non-vaccinating parent liable in delict. For now, I consider the consequences of imposing delictual liability on non-vaccinating parents and why this necessitates statutory reform.

6.2 CONSEQUENCES OF IMPOSING DELICTUAL LIABILITY ON NON-VACCINATING PARENTS

Under the element of wrongfulness in Chapter 5, I explored some of the social consequences of imposing liability to establish the reasonableness of imposing liability with reference to a legal duty. In that discussion, I explored the floodgates argument, the limitation of parental autonomy, and deterrence. This is not repeated here. The aim of the current discussion is not limited to the element of wrongfulness and aims to show how the consequences of imposing delictual liability necessitate statutory reform.

6.2.1 Deterrence of non-vaccination and the promotion of vaccine uptake

The deterrence argument is essentially rooted in the economic theory of tort law[1] which is, according to Reiss, a secondary issue as the primary goal is to compensate those injured as a

[1] Karako-Eyal (2017) *UMKCLR* 13.

result of non-vaccination.[2] Under the economic theory, tort law should internalise the social costs of non-vaccinating parents through liability.[3]

For Reiss, torts are not a viable measure to combat and deter non-vaccinating parents and should not be used as such.[4] It is suggested that the chances of tort liability motivating parents to vaccinate their children are even slimmer in the case of parents who refuse to vaccinate their children based on religious or philosophical considerations.[5]

Although the same may be said of the common-law delict in this context, deterrence may be an inevitable consequence if non-vaccinating parents are successfully held delictually liable for the non-vaccination of their children.[6] This means that parents may opt to vaccinate their children in an effort to avoid delictual liability.

Reiss suggests that tort lawsuits in the US may encourage more children to be vaccinated[7] as the financial sanctions of tort litigation may serve as an incentive to vaccinate.[8] Although the same may be said in the South African context, I submit that the common-law delict cannot, and should not, be used as a mechanism to address vaccine hesitancy and promote vaccine uptake based on deterrence.

Karako-Eyal and Reiss agree that it is doubtful whether tort law will create a pro-vaccination incentive[9] as studies suggest that non-vaccinating parents are unlikely to change their decision.[10] Hence, non-vaccinating parents may continue to choose non-vaccination despite the possibility of incurring liability in delict as they often believe that they are acting in their child's best interests.

Reiss supports the argument that although torts do not aim to make vaccinations mandatory, their goal is to internalise the cost of the choice (non-vaccination).[11] I agree with Reiss and submit that the common-law delict should not be used as a mechanism to mandate vaccination. Mandatory childhood vaccination must be addressed by statutory reform.

---

2 Reiss (2014) *JLPP* 598.
3 Karako-Eyal (2017) *UMKCLR* 13.
4 Reiss (2014) *JLPP* 598; Karako-Eyal (2017) *UMKCLR* 12.
5 As above. The current literature focuses mainly on doctrinal questions and not a thorough theoretical analysis of the justifications for the adoption of a liability model.
6 See Ciolli (2008) *YJBM* 135; Karako-Eyal (2017) *UMKCLR* 12: whether imposing liability on non-vaccinating parents would, in fact, cause them to change their behaviour and vaccinate their children has received only scant attention in current writings and Karako-Eyal notes that this absence of a thorough theoretical discussion regarding this question troubling.
7 Kostal (2015) *ABAJ* 18.
8 Karako-Eyal (2017) *UMKCLR* 13; JK Billington & SB Omer "Use of fees to discourage nonmedical exemptions to school immunization laws in US States" (2016) 106(2) *AJPH* 269–270.
9 Karako-Eyal (2017) *UMKCLR* 24 & 31.
10 As above.
11 Reiss (2014) *JLPP* 598.

In the South African context, the common-law delict may inadvertently be used as a tool to deter and punish non-vaccinating parents. Deterrence and punishment are not *per se* the goal of the common-law delict in the context of non-vaccination but are the consequence. This is because non-vaccinating parents will be penalised for their choice and the harm resulting from that choice if the *essentialia* of the common-law delict are satisfied. Hence, the common-law delict shifts the liability for the harm suffered from the victim to the wrongdoer. But this is not the issue here, the issue is that the consequence of deterrence is not the appropriate way in which to address the social issue of non-vaccination.

Even if the common-law delict acts as a deterrent and impacts on parental decisions, it is still not enough to address the issue of non-vaccination. I submit that CANSA and EPI-SA must continue their efforts to combat non-vaccination. Furthermore, statutory reform must assist with vaccine uptake. For example, legislation mandating specific childhood vaccines must be enacted to promote vaccination and deter non-vaccination, as opposed to relying on the common-law delict to deter non-vaccination and promote vaccine uptake.

The second issue requiring legislative intervention and clarification is parental autonomy in the context of non-vaccination.

6.2.2 Limitation of parental autonomy

In Chapter 5, I discussed the limitation of parental autonomy in the context of wrongfulness and concluded that the limitation of parental autonomy does not negate imposing liability in the Filia/Elimele hypothetical. In the context of non-vaccination, parental autonomy refers to the responsibilities of parents and the autonomy they require to be able to act.[12]

As noted in Chapter 5, Reiss suggests that imposing liability on a non-vaccinating parent inevitably places a limitation on parental autonomy.[13] In support, Baxter raises the issue of liability as an infringement of parents' federal constitutional rights[14] and privacy rights granted by states.[15] Holding a non-vaccinating parent liable in delict essentially limits his or her parental autonomy as a consequence of delictual liability in the context of non-vaccination.

---

12 Reiss (2018) *TJB* 73.

13 Reiss (2014) *JLPP* 610. Also see Reiss (2018) *TJB* 73.

14 Baxter (2014) *UCLR* 116–121: according to Baxter, critics argue that imposing liability on non-vaccinating parents infringes their rights under the US Constitution. The consideration of various rights and the effect of tort liability have been addressed by the courts. Baxter explores "substantive due process rights" as well as the "first amendment free exercise clause" under this discussion.

15 Baxter (2014) *UCLR* 125 explores the privacy rights guaranteed by various state constitutions or statutes. Baxter notes that the right of privacy is not absolute, and in some cases is subordinate to the state's fundamental right to enact laws which promote public health, welfare, and safety.

The goal of exploring parental autonomy here is to see how statutory reform may assist in protecting, promoting, and delineating parental autonomy in the context of non-vaccination, and how statutory reform on this point may aid litigants in the common-law delictual enquiry.

I suggest that statutory reform in South Africa should include provisions on parental autonomy and how they fit into the mandatory childhood vaccination conundrum. For example, tort claims may be defended by relying on parental immunity,[16] and parental immunity "offers a defence to negligence claims regarding, among other things, medical decisions for the child".[17] Statutory reform in South Africa must address whether parental immunity (or autonomy) offers a defence to delictual claims rooted in non-vaccination.

The common-law rights and duties of parents, like parental autonomy, must be clearly outlined in legislation in the context of vaccination. This will ultimately assist litigants in proving the delictual elements of, for example, wrongfulness. It will also establish whether parental autonomy is a defence against the element of wrongfulness.

Reiss argues that "parental immunity should not shield parents from tort claims brought by their unvaccinated children".[18] I agree and suggest that in the South African context parental autonomy does not automatically render non-vaccination lawful or negate a claim for common-law delictual damages. I submit that parental autonomy in the context of non-vaccination and statutory reform must be clearly outlined and defined with reference to the child's best interests.

Parental autonomy that is not exercised within the scope of the child's best interests will hardly serve as a meaningful consideration in the context of non-vaccination in that the child's best interests remain of paramount importance in the vaccination conundrum. Only if parental autonomy is expressly exercised in the best interests of the child and not the best interests of the non-vaccinating parent, can it be meaningfully used to explore whether it should serve as a defence against the delictual element of wrongfulness. Coupling parental autonomy and the best interests of the child will also aid the litigants in a common-law delictual suit as there is a statutory expectation or duty that the exercise of parental autonomy is for the child's benefit. If it is not, then it can hardly serve as a meaningful defence against wrongfulness.

Parental autonomy is not the only consideration which must be addressed in statutory reform — philosophical, religious, or moral convictions are as important, including how they

16 Reiss (2018) *TJB* 74.
17 As above.
18 As above.

fit into the mandatory childhood vaccination legislation. In the next section, I explore the limitation of cultural and religious rights and personal beliefs.

6.2.3 Limitation of cultural and religious rights, and personal beliefs

As noted in Chapter 2, parents often object to vaccination on the basis of various philosophical, religious, or moral convictions. Karako-Eyal suggests that these convictions frequently "override or ignore" the rational thought process and the decision to vaccinate.[19]

As mentioned in Chapters 3 and 5, in South Africa the choice of non-vaccination is constitutionally protected (ss 15 and 30 of the Constitution). Despite the constitutional protection afforded the cultural and religious rights and personal beliefs of non-vaccinating parents, common-law delictual liability shifts these rights to the back burner in favour of imposing liability via the element of wrongfulness.

This means that cultural and religious rights and personal beliefs are limited by common-law delictual liability. The goal of this discussion is to show how statutory reform may assist in protecting, promoting, and balancing the relevant cultural and religious rights and personal beliefs of non-vaccinating parents. I submit that these rights can only be afforded meaningful protection through exemptions from mandatory vaccination. I submit that regardless of the reasons underlying non-vaccination, the religious and cultural rights and freedoms of non-vaccinating parents cannot be discarded in favour of blanket mandatory vaccination. Statutory reform (i.e. amending the Children's Act) must consider the rights and interests of non-vaccinating parents, specifically their religious and cultural rights and freedoms. In turn, this will determine the exact scope of philosophical, religious, or moral exemptions from mandatory childhood vaccinations.

First, I suggest that an exemption from mandatory childhood vaccinations is not only a right afforded to non-vaccinating parents but also encompasses duties. Statutory reform must thus envision the steps that a non-vaccinating parent must take to prevent harm to others when opting out of mandatory vaccinations and relying on an exemption. Thus, the exemption allows the non-vaccinating parent to opt out of certain mandatory childhood vaccinations subject to him or her following certain prescribed steps when relying on this exemption. These duties must be extended beyond the scope of the child's best interests and include the interest of third parties and public health and safety.

---

19 Karako-Eyal (2017) *UMKCLR* 24.

Hence, non-vaccinating parents are duty-bound to protect the health of their unvaccinated child, as well as the health and safety of others with whom the child comes into contact.

Statutory reform must include these duties. For example, when relying on an exemption to mandatory childhood vaccinations the parent must: (1) warn and inform others when their child is ill; (2) self-isolate their child when that unvaccinated child displays symptoms of a vaccine-preventable childhood disease; (3) inform others with whom the child has come into contact that the child is unvaccinated and ill; and (4) inform the day care or school beforehand that their child is unvaccinated.

If the exemptions from mandatory childhood vaccinations are clearly set out in legislation it will make it easier for litigants to navigate the common-law delictual elements as the legal duty and defences negating wrongfulness will be clear. Compliance with the statutory duties envisioned by the exemptions may in turn protect and accommodate the non-vaccinating parents without unnecessarily impeding or limiting their constitutional rights. Compliance with the statutory duties envisioned by the exemptions also protect the unvaccinated child and vulnerable individuals (e.g., the immunocompromised) and public health.

Furthermore, the duties linked to the exemption may aid litigants when navigating the common-law delictual element of fault — specifically negligence — as reasonable foreseeability and reasonable preventability may be included in these duties. The legislation must, for example, include a section stating that the failure to comply with these statutory duties linked to the exemption render it reasonably foreseeable that harm may ensue as a result of non-compliance. These duties may also include a provision stating that they intend to prevent the reasonably foreseeable and preventable harm associated with non-vaccination. Hence, the harm caused by failing to comply with these duties coupled to the exemption are reasonably foreseeable and preventable, which may assist litigants to prove the common-law delictual element of fault, specifically negligence.

Ciolli posits that justifying religious exemptions to non-vaccination is easy — the hard part is justifying the harm and injuries suffered as a result of those religious exemptions.[20] Reiss comments that "using exemptions to deny children compensation from tort liability is inappropriate".[21] I agree with both these authors and suggest that clearly outlining the exemptions and their attendant duties will prevent a situation where an exemption is misused or manipulated to dodge liability.

---

20 Ciolli (2008) *YJBM* 132 & 135.
21 Reiss (2017) *BCLR* 14.

I suggest that legislative development may better regulate and balance the rights, duties, and interests of non-vaccinating parents, their children, vulnerable individuals, and public health interests. In turn, statutory reform will help litigants to navigate the common-law delictual elements, specifically wrongfulness (exemption as a defence and the duties coupled with it) and even fault, specifically negligence (with reference to the reasonable foreseeability and preventability of harm in compliance with the duties coupled to the exemption). The consequences of imposing liability, as discussed above, highlight the need for statutory reform.

In the following section, I briefly offer some recommendations and suggestions for statutory reform drawn from foreign law.

6.3 SOUTH AFRICAN VACCINATION MANDATES AND LEGISLATIVE REFORM

As mentioned in the previous chapters, vaccines are lauded as one of the most successful public health interventions[22] and are regarded as "one of modern medicine's greatest success stories".[23] The government-funded EPI-SA has made great strides in providing free vaccines to children in an effort to protect and preserve life, bodily autonomy, and dignity.

CANSA, too, has done much to inform the public about vaccines, their importance, their safety, and their necessity. The South African National Department of Health has striven to counter non-vaccination by debunking vaccine myths on its website in addition to reiterating that "[i]mmunisations can save your child's life" and "[i]mmunisation protects others you care about".[24]

However, these efforts by CANSA, EPI-SA, and the National Department of Health have not succeeded in adequately addressing non-vaccination in South Africa and need to be stepped-up. The Children's Act is silent on vaccination — it contains no express reference to childhood vaccine administration, the importance of vaccinations, or the duty of parents to present their children for vaccination. The Act must clearly stipulate that vaccination is a healthcare right of children. Although an inferred parental duty to vaccinate is argued in this thesis, an amendment of the Children's Act is desirable and preferred.

---

22 Walwyn & Nkolele (2018) *HRPS* 31; Oduwole *et al* (2019) *BMJ Open* 1.

23 See WHO "Immunisation" (5 December 2019) https://www.who.int/news-room/facts-in-pictures/detail/immunization (accessed 05 June 2022).

24 RSA Gov, DoH "Immunisation key messages" (date unknown) http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-08-29-27/immunization/category/165-immunisation?download=502:key-messages-immunisation (accessed 13 June 2020) at 1.

If an express parental duty to vaccinate is then included in the Children's Act, for example, it may aid in establishing the common-law delictual element of wrongfulness (with reference to a legal duty and its breach).

Although there are no express vaccination mandates in South Africa, public schools may require proof of vaccination for school enrolment. Notably, school vaccination requirements are generally based on the public good and not necessarily on the individual health of unvaccinated children.[25] Clearly, these vaccine requirements for school enrolment and attendance cannot be used to address the issue of non-vaccination. However, they may be indicative of public health interests as considered under the common-law delictual element of wrongfulness in Chapter 5.

I suggest that national legislation be enacted to address the issue of mandatory childhood vaccinations. I contend that this will create an opportunity to address vaccination exemptions as well in an effort to protect public health and individual rights. I suggest that the legislation regulating mandatory vaccinations outline the precise rights and duties of non-vaccinating individuals.

The legislation regulating mandatory vaccinations is not necessarily a blanket mandate that forces everyone to submit to mandatory vaccination. Instead, I propose that the legislation be seen as an effort to provide clarity on South Africa's vaccination mandates, their scope, and the consequences of non-compliance.

Legislation regulating mandatory vaccinations will create and promote legal certainty on vaccine mandates, childhood vaccination, parental rights and duties, the best interests of the child, the protection of third parties, and valid vaccination exemptions.

To date, South African case law dealing with the issue of mandatory vaccination has been limited to the workplace[26] and has not extended to children or the issue of common-law delictual liability. As noted in Chapter 2, in 2021 the ACDP, Free the Children — Save the Nation NPC, Caring Healthcare Workers Coalition, and COVID Care Alliance (the applicants) filed for an urgent interdict in the Pretoria High Court to halt the roll-out and administration of the COVID-19 vaccine to children aged 12–17.[27]

Section 27 intervened as an *amicus curiae* and argues that the vaccination of children (ages 12–17) allows learners to return to schools, and in turn offers access to sufficient food

25 Reiss (2017) *SLPS* 11.
26 See, e.g., *Solidarity v Ernest Lowe* (2022) 43 ILJ 1125 (LC) (hereinafter *Ernest Lowe*).
27 Sujee & Ndlela (2022) *SAJBL* 1–2.

and basic nutrition.[28] Although this illustrates the polarised nature of childhood vaccination, it does not address parental rights and duties or the potential common-law delictual liability for non-vaccination.

The absence of relevant case law necessitates legislative development and intervention, as it cannot be expected of the common-law delict to address the issue of non-vaccination beyond the scope of delictual liability. It is for this reason that statutory reform is essential in addition to the continuing efforts of CANSA, EPI-SA, and the Department of Health.

The proposed legislation regulating mandatory vaccinations in South Africa should include the following:

(1) Vaccination is a children's health care right.
(2) Vaccination is in the interests of public health and safety and is essential to sustain herd immunity.[29]
(3) The role of the state in vaccine supply and demand.[30]
(4) Which vaccines are mandatory and for whom.[31]
(5) Mandatory childhood vaccinations.
(6) Which childhood vaccinations are not mandatory?
(7) Proof of vaccination and the protection of personal information.
(8) Legally recognised and permitted vaccination exemptions:
    (8.1) Personal/philosophical exemptions;
    (8.2) Religious/cultural exemptions;
    (8.3) Medical exemptions.
(9) Individual rights and duties, especially the duties of non-vaccinating parents towards their children, third parties, and the general public.
    (9.1) Consequences for non-compliance with these duties.
(10) Consequences for non-compliance with vaccine mandates in the absence of a legally valid vaccine exemption.

---

28 Sujee & Ndlela (2022) *SAJBL* 1–2; *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP); Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022).

29 See, e.g., *Electoral Commission v Minister of Cooperative Governance & Traditional Affairs* 2022 (5) BCLR 571 (CC) (hereinafter *Electoral Commission*) [70].

30 See *Electoral Commission* [70] with reference to "community immunity" and vaccine supply.

31 *Ernest Lowe* only dealt with mandatory vaccination policies in the workplace. See also T Calitz "Constitutional rights in South Africa protect against mandatory COVID-19 vaccination" (21 April 2021) https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ (accessed 28 November 2022).

(11) The role of the state and the High Court in the context of mandatory vaccinations and non-vaccination.

(12) Prescription and waiver of claims.

(13) Contributory negligence and acceptance of risk.

(14) The potential delictual liability of a non-vaccinating parent towards their own child and third parties.

6.3.1 A common-law delictual liability clause in legislation

If a common-law delictual liability clause is included in the legislation mandating childhood vaccinations, it should ideally address the common-law delictual elements at play in the context of non-vaccination. Below, I have drafted a common-law delictual liability clause:

(1) Non-vaccination is regarded as a form of voluntary conduct.

(2) "Negligence" for purposes of this clause, refers to the conduct of a *reasonable person* in the position of the wrongdoer and a *reasonable person* in the position of the wrongdoer would:

  (a) foresee the reasonable possibility of his/her conduct injuring another;

  (b) take reasonable steps to guard against such occurrences; and

  (c) the wrongdoer failed to take such steps.

(3) Non-vaccination imposes duties on the non-vaccinating parent to, *inter alia*,

  (a) inform all interested parties (e.g., a school or day care facility, and the parents of classmates) that the child has not been not vaccinated against a specific vaccine-preventable disease;

  (b) self-isolate the child when he or she is ill or displaying symptoms of a vaccine-preventable disease;

  (c) warn and inform others when the unvaccinated child is ill; and

  (d) limit the child's contact with others in an effort to prevent infecting others;

(4) Failure to comply with these legislative duties (para (3)(*a*)–(*d*)) is *prima facie* unlawful[32] and negligent;

(5) Para (3)(*a*)–(*d*) is not a closed list and the court may consider additional duties to establish the elements of negligence and wrongfulness.

[32] Neethling & Potgieter (2020) 74 & 90.

(6) It is reasonably foreseeable that the failure to comply with these legislative duties may cause harm or damage to a third party.

(7) It is reasonably foreseeable that non-vaccination may cause harm or damage to a third party.

(8) A valid and legally recognised vaccine exemption does not automatically exempt a non-vaccinating parent from delictual liability.

(9) If the court is satisfied that common-law delictual liability has been established, the victim may claim delictual damages from the liable non-vaccinating parent.

In the above draft I do not deal with intent or a presumption of intent as a form of fault as the scope of non-vaccination often falls within the realm of negligence rather than intent. However, this does not mean that intent as a form of fault cannot be present. Furthermore, the mere fact that a person complies with statutory norms "does not necessarily mean that they can always escape civil liability".[33] Even if non-vaccinating parents act within the bounds of their statutory rights and duties, this does not automatically exempt them from liability, as other factors are at play when establishing their common-law delictual liability. An exemption does not negate the fundamental duty one has to act reasonably to prevent the spread of disease to others.[34]

Furthermore, all the elements of the common-law delict must be present to establish delictual liability. This is because the clause classes non-vaccination as negligent conduct but it is important to note that merely because it is negligent, does not automatically render it actionable in delict. All the elements of the common-law delict must be met.

I also mention foreseeability and wrongfulness. Once again, even if these are proven, all the common-law delictual elements must be present to establish delictual liability.

Legislation regulating mandatory vaccination will then assist the common-law delictual investigation and, in particular, the elements of wrongfulness, fault (in the form of negligence), and causation. To assume wrongfulness and negligence are present means that the common-law delictual investigation may kick off by inspecting causation.[35] Legal causation involves, *inter alia*, the reasonable foreseeability, direct consequences (proximate cause), and remoteness. As was seen in Chapter 5 legal causation and wrongfulness may overlap.

---

33 Baudouin (2018) Ch 1, [45].
34 Caplan *et al* (2012) *JLME* 609; Reiss (2017) *BCLR* 14.
35 *Bergrivier* [44].

According to the proposed clause, foreseeability may come into play to assist in determining legal causation as well as the reasonableness of imposing liability (under the wrongfulness consideration).

The statutory development that I suggest in this section is not aimed at the development of a statutory compensation scheme and also does not aim merely to codify the common-law delict or its elements. The reform I suggest is aimed at regulating childhood vaccine mandates and exemptions and the inclusion of a common-law delictual liability clause that may assist litigants to navigate the common-law delictual elements. Even if these common-law delictual elements are listed in the legislation and no reference is made to the common law of delict, it will still assist litigants in their navigation of wrongfulness and fault as express reference is made in the clause to foreseeability, preventability, and the consequences of breaching the duties linked to the exemption.

The Canadian Immunisation of School Pupils Act is a good example where legislation may come into play to address issues of non-vaccination and exemptions from school vaccine mandates or policies.

The South African legislature should arguably adopt similar provisions to clarify and regulate public school vaccine mandates and exemptions. Non-vaccination may be a legitimate (state-sanctioned) choice but this does not automatically exempt the non-vaccination parent from the consequences of that choice. However, if vaccination exemptions are legislated an opportunity is created to protect and define the parameters of parental autonomy, coupled with the best interests of the child and cultural and religious rights and the duties when opting for an exemption from mandatory vaccination.

As noted, non-vaccinating parents are then duty-bound to inform the school of their decision. Non-vaccinating parents also have a duty to prevent others from harm when their unvaccinated child contracts a vaccine-preventable disease. The rights of children and the duties of parents regarding non-vaccination can then be clearly set out which will provide clarity on issues of competing rights and duties. Furthermore, legislation regulating school vaccine mandates can also outline the importance of vaccines in the context of public health and safety and herd immunity which extend beyond the mere individual and third-party protection.

As discussed in Chapter 3, the revocation of religious exemptions from compulsory vaccination is not deemed unconstitutional in the US State of New York. Similarly, in

Germany, exemptions from measles vaccinations only allow for medical exemptions.[36] Reiss supports the revocation of non-medical exemptions and states that when parents (in the absence of a *bona fide* medical contra-indication) choose not to vaccinate they are opting for the greater risk.[37]

The Australian Public Health Act of 2005 deals with the "exclusion of unvaccinated children from particular services"[38] and, under Australian law, refusing a child enrolment for or attendance of a service based on their immunisation status is not unlawful discrimination under the Anti-Discrimination Act of 1991.[39]

The above foreign-law considerations may serve as an indication that religious objections to mandatory vaccinations should also not be regarded as a valid exemption from mandatory childhood vaccination in the South African context. It may also indicate that the exclusion of unvaccinated children from certain services does not constitute unlawful discrimination.

On the other hand, it may be argued that to minimise paternalistic forms of intervention in others' lives,[40] and to respect parental autonomy (coupled with the best interests of the child), religious and philosophical exemptions from mandatory vaccinations should be permitted in the South African context.

This means that, even if vaccines are regarded as in the best interests of individuals and society (or public health), vaccines cannot necessarily be forced on individuals as the right to dignity is omnipresent when interpreting section 12 of the Constitution in the light of the close links between sections 12 and 10.

Foreign law serves as an indication of the trends followed in foreign jurisdictions and may inspire legislative development in the South African context.

Vaccination exemption forms (in the public school context) are another option by which to address non-vaccination and may play an important role if the question of delictual liability should arise. For example, if non-vaccinating parents sign a vaccination exemption form they may accept certain duties that accompany their non-vaccination choice. The non-vaccinating parents then also accept certain risks of harm that may befall their child, and others, as a result of their non-vaccination choice. To illustrate the above theory on a vaccination exemption

---

36 *Masernschutzgesetz* of 10 February 2020, Art 1, No 8(e). See also LOC "Germany: New Act Makes Measles Vaccinations Mandatory" (date unkown) https://www.loc.gov/law/foreign-news/article/germany-new-act-makes-measles-vaccinations-mandatory/ (accessed 15 June 2020).

37 Reiss (2017) *SLPS* 17.

38 Part 2, Contagious conditions, Division 1AA, Exclusion of unvaccinated children from particular services.

39 Queensland Gov "Childcare immunisation requirements" (2020) https://www.qld.gov.au/health/conditions/immunisation/childcare (accessed 15 June 2022).

40 Bishop & Woolman "Chapter 40" in *CLoSA* (2014) 88.

form, I have drafted a vaccination exemption form (inspired by the Washington State Department of Health's "Certificate of exemption — personal/religious").[41]

Consider the following draft vaccination exemption form:

Section 1: Notice to non-vaccinating parents or guardians

1.1. Parents or guardians have a legal duty to vaccinate their children to protect the life, health, and physical integrity of the child and other individuals.

1.2. A parent or guardian may exempt their child from certain vaccinations by submitting this completed form to the child's school and/or child care facility.

1.3. A child who has been exempted from vaccination is considered at risk for the disease or diseases for which the vaccination offers protection.

1.4. An exempted child may be excluded from school enrolment or child care settings and activities if they have not been fully vaccinated.

1.5. Vaccine-preventable diseases still exist and can spread quickly in school and childcare settings.

1.6. Vaccination is one of the best ways to protect individuals (especially children) from contracting and spreading diseases that may result in serious (and permanent) illness, injury, disability, or death.

1.7. With the decision to delay or refuse vaccines, I accept responsibility that I am putting my child's health and even life at risk.

Section 2: Please select one of the following legally recognised exemptions:

2.1. Personal/philosophical exemption □

2.2. Religious exemption □

2.3. Medical exemption □

Clause 3: Non-vaccinating parent or guardian declaration for personal, philosophical, and/or religious exemption

3.1. One or more of the suggested childhood vaccines are in conflict with my personal, philosophical, or religious beliefs.

3.2. I have discussed the benefits and risks of vaccinations with the HPCSA healthcare professional (signed below) in a vaccination education session.

[41] Adapted from Washington State, DoH "Certificate of exemption — personal/religious" (2019) https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/348-106_CertificateofExemption.pdf (accessed 28 November 2022). Point 1.7 is derived from the Canadian Immunisation of School Pupils Act. See also *IB v Kyle* [52].

3.3.	I understand that the National Department of Health strongly recommends that all children should be fully vaccinated in accordance with the childhood vaccination schedule to protect my child's health, as well as the health of others, and public health in general.
3.4.	I have been informed that the non-vaccination of my child against a vaccine-preventable disease may lead to serious (and permanent) illness, injury, disability, or death, of not only my child, but also other individuals.
3.5.	I acknowledge that I have a duty to inform others (e.g., the school) if my unvaccinated child contracts a vaccine-preventable disease.
3.6.	I acknowledge that because I choose not to vaccinate my child against __, there is a risk of harm to my child and others and that I have a legal duty to take reasonable steps to prevent such harm.
3.7.	The information on this form is complete and correct.

Parent/guardian signature	HPCSA health care professional signature	Date
Parent/guardian name (print)	HPCSA health care professional name (print)	Date

Clause 4: Declaration of health care professional for a medical exemption

4.1.	I, Dr __, declare that vaccination for the disease(s) checked above is/are not advisable for this child.
4.2.	I, Dr __, have discussed the health benefits and risks of vaccinations with the parent/legal guardian as a condition for exempting their child based on medical contraindications related to this specific vaccine.
4.3.	I, the parent/guardian, have discussed the benefits and risks of vaccinations with the HPCSA healthcare professional (signed below).
4.4.	The information on this form is complete and correct.

Parent/guardian signature	HPCSA health care professional signature	Date
Parent/guardian name (print)	HPCSA health care professional name (print)	Date

This draft vaccination exemption form serves as a simple example of the clauses that such a form may include. If this form is signed by a non-vaccinating parent it may be used to prove, for example, reasonable foreseeability,[42] as well as the existence and acceptance of a parental duty to not only vaccinate, but also protect others from harm as a result of the risk associated with non-vaccination. Rodal and Wilson comment that this form may also help prove the

[42] Reiss (2018) *TJB* 74: Rodal & Wilson (2010) *MJLH* 60.

acceptance of risk and foreseeability.[43] In addition, signing this form may help prove subjective foresight and *dolus eventualis*, i.e., fault in the form of intent. If intent in the form of *dolus eventualis* is present, it is unnecessary to prove the elements of negligence to establish fault, and the *actio iniuriarum* (requiring intent) may come into play.

Rodal and Wilson suggest that exemption forms must address the standard of care issue.[44] As mentioned in the foreign law discussion, the standard of care refers to the element of fault, and whether the duty of care has been breached.[45] For purposes of the common-law delict, outlining the inherent risks of non-vaccination in a standardised exemption form may also aid in the determination of fault.

A clear outline of these duties accompanying the non-vaccination choice will ultimately assist in the determination of, for example, the common-law delictual element of wrongfulness (legal duty and breach and the reasonableness of imposing liability), as well as negligence (reasonable foreseeability and preventability of harm). This is because a vaccination exemption form can stipulate the duties of the non-vaccinating parent, as well as outline the possible harm as a result of non-vaccination.

By signing this form, a non-vaccinating parent accepts and consents to the contents of that specific form, which may be adduced into evidence during litigation to prove or disprove, certain common-law delictual elements and defences (e.g., statutory compliance as a valid ground of justification to negate wrongfulness). Rodal and Wilson suggest that by signing this form the non-vaccinating parent acknowledges the existence of risks to community health (by not vaccinating).[46]

Legislative development and exemption forms aimed at addressing non-vaccination will not prevent delictual causes of action but they may aid in establishing the elements of the common-law delict, and whether delictual liability should be imposed on the non-vaccinating parent. Legislative development and exemption forms will also aid in standardising school vaccination policies across the country.[47]

Similarly, the vaccination exemption form will not necessarily deter or prevent non-vaccination but it may aid in establishing the elements of the common-law delict, and if delictual liability should be imposed on the non-vaccinating parent. Rodal and Wilson point

43 Rodal & Wilson (2010) *MJLH* 60.
44 Rodal & Wilson (2010) *MJLH* 61–62.
45 Finch & Fafinski (2021) 37.
46 Rodal & Wilson (2010) *MJLH* 62.
47 As above.

out that exemption forms are increasingly popular in the US and Canada[48] and I suggest that the time is ripe for them to be introduced in the South African context.

Rodal and Wilson conclude that, in the Canadian context, non-vaccination and liability is a complicated legal issue, one that will be difficult to resolve without changes to the statutory regime governing immunisation.[49] I submit we face a similar situation in South Africa. Here, the issue of non-vaccination and common-law delictual liability is novel and complicated, but statutory reform and exemption forms may assist litigants to navigate the common-law delictual elements.

6.4 CONCLUSION

In the South African landscape the issue of non-vaccination is largely unexplored. For example, there is no current research indicating what the vaccine drivers and attitudes in the South African context are. The National Department of Health merely reiterates the importance of herd immunity and that vaccination is a *must*.

The efforts and impact of EPI-SA, CANSA, and the National Department of Health to reduce suffering and prevent the death of women and children from vaccine-preventable infectious diseases are laudable but still fall short in adequately addressing the issue of non-vaccination in South Africa. It is for this reason that legislative intervention is required, as suggested above.

In light of the global COVID-19 pandemic, the time is ripe for the legislature finally to address the issue of vaccine mandates in South Africa. In addition to enacting legislation to regulate the South African vaccine landscape, vaccine exemption forms in the school setting must be introduced. This will assist in creating legal certainty while also delineating and outlining the rights and duties of non-vaccinating parents. In turn, this may then be used to navigate the common-law delictual elements when pursuing a delictual claim against a non-vaccinating parent.

Currently, children have an implied constitutional right to vaccination, as discussed in Chapter 3. I suggest that there is also an implied parental duty to vaccinate their child. Of course, this is parental duty is subject to important qualifications, like vaccine supply (from the state), as well as medical contraindications supporting the non-vaccination of the child. But, regardless of whether this duty receives express statutory recognition from the enactment of

48 Rodal & Wilson (2010) *MJLH* 60.
49 Rodal & Wilson (2010) *MJLH* 61.

new legislation governing vaccine mandates, non-vaccinating parents may arguably still face common-law delictual liability if their choice causes another harm and all the elements of the common-law delict are satisfied. The absence of legislation mandating vaccines and outlining parental rights and duties does not prevent a victim from claiming delictual damages for non-vaccination.

Relying on an exemption may protect non-vaccinating parents if they base their decision on personal or medical beliefs and follow the correct procedures (e.g., compliance with the duties linked to the exemption). Non-vaccinating parents are not penalised for simply relying on an exemption, as the exemption is a state-mandated and legally-sanctioned choice. Hence, a non-vaccinating parent may rely on a statutory exemption (and compliance with the duties linked to that exemption) to negate wrongfulness and prove that their non-vaccination conduct was state-sanctioned and lawful. It is important to note that if the exemption is raised but the non-vaccinating parent acts negligently, the possibility of an action in delict still remains. If the non-vaccinating parent has acted negligently, the statutory-authority defence is not applicable. Clearly, the exemption does not allow the non-vaccinating parent automatically to dodge liability, and this exemption will not avoid compensating the victim. Legislative reform and the incorporation of the exemption form may well assist in proving the common-law delictual elements like fault, causation, and wrongfulness.

6.5 AVENUES FOR FURTHER RESEARCH

As mentioned in Chapter 1, the focus of this thesis is on non-vaccinating parents X and child Y. An avenue for further research includes the liability of X towards their own child, XX. Furthermore, in this thesis, I do not explore the role of the customary law of delict in the context of non-vaccination, which is also an avenue to pursue in further research. I have also limited my research to exclude the liability of the state, and this too is a promising avenue for further research. In this thesis, I consider the common-law delictual liability in the South African context and I do not venture into the realm of private international law. Non-vaccination in the context of private international law is another avenue to explore in future research.

CHAPTER 7: CONCLUSION

7.1 SHORT OVERVIEW OF CHAPTERS

The goal of this conclusion is briefly to touch on the main issues and topics explored in each chapter and highlight the crux of that particular chapter.

In Chapter 1, I introduce the topic of non-vaccination and why it is a current global health issue. Here, I discuss the terminology used when exploring non-vaccination – vaccine hesitancy, vaccine resistance or refusal, the vaccine attitude spectrum or continuum, anti-vaccination, and my umbrella term "non-vaccination". The main research problem underpinning this thesis is the potential delictual liability of non-vaccinating parents (X) towards another child (Y), based on their failure to have their own child (XX) vaccinated. The overarching research question: Can a non-vaccination parent (X) be held delictually liable if X's non-vaccinated child (XX) causes harm to another child (Y)?

To answer this and the sub-questions posed, I draw principally on the transformative constitutional method but also consider the applied, functional, and the critical comparative methods. In Chapter 2, I introduce the issue of non-vaccination and explain why it is a global health threat with reference to the underlying factors fuelling non-vaccination, the 3C-model, the vaccine Hesitancy Matrix, and free-riding behaviour. Better to understand the depth of non-vaccination and its social facets, I explore the (in)famous anti-vaxxers, internet-based anti-vaxx lobbying, and the leading conspiracy and quasi-scientific theories underpinning these movements. I explore the detrimental effects of non-vaccination to contextualise non-vaccination and its health consequences more closely and explore the efforts of EPI-SA, CANSA, and the National Department of Health to combat sub-optimal vaccine uptake and promote vaccination.

In Chapter 3, I explore constitutional considerations in the non-vaccination context as the Constitution cannot be side-lined in favour of a purely common-law delictual investigation. This is supported by reference to the transformative constitutional method and the doctrine of adjudicative subsidiarity. In Chapter 3 I explore three main questions — does a child have an express or implied constitutional right to vaccination? Is there an express or inferred constitutional duty to vaccination? Does this constitutional duty to vaccinate children fall on the parents?

To address these questions, I explore the relevant sections of the Constitution and the Children's Act, as well as relevant case law. This overview of constitutional considerations

sets the stage for the constitutional investigation of the relevant rights potentially at play in a delictual investigation. After exploring the relevant rights, duties, and interests of parents X and child Y, I consider the limitation of these rights under section 36 of the Constitution.

The section 36 analysis in this chapter serves as an indication of how these competing rights may be balanced and weighed in the context of non-vaccination. I submit that although there is, strictly speaking, no hierarchy of rights, certain rights do carry more weight than others in the limitation analysis. X's cultural and religious rights, and their parental autonomy must take a back seat to Y's right to life, bodily integrity, dignity, and his best interests as a child. This analysis together with the overview of constitutional considerations allow me to conclude that although children in South Africa do not have an express right to vaccination, they do have an implied right to vaccination as implicit in the collective of other rights.

Similarly, because rights and duties are relational, parents are constitutionally duty-bound to vaccinate their children. I suggest that the parental duty to vaccinate is implicit in the collective of other rights. For example, I argue that a duty to vaccinate exists in terms of section 12 of the Constitution as parents must act as responsible moral agents with mutual concern and respect for others (child Y).

The foreign law discussion in Chapter 3 illustrates how the foreign courts have approached child-vaccination cases, specifically where a parent opposes the administration of a vaccine. Here, I point out that although these foreign courts do not readily refer to the child's "right" to vaccination, they do emphasise the child's best interests and that vaccination generally serves the best interests of both the child and the public at large. I also show how these foreign courts refer to the parental duty to vaccinate under the banner of parental responsibilities to care for the child. From the analysis of foreign law it emerges that although vaccination cases involving children are polarised, the courts often rule in favour of vaccination as being in the child's best interests and in the interests of public health.

The foreign law discussion in Chapter 3 supports my conclusions that a child has an implied right to vaccination and that parents are duty-bound to vaccinate their children. This duty extends beyond child XX to include the protection of others (child Y).

In Chapter 4 I consider foreign law with a view to evaluate the non-vaccination issue in the context of civil (tortious or delictual) liability. I open the chapter with a brief introduction and overview of the law of torts in general, before concentrating on the tort of negligence. When investigating the tort of negligence, I specifically focus on the theory underlying its elements in common-law jurisdictions such as the US and Canada. This chapter also highlights the *Kruger v Coetzee* test and how it is used by foreign courts.

Under the tort of negligence, I focus on the specific elements of this tort: the duty of care; its breach; injury or harm; and causation. After exploring the theoretical considerations, I turn my attention to the Nonva/Vic hypothetical — my own creation.

In this discussion, I explore the tort of negligence in the US (excluding Louisiana) and conclude that Vic may possibly succeed in a claim in negligence as he is able to prove all the elements of the tort of negligence in the US. Causation is arguably the most difficult element to satisfy for purposes of the tort of negligence. Here, I focus specifically on epidemiology as the most appropriate means of proving factual causation and satisfying the *conditio sine qua non* test. In this discussion, I also explore the reliance on a statutory exemption and the defence of *volenti non fit injuria*.

I then explore Canadian tort law (excluding Quebec) in the context of the Nonva/Vic hypothetical. I conclude that Vic is likely to succeed under the Canadian tort of negligence as he is able to prove the elements of negligence, similar to that of the tort of negligence in the US. Here, I touch on parental rights and their limitation as well as parental immunity. I also analyse the reasonable person test, reasonable foreseeability, and causation — as under the preceding discussion of the US tort of negligence. I also comment on the material contribution test and its relevance in the context of mass outbreaks.

My focus then shifts to the civil law pockets — Quebec and Louisiana in Canada and the US respectively — and I explore the elements of liability in the Nonva/Vic hypothetical. Under the discussion of Quebec, I suggest that it is not *per se* the non-vaccination which may possibly amount to the "breach of a minimal norm of behaviour". Here, I argue that the breach of a minimal norm of behaviour includes non-vaccination and the failure to act as a reasonable person in similar circumstances would. When exploring liability under Louisiana law, I first consider the statutory definition of fault in the context of negligence. I also consider the Learned Hand approach to explain the relevant factors involved in a negligence enquiry in Louisiana.

Thereafter, I explore the Netherlands and Germany and their take on liability in the Nonva/Vic hypothetical. When considering Dutch and German law, I refer to their respective civil codes (the Dutch *Burgerlijk Wetboek* and the German *Bürgerliches Gesetzbuch*) and selected case law indicating how their respective delictual elements are approached. I show how the German and Dutch approaches to liability are in certain respects similar to the South African common law of delict and I weave these foreign-law considerations into Chapter 5. For example, the German approach to wrongfulness as the infringement of a right. I conclude

that Vic is likely to succeed with a claim in the Netherlands and Germany respectively, as he is able to satisfy the elements for delictual liability in these jurisdictions.

An investigation of foreign law indicates that a person like Vic may be able to succeed in a claim of civil liability against a person like Non if the requirements for liability are satisfied. Hence, if the elements of liability are met, parents (X) may face liability for their non-vaccination choice that harmed another (Y). The foreign law explored in this chapter not only supports a finding of liability, but also illustrates how the elements of tortious or delictual liability will support a claim in negligence.

The foreign law canvassed in this chapter further illustrates how these courts have often favoured the protection of children and their best interests, especially their health rights. Hence, the foreign law discussion may come to the aid of the South African common-law delict investigation when trickier elements (like causation) need to be navigated and when the balancing of competing rights and interests arises — e.g., the best interests of the child, public health interests, and parental autonomy.

In Chapter 5, I introduce the South African common-law delict by first exploring the much-debated definitions of "delict" and the law of delict. I consider the approaches to the common-law delict, its *essentialia,* and its functions. I introduce the Filia/Elimele hypothetical (similar to the Nonva/Vic hypothetical in Chapter 4) to set the stage for the discussion of the three actions in delict and their place in this chapter. Here, I touch on the *actio legis Aquiliae,* the Germanic action for pain and suffering, and the *actio iniuriarum* with reference to case law.

I follow this with an exploration of the elements of common-law liability in delict in the context of the Filia/Elimele hypothetical. First, I consider "harm" and what it entails in theory before applying it to the Filia/Elimele hypothetical. Under this element, I also consider the place of patrimonial harm, non-patrimonial harm, and prospective loss or damage again first presenting the underlying theory which I then apply to the Filia/Elimele hypothetical. This leads to the second element: conduct.

In a brief discussion, I explore the theory of conduct as a common-law delictual element and apply my findings to the Filia/Elimele hypothetical. Here, I focus specifically on the various commissions and omissions at play in the non-vaccination context.

In considering causation, traditionally a controversial element, I first explore factual causation followed by legal causation. Under factual causation, the focus is on epidemiology and the *conditio sine qua non* test, which are frequently called upon in foreign jurisdictions as emerged in Chapter 4. I consider the history and development of this common-law delictual

element with reference to case law before applying the traditional tests to the Filia/Elimele hypothetical.

Fault in the form of both intent and negligence is examined next. Here I focus on negligence and its specific requirements with reference to the classic *Kruger v Coetzee* test, which is also favoured in foreign law as seen in Chapter 4. The bulk of Chapter 5 is devoted to a discussion of wrongfulness as the final element under the spotlight in establishing common-law delictual liability. Here, I explore the grounds for determining wrongfulness in the case of commissions and omissions and examine some of the other approaches to establishing wrongfulness. I also canvass policy considerations relevant to the determination of whether it is reasonable to impose liability. I criticise certain of the approaches used to establish wrongfulness, notably, the infringement of a right approach and refer to foreign law to support my view. I also distinguish the determination of wrongfulness in novel or borderline cases from the Filia/Elimele hypothetical.

The common-law delictual remedies available to a person like Elimele are explored only once all the common-law delictual elements have been considered. Here, I refer to the role of damages and interdicts. Before concluding this chapter, I also briefly refer to constitutional damages and their place in the common-law delictual conundrum.

In Chapter 6, I consider the consequences of imposing common-law delictual liability and how these consequences demand statutory reform. In this chapter, I refer to foreign law to offer suggestions for statutory reform, as well as the adoption and use of a vaccination exemption form. I also explore how this form and statutory development on the issue of non-vaccination may assist litigants in navigating the trickier common-law delictual elements like fault, causation, and wrongfulness. In this chapter, I also present a draft vaccination exemption form and explore its possible effect in establishing common-law delictual liability.

7.2 CONCLUDING REMARKS

Despite the fact that the South African judiciary has not yet had an opportunity to decide the issue of common-law delictual liability in the context of non-vaccination, foreign-law considerations in conjunction with a close analysis of the South African Constitution, legislation (e.g., the Children's Act), and case law support my argument for imposing liability if the requirements of the common-law delict have been satisfied.

This means that in South Africa, non-vaccinating parents (X) could face delictual liability if their choice (non-vaccination) results in harm to another (Y). This said, non-vaccination itself

does not automatically establish common-law delictual liability unless all the elements for the common-law delict have been satisfied.

When deciding the issue of common-law delictual liability as explored in this thesis, it is clear that the competing rights, duties, and interests of the non-vaccinating parent (X) and the children (XX and Y) are at play. If the non-vaccinating parent is held delictually liable, this ultimately places a limitation on parental autonomy. This is a natural and inevitable result of delictual liability in the context of non-vaccination as illustrated and debated in this thesis.

A non-vaccinating parent cannot escape liability for the harm their non-vaccinating choice has caused if the common-law delictual requirements are met. Hence, non-vaccination itself does not automatically establish delictual liability in that it is not the sole issue at play in the common-law delictual investigation.

The common-law delictual investigation in the context of non-vaccination necessitates a deeper look into the world of non-vaccination and its operation against a constitutional backdrop, as well as the common-law rights and duties of parents, the rights of children, and public health interests. The common-law delictual enquiry in the context of non-vaccination reaches into the realms of constitutional and comparative law without which the issue of common-law delictual liability cannot be meaningfully investigated. The common law of delict serves as a meaningful and important legal avenue in the context of non-vaccination, not only for the aggrieved party but also for the non-vaccinating parents. This is so because the common law of delict will consider, weigh, and balance the competing rights and interests of both parties to reach a fair outcome.

In conclusion, the common-law delict may allow an award for damages where a non-vaccinating parent's choice causes harm to another and all the common-law delictual elements have been satisfied.

TABLE OF CASES

Australia

Sutherland Shire Council v Heyman (1985) HCA 41
Perre v Apand (1999) HCA 36
Seltsam v McGuiness (2000) NSWCA 29
Sullivan v Moody (2001) HCA 59
Graham Barclay Oysters v Ryan (2002) HCA 54
Woolcock Street Investments v CDG (2004) HCA 16
Amaca v Ellis (2010) HCA 5
Woolworths v Strong (2010) NSWCA 282
Mains v Redden (2011) FamCAFC 184
Strong v Woolworths (2012) HCA 5
Duke-Randall v Randall (2014) FamCA 126
Rilak v Tsocas (2015) FamCAFC 120

Canada

AC v LL 2021 ONSC 6530
AC v Manitoba (Director of Child and Family Services) 2009 SCC 30
AG v MA 2021 ONCJ 531
B (R) v Children's Aid Society of Metropolitan Toronto 1995 CanLII 115 (SCC)
BCJB v ERRR 2020 ONCJ 438
BLO v LJB 2019 ONCJ 534
Campbell v Heffern 2021 ONSC 5870
Cates v Kendall 2011 SKQB 225
Childs v Desormeaux 2006 SCC 18
CMG v DWS 2015 ONSC 2201
Cook v Lewis 1951 CanLII 26 (SCC)
DRB v DAT 2019 BCPC 334
IB v Kyle 2018 CanLII 30998 (ON HSARB)
JB & MB v Eastern Ontario Health Unit 2018 CanLII 31877 (ON HSARB)
JN v CG 2022 ONSC 1198
JW v BJH 2017 CanLII 50748 (ON HPARB)
Laferrière v Lawson 1991 CanLII 87 (SCC)
LS v MAF 2021 ONCJ 554
OMS v EJS 2021 SKQB 243
PW v CM 2017 NSSC 91
R v Cuerrier 1998 CanLII 796 (SCC)
Resurfice Corp v Hanke 2007 SCC 7
RSL v ACL 2022 BCPC 9
Saint-Phard v Saint-Phard 2021 ONSC 6910
Sembaliuk v Sembaliuk 2022 ABQB 62
SWS v RS 2021 ONCJ 646
Tarkowski v Lemieux 2020 ONCJ 280
TK v JW 2022 BCPC 16
TLM v JTM 2022 ABQB 109

TRB v KWPB 2021 ABQB 997

Germany

ECLI:DE:BVerfG:2020:rk20200511.1bvr046920
ECLI:DE:BVerfG:2022:rs20220721.1bvr046920
ECLI:DE:BGH:2017:030517BXIIZB157.16.0
ECLI:DE:BGH:2017:030517BXIIZB157.16.0

Netherlands

ECLI:NL:GHAMS:2017:4424
ECLI:NL:GHARL:2019:10763
ECLI:NL:GHARL:2019:9402
ECLI:NL:GHARL:2020:3428
ECLI:NL:GHDHA:2019:331
ECLI:NL:GHDHA:2020:257
ECLI:NL:GHLEE:2009:BJ7903
ECLI:NL:GHSHE:2018:2793
ECLI:NL:HR:2022:115
ECLI:NL:PHR:2021:517
ECLI:NL:RBDHA:2021:13985
ECLI:NL:RBGEL:2020:3699
ECLI:NL:RBGEL:2020:6342
ECLI:NL:RBGEL:2020:7665
ECLI:NL:RBGRO:2009:BK7384
ECLI:NL:RBMNE:2022:2947
ECLI:NL:RBNHO:2021:10079
ECLI:NL:RBNNE:2021:2160
ECLI:NL:RBOBR:2018:4218
ECLI:NL:RBOBR:2018:4414
ECLI:NL:RBOBR:2018:6742
ECLI:NL:RBROT:2019:693
ECLI:NL:RBROT:2020:4462
ECLI:NL:RBROT:2021:4841

South Africa

Administrateur, Transvaal v Van der Merwe 1994 (4) SA 347 (AD)
Administrator General for South-West Africa v Kriel (1988) 2 All SA 323 (A)
Administrator of Natal v Edouard 1990 (3) SA 581 (AD)
Afriforum v Minister of Finance (2021) ZAGPPHC 730
Afriforum v Minister of Police (2021) ZAGPPHC 882
AK v Minister of Police 2022 (11) BCLR 1307 (CC)
Al-Kharafi & Sons v Pema 2010 (2) SA 360 (W)
Antonie v Governing Body, Settlers High School 2002 (4) SA 738 (C)
Ascendis Animal Health v Merck Sharpe Dohme Corporation (2019) ZACC 41
Attorney-General, Cape v Bestall (1988) ZASCA 48
August v Electoral Commission 1999 (3) SA 1 (CC)

Avonmore Supermarket v Venter 2014 (5) SA 399 (SCA)
Bato Star Fishing v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC)
BE v MEC for Social Development, Western Cape 2022 (1) SA 1 (CC)
Bergrivier Municipality v Van Ryn Beck 2019 (4) SA 127 (SCA)
Bester v Commercial Union Versekeringsmaatskappy van SA 1973 (1) SA 769 (A)
Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC)
Blaikie-Johnstone v P Hollingsworth 1974 (3) SA 392 (D)
Boswell v Minister of Police 1978 (3) SA 268 (E)
Botha v Fick 1995 (2) SA 750 (AD)
Botha v The Governing Body of the Eljada Institute (2016) ZASCA 36
Cape Empowerment Trust v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA)
Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA)
Cape Town Municipality v Paine 1923 AD 207
Carelse v City of Cape Town (2019) 2 All SA 125 (WCC)
Carmichele v Minister of Safety & Security 2001 (4) SA 938 (CC)
Christian Education South Africa v Minister of Education 1999 (4) SA 1092 (SE)
Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)
Christian Lawyers Association v National Minister of Health 2005 (1) SA 509 (T)
City Council of Pretoria v De Jager (1997) 1 All SA 635 (A)
Coetzee v SA Railways & Harbours 1933 CPD 565
Country Cloud Trading v MEC, Department of Infrastructure Development 2015 (1) SA 1 (CC)
Crown Chickens v Rieck 2007 (2) SA 118 (SCA)
Custom Credit v Shembe 1972 (3) SA 462 (A)
Da Silva v Coutinho 1971 (3) SA 123 (A)
Dantex v Brenner (1989) 1 All SA 411 (A)
Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC)
De Klerk v Minister of Police 2021 (4) SA 585 (CC)
De Reuck v DPP 2004 (1) SA 406 (CC)
Dikoko v Mokhatla 2006 (6) SA 235 (CC)
DPP, Gauteng v Pistorius 2016 (2) SA 317 (SCA)
Electoral Commission v Minister of Cooperative Governance & Traditional Affairs 2022 (5) BCLR 571 (CC)
Els E v Bruce; Els J v Bruce 1922 EDL 295
Enslin v Nhlapo 2008 (5) SA 146 (SCA)
Equal Education v Minister of Basic Education 2021 (1) SA 198 (GP)
Eskom Holdings v Hendricks (2005) 3 All SA 415 (SCA)
Esorfranki Pipelines v Mopani District Municipality 2022 (2) SA 355 (SCA)
Evins v Shield (1980) 2 All SA 40 (A)
Ex parte Minister of Safety & Security: In re: S v Walters 2002 (4) SA 613 (CC)
F v Minister of Safety & Security 2012 (1) SA 536 (CC)
Ferreira v Levin 1996 (1) SA 984 (CC)
First National Bank of Southern Africa v Duvenhage (2006) 4 All SA 541 (SCA)
Fose v Minister of Safety & Security 1997 (3) SA 786
Fourway Haulage v SA National Roads Agency 2009 (2) SA 150 (SCA)
Freddy Hirsch Group v Chickenland 2011 (4) SA 276 (SCA)
Freedom of Religion South Africa v Minister of Justice & Constitutional Development 2020 (1) SA 1 (CC)
Gold Circle v Maharaj (2019) ZASCA 93
Gouda Boerdery v Transnet (2004) 4 All SA 500 (SCA)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)
Government of the Western Cape: Department of Social Development v CB 2019 (3) SA 235 (SCA)
Groenewald v Groenewald 1998 (2) SA 1106 (SCA)
Grootboom v Oostenburg Municipality 2000 (3) BCLR 277 (C)
Guardrisk Insurance Company v Cafe Chameleon 2021 (2) SA 323 (SCA)
H v Fetal Assessment Centre 2015 (2) SA 193 (CC)
Hattingh v Roux 2011 (5) SA 135 (WCC)
Hawekwa Youth Camp v Byrne 2010 (6) SA 83 (SCA)
Hay v B 2003 (3) SA 492 (W)
Herschel v Mrupe 1954 (3) SA 464 (A)
Hoffa v SA Mutual Fire & General Insurance 1965 (2) SA 944 (C)
Hotz v University of Cape Town 2017 (2) SA 485 (SCA)
Indac Electronics v Volkskas Bank 1992 (1) SA 783 (AD)
International Shipping Company v Bentley (1990) 1 All SA 498 (A)
Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors: In re Hyundai Motor Distributors v Smit 2001 (1) SA 545 (CC)
Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC)
Johncom Media Investments v M 2009 (4) SA 7 (CC)
Jones v Santam 1965 (2) SA 542 (A)
Jooste v Botha 2000 (2) SA 199 (T)
Jowell v Bramwell-Jones 2000 (3) SA 274 (SCA)
K v Minister of Safety & Security 2005 (6) SA 419 (CC)
Khosa v Minister of Social Development 2004 (6) SA 505 (CC)
Khumalo v Holomisa 2002 (5) SA 401 (CC)
Khupa v South African Transport Services 1990 (2) SA 627 (W)
King v De Jager 2021 (4) SA 1 (CC)
Komape v Minister of Basic Education (2019) ZASCA 192
Konstanz Properties v WM Spilhaus 1996 (3) SA 273 (SCA)
Kruger v Coetzee 1966 (2) SA 428 (A)
Le Roux v Dey 2011 (6) BCLR 577 (CC)
Lee v Minister for Correctional Services 2013 (2) SA 144 (CC)
Lillicrap v Pilkington Brothers 1985 (1) SA 475 (A)
Local Transitional Council of Delmas v Boschoff 2005 (5) SA 514 (SCA)
Lomagundi Sheetmetal & Engineering v Basson 1973 (4) SA 523 (RA)
Loureiro v Imvula Quality Protection 2014 (3) SA 394 (CC)
M v RAF (2017) ZAGPPHC 247
Maarman v The President of the Republic of South Africa (2022) ZAWCHC 91
Makhanda against Mandates v Rhodes University (2022) ZAECMKHC 5
Makhubele v RAF (2017) ZAGPPHC 805
Masemola v RAF (2017) ZAGPPHC 1202
Mashongwa v PRASA 2016 (3) SA 528 (CC)
Matthews v Young 1922 AD 492
McIntosh v Premier of the Province of KZN 2008 (6) SA 1 (SCA)
mCubed International v Singer (2009) ZASCA 6
MEC for Education, KZN v Pillay 2008 (1) SA 474 (CC)
MEC for Health & Social Development, Gauteng v DZ 2018 (1) SA 335 (CC)
MEC for the Department of Public Works, Roads & Transport v Botha (2016) ZASCA 20
MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA)
MEC v Zulu (2016) ZASCA 185

Media 24 v Grobler 2005 (6) SA 328 (SCA)
Media 24 v SA Taxi Securitisation 2011 (5) SA 329 (SCA)
Michael v Linksfield Park Clinic (2002) 1 All SA 384 (A)
Mineworkers Investment Company v Modibane (2002) ZAGPHC 6
Minister of Defence v Jackson 1991 (4) 23 (ZSC)
Minister of Finance v Gore 2007 (1) SA 111 (SCA)
Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC)
Minister of Home Affairs v National Institute for Crime Prevention 2005 (3) SA 280 (CC)
Minister of Justice & Constitutional Development v X 2015 (1) SA 25 (SCA)
Minister of Law & Order v Kadir 1995 (1) SA 303 (A)
Minister of Police v Skosana 1977 (1) SA 31 (A)
Minister of Safety & Security v Mohofe 2007 (4) SA 215 (A)
Minister of Safety & Security v Gaqa 2002 (1) SACR 654 (C)
Minister of Safety & Security v Van Duivenboden (2002) 3 All SA 741 (SCA)
Minister of Welfare & Population Development v Fitzpatrick 2000 (3) SA 422 (CC)
Minister van Polisie v Ewels 1975 (3) SA 590 (A)
Minister van Polisie v Van der Vyver (2013) ZASCA 39
Minister: Western Cape Department of Social Development v E (2020) ZASCA 103
Mkhatswa v Minister of Defence (2000) 1 All SA 188 (A)
Moise v Transitional Local Council of Greater Germiston 2001 (4) SA 491 (CC)
Mostert v Cape Town City Council 2001 (1) SA 105 (SCA)
MTO Forestry v Swart 2017 (5) SA 76 (SCA)
Mukheiber v Raath (1999) 3 All SA 490 (A)
Municipality of Cape Town v Bakkerud (2000) 3 All SA 171 (A)
N v MEC for Health, Gauteng (2015) ZAGPPHC 645
N v T 1994 (1) SA 862 (C)
National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6
National Media v Bogoshi 1998 (4) SA 1196 (SCA)
Ngubane v South African Transport Services 1991 (1) SA 756 (AD)
NM v Smith 2007 (5) SA 250 (CC)
Nohour v Minister of Justice & Constitutional Development (2020) ZASCA 27
Ntsala v Mutual & Federal Insurance 1996 (2) SA 184 (T)
NVM v Tembisa Hospital (2022) ZACC 11
O'Shea v Van Zyl 2012 (1) SA 90 (SCA)
Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape 2016 (1) SA 325 (CC)
Oslo Land v The Union Government 1938 AD 584
P v Member of the Executive Council for Health & Social Development (Gauteng) (2017) ZAGPJHC 101
PAF v SCF (2022) ZASCA 101
Perlman v Zoutendyk 1934 CPD 151
Petropulos v Dias 2020 (5) SA 63 (SCA)
Phillips v DPP, Witwatersrand Local Division 2003 (3) SA 345 (CC)
Phiri v S 2014 (1) SACR 211 (GNP)
President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)
President of the Republic of South Africa v Modderklip Boerdery 2005 (5) SA 3 (CC)
Prinsloo v Goldex 2014 (5) SA 297 (SCA)
Pro Tempo v Van der Merwe 2018 (1) SA 181 (SCA)
Protea Assurance v Lamb 1970 (1) SA 530 (A)
Qwelane v South African Human Rights Commission 2021 (6) SA 579 (CC)

RAF v Marunga (2003) 2 All SA 148 (SCA)
RAF v Mtati (2005) 3 All SA 340 (SCA)
RAF v Sauls 2002 (2) SA 55 (SCA)
Rail Commuters Action Group v Transnet 2005 (2) SA 359 (CC)
Reddell v Mineral Sands Resources (2022) ZACC 38
Regal v African Superslate 1963 (1) SA 102 (A)
RK v Minister of Basic Education 2020 (2) SA 347 (SCA)
Roux v Hattingh 2012 (6) SA 428 (SCA)
Rust v Coetzee (2022) ZAWCHC 88
S v Bochris Investments (1988) 4 All SA 207 (AD)
S v Coetzee 1997 (3) SA 527 (CC)
S v Daniëls 1983 (3) SA 275 (A)
S v Dodo 2001 (5) BCLR 423 (CC)
S v Huma 1996 (1) SA 232 (W)
S v Humphreys 2013 (2) SACR 1 (SCA)
S v Johnson 1969 (1) SA 201 (A)
S v Jordan 2002 (6) SA 642 (CC)
S v M 2008 (3) SA 232 (CC)
S v Makwanyane 1995 (6) BCLR 665
S v Mamabolo 2001 (3) SA 409 (CC)
S v Manamela 2000 (3) SA 1 (CC)
S v Mbatha 2012 (2) SACR 551 (KZP)
S v Nyalungu 2005 JOL 13254 (T)
S v Sigwahla 1967 (4) SA 566 (A)
S v TNS 2015 (1) SACR 489 (WCC)
Saki v MEC of the Department of Health, Eastern Cape Government (2020) ZAECGHC 107
Santam Insurance v Vorster 1973 (4) SA 764 (A)
Schmidt v RAF (2007) 2 All SA 338 (W)
Sea Harvest Corporation v Duncan Dock Cold Storage (2000) 1 All SA 128 (A)
Seti v South African Rail Commuter Corporation (2013) ZAWCHC 109
Shilubana v Nwamitwa 2009 (2) SA 66 (CC)
Sigournay v Gillbanks 1960 (2) SA 552 (A)
Siman v Barclays National Bank 1984 (2) SA 888 (A)
Smit v Abrahams (1994) 4 All SA 679 (AD)
Solidarity v Ernest Lowe (2022) 43 ILJ 1125 (LC)
Soobramoney v Minister of Health, KZN 1998 (1) SA 765 (CC)
South African Hang & Paragliding Association v Bewick 2015 (3) SA 449 (SCA)
South African Railways & Harbour v Estate Saunders 1931 AD 276
Southern Insurance Association v Bailey 1984 (1) SA 98 (A)
Standard Chartered Bank of Canada v Nedperm Bank 1994 (4) SA 747 (AD)
Stedall v Aspeling (2017) ZASCA 172
Swinburne v Newbee Investments 2010 (5) SA 296 (KZD)
Symington v Pretoria-Oos Privaat Hospital (2005) 4 All SA 403 (SCA)
TC v SC 2018 (4) SA 530 (WCC)
Technical Systems v RTS Industries (2021) ZAWCHC 35
Telematrix v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)
The Premier of the Western Cape Provincial Government v Rochelle Madalyn Kiewitz 2017 (4) SA 202 (SCA)
Thubakgale v Ekurhuleni Metropolitan Municipality 2022 (8) BCLR 985 (CC)
Transnet v Sechaba Photoscan (2004) ZASCA 24

Truter v Deysel 2006 (4) SA 168 (SCA)
Union Government (Minister of Railways & Harbours) v Warneke 1911 AD 657
Union Government v National Bank of SA 1921 AD 121
Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T)
Universiteit van Pretoria v Tommie Meyer Films 1979 (1) SA 441 (A)
Van der Merwe v RAF 2006 (4) SA 230 (CC)
Van der Plaats v South African Mutual Fire 1980 (3) SA 105 (A)
Van Schalkwyk v S 2016 (2) SACR 334 (SCA)
Van Vuuren v Ethhekwini Municipality 2018 (1) SA 189 (SCA)
Van Zijl v Hoogenhout (2004) 4 All SA 427 (SCA)
Weber v Santam Versekeringsmaatskappy 1983 (1) SA 381 (A)
Young v Shaikh 2004 (3) SA 46 (C)
Za v Smith 2015 (4) SA 574 (SCA)

United Kingdom

Anns v Merton (1977) 2 All ER 492
Applying Re K (Forced Marriage: Passport Order) (2020) EWCA Civ 190
Bonnington Castings v Wardlaw (1956) AC 613
C (Looked After Child) (COVID-19 Vaccination) (2021) EWHC 2993 (Fam)
Caparo v Dickman (1990) All ER 568
Donoghue v Stevenson (1932) UKHL 100
F v F (2013) EWHC 2683 (Fam)
Fairchild v Glenhaven Funeral Homes (2003) 1 AC 32
Gillick v West Norfolk & Wisbech Area Health Authority (1985) 3 All ER 402 (HL)
Greatorex v Greatorex (2000) EWHC 223 (QB)
H West & Son v Shephard (1963) UKHL 3
In Re W (a minor) (medical treatment) (1992) 4 All ER 627 (CA)
M v H (Private Law Vaccination) (2020) EWFC 93
Re H (A Child: Parental Responsibility: Vaccination) (2020) EWCA Civ 664
Re SL (Permission to Vaccinate) (2017) EWHC 125 (Fam)
X (Minors) v Bedfordshire County Council (1995) 2 AC 633

United States of America

Abeel v Clark (1890) 84 Cal 226
BN v KK 538 A2d 1175 (Md 1988)
Brown v Smith B279936 (2 July 2018)
FF v State of New York 2019 NY Slip Op 29376
FF v State of New York 2021 NY Slip Op 01541
In Matter of Christine M 157 Misc 2d4 (NY Fam Ct 1992)
Jacobson v Massachusetts 197 US 11 (1905)
JF v DF 2021 NY Slip Op 21327
John B v Superior Court 38 Cal4th 1177 (Cal 2006)
Kagen v Kagen No 318459 (Mich Ct App Jul 14 2015)
Matheson v Schmitt No 347022 (Mich Ct App Nov 21 2019)
Smith v Baker July 5, 1884 (Circuit Court, SD New York)

TABLE OF STATUTES

Australia

Anti-Discrimination Act 85 of 1991 (Current as at 5 June 2017)
Civil Liability Act 2003 of Queensland (Current as at 2 March 2020)
Public Health Act of 2005 (Current as at 25 May 2020)
Social Services Legislation Amendment (No Jab, No Pay) Act 158 of 2015

Canada

Children's Law Reform Act RSO 1990
Health Protection and Promotion Act RSO 1990
Immunisation of School Pupils Act RSO 1990

Germany

Bürgerliches Gesetzbuch (German Civil Code) of 2 January 2002
Grundgesetz (Basic Law for the Federal Republic of Germany) of 23 May 1949
Infektionsschutzgesetz (Protection Against Infection Act) of 20 July 2000 as amended in December 2022
Masernschutzgesetz (Measles Protection Act) of 10 February 2020
Strafgesetzbuch (German Criminal Code) of 13 November 1998 as amended in November 2021

Netherlands

Burgerlijk Wetboek (Dutch Civil Code) of 1992
Constitution of the Kingdom of the Netherlands of 22 September 2008

South Africa

Child Care Act 74 of 1983
Children's Act 38 of 2005
Children's Amendment Act 41 of 2007
Choice on Termination of Pregnancy Act 92 of 1996
Constitution of the Republic of South Africa, 1996
Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
Criminal Procedure Act 51 of 1997
Domestic Violence Act 116 of 1998
National Education Policy Act 27 of 1996
National Health Act 61 of 2003
Prescription Act 68 of 1969
Prevention of Family Violence Act 133 of 1993
Promotion of Access to Information Act 2 of 2000
Protection of Personal Information Act 4 of 2013
South African Schools Act 84 of 1996
Superior Courts Act 10 of 2013

South Africa: Government Gazette

Notice No 2432 of 1998 in *Government Gazette* 19377 of 19 October 1998

United States of America

Tenth Amendment to the US Constitution (ratified on 15 December 1791)
New York Consolidated Laws, Public Health Law of 2012
Louisiana Civil Code (2022)

United States of America: draft legislation

Vaccinate All Children Act of 2019 (Introduced 05/03/2019)
Vaccine Access Improvement Act of 2019 (Introduced 05/23/2019)
Vaccines Act of 2019 (Introduced 05/21/2019)

BIBLIOGRAPHY

A

Ahmed, R "The influence of reasonableness on the element of conduct in delictual or tort liability — comparative conclusions" (2019) *Potchefstroom Electronic Law Journal* 1–34

Albertyn & Goldblatt "Chapter 35" in *CLoSA* (2014)

Albertyn, C & Goldblatt, B "Chapter 35: equality" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 03-07, 2014) Juta & Company Ltd: Claremont

American Law Institute *Restatement of the law third, torts: liability for physical and emotional harm* (2010–2012) American Law Institute Publishers: Saint Paul, Minnesota

Auckland, C & Goold, I "Parental rights, best interests and significant harms: who should have the final say over a child's medical care?" (2019) 78(2) *Cambridge Law Journal* 287–323

Australian Government "Immunisation medical exemptions" (21 December 2021) https://www.servicesaustralia.gov.au/individuals/topics/immunisation-medical-exemptions/40531 (accessed 15 June 2022)

Australian Government "What are immunisation requirements" (1 July 2022) https://www.servicesaustralia.gov.au/individuals/topics/what-are-immunisation-requirements/35396 (accessed 15 June 2022)

Australian Government, Department of Social Services "Immunisation and health check requirements for family tax benefit" (6 August 2020) https://www.dss.gov.au/our-responsibilities/families-and-children/benefits-payments/strengthening-immunisation-for-young-children (accessed 15 June 2022)

Australian Law Reform Commission "The right to sue in tort" (08 December 2014) https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-

commonwealth-laws-ip-46/16-authorising-what-would-otherwise-be-a-tort/the-right-to-sue-in-tort/ (accessed 28 November 2022)

B

Baker, L "Vaccination saves lives — dare we allow the anti-vaccine lobbyists to prevent it?" (2015) 105(11) *South African Medical Journal* 881–882

Bärnighausen, T & Bloom, DE; Canning, D & O'Brien, J "Accounting for the full benefits of childhood vaccination in South Africa" (2008) 98(11) *South African Medical Journal* 844–846

Baudouin (2018)
Baudouin, JL *Tort law in Quebec* (2018) Kluwer Law International: The Netherlands

Baxter (2014) *UCLR*
Baxter, TD "Tort liability for parents who choose not to vaccinate their children and whose unvaccinated children infect others" (2014) 82(1) *University of Cincinnati Law Review* 103–141

Beard, FH; Leask, J & McIntyre, PB "No jab, no pay and vaccine refusal in Australia: the jury is out" (2017) 206(9) *Medical Journal of Australia* 381–383

Beck Online "*Bundesrat billigt Pflicht zur Masernimpfung*" (Federal Council approves compulsory measles vaccination) (20 December 2019) https://beck-online.beck.de/Dokument?vpath=bibdata%2Freddok%2Fbecklink%2F2015093.htm&pos=6&hlwords=on (accessed 15 June 2020)

Beck Online "*Eilanträge gegen Nachweis der Masernschutzimpfung vor Kita-Besuch erfolglos*" (Urgent applications against proof of the measles vaccination before visiting the daycare center were unsuccessful) (19 May 2020) https://beck-online.beck.de/Dokument?vpath=bibdata%2Freddok%2Fbecklink%2F2016349.htm&pos=6&hlwords=on (accessed 15 June 2020)

Bedford, H; Attwell, K; Danchin, M; Marshall, H; Corben, P & Leask, J "Vaccine hesitancy, refusal and access barriers: the need for clarity in terminology" (2018) 36(44) *Vaccine* 6556–6558

Beever, A *A theory of tort liability* (2016) Hart Publishing, an imprint of Bloomsbury Publishing: Oxford; Portland, Oregon

Beggs, CB; Noakes, C J; Sleigh, PA; Fletcher, LA & Siddiqi, K "The transmission of tuberculosis in confined spaces: an analytical review of alternative epidemiological models" (2003) 7(11) *International Journal of Tuberculosis and Lung Disease* 1015–1026

Bekker, JC; Rautenbach, C & Goolam, NMI *Introduction to legal pluralism in South Africa* (2021) LexisNexis: South Africa

Belseck, N "Still no link between MMR vaccine and autism, refuting persistent claims by anti-vaxxers, a new study from Denmark once again disproves the link between the measles, mumps, rubella (MMR) vaccine and autism" (2019) 6 *Medical Chronicle* 6–7

Bhana (2013) *SAJHR*
Bhana, D "The horizontal application of the Bill of Rights: a reconciliation of sections 8 and 39 of the Constitution" (2013) 29 *South African Journal on Human Rights* 351–375

Billington, JK & Omer, SB "Use of fees to discourage nonmedical exemptions to school immunization laws in US States" (2016) 106(2) *American Journal of Public Health* 269–270

Bishop & Woolman "Chapter 40" in *CLoSA* (2014)
Bishop, M & Woolman, S "Chapter 40: freedom and security of the person" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 07-06, 2014) Juta & Company Ltd: Claremont

Blank, M "Posttraumatic stress disorder in infants, toddlers, and preschoolers" (2007) 49(3) *BC Medical Journal* 133–138

Boberg, PQR *The law of delict: vol 1 Aquilian liability* (1984) Juta & Company Ltd: Cape Town

Boezaart (2009)
Boezaart, T (ed) *Child law in South Africa* (2009) Juta & Company Ltd: Claremont

Bonita *et al* (2006)
Bonita, R; Beaglehole, R; Kjellström, T & WHO *Basic epidemiology* 2ed (2006) World Health Organisation

Brennan (2017)
Brennan, C *Tort law concentrate: law revision and study guide* 4ed (2017) Oxford University Press: Clarendon

Brennan (2019)
Brennan, C *Tort law concentrate: law revision and study guide* 5ed (2019) Oxford University Press: Clarendon

Brey, P "From moral agents to moral factors: the structural ethics approach" (2014) https://archive.ethicsandtechnology.eu/wp-content/uploads/downloadable-content/Brey-2014-Structural-Ethics.pdf (accessed 21 November 2022)

Brickhill & Friedman "Chapter 59" in *CLoSA* (2014)
Brickhill, J & Friedman, A "Chapter 59: access to courts" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 11-07, 2014) Juta & Company Ltd: Claremont

Brookes, M; Stirling, G & Nankivell, H "The 'but for' test of causation in Australian law" (December 2020) https://www.carternewell.com/page/Publications/2020/the-but-for-test-of-causation-in-australian-law/ (accessed 25 November 2022)

Brüggemeier (2020) *EJCLG*
Brüggemeier, G "The civilian law of delict: a comparative and historical analysis" (2020) 7 *European Journal of Comparative Law and Governance* 339–383

Buchanan, JJ "Prospective damages in actions for damages for bodily injury" (1960) 77(2) *South African Law Journal* 187–192

Buchanan, JL; Corbett, MM & Gauntlett, JJ *The quantum of damages in bodily and fatal injury cases (general principles)* 3ed (1985) Juta: Cape Town

Büchner-Eveleigh (2016) *DJLJ*
Büchner-Eveleigh, M "Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy" (2016) 49(2) *De Jure Law Journal* 307–325

Burnett *et al* (2015) *SAMJ*
Burnett, RJ (corr); Von Gogh, LJ; Moloi, MH & François, G "A profile of anti-vaccination lobbying on the South African internet, 2011–2013" (2015) 105(11) *South African Medical Journal* 922–926

Burnett *et al* (2019) *SAJS*
Burnett, RJ; Dlamini, NR; Meyer, JC; Fernandes, L; Motloung, BR; Ndlovu, TH; Simango, HA; Kibuuka, DK; Dochez, C; Montwedi, DN; Nkwinika, VV & Mphahlele, MJ "Progress towards obtaining valid vaccination coverage data in South Africa" (2019) 115(5/6) *South African Journal of Science* 1–4

Barker *et al* (2012)
K Barker, P Cane, M Lunney & F Trindade *The law of torts in Australia* 5ed (2012) Oxford University Press: Melbourne, Australia

C

Calitz, T "Constitutional rights in South Africa protect against mandatory COVID-19 vaccination" (21 April 2021) https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/ (accessed 28 November 2022)

Calzolaio (2022)
Calzolaio, E *Comparative contract law: an introduction* (2022) Routledge: Abingdon

Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/asymptomatic (accessed 24 November 2022)

CANSA "Fact Sheet and Position Statement on Vaccines and Vaccination" (August 2021) https://cansa.org.za/files/2021/08/Fact-Sheet-and-Position-Statement-on-Vaccines-and-Vaccination-August-2021-Final.pdf (accessed 10 July 2022)

Caplan *et al* (2012) *JLME*
Caplan, AL; Hoke, D; Diamond, NJ & Karshenboyem, V "Free to choose but liable for the consequences: should non-vaccinators be penalized for the harm they do?" (2012) 40(3) *Journal of Law, Medicine and Ethics* 606–611

Carstens & Pearmain (2007)
Carstens, PA & Pearmain, D *Foundational principles of South African medical law* (2007) LexisNexis: Durban

CDC "How TB Spreads" (3 May 2022) https://www.cdc.gov/tb/topic/basics/howtbspreads.htm (accessed 25 November 2022)

CDC "Tuberculosis (TB) Vaccines" (3 May 2022) https://www.cdc.gov/tb/topic/basics/vaccines.htm#:~:text=TB%20Vaccine%20(BCG),protect%20people%20from%20getting%20TB (accessed 25 November 2022)

CDC "Understanding the epidemiologic triangle through infectious disease" (date unknown) https://www.cdc.gov/healthyschools/bam/teachers/documents/epi_1_triangle.pdf (accessed 24 November 2022)

Centers for Disease Control and Prevention "Benefits of Getting a COVID-19 Vaccine" (19 June 2022) https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html#:~:text=COVID%2D19%20vaccination%20helps%20protect,have%20mild%20or%20severe%20illness (accessed 05 July 2022) (on file with the author)

Centers for Disease Control and Prevention "Immunisation: The basics. Definition of terms" (1 September 2021) https://www.cdc.gov/vaccines/vac-gen/imz-baics.htms (accessed 05 June 2022) (on file with the author)

Ciolli (2008) *YJBM*
Ciolli, A "Mandatory school vaccinations: the role of tort law" (2008) 81(3) *Yale Journal of Biology and Medicine* 129–137

Clark & Harris (2005) *DCJ*
Clark, SS & Harris, C "Tort law reform in Australia: fundamental and potentially far-reaching change" (2005) 72 *Defense Counsel Journal* 16–23

Cloete, R "Government plans to vaccinate children against COVID-19" (12 December 2022) https://www.careersportal.co.za/news/government-plans-to-vaccinate-children-against-covid-19 (accessed 22 January 2023)

Cluskey, P "Dutch government relieved as anti-vax movement fails to ignite" (6 September 2021) https://www.irishtimes.com/news/world/europe/dutch-government-relieved-as-anti-vax-movement-fails-to-ignite-1.4666521 (accessed 5 December 2022)

Congress.Gov "H.R.1973 — Vaccine Access Improvement Act of 2019" https://www.congress.gov/bill/116th-congress/house-bill/1973?q=%7B%22search%22%3A%5B%22vaccine%22%5D%7D&r=2&s=3 (accessed 15 June 2020)

Congress.Gov "H.R.2527 — Vaccinate All Children Act of 2019" https://www.congress.gov/bill/116th-congress/house-bill/2527?q=%7B%22search%22%3A%5B%22immunization%22%5D%7D&s=7&r=10 (accessed 15 June 2020)

Congress.Gov "H.R.2862 — Vaccines Act of 2019" https://www.congress.gov/bill/116th-congress/house-

bill/2862/text?q=%7B%22search%22%3A%5B%22vaccine%22%5D%7D&r=1&s=1 (accessed 15 June 2020)

Connolly (2006)
Connolly, T "Where does the tort debate leave us? Views from the bench" (26–28 July 2006) 15th Annual Insurance Law Congress, Sydney

Cornell Law School "Damages" (date unknown) https://www.law.cornell.edu/wex/damages (accessed 1 December 2022)

Cornell Law School "Federalism" (date unknown) https://www.law.cornell.edu/wex/federalism (accessed 06 July 2022)

Cornell Law School "Tort" (date unknown) https://www.law.cornell.edu/wex/tort#:~:text=Negligent%20torts%20occur%20when%20the,particular%20result%20or%20harm%20manifested (accessed 1 December 2022)

COVID-19 South African Online Portal "I Choose #VacciNation" (date unknown) https://sacoronavirus.co.za/category/i-choose-vaccination/ (accessed 28 November 2022)

Currie & De Waal (2013)
Currie, I & De Waal, J *The Bill of Rights handbook* 6ed (2013) Juta & Company Ltd: Claremont

D

Davis & Klare (2010) *SAJHR*
Davis, DM & Klare, K "Transformative constitutionalism and the common and customary law" (2010) 26(3) *South African Journal on Human Rights* 403–509

De Jong, C (ed) "*Mijn zoontje was bijna dood door een kind dat niet ingeënt was*" (My son was almost killed by a child who had not been vaccinated) (06 August 2018) https://eenvandaag.avrotros.nl/item/mijn-zoontje-was-bijna-dood-door-een-kind-dat-niet-ingeent-was/ (accessed 15 June 2020)

De Jong, J; Kroneman, M; Fermin, A; Legemaate, J; Widdershoven, G; Hansen, J; van Esch, T & van Dijk, L "*Maatregelen om de vaccinatiegraad in Nederland te verhogen*" (Measures to increase vaccination coverage in the Netherlands) (December 2019) https://www.nivel.nl/sites/default/files/bestanden/1003621.pdf (accessed 12 July 2022)

Deakin *et al* (2003)
Deakin, S; Johnston, AC & Markesinis, BS *Markesinis and Deakin's tort law* 5ed (2003) Oxford University Press: Clarendon

Desilver, D "States have mandated vaccinations since long before COVID-19" (8 October 2021) https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/ (accessed 06 July 2022)

Deutsche Welle "Germany: law mandating vaccines in schools takes effect" (date unknown) https://www.dw.com/en/germany-law-mandating-vaccines-in-schools-takes-effect/a-52596233 (accessed 15 June 2020)

Diekema (2009) *MLR*
Diekema, DS "Choices should have consequences: failure to vaccinate, harm to others, and civil liability" (2009) 107 *Michigan Law Review* 90–94

Dietrich & Field (2017) *MULR*
Dietrich, J & Field, I "The 'reasonable tort victim': contributory negligence, standard of care and the equivalence theory" (2017) 41(2) *Melbourne University Law Review* 602–646

Du Plessis "Chapter 32" in *CLoSA* (2014)
Du Plessis, L "Chapter 32: interpretation" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 06-08, 2014) Juta & Company Ltd: Claremont

Dutch Civil Law (DCL) "BW: Book 6 The law of obligations" (date unknown) http://www.dutchcivillaw.com/civilcodebook066.htm (accessed 29 March 2022)

Dyson (2015)
Dyson, M *Comparing tort and crime: learning from across and within legal systems* 9ed (2015) Cambridge University Press: Cambridge

E

Erbacher (2017)
Erbacher, S *Negligence and illegality* (2017) Hart Publishing, an imprint of Bloomsbury Publishing: Oxford; Portland, Oregon

European Centre for Disease Prevention and Control "Governance" (date unknown) https://www.ecdc.europa.eu/en/about-us/ecdcs-governance (accessed 15 June 2020)

European Centre for Disease Prevention and Control "What we do" (date unknown) https://www.ecdc.europa.eu/en/about-uswhat-we-do/ecdcs-mission (accessed 15 June 2020)

European Vaccination Information Portal "Vaccination" (date unknown) https://vaccination-info.eu/en/vaccination (accessed 15 June 2020)

F

Fagan, A "Causation in the Constitutional Court: Lee v Minister of Correctional Services" (2013) (5) *Constitutional Court Review* 104–134

Fagan, A "Further reflections on wrongfulness in the law of delict" (2018) 135(1) *South African Law Journal* 18–54

Fagan, A "Reconsidering Carmichele" (2008) 125 *South African Law Journal* 659–673

Fagan (2019)
Fagan, A *Aquilian liability in the South African law of delict. A textbook for students* (2019) Juta & Company Ltd: Claremont

Fagan (2018)
Fagan, A *Undoing delict: the South African law of delict under the Constitution* (2018) Juta & Company Ltd: Claremont

Farlam "Chapter 41" in *CLoSA* (2014)
Farlam, P "Chapter 41: freedom of religion, belief and opinion" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 12-03, 2014) Juta & Company Ltd: Claremont

Federal Court of Justice Communication from the press office "Entscheidungsrecht bei Uneinigkeit der Eltern über Schutzimpfung ihres Kindes" (Right to decide in the event of disagreement between the parents vaccination of their child) (2017) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&anz=1&pos=0&nr=78383&linked=pm&Blank=1 (accessed 15 June 2020)

Federal Register of Legislation "Social Services Legislation Amendment (No Jab, No Pay) Act 2015" (date unknown) https://www.legislation.gov.au/Details/C2015A00158 (accessed 06 July 2022)

Fenyves, A; Karner, E; Koziol, H & Steiner, E *Tort law in the jurisprudence of the European Court of Human Rights* (2011) De Gruyter: Germany

Ferraiolo, SA "Justice for injured children: a look into possible criminal liability of parents whose unvaccinated children infect others" (2016) 19(1) *Quinnipiac Health Law Journal* 29–54

Ferreira (2006) *SJ*
Ferreira, G "The direct and indirect application of the Bill of Rights: constitutional imperative or questionable academic innovation?" (2006) 20 *Speculum Juris* 241–247

Finch & Fafinski (2021)
Finch, E & Fafinski, S *Law express: tort law* 8ed (2021) Pearson: England

Friedman *et al* "Chapter 47" in *CLoSA* (2014)
Friedman, A; Pantazis, A & Skelton, A "Chapter 47 Children's Rights" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, RS1, 07-09, 2014) Juta & Company Ltd: Claremont

Fuglinszky (2013) *TECLF*
Fuglinszky, Á "Civil liability in a mixed jurisdiction: Quebec and the network of ratio communis" (2013) 28 *Tulane European and Civil Law Forum* 1–50

Funakoshi, M "US state vaccine mandates in schools" (15 September 2021) https://graphics.reuters.com/HEALTH-CORONAVIRUS/BIDEN/zgpombrajpd/ (accessed 15 June 2022)

G

GAVI "The power of vaccination" (date unknown) https://www.gavi.org/vaccineswork/value-vaccination?gclid=Cj0KCQjwxtSSBhDYARIsAEn0thRyiHLDJRFLrlSV-X4aYm1ZJWlZaE4sEqlPAvhGzQmzgfK-65Zn2a0aAv_sEALw_wcB (accessed 05 June 2022) (on file with the author)

Germani, F & Biller-Andorno, N "The anti-vaccination infodemic on social media: a behavioral analysis" (2021) 16(3) *PloS One* e0247642

Gillaerts, P "Instrumentalisation of tort law: widespread yet fundamentally limited" (2019) 15(3) *Utrecht Law Review* 27–43

Giubilini (2018)
Giubilini, A *The ethics of vaccination* (2018) Springer: Switzerland

Government of Canada "Where our legal system comes from" (2021) https://www.justice.gc.ca/eng/csj-sjc/just/03.html#:~:text=Quebec%20is%20the%20only%20province,it%20is%20used%20throughout%20Canada (accessed 29 March 2022)

GovTrack "H.R. 2527 (116th): Vaccinate All Children Act of 2019" (8 August 2019) https://www.govtrack.us/congress/bills/116/hr2527/summary (accessed 19 June 2020)

Green, A "Anti-vaxxers alive in South Africa; risking children's lives" (2016) https://bhekisisa.org/article/2016-04-27-fear-of-inoculation-will-affect-childrens-health-globally/ (accessed 10 March 2020)

Gutteridge (2015)
Gutteridge, HC *Comparative law* (2015) Cambridge University Press: Cambridge

H

Handbook Germany "Vaccination Schedule in Germany" (date unknown) https://handbookgermany.de/en/live/vaccination.html (accessed 15 June 2020)

Health 24 "Millennials most likely to skip flu shot and believe "anti-vaxxer" claims" (2020) available at https://www.health24.com/Medical/Flu/News/millennials-most-likely-to-skip-flu-shot-and-believe-anti-vaxxer-claims-20200205-2 (accessed 10 March 2020)

Hellwege, P & Witting, P "Chapter 4: delictual and criminal liability in Germany" in Dyson, M *Comparing tort and crime: learning from across and within legal systems* 9ed (2015) Cambridge University Press: Cambridge

Hendricks, ML "Mandatory reporting of child abuse in South Africa: legislation explored" (2014) 104(8) *South African Medical Journal* 550–552

Homeland Security News Wire "In Germany, vaccine fears spark conspiracy theories" (13 May 2020) http://www.homelandsecuritynewswire.com/dr20200513-in-germany-vaccine-fears-spark-conspiracy-theories (accessed 15 June 2020)

Hopkinsmedicine "What is a pneumonectomy?" (date unknown) https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/pneumonectomy#:~:text=A%20pneumonectomy%20is%20a%20type,through%20a%20series%20of%20tubes (accessed 19 January 2022)

Human Rights House "Freedom of association" (date unknown) https://humanrightshouse.org/we-stand-for/freedom-of-association/ (accessed 04 February 2021)

Husa (2015)
Husa, J *A new introduction to comparative law* (2015) Hart Publishing, an imprint of Bloomsbury Publishing: Oxford; Portland, Oregon

Hyman, A "Immunisation cards needed for grade 1 admission in Gauteng, says Lesufi" (01 August 2021) https://www.timeslive.co.za/news/south-africa/2021-08-01-covid-19-immunisation-certificate-needed-for-grade-1-admission-in-gauteng-says-lesufi/ (accessed 2 December 2022)

I

International Commission of Jurists "The unvaccinated equality not charity in Southern Africa" (2021) https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf (accessed 22 November 2022)

J

Jamrozik, E; Handfield, T & Selgelid, MK "Victims, vectors and villains: are those who opt out of vaccination morally responsible for the deaths of others?" (2016) 42 *Journal of Medical Ethics* 762–768

Jeon, SR; Kang, JW; Ang, L; Lee, HW; Lee, MS & Kim, TH "Complementary and alternative medicine (CAM) interventions for COVID-19: an overview of systematic reviews" 2022 11(3) *Integrative Medicine Research* 100842

Jurist "Germany makes measles vaccinations compulsory for children" (15 November 2019) https://www.jurist.org/news/2019/11/germany-makes-measles-vaccinations-compulsory-for-children/ (accessed 15 June 2020)

Justia US Law "2021 Louisiana Laws Civil Code Art. 2315. Liability for acts causing damages" (2022) https://law.justia.com/codes/louisiana/2022/civil-code/article-2315/ (accessed 13 February 2023)

Justia US Law "Brown v Smith" (2018) https://law.justia.com/cases/california/court-of-appeal/2018/b27 9936.html (accessed 15 June 2020)

Justia US Law "FF v State of New York" (2021) https://law.justia.com/cases/new-york/appellate-division-third-department/2021/530783.html (accessed 15 June 2022)

K

Karako-Eyal (2017) *UMKCLR*
Karako-Eyal, N "Increasing vaccination rates through tort law: theoretical and empirical insights" (2017) 86(1) *University of Missouri-Kansas City Law Review* 1–36

Kibet & Fombad (2017) *AHRLJ*
Kibet, E & Fombad, C "Transformative constitutionalism and the adjudication of constitutional rights in Africa" (2017) 17 *African Human Rights Law Journal* 340–366

Klaaren & Penfold "Chapter 62" in *CLoSA* (2014)
Klaaren, J & Penfold, G "Chapter 62: access to information" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 2002, 2014) Juta & Company Ltd: Claremont

Klopper (2017)
Klopper, HB *Damages* (2017) LexisNexis: Durban

Knobel, JC "Thoughts on intention, consciousness of wrongfulness and negligence in delict" (2012) 75 *Tydskrif vir die Suid-Afrikaanse Reg* 484–491

Kostal (2015) *ABAJ*
Kostal, S "A vaxxing dilemma: lawyers quarrel over tort liability after the measles outbreak" (2015) 101(7) *American Bar Association Journal* 17–18

Koziol (2015)
Koziol, H (ed) *Basic questions of tort law from a comparative perspective* (2015) Jan Sramek Verlag: Wien

L

Langa (2006) *SLR*
Langa, P "Transformative constitutionalism" (2006) 17 *Stellenbosch Law Review* 351–360

Levis (2017) *DLR*
Levis, T "Vaccines and the tragedy of the commons: an argument for an alternative liability tort remedy" (2017) 65(4) *Drake Law Review* 1059–1080

Library of Congress "Germany: new Act makes measles vaccinations mandatory" (2020) https://www.loc.gov/law/foreign-news/article/germany-new-act-makes-measles-vaccinations-mandatory/ (accessed 15 August 2020)

Loubser & Midgley (2017)
Loubser, M & Midgley, R (eds) *The law of delict in South Africa* 3ed (2017) Oxford University Press Southern Africa: Cape Town

Loubser (2020)
Loubser, M *Tort law in South Africa* (2020) Wolters Kluwer: The Netherlands

LSU Law Library "French law: home" (11 August 2021) https://libguides.law.lsu.edu/c.php?g=693022#:~:text=Louisiana%20is%20the%20only%20Civil,Civil%20and%20Common%20law%20influences (accessed 29 March 2022)

M

MAAK "Tort under Dutch law" (date unknown) https://www.maak-law.com/tort-under-dutch-law/ (accessed 29 March 2022)

MacDonald, NE; Butler, R & Dubé, E "Addressing barriers to vaccine acceptance: an overview" (2018) 14(1) *Human Vaccines and Immunotherapeutics* 218–224

Mahery & Slemming (2019) *SAJBL*
Mahery, P & Slemming, W "Mandatory childhood immunisation in South Africa: what are the legal options?" (2019) 12(2) *South African Journal of Bioethics and Law* 76–78

Maraist & Galligan (2021)
Maraist, FL & Galligan, TC *Louisiana tort law* 2ed (2021) LexisNexis

Maraist (2010)
Maraist, FL *Louisiana law of torts: a précis* (2010) Carolina Academic Press: North Miami

Markesinis & Unberath (2002)
Markesinis, BS & Unberath, H *The German law of torts: a comparative treatise* 4ed (2002) Hart Publishing: Oxford & Portland

Massyn *et al* (2017)
Massyn, N; Padarath, A; Peer, N & Day, C (eds) *District health barometer 2016/17* (2017) Health Systems Trust: Durban

McKerron, RG *The law of delict: a treatise on the principles of liability for civil wrongs in the law of South Africa* 7ed (1971) Juta & Company Ltd: Cape Town

McManus (2021)
McManus, F "Introduction" in *Delict essentials* 4ed (2021) Edinburgh University Press: Edinburgh

McManus (2017)
McManus, F *Delict Essentials* 3ed (2017) Edinburgh University Press: Edinburgh

McManus (2013)
McManus, F *Law essentials delict* 2ed (2013) Dundee University Press: Dundee

McQuoid-Mason "Chapter 38" in *CLoSA* (2014)
McQuoid-Mason, D "Chapter 38: privacy" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 12-03, 2014) Juta & Company Ltd: Claremont

McQuoid-Mason (2010) *SAMJ*
McQuoid-Mason, D "Medicine and the law. Provisions for consent by children to medical treatment and surgical operations, and duties to report child and aged persons abuse: 1 April 2010" (2010) 100(10) *South African Medical Journal* 646–648

McQuoid-Mason (2005) *SAMJ*
McQuoid-Mason, D "Parental refusal of blood transfusions for minor children solely on religious grounds — the doctor's dilemma resolved" (2005) 95(1) *South African Medical Journal* 29–30

Mehlman & Lederman (2020) *PAI*
Mehlman, MJ & Lederman, MM "Compulsory immunization protects against infection: what law and society can do" (2020) 5(1) *Pathogens and Immunity* 1–7

Merrill (2017)
Merrill, RM *Introduction to epidemiology* 7ed (2017) Jones & Bartlett Publishers: Burlington

Midgley, JR *Delict* 3ed vol 15 in *Law of South Africa* (2016) LexisNexis: South Africa

Milo, D "'It's hard for me to say I'm sorry': apology as a remedy in the South African law of defamation" (2012) 4(1) *Journal of Media Law* 11–16

Milo *et al* "Chapter 42" in *CLoSA* (2014)
Milo, D Penfold, G & Stein, A "Chapter 42: freedom of expression" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 06-08, 2014) Juta & Company Ltd: Claremont

Monama, T "ACDP takes health department to court over COVID-19 vaccine for children" (2021) https://www.news24.com/news24/southafrica/news/acdp-takes-health-department-to-court-over-covid-19-vaccine-for-children-20211109 (accessed 05 June 2022)

Moore, KL "Disabled autonomy" (2020) 22 *Journal of Health Care Law and Policy* 245–279

Muhametaj (2017) *GJPLR*
Muhametaj, G "Introduction of the tort of negligence in the UK legislation and jurisprudence" (2017) 5(6) *Global Journal of Politics and Law Research* 29–33

Mukheibir, A "Ubuntu and the amende honorable — a marriage between African values and medieval canon law" (2007) 28(3) *Obiter* 583–589

Mulheron, R *Principles of tort law* 2ed (2020) Cambridge University Press: Cambridge Mulheron (2020)

Murcott & Van der Westhuizen (2015) *CCR*
Murcott, M & Van der Westhuizen, W "The ebb and flow of the application of the principle of subsidiarity-critical reflection on Motau and My Vote Counts" (2015) 7(1) *Constitutional Court Review* 43–67

N

Neethling, J & Potgieter, JM "Herlewing van die amende honorable as remedie by laster: Mine Workers Investment Company (Pty) Ltd v Modibane 2002 (6) SA 512 (W)" (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 329–333

Nathanson (2016) *AJLM*
Nathanson, D "Herd protection v vaccine abstention: potential conflict between school vaccine requirements and state religious freedom restoration acts" (2016) 42(2&3) *American Journal of Law and Medicine* 621–641

National Institute for Communicable Diseases "COVID-19 vaccine rollout strategy FAQ" (date unknown) https://www.nicd.ac.za/covid-19-vaccine-rollout-strategy-faq/#:~:text=DO%20INDIVIDUALS%20HAVE%20TO%20PAY,at%20the%20point%20of%20service (accessed 10 December 2022)

National Institute for Communicable Diseases "Vaccine information for parents and caregivers" (2016) https://www.nicd.ac.za/wp-content/uploads/2017/08/NICD_Vaccine_Booklet_D132_FINAL.pdf (accessed 02 June 2021)

Ndeunyema, N *Re-invigorating ubuntu through water: A human right to water under the Namibian Constitution* (2021) Pretoria University Law Press: Pretoria

Neethling & Potgieter (2020)
Neethling, J & Potgieter, JM *Law of delict* 8ed (2020) LexisNexis South Africa: Durban

Neethling *et al* (2019)
Neethling, J; Potgieter, JM & Roos, A *Neethling on personality rights* (2019) LexisNexis Butterworths: Durban

Nemours Children's Health "What's the difference between infectious and contagious?" (date unknown) https://kidshealth.org/en/teens/contagious.html (accessed 1 December 2022)

New South Wales Government "No jab no pay immunisation requirements" (24 June 2021) https://www.health.nsw.gov.au/immunisation/Pages/no-jab-no-pay.aspx (accessed 1 December 2022)

Ngcobo *et al* (2019) *SAMJ*
Ngcobo, NJ; Burnett, RJ; Cooper, S & Wiysonge, CS "Human papillomavirus vaccination acceptance and hesitancy in South Africa: research and policy agenda" (2019) 109(1) *South African Medical Journal* 13–15

NL Times "Bible Belt vaccination rate increasing after COVID outbreaks" (11 November 2021) https://nltimes.nl/2021/11/11/bible-belt-vaccination-rate-increasing-covid-outbreaks (accessed 5 December 2022)

NL Times "Majority support letting daycares refuse un-vaccinated kids" (18 February 2020) https://nltimes.nl/2020/02/18/majority-support-letting-daycares-refuse-un-vaccinated-kids (accessed 15 June 2020)

North Dakota Health "COVID-19 vaccines & fetal cell lines" (17 August 2022) https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (accessed 26 October 2022)

NOS News "*Kamer voor recht kinderdagverblijf om ongevaccineerd kind te weigeren*" (Chamber for right of daycare to refuse an unvaccinated child) (18 February 2020) https://nos.nl/artikel/2323564-kamer-voor-recht-kinderdagverblijf-om-ongevaccineerd-kind-te-weigeren.html (accessed 15 June 2020)

NPS Medicine Wise "Vaccines and immunisation" (3 September 2020) https://www.nps.org.au/consumers/vaccines-and-immunisation#:~:text=Vaccination%20%20is%20when%20a%20vaccine,become%20immune%20to%20the%20infection (accessed 30 June 2020) (on file with the author)

O

Oduwole *et al* (2019) *BMJ Open*

Oduwole, EO; Pienaar, ED; Mahomed, H & Wiysonge, CS "Current tools available for investigating vaccine hesitancy: a scoping review protocol" (2019) 9(12) *BMJ Open* 1–7

Olliaro, P; Torreele, E & Vaillant, M "COVID-19 vaccine efficacy and effectiveness — the elephant (not) in the room" (2021) 2(7) *The Lancet* E279–E280

Osman, F "The consequences of the statutory regulation of customary law: an examination of the South African customary law of succession and marriage" (2019) *Potchefstroom Electronic Law Journal* 2–24

Ohikere, O "Germany tightens vaccination laws" (26 May 2017) https://world.wng.org/content/germany_tightens_vaccination_laws (accessed 15 June 2020)

P

Palmer & Reid (2009)

Palmer, V & Reid, E *Mixed jurisdictions compared: private law in Louisiana and Scotland* (2009) Edinburgh University Press: Edinburgh

Pieterse "Chapter 39" in *CLoSA* (2014)

Pieterse, M "Chapter 39: life" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, RS3, 05-11, 2014) Juta & Company Ltd: Claremont

Pieterse (2005) *SAPL*

Pieterse, M "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *Southern African Public Law* 155–166

Potgieter *et al* (2012)

Potgieter, JM; Steynberg, L & Floyd, TB *Visser and Potgieter: Law of Damages* 3ed (2012) Juta & Company Ltd: Claremont

Price (2014) *SALJ*
Price, A "Factual causation after Lee" (2014) 131(3) *South African Law Journal* 491–500

Q

Queensland Government "Childcare immunisation requirements" (2020) https://www.qld.gov.au/health/conditions/immunisation/childcare (accessed 15 June 2022)

R

Ramotsho, K "High cost of civil and criminal litigation is one of the main barriers to accessing justice" (2022) *De Rebus* (online)

Rao & Andrade (2011) *IJP*
Rao, TS & Andrade, C "The MMR vaccine and autism: sensation, refutation, retraction, and fraud" (2011) 53(2) *Indian Journal of Psychiatry* 95–96

Rautenbach (2019) *PELJ*
Rautenbach, C "Case law as an authoritative source of customary law: piecemeal recording of (living) customary law?" (2019) *Potchefstroom Electronic Law Journal* 1–20

Raz (2010) *OJLS*
Raz, J "Responsibility and the negligence standard" (2010) 30(1) *Oxford Journal of Legal Studies* 1–18

Reiss (2014) C*JLPP/JLPP*
Reiss, DR "Compensating the victims of failure to vaccinate: what are the options?" (2014) 23(3) Cornell Journal of Law and Public Policy 595–634

Reiss (2017) *BCLR*
Reiss, DR "Decoupling vaccine laws" (2017) 58(E) *Boston College Law Review* 9–17

Reiss (2018) *TJB*
Reiss, DR "Health law: protecting children when parents choose not to vaccinate" (2018) 2(13) *The Judges' Book* 73–78

Reiss, DR "Legal responsibilities in choosing not to vaccinate" (12 September 2013) https://shotofprevention.com/2013/09/12/legal-responsibilities-in-choosing-not-to-vaccinate/ (accessed 19 January 2022)

Reiss, DR "Lori Matheson refuses vaccines for child — Michigan Supreme Court disagrees" (2020) https://www.skepticalraptor.com/skepticalraptorblog.php/lori-matheson-refuses-vaccines-child-michigan-court-no/ (accessed 24 August 2020)

Reiss (2017) *SLPS*
Reiss, DR "Rights of the unvaccinated child" (2017) 73 *Studies in Law, Politics, and Society* 73–108

Reiss & Diamond (2019) *SDLR*
Reiss, DR & Diamond, J "Measles and misrepresentation in Minnesota: can there be liability for anti-vaccine misinformation that causes bodily harm" (2019) 56(3) *San Diego Law Review* 531–580

Rickard, C "Dismissal of staffer who refused COVID-19 vaccine ruled 'fair'" (27 January 2022) https://africanlii.org/article/20220127/dismissal-staffer-who-refused-covid-19-vaccine-ruled-%E2%80%98fair%E2%80%99 (accessed 22 November 2022)

Rijksvaccinatieprogramma "Dutch National Immunisation Programme" (date unknown) https://rijksvaccinatieprogramma.nl/english (accessed 15 June 2022)

Rijnhout (2021) *UJIEL*
Rijnhout, R "Mothers of Srebrenica: causation and partial liability under Dutch tort law" (2021) 36(2) *Utrecht Journal of International and European Law* 127–140

Robbennolt & Hans (2016)
Robbennolt, JK & Hans, V *The psychology of tort law* (2016) New York University Press: New York

Robert Koch Institute "Standing Committee on Vaccination (STIKO)" (29 August 2016) https://www.rki.de/EN/Content/infections/Vaccination/Vaccination_node.html (accessed 15 June 2020)

Rodal & Wilson (2010) *MJLH*
Rodal, R & Wilson, K "Could parents be held liable for not immunizing their children?" (2010) 4(1) *McGill Journal of Law and Health* 39–64

Roederer (2009) *AJICL*
Roederer, CJ "Working the common law pure: developing the South African law of delict (torts) in light of the spirit, purport and objects of the South African Constitution's Bill of Rights" (2009) 26(2) *Arizona Journal of International and Comparative Law* 427–503

Ronquillo, Y; Pesce, MB & Varacallo, M "Tort" (2022) https://www.statpearls.com/ArticleLibrary/viewarticle/23586 (accessed 1 December 2022)

S

SAGE "Report of the Sage Working Group on Vaccine Hesitancy" (12 November 2014) https://www.asset-scienceinsociety.eu/sites/default/files/sage_working_group_revised_report_vaccine_hesitancy.pdf (accessed 10 July 2022)

San Francisco, Department of Public Health "Infectious Diseases A to Z" (date unknown) https://www.sfcdcp.org/infectious-diseases-a-to-z/ (accessed 1 December 2022)

Sanders, JG; Spruijt, P; van Dijk, M; Elberse, J; Lambooij, MS; Kroese, FM & de Bruin, M "Understanding a national increase in COVID-19 vaccination intention, the Netherlands, November 2020–March 2021" (2021) 26(36) *Euro Surveillance* 2100792

Schoeman, M "Chapter 14: The African concept of Ubuntu and restorative justice" in Gavrielides, T & Artinopoulou, V (eds) *Reconstructing restorative justice philosophy* (2013) Ashgate Publishing Ltd: England

Scott, J "The actio de feris — phoenix from the ashes or vain chimera? — Van der Westhuizen v Burger (February 1, 2019)" (2018) 81 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 510–527

Scott, TJ "Damage(s): reflections on the misuse of legal terminology" (2016) 113(4) *South African Law Journal* 715–730

Section27 "Section27 supports vaccination of adolescents in court on 28 and 29 April" (26 April 2022) https://section27.org.za/2022/04/section27-supports-vaccination-of-adolescents-in-court-on-28-and-29-april/ (accessed 21 November 2022)

Section27 homepage available at https://section27.org.za/ (accessed 21 November 2022)

Shimonovich, M; Pearce, A; Thomson, H; Keyes, K & Katikireddi, SV "Assessing causality in epidemiology: revisiting Bradford Hill to incorporate developments in causal thinking" (2021) 36(9) *European Journal of Epidemiology* 873–887

Simonelli, A "Posttraumatic stress disorder in early childhood: classification and diagnostic issues" (2013) *European Journal of Psychotraumatology* 1–11

Sobczak (2010) *ERPL*
Sobczak, F "Proportionality in tort law. A comparison between Dutch and English laws with regard to the problem of multiple causation in asbestos-related cases" (2010) 18 *European Review of Private Law* 1155–1179

South African Government "COVID-19 Coronavirus vaccine myths and facts" (date unknown) https://www.gov.za/covid-19/vaccine/myths (accessed 01 June 2021)

South African Government "COVID-19 Coronavirus vaccine" (date unknown) https://www.gov.za/covid-19/vaccine/vaccine (accessed 1 December 2022)
South African Government "Getting to know your COVID-19 Vaccines" (date unknown) https://www.gov.za/sites/default/files/gcis_documents/Covid-19Vaccine-brochure.pdf (accessed 08 July 2022)

South African Government, Department of Basic Education "Admission of learners to public schools" (date unknown) https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolAdmissions.aspx (accessed 13 June 2020) (on file with the author)

South African Government, Department of Health "Facts about immunisation, EPI (SA) fact sheet" (date unknown) http://www.health.gov.za/index.php/component/phocadownload/category/165 (accessed 10 March 2020) (on file with the author)

South African Government, Department of Health "Immunisation key messages" (date unknown) http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-

08-29-27/immunization/category/165-immunisation?download=502:key-messages-immunisation (accessed 13 June 2020) (on file with the author)

South African Government, Department of Health "Immunisation" (date unknown) https://www.health.gov.za/immunization/ (accessed 10 March 2020) (on file with the author)

South African Government, Department of Health "Immunisation" (date unknown) https://www.health.gov.za/immunization/#:~:text=Immunization%20protects%20young%20children%20against,free%20in%20all%20public%20clinics (accessed 10 December 2022)

South African Government, Department of Health "Immunisation" (date unknown) https://www.health.gov.za/immunization/#:~:text=Parents%20and%20caregivers%2Cprotect%20your,second%20dose%20of%20measles%20vaccine (accessed 1 December 2022)

South African Government, Department of Health "The use of COVID-19 Pfizer Vaccine for children between 5 and 11 years of age who are at risk of severe COVID-19 infection & complications" (15 August 2022) https://sacoronavirus.co.za/wp-content/uploads/2022/12/A43_Recommendation-for-vaccinating-children-5-11-years-old-with-COVID-19-vaccines.pdf (accessed 16 February 2023)

South African Government, Department of Health "What you need to know about vaccinations" (date unknown) http://www.kznhealth.gov.za/vaccinations.pdf (accessed 10 March 2020) (on file with the author)

South African Government, News "COVID-19 vaccine for kids aged between 5 and 11 next year" (9 December 2022) https://www.sanews.gov.za/south-africa/covid-19-vaccine-kids-aged-between-5-and-11-next-year (accessed 22 January 2023)

Spindler & Rieckers (2019)
Spindler, G & Rieckers, O *Tort law in Germany* 3ed (2019) Kluwer Law International: The Netherlands

Steele (2017)
Steele, J *Tort law: text, cases, and materials* 4ed (2017) Oxford University Press: Oxford

Steiner-Dillon (2019) *UCLR*
Steiner-Dillon, JR "Sticking points: epistemic pluralism in legal challenges to mandatory vaccination policies" (2019) 88(1) *University of Cincinnati Law Review* 169–238

Steinitz, M *The case for an international court of civil justice* (2019) Cambridge University Press: Cambridge

Stent, J "Panda's Nick Hudson opposes SA's vaccination plan. What he hasn't said is that his company makes alternative medicines" (28 September 2021) https://www.dailymaverick.co.za/article/2021-09-28-pandas-nick-hudson-opposes-sas-vaccination-plan-what-he-hasnt-said-is-that-his-company-makes-alternative-medicines/ (accessed 22 November 2022)

Sujee & Ndlela (2022) *SAJBL*
Sujee, Z & Ndlela, S "COVID-19 child vaccinations: promoting children's right to equality, education, food and health" (2022) 15(1) *South African Journal of Bioethics and Law* 1–2

Supreme Court of the United States "Petition — Supreme Court of the United States" (date unknown) https://www.supremecourt.gov/DocketPDF/21/21-1003/207832/20220110152049902_Petition.pdf (accessed 06 July 2022)

Swart, N "Nick Hudson of PANDA on recent events indicating that, finally, the tide behind the official COVID-19 narrative may be turning" (24 December 2021) https://www.biznews.com/thought-leaders/2021/12/24/panda-nick-hudson-covid-19 (accessed 22 November 2022)

T

Taekema (2014) *NJLP*
Taekema, S "Private law as an open legal order: understanding contract and tort as interactional law" (2014) 43(2) *Netherlands Journal of Legal Philosophy* 140–149

Temple-Mabe, K & Weitzman, A "Tort — the different types of tort" (10 October 2022) https://www.lexisnexis.co.uk/legal/guidance/tort-the-different-types-of-tort (accessed 1 December 2022)

Thomas *et al* (2000)
Thomas, PJ; Stoop, BC & van der Merwe, CG *The historical foundations of South African private law* 2ed (2000) LexisNexis Butterworths: Durban

Tuitt *et al* (2015)
Tuitt P, Bermingham, V & McLaughlin, M *Tort law* (2015) University of London: London (on file with the author)

Tull (2019)
Tull, K "Vaccine hesitancy: guidance and interventions" University of Leeds Nuffield Centre for International Health and Development, (2019) K4D Helpdesk Report, commissioned by the UK Department for International Development

Tweede Kamer der Staten-Generaal "Parliamentary papers 35049, end text" (18 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D07026 (accessed 15 June 2020)

Tweede Kamer der Staten-Generaal "Parliamentary papers 35049, second note of amendment" (10 February 2020) https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z17437&did=2020D05325 (accessed 15 June 2020)

U

UNICEF SA "Immunisation against vaccine-preventable diseases is essential to protect children" (24 April 2020) https://www.unicef.org/southafrica/stories/immunization-against-vaccine-preventable-diseases-essential-protect-children (accessed 10 August 2020)

Uniform Rules of Court (updated to 1 December 2020) available at http://www.saflii.org/images/superiorcourts/Uniform%20Rules%20of%20Court%20[F].pdf (accessed 29 November 2022)

United States, Department of Health & Human Services "Five important reasons to vaccinate your child" (6 May 2022) https://www.hhs.gov/immunization/get-vaccinated/for-parents/five-reasons/index.html (accessed 7 December 2022)

United States, Department of Health & Human Services, NCCIH "COVID-19 and 'alternative' treatments: what you need to know" (last updated June 2022) https://www.nccih.nih.gov/health/covid-19-and-alternative-treatments-what-you-need-to-know (accessed 6 December 2022)

V

Van der Merwe, NJ & Olivier, PJJ *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) JP van der Walt: Pretoria

Van der Walt, JC & Midgley, R *Principles of delict* 3ed (2005) LexisNexis Butterworths: Durban

Van der Walt, JC & Midgley, R *Principles of delict* 4ed (2016) LexisNexis Butterworths: Durban

Van Schilfgaarde (1991) *CWILJ*
Van Schilfgaarde, E "Negligence under the Netherlands Civil Code — an economic analysis" (1991) 21(2) *California Western International Law Journal* 265–302

Verelst *et al* (2019) *Vaccine*
Verelst, F; Kessels, R; Delva, W; Beutels, P & Willem, L "Drivers of vaccine decision-making in South Africa: a discrete choice experiment" (2019) 37(15) *Vaccine* 2079–2089

Verheij (2016) *IRLCT*
Verheij, A "The right to be forgotten a Dutch perspective" (2016) 30(1–2) *International Review of Law, Computers and Technology* 32–41

Visser, PJ & Potgieter, JM *Law of damages through the cases* 3ed (2004) Juta & Company Ltd: Cape Town

W

Wadman, M "Abortion opponents protest COVID-19 vaccines' use of fetal cells" (2022) https://www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells (accessed 26 October 2022)

Wallis (2012) 25(1) *Advocate*
Wallis, M "Some thoughts on the commercial side of practice" (2012) 25(1) *Advocate* 33 – 52

Walwyn & Nkolele (2018) *HRPS*
Walwyn, DR & Nkolele, AT "An evaluation of South Africa's public-private partnership for the localisation of vaccine research, manufacture and distribution" (2018) 16(1) *Health Research Policy and Systems* 30–47

Walwyn, DR & Nkolele, AT "Coordinating health and industrial policy in South Africa; a case study of the vaccine public-private partnership" (2018) 60(4) *South African Family Practice* 42–51

Wang *et al* (2015) *Vaccine*
Wang, E; Baras, Y & Buttenheim, AM "'Everybody just wants to do what's best for their child': understanding how pro-vaccine parents can support a culture of vaccine hesitancy" (2015) 33(48) *Vaccine* 6703–6709

Washington State, Department of Health "Certificate of exemption — personal/religious" (2019) https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/348-106_CertificateofExemption.pdf (accessed 28 November 2022)

Waterman, M "Indorsing infant immunity: an argument for criminalizing parents' refusal to immunize their children" (2015) 51(1) *Tulsa Law Review* 153–180

Western Cape Government "Immunisation" (29 July 2022) https://www.westerncape.gov.za/service/immunisation (accessed 22 November 2022)

White House "About the White House our government" (date unknown) https://www.whitehouse.gov/about-the-white-house/our-government/ (accessed 06 July 2022)

Wille, G; Du Bois, F (ed) & Bradfield, G *Wille's principles of South African law* (2007) Juta & Company Ltd: Cape Town

Wimmer, W "Information on the Measles Protection Act for admission to a joint institution for children / registration at primary schools" (date unknown) https://www.stadt-muenster.de/fileadmin//user_upload/stadt-muenster/40_schulamt/pdf/Startseite_Anreisser/Anmeldung_Grundschulen_2020/hinweise_masernschutzgesetz_englisch.pdf (accessed 05 July 2022)

Witting (2007) *MULR*
Witting, C "Tort law, policy and the High Court of Australia" (2007) 31(2) *Melbourne University Law Review* 569–590

Woolman & Botha "Chapter 34" in *CLoSA* (2014)
Woolman, S & Botha, H "Chapter 34: limitations" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 07-06, 2014) Juta & Company Ltd: Claremont

Woolman "Chapter 31" in *CLoSA* (2014)
Woolman, S "Chapter 31: application" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 02-05, 2014) Juta & Company Ltd: Claremont

Woolman "Chapter 36" in *CLoSA* (2014)
Woolman, S "Chapter 36: dignity" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 12-05, 2014) Juta & Company Ltd: Claremont

Woolman "Chapter 44" in *CLoSA* (2014)
Woolman, S "Chapter 44: freedom of association" in Woolman, S & Bishop, M (eds) *Constitutional law of South Africa* (2ed, OS 12-03, 2014) Juta & Company Ltd: Claremont

World Health Organisation "10 global health issues to track in 2021" (24 December 2020) https://www.who.int/news-room/spotlight/10-global-health-issues-to-track-in-2021 (accessed 04 February 2021)

World Health Organisation "Alphabetical list of WHO member states" https://www.who.int/choice/demography/by_country/en/ (accessed 10 March 2020)

World Health Organisation "Coronavirus disease (COVID-19): Vaccines" (17 May 2022) https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-(covid-19)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=CjwKCAjw7IeUBhBbEiwADhiEMQE7gJM_oDx8FsqqM7r7d9hfFQxEnbKvSqPFVf0y93AKRcfba1_usRoCTzIQAvD_BwE# (accessed 28 November 2022)

World Health Organisation "Coronavirus disease (COVID-19)" (date unknown) https://www.who.int/health-topics/coronavirus#tab=tab_1 (accessed 30 November 2022)

World Health Organisation "COVAX" (date unknown) https://www.who.int/initiatives/act-accelerator/covax (accessed 7 July 2022)

World Health Organisation "Global vaccine action plan 2011–2020" (21 February 2013) https://www.who.int/publications/i/item/global-vaccine-action-plan-2011-2020 (accessed 10 March 2020)

World Health Organisation "Immunisation" (5 December 2019) https://www.who.int/news-room/facts-in-pictures/detail/immunization (accessed 05 June 2022) (on file with the author)

World Health Organisation "Immunisation" (date unknown) https://www.afro.who.int/health-topics/immunization (accessed 1 December 2022)

World Health Organisation "Improving vaccination demand and addressing hesitancy" (2020) https://www.who.int/immunization/programmes_systems/vaccine_hesitancy/en/ (accessed 10 December 2020) (on file with the author)

World Health Organisation "Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern" (26 November 2021) https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern (accessed 19 January 2022)

World Health Organisation "Ten threats to global health in 2019" (2019) https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (accessed 10 March 2020)

World Health Organisation "Vaccines and immunisation" (date unknown) https://www.who.int/topics/vaccines/en/ (accessed 01 April 2020)

World Intermediary Liability Map "Article 6:162 Dutch Civil Code" (14 June 2018) https://wilmap.stanford.edu/entries/article-6162-dutch-civil-code (accessed 5 December 2022)

Y

Yousefinaghani, S; Dara, R; Mubareka, S; Papadopoulos, A & Sharif, S "An analysis of COVID-19 vaccine sentiments and opinions on Twitter" (2021) 108 *International Journal of Infectious Diseases* 256–262

Yousuf, H; Van der Linden, S; Van Essen,T; Gommers, D; Scherder, E; Narula, J & Hofstra, L "Dutch perspectives toward governmental trust, vaccination, myths, and knowledge about vaccines and COVID-19" (30 December 2021) https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787606 (accessed 5 December 2022)

Z

Zimmermann & Visser (1996)
Zimmermann, R & Visser, D *Southern Cross: civil law and common law in South Africa* (1996) Clarendon Press: Oxford

Zimmermann, R *The law of obligations: Roman foundations of the civilian tradition* (1996)

Zitzke (2015) *CCR*
Zitzke, E "Constitutional heedlessness and over-excitement in the common law of delict's development" (2015) 7(1) *Constitutional Court Review* 259–290

Zitzke (2020) *TSAR*
Zitzke, E "The Life Esidimeni arbitration: towards transformative constitutional damages?" (2020) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 419–440

Zweigert & Kötz (1998)
Zweigert, K & Kötz, H (trans Weir, T) *An introduction to comparative law* 3ed (1998) Clarendon Press: Oxford