

Chapter 7

Law Of Delict: Health Service Delivery

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7.1 Introduction

Civil wrongdoing in the context of the law relating to health services delivery introduces the question of the balance of power between provider and patient and whether the fact that the provider usually has a considerable advantage over the latter should have any bearing on the manner in which the law addresses claims in delict. The patient is often in a position of vulnerability in relation to the health care provider similar to very few consumers of other goods and services. It is obvious that health services are of such a nature that they are extremely personal to the consumer. The vulnerability of the patient as consumer of health care goods and services manifests on a number of fronts –

- The knowledge of the service provider usually far exceeds that of the patient. The latter is, most of the time, in no position to disagree with the service provider on technical points such as the likelihood of success of a particular form of treatment vis-à-vis other treatment options and the relative levels of risk involved;

- The quality and efficacy of service provided is often dependent as much upon the level of personal skill and expertise of the service provider, which the patient is usually incapable of assessing in any meaningful way, as it is upon the selected treatment modality;
- In the case of surgical procedures, services are delivered while the patient is unconscious and therefore completely oblivious of what is happening to him or her;
- The services are usually rendered in circumstances where the patient is already weakened either physically or psychologically, or both, by a health condition;
- The service provider is often party to the most intimate details of the patient's life and may know more about him than even his spouse;
- The patient often has no option but to trust the service provider, especially in the public sector where choice of providers is usually extremely limited, if it exists at all.
- The consequences of failure by the service provider to perform in accordance with acceptable and recognised standards can be extremely costly to the patient in the sense that no amount of money can compensate for what is lost.¹ In some instances, the negligence of the service provider can command the highest price of all – the life of a patient.

There are a number of rights in the constitutional Bill of Rights that are impacted by this relationship. They are the rights to life² and human dignity³, the

¹ *Collins v Administrator Cape* 1995 (4) SA 73 (C)

² Constitution section 11

³ Constitution section 10

right to privacy⁴, the right to freedom and security of the person⁵, the right to bodily and psychological integrity⁶, the right of access to health care services⁷ and the right to equality⁸ - to name those rights most directly involved.

The manner in which the provider relates to the patient is itself a part of the services the former is rendering and can influence the outcome of the treatment. Patients are therefore uniquely vulnerable in the provider-patient relationship. In an obvious example, that of psychiatry, the manner in which the psychiatrist relates to her patients could literally mean the difference between whether they commit suicide or commit to long term therapy for depression⁹. In a less obvious example, a doctor may have to convince a patient that it is in the patient's best interests to undergo an HIV test. The patient is unlikely to consent to this if the doctor comes across as being critical of HIV positive people as immoral or inferior to others or more concerned for his own safety in treating the patient than in the patient's wellbeing. In other provider-purchaser relationships, the relationship itself is not necessarily a material factor influencing the quality and efficacy of the services. An evil tempered plumber is capable of fixing a broken pipe as well as an even tempered one and apart from some extra unpleasantness for the customer in the case of the former, the

⁴ Constitution section 14

⁵ Constitution section 12

⁶ Constitution section 12 (2)

⁷ Constitution section 27(1) and section 27(3)

⁸ Constitution section 9

⁹ The Royal College of Psychiatrists in 'Vulnerable Patients, Vulnerable Doctors: Good Practice in Our Clinical Relationships' <http://www.rcpsych.ac.uk/publications/cr/council/cr101/pdf> dated April 2001 recommends that the clinician should develop self awareness – the ability to monitor and understand his or her own feelings and actions within the therapeutic relationship. They state that the clinician is in a particularly powerful position in any relationship with a patient and that the patient trusts the clinician to handle that power with sensitivity. It notes that in certain circumstances the clinician is charged with taking over responsibility for deciding what is in the patient's best interests, sometimes against the will of the patient. Such action should be taken only when there is no alternative, in the least restrictive manner possible with reciprocal benefit to the patient, strictly within the law and with due consultation. It observes that it is not in the patient's best interest for the clinician to hold on to knowledge about the patient's condition or to 'invent' certainty where there is none, for the clinician's own comfort. The Society states that the ability to decide how to impart difficult information sensitively – both the certainty and uncertainty of diagnosis and prognosis – is a skill that the clinician must acquire and observes that therapeutic relationships are founded on mutual respect and that respect breaks down when the expectations of the patient exceed the capabilities of the therapist and *vice versa*. In the document it is recognized that all patients are vulnerable by virtue of being patients needing help. See also Strauss SA 'Geneesheer Pasiënt en Reg: 'n Delikate Driehoek' 1987 *TSAR* 1

outcome is still the same and the pipe is fixed. The area of clinical trials is another one in which patient vulnerability has been recognised¹⁰.

In other contexts the law does take cognisance of such imbalances between suppliers and purchasers and attempts to redress them. For instance in *Consol Ltd T/A Consol Glass v Twee Jonge Gezellen (Pty) Ltd And Another*¹¹ the court had the following to say on the subject of consequential damages:

"In my view plaintiff's submission on this issue is correct. The meaning of the term consequential loss or damage is unfortunately not precise. In one sense it is contrasted with direct damage. Visser and Potgieter *Law of Damages* at 55 refers to a view that direct loss means the immediate or direct consequence(s) of a damage-causing event, while consequential loss is damage that flows from such direct loss. In the context of relief under the aedilitian remedies, however, a claim for consequential damages is contrasted with redhibitorian relief, ie relief for the return of the purchase price paid for the defective goods. See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 682 in fine - 683C: 'The legal foundation of respondent's claim is the principle that a merchant who sells goods of his own manufacture or goods

¹⁰ See for example Perkins H S 'Balancing Self and Patient in the Physician-Patient Relationship' *Chest* April 2002 (<http://www.findarticles.com>) in which he observes that: "Certain sensitive relationships involving unequal parties demand a higher motivation than self-interest. The stronger party has a special duty to ignore self-interest and serve the interests of the weaker party. Such relationships are called fiduciary because the weaker party must trust the stronger. Physician power and patient vulnerability make the physician-patient relationship necessarily a fiduciary one. The physician must promote the patient's legitimate medical interests, sometimes at a cost to the physician's own interests. The rational for such a fiduciary duty is clear: a patient will not come for care without trusting the physician to promote the patient's interests." Perkins refers to the issue of clinical trials funded by pharmaceutical companies and performed by practising physicians and a specific trial comparing a new inhaled corticosteroid, a proven inhaled corticosteroid and a placebo for treating moderate persistent asthma. He notes that there is convincing argument that by withdrawing patients with stable asthma from proven treatment and randomising some to the placebo, the trial risks patients' serious clinical deterioration. In response to the question as to why the trial was approved he notes the speculation that self-interest was the driving force – that the sponsoring company may have expected marketing advantages from the results and the participating physicians their fees for subject recruitment. Perkins makes the point that if physicians received bounties for recruiting patients to the study then this creates a serious conflict of interest since the profit motive may have tempted physicians to recruit their patients despite the medical risks involved. He also points out that there were consistent references in the trial report to subjects as 'patients' and to research interventions as 'treatments'. He says that this blurred the critical distinction between research and therapy. Research subjects should expect no benefit and possibly some harm from research interventions. Furthermore, he says, research physicians owe subjects only the few services detailed in consent forms. In contrast, patients can expect benefit from therapy and treating physicians owe them extensive, often unwritten, fiduciary services. Not grasping this distinction, says Perkins, many patients mistakenly expect therapeutic benefit from research and physicians often do not think to correct the misunderstanding.

See also Puttagunta PS, Caulfield, TA, Griener G, 'Conflict of Interest in Clinical Research: Direct Payment to the Investigators for finding Human Subjects and Health Information' *Health Law Review* Vol 10 no 2 p30 (www.law.ualberta.ca) who note that the recent death of a teenager in a drug therapy trial has drawn attention to how financial conflicts of interest may compromise patient protection. They state that while research institutions throughout the world have instituted a variety of conflict of interest guidelines, the potential conflicts associated with investigators receiving direct payment from private companies for both recruitment of patients and the running of clinical trials in pharmaceutical research remains a relatively unexplored area. They note that more and more doctors in private practice are being recruited to run industry sponsored trials and that this trend arose in the last twenty years when government funding for clinical drug trials declined and industry funding increased. They note that the conflicts include erosion of informed consent, compromise of patient confidentiality and enrolment of ineligible subjects in clinical trials.

¹¹ *Consol Ltd* 2002 (6) SA 256 (C)

in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the abovementioned categories, the law irrefutably attaches this liability to him, unless he has expressly or impliedly contracted out of it. (See Voet 21.1.10; Pothier *Contrat de Vente*, para 214; *Kroonstad Westelike Boere Ko-op Vereniging v Botha* 1964 (3) SA 561 (A); also *Bower v Sparks, Young and Farmers Meat Industries Ltd* 1936 NPD 1; *Odendaal v Bethlehem Romery Bpk* 1954 (3) SA 370 (O).) The liability is additional to, and different from the liability to redhibitorian relief which is incurred by any seller of goods found to contain a latent defect.””

Whether the law of delict takes sufficient cognisance of the peculiarities of the health services context is a matter for discussion in the pages that follow.

Another question that arises with regard to the law of delict, especially in the context of health services delivery, is whether the scope and ambit of the obligations of the provider in terms of the law of delict are similar to those imposed in terms of the law of contract or whether they are different and if so, in what way. Contracts for health services are in some respects different from contracts for other goods and services. Medicines, for example, often come with no guarantees of efficacy and no promises of a cure despite the fact that one of the criteria for the registration of a medicine in South Africa in terms of the Medicines and Related Substances Control Act¹² is efficacy. Consequently damages for breach of a contract for health services tend in many instances to resemble quite closely those that are payable in terms of the law of delict in the same context. It has been argued elsewhere in this thesis that one of the most obvious tacit or implied terms of a health care services contract is that the provider will take due and proper care not to harm or injure the patient’s person since this is one of the usual risks of medical treatment. If such a term is breached then the nature of the damages should it be submitted, be very similar to those for a delict in the same circumstances. This issue is discussed in more detail below.

¹² Medicines Control Act No 101 of 1965

From a public sector perspective one must ask about the delictual liability of the Medicines Control Council if it negligently approves the registration of a medicine which subsequently proves to be ineffective, unsafe or of low quality. What also would be the liability of the retailer of the medicine or the prescriber of the medicine in these circumstances? Would they be protected by the argument that because the medicine is registered with the Medicines Control Council they are entitled to assume that it is safe, effective and of a suitable quality for the purpose or indication for which it was registered? If one medicine is prescribed in the public sector in preference to another because the former medicine has been donated and is therefore supplied at no cost to the state, what is the liability of the state in a situation in which the donated medicine turns out to be defective or where it is effective but less so than the other medicine? Where logistics in the public health sector break down to the point where persons requiring chronic, life-sustaining medication, such as insulin for diabetes, are unable to obtain their medication would such a failure constitute a delict on the part of the state? In a factual situation such as that in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*¹³ could the state be held liable in delict for the infection with HIV of a neonate who together with her HIV positive mother was not given Nevirapine as prophylaxis for mother to child transmission of the disease? Could the state be held liable in delict for its refusal in principle to supply a certain drug to patients in the public health sector or to allow the transplantation of organs into HIV positive patients? In other words, does the law of delict extend to policy decisions that are taken by the government in the public health care context? Organs of state are explicitly bound by the Constitution and the Bill of Rights whilst this is not necessarily the case for private persons. If the state's actions in violating a constitutional right fit the legal framework for the law of delict then technically speaking, a violation of constitutional rights can constitute a delict in certain circumstances.

¹³ TAC 2002 (5) SA 721 (CC)

From a private sector perspective, is the right of access to health care services in the Bill of Rights horizontally applicable and if so, would a violation of that right by a service provider in that sector give rise to a claim in the law of delict? Is there a different duty of care implied in this right for the public provider as opposed to the private provider or is it the same for both? If defective health care services are rendered by a private provider can this constitute a violation of the patient's right of access to health care services? This question relates to the meaning of the term 'access' in that context of section 27(1) of the Constitution.

Section 38 of the Constitution recognises the possibility of class actions¹⁴. The decisions and actions of organs of state can affect large numbers of people whereas those of private entities tend, on the whole to affect smaller numbers. There are, of course, exceptions to this general feature in that the decision of a pharmaceutical company to discontinue the production of a medicine can have a significant effect on millions of people but on the whole individual transactions within the private sector tend to be limited in the risk they pose for the participants. For example a decision by the state to use a particular medicine for a particular health condition will impact on large numbers of patients treated by the state for that condition whereas in the private sector, whilst the use of drug formularies is on the increase, health professionals, and to a lesser degree their patients, still have a fair degree of choice in the medicines that are used and prescribed.

In *Carmichele v Minister of Safety and Security*¹⁵, the constitutional court said that where the common law is deficient, courts have an obligation, not a discretion, to develop the common law and that while this does not mean that

¹⁴ The section provides: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

¹⁵ *Carmichele* 2001 (4) SA 938 (CC)

courts must in each and every case embark on an independent exercise as to whether the common law is in need of development, instances may arise where a court is obliged to raise the matter on its own and require full argument from the parties¹⁶.

In this chapter the fundamental aspects of the law of delict are discussed in relation to health service delivery. These aspects are conduct, causation,

¹⁶ Leinies and Midgley JR 'The Impact of the Constitution on the Law of Delict' (2002) 119 *SALJ* p17 point out that the obligation imposed upon the courts is the following: first they have to consider whether the common law is deficient when measured against the constitutional objectives; if it is then courts have to determine what ought to be done to ensure that the common law reflects the proper values. They argue that while agreeing that the courts have an obligation to develop the law, the rationale therefore does not lie in either of the sections 39(2) or 173 of the Constitution –that section 39(2) obliges all courts (including magistrate's courts), tribunals or forums to promote the spirit, purport and objects of the Bill of Rights *when* they develop the common law, but under the section, there is no directive as to when any development should be undertaken. Similarly, they say, section 173 confirms that the constitutional court, the Supreme Court of Appeal and the High Courts have inherent power to develop the common law, but there is no indication that they must do so. They question whether, in the light of the fact that magistrate's courts, tribunals and forums do not have such inherent power, the constitutional court considers them to have an obligation similar to that of the higher courts and then go on to suggest that the obligation to develop the common law can be found in section 8 of the Constitution which states that the Bill of Rights applies to all law and binds the judiciary (section 8(1)) and in order to give effect to the Bill, courts must develop the common law (section 8(3)). They state that in their view, this section contains the implicit obligation on courts to ensure that the common law reflects constitutional values. The writer submits that whilst there is merit in the views of Leinies and Midgley on this point, the obligation of the courts to amend the common law should be drawn from a holistic view of the Constitution rather than piecemeal debates about which particular section contains this obligation. For instance section 2 of the Constitution states that it is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. It is submitted that the inconsistencies to which it refers are not necessarily only positive contradictions, express or implied, of the Constitution but also negative contradictions in terms of which the common law does not recognise or affords insufficient recognition to constitutional principles and values. If a negative inconsistency is just as invalid as a positive one, the obvious solution in the former case is to develop the common law in such a manner as to eliminate the inconsistency. The injunction at the end of section 2 that obligations imposed by the Constitution must be fulfilled reinforces this argument particularly with regard to negative inconsistencies. To the extent that the judiciary can be regarded as being a part of 'the state' and it is submitted that there is no reason why it should not, section 7 (2) which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights also carries a clear implication of an obligation upon the judiciary to develop the common law where it is not in keeping with constitutional values and principles. If this section had stopped at respect and protect this argument might not have been as strong but it is submitted that the obligation to promote and fulfil in the context of the judiciary can only mean that the courts may not sit back and wait for the legislature and the executive to introduce statutory reforms but must themselves play an active, creative and positive role in ensuring that the rights in the Bill of Rights are realised. Given the context in which they operate this means, *inter alia*, developing the common law. Similarly, there is a rationale for this obligation of the courts, and indeed forums and tribunals, in section 9 which deals with the right to equality. Section 9(2) states that equality 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" (writer's italics). It is submitted that these 'other measures' in the context of the judiciary, can mean the development of the common law. Feminists in particular may say that, with respect to *Carmichele* (fn 15 *supra*) this argument is of particular significance given that rape is presently a crime against women in the South African legal system and that in the past the rights of women, a group disadvantaged by unfair discrimination, have not been high on society's list of priorities. Feminist arguments aside, however, section 9(1) is the real weight behind this particular point since it states that everyone is equal before the law and has the right to equal protection and benefit of the law. In *Carmichele*, the common law of delict was not offering that 'equal protection and benefit'. It favoured the authorities who had not taken sufficient steps in the circumstances to ensure that the appellant's rights to bodily and psychological integrity would be protected. 'Equal' does not, it is submitted, mean that 'all cats are grey in the dark' and that a 'one size fits all' approach is appropriate but rather that there must be balance in the law such that one party is not unduly favoured over another. The appellant in *Carmichele*, because of her circumstances, did not have 'equal enjoyment' of all rights and freedoms and the common law of delict failed to recognise this.

unlawfulness, fault and loss. Other relevant concepts such as vicarious liability, the maxims *imperitia culpe adnumeratur* and *res ipsa loquitur* and necessity are also covered. Specific attention is given to delicts involving medicines and the prospect of class actions is considered.

7.2 Fundamental Concepts

The State Liability Act¹⁷ recognises the liability of the state for delictual acts including its vicarious liability for the wrongful acts of state employees.

In terms of section 1 of the Act, any claim against the state which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the state or out of any wrong committed by any servant of the state acting in his capacity and within the scope of his authority as such servant.

Unlike the private health sector in South Africa, the state employs not only nurses, physiotherapists, and pharmacists but also general practitioners and medical specialists. The private sector employs nurses but physiotherapists, pharmacists, general practitioners and medical specialists tend to be in independent practice in the private sector. Consequently the scope of the risk of vicarious liability to which a private hospital is exposed could be significantly smaller than the scope of the same risk for a public hospital owned by a provincial government. It might be possible, however, to hold a private provider liable for its own negligence in allowing an incompetent surgeon to continue to operate within its premises since such provider has the power to refuse admission privileges or other forms of access to its facilities. In this instance, it would be not so much a question of vicarious liability for the delicts of an

¹⁷ State Liability Act No 20 of 1957

independent third party as much as direct liability for the provider's own negligence.

The fundamental elements to establish a claim in delict in South African law are causation, wrongfulness, fault (consisting of negligence [*culpa*] and intention [*dolus*] but more commonly negligence), voluntariness (conduct)¹⁸ and loss¹⁹. Both acts and omissions may found a claim in delict. Delictual actions are generally regarded as private law actions. The principal difference between private law and public law is that private law is directed at the protection of the individual or private interest, whilst public law aims to preserve the public interest. Delictual remedies are compensatory in nature, compensating the prejudiced person for the harm the wrongdoer has caused²⁰.

7.2.1 Conduct

Only an act of a human being, in contrast to that of an animal or a force of nature, is accepted as conduct. A juristic person may act through its organs (humans) and may thus be held delictually liable for its actions. Conduct only qualifies as such for the purposes of the law of delict if it is voluntary i.e. subject to the control of the will of the person engaged in the conduct. The person concerned must not be acting under some form of compulsion and must be able to exercise his or her own will in acting or refraining from action.

¹⁸ The term 'conduct' includes both a positive act and an omission. See Neethling, Potgieter and Visser, *The Law of Delict* 3rd ed p 2 who state that for the purposes of the law of delict, conduct may be defined as a voluntary human act or omission. See also the discussion on the subject in Boberg PQR *The Law of Delict: Aquilian Liability Vol I*; Burchell J *Principles of Delict*; McKerron RG *The Law of Delict*, Van der Walt JC and Midgley JR *Delict: Principles and Cases*.

¹⁹ These are expressed in different ways. For instance the South African law Commission (Discussion Paper 97, Project 82, 'A Compensation System for Victims of Crime in South Africa') has observed that: "There are five elements of a delict: namely an act, wrongfulness, fault, harm and causation. If one of these elements is missing, no delict exists and, accordingly, no liability. In South African law, a distinction is made between delicts that cause patrimonial financial damage and those of an intentional nature, which cause injury to personality. The South African law of delict allows a third action for pain and suffering in terms of which compensation for injury of personality is allowed as a result of the wrongful and negligent (or intentional) impairment of the bodily or physical-mental integrity (Neethling et al., 1990, p. 5)." See also *Geldenhuys v Minister of Safety and Security and Another* 2002 (4) SA 719 (C) in which the Davis J said "It is perhaps trite to set out the well-known elements of the modern Aquilian action, but for the purposes of analysis, a recapitulation assists to promote the internal coherence of this judgment. The six elements are (i) voluntary conduct; (ii) unlawful or wrongful; (iii) capacity; (iv) fault either in the form of dolus or culpa; (v) causation; (vi) loss." [Footnotes omitted]

²⁰ SA Law Commission Discussion Paper 97, Footnote 427 at fn 9 *supra*

Although an act may be separate in time and space from its consequences, this does not mean that one can say that a delict arises in the absence of voluntary conduct²¹. In the healthcare context the thalidomide disaster is a good example of conduct, in this case the release of the drug into the market, remote in time and space from the damage it caused. Thalidomide is a drug with anti-inflammatory and antiangiogenic properties that was sold mainly in 1962. Its use by pregnant women resulted in thousands of cases of serious birth defects and it was withdrawn from the market. In *S v Shivute*²², the court had to consider the issue of voluntariness in relation to a charge of culpable homicide against a nurse who administered an intramuscular injection of chloroquine into a four year old child as opposed to the prescribed chloroquine syrup which was to be administered orally. The child died. The nurse who worked in a busy camp under apparently stressful conditions that dealt with returnees to Namibia, said that she knew that the administration of an injection of chloroquine would kill a child and that she was not consciously aware that she was administering the wrong prescription. She never raised the defence of mental illness or defect in her defence. The court noted that the law presumes that an accused is of sound mental health and is criminally responsible. It held that when the issue is whether the accused was not criminally responsible because of a mental illness or defect, the onus of proof rests on the accused and such onus must be discharged on a balance of probabilities. It stated that when the issue is raised in the absence of criminal responsibility which is not the result of mental illness or defect and if a proper basis is laid in the evidence for the absence of criminal responsibility, then the accused must be given the benefit of the doubt on the issue of criminal responsibility if a reasonable doubt exists at the close of the case for the defence in regard to the cause of the absence of criminal responsibility. The court said with regard to negligence that the requirement is that the accused ought reasonably to have foreseen the possibility of death resulting from his or her conduct and failed to take reasonable steps to avoid

²¹ See Neethling, Potgieter and Visser fn 18 *supra* at p 27-34 for a detailed discussion of the element of conduct.

²² *S v Shivute* 1991 (1) SACR 656 (Nm)

this eventuality. It found that in view of the fact that the accused was a qualified and experienced nurse taken together with the fact that she said she knew that to administer that quantity of chloroquine to that child would have been fatal the only reasonable inference to draw was that any reasonable person with the qualifications and experience of the accused and in the position of the accused would have known at the time of the injection at least that such a course could have been fatal and therefore would have taken reasonable care to pursue a course of conduct which would have prevented such a result. The accused, it found, had failed to act like a reasonable person and was thus either reckless or negligent. O'Linn J observed that at the end of the day the only defence raised on behalf of the accused was whether or not the accused was criminally responsible at the time of the alleged crime based on the possibility that she suffered some form of non-pathological mental aberration or defect at the time of the commission of the crime. There was expert evidence to the effect that the appellant suffered from a 'non-pathological mental disintegration of a temporary nature'. It was submitted by counsel for the appellant that she was 'momentarily impaired'. It was not expressly suggested that the accused acted in a state of automatism which would have eliminated the element of voluntariness from her action. The court considered all of the evidence and came to the conclusion that the decision of the court *a quo* in convicting the accused of culpable homicide was correct and that there was insufficient evidence that she had not acted out of her own volition in administering the lethal dose to the child. It would seem from some aspects of the judgment, that the nurse may have made an error due to stress and tiredness. At one stage, 400 returnees a day entered the camp where she was working and the day of the child's death had been busy. She said that she did not know what happened to her at the stage that she administered the drug to the child incorrectly. However, the court noted that the excuse was nowhere made that she could not cope with the pressure of her work or that she was too tired to give proper attention to the patients or that she was suffering from some illness or defect affecting her physical and mental resources.

People may act involuntarily for a number of reasons. Those that have been recognised by the courts in the past include sleep, unconsciousness, a fainting fit, an epileptic fit, serious intoxication, a blackout, compulsion by human agency (*vis absoluta*), mental illness, hypnosis, strong emotional pressure, low blood sugar and heart attack²³. Automatism, i.e. that fact that a person acts mechanically and not of his or her own free will is recognised as a defence but it will not succeed if the defendant intentionally created the state of automatism in which he or she acted involuntarily in order to harm another²⁴. In the health care context the defence of compulsion can become fairly complex. It is closely related to the defence of necessity sometimes referred to as 'duress of circumstance'²⁵.

7.2.1.2 Assault

Medical treatment without consent can attract a criminal charge of assault²⁶. The court in *The State v Marx* noted that the definition of assault is as follows:

²³ Cases of relevance in this regard are *S v Goliath* 1972 (3) SA 1 (A); *S v Johnson* 1969 (1) SA 204 (A); *R v Dhlamini* 1955 (1) SA 120 (T), *R v Du Plessis* 1950 (1) SA 297 (O); *R v Rossouw* 1960 (3) SA 326 (T); *R v Victor* 1943 TPD 77; *R v Schoonwinkel* 1953 (3) SA 136 (C); *S v Ramagaga* 1965 (4) SA 254 (O); *S v Bezuidenhout* 1964 (2) SA 651 (A); *S v van Rensburg* 1987 (3) SA 35 (T) and *S v Stellmacher* 1983 (2) SA 181 (SWA). They are discussed in more detail in Neethling, Potgieter and Visser (fn 18 *supra*)

²⁴ Neethling, Potgieter and Visser (fn 18 *supra*). Burchell, fn 18 *supra*, notes at p 75 that for an act to be justified on the ground of necessity, (a) a legal interest of the defendant must have been endangered (b) by a threat which had commenced or was imminent but which was (c) not caused by the defendant's fault, and, in addition, it must have been necessary for the defendant to avert the danger, and (e) the means used for this purpose must have been reasonable in the circumstances.

²⁵ Compulsion or duress is a form of necessity and is recognized as a general defence. *S v Goliath* (fn 23 *supra*); *S v Mtetwa* 1977 (3) SA 628; *S v Kibi* 1978 (4) SA 173; *S v Alfeus* 1979 (3) SA 145; *S v Petersen* 1980 (1) SA 938.

²⁶ This seems to be the situation in other jurisdictions as well. In Canada, for instance (Somerville MA 'Medical Interventions and the Criminal Law: Lawful or Excusable Wounding' (1980) *McGill Law Journal* vol 26 p82-96) section 45 of the Criminal Code specifically exempts surgical operations from criminal sanction stating that everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if (a) the operation is performed with reasonable care and skill and (b) it is reasonable to perform the operation having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case. The Canadian Criminal Code is based on the common law which enforced a prohibition against maiming oneself or another. The word 'maim' was defined in *Stephen's Digest* as follows: "A maim is a bodily harm whereby a man is deprived of the use of any member of his body, or of any sense in which he can use in fighting, or by the loss of which he is generally and permanently weakened; but a bodily injury is not a maim merely because it is a disfigurement". Therefore any more than *de minimis* wounding was *prima facie* illegal, but some woundings could be justified. Section 198 of the Canadian Criminal Code provides that "Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful acts that may endanger the life of another person or to do any other lawful acts that may endanger the life of another person, is except in cases of necessity, under a legal duty to have and to use

reasonable knowledge, skill and care in so doing." Somerville points out that in the Criminal Code if the phrase 'surgical or medical treatment' is intended to be qualified by the phrase 'lawful act' i.e. that medical or surgical treatment is just one example of lawful acts dangerous to life, the *prima facie* assumption would be one of legality. She notes, however, that the difficulty with such an interpretation is that the forerunners of section 198 were first *Stephen's Digest* and then section 212 in the first Canadian Criminal Code and there is no indication that these provisions were meant to alter the substantive law as it then stood. Rather, in all probability, they merely formulated the standard of care required in order to avoid criminal liability where persons undertook acts requiring special skill or knowledge which were of a dangerous character. Thus, she says, it may be argued that the *prima facie* legality or illegality of any such act was not contemplated by these provisions and remained to be determined by a separate enquiry. She discusses the section in more detail and in doing so mentions the case of *Re "Eve"* P.E.I Family Court No FDS-37, June 14, 1979 (The Supreme Court of Canada made a later decision on this matter in *E (Mrs) v Eve* 2 S.C.R. 388 (1986)) in which Justice McQuaid held that: "the benefit referred to in section 45 was thereby extended to include not only the health of the patient but as well the socio-economic and other considerations with the result that the surgery might be employed not only to preserve and protect health, but as well to preserve the quality of life in a broader medical sense." Despite the use of the wide criterion, however, the judge refused to authorize the particular sterilisation procedure. There are similar issues that impact on questions of sterilisation in South African law and the National Department of Health is busy at the time of writing processing an amendment to the South African Sterilisation Act No 44 of 1998. Section 2 (3) (a) provides that: 'Sterilisation may not be performed on a person who is under the age of 18 years except where failure to do so would jeopardize the person's life or seriously impair his or her physical health.' No mention is made of the person's mental health or human dignity, both of which are protected by the Constitution, the former in section 12(2) of the Constitution in the form of psychological integrity and the latter in section 10 of the Constitution. The amendment of this section of the Act is therefore necessary to align it with the recognition by the Constitution of these rights.

Somerville goes on to explore the practical realities and the question of whether non-therapeutic medical interventions are lawful. She says it has become a matter of increasing importance as such procedures have been more frequently undertaken and are even regarded as commonplace. She notes that the question of their legality first arose with the increasing availability and effectiveness of cosmetic surgery. The courts, she says, stretched the law a little by asserting that these operations were within the traditional concept of therapeutic benefit because there was psychological benefit present. The problem became even more acute, however, with live donor organ transplants and after initial use of the psychological benefit test, most courts faced the reality that in many cases there was no therapeutic benefit to the donors. She says that even before the enactment of legislation authorising such donation, the operation was not in practice considered illegal, at least when performed on a competent consenting adult. Similarly non-therapeutic sterilization of consenting adults and non-therapeutic medical experimentation are frequent events in society that do not foment court actions by the mere fact of their performance. With respect to the latter practice Somerville says it is worth noting that in *Hlushka v University of Saskatchewan* (1996) 53 D.L.R. (2d) 436 (Sask. C. A.), one of the earliest cases involving non-therapeutic medical research, the question of the illegality of the intervention itself was not raised. She asks how this *de facto* legalisation of non-therapeutic interventions can be reconciled with the legal precedents which have been outlined? She states that a solution depends on determining how public policy and section 45 act and interact to legitimise medical interventions.

In the United Kingdom the starting point is also that intentionally touching a person is unlawful – the civil wrong of battery or even the crime of assault – unless that person has consented or there is other lawful authority (Oates L, 'The court's role in decisions about medical treatment' *British Medical Journal* Nov 18 2000). Oates states that each year there are about 20 cases in the family division of the High Court in England and Wales concerning whether medical procedures should be carried out on people who are unable, or refuse, to consent to such treatment. Oates acts as a state funded lawyer brought in to represent those who need a guardian *ad litem* or litigation friend (primarily children and mentally incapacitated people) or as an *amicus* at the request of the court. He notes that there is a legal doctrine of necessity that provides lawful authority for emergency medical treatment that is both necessary and reasonable and designed to save life, assist recovery or ease suffering. According to Oates, the House of Lords in the case of *R v Bournewood* [1999] 1 AC 458 extended the doctrine of necessity to cover treatment for mental disorder when there has been an informal admission to hospital. Oates states that most instances where medical treatment is given to save life or to enhance the quality of life take place without the need for any reference to the court and that there is in fact a duty of care upon medical practitioners to treat the patient according to a judgment of his or her best interests. Once lack of capacity is shown, the test is one of best interests. This has been judicially defined, says Oates, to encompass medical, emotional, and all other welfare issues. He says that a court should draw up a checklist of the actual benefits and disadvantages and potential gains and losses, including physical and psychological risks and consequences, and should reach a balanced conclusion as to what is right from the point of view of the individual who is the subject of the proceedings.

It is submitted that the difficulties in the Canadian experience in even attempting (under one interpretation) to exclude medical interventions from the definition of assault and render them *prima facie* lawful demonstrate the value of the current approach of South African law that they are *prima facie* unlawful violations of well established and long recognised rights. If one starts from the premise that they are lawful it starts to become extremely difficult to define just what it is that is lawful and where that lawfulness begins and ends. In South African law this problem does not arise because the intervention is *prima facie* unlawful. The maxim *volenti non fit injuria* provides a key element of this system of legal principle in that it both recognises and supports the fundamental importance of such 'absolute' human rights as the rights to life, to human dignity, to freedom and

"an assault is the act of intentionally and unlawfully applying force to another directly or indirectly or attempting or threatening by any act or gesture to apply such force to the person of another if the person making the threat has, or causes the other to believe upon reasonable grounds that he has, the present ability to effect his purpose".²⁷

In *Stoffberg v Elliot*²⁸ Watermeyer J observed that a man by entering a hospital does not submit himself to such surgical treatment as the doctors in attendance upon him might think necessary. He said that by going into hospital a person does not 'waive or give up his right of absolute security of the person'. He still has the right to say what operation he will submit to, and unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body.

In *Esterhuizen v Administrator Transvaal*²⁹ the question of medical assault and the difference between South African and English law in this regard was canvassed by counsel for the plaintiff³⁰. Bekker J held in *Esterhuizen* that:

security of the person and to bodily and psychological integrity. It also places squarely in the hands of the individual the right to self-determination. The pivotal importance of the principle of consent in the South African system can therefore not be overstated and should be bolstered rather than undermined. If one adopts this approach that medical interventions are *prima facie* lawful then the importance of consent becomes greatly diminished since the consent of the individual is presently the primary legalising factor in South African law. To the extent that the *obiter dictum* of Marais JA in *Broude v McIntosh and Others* 1998 (3) SA 60 (SCA) that it is not appropriate for a doctor to be accused of assault, with all its pejorative connotations, for mere lack of patient consent can be interpreted as meaning that South African law should convert to the idea that medical interventions are *prima facie* lawful, the writer submits that it this is not supported by constitutional principles. Given the history of the South African people and the past disregard for the rights of human dignity, bodily and psychological integrity and freedom and security of the person it is submitted that to diminish the value of consent in this context would be wholly inappropriate and could potentially undermine the realisation of the fundamental rights in the Bill of Rights for South Africans. The current system of dealing with medical interventions on an exception or justification basis and on the circumstances of each individual case is far preferable - especially in view of the imbalance of power in favour of the health professional as discussed elsewhere in this thesis. It is submitted that the evidentiary difficulties and challenges to patients in discharging the burden of proof which are currently at undesirable levels due to the courts' persistent unwillingness to apply the maxim of *res ipsa loquitur* to medical negligence cases can only be exacerbated by a shift in legal thinking to the effect that medical interventions of *prima facie* lawful - despite the best intentions of health professionals. The application of public policy considerations to determine the outer limits of wrongfulness are a sufficient safeguard to ensure adequate protection of health professionals in South Africa at this stage given the fact that litigation in South Africa is far from accessible to the person in the street.

²⁷ Marx 1962 (1) SA 848 (N). The definition was taken from Gardiner and Lansdown, S.A. *Criminal Law and Procedure*, 6th. ed. vol. 11 at p 1570. Williamson JP observed that "This definition, as pointed out by Innes, C.J, in *Rex v Jolly and Others*, 1923 AD 176 at p. 179, is substantially taken from the Transkeian Penal Code. 'This definition,' said Sir James Rose-Innes, 'would appear to be satisfactory for all practical purposes. It recognises that the application of force may be indirect as well as direct - a conclusion which is logically unassailable, for it is evident that a person may cause force to be applied to the body of another without himself touching that other.'"

²⁸ *Stoffberg* 1923 CPD 148

²⁹ *Esterhuizen* 1957 (3) SA 710 (T)

"a therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient - no matter how laudable his

³⁰ Counsel's argument contains a useful survey of the case law and relevant authorities and is thus reflected below for the sake of convenience. "Plaintiff's claim for assault is based on the *actio injuriarum*. Any aggression upon the person of another is *prima facie* an *injuria*. By an *injuria* is meant an act committed in contempt of another's personality. See McKerron Law of Delict, 4th ed. pp. 66 and 67. See also *Stoffberg v. Elliot*, (fn 28 *supra*). All the plaintiff needs show in order to establish the existence of *animus injuriandi* is that the act complained of constituted an aggression upon his person, his dignity or his reputation and that the act was intentional. See *Whittaker v Roos*, 1912 AD 131. See also the aspect of defamation. McKerron, *supra* at p 203. Defendant may, however, rebut the presumption by proving that he was unaware that his act would constitute an impairment of the plaintiff's personality. English Law with its categories of torts is no guide. In English law assault is dealt with under the broad heading of the trespass to the person. In SA law assault is dealt with under the *actio injuriarum*. In this case the onus is on the defendant to prove that the act complained of was not wrongful. There is a distinction between South African law and English law in regard to assault. As far as South African law is concerned the definition of assault in Criminal Law contains no reference to the words 'without consent'. See the definition of assault in *Gardiner & Lansdown Criminal Law & Procedure*, vol. II, p. 1432. In English law the words 'without consent' are introduced. Therefore, in English law there can only be an assault if there is no consent, whereas in South African law 'the act of intentionally and unlawfully applying force to the person of another' constitutes an assault. The word 'unlawful' presents no difficulty as it is always unlawful to invade the right of bodily safety of another. In South African law assault is an 'injuria' together with a large number of other acts which infringe the personal rights of safety, dignity, privacy or reputation. See *Gardiner & Lansdown*, *supra*, secs. 1 and 2. English law in this respect differs greatly from South African law. In South African law there is no onus on the plaintiff to prove that the assault was committed without the plaintiff's consent. The onus is on the defendant to prove that the plaintiff consented to the assault. See *de Villiers Roman & Roman Dutch Law of Injuries* pp. 24, 25, 27, 144, 145 and 146. See also Manfred Nathan *Common Law of South Africa*, vol. III, p. 1662 and vol. IV, p. 2584. See also *Cohen Lazar & Co v Gibbs*, 1922 T.P.D. 145. The defendant may rebut the presumption of *injuria* by establishing the defence of *volenti non fit injuria*. Consent to a surgical operation is treated on the basis of *volenti non fit injuria*. See McKerron, *supra* pp. 95, 96. See also *Stoffberg v Elliot*, *supra*; *Ex parte Dixie* 1950 (4) SA 748. English and American authorities also treat consent to an injury on the basis of *volenti non fit injuria*. See *Halsbury Laws of England*, 2nd ed. vol. 23 pp. 715 to 719. See also Re-statement of the Law of Torts American Law Institute, vol. I, p. 96, sec. 49. There cannot be consent by a person to a surgical operation unless the risks are explained. See *Botha v Rompel*, 1955 T.P.D. case 501/1953, unreported. When one speaks of consent to an intentional harm it is on the basis of *volenti non fit injuria*. See *Lampert v Hefer, N.O.*, 1955 (2) SA 507. In order to establish the defence of *volenti non fit injuria* the defendant must establish knowledge of the danger, appreciation thereof, and consent thereto. See *Waring & Gillow Ltd v Sherborne*, 1904 T.S. 340. See also *Union Government v Mathee*, 1917 AD 703. The Courts will not find the existence of an implied agreement unless the person who is alleged to have made it had full knowledge of the nature and extent of the risk to be run. See McKerron, *supra* pp. 96, 97. See *Stern v Podfrey*, 1947 (1) SA 350; *Osborn v L & N. W. Railway*, 1888 (2) Q.B.D. 220. See also *Canadian Pacific Railway Co v Fréchette*, 1915 A.C. 871." In *The State v Marx* fn 27 *supra*, counsel for the state observed that according to the definition of assault in *Gardiner & Lansdown*, vol. 11 at p. 1570, the application of direct or indirect force is a requisite. He submitted that the administration of a noxious substance amounts to the applying of indirect force to the victims. He argued that if it were held that the present case was not an assault then *injuria* is a competent verdict noting that where the offence charged includes the commission of any other offence, the accused may be convicted of any offence so included although the whole offence charged is not proved. Assault is frequently a constituent part of a more serious crime. Assault is also a constituent part of any indictment alleging the unlawful infliction of bodily harm. The unlawful infliction of bodily harm is in itself a common law offence namely that of *injuria* (*Gardiner & Lansdown*, vol. 11 pp. 1579 – 81). Counsel for the state argued that although the crime of *injuria* in South African law has popularly been applied to injury to dignity and reputation, it has also in instances been applied to cases of physical injuries; *Rex v Jack*, 1908 T.S. 131; *Rex v Kelamon*, 14 S.C. 329 at p. 333. He noted that the present indictment alleges injuries to the children and it would therefore be competent in the circumstances of this case to substitute the verdict of guilty of *injuria*. This case is interesting because it involved a charge of assault for the administration of alcohol to children. Alcohol is a toxic substance as are most medicines. The court held that the deliberate administration of alcohol to children is an assault on them. It is submitted that the administration of a medicine to a child under circumstances in which there has been no proper consent obtained could therefore also constitute assault in certain circumstances. See further the discussion of *R v Van Schoor* 1948 (4) SA 349 (C), *S v Mkweshana* 1965 (2) SA 493 (N) and *S v Shivate* 1991 (1) SACR 656 (Nm) below which involved charges of culpable homicide as a result of the incorrect administration of medicines.

motives might be - and should he act without having done so and without having secured the patient's consent, he does so at his own peril".

In *Broude v McIntosh and Others*³¹ Marais JA questioned whether cases involving medical negligence and lack of patient consent should be pleaded as assault³². His view is that it is a strange notion to suggest that the actions of a medical practitioner whose intention is to heal a patient should be labelled pejoratively in this way simply because he or she omitted to explain one or other material fact to a patient concerning the proposed treatment. It is submitted with respect that while the arguments of Marais JA have merit, they are based on somewhat emotional grounds rather than the importance of the right to bodily and psychological integrity. In South African law the term 'assault' includes a wide variety of activities that do not all suggest criminal violence. Whilst it may well have taken on such a connotation in the minds of laymen, to a lawyer, 'assault' is a technical term in law which for sound reason covers a range of activities which on the violence scale range from zero to infinity. The point is that the criminal law upholds what the court in *Stoffberg v Elliot* called 'absolute security of the person'. It is a right that is fundamental to the state of being human and is akin to the right to life itself. Any suggestion

³¹ *Broude* fn 26 *supra*

³² At pages 67-68 of the judgment in *Broude supra* Marais JA stated: "Pleading a cause of action such as this as an assault to which the patient did not give informed consent is of course a familiar and time-honoured method of doing so. However, I venture to suggest with respect that its conceptual soundness is open to serious question and merits reconsideration by this Court when an appropriate case arises. To the average person, and I suspect to many a lawyer, it is a strange notion that the surgical intervention of a medical practitioner whose sole object is to alleviate the pain or discomfort of the patient, and who has explained to the patient what is intended to be done and obtained the patient's consent to it being done, should be pejoratively described and juristically characterised as an assault simply because the practitioner omitted to mention the existence of a risk considered to be material enough to have warranted disclosure and which, if disclosed, might have resulted in the patient withholding consent. It seems to me to be inherent in the notion that, even if the risk does not eventuate and the surgical intervention is successful, the practitioner's conduct would nonetheless have constituted an assault. That strikes me as a bizarre result which suggests that there is something about the approach which is unsound. There is no principle of law of which I am aware by which the characterisation as lawful or unlawful of an intentional act objectively involving the doing of bodily harm to another can be postponed until its consequences are known. Either it was an assault at the time of its commission or it was not. Events occurring *ex post facto* can logically have no bearing on the question. It is no answer to say that if the undisclosed risk does not eventuate, no damage will have been caused. That has nothing to do with the characterisation of the medical practitioner's act in intervening surgically as lawful or unlawful. I mention this merely by way of example to explain why I consider that the validity of causes of action framed in this manner in circumstances similar to those which are said to exist in this case requires re-examination. (I emphasise the latter qualification; I leave aside cases in which *mala fides* is involved such as cases of deliberate fraud and deliberate misrepresentation of what is entailed in order to obtain consent which would otherwise not be forthcoming.) However, re-examination would be inappropriate in the present case. The matter was not argued and even if it be assumed in favour of appellant that the cause of action based upon an allegation of assault is conceptually sound in law, I agree with the trial Judge's conclusion that the evidence does not bear it out." See also Strauss SA 'Bodily Injury and the Defence of Consent' 1964 *SALJ* 179; Strauss SA 'Toestemming tot Benadeling As Verweer In Die Strafreg en Die Deliktereg' (doctoral thesis) (1961)

that an unjustified interference with such a right is something less than criminal needs extremely careful consideration. In South Africa it is well known to anyone who works in the health sector that health professionals do not take the question of informed consent seriously in their daily practice. Health professionals still tend to have a highly paternalistic approach to their patients, especially, but not solely, to those who may be illiterate or have a low level of education. In the public sector they raise arguments about spending ‘unnecessary’ time talking to patients about their condition while in the private sector, informed consent if any, is relegated to the signature of a form on admission to a hospital which the patient may feel he or she has little or no choice in signing, or in the case of a private medical practice, a blanket consent which is signed when a person first visits the doctor’s rooms with the intention of becoming his patient. None of this is legally acceptable but it happens every day. All of this is with the threat of criminal assault in the event of failure to obtain consent hanging over the heads of providers. South African society, unlike American society, is largely non-litigious – a fact which is undoubtedly attributable to the fact that litigation is still an extremely expensive business and mostly beyond the means of the ordinary person and justice is a commodity that has to be purchased. The National Health Act³³ specific provision for informed consent on the part of patients largely because of the failure by the health professions to adequately address this issue. It is noteworthy that the Bill contains an express requirement that the patient must be informed that he or she can refuse the proposed treatment³⁴. Strauss states that in the absence of an

³³ National Health Act No 61 of 2003

³⁴ Strauss SA *Doctor Patient and the Law: A Selection of Practical Issues* notes that to perform a medical operation upon or to administer treatment to a person against his will or even without his consent amounts to assault, for which the doctor may be held liable in a civil action for damages and be criminally prosecuted. He states that as far as a claim for damages is concerned a South African court will probably not award more than a nominal amount where it appears that the doctor has in fact saved the patient’s life. Where there has been *injuria* associated with the unauthorised treatment, damages may well be awarded in respect of such *injuria*. Strauss does state that if, however, a patient has suffered harm, for instance in consequence of a blood transfusion such as an infection with a serious disease on account of the blood having been contaminated, substantial damages may conceivably be awarded. The writer submits that where no damages can be proved, none will be awarded since damages in terms of the law of delict are not generally punitive but compensatory in nature. This subject was canvassed in detail by the constitutional court in *Fose v Minister Of Safety And Security* 1997 (3) SA 786 (CC).

In *G Q v Yedwa And Others* 1996 (2) SA 437 (TK) the plaintiff claimed damages for shock, pain and suffering, as well as *injuria*, arising out of his wrongful assault and circumcision by the defendants. The plaintiff was a

captain in the Defence Force. He had already gone through the Xhosa initiation rites, including circumcision, several years before the attack by the defendants, who were also members of the Defence Force. White J stated that "I have therefore turned to those cases in which the plaintiffs were assaulted, but did not suffer serious injury, for guidance in determining the quantum of damages. When doing so, it once again struck me how small, and often insignificant, are the awards made by our courts for damages arising from personal injury and contumelia arising from an assault. I can only add my voice to the suggestion, which has been made from time to time, that such awards be increased substantially." In this case the plaintiff did not suffer serious or lasting physical injuries. He did not require hospitalisation and the only medical treatment he received was the cleaning of the wound to his foreskin, and the application of ointment thereto. The pain he suffered was also not excessive. The removal of the remainder of his foreskin was undoubtedly painful and, as stated above, he thereafter suffered pain, which appeared to the court to be no more than discomfort, for a period of two weeks. In all the circumstances an equitable award for shock, pain and suffering, which will be fair to both the plaintiff and the defendants, will be an amount of R5 000. White J observed that: "By far the most serious aspect of the assault, vis-à-vis damages, is the contumelia (insult) suffered by the plaintiff. Three aspects of the case exacerbated his humiliation. They were the nature of the assault, the imputation against his manhood, and the effect of that imputation on his subordinates. The first aggravating feature was the very nature of the assault. To have his trousers removed, his legs forced open and them to be circumcised, was manifestly an extremely degrading experience. The second aggravating feature was the symbolic imputation of the assault. Circumcision has great significance in Xhosa culture - it signifies the passing from boyhood to manhood, and the conferring on the recipient of the rights and privileges, and more particularly responsibilities, of manhood. A man who has not been circumcised has no standing in, and is denigrated by, their society. Circumcision is therefore a very emotive issue, especially when an uncircumcised man professes to have been circumcised and to be entitled to the privileges of manhood, and from time to time uncircumcised men, who act in this manner, are forcibly circumcised. Against this background it is clear that when the defendants assaulted the plaintiff they implied that he was not a man, but a charlatan and impostor who had not been circumcised. It is therefore not surprising that the plaintiff testified that he found this imputation against his manhood extremely offensive, degrading and humiliating. The third aggravating circumstance was that the imputation that the plaintiff had not been circumcised resulted in his being held in contempt by his subordinates, which caused him further degradation and humiliation. For the reasons set out above the Court must award a substantial amount as damages for contumelia, and I am of opinion that the amount claimed by the plaintiff under this heading is not excessive." The Court granted damages in the amount of R15 000. Of this amount R10 000 was for contumelia and R5000 was for shock, pain and suffering.

In *Minister Of Justice v Hofmeyr* 1993 (3) SA 131 (A), Hoexter JA held that: "One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element."

It is submitted that this is consistent with the manner in which the right to bodily and psychological integrity has subsequently been framed in section 12(2) of the Constitution.

Hoexter J stated that: "The general principles of the modern South African law of delict are essentially derived from Roman law. See Joubert (ed) Law of South Africa vol 8 at 11 para 6. *Injuria* is the wrongful and intentional infringement of an interest of personality. In an action for damages based on *injuria* the plaintiff must prove intent (*dolus, animus injuriandi*) on the part of the defendant. Intent and motive, however, are discrete concepts. As pointed out by Stratford JA in *Gluckman v Schneider* 1936 AD 151 at 159: 'Motive ... is the actuating impulse preceding intention.' Intention is a reflection of the will rather than desire. The pertinent difference between the two concepts was stressed in the Whittaker case *supra*. At 131 of his judgment Solomon J stated: 'It is not necessary in order to find that there was an *animus injuriandi* to prove any ill-will or spite on the part of the defendants towards the plaintiffs' It is clear that without *dolus* the action for an *injuria* would lie neither in Roman law nor in Roman-Dutch law. See the remarks of Davis J in *Wade & Co v Union Government* 1938 CPD 84 at 86. It is equally clear, however, that in a limited class of *injuriae* the current of precedent has in modern times flowed strongly in a different direction. In this limited class of delicts *dolus* remains an ingredient of the cause of action, but in a somewhat attenuated form, in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods. The possibility that in the case of certain forms of *injuriae* involving constraints on personal liberty the wrongdoer's legal liability might exist even in the absence of his appreciation of the wrongful nature of his injurious act, has been explicitly recognised by this Court. In *Ramsay v Minister van Polisie en Andere* 1981 (4) SA 802 (A) Botha AJA (with whom the remaining members of the Court concurred) agreed with the order appearing at the end of the judgment of Jansen JA but was at pains to dissociate himself from certain observations in regard to *animus injuriandi* in the judgment of Jansen JA. At 818E-H Botha AJA said the following: 'Hy aanvaar, na aanleiding van die posisie by laster, dat *animus injuriandi*, wat onregmatigheidsbewussyn verg, in die algemeen 'n element is van alle inbreuke op die persoonlikheid wat as *injuriae* aangemerkt word. Ek aanvaar dit nie. Ek laat die moontlikheid oop dat daar by bepaalde vorme van *injuria* na die eise van regsbaleid aanspreeklikheid kan bestaan in die afwesigheid van onregmatigheidsbewussyn by die dader. In der waarheid word my benadering onderskraag deur die huidige stand van die regsspraak. Dit val nie te betwyfel nie dat daar in die regsspraak, veral in die Transvaal, oor 'n tydperk van jare met betrekking tot sekere vorms van *injuria* 'n standpunt ingeburger is wat beteken dat by sekere *injuriae* onregmatigheidsbewussyn by die dader geen voorvereiste vir aanspreeklikheid is nie. Ek hoef nie daaroor op besonderhede in te gaan nie. By wyse van enkele voorbeeldte verwys ek slegs na *Birch v Ring*

1914 TPD 106; *Cohen Lazar & Co v Gibbs* 1922 TPD 142; *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T).¹ In the Cohen Lazar case supra a court messenger, on the instructions of a creditor who had no judgment, seized property of the debtor. A Full Court (Wessels JP and Gregorowski J) held that the seizure was an *injuria*. In the course of his judgment Wessels JP said at 144: 'The mere illegal and intentional interference with the liberty of a free man by seizing him or his property is a delict which will support an action for damages.' and later in his judgment at 145: 'It is revolting to one's common sense to think that a person unsupported by any judgment could induce a clerk to issue to him a writ, seize a person's property, and escape liability merely because he acted without malice and under the impression that no judgment was required. If a person by his own unauthorised act intentionally injures an innocent person in his property, the latter is *prima facie* entitled to damages for loss caused to him.'... I have cited the majority judgment in the Ramsay case supra as an example of recognition by this Court of the fact that in cases involving the liberty of the citizen there may be liability for an *injuria* despite the wrongdoer's unawareness of the wrongful character of his act. No less significant, however, is the line of reasoning adopted by this Court more than 80 years ago in the Whittaker case *supra*. The same recognition, although not roundly expressed, is, I think, implied in the decision in the Whittaker case. It is clear from the judgments delivered therein that *dolus* was predicated as an essential element of the *injuria* with which the Court was concerned. Innes J in the course of his judgment (at 122) put the matter thus: 'I agree with Wessels J (who delivered the judgment of the Court below) in holding that the illegal treatment to which the plaintiffs were subjected amounted to a delict on the part of those responsible for it. And I think the delict was of the class dependent upon intent (*dolus*); in other words, that it constituted an *injuria*. The action of the Governor was a wrongful and intentional interference with those absolute natural rights relating to personality, to which every man is entitled.' And again at 124: 'I have already pointed out that the infringement of the rights of these persons amounted to an *injuria*; a necessary feature of which is the existence of *dolus*, or intent. But when an unlawful aggression of this nature has been proved, the law presumes that the aggressor had in view the necessary consequence of his conduct; that is, that he had the intention to injure, the *animus injuriandi* (De Villiers Injuries 145). That does not mean that he was actuated by malice or ill-will, but that he deliberately intended that the operation of this unlawful act should have effect upon the plaintiff.'

Turning to the judgment of Solomon J one finds the following remarks at 130-1: 'It seems to me that we have present here all the requisites which are necessary to found an action of *injuria*. Those requisites are well laid down by De Villiers in his work on the law of injuries as follows: First: "An intention on the part of the offender to produce the effect of his act"; in other words, the *animus injuriandi*. It is not necessary in order to find that there was an *animus injuriandi* to prove any ill-will or spite on the part of the defendants towards the plaintiffs; and it is quite immaterial what the motive was or that the object which the defendants had in view was a laudable one. It is sufficient that the injuries suffered by the plaintiffs were inflicted by the defendants, not accidentally or negligently, but with deliberate intention.' Neethling *Persoonlikheidsreg* 2nd ed (1985) says at 116: 'Alhoewel onregmatige vryheidsberowing 'n *injuria* is waarvoor animus injuriandi 'n aanspreeklikheidsvereiste behoort te wees, het die regsprak onder invloed van die Engelse reg hierdie vereiste feitlik geheel en al negeer.' In amplification of the above statement the learned author in footnote 11 on the same page points out that in the *Whittaker* case *supra* at 122 and 130-1 '... dolus of animus injuriandi onomwonde as vereiste vir onregmatige vryheidsberowing gestel word. Nietemin is die verweerders aanspreeklik gehou nieteenstaande die feit dat hulle bona fide geglo het dat hulle optrede geregtig was (vgl op 129) en opset weens gebrek aan onregmatigheidsbewussyn bygevolg by hulle ontbreek het . . .' Having referred to the decision in *Smit v Meyerton Outfitters* (*supra*) Prof Neethling comments: 'Die opsetselement, onregmatigheidsbewussyn, en by gevolg dwaling as 'n verweer word dus uitdruklik verwerp. Mens kan gevolglik konkludeer dat aanspreeklikheid op grond van onregmatige vryheidsberowing skuldloos is.' To which he adds (by way of footnote no 16 on the same page):'Agesien daarvan dat hierdie negering van die skuldvereiste aan die invloed van die Engelse reg toe te skryf is, kom spesiale oorwegings wat sodanige afwyking regverdig nitemet hier te pas . . .' In my opinion the succinct dictum in *Smit v Meyerton Outfitters* (*supra*) quoted earlier in this judgment embodies a correct statement of our modern law. The application of the principle therein stated furthermore entails practical consequences which seem to me to be both sensible and just. The principles of our law of delict which govern the legal liability of a wrongdoer for the infliction of unlawful bodily restraint, touching as they do the liberty of the subject, are principles of vital importance. I do not think that this Court should try to reverse the direction along which our law has developed as reflected in the line of judicial precedents examined in this judgment. To upset an established and satisfactory principle because it is not in accordance with the Roman or Roman-Dutch law would be to deny development to our law. Law is not a static thing. It is forever changing and being adapted to novel conditions." In *Peter v Peter And Others* 1958 (4) SA 361 (N) Caney J observed that "The word 'injury' or 'injuries' can be used in a wide sense, as meaning any infraction of right or wrongful act. But the ordinary meaning is injury to property or to person (*R v Hutcheons and Another*, 1912 T.P.D. 705 at p. 710), although it seems that, in relation to property, the more appropriate term is 'damage to property', whilst 'injury' is employed in relation to persons, whether as to bodily or physical injury (embraced in the Aquilian action) or injury to 'absolute rights of personality', as to dignity or reputation. For this the *actio injuriarum* is given. De Villiers on *Injuries*, pp. 21, 22; *Wille's Principles*, p. 465 (3rd ed.).... In our country, also, damages or compensation for 'personal injuries' has an established meaning, that is to say relief in consequence of bodily hurt obtainable primarily under the aquiliani action, though there may also be an element of *contumelia*."

It is submitted that in the health services context this line of legal precedent is consistent with and supportive of the idea that damages for unauthorised medical treatment can and should be awarded in appropriate circumstances not only in respect of physical or bodily injury in the Aquilian sense, but also in respect of *injuria*. The nature of medical treatment is such that it affects the patient's 'personhood'. It affects

overriding social interest, or an interests such as that of a minor child who is dependent upon the person concerned, the mentally competent individual's right to control his own destiny in accordance with his own value system must be rated higher than even his health and life. He says that if there is a conflict between the desire of a person to go his own way, forego medical treatment and to expire in his own manner, on the one hand, and the desire of the doctor to cure him of his disease or to secure his health on the other, the former should be accorded preference. There is neither a general right nor a general duty on the part of a person to protect another against himself³⁵.

7.2.1.3 Liability for Omissions

Generally speaking liability for omissions is more restricted than liability for commissions due to the fact that the courts are reluctant to make individuals within society responsible for the welfare of others to whom they have no relationship.³⁶ One is generally speaking entitled in law to mind one's own business.³⁷ In the context of health care the Constitution has to some extent

much more than just his life or physical wellbeing. Strauss (fn 34 *supra*) comments that if the treatment saves the patient's life then the award of damages is likely to be minimal but this should not be the case in all circumstances. If a patient who is suffering from an incurable disease is forcibly treated against his will in order to save his life and this objective is achieved but in the process his suffering is prolonged and his rights to human dignity and to bodily and psychological integrity have been violated it is submitted that there may well be arguments on the basis of public policy that clearly favour the wrongfulness of such an act and that would support a significant award of damages. Life is not everything. It is rather the lowest common denominator in being human as the matrix of other rights in the constitutional Bill of Rights indicates.

³⁵ Strauss fn 28 *supra* at p31

³⁶ Neethling, Potgieter and Visser (fn 18 *supra*)

³⁷ In *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA), Scott JA observed that "In the course of the past 20 years or more this Court has repeatedly emphasised that wrongfulness is a requirement of the modern Aquilian action which is distinct from the requirement of fault and that the inquiry into the existence of the one is discrete from the inquiry into the existence of the other. Nonetheless, 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. (Compare *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 497B - C.) It is essentially in relation to liability for omissions and pure economic loss that the element of wrongfulness gains importance. Liability for omissions has been a source of judicial uncertainty since Roman times. The underlying difficulty arises from the notion that, while one must not cause harm to another, one is generally speaking entitled in law to mind one's own business. Since the decision in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) the Courts have employed the element of wrongfulness as a means of regulating liability in the case of omissions. If 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 or, as it is sometimes stated, whether there existed a legal duty to act. (The expression "duty of care" derived from English law can be ambiguous and is less appropriate in this context. See *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27D - E.) To find the answer the Court is obliged to make what in effect is a value judgment based, *inter alia* on its perceptions of the legal convictions of the community and on considerations of policy. The nature of the enquiry has been

introduced an exception to this rule in the form of the right in section 27(3) not to be refused emergency medical treatment. This right has been discussed elsewhere in this thesis in greater detail. The point to note is that it, like the other constitutional rights is not absolute, but it nonetheless comes closer so far than any other legal principle in compelling certain persons to act in certain circumstances. A health professional or health establishment that refuses to provide emergency medical treatment, whether in the private or public sectors, without solid grounds for doing so is likely to be faced with a claim for violation of this constitutional right. The claim will in all likelihood be based in delict since the harm caused by the refusal to give emergency medical treatment is likely to be construed as a civil wrongdoing involving *dolus* rather than *culpa*. Obviously the claim would have to be considered in the light of the relevant circumstances. It is noteworthy that although the language of the Constitution seems to be couched in terms of a positive act, i.e. a refusal to provide medical treatment, rather than an omission, the wrongful ‘act’ in question is likely to be an omission – the failure to provide medical treatment – rather than a positive act.

7.2.2 Causation

In *Muller v Mutual And Federal Insurance Co Ltd And Another*³⁸ the court observed that “...the problem of causation in delict involves two distinct enquiries. The first is whether the defendant's wrongful act was a cause of the plaintiff's loss ('factual causation'); the second is whether the wrongful act is

formulated in various ways. See, for instance, *Minister van Polisie v Ewels* (*supra* at 597A - B); *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318 E - H and the recent formulation, albeit in a different context, in *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (A) at 1204D. It is clear that the same facts may give rise to a claim for damages both *ex delicto* and *ex contractu* so that the plaintiff may choose which to pursue. But a breach of a contractual duty is not per se wrongful for the purposes of Aquilian liability. (See the *Lillicrap* case *supra* at 496D - I and 499D - G.) Whether the requirement of wrongfulness has been fulfilled or not will be determined in each case by the proper application of the test referred to above.” This passage was quoted with approval by Comrie J in *Pinshaw v Nexus Securities (Pty) Ltd And Another* 2002 (2) SA 510 (C)

³⁸ *Muller* 1994 (2) SA 425 (C)

linked sufficiently closely to the loss for legal liability to ensue ('legal causation' or remoteness)."³⁹

In *Minister of Police v Skosana*⁴⁰, the court observed that causation in the law of delict gives rise to two distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to see the harm giving rise to the claim⁴¹. If it did not, then no legal liability can arise and *caedit quaestio*. If it did, 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 is basically a juridical problem in which considerations of legal policy may play a part⁴². Therefore the test for factual causation is, except in the most unusual of circumstances, the *causa (conditio) sine qua non*. The plaintiff must show that the harm would not have arisen but for the actions or omissions of the defendant. The courts decide the question of legal causation on the basis of a number of factors that relate essentially to public policy. The importance of public policy in the constitutional legal order that prevails in South Africa has already been discussed in some detail elsewhere. Public policy is informed by the values and principles of the Constitution. Thus decisions as to legal causation must also be informed by constitutional values and principles.

³⁹ See also *Minister of Police v Skosana* 1977 (1) SA 31 (A) at p 34E-35D and *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at p 914F-915A; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at p 700E-701F and *S v Mokgethi en Andere* 1990 (1) SA 32 (A)

⁴⁰ *Skosana* 1977 (1) SA 31 (A) at 34E-35D

⁴¹ *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) at 264; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) at 222

⁴² Farlam AJ in this case quoted *Prosser Law of Torts* 4th ed at p 237, where it is stated: "A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event. In particular it covers the defendant's omissions as well as his acts." And then observed that: "The test is thus whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred. This test is otherwise known as that of the *causa (conditio) sine qua non* and I agree with my Brother Viljoen that generally speaking there may be exceptions- (see *Portwood v Svamvur* 1970 (4) SA 8 (RA) at 14) no act, condition or omission can be regarded as a cause in fact unless it passes this test (see *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 147)."

Questions of legal causation involve the limits of legal liability.⁴³ The appropriate test for legal causation has been a matter for some debate both in foreign jurisdictions and in South African law⁴⁴. In *Smit v Abrahams*⁴⁵ the court identified two tests from the literature: the direct consequences test and the reasonable foresight test. The former has been explained as follows:

“The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act.”⁴⁶

The second test is derived from the judgment of Lord Simonds in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd*⁴⁷ where he stated:

“... (T)it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be “direct”. It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.”

In, Farlam AJ points out that the principle upheld in *Overseas Tankship* is subject to at least two qualifications: (a) as long as the ‘kind of damage’ is foreseeable the extent need not be and (b) the precise manner of occurrence need not be foreseeable.

Farlam AJ states in *Smit* that it is his view that the direct consequence test is not really a rival which ousts the test of reasonable foresight observing that where it applied it operated as an extension to the reasonable foresight test so that, in

⁴³ “The use of the expression ‘legal causation’ to describe the concept underlying the second enquiry, namely the enquiry as to the remoteness of damage, may be a convenient label, but it must not be allowed to distract one’s attention from the important consideration that the second enquiry does not really raise a question of causation but relates to the fixing of the outward limit of legal liability.”

⁴⁴ See the discussion in *Smit v Abrahams* (fn 45 *infra*) at p162-174

⁴⁵ *Smit* 1992 (3) SA 158 (C)

⁴⁶ *In re Polemis and Furness, Withy & Co* [1921] 3 KB 560 (CA)

⁴⁷ *Overseas Tankship* [1961] AC 388 (PC) ([1961] 1 All ER 404)

effect, the two were combined with the result that a defendant will be held liable for (i) the reasonably foreseeable consequences of his culpable conduct, plus (ii) any direct consequences thereof, even if they were not foreseeable.

This view was subsequently accepted in *Gibson v Berkowitz*⁴⁸ along with the dicta in *S v Mokgethi an Andere*⁴⁹.

In *Silver v Premier, Gauteng Provincial Government*⁵⁰, the court quoted from the minority judgment of Corbett JA (as he then was) in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*⁵¹ and especially at 915E where he said:

"In many instances, however, the enquiry requires the substitution of a hypothetical course of lawful conduct for the unlawful conduct of the defendant and the posing of the question as to whether in such case the event causing harm to the plaintiff would have occurred or not; a positive answer to this question establishing that the defendant's unlawful conduct was not a factual cause and a negative one that it was a factual cause. This is so in particular where the unlawful conduct of the defendant takes the form of a negligent omission. In *The Law of South Africa* (ibid para 48) it is suggested that the elimination process must be applied in the case of a positive act and the substitution process in the case of an omission. This should not be regarded as an inflexible rule. It is not always easy to draw the line between a positive act and an omission, but in any event there are cases involving a positive act where the application of the but-for rule requires the hypothetical substitution of a lawful course of conduct (cf Prof A M Honoré in *International Encyclopaedia of Comparative Law* c 7 at 74–6). A straightforward example of this would be where the driver of a vehicle is alleged to have negligently driven at an excessive speed and thereby caused a collision. In order to determine whether there was factually a causal connection between the driving of the vehicle at an excessive speed and the collision it would be necessary to ask the question whether the collision would have been avoided if the driver had been driving at a speed which was reasonable in the circumstances. In other words, in order to apply the but-for test one would have to substitute a hypothetical positive course of conduct for the actual positive course of conduct."

⁴⁸ *Gibson v Berkowitz And Another* 1996 (4) SA 1029 (W). The court noted as follows: "In South Africa the matter has become settled in that the Appellate Division has now laid down a 'flexible norm' ('soepele maatstaf') whereby considerations of policy, reasonableness, equity and justice are applied to the facts of the case. Van Heerden JA in *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 40I-41B described the test for legal causation thus: "Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekompleks, en vir die doeleindes van die koppeling van enige vorm van regsaanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie."

⁴⁹ *Mokgethi* 1990 (1) SA 32 (A). See also *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C)

⁵⁰ *Silver* 1998 (4) SA 569 (W). See chapter 8 for a discussion of the facts and judgment of this case.

⁵¹ *Siman* fn 39 *supra* at p 914C–918A

The potential for convergence of the principles of the law of contract and of delict is evident from the judgement in *Silver* where the court refused to distinguish between the test for causation in considering the contractual as opposed to the delictual claim of the patient⁵². It is submitted that this is particularly relevant in the context of claims involving health care services since the facts upon which the claim is based, whether in contract or in delict, are likely to be the same in many instances. In other contexts where contractual claims are based rather more on the anticipated outcome or results of performance than on a failure to perform to some reasonably required minimum standard, there may be argument for a different test of causation to that contemplated in the law of delict. The latter attempts to put the plaintiff in the position in which he would have been but for the wrong that was done him whereas the law of contract attempts to put the plaintiff into the position in which he would have been had the obligations of the defendant under the contract been fulfilled. In the context of the law relating to health services delivery in particular, it has already been pointed out that it is very seldom that results of treatment are contractually guaranteed by those rendering it and the courts are unlikely to infer any kind of assurance of an outcome in a health services contract due to the unpredictability in many instances of health outcomes following treatment. The conflation of delictual and contractual

⁵² *Silver v Premier, Gauteng Provincial Government* fn 50 *supra*. On the subject of the *sine qua non* test the court observed at p 574-575 of the judgement that: "I am aware that the plaintiff's claim is founded in contract and, in the alternative, in delict. But I see no reason why the *sine qua non* test should not apply equally to the contractual claim in casu. The loss sustained by the plaintiff is said to have been caused by the breach of an implied term of an agreement that the hospital through its staff and employees would exercise due care, skill and diligence in providing nursing care. Precisely the same facts are relied upon as constituting a breach of the implied term as are relied upon as constituting a breach of the duty of care owed to the plaintiff. It would be anomalous if the same result did not follow irrespective of the cause of action. Furthermore, although the question of remoteness of damage for breach of contract is approached (in the absence of a contractual stipulation as to the basis on which compensation is to be made) by determining whether the damage flowed naturally and directly from the defendant's breach or is such a loss as the parties contemplated might occur as a result of such breach (*Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 and 54), it must, in my view, follow as a matter of logic that as a general rule, the test for factual causation would first have to be satisfied. There will, of course, be exceptions, such as that cited by Visser and Potgieter in *Law of Damages* (1993) para 6.3.2 at 80-1: '(W)here a building contractor X is not able to build because Y, who has to deliver cement, and Z, who has to supply bricks, both fail to honour their contractual obligations on the same day and thus cause damage to X (eg he loses profit). According to the *conditio sine qua non* "test", neither Y nor Z has caused damage since, if the breach of contract of each is notionally eliminated, the damage does not fall away!' The learned authors express the view that common sense must be employed in such cases - an approach emphasised by Corbett JA in Siman's case at p 917 in fine-918A and employed by Lord Wright in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 (HL) at 706 ([1942] 2 All ER 6) and by Beadle CJ in *Portwood v Svanvur* 1970 (4) SA 8 (RA) at 15F-G."

principles in this context is thus logical and justifiable because it is the harm that is done to the patient in the ‘delictual’ sense, that grounds the claim in contract on the basis of a breach of an implied or express term to take reasonable care. Put another way, the law of contract tends to presuppose that the basis for the contract is an intended positive change in the circumstances of the contracting parties – an arrangement for their mutual benefit that contemplates an improvement in both their situations. To the extent that contracts for health care services do not tend towards such legally recognised presuppositions, the obligations of the parties to the contract are not squarely within the contractual paradigm but lean to some extent towards the delictual paradigm.

The spirit of contractual arrangements from the patient’s perspective in the health services context could generally be summed up as: “If you won’t say that you can cure me, at least promise to take due care not to harm me in the process of trying”. This is a ‘contractualisation’ of the principles of the law of delict which is why it is entirely apposite to treat the two kinds of claims similarly. There is technically speaking no need to incorporate such a term in the contract except, possibly, for the purpose of mitigating the burden of proof for the patient which he or she would carry in terms of the law of delict. However, the balance of power between patient and provider is such that there is unlikely to be an express term in the contract between them which renders the provider strictly liable for any harm the patient may suffer as a result of the former’s ministrations. Consequently the parties are most likely to contemplate an element of fault in their contract as being the reasonable ‘trigger’ for the liability of the provider. As far as implied terms are concerned, a court is unlikely to accept argument that an implied term of such a contract disposed of the requirement of fault on the part of the provider as a trigger for a claim by the patient. This is likely to be contrary to the norms of society in the majority of cases. Fault is a prominent feature of the law of delict which is why there is in

some respects no practical difference between the contractual and delictual claims in such a situation.

Lines of cause and effect are a preoccupation of the *sine qua non* test for causation⁵³. It is important to distinguish, however, between factual causation and legal causation. Even if the *conditio sine qua non* test is satisfied on the basis of the facts there is still the question of whether, legally speaking, the causal link should be recognised⁵⁴. The question of causation, viewed holistically, is therefore as much one of policy as it is one of fact⁵⁵. In *S v*

⁵³ The court quoted from an unreported case in discussing the applicability of the 'but for' test for causation as follows: "In conclusion, on the applicability of the 'but for' test for causation, I would refer to the following passage in the unreported judgment (which I feel obliged to say I gave but in which Labuschagne J concurred) in *Aalwyn J Bezuidenhout and Another v Willie J Jacobus Rossouw h/a Riviera Eiendomme* (WLD, case No A3010/97, delivered on 15 May 1997): 'Gewoonlik waar daar bepaal moet word of 'n sekere gevolg deur die optrede of versuim van een van die partye regtens veroorsaak is, moet daar gekyk word na 'n verskeidenheid van faktore wat 'n waardebeplasing deur die Hof verg. Die vraag of die eerste bekendstelling van die eiendom die eintlike verkooptransaksie veroorsaak het, is geen uitsondering nie. In *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871 (W) te 873H-874D het Marais R die volgende gesê: "The law with regard to a matter of this kind is usually stated in the following form: The duty of the estate agent, if he is to earn remuneration by way of commission for selling property, is to introduce to his principal (the seller) a purchaser who is willing and financially able to buy the property, and he earns the commission if a sale is concluded with that purchaser at the stipulated price or a price ultimately proved to have been acceptable to the seller. A proviso has been added to the effect that the introduction of the able and willing buyer must have been the effective cause or causa causans of the sale. If a new factor intervenes causing or contributing to the conclusion of the sale and the new factor is not of the making of the agent, the final decision depends on the result of a further enquiry - viz, did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale as the introduction was, or was the introduction still overridingly operative? Only in the latter instance is commission said to have been earned. This enquiry is not a metaphysical speculation in the result of cause and effect. It requires, as is said in *Webranchek v L K Jacobs and Co Ltd* 1948 (4) SA 671 (A), a commonsense approach to the question of what really caused the sale to be concluded, or, to put it differently, as it is said in a restatement of the law in America, whether it is 'just' that the agent should receive credit and compensation for the work he has done for the seller. In regard to this latter version, it may be said in passing that this question has nothing to do with the amount of work the agent put into it. The mere furnishing to the prospective buyer of the principal's address or the location of the property offered may be sufficient to entitle him to claim commission from the seller, provided a line of cause and effect can reasonably be traced from the introduction to the conclusion of the sale." Die woorde wat ek gekursiveer het, is belangrik. Dit moet nooit uit die oog verloor word nie dat voordat die gewone vraag (soos in *Aida Real Estate v Lipschitz* (*supra*) uiteengesit) ontstaan, daar hier - soos in enige ander situasie waar oorsaaklikheid bepaal moet word - eers aan die *sine qua non* (ofte wel "but for") toets voldoen moet word. Met ander woorde, as daar nie gesê kan word dat, was dit nie vir die agent se optrede nie, die gevolg (verkoop van die eiendom) nie sou ingetree het nie, kan die optrede van die agent nooit as oorsaak van die verkooptransaksie bestempel word nie. Andersom gestel, as die verkooptransaksie sou plaasgevind het afgesien van enigiets wat die agent gedoen het, is die agent nie (ingevolge die gewone kontrak tussen 'n agent en die eienaar) op kommissie geregellig nie.'

⁵⁴ Thus in *Standard Chartered Bank of Canada v Nedperm Bnkk Ltd* 1994 (4) SA 747 (A) the court stated: "My conclusion is that the untrue report issued by Nedbank was a factual cause of Stanchar's loss. In other words, it was a *conditio sine qua non* of such loss. That, however, does not conclude the enquiry. It is still necessary to determine legal causation, i.e. whether the furnishing of the untrue report was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. The principles applied in such an inquiry have recently been expounded by this Court in the cases of *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39D-41B; *International Shipping Co (Pty) Ltd v Bentley* (*supra* at 700E-701G); and *Smit v Abrahams*, as yet unreported, dated 16 May 1994, at pp 22-5, 32-3, 36-7, 39-40 of the typescript. As appears from these judgments, the test to be applied 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 their part."

⁵⁵ In *Smit v Abrahams* 1994 (4) SA 1 (A) the court held that there can be no doubt that in South African law the ratio of *Owners of Dredger Liesbosch v Owners of Steamship Edison; The Edison* [1933] AC 449 (HL) ([1933]

*Williams*⁵⁶ the court was faced with a situation in which a person was wounded so seriously that the injuries, in the absence of prompt medical intervention, would very soon lead to death. The victim of the crime was kept alive artificially by means of a respirator. She was subsequently taken off the respirator once it had been established that her brainstem was no longer functioning. Her heart and lungs ceased functioning some ten minutes after the ventilator was disconnected. The appellant was sentenced to death for her murder. He appealed on the grounds that the real cause of the victim's death was the disconnection of the respirator. In other words a *novus actus interveniens* had occurred to cause her death. The court held that it was not necessary to decide the case on the basis of whether the medical definition of death as being brainstem death must be accepted in law since it was possible to deal with the matter on the more traditional view of the community that death occurred when there was no longer a heartbeat or respiration. It held that the appellant's allegation of a *novus actus interveniens* was unreasonable and unacceptable in that he had given the deceased a wound which, had she not received medical assistance, would have led rapidly to her death. Medical practitioners had done their best to save her. In the process her life was artificially maintained. When the ventilator was finally disconnected this action

All ER Rep 144), i.e. that damages consisting of expenses incurred as a result of the plaintiff's impecuniosity, has no right of existence. The rigidity of the rule is inconsistent with the flexible approach followed in South African law, as explained in *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39J-41B, in particular the flexible criterion whereby the Court considers on the basis of policy considerations whether there is a sufficiently close connection between act and consequence (at 40II-J). There is no room for the employment of the *ratio of The Edison* in a system where legal causality is determined by asking the question whether there is a sufficiently close connection between act and consequence, and that question has to be answered on the basis of policy considerations and the limits of reasonableness, fairness and justice. The impecuniosity of the plaintiff as a joint cause of the damage is merely one of the facts which, together with all the other facts of each particular case, has to be taken into consideration in the application of the predominating flexible criterion (the 'oorheersende elastiese maatstaf') (Mokgethi's case at 40D) in terms of which the Court determines whether the defendant should be held liable for the damages in question. (At 14E-F, 15E-G.) The court took the view that the importance and efficacy of the predominating criterion in resolving questions of legal causality lies in its flexibility. Any attempt to detract from its flexibility should be resisted. Comparisons between the facts of the case which has to be resolved and the facts of other cases in which a solution has already been found, or which might hypothetically arise, can obviously be useful and of value, and sometimes even decisive, but one should be careful not to attempt to distil fixed or generally applicable rules or principles from the process of comparison. The argument that the plaintiff's claim should 'in principle' be rejected is misplaced. There is only one principle: in order to determine whether the plaintiff's damages are too remote from the defendant's act to hold the defendant liable therefor, considerations of policy, reasonableness, fairness and justice should be applied to the particular facts of the case. (At p 18E-H). (From headnote)

⁵⁶ *S v Williams* 1986 (4) SA 1188 (A)

was not the cause of her death but rather the termination of a fruitless attempt to save her life.⁵⁷

Medical treatment does not necessarily have the effect of breaking the line of causation between the original injury and the death of a person. Even from the point of view of factual causation the withdrawal of medical treatment from a person who has suffered mortal injury cannot be said to constitute a new intervening cause of the ultimate result. From the point of view of legal causation the argument of a *novus actus interveniens* in these circumstances is clearly wrong since it would be contrary to the legal convictions of the community and the values of the Constitution to allow a wrongdoer to escape the consequences of such a heinous crime on the basis that medical practitioners tried to save the victim's life but failed. The argument of a *novus actus interveniens* in the context of medical treatment could only succeed if there was convincing evidence that the medical treatment itself precipitated the person's death and that the initial injury would not have had the same result.

With specific regard to the health care context, it has been observed that the general causation requirement in toxic torts encourages both corporate self-deception and disregard for the public interest. It encourages industry not to investigate harm resulting from its product. By predicating liability on the plaintiff's proof of causation, the tort system builds in disincentives for corporations to know and disclose information about harm. Legal scholar Margaret Berger argues that it is time to create a new toxic tort that would condition culpability on the 'failure to develop and disseminate significant

⁵⁷ The court in *Williams* (fn 56 *supra*) referred to the observations of the English court in the case of *R v Malcherek; R v Steel* [1981] 2 All ER 422 in which Lord Lane stated as follows: "There is no evidence in the present case here that at the time of conventional death, after the life support machinery was disconnected, the original wound or injury was other than a continuing, operating and indeed substantial cause of the death of the victim, although it need hardly be added that it need not be substantial to render the assailant guilty..." and "Where a medical practitioner adopting methods which are generally accepted comes *bona fide* and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist (for example, circulation) are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim's death. Putting it in another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death."

data'⁵⁸. She says that agent orange, asbestos, the Dalkon Shield, thalidomide and tobacco are all instances where companies failed to test their products initially, failed to report problems as they emerged and failed to do research to investigate those problems. A system that encourages a 'don't ask, don't tell' policy decouples liability from moral responsibility and thus threatens the basic underpinning of corrective justice. It has been observed that some might argue that current regulations which require premarket testing for drugs and chemicals deemed to be potential hazards are sufficient. However, the regulations have loopholes that the tort system, in placing the burden of proof on the plaintiff, fails to close.

7.2.3 Wrongfulness (Unlawfulness)

Wrongfulness is a question of public policy as informed by the values and principles of the Constitution.⁵⁹ It is remarkable that both the Cape High Court and the Supreme Court of Appeal had to be reminded of this fact by the Constitutional Court in a judgment handed down in 2001⁶⁰ despite the fact that in other judgments, in some cases in the same division of the High Court, the courts were taking express cognizance of this central legal principle.⁶¹

⁵⁸ She is quoted by Raffensberger C in 'Toxic Tort System Fails the Basic Test' *Science for Lawyers* The Environmental Forum, May 2002 www.sehn.org/pdf/may-june_02.pdf

⁵⁹ In *Van Duivenboden v Minister of Safety and Security* [2001] 4 B All SA 127 (C), Davis J stated at 132d: "(I)t would appear that the requirement of wrongfulness demands of the court that it determine whether society requires that the law classify the type of conduct concerned as impermissible, that is conduct of which a society disapproves. See Van Aswegen at 192 and Neethling, Potgieter and Visser *The Law of Delict* (1999) at 39 - 41. In turn the determination of "impermissibility" shaped by a society's vision of itself is contained within its legal system. In terms of the ultimate law in this country, the Constitution, South African society is predicated upon foundational values of human dignity, liberty and equality. The newly established constitutional community is to be built upon those "common values and norms" and the added principle that public authority must be transparent and accountable to the public it serves."

⁶⁰ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* fn 15 *supra*.

⁶¹ See *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) where Davis J stated: "In my view, the determination of the legal convictions of the community on which the test for wrongfulness is based must take account of the spirit, purport and object of the Constitution. As Prof Mureinik wrote, the new Constitution 'must lead to a culture of justification' - a culture in which every exercise of power is expected to be justified" ((1994) 10 SAJHR 31 at 32). This principle of justification includes the concept of accountability, namely that a public authority is accountable to the public it serves when it acts negligently and without due care. Accountability includes the recognition of legal responsibility for the consequences of such action."

The case of *Carmichele v Minister Of Safety And Security And Another*⁶² is a classic example of the importance of the role of the Constitution in the decisions of the courts and of the need to take into account the values and principles contained in the Constitution when considering matters that were previously solely the domain of the common law. In an earlier judgment granting absolution, the Cape High Court held that the pleaded omissions, on which the plaintiff relied, were not wrongful in that the defendants did not owe the plaintiff a legal duty to take positive steps to prevent the harm occasioned to the plaintiff. The court's finding was based on the application of the common-law position as expounded in the decisions of the then Appellate Division in *Minister van Polisie v Ewels*⁶³; *Minister of Law and Order v Kadir*⁶⁴; *Knop v Johannesburg City Council*⁶⁵. The matter then went to the Supreme Court of Appeal and from there to the Constitutional Court.

On appeal, the Constitutional Court (*Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*)⁶⁶ referred to the aforementioned common-law test, and, with particular reference to the dictum of Hefer JA (in *Minister of Law and Order v Kadir*), concluded that in the exercise of determining whether a legal duty exists, the weighing and striking of a balance between the interests of the parties and the conflicting interests of the community amount to “a proportionality exercise with liability dependant upon the interplay of various factors”. It held further that “proportionality is consistent with the Bill of Rights, but that exercise must now 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 and in which government has positive duties to promote and uphold such values”.

⁶² *Carmichele* fn 49 *supra*

⁶³ *Ewels* 1975 (3) SA 590 (A)

⁶⁴ *Kadir* 1995 (1) SA 303 (A)

⁶⁵ *Knop* 1995 (2) SA 1 (A)

⁶⁶ *Carmichele* fn 15 *supra*

In upholding the appeal, the Constitutional Court refrained from itself deciding whether the law of delict should be developed on the basis contended for on behalf of the plaintiff. What it did hold was that where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing that deviation. It furthermore held that under the Constitution, courts are obliged to develop the common law under section 39(2) of the Constitution and that both the Cape High Court and the Supreme Court of Appeal assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied and in so doing “overlooked the demands of s 39(2)” of the Constitution. The Cape High Court in its reconsideration of the matter admitted that in handing down its initial judgment it did not have regard to the provisions of section 39(2). It noted that counsel for the applicant submitted that in the light of this constitutional duty imposed on the state, and in particular the duty on the State to protect women against violent crime in general, it is necessary to revisit the conventional test for wrongfulness to determine whether the state owed the plaintiff a legal duty to protect her against attacks of the sort perpetrated against her by the rapist: Reasonableness, on which the legal convictions of the community are based, is now to be found in the Constitution and not in some vague notion of public sentiment or opinion. In agreeing with him, Chetty J referred to the words of Davis J in *van Duivenboden* to the effect that the requirement of wrongfulness demands of the court that it determine whether society requires that the law classify the type of conduct concerned as impermissible, that is conduct of which a society disapproves and that in terms of the ultimate law in South Africa, the Constitution, South African society is predicated upon foundational values of human dignity, liberty and equality⁶⁷. Leinius and Midgely⁶⁸ note that the criterion for assessing wrongfulness or unlawfulness is said to be one of objective reasonableness, requiring careful

⁶⁷ *Van Duivenboden* fn 59 *supra*

⁶⁸ Leinius and Midgley fn 16 *supra*

balancing, amongst others, of the parties' interests and the circumstances of the particular case. Public policy plays an important role: courts are required to render value judgments as to what society's notions of justice demand and such judgments should reflect the community's perception of justice, equity, good faith and reasonableness⁶⁹. They note further that the constitutional court suggested in *Carmichele*⁷⁰ that in applying section 39(2), concepts such as 'policy decisions and value judgments' might have to be replaced, supplemented or enriched by constitutional norms (paragraph 56). Noting that they agree with this view, they observe that the Constitution sets out criteria for determining society's notions of justice and equity and articulates values and norms which must underpin society's rules and their application. They state that if the common law does not reflect these notions and values, some development will be necessary to ensure that it does so from now on. Leinius and Midgley caution, however, that the view of the constitutional court that development should take place within the common law's paradigm should be heeded so that whilst the Bill of Rights is now an important factor in assessing wrongfulness, it is not the exclusive embodiment of public policy in delictual matters. They point out that the *boni mores*, the legal convictions of the community, reflect wider concerns and encompass additional policy considerations – particular factors relevant to omissions, or pure economic loss (for example indeterminate liability), being some of them⁷¹. It is submitted that whilst Leinius and Midgely

⁶⁹ Leinius and Midgley, fn 16 *supra* at p 19. They cite *Minister of Law and Order v Kadir* 1995(1) SA 303 (A) at 318F-G; J C van der Walt & R Midgley *Delict: Principles and Cases vol 1 'Principles'* 2ed (1997) para 56; J Neethling, JM Potgieter & PJ Visser *Law of Delict* 3 ed (1999) at p 38 and p 43.

⁷⁰ *Carmichele* fn 15 *supra*

⁷¹ Leinius and Midgley, fn 16 *supra*, note that according to the constitutional court, it remains unclear as to how constitutional obligations on the state translate into private-law duties towards individuals. On the one hand it might be easier, they say, to accentuate the objective nature of unlawfulness and 'to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect protect promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.' On the other hand the elements of fault and remoteness (legal causation) might play a greater role. They do acknowledge that in some instances constitutional values might point to more restricted liability. In their view, while there are instances where constitutional imperatives must be taken into account in assessing fault or legal causation, the wrongfulness criterion is the correct locus for enquiring whether constitutional obligations have delictual equivalents. They note that an infringement of a fundamental right or breach of a constitutional duty will not necessarily entitle one to sue in delict. To do so, fundamental rights and obligations which flow therefrom must establish a subjective right or a corresponding legal duty, or at least fit into one of the established categories. The duty upon the state to ensure that one can freely exercise the right to vote, they say, is an example of a constitutional duty which does not have a delictual equivalent, whereas the right to dignity clearly has. They state that at another level, the more common one, the Constitution will have an 'indirect radiating effect' on existing concepts, as suggested in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at paragraph

may be correct in saying that constitutional values and principles are a subset of those to be found at common law, where the latter are inconsistent with the former, section 2 of the Constitution is relevant and applicable and the latter must be discarded. In this sense therefore, only to the extent that common law policy considerations can be regarded as logically and legally consistent extensions of the constitutional values and principles, can they legitimately be applied in deciding claims in the law of delict. It is further submitted that lawyers should guard against being overly legalistic, in the sense of looking at the letter of the Constitution, rather than its spirit, when engaging in legal analysis of public policy principles since policy in itself is not a legal concept that fits easily into moulds of black and white or this and that. Policy is polycentric. Values are relative. The focus in policy consideration is not so much upon the words which express it as the spirit behind it. For this reason, legal thinking from a previous era which tends to focus more or less exclusively on an analytical, almost scientific, approach to legal interpretation and argument is likely to sit uncomfortably in policy debates, constitutional or otherwise.

In *Dersley v Minister Van Veiligheid En Sekuriteit*⁷² the court held that the test for wrongfulness required that a judicial value judgment had to be pronounced upon whether or not the infringement of the particular interest of the plaintiff was, in the circumstances, in accordance with the *boni mores* (i.e. the legal

110 but that it seems to them that in these instances courts are not concerned with establishing principles or legal norms which apply across the board to all similar instances. Rather, as the Supreme Court of Appeal pointed out in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paragraph 27 "In applying the test of what the legal convictions of the community demand and reaching a particular conclusion the courts... are making value judgments *ad hoc*'. They note that in the Bakkerud case it was noted that the imposition of a duty on one municipality to repair pavements would not lead to a blanket duty on all municipalities to do so and in the context of *Carmichele* (fn 15 *supra*) the imposition of a duty on either the police or the prosecutor would not create a legal principle that liability would exist in all similar cases. Each case depends on its own facts. Thus when the Constitution is used in this way – to permeate and enrich the common law, Leinius and Midgely, argue that it is not the common law rule that is tested but the result of its application in the circumstances of the case. A court's conclusion as to whether or not a legal duty exists in the circumstances must be compatible with the constitutional norms and values. They state that in both instances thus far the enquiry focuses on whether or not the defendant's *conduct* adhered to constitutional standards. According to Leinius and Midgely, a third way in which the Constitution could be used is in determining whether or not the *law* applicable to the parties is constitutional. They note that in *Carmichele* the constitutional court did exactly that when it noted that the issue of wrongfulness involves 'weighing and the striking of a balance between the interests of the parties and the conflicting interests of the community' and commented that such a proportionality exercise is consistent with the Bill of Rights. In saying so, they maintain that the court in fact declared the standard test for determining wrongfulness to be constitutional.

⁷² *Dersley* 2001 (1) SA 1047 (T)

convictions of the community). If so, there was a legal duty upon a defendant to protect the rights of the plaintiff, which he could not neglect. If not, there was no such legal duty upon a defendant. It stated that the *boni mores* standard consisted of the legal convictions of the community and was not necessarily an ethical, social or contemporary moral standard. Rather it was directed at weighing, in the light of the particular circumstances, the reasonableness or otherwise of the defendant's conduct against the infringement of the plaintiff's interests. If reasonableness lay on the side of the defendant, he was not burdened by any legal duty. If, on the other hand, reasonableness lay on the side of the plaintiff, the defendant was indeed subject to a legal duty⁷³.

⁷³ At 1054I/J - 1055E/F. Scott J in 'Deliktuele Aanspreeklikheid Vir Veroorsaking Van Suiwer Ekonomiese Verlies: Die Deur Word Wyer Oopgemaak'. 2001 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 64 p681-689 critically examines the judgment in *Dersley*. He says that van Dyk J did not once in this case expressly refer to the fact that he was dealing with the question of delictual liability for pure economic loss. Van Dyk J, he says, found the core of the problem that stared him in the face in the process of the application of the relevant legal principles to the facts before him in the legal rules of delict applicable to omissions as a manifestation of human behaviour. Accordingly he devoted his attention exclusively to capturing the modern South African dispensation concerning the test for unlawfulness in the case of an omission. He observes with regard to the aspect of unlawfulness as dealt with in this case that Van Dyk J attached great value to the contribution of J C van der Walt who points to the basis of unlawfulness as being located in either a violation of the claimant's subjective right or the non-compliance with legal duty owed to the claimant. He notes that these sentiments have been shared since the sixties through the writings of academic heavyweights such as WA Joubert and NJ van der Merwe and further notes that the acceptance of van der Walt's opinion regarding the more sophisticated present day nature of the *boni mores* test does not exactly indicate something which would be regarded in academic circles as revolutionary. In fact, says Scott, it should rather be disturbing for academics working in the field of delict that concepts such as those expressed by Van der Walt are accepted as noteworthy by the bench. Van Dyk J came to the conclusion that: "Dit het my getref dat die basiese toets verander het en dat dit vandag daarin geleë is dat 'n judisiele waarde-ordeel uitgespreek moet word of die eiser se betrokke aangetaste belang in die omstandighede en tipe situasie wat voor die hof op die feite sou dien, ooreenkomsdig die *boni mores* (dit will sê, die regsoptatting van die gemeenskap) beskermingswaardig is al dan nie; en indien wel, is darr inderdaad 'n regsgelig op sodanige persoon wat hy nie mag nalaat nie. Andersins is daar geen regsgelig op 'n verweerde om die regte van die eiser te beskerm nie." Scott states that the court's conclusion unfortunately paints a skewed picture of the *boni mores* test. Firstly, he says, it is clear that van Dyk J was setting out the application of the test for unlawfulness in the adjudication of an omission as the cause of pure economic loss while he gave the impression that he was defining the test for unlawfulness in general. Unlawfulness as the violation of a legal duty, the existence and scope of which is determined by the *boni mores*, is the model of choice for the adjudication of omissions. Secondly, says Scott, it should be noted that it is simplistic to hint that the *boni mores* are only relevant in the determination of the worthiness of protection, or not, of an interest. It is obvious that a legally protected interest may in other circumstances be violated, such as in the case of justification. Scott says that van Dyk J's formulation does not allow the function of the *boni mores* to be fulfilled in the process of the demarcation of the scope of the legally protected interest. He observes that there is a great difference between a case such as that of *Dersley* and that of *Ewels* which revolved around the fact that policemen had failed to intervene in the plaintiff's cause. In *Dersley* the employee of the defendant had gone out of his way to be helpful to the plaintiff. He engaged in positive action which led to harm to the plaintiff. The mere fact that this conduct was a failure to fulfil his role as a police official in conflict with specific and general legislation ought not to magically transform his act into an omission says Scott. He refers to Van der Walt and Midgley *Delict: Principles and Cases* who issue a warning with regard to this type of situation in the following words: "The failure (omission) to stop at a stop street indicates negligent or deficient positive conduct – *culpa in faciendo*. The mere fact that linguistic alternatives enable us to describe the positive occurrence in a negative way (for example, 'the driver failed or omitted to stop at the stop street') is legally irrelevant in the determination of the nature of the conduct."

In *Aucamp And Others v University Of Stellenbosch*⁷⁴ it was held that in considering whether or not the conduct in question is wrongful, the Court is required to make a value judgment. In doing so it must weigh up the interests of the parties and of the community at large against the background of the relevant facts and circumstances. In addition, it must strive, impartially and objectively, to apply the values of justice, fairness and reasonableness, while taking into account considerations of good faith (*bona fides*) and good morals (*boni mores*), otherwise known as public policy reflecting the legal convictions of the community⁷⁵. The court in this case set out the factors that should be taken into account in considerations of wrongfulness, i.e. whether the defendant was able to avoid reasonably foreseeable harm by taking reasonable steps to do so, as follows:

- (a) whether the defendant had known or had subjectively foreseen that his or her negligent conduct would cause harm to the plaintiff;
- (b) whether the defendant could have taken reasonably practical steps to prevent such harm;
- (c) whether the defendant possessed or had professed to possess special skill, competence or knowledge;
- (d) whether special protection against economic loss had been required;
- (e) whether a finding in favour of the plaintiff would lead to a multiplicity of actions or indeterminate liability which would have severe social consequences;
- (f) whether a statutory provision required the prevention of economic loss;
- (g) whether the plaintiff had been able to protect him- or herself against potential economic loss; and
- (h) whether the defendant had been able to protect him- or herself against such loss, for example by arranging adequate insurance cover⁷⁶.

⁷⁴ *Aucamp* 2002 (4) SA 544 (C)

⁷⁵ *Aucamp* fn 74 *supra* paragraph [68] at 567I - 568B/C.

⁷⁶ *Aucamp* fn 75 *supra* paragraph [69] at 568F - I/J.

The court stressed, however, that there was no *numerus clausus* of such factors. It stated that in the case of negligent misrepresentation, wrongfulness is determined by establishing whether or not the defendant had breached a legal duty to furnish correct information to the person entitled to such information. Similar principles to those applicable with regard to wrongfulness in a general delictual context apply, as do similar guidelines as to whether or not the defendant had a legal duty in a particular case. It listed the factors to be taken into consideration in considering a claim for negligent misrepresentation as follows:

- (a) whether the parties had a contractual or fiduciary relationship requiring that correct information concerning any matter arising from such relationship be supplied
- (b) whether the defendant had certain exclusive information which was not readily accessible to the plaintiff or other parties;
- (c) whether the defendant had furnished information by virtue of his or her professional knowledge and competence;
- (d) whether the defendant had been aware, or ought by the exercise of reasonable care to have been aware, of the existence and identity of persons who would rely on his or her negligent misrepresentation; and
- (e) whether the defendant had been aware, or ought by the exercise of reasonable care to have been aware, of the existence and identity of persons who would suffer damage should the misrepresentation not be corrected, and would benefit should it be corrected⁷⁷.

In *Geldenhuys v Minister Of Safety And Security And Another*⁷⁸ Davis J referred to an article by Francois du Bois⁷⁹ which sets out four themes that are illustrative of the key considerations taken into account by courts in investigating wrongfulness. Davis J notes that briefly stated, these themes can be set out thus:

⁷⁷ *Aucamp* fn 74 *supra* at paragraph [70] at 568J - 569E

⁷⁸ *Geldenhuys* 2002 (4) SA 719 (C)

⁷⁹ Du Bois F "Getting wrongfulness right: A Ciceronian attempt" 2000 *Acta Juridica* 1 at p 33ff

1. Courts are reluctant to impose delictual liability in cases where the enforcement of a duty in delict may disrupt a contractual allocation of rights and duties.
2. A finding of wrongfulness may be excluded where the law of delict lacks jurisdiction because the event complained of is of such a nature that the legal determination of the defendant's duty to the plaintiff, being the application of the element of fault, cannot be expected to reflect that person's obligations correctly. Of particular relevance to this issue is the recognition by the law of a sphere of decision-making autonomy, which makes the context of the dispute unsuitable for a judicial determination.
3. The extension of wrongfulness will not be easily undertaken where the rights and duties that are at issue have economic and the market provides a mechanism for distributing these in circumstances that could function as an alternative to adjudication.
4. The consideration that an extension of wrongfulness would open the "floodgates" of litigation; a point made by Toon van den Heever as follows: "If every individual were liable for failure to protect others against loss, each would be compelled in order to avoid liability, to run around and busy himself with the affairs of his neighbours, to the neglect of his own, which would lead to chaos." (*Aquilian Damages in South African Law* (1944) at 37.)

Questions of wrongfulness in the context of health care can become particularly complicated. Reference has already been made to the thalidomide disaster in the 1960s and the fact that the drug was withdrawn from the market. In 1987 the Hansen's Disease Centre contracted with the manufacturer of the drug to manufacture clinical grade thalidomide for the treatment of erythema nodosum leprosum. Over 50 kilograms of 99.5%-plus pure drug was delivered and used. Thalidomide clinical trial planning commenced in 1989 with the submission of the drug master file, inspection by FDA and planned orphan drug designation

submissions. The first pilot clinical trial against Crohn's disease was begun in 1991. In 1992, working with the Division of AIDS of the National Institute of Allergy and Infectious Diseases and an AIDS Clinical Trials Group principal investigator, planning began for a trial against recurrent aphthous ulcers in HIV-positive patients, a previously untreatable and incurable condition that severely degraded the quality of life. Study interim analysis in October of 1995 showed that 61 percent of treated patients had complete healing of all their ulcers versus the 5 percent of placebo patients and 91 percent of treated patients had partial or complete healing of all of their ulcers as compared to 18% of placebo patients. From 1993 to 1997 pilot trials were started against three AIDS-related conditions – Kaposi's sarcoma, prurigo nodularis, a severe dermatological condition and immuno deficiency in AIDS patients. The drug clearly has benefits in the treatment of otherwise untreatable conditions. The problem is how to maximise the availability of thalidomide to patients for whom nothing else works while inhibiting its routine availability so as to ensure a pregnant woman can protect her foetus. Thalidomide must therefore be safe and effective not only in the regulatory sense, but safe and effective for everyday use. It was noted in 1997 that the political pendulum in the US was swinging from a paradigm of government as protector and as agent of its citizens to one of less regulation and more consumer and independent citizen decision making. The point was made that if there are fewer government resources to provide comprehensive knowledge and regulatory balancing of risk and reward as they pertain to thalidomide, the patient's ability to make a fully informed and objective use decision can only be adversely affected. When cost-effectiveness constraints and time constraint pressures on providers are added, risk to the patient can only increase further. The result of all this increases the chance of accidents and therefore the threat of litigation. Such a series of events would be nothing short of catastrophic, not only to the victim, but to all others then benefiting from thalidomide and all who might benefit from it. Investment and development initiatives would be chilled or halted, probably irrevocably.⁸⁰

⁸⁰ Andrus Corporation "Thalidomide: Potential Benefits and Risks" transcript Open Public Scientific Workshop

Wrongfulness in the health care context can be a question of balancing the interests of various groupings in society. It can be a question of calculated risks. The question is who takes these decisions and on what basis? These are important questions because if the risk is demonstrably worth it, and the courts sanction those who take it on the basis of a single case that goes wrong, what are the consequences for the many who benefit from the risk? The courts do not necessarily have the means to make policy decisions at these levels. The logical tools at their disposal do not necessarily allow for consideration of all of the public interest issues. Cases that are argued before them are most likely to be about the interests of individuals and not the interests of society as a whole.

The South African Law Commission has observed that professionals traditionally operate in spheres in which success is not always feasible and that even where important factors are within the professional's control, he cannot always guarantee success.⁸¹ The Commission notes that the courts face a particular difficulty in establishing a rational approach to professional liability. On the one hand provision has to be made for adequate protection of the consumer, client or patient and on the other hand human fallibility has to be taken into account. The Commission noted that South African medical practitioners have traditionally received "soft treatment" from the courts and that there have been several cases in which medical practitioners have been held liable for malpractices but in the majority of cases they have been absolved of blame. It also noted that an interesting phenomenon in the USA is that the greatest increase in litigation is experienced in those fields of medicine where the most progress has been made with the development of methods of treatment. The development of sophisticated technology has apparently created higher expectations among patients.

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⁸¹ Working Paper 51 'Limitation of Professional Liability' Project 70 1989

7.2.4 Fault

Negligence (*culpa*) is the most commonly encountered form of fault in the context of health service delivery. Although intention (*dolus*) is another recognized form of fault, it tends to play a more significant role in the criminal law than in the law of delict. For this reason, the discussion that follows will focus on fault in the form of negligence. The test for negligence in the South African law of delict has for a long time been accepted as the one enunciated by Holmes JA in *Kruger v Coetze*⁸²: “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.”⁸³

In *Mukheiber v Raath and Another*⁸⁴ the Supreme Court of Appeal apparently seems to have favoured the relative theory of negligence posed by Boberg⁸⁵ and stated as follows:

“For the purposes of liability *culpa* arises if -

- (a) a reasonable person in the position of the defendant -

⁸² *Kruger* 1966 (2) SA 428 (A) at p 430E - F.

⁸³ Holmes J states in *Kruger*, fn 82 *supra*, that: “This has been constantly stated for the last 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast rules can be laid down. Neethling J and Potgieter JM in ‘Die Toets vir Nalatigheid Onder Die Soeklig: Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA); Mkatshwa v Minister of Defence 2000 (1) SA 1004 (SCA)’ note that in *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) 1077 Olivier JA chose to follow Boberg’s reformulation of the test. They criticise this departure from precedent as being without explanation and as supportive of the legal impossibility that even a completely lawful act could be construed as negligent. They say that these decisions create a climate of uncertainty and are thus regrettable. See further the discussion under *Mukheiber v Raath* in chapter nine of this thesis

⁸⁴ *Mukheiber* fn 83 *supra*

⁸⁵ Boberg PQR, *The Law of Delict : Aquilian Liability*. Vol I at p 390

- (i) would have foreseen harm of the general kind that actually occurred;
 - (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
 - (iii) would have taken steps to guard against it, and
- (b) the defendant failed to take those steps."

Scott JA comments in his judgement in *Sea Harvest Corporation (Pty) Ltd And Another v Duncan Dock Cold Storage (Pty) Ltd And Another*⁸⁶ that, broadly speaking, the former involves a narrower test for foreseeability, relating it to the consequences which the conduct in question produces, and serves in effect to conflate the test for negligence and what has been called "legal causation" (cf *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*⁸⁷ so as, it is contended, to eliminate the problems associated with remoteness.

Scott JA does not read the judgment in *Mukheiber* to have unequivocally embraced the relative theory of negligence. He points out that elsewhere in the judgment and when dealing with the issue of causation the court appears to have applied the test of "legal causation" which the strict application of the relative theory would have rendered unnecessary. He then goes on to state that, having said this, it 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 person⁸⁸.

In *Mkhatswa v Minister of Defence*⁸⁹ the court emphasised that what is required to satisfy any test for negligence is foresight of the reasonable possibility of harm. Foresight of a mere possibility of harm will not suffice. The Supreme Court of Appeal in this case refused to follow the judgement in *Mukheiber* on

⁸⁶ *Sea Harvest* 2000 (1) SA 827 (SCA)

⁸⁷ *Siman* fn 39 *supra* at p 914F - H

⁸⁸ *Sea Harvest Corporation (Pty) Ltd And Another v Duncan Dock Cold Storage (Pty) Ltd And Another* fn 86 *supra* at p 839

⁸⁹ *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA)

the ground that it “might give rise to some uncertainty as to what was sought to be conveyed”⁹⁰.

In *Van Duivenboden*⁹¹ the court observed that negligence is not inherently unlawful. It is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Unlike the case of a positive act causing physical harm, which is presumed to be unlawful, a negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. The value of synthesis as opposed to analysis is clear from this statement. Although it is useful to identify the various elements of a delict in order to contemplate them in greater detail, there is a danger in considering them in isolation since they must be considered in a systemic context in terms of which each has a bearing on or relationship to the other. In the same vein, where a legal duty is recognised by the law, an omission will attract liability only if the omission was also culpable according to the test of whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have then acted to avert it⁹². The academic debate that was provoked by *Mukheiber v Raath* is canvassed in more detail in the discussion of that case below.

7.2.5 Loss

As stated previously, loss in the law of delict is calculated differently to loss in the law of contract. Under the law of contract the loss is calculated with regard to the position in which the plaintiff would have been but for the breach of contract. Generally speaking this position is a positive improvement on the position of the plaintiff prior to the contract. In terms of the law of delict, loss is calculated with regard to the position that the wronged party would have been in

⁹⁰ *Mukheiber* fn 83 *supra* at p1111

⁹¹ *Van Duivenboden* fn 59 *supra*

⁹² *Van Duivenboden* 2002 (6) SA 431 (SCA) paragraph [12] at p 441E - 442A.

but for the wrongdoing. It therefore attempts to restore the plaintiff as far as possible to the position he was in before the wrong occurred. In delict, both non-pecuniary and pecuniary loss is recognised whereas in the law of contract, only pecuniary loss is recognised⁹³. With regard to non-pecuniary loss, however, South African courts have apparently decided that it must be viewed subjectively⁹⁴ as opposed to objectively in that, the victim of the delict must be in a position to be able to appreciate and experience the wrong that has been done in order for it to be compensable. In *Collins v Administrator, Cape*⁹⁵, the facts of which are given in more detail below, the court held that where a defendant's negligence has resulted in the plaintiff becoming permanently unconscious for the remainder of her life, there is no basis in South African law for awarding her non-pecuniary damages in respect of pain and suffering, shock, discomfort, loss of amenities or shortened expectation of life because the delictual action for damages is compensatory, not punitive. In other words where the non-pecuniary loss is so great that the plaintiff is unable to comprehend it, no damages will be awarded. Where the degree of non-pecuniary loss is not such that the loss itself has robbed the plaintiff of the capacity to experience the loss, however, non-pecuniary damages will be awarded. The court in *Collins* said that where the plaintiff is unconscious and all her physical needs have been taken care of, it is not possible to compensate her

⁹³ *Administrator Natal v Edouard* 1990 (3) SA 581 (A)

⁹⁴ Although in *Collins v Administrator, Cape* fn 1 *supra* the Cape court held that there is no basis for accepting in South African law the distinction drawn in English law between a subjective and an objective element in the loss of amenities of life, a distinction which owes its existence to the Law Reform (Miscellaneous Provisions) Act of 1934 which made a claim for loss of expectation of life transmissible to a deceased's estate. As such a claim is not transmissible in South Africa the occasion for such distinction does not arise and, without such need, there is no logical basis for the drawing of such a distinction, it is submitted that in essence this is what the 'functional' approach of the court amounts to.

Neethling, Potgieter and Visser (fn 18 *supra*) at p 249 that in *Gerke v Parity Insurance Co Ltd* 1966 3 SA 484 (W) the court researched the English law and came to the conclusion that in that system a predominantly abstract (objective) approach is followed but that subjective considerations do play a role in determining the quantum of damages. They quote the observations of Ludorf J to the effect that the test is (a) objective in that something fails to be awarded for what has been called loss of happiness even in a case where the victim has been reduced to a state in which he has never realised and will never realise that he has suffered this loss; (b) is, however, subjective, in the sense that the court in fixing quantum, will have regard to any relevant data about the individual characteristics and circumstances of the plaintiff which tend to show the extent and degree of the deprivation; (c) is subjective, also, in the sense that any realisation which the plaintiff has, or did have or will have, of what he has lost, is most material and important. The authors observe that although the case has been strongly criticised and correctly so in some instances, it has generally been followed in other cases such as *Reyneke v Mutual and Federal Insurance Co Ltd* 1991 3 SA 412 (W) and in *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A). They point out that the Appellate Division did not condemn the approach in the *Gerke* case in *Bailey*.

⁹⁵ *Collins* fn 1 *supra*

for her loss. It would be like paying a dead person money in order to compensate him for the loss of his life. In *Collins*, the court held that the so-called ‘functional’ approach is consistent with the principles of South African law and involves the award of non-pecuniary damages only to the extent that such damages can fulfil a useful function in making up for what has been lost in the sense of providing for physical arrangements which can make the victim’s life more endurable. It cited *Southern Insurance Association Ltd v Bailey NO*⁹⁶ in support of the principle that the function to be served by an award of damages is a relevant consideration in determining what damages should be awarded. The effect of the judgment is that where an award of non-pecuniary damages to the unconscious plaintiff will not serve any purpose for the plaintiff at all, there is no basis for making any award.

The decision in *Collins* has been criticised as a failure on the part of the court to take into account the high value accorded to human life and dignity by the Bill of Rights⁹⁷. Neethling *et al*⁹⁸ argue that in analysing the problem under discussion it is important to note that the existence of injury to personality should not be confused with its compensability. They state that there is clear agreement that injury to the personality of a person whose consciousness has been reduced to such a level that he has little or no insight into his own condition cannot be compensated by an award of damages and point out that the solution under German law in such a case is to make an award of objective satisfaction which signifies a symbolic redress of the harm by effecting retribution for the wrong done to the plaintiff⁹⁹. Neethling *et al* observe that

⁹⁶ *Bailey* fn 94 *supra*

⁹⁷ Visser PJ ‘Geen Vergoeding vire Bewustelose Eiseres’ 1996 *THRHR* p 179

⁹⁸ Neethling *et al* fn 18 *supra*

⁹⁹ Neethling *et al* (fn 18 *supra*) note that Boberg *Delict* p 570 also seems to favour the German approach. Boberg states that “It is believed that our courts will and should continue to award a nucleus of damages for loss of amenities of life to the unconscious plaintiff a la Gerke, though any actual evidence of awareness should greatly increase the award. Compromise this solution may be, but if offers the necessary flexibility to deal justly with individual circumstances, and enables the law to express society’s sympathy with the victim and its sense of outrage at this grievous loss”. See the criticism by Neethling *et al* in fn 338 on p 250 of the views of van der Merwe and Olivier (*Die Onregmatige Daad in die Suid-Afrikaanse Reg*) p 192 fn 51 on this subject and also their exploration of the opinions of Luntz H ‘Damages in Cases of Brain Injury’ 1965 *SALJ* p 10 and Erasmus HJ ‘Genoegdoening vir Verlies aan Lewensgenietinge’ 1976 *TSAR* p 238. The court in *Reyneke* (fn 94 *supra*) stated as follows with regard to the criticism of Luntz H in an article entitled ‘Damages in cases of brain injury -

injury to personality in cases of interests which are directly related to consciousness consists only of an injury to feelings. The operation of the conscious mind is thus a prerequisite, they say, for the existence of harm such as pain and physical suffering. They note that other forms of personal loss are only

Some developments' SALJ 1967 at 6 (Luntz disagreed with the conclusion reached by Ludorf J in the *Gerke* case. He seemed to favour the functional approach, i.e. the subjective approach and relied heavily on the Australian case of *Skelton v Collins* (1966) 39 ALJR p 480 wherein the High Court of Australia dissented from the views expressed in the *Wise v Kaye* and *West v Shephard* cases.): "His criticism seems to have lost much force in view of the House of Lords decision in the *Lim Poh Choo* case [*Lim Poh Choo v Camden and Islington Health Authority* [1979] 2 All ER 910 (HL)]. ... It seems to me that the criticism of Luntz is also rendered ineffective by the judgment of Nicholas JA in the *Bailey* case [*Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A)] ... when the learned Judge referred to Lord Scarman's judgment aforesaid with apparent approval and then continued at 119F as follows: 'As I read the judgment in the Katz case, however, it did not lay down that the "functional" approach was the one to be followed: all that was said was that on the facts of the *Katz* case, an approach of that kind would not call for an interference with the damages awarded by the trial Court.' Classen J said: "I respectfully read the judgment of Nicholas JA as expressly refraining from laying down a principle of law that the Court is obliged to apply the functional approach where the patient is unconscious of any loss suffered or where the award would most probably not be employed to alleviate his lot. As I understood his judgment the Courts, when making an assessment for general damages, may take into account as one of the factors influencing the amount of the award the fact that such an award cannot be utilised by the patient to alleviate any loss of amenities of life. He did not prohibit the award of general damages for loss of amenities of life or reduced expectation of life to a patient in a 'cabbage' case." With regard to the criticism of *Gerke* by Erasmus, ('Genoegdoening vir verlies van lewensgenietinge' (1976) 2 TSAR 238) the court in *Reyneke* observed that: "The learned author argues that damages for pain and suffering and loss of amenities of life are in the nature of a solatium analogous to that awarded under the *actio injuriarum*. He cites *Government of The Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 607B - C where Holmes JA held as follows: 'Third, claims for bodily injury involving pain and suffering and the like have this in common with claims under the *actio injuriarum* - namely that both relate to non-pecuniary loss and the amount awarded is regarded in the nature of a solatium. As Van Winsen J observed in *Hoffa's* case *supra* at 955A: "(T)he damages awarded therefore bear a direct relationship to the personal suffering of the injured party and are intended for his personal benefit. The damages awarded to him are in a certain sense analogous to the *solatium* which is awarded under the *actio injuriarum* to someone as a salve for his wounded feelings.'" Professor Erasmus then proceeds to conclude that the *Gerke* decision [*Gerke NO v Parity Insurance Co Ltd* fn 94 *supra*] is wrong and in conflict with the *Ngubane* decision: "Die huidige posisie is dus dat by die enigste geleentheid waarop die vraag pertinent ter sprake gekom het, vergoeding vir verlies van lewensgenietinge toegestaan is aan 'n persoon wat sodanig breinbeskadig was dat hy nie bewus was van sy eie toestand nie. Intussen het die Appelhof, in navolging van verskeie Provinciale Afdelings, 'n uitleg gegee van die aard van die aksie wat onversoenbaar is met enige toekenning onder hierdie hoof aan die breinbeskadigde slagoffer. Daar word derhalwe met eerbied aan die hand gedoen dat in die lig van die beslissing van die Appelhof van die Ngubane -saak, daar nou sonder twyfel aanvaar moet word dat die *Gerke* -saak verkeerd beslis is. As die vergoeding vir verlies van lewensgenietinge die vorm aanneem van 'n troosgeld, 'n *solatium*, dan is dit genoegdoening vir die leed wat die slagoffer persoonlik ervaar. As die benadeelde persoon as gevolg van die aard van sy beserings geen leed ervaar nie, is hy a fortiori nie geregtig op genoegdoening vir dit wat hy nie ervaar nie."

Classen J then states: "With respect to the learned author, I cannot agree with his conclusions. The *Ngubane* case decided that a claim for damages for pain and suffering and loss of amenities of life is incapable of cession prior to *litis contestatio*. The Court did not decide, nor was it called upon to decide, whether a patient in a vegetative state, and thus still alive, is entitled to general damages for pain and suffering and loss of amenities of life. As indicated in the *Sandler v Wholesale Coal Suppliers Limited* case *supra*, completely different considerations apply as to whether damages are claimable or not. These were described as 'the broadest general considerations' and 'what is fair in all the circumstances'. These considerations do not apply when considering the question whether or not a claim for pain and suffering and loss of amenities of life is cedable or not. It goes without saying that a *solatium* is not capable of cession. However that is not the enquiry I am concerned with. I have to decide whether a *solatium* is payable to a person in a vegetative state. The question which is relevant here is whether an objective or subjective standard is to be applied in assessing such damages. The merits or demerits of these tests were never considered nor relevant in either the *Ngubane* case or the case of *Hoffa NO v SA Mutual Fire & General Insurance Co Ltd* 1965 (2) SA 944 (C). As such the criticism of Prof Erasmus seems unjustified. Furthermore, in awarding damages for loss of amenities of life to a person in a vegetative state, one is not awarding such damages to anyone else but the patient. It is not an award to the heirs. The fact that it may eventually redound to the benefit of the heirs because the patient cannot utilize it for his own benefit, does not make the award any less an award of damages to the patient. In any event it seems to me that the criticism of Prof Erasmus falls by the wayside in view of the stamp of approval given by the House of Lords and the South African Appellate Division in the *Lim Poh Choo* and *Bailey* cases respectively."

indirectly related to consciousness. Thus where there is an impairment of reputation or a loss of the amenities of life, the loss is not only to be found in the feelings or consciousness of the plaintiff. In cases of defamation and loss of amenities, it is possible to ascertain objectively without reference to the feelings of the plaintiff whether his esteem in society has been lowered or to what extent his capacity to enjoy a normal life has been negatively influenced. They state that the connection with consciousness is only created through affective (sentimental) loss, that is the reaction of the injured person to his loss, or in other words, his personal unhappiness. In such case an injury to personality has both a subjective and an objective element. According to Neethling *et al* unconsciousness excludes only the subjective element. They observe that an unconscious person with brain injuries does not have a normal life and does not take part in normal activities and ask how it can then be correct to say that there is no loss? They take the view that the fact that the loss cannot be compensated does not mean that it is non-existent or that the law should ignore it and point out that in such cases the objective function of satisfaction becomes relevant in German, Australian and South African law. They state that the common mistake which is made in the evaluation of personal loss where the plaintiff is unconscious is to equate the existence of loss with its compensability.

In *Reyneke v Mutual and Federal Insurance Co Ltd*¹⁰⁰ the court stated that in making an award the courts adopt an objective approach in determining the

¹⁰⁰ *Reyneke* fn 94 *supra*. The facts of the case were that the plaintiff, the father of a minor daughter, Suzette Analine Reyneke, who was born on 8 July 1970 sued the defendant company both in his personal capacity and in his capacity as father and natural guardian of Suzette. The claim arose out of a collision which occurred on 9 October 1986. Suzette was on roller skates in Lombard Street, Klerksdorp when the vehicle, which was insured by the defendant company, collided with her. Since the injury, Suzette lay in the surgical ward No 6 at the Klerksdorp hospital. She sustained various minor injuries, viz a fractured jaw, a fracture of the metacarpal of her hand, multiple rib fractures and fractures of both knees. For all practical purposes these minor injuries were not relevant to the dispute. However, as a result of a major head injury, Suzette was in a permanent vegetative state, i.e. she fell into the class of cases known as 'cabbage' cases. She was unaware of all bodily functions, blind, mute, deaf and there was no prognosis of recovery of any of these faculties. The brain injury caused prolonged loss of consciousness and haemorrhage in the deep seated ganglial areas of the brain. As a result of this head injury she was 100% disabled. She was fed by a naso-gastric tube and her urine was drained by an indwelling catheter. She responded to pain only by decerebration posturing. There was a well-marked cough reflex on tracheal pressure. Her pupils were large and did not respond to light. She was blind. Her primary reflexes were still present but she had no spontaneous movement. She could not speak but breathed spontaneously. Her bowels were evacuated either spontaneously or with digital help two or three times a week in bed. There had been episodic chest and bladder infections but these usually clear up within two to three days and in a few instances after approximately nine days. Suzette was emaciated and had lost approximately 16

amount of damages, that is, it awards damages for loss whether the victim is aware of such loss or not. In awarding damages for loss in this category, the court may, but is not obliged to, take into account as one of the factors influencing the award, the so-called 'functional approach' whereby the amount of damages may be increased or decreased depending on (a) the extent to which the money so

kilograms in weight since the date of the collision. At that time she weighed approximately 55 kilograms, whereas her weight had reduced to 39 kilograms. At the time of the collision she was 16 years of age and she was 20 years when case was heard. She would be bedridden for the rest of her life. In medical terms her condition is described as being a Persistent Vegetative State or PVS after a definition by Jennett and Plum made in 1972. A brain scan showed extensive loss of cortex and diffuse atrophy. She had been in a coma since the collision. The Persistent Vegetative State described patients with irreversible brain damage who, on recovery from a deep coma, pass into a state of seeming wakefulness and reflex responses but never return to a cognitive sapient state. It is the result of destruction of the cerebral cortex of the brain but with sufficient preservation of the brainstem to sustain the vegetative functions - respiration, circulation, gag-reflex etc. The PVS is distinguishable from brainstem death where the patient is kept alive by mechanical respiratory support which, if withdrawn, will result in death. The claim was for (1) Suzette's remaining life expectation; (2) general damages; (3) past and future loss of earnings. With regard to the claim for general damages, Classen J stated at p419 onwards as follows: I now turn to the difficult task of making an award under the heading of 'general damages'. Normally this head of claim will include items such as pain and suffering, loss of expectation of life, loss of amenities of life, disfigurement etc. I may just in passing mention that 'loss of amenities of life' has been defined as 'a diminution in the full pleasure of living'. See *H West & Son Ltd and Another v Shephard* [1963] 2 All ER 625 (HL) at 636G - H. The amenities of life flow from the blessings of an unclouded mind, a healthy body, sound limbs and the ability to conduct unsaid the basic functions of life such as running, eating, reading, dressing and controlling one's bladder and bowels. Per Hoexter JA in *Administrator-General, South West Africa and Others v Kriel* 1988 (3) SA 275 (A) at 288E - G. It is common cause that Suzette has lost all these amenities of life. The problem with which I am faced is the difficult question of whether Suzette is aware of the fact that she has suffered any loss of this nature. Suzette's case is to be distinguished from other cases known as the 'twilight' cases where some communication with the patient is sometimes possible. Examples of the so-called 'twilight cases' are *Roberts NO v Northern Assurance Co Ltd* 1964 (4) SA 531 (D); *Lim Poh Choo v Camden and Islington Health Authority* [1979] 2 All ER 910 (HL); *Marine & Trade Insurance Co Ltd v F Katz NO* 1979 (4) SA 961 (A) at 983A; and *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 120A. The 'cabbage' cases which are on all fours to the present instance are *Wise v Kaye and Another* [1962] 1 All ER 257 (CA) and *Gerke NO v Parity Insurance Co Ltd* 1966 (3) SA 484 (W). A problem which arises in the 'cabbage' cases is whether a Court should award any general damages in circumstances where the patient is not aware of any suffered loss and where any awarded amount will only redound to the benefit of the patient's heirs, i.e. the patient will not be able to make use of the money to alleviate his/her condition. In dealing with this vexed question the Courts in England and in South Africa have developed a twofold approach, namely a subjective and an objective approach: (i) A subjective approach is adopted in the sense of recognising that certain losses can only be compensated if they are consciously experienced by the patient. Conjoined to this subjective approach is the additional consideration that the money should be employable to alleviate the victim's condition in some manner. This approach has sometimes been called the 'functional' approach, according to which damages for non-pecuniary loss may be awarded only to the extent that they can be employed to provide the patient with reasonable solace ('solation') for his misfortunes. See Bailey's case *supra* at 118A where Nicholas JA indicates that the Supreme Court of Canada has favoured the functional approach. In South Africa the functional approach was adopted by Roberts AJ in *Steenkamp v Minister of Justice* 1961 (1) PH J9. This case was approved by Rosenow J in *Geldenhuys v SAR & H* 1964 (2) SA 230 (C) but dissented from by Burne J in *Roberts NO v Northern Assurance Co Ltd* 1964 (4) SA 531 (D) at 540D - G. (ii) An objective approach is adopted in the sense that certain losses are experienced by a patient whether he is conscious thereof or not. The aforesaid divided approach has been applied in Gerke's case *supra* at 494F - H, *Wise v Kaye* (*supra* at 263C - F and 265C - E) and in *T Marsden v National Employers General Insurance Company Limited*, an unreported decision by Swart J in case No 7992/88, delivered in the WLD on 24 September 1990 where Swart J held: "And, as to the distinction to be drawn between damages for pain and suffering and damages for loss of amenities: "The former depend on the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation - a substantial loss, whether the plaintiff is aware of it or not." The effect of this divided approach is that the head of claim 'loss of amenities' is divided into two categories of loss, viz

- (1) pain and suffering, shock, mental anguish, anxiety, distress or fear etc; and
- (2) loss of amenities of life, loss of expectation of life, disfigurement etc.

It is then said that category 1 requires a subjective approach, i.e. if the patient does not consciously experience pain, distress, fear etc, there can be no compensation. As for category 2, it is said that these amenities are objectively lost whether the patient is aware of such loss or not."

awarded can be utilised to benefit the victim in alleviating his/her lot in life; and/or (b) the extent to which such money will exclusively benefit the victim's heirs. The court in *Reyneke* followed the decision in *Gerke* while the court in *Collins* refused to follow these two decisions and the precedent on which they were based. Since the *Reyneke* and *Gerke* decisions are those of Witwatersrand Provincial Division of the then Supreme Court and the decision in *Collins* is that of the Cape Provincial Division of the then Supreme Court, one is in effect faced with a bifurcated approach to a single question of law by South African courts who on a par in terms of the authoritative levels of their respective judgments. (See *Neethling et al*)

One of the arguments used by the court in *Collins* to justify its decision is that the object of an award of damages under the law of delict is compensatory and not punitive. Potentially there is another basis for damages which lies between these two polarities and which falls within the realm of constitutional law rather than common law. This possibility is, however, dependent upon the view that the Constitution creates rights that are over and above those recognised by the common law of delict. If one takes for example the Constitutional right to bodily and psychological integrity as expressed in section 12 (2) of the Constitution, one must ask, in order to justify an award of constitutional damages for violation of this right, whether the parameters of this right are wider than those traditionally recognised by the law of delict in respect of bodily and mental injury. Even if the answer is in the affirmative, one is then faced with the question of the extent to which the common law right and the constitutional right overlap. It is only to the extent that the common law right is a subset of the constitutional right, i.e. that the constitutional right is broader than the common law right, that there is scope for the recognition of purely 'constitutional damages' i.e. those falling outside of the scope of the law of delict. Where the two rights overlap, there is no logic in awarding what effectively could amount to double damages as this would place the plaintiff in a better position than that in which he found himself prior to the wrong done to

him. Furthermore, one must bear in mind the constitutional injunction to the courts to develop the common law. According to section 8(3) of the Constitution¹⁰¹, when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1)¹⁰².

Traditionally, damages are awarded in terms of the common law of delict to compensate the plaintiff. The court in *Collins* did not refer to the Constitution. Would the Constitution require one to take a different view to the judgments in *Reyneke* or *Collins* or is it supportive of the judgments in either of these cases? Due to the fact that the court in *Collins* saw fit to depart from the decision in *Reyneke*, one is now faced with a choice as to how similar matters should in

¹⁰¹ Act No 108 of 1996

¹⁰² The constitutional court in *Carmichele v Minister Of Safety And Security And Another (Centre For Applied Legal Studies Intervening)*(fn 15 *supra*) was critical of both the High Court and the Supreme Court in their failure to take into consideration the provisions of section 39(2) of the Constitution holding that where, as in the present case, it was clear that the common law had to be developed beyond existing precedent, there were two stages to the enquiry the Court was obliged to undertake: it had to consider, first, whether the existing common law required development in accordance with the objectives of s 39(2) and, if so, how this development was to take place in order to meet the objectives of s 39(2). It said that in the present case neither the High Court nor the SCA had embarked on either stage of this enquiry, with the result that the CC did not have the benefit of any assistance from either Court on either stage of the above enquiry. Ackermann and Goldstone JJ commented at p 961-962 that: "The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed. This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform. The proper development of the common law under s 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm. There are notionally different ways to develop the common law under s 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the IC, the refashioning of the common law in this area entailed 'policy decisions and value judgments' which had to 'reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'. A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what 'the (court) conceives to be society's notions of what justice demands'. Under s 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution."

future be decided. There is furthermore the public policy concern that in situations such as those in *Reyneke* and *Collins*, how does one give recognition to the weight of the harm that has been done in the light of constitutional rights to human dignity, the right to life and the right to bodily and psychological integrity? Assuming that wrongfulness has been clearly established in terms of the law of delict and in view of the extreme nature of the plaintiff's loss, how does one recognize or admit such a gross violation of these constitutional rights? Is the compensation that is and was traditionally available under the common law of delict sufficient for this purpose or is something more required? While compensation is the main object of the law of delict it is not necessarily the main object of the Bill of Rights. The objects of the latter embrace the possibly broader concerns of the protection of human dignity and freedom, the enforcement of respect for the human condition and for human life and the recognition of the individual worth of every member of society as a human being. The Constitution is expressly concerned with fundamental values. The question is, if society has recognised the innate worth of an individual human being, then surely it has as much of an interest in the observation of the constitutional rights of individuals as do the individuals themselves?¹⁰³ This is one sense in which the Constitution may be said to be broader in scope than the law of delict which, falling as it does within the scope of private law, is more concerned with the rights and interests of individuals rather than the collective. The vital interests of society in the observation of the provisions of the Constitution generally and the Bill of Rights in particular could be said to be more prominently recognised in constitutional law than in the law of delict. However, a powerful counterargument to this is that the Bill of Rights in the particular context of the right to bodily and psychological integrity is merely a

¹⁰³ This is clearly expressed in the minority judgment of Didcott J in *Fose v Minister of Safety and Security* (1996 (2) BCLR 232 (W)) where he stated: "Deterrence speaks for itself as an object. But the idea of vindication, used in the sense that it conveys at present, calls for some elaboration. One of the ordinary meanings which 'to vindicate' bears, the aptest now so it seems to me, is 'to defend against encroachment or interference'. Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but it as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another. The importance of the two goals is obvious and does not need to be laboured. How they are best attained is the question."

codification of the common law right and the fact that the law of delict recognises the importance of public policy in the concept of wrongfulness is comparable to, and in fact no different from, the constitutional expression of the interests of society in the observation of the right in question. The Constitution merely spells out the values of society in a more definite way so that there is now no doubt as to the nature of the public policy that must be taken into consideration in questions of wrongfulness for the purposes of the law of delict.

It has been argued that the objectives of the law of delict differ fundamentally from those of constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the chapter 3 rights of individuals from state intrusion. Similarly, the purpose of a delictual remedy differs fundamentally from that of a constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff's rights entrenched in chapter 3 of the Constitution. The common-law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfil the purposes of constitutional law. Hence the necessity for a specific and separate public-law constitutional damages remedy¹⁰⁴.

¹⁰⁴ These were the arguments of counsel for the plaintiff in *Fose v Minister Of Safety And Security*, fn 34 *supra*, as summarised by Ackermann J at p 798.

The court in *Collins* was of the opinion that the concepts of loss and damages are two distinct elements which should not be confused. They are separate concepts. This sharp distinction, although logical when considered with regard to the idea of compensation for personal injury as subjectively experienced, is somewhat counter-intuitive and paradoxical from an holistic and more value based approach. It creates a certain unease, possibly because the message seems to be that if one is going injure someone, it may be cheaper to do it to such a degree that he is unable to appreciate certain elements of his loss. In fact, as the courts have pointed out, it could be argued that it is cheaper to kill a person than to maim him. Although the degree of loss in the *Collins* case was possibly the greatest that could be sustained by a human being, damages could not be awarded because the loss was so great that nothing would compensate for it. There is also the argument that the criminal law exists to express society's displeasure at wrongful actions causing such loss at that such displeasure should not be expressed through the law of delict in the private sphere¹⁰⁵. It is argued that the defendant must be entitled to the full protection of the higher standard of proof that is placed upon the state in a criminal case in which he runs the risk of punishment. It could be argued that this sense of unease arises only from the point of view of the compensation payable in terms of the law of delict and because it does not take into account the possible criminal penalties that may also be involved. A counter to this is that not all delicts are crimes but this does not diminish the wrongfulness of the delictual action in the public mind. The courts have indeed observed with regard to the concept of wrongfulness in criminal law that it is the same as the concept of wrongfulness in terms of the

¹⁰⁵ Van der Walt, *Delict: Principles and Cases* states: "The historical anomaly of awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant is not justifiable in a modern system of law. The basic purpose of a civil action in delict is to compensate the victim for the actual harm done. In the case of impairment of personality by wrongful conduct it may be difficult to determine the amount of the solatium which will confer personal satisfaction or compensation for the injury, but in principle all factors and circumstances tending to introduce penal features should be rigorously excluded from such an assessment. The aim of discouraging evil and high-handed conduct is foreign to the basic purposes of the law of delict. It is for criminal law to punish and thereby discourage such conduct. The policy of awarding punitive damages unduly enriches the plaintiff who is entitled only to compensation for loss suffered. This policy has the added disadvantage of putting a wrongdoer in jeopardy of being punished twice - in the civil proceedings and in the criminal proceedings which could conceivably follow or which have preceded the civil action."

law of delict.¹⁰⁶ There seems to be a view that the only distinguishing factor between a delict and a crime is that the one is compensatory and the other, punitive and that consequently this distinction should not be blurred because it would be prejudicial to defendants in delictual claims and would obviate the compensatory principle of the law of delict by rewarding the plaintiff for claiming¹⁰⁷. It is submitted that this view requires considerable legal

¹⁰⁶ In *Clarke v Hurst No And Others* 1992 (4) SA 630 (D) at p 652, Thirion J said: "Wrongfulness is tested according to society's legal, as opposed to its moral, convictions but at the same time morality plays a role in shaping society's legal convictions. If it is accepted, as I think it should, that law is but a translation of society's fundamental values into policies and prescripts for regulating its members' conduct, then the Court, when it determines the limits of such a basic legal concept as wrongfulness, has to have regard to the prevailing values of society. I can see no reason why the concept of wrongfulness in criminal law should have a content different from what it has in delict. For the purposes of this case I accept the following formulation of wrongfulness in criminal law by Snyman Strafreg 2nd ed at 100: 'Om vas te stel of 'n handeling wederregtelik is, moet dus gekyk word of dit in stryd is met die goeie sedes of die regsoortiging van die gemeenskap. Die regverdigingsgronde moet gesien word as praktiese hulpmiddels om die wederregtelikhed vas te stel. Hulle verteenwoordig maar net die situasies wat meestal in die praktyk voorkom en wat daarom al uitgekristalliseer het as maklik herkenbare gronde vir die uitsluiting van wederregtelikhed. Hulle dek egter nie die hele terrein van die onderwerp waaroor dit hier gaan nie, te wete die afbakening van wederregtelike en regmatige gedrag.' However, see the statement of the constitutional court in *Khumalo And Others v Holomisa* 2002 (5) SA 401 (CC) that: "It should be emphasised that the Court's perception of the legal convictions of the community as a test for determining wrongfulness in delict might well have to be reconsidered in the context of our new constitutional order. See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 839 CC". It is submitted that this observation of the court in *Khumalo* concerning the dicta of the court in *Carmichele* should not be seen as an expression of the need to do away with the test of the legal convictions of the community so much as it is the need to see the values expressed in the Constitution as the basis for the legal convictions of the community. This is borne out by the emphasis of the court in *Carmichele* of the need for sensitivity to the common law at p 961 to 962 of the judgment and its statement that: "Under s 39(2) of the Constitution concepts such as "policy decisions and value judgments 'reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution." [writer's italics]

¹⁰⁷ The court in *Fose* (fn 34 *supra*) stated that: "Serious judicial doubts have been expressed concerning, and considerable academic criticism levelled against, the award of punitive damages in delictual claims... Professor Van der Walt, whose views are broadly representative of academic criticism generally, expresses his misgivings succinctly as follows: 'The historical anomaly of awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant is not justifiable in a modern system of law. The basic purpose of a civil action in delict is to compensate the victim for the actual harm done. In the case of impairment of personality by wrongful conduct it may be difficult to determine the amount of the *solutum* which will confer personal satisfaction or compensation for the injury, but in principle all factors and circumstances tending to introduce penal features should be rigorously excluded from such an assessment. The aim of discouraging evil and high-handed conduct is foreign to the basic purposes of the law of delict. It is for criminal law to punish and thereby discourage such conduct. The policy of awarding punitive damages unduly enriches the plaintiff who is entitled only to compensation for loss suffered. This policy has the added disadvantage of putting a wrongdoer in jeopardy of being punished twice - in the civil proceedings and in the criminal proceedings which could conceivably follow or which have preceded the civil action.'" [Footnotes omitted] Ackermann J did state however that: "The question whether, in addition to compensatory damages, 'penal' or 'punitive' or 'exemplary' damages (expressions often used interchangeably and confusingly) are (or ought to be) awarded in delictual claims is a matter of some debate in South Africa. It appears to be accepted that in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place. The Appellate Division has, however, recognised that in the case of defamation punitive damages may in appropriate cases be awarded. In the case of damages for adultery it has been accepted that a penal component is still appropriate. It must of course be borne in mind that it is not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the injuria have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word. There appears to be scant authority for the award of punitive damages in the case of assault, over and above the damages awarded for patrimonial loss, pain and suffering and for the contumelia suffered, which can itself be aggravated by the circumstances of and surrounding the assault."

See *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at p 908 where the court stated: When damage for personal injuries has to be assessed, a person's patrimony includes, *inter alia*, the capacity to earn money

philosophical debate and discussion which is beyond the scope of this thesis. It is however, worth noting that in his minority judgment in *Fose*¹⁰⁸ Kriegler J makes the following cautionary comments on the judgments of the majority of the court and the minority judgment of Didcott J in that case:

“On one point, I respectfully suggest, Ackermann J is uncharacteristically ambivalent. As I understand the reasoning in paras [69]–[73] of his judgment, my learned Colleague in principle condemns punitive damages as a potential remedy for infringements of constitutional rights but at the same time seeks to found the current rejection on the particular facts of this case. For reasons that I hope to make plain shortly, I agree that we should unequivocally reject punitive damages as a remedy in this case. I do believe, however, that we should refrain from any broad rejection of any particular remedies in other circumstances. On that same point my Colleague Didcott J holds that punitive or exemplary damages are not claimable from the State, the defendant in the present case, for breaches of constitutional rights. He, however, leaves open the case of other infringers of such rights. *Notwithstanding the circumscribed ambit of the rejection of punitive/exemplary damages, I believe that we need not and should not go as far as Didcott J in rejecting for all time the possibility that a case may arise where punitive or exemplary damages are ‘appropriate’ redress for infringement of constitutionally protected rights.*[writer’s italics]

It is important to note that in the context of the law relating to the delivery of health care services, violations of the constitutional rights to bodily and psychological integrity and other aspects of the right to freedom and security of the person will almost inevitably underlie claims in delict. Whether the converse is true is arguable¹⁰⁹.

through his work and skill, i.e. his mental and physical efforts. The loss or impairment of this capacity is therefore also an element of Aquilian damages, if it has in fact led to a diminution of the plaintiff's patrimony. Reinecke (op cit at 29, 34); Byleveldt's case *supra* at 150C. In dealing with this particular head of damage, it is therefore more correct to talk of loss or impairment of earning capacity than of loss of income (whether of past income or future income). Equally, there is in principle no distinction between "loss of past income" and "loss of future income"; the lapse of time between the injury and the trial is purely incidental. In theory the loss was caused immediately when the personal injury was sustained and in theory (perhaps also in practice) the claim for damages could be heard on the day after the accident. In theory there is only one, indivisible cause of action for Aquilian damages and the passage of time only helps to bring greater clarity about the facts regarding the sequelae of the injury. Byleveldt's case at 174G. There has been discussion in the common law whether the correct concept is "loss of earnings" or "loss of earning capacity", the underlying notion being that in the latter event there should be an award of damages for this item of loss even if it has not in fact led to any actual patrimonial loss at all (i.e. the test is then what could the led to any actual patrimonial loss at all (i.e. the test is then what could the plaintiff have earned, not what would he have earned); Luntz *Assessment of Damages for Personal Injury and Death* (1974) at 131 - 6; *Winfield & Jolowicz on Tort* 10th ed (1975) at 572 note 55. Fleming (op cit at 218). Whilst such an approach would be quite wrong for our law, it appears to have found some adherents in the Australian Courts; however, it appears from the *dictum* in the leading Australian case of *Graham v Baker* (quoted by Luntz (op cit at 134)) that the correct approach has now also been adopted there.”

¹⁰⁸

Fose fn 103 *supra*

¹⁰⁹

See for instance the judgment of Cameron JA in *Ojitzki Property Holdings v State Tender Board And Another* 2001 (3) SA 1247 (SCA) in which he observes that: “It is well established that in general terms the question whether there is a legal duty to prevent loss depends on a value judgment by the court as to whether the

plaintiff's invaded interest is worthy of protection against interference by culpable conduct of the kind perpetrated by the defendant. The imposition of delictual liability (as Prof Honoré has pointed out) thus requires the court to assess not broad or even abstract questions of responsibility, but the defendant's liability for conduct 'described in categories fixed by the law'. This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent loss 'is a conclusion of law depending on a consideration of all the circumstances of the case'.

Where the legal duty to the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is 'just and reasonable' that a civil claim for damages should be accorded. 'The conduct is wrongful, not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right.' The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.

Though this Court's broad-based approach to determining whether in such circumstances a legal duty exists has attracted criticism, it seems generally to accord with trends in other jurisdictions grappling with related issues. More importantly, it seems to me to be especially apposite to constitutional interpretation, which involves the application of just such standards of public principle and policy. Section 187 does not appear in an ordinary statute. It is part of a Constitution, and within the limits of linguistic meaning 16 constitutional principles must infuse our understanding of its effect. The enactment of the interim Constitution marked the transition from the old order to a new society - one avowedly open and democratic and based on freedom and equality, in which courts were not only enjoined in interpreting fundamental rights provisions to promote the values underlying such a society (s 35(1)), but in interpreting any law to have due regard to the spirit, purport and objects of the fundamental rights chapter (s 35(3)). Though the provisions of the interim Constitution do indeed deal with many mundane questions of governmental structure and organisation not requiring the application of lofty principle, 'any law' in s 35(3) in my view includes where appropriate the other provisions of the interim Constitution itself. 18 Specifically, therefore, in interpreting such provisions s 35(3) applies, and '... when a court is confronted with a problem of unenumerated rights it should seek to answer the question as to whether the development [scil: recognition] of a right which is unenumerated in the Constitution would foster or promote those values which underlie an open and democratic society based on freedom and equality'.

To these considerations may be added that in determining whether a delictual claim arises from breach of a statute the fact that the provision is embodied in the Constitution may (depending on the nature of the provision) attract a duty more readily than if it had been in an ordinary statute."

In this case the plaintiff pleaded its claim on two alternative bases. Claim A alleged that its entitlement to damages arose from the defendants' breach of the plaintiff's right to a fair, public and competitive system of tendering embodied in s 187(2) of the interim Constitution. Claim B alleged in the alternative that the defendants' conduct constituted an infringement, entitling the plaintiff to damages, of the fundamental right to administrative justice enshrined in s 24(a), (b) and (d) of the interim Constitution. In 1995, the provincial government of Gauteng began to make arrangements to relocate from Pretoria to Johannesburg. It invited tenders for office accommodation to house various departments in an inner-city precinct. The appellant ('the plaintiff') obtained an option to purchase a building in the precinct, and tendered to provide office space in it to the provincial government. Its tender was not accepted. Thereafter it instituted a claim for damages against the first and second respondents, respectively the State Tender Board which awarded the tender, and the Province of Gauteng which the plaintiff alleged had misconducted itself during the tender process in specified ways with which the Tender Board has associated itself. The damages the plaintiff claimed allegedly arose from the defendants' unlawful conduct in managing the tender process and in awarding the tender. They consisted in the profit the plaintiff asserted it would have made from rentals if it had been awarded the tender. The claim failed. Cameron J observed that: "The plaintiff, which seeks to evoke a delictual remedy from the interstices of the interim Constitution, aspires to recover through it a loss measured not in delictual but in contractual terms. That is a far-reaching assertion. While it is not impossible that a statutory provision, constitutional or otherwise, could be held to accord such recompense for its breach, it seems to me quite inappropriate for this to occur by judicial interpretation of a provision whose primary injunction is for legislative action to occur in that very area. Certainly the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive... I agree with the observations of Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* that in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability. This in turn must of course weigh in the balance when determining legal responsibility for the consequences of public malfeasance." [Footnotes omitted]

The conflation of the concept of constitutional damages with that of punitive damages may not necessarily be theoretically correct. Punishment in the criminal law is expressed as much in terms of imprisonment as it is expressed in money. Indeed, in the case of more serious criminal actions, punishment sounding in money is not an option. The idea in delict that money is adequate compensation for the violation of the rights of personality is illusory¹¹⁰. This is nowhere more clearly demonstrated than in the law of defamation. A reputation, once lost, can seldom if ever be recovered¹¹¹ in the same way that the capacity to enjoy life, or to be happy, can in certain circumstances never be recovered - irrespective of the amount of damages awarded. Damages sounding in money are, nonetheless awarded in the case of the former¹¹².

¹¹⁰ In *Chetcuti v Van Der Wilt* 1993 (4) SA 397 (TK) the court observed that: "Assessment of such damages is always a difficult matter, involving as it does 'the placing of a money value upon abstractions' (Amerasinghe 'Defamation and Aspects of Actio Injuriarum in Roman Dutch Law' at 178) and the damages cannot be gauged with precision or nicety. In dealing with the difficulty of assessing such damages Lord Atkin in *Ley v Hamilton* [1935] TLR 384 stated at 386: 'They are not arrived at as the Lord Justice seems to assume by determining the "real" damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation . . . The "punitive" element is not something which is or can be added to some unknown factor which is non-punitive.' In *Muller v South African Associated Newspapers Ltd and Others* 1972 (2) SA 589 (C) Watermeyer J stated as follows at 595A: "In estimating the amount of damages to be awarded the Court must have regard to all the circumstances of the case. It must, *inter alia*, have regard to the character and the status of the plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the defendant and, in particular, his attempts, and the effectiveness thereof, to rectify the harm done."

In *Buhlezi v Poorter and Others* 1975 (4) SA 608 (W) at 613H-I Williamson AJ added the rider that the Court "is also entitled to take into account the conduct of the defamer from the time the libel was published until judgment to the extent that such conduct is directly connected with the wrong sued on". See also *Khan v Khan* 1971 (2) SA 499 (RAD) at 500C where Lewis AJP stated that: "In English law and in South African law, it is well recognised that the Court is justified in awarding exemplary damages in an appropriate case. The circumstances which have been held to justify such an award of exemplary damages are the wantonness of the allegation and the conduct of the defendant in regard to the allegations right up to the time of judgment . . ."

¹¹¹ In *Afrika v Metzler And Another* 1997 (4) SA 531 (NM) the Namibian court put it graphically thus: "It is, in my view, humanly speaking virtually impossible for one to restore another's good name and reputation to its former glory by a mere, at times invariably predestinated, retraction and/or apology. Similarly no one who empties an eiderdown quilt in the wind is able again to gather the eiderdown and restuff the quilt to its previous format with same." The court stated that: "With the new democratic dispensation heralded by the Namibian Constitution entrenching fundamental human rights and fundamental freedoms and the premium to be attached to one's good name and reputation in instances of flagrant violation thereof, the time has come to have a liberal approach in the determination of the quantum and award much higher damages, especially instances where aggravating circumstances are present as in the present case. Only then will persons, especially newspaper editors/reporters, publishers/printers and/or owners, be more on their qui vive and be mindful of the strict/absolute liability applicable to members of the press and hopefully act in accordance with the special duty of care that rests upon their shoulders and subject to law pursuant to the reasonable restrictions on the exercise of the fundamental freedoms imposed by art 21(2) of the Namibian Constitution, if they know that substantive exemplary/punitive damages could be visited upon them if they defame another animus iniuriandi."

¹¹² In *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1980 (1) SA 24 (A) the Appellate Division observed that: "The elements to be taken into account in estimating the amount to be awarded are thus the contumelia suffered, the loss of reputation and the penalty. See *Gelb v Hawkins* 1960 (3) SA at 693H; *Salzmann v Holmes* 1914 AD at 480." See also with regard to punitive damages *Pont v Geyser en 'n Ander* 1968 (2) SA 545; SA

It is conceivable, especially in circumstances where the defendant health care provider is guilty of persistent and repeated violations of such constitutional rights, that exemplary damages, or at least vindictory damages in the form of a heavier award of damages than would normally be the case, would be justified in terms of the law of delict on constitutional grounds.

In *Fose v Minister Of Safety And Security*¹¹³ the court canvassed the subject of constitutional damages in other jurisdictions in some detail. It summarised the position in foreign jurisdictions as follows:

“The foregoing survey of the remedies granted in other jurisdictions for the breach of a constitutional right indicates that in most cases they are ‘public law’ remedies (to employ for the moment the nomenclature used in certain of the foreign jurisdictions). My understanding of the United States jurisprudence is that both the s 1983 relief as well as the award of constitutional damages based directly on the Constitution should be seen as legislative and judicial responses to the perceived inadequacy of the common-law tort remedies. This inadequacy arises from the limitations placed on relief in tort by various manifestations of the principle of sovereign immunity and vicarious liability and by the vagaries and inconsistencies of tort law, which falls within the jurisdiction of state courts. The responses differ, however. The s 1983 response is basically a statutory extension of a remedy which still is fundamentally a common-law tort remedy. On the other hand the remedy developed in the *Bivens* and similar cases discussed above appears to have a marked ‘public law’ character. The plaintiff is not limited to a remedy under ordinary tort law. The remedy is a completely independent remedy. It differs from that granted between two private citizens and it is one particularly intended to ‘vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities’. The ‘public law’ nature of the remedy under the Canadian Charter is clearly, albeit perhaps implicitly, recognised and express recognition of the ‘public law’ nature of similar remedies has been given under the New Zealand Bill of Rights and the Constitutions of Trinidad and Tobago, India and Sri Lanka.”

The court in *Fose* was asked to award constitutional damages in order to vindicate the constitutional rights of the plaintiff and was asked for punitive damages for violation of the plaintiff’s constitutional rights in order to deter similar future violations of such rights. The interim Constitution was in force at

¹¹³ *Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442; *Buthelezi v Poorter and Others* 1975 (4) SA 608.

Fose fn 34 *supra*

the time of this case. The only requirement of the interim Constitution was that the relief given by a competent court in any particular case should be ‘appropriate relief’ (in terms of section 7(4)(a)). It was left to the courts to decide what would be appropriate relief in any particular case. There was much discussion on the subject of a ‘public law’ remedy as opposed to the ‘private law’ remedy that was available to the plaintiff in terms of the law of delict. Significantly, Ackermann J refused to deal with the issue on the basis of the divisions between public and private law recognising that the validity of such artificial distinctions is becoming increasingly questionable and that it could be dangerous to infer solutions in terms of such an analytical framework¹¹⁴.

7.3 Necessity

This defence¹¹⁵ is often raised in controversial contexts such as the need to smoke cannabis for medical reasons, euthanasia, abortion, sterilisation of mentally disabled persons and surgical removal of organs from donors¹¹⁶.

¹¹⁴ In this regard Ackerman J observed at p818-819 that: “While the foreign jurisprudence referred to emphasises that the proper protection of entrenched fundamental rights requires a ‘public law’ remedy, it is preferable, for the present, to refer to the ‘appropriate relief’ envisaged by s 7(4) merely as a ‘constitutional remedy’. It is both undesirable and unnecessary, for purposes of this case, to attempt to do that which has seemingly eluded scholars in the past and given rise to wide differences of opinion among them, namely the drawing of a clear and permanent line between the domains of private law and public law and the utility of any such efforts. Much of this interesting debate is concerned with an analysis of power relations in society; the shift which has taken place in the demarcations between ‘private law’ and ‘public law’; how functions traditionally associated with the state are increasingly exercised by institutions with tenuous or no links with the state; how remedies such as judicial review are being applied in an ever widening field and how legal principles previously only associated with private legal relations are being applied to State institutions. Suffice it to say that it could be dangerous to attach consequences to or infer solutions from concepts such as ‘public law’ and ‘private law’ when the validity of such concepts and the distinctions which they imply are being seriously questioned.”

¹¹⁵ Necessity is in fact one of a number of grounds of justification. See for instance the discussion of grounds of justification in Neethling *et al* fn 18 *supra* at p73-111. Burchell, fn 18 *supra*, comments at p 70 that if a medical practitioner performs an operation upon or treatment of a patient without informed consent being given by the patient (or legally approved representative) the medical procedure will be unlawful (i.e. an assault). However in an emergency situation (where for instance the patient is unconscious, cannot give the required consent and there is no time to contact relatives) then the doctor may be justified by necessity in performing an operation to save the patient’s life.

¹¹⁶ In an English case in September 2000 the Court of Appeal gave judgment in the case of *Re: A (Children)* 2000 (www.courtservice.gov.uk) on the question of whether the proposed surgical separation of ischiopagus twins (joined at the pelvis), which would result in the death of one of them, would constitute murder. At the heart of the legal debate in this case was the question of whether decisions about the relative worth of the life of individuals could be legally made when those decisions result in the loss of the life considered less worthy. The twins, Jodie and Mary were born to parents who were devout Catholics. Mary was the weaker of the two and had she been born alone, would not have survived. She was kept alive by virtue of Jody’s circulatory system. Although Jodie was considered capable of surviving a separation procedure, Mary was not. If no separation took place, both would die in a matter of months due to the added strain on Jodie’s circulatory system. The medical team looking after the twins wished to separate them but the parents would not sanction the operation. The latter could not sanction the shortening of Mary’s life in order to extend Jodie’s. They felt that if it was God’s will that both should die then so be it. The medical team at St Mary’s Hospital, Manchester sought a

ruling from the High Court that surgery to separate the twins, knowing that such a procedure would kill Mary, would not be unlawful. Johnson J ruled that the operation would not be unlawful because in his view the proposed operation represented a withdrawal of blood - a situation analogous to the withdrawal of feeding and hydration in *Airedale NHS Trust v Bland* (1993). The parents appealed on the grounds that Johnson J was wrong in finding that the proposed operation was in either Mary's or Jodie's best interests and that it should have been held that the operation was not legal. Ward LJ, Brook LJ and Walker LJ of the Court of Appeal considered submissions from all interested parties and came to the same conclusion – that Johnson J was correct and that the operation to separate the twins was not unlawful. However, they came this decision via differing routes. The Court of Appeal held that:

- (1) The clinical judgment is that Jodie and Mary are both alive and therefore separate human beings for the purposes of civil and criminal law;
- (2) It is fundamental that every person's body is inviolate and that every person's life is of equal inherent value and the judge in the court a quo had therefore been wrong to conclude that Mary's life would be worth nothing to her. It said that life was of value in itself whatever the diminution in one's capacity to enjoy it. Furthermore, apart from the fact that the distinction between an act and an omission was of doubtful ethical or legal importance in the context of a doctor's duty to preserve life, it was utterly fanciful to characterise the contemplated operation as an omission rather than an act. The operation would involve a substantial invasion of Mary's bodily integrity and would, in the absence of justification, involve an unlawful assault upon her. The correct question is whether it was in Mary's best interests that an operation which would cause Mary to die, should be carried out. It followed that, looking at Mary's position in isolation and ignoring the equally clear benefit to Jodie, the court would not be able to sanction the operation.
- (3) The question was whether the court could balance Jodie's and Mary's conflicting interests where the right to life is at stake. Ordinarily in family law the interests of the child are paramount but this must be qualified where the interests of two children, each with an entitlement to have their interest treated as 'paramount' were in conflict. It would be an abdication of the court's duty to refuse to undertake such a balancing act and the least detrimental alternative must be found.
- (4) Whilst the parents have the right to make a decision on the future of the twins and their wishes command the greatest respect such rights are subservient to the paramount duty of the court to consider the welfare of the child. Where its view of the child's welfare was inconsistent with the view of the parents, it must give effect to its own judgment. The matter should be decided afresh, albeit with due weight attached to the wishes of the parents rather than reviewing the reasonableness of the parental decision.
- (5) The interests of the two children must be balanced, weighing the advantages and disadvantages to each of the proposed course of action rather than comparing the worth of one life against another. As such it was legitimate to consider the actual quality of life that each may experience. The prospect of a full life for Jodie was counterbalanced by the acceleration of certain death for Mary but the fact that Mary's capacity to live was in any event fatally compromised meant that the balance of interest was heavily in Jodie's favour. Furthermore, it was relevant that Mary was only alive at all because she was supported by her stronger sibling and that she was constitutionally incapable of being self-supporting. It followed that, subject to the question of the lawfulness of the proposed operation in terms of the criminal law, permission should be granted.
- (6) The proposed operation would unquestionably and foreseeably cause Mary's death so that the doctors have the required murderous intent. The lawfulness of the operation therefore turns on the availability of a defence to murder. Two important principles could be discerned. The doctors have a duty to Mary not to operate because it would kill her and a duty to Jodie to operate because it would save her life. The doctors cannot be denied a right of choice where they were under a duty to choose. In the face of such a conflict of duty, the law must allow an escape route by allowing the doctors to choose the lesser of two evils and they should be placed in exactly the same position as that in which the court found itself and allowed to make the decision along the same lines as the court has done.
- (7) The proposed operation does not offend against the sanctity of life principles. The reality of the situation was that Mary was killing Jodie by draining her lifeblood, albeit such an action on her part could not be described as unlawful. The doctors would therefore be justified in coming to Jodie's aid in legitimate defence of her life. The plea of quasi self-defence is applicable in the unique circumstances of this case;
- (8) The three requirements for the application of the defence of necessity, that the act was needed to avoid the inevitable and irreparable evil, that no more should be done than was reasonably necessary for the purpose to be achieved and that the evil inflicted was not disproportionate to the evil avoided, were satisfied in this case.
- (9) The Human Rights Act, 1998, incorporating the European Convention on Human Rights into domestic law, is due to come into force before any operation could be carried out and is therefore applicable. Article 2 of the Convention provides that no one should be deprived of their life intentionally save in circumstances not relevant to this appeal. However, the ECHR does not import any prohibition on the proposed operation not already found in pre-existing domestic law.

(<http://www.worldlii.org/int/cases/ICRHL/2000/67.html>)

The case sparked quite a bit of controversy and as one writer put it 'brought into focus so many difficult and far-reaching issues in family and criminal law that the debate is likely to go on for years'. (Fitzpatrick J 'Jodie and Mary: whose choice was it anyway?' *Spiked Liberties* 19 June 2001 (<http://www.spiked-online.com>).

Fitzpatrick, a director at the Kent Law Clinic and co-author of *Criminal Justice and the Human Rights Act 1998*, 2nd edition 2001, observes that the law protects human life in different ways at different stages. The law protects the embryo from experimentation once the primitive streak has appeared or 14 days have passed, but not before. The law protects the foetus from a termination but not during the first 24 weeks of pregnancy if medical opinion considers there to be a health risk (very broadly defined) to the mother or any of her children. Furthermore, he says, the law allows a mother to have a termination at any time before birth if medical opinion confirms a substantial risk of a seriously handicapped child being born. A mother suffering from post-natal depression who kills her child in its first year will face an infanticide rather than a murder charge and be treated as if she had committed manslaughter. Beyond that, the laws of assault, homicide etc, protect all legal persons, adult and child alike. Fitzpatrick points out that one situation that raises similar principles to the conjoined twins case is that of the pregnant woman who can seek a termination right up to term in cases where serious handicap is expected. The interests of the woman, as future parent with the extra burdens of caring for a seriously handicapped child, are simply given priority over those of the foetus - either because the foetus (handicapped or not) is not recognised as a person who can be wronged by a termination, or because a greater value is placed upon the self-determination of an adult than on the life of a seriously handicapped unborn baby. In either case, he says, it is not clear what the difference is between a seriously handicapped foetus a few days before birth and a seriously handicapped neonate a few days after birth. Nor is it clear how the physical event of birth transforms a foetus into a person or confers a value on the handicapped neonate equal to that of a healthy adult human being. He points out that the law, however, confers personhood at birth, drawing a crucial line at this point for understandable reasons, not least the fact of separation and entry into the world. He notes that it is necessary to draw a line as to when life begins at some point and it may be necessary to apply it rigidly for the purpose of upholding its integrity and says that once the law recognised Jodie and Mary as legal persons who were children, there was only one decision to which the courts could come. Under British law if the jurisdiction of the court is invoked to protect a legal person who is a child, then the court must give 'first and paramount consideration' to the interests of that child. There is little flexibility, the interests of the parents must come second. Fitzpatrick states that there is a limited analogy between the position of these parents and that of the pregnant woman seeking a very late termination of the pregnancy on account of the risk of a seriously handicapped child. In both cases the parents are prepared to sanction the death of their severely handicapped babies, one by termination, the other by refusing to consent to an operation that could save one of the twins. One difference, however, is that the respect and mercy shown by the law to the pregnant mother is not available to the twins' parents because their children have actually been born. He says that whilst human beings must have the protection of the law, the question as to whether that protection has to be both full and immediate is less clear as the law on infanticide indirectly indicates. Fitzpatrick refers to a case in 1997 in which the Court of Appeal had reversed a High Court order that the transplant operation take place on a child a few weeks old against the mother's wishes. Medical opinion was that the child would die within two and a half years without the surgery, the prospects of a successful transplant were good and in the patient's best interests. In determining the interests of the child the court gave special weight to the strong and reasoned parental objections – based on risk of failure, knowledge of pain and suffering involved and the effect on the mother's future care of the child were she made to bring him up against her wishes. He says that this case was mentioned in the case of Jodie and Mary but not followed and notes that the law can be a blunt instrument and that it is foolish to make use of it at every opportunity. The parents were faced with the gross abnormalities of conjoined children, the prospect of certain early death of one and the survival of the other with a risk she was seriously handicapped. Worse still, the survival of that child depended upon their sanctioning the immediate death of the other. Fitzpatrick states that the striking feature of the case is that the hospital authorities insisted on invoking the law. They were not prepared to let the parents have their way but sought to impose their own view as to what should happen to the children. He says their action bespeaks boldness among healthcare professionals about the propriety of interfering in the private lives of their patients and a readiness to resort to law rather than to accommodate the judgment of others. Fitzpatrick notes that in his judgment Lord Justice Ward said that the hospital authorities were entitled to seek the court's ruling. He went out of his way, however, not to endorse the view that the hospital authorities were under a duty to refer the matter to the court and he also said that other medical teams may well have accepted the parent's decision. Had St Mary's done so, there could not have been the slightest criticism of the hospital for letting nature take its course in accordance with the parents' wishes. Later in his judgment he said, however, that if the court were to give permission for the operation to take place, then a legal duty would be imposed on the doctors to treat their patient in her best interests, i.e. to operate upon her. Fitzpatrick reflects that this is an interesting position: it would have been lawful for the doctors to have accepted the parent's decision and let the twins die; the doctors were entitled, but not bound, to seek a court ruling; having done so they were bound in law to accept the court's decision – which was contrary to that of the parents. He notes that the judge seemed to be saying that not everything has to be referred to the courts, even those matters of life and death that the court would be constrained to decide differently. Fitzpatrick states that something of the judge's own diffidence on this topic is contained in his opening comment: 'There has been some public concern as to why the court is involved at all. We do not ask for work but we have a duty to decide what parties with a proper interest ask us to decide.'

Necessity is a defence against unlawfulness or wrongfulness. In *S v Adams*¹¹⁷ the court considered the doctrine of necessity in the context of the criminal law and noted that for an act to be justified on the grounds of necessity:

- (a) a legal interest of the accused must have been endangered;
- (b) by a threat which had commenced and was imminent;
- (c) which was not caused by the accused's fault and
- (d) in addition it must have been necessary for the accused to avert the danger; and
- (e) the means used for this purpose must have been reasonable in the circumstances.

In *Adams*¹¹⁸ King J referred to *R v Bourne*¹¹⁹ where a surgeon carried out an operative procedure on a girl of 15 in order to procure an abortion. She had conceived in consequence of a rape. It was held that the defence of necessity had succeeded – apparently because it was held that the operation was necessary to preserve the life of the girl which the accused genuinely believed to be in danger. There was considerable argument in *Bourne* as to the distinction between danger to life and danger to health. The statements by McNaghten J are contained in his direction to the jury and, said King J, it appeared therefrom that if the danger had been to health alone the accused would have been convicted.¹²⁰ King J stated that there was no reason why threats to the interests of a third party, particularly one under the protection of an accused, should not justify an act in necessity to the same extent as threats in respect of an accused himself. The principle *nemo tenetur ad impossibilia* can only be applied to a prohibitory provision by holding that an accused could not help doing the act prohibited by law, in the sense of impossibility of performance. King J said he did not intend,

¹¹⁷ *Adams* 1979 (4) SA 793 (T)

¹¹⁸ *Adams* fn 117 *supra*

¹¹⁹ *R v Bourne* (1938) 3 All ER 615 (CCC)

¹²⁰ In *R v Bourne* (fn 119 *supra*) at p 617 and 618, in dealing with the distinction between danger to life and danger to health, McNaghten J said: "... As I say, you have heard a great deal of discussion as to the difference between danger to life and danger to health... but is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life... it may be that you will accept the view that Mr Oliver put forward when he invited you to give to the words 'for the purpose of preserving the life of the mother' a wide and liberal view of their meaning. I would prefer the word 'reasonable' to the words 'wide and liberal' ... He is not only entitled, but it is his duty to perform the operation with a view to saving her life..."

in saying this, to confuse the defence of necessity with the defence of impossibility, the two being distinguishable legal concepts.

He said he agreed with the statement by Glanville Williams¹²¹ that a criminal statute need make no mention of the doctrine of necessity as a statute can be regarded as being impliedly subject to the doctrine, just as a statute is impliedly subject to the defence of infancy, insanity or self-defence. This, in turn, would, of course, be subject to an express provision in the statute excluding the doctrine of necessity or an implied exclusion because of some express language in the statute. In regard to the legal interest, there is no clear statement of law as to what can be embraced by a legal interest to justify a defence of necessity. An interest connotes objective concern in something. The difficulty arises in endeavouring to define a legal objective concerning something. It was submitted on behalf of the appellant that the legal interest need only be a legitimate one, which the ordinary man has in our society, to protect the life or good health of himself and the persons to whom he stands in a protective relationship. King J held that a legal interest must involve a fear of injury to person or damage to property saying he found it unnecessary to decide whether the legal interest must be one which is capable of protection in law or need only be legitimate, but not necessarily one capable of protection in law¹²².

Rumpff J held in *S v Adams; S v Werner*¹²³ that “Wanneer ‘n toestand regtens as noodtoestand beskou moet word, sal afhang van die feite van elke geval. Of die optrede van ’n persoon wat in noodtoestand handel as redelik beskou kan word of nie, hang ook van die feite van elke geval af.”¹²⁴ South African law

¹²¹ Glanville Williams 1965 *Current Law Problems* at p 224

¹²² King J in *Adams* fn 117 *supra* also referred to the American Penal Code, Tentative Draft No 853, which stated: “Conduct which an actor believes to be necessary to avoid an evil to himself or to another is justifiable, provided that: (a) The evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged...”

¹²³ *S v Adams; S v Werner* 1981 (1) SA 187 (A)

¹²⁴ Du Toit, one of the Counsel for the state set out the principles and precedents as follows: “In die Suid-Afrikaanse reg is die volgende vereistes vir die verweer van noodtoestand aangestip: (1) daar moet, objektief gesien, ’n reeds begonne toestand van nood wees, of, ook objektief gesien, ’n onmiddellik dreigende noodtoestand; (2) die persoon in beweerde nood moes nie regtens verplig gewees het om die nood te verduur

recognizes a general defence of necessity. In Roman law there was no systematic discussion of the defence of necessity but there are isolated instances in which such a defence was recognized¹²⁵. Several Roman-Dutch writers considered necessity as a general defence¹²⁶. Necessity has been recognized as a general defence in modern South African law¹²⁷. The legally protected interest may be threatened by force of surrounding circumstances¹²⁸.

Strauss¹²⁹ submits that there are only three possible grounds of justification for a medical intervention namely –

- The patient's consent (or the consent of someone legally capable of consenting on his behalf);
- *Negotiorum gestio* which entitles a doctor to administer emergency medical treatment in those cases where on account of the patient's condition he is unable to consent;
- Necessity, i.e. where the interests of society are at stake (which would entitle a doctor to treat the patient even against his will) for example where medical intervention is necessary to prevent the spreading of a contagious disease¹³⁰.

nie; (3) die persoon moes nie self die toestand van nood geskep het nie; (4) sy gewraakte optrede moet die enigste manier van redding uit die nood wees; en (5) die belang wat hy opoffer moet nie groter wees as die bedreigde belang nie. Kyk De Wet en Swanepoel *Strafreg* 3de uitg te 87 - 89; Burchell en Hunt *South African Criminal Law and Procedure* band 1 te 283 et seq; *R v Yermaak* (1900) 21 NLR te 211; *R v Garnsworthy* 1923 WLD te 21; *R v Mahomed* (supra te 34, 36); *R v Werner* 1947 (2) SA 823; *R v Baxter* 1929 EDL 189; *R v Damascus* 1965 (4) SA te 600 - 601, 603; *S v Bradbury* 1967 (1) SA te 393, 394, 399 - 400, 404; *R v Mneke* 1961 (2) SA te 243; *R v Canestra* (1951 (2) SA te 324); *R v Van der Merwe* 1950 (4) SA te 126; *R v Samuel* 1960 (4) SA te 703; *United States v Holmes* 1 Wall Jr 1,26 Fed Cas 360; *R v Chipesa* 1964 (4) SA te 474; *S v Mtewtwa* 1977 (3) SA te 631; *S v Pretorius* 1975 (2) SA te 90; *S v Goliath* 1972 (3) SA 1; *S v Alfeus* 1979 (3) SA 145.”

¹²⁵ D 47.9.3.7; D 9.2.49.1; D 43.24.7.4; D 9.2.29.3; D 19.5.14

¹²⁶ Grotius *De Jure Belli ac Pacis* 2.2.6 - 9; Puffendorf *De Jure Naturae et Gentium* 2.6.4 and 5; Van der Keessel *Praelectiones* 47.2.8.

¹²⁷ *S v Mahomed and Another* 1938 AD at 34 - 35; *S v Rabodila* 1974 (3) SA 324; *S v Pretorius* 1975 (2) SA 85; *Chetty v Minister of Police* 1976 (2) SA at 452 - 3; *Minister of Police v Chetty* 1977 (2) SA 885; *S v Adams* 1979 (4) SA at 796A - C; Burchell and Hunt *South African Criminal Law and Procedure* vol I *General Principles* at 283 et seq; De Wet and Swanepoel *Strafreg* 3rd ed at 87 - 88; J V van der Westhuizen *Noodtoestand as Regverdigingsgrond in die Strafreg* (1979) LLD dissertation (Pretoria) 730.

¹²⁸ *S v Pretorius* 1975 (2) SA 85 at 89 - 90; *Stoffberg v Elliott* 1923 CPD 148 at p 150.

¹²⁹ Strauss fn 34 *supra*

¹³⁰ Strauss (fn 34 *supra*) at p31. In “Murder, The Defence of ‘Necessity’ and Medical Practice after the case of the conjoined twins Jodie and Mary” (http://www.forensicmed.co.uk/siamese_twins.htm) Jones R examines the legal basis for the type of decision that was made in this case and considers whether this decision will have any impact on other areas of medical practice where ‘value of life’ decisions are made. He notes that Ward LJ made the point in his judgment that the prohibition of intentional killing was recognised as the cornerstone of law and

He points out that in *Stoffberg v Elliot*¹³¹ it was held that in the eyes of the law every person has certain absolute rights which the law protects. They are not dependent on statute or upon contract but they are rights to be respected and one of the rights is absolute security to the person. Any bodily interference with or restraint of a man's person which is not justified, or excused or consented to is wrong. A man by entering a hospital does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary. He remains a human being and retains his rights of control and disposal of his own body. He still has the right to say what operation he will submit to and any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body and is a wrong entitling him to damages if he suffers any. More recently, in *Minister of Safety and Security and Another v Xaba*¹³², Southwood J in the Durban and Coast Local Division of the High Court refused to follow a decision of the Cape High Court in *Minister of Safety and Security and Another v Gaga*¹³³ in which an order was granted to allow police officials to use necessary violence to obtain the surgical removal of a bullet from an accused in circumstances where it was required as evidence in the criminal prosecution of the accused. In *Xaba* the applicants applied for the confirmation of a rule *nisi* which would declare the second

social relationships and is of supreme moral value. It reflects the sanctity of life doctrine which is essentially a religious concept. He points out, however, that Ward LJ noted that the principle does not represent an absolute rule – life must be protected from unjust attack, and the deliberate taking of life is prohibited except in self-defence or in the legitimate defence of others. All of the judges considered the possibility of the proposed operation on Jodie and Mary as falling within the realm of the doctrine of necessity although it was Brook LJ who provided a detailed examination of the application of this 'obscure aspect of the common law' as Jones puts it. He notes that in essence the defence of the doctrine of necessity is of a similar species to that of duress and has been termed "duress of circumstances" and that it embodies the concept of utilitarianism. He quotes Sir James Stephens who stated in the Digest of Criminal Law (1887) that the doctrine of necessity could be described as follows: "An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose and that the evil inflicted by it was not disproportionate to the evil avoided."

Jones notes the defence of duress itself has been disapproved where the charge is murder (*Abbott v R* (1976)) and historically, the case of *R v Dudley & Stephens* (1884) suggested that necessity was not a defence that would be successful either. It was reaffirmed in the more recent cases of *R v Howe* (1987) and *R v Pommell* (1995) but Brook LJ considered the facts of these cases to be very different to the case of Jodie and Mary. Brook LJ found that the component parts of necessity had been fulfilled in *Re: A (Children)*. Ward LJ agreed and stated that the doctors were in an impossible position.

¹³¹ *Stoffberg* fn 28 *supra*

¹³² *Xaba* 2003 (2) SA 703

¹³³ *Gaga* 2002 (1) SACR 654 (C)

applicant, a police officer, to be entitled to ‘use reasonable force, including any necessary surgical procedure performed by . . . medical doctors’ to remove a bullet lodged in the respondent’s thigh, and directing the respondent to subject himself to the procedure, failing which the Sheriff was to furnish the necessary consent on his behalf. The respondent was a suspect in a motor-vehicle hijacking case and the police believed the bullet would connect him with the crime. Not surprisingly, the respondent refused to undergo the procedure. The applicants relied on section 27 of the Criminal Procedure Act¹³⁴ which deals with legitimate use of force by police in the event of resistance against search or seizure, and section 37, which deals with police powers in respect of prints and bodily features of the accused. Section 27 of the Criminal Procedure Act authorises a ‘police official’ to ‘use such force as may be reasonably necessary to overcome any resistance’ against a lawful search of any person or premises. Section 37(1)(c) authorises a ‘police official’ to ‘take such steps as he may deem necessary in order to ascertain whether the body of a person . . . has any mark, characteristic or distinguishing feature or shows any condition or appearance; provided that no police official shall take any blood sample’. Section 37(2)(a) allows ‘any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse to ‘take such steps, including the taking of a blood sample, as may be deemed necessary to ascertain whether the body of any person ... has any mark, characteristic, or distinguishing feature or shows any condition or appearance’. The applicable section of the Constitution, section 12, guarantees the right to freedom and security of the person, including the right ‘to be free from all forms of violence from either public or private sources’, and the right to bodily and psychological integrity, including the right to ‘security and control [one’s] body’. Section 36 of the Constitution provides that fundamental rights such as those in section 12 may be limited by a law of general application in certain circumstances.

¹³⁴ Criminal Procedure Act No 51 of 1977

In the cases of *Xaba* and *Gaga* the court had to balance the rights of the suspects to bodily and psychological integrity against the rights of society as a whole to safety and security. It is interesting that in the one the court came down in favour of the individual and in the other in favour of the collective. Generally speaking the courts seem to favour the rights of the individual over those of the collective. The obvious question in these two cases is why, if the suspects were innocent, they would object to having the bullet removed since this would have proved their innocence if it in fact existed. In the context of the doctrine of necessity it is possible that the decision of the court in *Xaba* was correct provided that the court could draw an adverse inference from the suspect's unwillingness to have the bullet removed. In other words there may be less drastic ways of proving the suspect's guilt than the forced removal of the bullet. However, it could be argued that in South Africa the rights of society to safety and security are under siege and that the interests of the collective should weigh more heavily in these circumstances than those of the individual since the harm to the individual, should he be guilty or innocent, of minor surgery is not nearly as significant as the potential harm to society, should he be guilty, of releasing him to continue his hijacking activities which cost people their lives.

7.4 Vicarious Liability

The liability of public providers of health care services is likely to be vicarious in most if not all instances. As noted previously the State Liability Act specifically recognizes the possibility of such liability. According to Neethling *et al*, vicarious liability may in general terms be described as the strict liability of one person for the delict of another. In other words if the delict of the tortfeasor is imputed to another person who has a particular relationship of authority over the tortfeasor in the absence of fault on the part of that other person. The important relationships in this regard are employer and employee and principal and agent. Neethling *et al* observe that the rationale for the vicarious liability of an employer for the delicts of an employee is controversial. They state that the best-known explanation is that the employer's liability is

founded on his own fault (*culpa in eligendo*). However, fault in the choice of employee has been referred to in *Feldman (Pty) Ltd v Mall*¹³⁵ as a “hoary explanation” and Neethling *et al* agree. They point out that this explanation is based on a fiction since according to this theory there is an irrebuttable presumption that the master has been negligent if he servant commits a delict. It is not open to him to prove the opposite. Other theories put forward are the interest or profit theory, the identification theory, the solvency theory and the risk or danger theory¹³⁶ Neethling *et al* observe that Scott¹³⁷ argues convincingly that the risk or danger theory furnishes the true rationale for the employer’s liability. The theory assumes that the work entrusted to the employee creates a certain risk of harm for which the employer should be held liable on the grounds of fairness and justice as against injured third parties¹³⁸. Scott¹³⁹ maintains that the employer should only be held liable if the conduct of the employee was reasonably foreseeable¹⁴⁰.

In *Masuku and Another v Mdlalose and Others*¹⁴¹ the Supreme Court of Appeal observed that despite various nuances in expression, the common-law test of vicarious liability, i.e whether the employee in question was acting in the course and scope of his employment or, put differently, whether he was engaged in the affairs or business of the employer, had been applied consistently since 1958 to the liability of the state for the wrongful acts of police officers.¹⁴² It stated that

¹³⁵ *Feldman* 1945 AD 733

¹³⁶ See Neethling *et al* fn 18 *supra* at p 373 for a more detail as to the substance of these theories.

¹³⁷ Scott WE, *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* p 30

¹³⁸ In *Minister Of Law And Order v Ngobo* 1992 (4) SA 822 (A) the court held, however, that in the circumstances of that case, there could be no doubt that, on the basis of the standard test, the appellant ought not to have been held vicariously liable for the employee’s wrongful act because the constables had not been on duty; they had at no stage purported to be carrying out any police function, they had unnecessarily resorted to the use of firearms in the course of an equally unnecessary altercation with strangers; and they had in no sense been engaged in the affairs of the appellant (despite the fact that they had used the revolvers they had been authorised to retain, which factor, though relevant, was not in itself enough to satisfy the standard test).

¹³⁹ Scott fn 137 *supra*

¹⁴⁰ This conclusion was not supported by the minority judgment of Viljoen JA in *Minister of Police v Mbilini* 1983 (3) SA 705 (A)

¹⁴¹ *Masuku* 1998 (1) SA 1 (SCA)

¹⁴² See *African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437 (A) at p 445; *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) especially at 567 para (3); *Macala v Maokeng Town Council* 1993 (1) SA 434 (A); *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 826F–828A;

the previous cases, on analysis, all confirmed that, in order to establish the vicarious liability of the state, the plaintiff must prove that the person who did the wrong was (a) an employee of the state acting in that capacity, and (b) that he or she performed the wrongful act in the course or scope of his or her employment. It said that the tests for state liability for the wrongful acts of police officers and the test for an employer's vicarious liability were stated explicitly to be the same in *Mhlongo and Another NO v Minister of Police*¹⁴³.

The terms 'within the scope of his authority' and 'within the scope of employment', said the court, were treated as being synonymous. Reference was made to the notional difference between the two last-mentioned concepts that were mentioned, but not explained or used, in *Feldman (Pty) Ltd v Mall* but doubt was expressed as to the tenability of this difference when Corbett JA stated at 567D:

"Nevertheless, it has never been suggested that the state escapes liability for a wrongful act committed by a servant in his capacity as such simply because the act fell outside the 'scope of his authority', when it was clearly within the 'scope of his employment'."

In *Minister of Safety and Security v Jordaan T/A Andre Jordaan Transport*¹⁴⁴ it was noted that the standard test for vicarious liability is whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business, or doing the work, of the employer. The court said that while this was no doubt true, it should not be overlooked that the affairs or business or work of the employer in question must relate to what the employee was generally or specifically instructed to do. It held that provided the employee was engaged in activity reasonably necessary to achieve either objective, the employer would be liable. The court observed that the difficulty is that, while the general approach to be adopted may be easy enough to formulate,

¹⁴³ *Tshabalala v Lekoa City Council* 1992 (3) SA 21 (A) at 28B–29B; *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 132G–H, 134D–135C; *Minister of Police v Mbilini* 1983 (3) SA 705 (A) especially at p 710B–712B.

¹⁴⁴ *Mhlongo* fn 142 *supra*

Jordaan 2000 (4) SA 21 (SCA)

its lack of exactitude is such that problems inevitably arise in its application. This is particularly so in the so-called deviation cases. Not every act of an employee committed during the time of his employment which is in the advancement of his personal interests or for the achievement of his own goals, necessarily falls outside the course and scope of his employment. In each case, whether the employer is held to be liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. The court found that whether that stage has been reached is essentially a question of degree and said that answer to each case will depend upon a close consideration of the facts. The same is true of the inquiry as to whether the deviation has ceased and the employee has resumed the business of his employer.

In *Minister van Veiligheid vn Sekuriteit v Phoebus Apollo Aviation Bk*¹⁴⁵ it was held that the actions of three dishonest policemen who were involved in a robbery had not, considered objectively or subjectively, fallen within the course and scope of their duties and that they had embarked on an unauthorised jaunt for their own benefit with the intention of stealing from their own employer. It was held, further, that the three policemen had, by their theft and fraudulent conduct, not caused vicarious liability to devolve upon their employer.

In *Minister van Veiligheid en Sekuriteit v Japmoco Bk H/A Status Motors*¹⁴⁶ the respondent claimed that members of the vehicle theft unit of the South African Police Service, in the service of the State, had intentionally and for private gain, co-operated with a syndicate of car thieves and made it possible for the latter to sell cars stolen by its members. The relevant policemen prepared and issued motor vehicle clearance certificates, without which the vehicles could not be B

¹⁴⁵ *Phoebus Apollo* 2002 (5) SA 475 (SCA)

¹⁴⁶ *Japmoco* 2002 (5) SA 649 (SCA)

registered and resold. Eight of the vehicles for which false documentation was provided were sold to a second-hand motor vehicle dealer, Pro-fit, which in turn sold the vehicles to the respondent. The respondent sold seven of the vehicles at a profit to various members of the public. All eight vehicles were later seized by the police. Six of the seven purchasers held the respondent liable in terms of his common-law implied warranty against eviction and the respondent was forced to compensate each of them by repaying the purchase price or value of the motor vehicle. The respondent lost the eighth vehicle. The respondent based his claim in delict. It was argued that the relevant policemen, acting within the course and scope of their employment as employees of the state, had made it possible for the thieves to trick unsuspecting purchasers with false documentation. Without the relevant documents, the respondent alleged that he would never have purchased the relevant vehicles and would therefore have suffered no damages. During the trial it was admitted that the relevant clearance certificates were issued while the relevant policemen were aware of the fact that the clearance certificates were being issued in respect of stolen vehicles. The Court had to answer three questions: (1) Had the respondent proved a causal link between the actions of the relevant policemen and the purchase of the eight vehicles by the respondent; (2) had the policemen been acting within the course and scope of their duties; and (3) had the respondent proved the fact that he had suffered damages as well as the quantum thereof. Nienaber JA held that an employer was legally liable for the damage caused to third parties by the unlawful actions of his employee within the course of his duty. He said that whether the unlawful action occurred within the course of the employee's duty was a factual enquiry and that sometimes it was a question of degree whether the relevant action fell just within or without the scope of the employment. It could fall within the scope of employment even where it conflicted with an emphatic ban from the employer and even where the employee acted intentionally and not negligently. The employee's purpose had to be examined and in this respect, the test was subjective. Where there was, however, a close connection between the employee's action for his own interests and purposes

and the business of the employer, the employer might still be liable. Nienaber JA held that this was an objective test. He held further that the unlawful conduct of the relevant policemen consisted of the intentional issue of false clearance certificates, knowing that innocent third parties could be misled to their detriment thereby. Such actions were in conflict with the prescriptions of their employer, the appellant. Subjectively speaking, their prime objective was not to serve the interests of their employer but to favour their own pockets. On the other hand, each of them was, objectively speaking, performing the exact task assigned to them. This was accordingly not a matter where the employees, in the manner in which they performed the task, had totally distanced themselves from their assigned duties. The court said that that, while the clearance certificates were false, they were not forged. There was therefore a close connection between the employees' actions for their own interests and purposes and the business of the employer. The appellant was accordingly, in principle, responsible for the actions of his officers. It said that such action contained an element of fraud was not in itself conclusive. The fraud was not so much aimed at the employer as at third parties and did not necessarily reside in the action but the purpose with which the action was executed. However, the respondent failed in his claim because he had not proved the quantum of his damages.

In *Minister of Safety and Security v Van Duivenboden*¹⁴⁷ the court had to consider the question of liability for an omission as well as vicarious liability of the state for the omissions of its employees. In this case it held that there was no effective way of holding the state accountable other than by way of an action for damages. The court stated that in the absence of any norm or consideration of public policy outweighing it, the constitutional norm of accountability required that a legal duty be recognised. The negligent conduct of police officers in those circumstances was accordingly actionable and the state was vicariously liable for the consequences of any such negligence¹⁴⁸.

¹⁴⁷ *Van Duivenboden* fn 92 *supra*

¹⁴⁸ Paragraph [22] at 448C/D - E.

Strauss¹⁴⁹ points out that the general principle is that there must be a relationship of employment whereby one person stands in a position of authority in relation to another in terms of which the former is legally capable of exercising control over the latter's actions¹⁵⁰.

The question in the health care context is whether employees who are registered health professionals can incur liability on the part of their employers by their negligent actions in the course and scope of their duties. After all they can be punished by their own professional boards for such acts and the employer does not necessarily itself have the expertise to know when for instance an employee surgeon is being negligent in the operating theatre. The earlier cases did at first subscribe to the view that an employer cannot be held vicariously liable for the 'professional' negligence of employees. Thus it was held in the case of *Lower Umfolosi District War Memorial Hospital v Lowe*¹⁵¹ that the placing by a nurse of a hot water bottle in the bed of a patient who had been under the effects of an anaesthetic, causing the patient to be badly burnt, was a professional act of negligence and that the hospital could thus not be held liable.¹⁵² In *St*

¹⁴⁹ Strauss fn 34 *supra*

¹⁵⁰ In *Stein v Rising Tide Productions CC* 2002 (5) SA 199 (C) it was held that the Courts had drawn a clear distinction, for the purposes of vicarious liability, between an 'independent contractor' and an employee (or 'servant'). As a general rule, an employer was vicariously liable for the delicts of his employee acting in the course and scope of his employment, while he was not vicariously liable for the negligence of an independent contractor employed by him - the exception being where the employer himself had in some way been personally at fault (usually negligent) in regard to the conduct of the independent contractor that had caused harm to a third party. The main distinction between the two was that the employee (servant) undertook to render personal services to the employer, while the independent contractor undertook to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor was generally not subject to the control or the instructions of the employer as to how he performed the work or produced the result. In the past the Courts had generally relied on the so-called 'control test' to determine whether the employment relationship was one of 'master and servant' or one of employer/independent contractor. The court further held that problems experienced with the control test had led the Courts to rely, particularly in marginal cases, on the 'dominant impression' test, viz whether or not the dominant impression was that of a contract of employment. This required a typological approach in which the right of control was not an indispensable requirement of the contract of service, but only one of a number of indicia, the combination of which might be decisive. Other indicia were: the nature of the work; the existence of a right of supervision; the manner of payment (fixed rate or commission); the relative independence of the employee; the employer's power of dismissal; whether the employee was precluded from working for another; whether the employee was required to devote a particular amount of time to his work; whether the employee was required to perform his duties personally; the ownership of the working facilities and whether the employee provided his own tools and equipment; the intention of the parties; the period of employment, etc. (From headnote)

¹⁵¹ *Lower Umfolosi* 1937 TPD 31

¹⁵² Other South African cases that followed the same logic are *Hartl v Pretoria Hospital Board* 1915 TPD 336 and *Byrne v East London Hospital Board* 1926 EDL 128

*Augustine's Hospital (Pty) Ltd v Le Breton*¹⁵³ a 92-year-old patient fractured her leg when, in the middle of the night, she fell out of a hospital cot due to the negligence of the nursing staff in failing to erect the sides of the cot at night. The single judge was constrained to hold that in the absence of any special term in the contract between the hospital and that patient, the ordinary contract between patient and hospital does not cast upon the hospital an obligation to do more than take reasonable steps to assure itself of the professional competence of the nurses it employs to attend to the patient. The patient could thus not hold the hospital liable for the negligence of its nursing staff. The court in this case made the point that it was obliged by the principle of *stare decisis* and the fact that the decision of the Natal court in the *Lower Umfolosi Memorial Hospital* case had been one of a Full Bench to make the judgment that it had but that it would have preferred to come to a different finding had it been free to do so. In *Mtetwa v Minister Of Health*¹⁵⁴ the plaintiff was a patient at the King George V Hospital. She was being treated for suspected tuberculosis. The physician treating her was a certain Dr Pala, an employee of the defendant. The plaintiff alleged that Dr Pala acted carelessly in prescribing and administering a particular medication for her, in consequence of which she suffered a series of unpleasant and harmful after- and side-effects. She accordingly claimed R7 000 for pain, suffering, discomfort and inconvenience and R3 000 for loss of amenities. The respondent excepted to the plaintiff's claim on the basis of the decision of the court in *Lower Umfolosi District War Memorial Hospital v Lowe*. The court in Mtetwa observed that in the Transvaal the cases of *Esterhuizen v Administrator Transvaal*¹⁵⁵; *Dube v Administrator Transvaal*¹⁵⁶ and *Buls and Another v Tsatsarolakis*¹⁵⁷ do not mention nor support the distinction, which is pivotal to the decision in the *Lower Umfolosi* case, between professional work over which the hospital is said to have no control and for

¹⁵³ *St Augustine's* 1975 (2) SA 188 (D); 1975 (2) SA 530 (D)

¹⁵⁴ *Mtetwa* 1989 (3) SA 600 (D)

¹⁵⁵ *Esterhuizen* fn 29 *supra*

¹⁵⁶ *Dube* 1963 (4) SA 260 (T)

¹⁵⁷ *Buls* 1976 (2) SA 891 (T)

which it is accordingly not liable, and managerial or administrative duties performed by an employee, for which it is responsible. In the Transvaal cases the issue was simply whether the particular member of staff was negligent in the exercise of his duties, regardless of whether he was part of a professional team or not. However, said the court, as long as the decision in the *Lower Umfolosi* case stands, that is not the prevailing view in Natal. Because of the divergence of judicial views, and because the plaintiff was anxious to avoid the predicament which compelled Fannin J in the *St Augustine's Hospital (Pty) Ltd* case to follow the one view while preferring the other, the plaintiff, as the respondent to the exception, initiated an application in terms of s 13(1)(b) of the Supreme Court Act¹⁵⁸ to have the hearing of the exception referred to the Full Court of the Natal Provincial Division. That application, which was not opposed, was duly granted. The court observed that the point on which the decision in the *Lower Umfolosi* case hinged was that a member of the professional staff of a hospital was not a servant proper for whose misdeeds the hospital was accordingly responsible. At the time that was perceived to be a principle of law. Nowadays, the question is purely one of fact. The degree of supervision and control which is exercised by the person in authority over him is no longer regarded as the sole criterion to determine whether someone is a servant or something else. The deciding factor is the intention of the parties to the contract, which is to be gathered from a variety of facts and factors. Control is merely one of the *indicia* to determine whether or not a person is a servant or an independent worker. Nienaber J stated that just as the Minister of Law and Order can be held accountable for the peccadilloes of a policeman even when the latter exercised a discretion of his own¹⁵⁹ and indeed, even when he was not on duty¹⁶⁰, so too, it might be argued by analogy, the Minister of Health is at risk if a member of the staff of a hospital under his command is negligent in the exercise of any of his duties, be they professional and not subject to dictation

¹⁵⁸ Supreme Court Act No 59 of 1959

¹⁵⁹ *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A)

¹⁶⁰ *Minister of Police v Rabie* 1986 (1) SA 117 (A)

from others. The court held that to the extent that the judgment in the *Lower Umfolosi* case purported to enunciate a universal principle of law, namely that a hospital assumes no responsibility for the negligence of any member of its staff engaged in professional work, it has been overtaken by more recent authority, not only by the South African cases referred to but by English ones as well.¹⁶¹

7.5 Medicines

Medicines are of particular interest in the delictual sphere because they are the product or goods aspect of health services delivery. Consequently issues such as product liability and the liability of the manufacturer as opposed to that of the health services provider who supplies the medicine are of relevance. Whilst issues of the administration of medicines by health care providers are also important, the context in which medicines are marketed, developed and supplied by manufacturers adds a new dimension to the discussion. The efficacy of a medicine is a quality that can only be generally, as opposed to specifically, established in the sense that different individuals react and respond differently to the same medicine¹⁶². They may experience different side-effects, they may

¹⁶¹ See, for instance: *Gold v Essex County Council* [1942] 2 KB 293; *Collins v Hertfordshire County Council* [1947] KB 598; *Cassidy v Ministry of Health* [1951] 2 KB 343 (CA); *Roe v Minister of Health* [1954] 2 QB 66

¹⁶² The Nuffield Council on 'Bioethics Pharmacogenetics: Ethical Issues' has stated that: "People vary in their response to the same medicine. Few medicines are effective for everyone; all may cause adverse reactions or occasionally death. Some of the variation between individuals in response to medicines is due to differences in their genetic make-up. There are many different reasons why medicines may be dangerous or ineffective, such as inaccurate prescribing, poor compliance by the patient and interaction between a particular medicine and other substances, including other medication. However, advances in genetic knowledge may enable us to take better account of differences between individuals. Pharmacogenetics is the study of genetic variation that affects response to medicines. It has the potential to play an important role in improving safety and efficacy. Adverse reactions to medicines have significant costs, in both human and monetary terms. In addition, considerable resources are wasted on prescribing medicines that have little or no effect in particular patients" http://www.nuffieldbioethics.org/filelibrary/pdf/pharmacogenetics_report.pdf. They proceed to point out that the most common reason for medicines to be withdrawn from the market once they have been licensed is the subsequent occurrence in patients of serious adverse reactions which were either unsuspected at the time of marketing authorisation or occur more frequently than was expected at the time of the grant of marketing authorisation. They also make the point that both public and private providers of healthcare operate on limited budgets. In addition to the traditional requirements of quality, efficacy and safety for the regulatory approval of new medicines, public policy in many countries is developing the requirement to assess medicines for their cost-effectiveness.

Abraham J, Sheppard J and Reed T "Rethinking Transparency and Accountability in Medicines Regulation in the United Kingdom" *British Medical Journal* Jan 2 1999 observe that: "The marketing of a number of drugs that would have been withdrawn because their risks outweighed their benefit would probably have been challenged earlier if there had been greater transparency and public accountability... In the case of Opren, the lack of experimental testing for photosensitivity before approval in the United Kingdom and the omission of clear estimates of risks of photosensitivity from the United Kingdom product data sheet might well have been questioned. Hundreds of patients who had taken Opren subsequently complained of persistent photosensitivity. Similarly, Zomax was approved in the United Kingdom for the chronic treatment of arthritis without any

experience widely varying levels of efficacy, in some cases they may even experience an allegoric reaction to the medicine. Furthermore, the efficacy of a medicine from the point of view of the patient is dependent upon a number of external factors such as the accuracy of the diagnosis, the manner and the environment in which it is administered or taken, the overall state of health of the patient, whether the patient has an allergy to the medicine¹⁶³, whether it is taken in combination with other drugs or an appropriate dietary regimen etc.

Laypersons are sometimes of the view, in relation to medicines, that even if the medicine is not effective surely there can be no harm in taking it. This can be a dangerous misperception. Many medicines are toxic substances, some more so than others¹⁶⁴. They can themselves induce illness if used incorrectly. There can

warning on the product data sheet, despite positive carcinogenicity findings in animal tests before marketing. After the drug had been withdrawn, the Medicines Commission described the findings on carcinogenicity as a cause for concern when justifying its recommendation that Zomax should be returned to the market. Had those findings been public before the drug had been approved fewer patients would probably have been prescribed Zomax. More recently, Halcion was finally banned in the United Kingdom in 1993. It had been approved in 1978 but suspended since 1991. On banning Halcion the British regulatory authorities said that if they had known in 1978 what they knew in 1991, they would never have approved the drug in the first place."

Brazell C, Freeman A and Mosteller, M "Maximizing the value of medicines by including pharmacogenetic research in drug development and surveillance" *British Journal of Clinical Pharmacology* March 2002 state that "Genetics provides significant opportunities to maximize the safety and efficacy of medicines...The ability to develop drugs with a predictable response will allow clinicians to provide targeted treatment for patients with greater confidence of safety and efficacy. Patients will therefore receive more efficacious, timely and well-tolerated medicines."

¹⁶³ Penicillin for example is an effective antibiotic in many instances but some individuals are allergic to it and therefore cannot use it.

¹⁶⁴ Anti-retroviral drugs are highly toxic substances that can in some cases result in death. By way of example the drug profile of Abacavir (ABC): *Ziagen* (GlaxoSmithKline); related: *Trizivir* (TZV) CLASS: reads as follows – NRTI INDICATIONS: Most potent NRTI. FORMS AND PRICE: Tabs: 300 mg at \$6.41. As TZV: AZT 300 mg/3TC 150 mg/ ABC 300 mg at \$16.75 PATIENT ASSISTANCE: 800-722-9294

REGIMEN: 300 mg bid. Renal failure: Standard. PATIENT INSTRUCTIONS: No food restrictions. Warn about hypersensitivity reactions expressed as fever (usually 39° to 40°C), rash (maculopapular, often subtle), fatigue, nausea, vomiting, diarrhea, abdominal pain, muscle/joint pain, paresthesias, cough and/or dyspnoea. The highest risk is in the first 6 weeks but can occur at any time. A common concern is that every cold or side effect from a drug taken concurrently is interpreted as a side effect of ABC. Fever is nearly always present with ABC hypersensitivity. Patients should be advised to contact provider with questions prior to d/c. Warn of lipodystrophy and fat redistribution. WARNINGS: HSR, may be severe, resulting in hypotension and possible death. Warning card is available from pharmacists. Next dose will illicit same or worse Sx, may wish to administer next dose under observation. Remember that once this drug is stopped for suspected hypersensitivity it is often lost forever. SIDE EFFECTS: HSR with above Sx; complications include anaphylaxis, renal failure, hepatic failure, hypotension and death. Rechallenge has resulted in 3 deaths. GI intolerance. Class ADR: Lactic acidosis and hepatic steatosis.... DRUG INTERACTIONS: ETOH increases ABC AUC 41% (clinical significance unknown); ABC may ↑methadone Cl; ↑methadone dose may be required. PREGNANCY: Category C.

Efavirenz, EFV: *Sustiva* (Bristol-Myers Squibb)

CLASS: NNRTI

INDICATIONS: Potent anti-HIV agent; one of few triple agent regimens with comparable antiviral activity with baseline VL above or below 100,000 c/mL in treatment naïve patients.

FORMS AND PRICE: Caps: 50 mg, 100 mg, 200 mg at \$4.39

REGIMENS: 600 mg (three 100 mg tabs) hs. Renal failure or hepatic failure: Standard PATIENT INSTRUCTIONS: Take without regard to meals except that high fat meals should be avoided because they increase absorption. If switching from PI to EFV, some experts suggest an overlap of 1 week to achieve

also be significant consequences for general public health if they are used inappropriately. Multi-drug resistant tuberculosis (MDR-TB)¹⁶⁵ is a real example of the dangers for patients of widespread resistance to antibiotics. MDR-TB can only be treated with a limited number of extremely expensive antibiotics. If resistance to these antibiotics develops, there is no other effective treatment for the disease. Malaria is another example of a disease that has beaten what was once its standard treatment.¹⁶⁶ The World Health Organisation has warned that many infectious diseases which can be controlled now may be untreatable within 10 years¹⁶⁷. The same principles are applicable to

therapeutic EFV levels. Avoid in pregnancy and in women contemplating pregnancy. Warn of potential side effects of bad dreams and "disconnected" feeling, with the anticipation that if these occur, they will occur with the first dose and will usually resolve in 2 to 4 weeks. Women cannot depend on oral contraceptives when taking EFV. Warn of lipodystrophy, fat redistribution, and rash. **WARNINGS:** Avoid in 1st trimester of pregnancy and in women contemplating pregnancy; birth control pills may be unreliable due to interaction with EFV. CNS side effects in >50% in first 2 to 3 weeks and may be profound with confusion, vivid dreams, depersonalization, etc. Impact of ETOH, prior mental illness, or psychoactive drugs not well characterized. May need to avoid driving and other potentially dangerous activities during first 2 to 4 weeks. May cause false positive cannabinoid test (confirmatory tests are negative). Drug interactions, see below. **SIDE EFFECTS:** Rash—15% to 27%, sufficiently serious to d/c drug in 1% to 2%; d/c if rash is associated with fever, blistering, desquamation, mucous membrane involvement, arthritis or Stevens-Johnson syndrome (rare). CNS effects, see above. Hepatitis with ALT >5 x ULN in 2% to 3%. Class ADRs: Rash, lipodystrophy (not well characterized), cholesterol and HDL increase. **DRUG INTERACTIONS:** Contraindicated: Astemizole, terfenadine, midazolam, triazolam, cisapride, clarithromycin and ergot. EFV reduces levels of RBT, increase RFB dose to 450–600 mg/day or 600 mg 2x/week. Minimal RIF interaction, use standard doses of each. EFV reduces methadone levels, monitor for withdrawal Sx. Possibly significant interactions: Ethinyl estradiol (use alternative method of birth control) and warfarin (monitor pro-time). PIs: see Table 6–10, p. 34.

Source: <http://www.hopkins-aids.edu/publications/abbrevgd/abbrevgd.pdf>.

¹⁶⁵ Biotec Tuberculosis <http://www.biotec.com/fptbrapid.html>. "Multi-drug resistant tuberculosis (MDR-TB) refers to drug resistance to at least two key TB drugs, isoniazid and rifampicin... Treatment of MDR-TB requires use of less effective, more toxic and expensive drugs for longer periods. Patients with MDR-TB are less likely to be cured, giving the potential opportunity of spreading MRD-TB to the community."

¹⁶⁶ Radio Netherlands 'Drug Resistance' <http://www.rnw.nl/health/html/drug-resistance.html> reports that chloroquine as frontline treatment for malaria is now nearly useless. Since its synthesis in 1934, chloroquine has been used all over the world as a cheap and effective front-line treatment for malaria. In the later 1950's the first cases of chloroquine resistance were detected and today, chloroquine is no longer an effective anti-malarial drug in many countries of South America and Asia and Africa where 90% of malaria cases occur. Drug Information – News <http://pharmnet.co.za/druginfo/news/news02.htm> informs travellers that current malaria prophylaxis is being recognised globally as becoming less effective due to parasitic resistance. Chloroquine has been the mainstay of antimalarial drugs treatment for the past 40 years but resistance is now widespread and few countries are unaffected. Resistance to mefloquine is also developing rapidly, particularly in areas of South East Asia.

¹⁶⁷ BBC News 'Antibiotics could soon be useless' 13 June 2000 <http://news.bbc.co.uk/1/hi/health/789591.stm>. According to the report, new strains of 'old' diseases, such as tuberculosis (TB), which are immune to existing treatments have been reported across the world in recent years. In Russia and China, 10% of TB patients have strains resistant to the two most powerful treatments. Last year, New York City spent almost US\$1 bn to control an outbreak of multi-drug resistant TB. In Thailand, drug resistance has meant the doctors can no longer prescribe the three most common drugs to treat malaria. Dr David Heymann, executive director of the WHO's communicable diseases programme said there was an urgent need to reduce infection levels before the diseases wear the drugs down. He is quoted as saying, "The world may only have a decade or two to make optimal use of many of the medicines presently available to stop infectious diseases. We are literally in a race against time to bring levels of infectious disease down world-wide." The WHO says that drug resistance has occurred as a result of haphazard use of drugs. In wealthy countries resistance has occurred because of unnecessary demand and overuse of drugs. In poorer countries drug resistance is often blamed on underuse of drugs because many people fail, often because of lack of money, to finish drug treatment courses.

antiretroviral drugs (ARVs). The dangers of resistance are real¹⁶⁸. Apart from mutation of the virus within individuals which can lead to individual resistance to ARVs, there is the danger of global resistance to ARVs as the ARV resistant strains spread and become dominant. The HIV virus mutates periodically to a point at which the prevailing recommended drug regimens have to be changed or new drugs, where possible, introduced¹⁶⁹. Given that there is only a limited number (approximately 20) different ARVs available worldwide and most of them are currently used in 3 or 4 drug combinations¹⁷⁰, mass resistance to ARVs

¹⁶⁸ According to the Rutger Hauer Starfish Foundation, a global surveillance system for tracking HIV drug resistance has been launched by the World Health Organization and the International AIDS Society. They believe that the programme will be crucial to prevent important HIV drugs, called antiretrovirals, from being "wasted" as they start to be used in the developing world. Their use has been made possible as a result of price cuts by drug companies, cheaper generic versions of the drugs and foreign aid funding. The surveillance network will also help western countries use antiretrovirals more intelligently. (www.rutgerhauer.org/rutgerhauerstarfish.info/2info/newsstories) See also WHO Global Strategy for Containment of Antimicrobial Resistance (WHO/CDS/CSR/DRS/2001.2) in which it is stated that deaths from acute respiratory infections, diarrhoeal diseases, measles, AIDS, malaria and tuberculosis account for more than 85% of the mortality from infection worldwide. Resistance to first-line drugs in most of the pathogens causing these diseases ranges from zero to almost 100%. In some instances resistance to second- and third-line agents is seriously compromising treatment outcome. Added to this is the significant global burden of resistance hospital-acquired infections, the emerging problems of antiviral resistance and the increasing problems of drug resistance in the neglected parasitic diseases of poor and marginalized populations. According to the WHO, resistance has recently been described as a threat to global stability and national security. In 1998 the World Health Assembly urged member states to develop measures to encourage appropriate and cost-effective use of antimicrobials, to prohibit the dispensing of antimicrobials without the prescription of a qualified health professional, to improve practices to prevent the spread of infection and thereby the spread of resistant pathogens, to strengthen legislation to prevent the manufacture, sale and distribution of counterfeit antimicrobials and the sale of antimicrobials on the informal market and to reduce the use of antimicrobials in food-animal production.

http://www.who.int/csr/resources/publications/drugresist/EGlobal_Strat.pdf. In another publication in 2000, entitled 'Overcoming Antimicrobial Resistance' the World Health Organisation stated that recent studies it had undertaken indicated that for every 100 respiratory infections, only 20% required antibiotic treatment. This meant that 80% of patients are treated with unnecessary medications thereby leading drugs directly into the sight lines of resistance. It commented that while bacterial infections can kill, treating viral illness with antibiotics is not only ineffective but contributes to the development of resistance. (<http://www.who.int/infectious-disease-report/2000/ch4.htm>).

¹⁶⁹ Gillim L, Gusella GL, Vargas J Jr, Marras D, Klotman ME and Cara A 'Development of a Novel Screen for Protease Inhibitors' *Clinical and Diagnostic Laboratory Immunology* <http://cdli.asm.org/cgi/content/full/8/2/437> note that "Since the onset of the AIDS epidemic, a number of antiretroviral drugs have been developed for the treatment of human immunodeficiency virus type 1(HIV-1) infection. While the initial target for therapy was reverse viral transcriptase, inhibitors targeting the viral protease (PR) enzyme have become a mainstay of antiretroviral therapy. Although use of these compounds in multidrug regimens has dramatically reduced viral load as well as morbidity and mortality, their long term benefit in HIV-1 infected patients has dramatically reduced viral load as well as morbidity and mortality, their long-term benefit in HIV-1 infected patients has been limited by the emergence of drug-resistant viral strains. The high rate of mutation of HIV-1 coupled with incomplete viral suppression and widespread use of this class of drugs will continue to contribute to this problem. For this reason it is essential that new drugs targeting PR, as well as new viral targets be developed."

¹⁷⁰ See 'Quadruple Therapy With A Protease Inhibitor and NNRTI Achieves Highest Rate of Viral Suppression in Nucleoside Analogue Experienced Patients' (Montaner/Mellors, *NEJM* 8/9) *HIVdent Drug & Medications News Update*. It has now been observed, for example, that quadruple therapy consisting of two nucleoside reverse transcriptase inhibitors (one of which is new), a protease inhibitor and a non-nucleoside reverse transcriptase inhibitor achieves a higher rate of viral suppression in patients who have already been treated with NRTIs (antiretroviral drugs) than treatment regimens consisting of NRTIs and either a NNRTI or a protease inhibitor, according to a study published in the August 9 (2001) edition of the New England Journal of Medicine. The study was conducted by Dr Mary Albrecht and colleagues of the AIDS Clinical Trials Group. The findings indicated that quadruple therapy offers "significantly more durable suppression" than either

can rapidly become a serious and global public health problem. Negligent or irresponsible prescription and use of certain drugs can therefore in itself be harmful not only to individual patients but to society as a whole. What has all this to do with the law of delict, one might ask. It is submitted that there is potential for claims in delict, based on the circumstances discussed above, at a number of different levels within the health system. Take for example the case of a family doctor who negligently, unnecessarily and repeatedly prescribes a drug for a particular patient. The drug is a lifesaver for a particular condition (eg myocardial infarct) when taken appropriately but if used too frequently results in a rapid build up of resistance within the patient which nullifies its efficacy for the life threatening condition. In certain circumstances the doctor could be held liable for a claim in delict if the patient's capacity to benefit from the drug was nullified by the doctor's unnecessary prescription of it and it was reasonably foreseeable that the patient could suffer from the life threatening condition at some stage. Obviously much would depend on the facts of the particular case but delictual liability within these circumstances is not impossible. Within the public sector, overuse or misuse of certain medicines on the prescription of doctors who are employees of the state and who create a public health risk because of an increase in drug resistance due to the overuse or misuse of the medicine, could conceivably lead to claims in delict in certain circumstances. At a constitutional level the irresponsible and irrational prescription of a drug within the public health sector could result in reduced access to health care services for large numbers of patients – especially if any alternative therapies were considerably more expensive and therefore unaffordable for the majority of patients that previously had access to the now defunct drug. Class actions could conceivably arise against drug manufacturers in consequence of marketing practices which actively encourage health professionals to 'push'

version of triple therapy. Extensive previous treatment with NRTIs that has lead to zidovudine resistance may result in hypersusceptibility to NRTIs. They stated that although conserving some classes of treatment for later use is an important consideration, the benefits of using additional classes of potent agents with the goal of suppressing viral replication must be weighed against the potential risks of incurring new or long term toxic effects and limiting future treatment options.

(<http://www.hivdent.org/drugs/drugs1/drugtwap082001.htm>)

their products when treating patients in terms of prescriptions and medical advice if it can be shown that such marketing is irresponsible and does not warn doctors and other prescribers of the dangers of resistance with the result that the drug becomes useless to those who need it. There has of late been a major shift in advertising with more and more funds being spent on direct to consumer promotion of drugs.

One of the major problems with responsible use of pharmaceutical products in order to avoid mass resistance and one that does not seem to be linked very often in the literature to problems of resistance are the commercial practices surrounding the sale and marketing of medicines. Pharmaceutical manufacturers and others in the medicines supply chain incentivise healthcare professionals to prescribe and administer their particular products and also specific volumes of those products. The primary motivation is commercial – to ‘move’ as much product as possible. The results of unethical marketing of medicines are *inter alia* unethical, unnecessary and irresponsible prescription of medicines.¹⁷¹ Furthermore, at the extreme end of the spectrum, it could even be said that drug resistance is a beneficial aspect of the system from the point of view of the manufacturer since as long as it can continue, by means of research and development to stay ahead of the resistance game it is guaranteed of a market for new drugs as the older ones become obsolete. Drug companies are likely to argue that drug resistance is not beneficial for them because they would like to continue to sell both old and new products. However the maximum duration of a patent is usually twenty years in principle and less in practice. Once the drug goes off patent, the fact is that its price drops dramatically as generic manufacturers climb onto the bandwagon. The theory of planned

¹⁷¹ Fresle DA and Wolfheim C ‘Public Education in Rational Drug Use: A Global Survey’ WHO Geneva March 1997 Pharmaceutical marketing to prescribers, dispensers and consumers may contribute to irrational use. Unethical marketing of drugs is widespread in developing countries and although standards have improved in developed countries, recent studies have found continuing problems, such as false and misleading claims, switch campaigns and commercial promotion disguised as scientific trials.
www.who.int/medicines/library/dap/who-dap-97-5/WHODAP975.pdf

obsolescence¹⁷² describes a way of maintaining control of a particular market in other industries¹⁷³. Manufacturers who make drugs for the communicable diseases market do not have to worry about planned obsolescence – nature has built it into the system for them in the form of drug resistance. However, this does not mean to say that they cannot profit significantly from drug resistance and that there is no inherent perverse incentive sufficiently present within the system for them to focus on and actively promote widespread, high-volume use of a drug without being overly concerned about the appropriacy of that use. Furthermore, all drugs have expiry dates beyond which they may not lawfully be sold. It is clear that just around medicines alone, which are only one aspect of health services delivery, there are a number of complex issues upon which the law of delict has relevance.

The question of the liability of a medicines regulatory authority to cancel or suspend the registration of a medicine on receipt of information subsequent to its registration that its efficacy is dubious is also of interest in the context of delicts committed by the state¹⁷⁴. Section 16 of the Medicines and Related Substances Control Act¹⁷⁵ states that:

1) If the council-

¹⁷² The *New Dictionary of Cultural Literacy*, Third Edition 2002, defines 'planned obsolescence' as "Incorporating into a product features that will almost certainly go out of favour in a short time, thereby inducing the consumer to purchase a new model of the product. Placing sweeping tail fins on an automobile was an example of planned obsolescence." <http://www.bartleby.com/59/18/plannedobsol.html>

¹⁷³ Bulow J 'An Economic Theory Of Planned Obsolescence' states that "Except under unusual conditions, a monopolist will produce goods with inefficiently short useful lives. The result is closely linked to the observation that a durable goods monopolist will prefer to rent, rather than sell, its output. An oligopolist, or equivalently a monopolist facing certain entry in a subsequent period, also has a countervailing incentive to extend durability. As a corollary, such firms have an incentive to steer customers to purchase rather than rental contracts. This same result also holds if future competition is to be over a related but not identical substitute product. Therefore, while monopolists will opt for inefficiently short useful lives, oligopolists may choose either uneconomically short or long lives, depending on their technologies and market conditions. There is also an incentive to increase durability to deter entry."

<https://faculty-gsb.stanford.edu/bulow/articles/An%20Economic%20Theory%20of%20Planned%20Obsolescence.pdf>

¹⁷⁴ In terms of section (3) (a) of the Medicines and Related Substances Act No 101 of 1965: If after consideration of any such application and after any investigation or enquiry which it may consider necessary the council is satisfied that the medicine in question is suitable for the purpose for which it is intended and complies with the prescribed requirements and that registration of that medicine is in the public interest, it shall approve of the registration thereof. In terms of section 1(3) of the Act: In determining whether or not the registration or availability of a medicine is in the public interest, regard shall be had only to the safety, quality and therapeutic efficacy thereof in relation to its effect on the health of man or any animal, as the case may be.

¹⁷⁵ Medicines Act fn 12 *supra*

- (a) is of the opinion that any person has failed to comply with any condition subject to which any medicine has been registered; or
- (b) is of the opinion that any medicine does not comply with any prescribed requirement; or
- (c) is of the opinion that it is not in the public interest that any medicine shall be available to the public,

the council shall cause notice in writing to be given accordingly by the registrar to the holder of the certificate of registration issued in respect of that medicine.

(2) Any such notice shall specify the grounds on which the council's opinion is based, and shall indicate that the person to whom it is directed may within one month after receipt thereof submit to the registrar any comments he may wish to put forward in connection with the matter.

(3) If no such comments are so submitted, or if after consideration of any comments so submitted the council is of the opinion that the registration of the medicine in question should be cancelled, the council may direct the registrar to cancel the registration thereof.

The Act does not state what happens if the council fails to comply with section 16. Furthermore subsection (3) states that the council *may* direct the registrar to cancel the registration of the medicine if it is of the opinion that the registration of the medicine in question should be cancelled. Since for the purposes of the Act, registration of a medicine is based upon its quality, efficacy and safety, it is difficult to envisage a situation in which the Council would be justified in failing to cancel the registration of a medicine where it is of the opinion that such registration should be cancelled.

7.6 Constitutional Delicts?

To some extent this topic has already been touched upon in the earlier discussion under the section on loss. However, it is important to explore this

issue specifically from the constitutional perspective of the State's obligation to achieve the progressive realisation of the right of access to health care services. If the State, or some organ of state, fails in some obvious respect to do so, does this constitute a delict against the affected persons? A pertinent example of this is the present state of affairs concerning municipal health services. Section 84 of the Local Government: Municipal Structures Act¹⁷⁶ assigns certain functions to district municipalities including municipal health services.¹⁷⁷ There are two problems associated with this. The first is that health services being rendered by municipalities are for the most part funded and rendered by metropolitan municipalities and local municipalities. These latter levy rates and taxes within their areas of jurisdiction and fund such services from these rates and taxes. District municipalities do not have the power to raise money in this way. Essentially, therefore, the Municipal Structures: Local Government Act has created an unfunded mandate for district municipalities. This in itself is not problematic in view of the fact that the Minister of Provincial and Local Government can authorise a local municipality to render municipal health services in its area.¹⁷⁸ The Minister did issue such authorisations to most, if not all, local municipalities by way of a series of notices issued in November 2000. Subsequently, in 2003, the Minister decided to revoke the authorisation to the extent that it covered municipal health services with effect from 01 July 2004 and did so by way of a series of notices published in the Gazette. Since the funding issues for district municipalities will not have been resolved at that time, since estimates are that the current value of municipal health services rendered by local municipalities is close to one billion rands and since the provincial governments do not have this kind of funding available to enable them to step into the breach, the Minister's actions in revoking the authorisations are highly problematic and quite possibly unconstitutional.

¹⁷⁶ Municipal Strutures Act No 117 of 1998

¹⁷⁷ Fn 176 *supra* Section 84(1)(i)

¹⁷⁸ Fn 176 *supra* Section 84(3)(a)

It is conceivable that a situation could arise in which a person seeking health care services, especially emergency medical treatment, suffers loss due to the fact that the required health care services were not available or were not available within a specific time. Reference has already been made to the case of *Olitzki* and the concurrence of the Supreme Court of Appeal in that case with the observations of Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape*¹⁷⁹ that in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability. What is the position when the statute in question is the Constitution itself? In *NAPTOSA and Others v Minister of Education, Western Cape, and Others*¹⁸⁰ the court observed that:

“The complexities of remedies for a violation of a fundamental right were, in the context of a claim for ‘constitutional damages’, discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851). It is clear from this decision of the Constitutional Court that there may be circumstances where a litigant against the state would be entitled to rely directly on a breach of a fundamental right. Whether this would be permissible would depend, however, on the availability of ‘appropriate relief’. The majority judgment written by Ackermann J explains that ‘appropriate relief’ will in essence be relief that is required to protect and enforce the Constitution. In deciding what is appropriate relief, the interests not only of the complainant but of society as a whole, he holds, ought to be served.

In *Gerber v Voorsitter: Komitee Oor Amnesty van Die Kommissie vir Waarheid en Versoening*¹⁸¹ it was held that it was of paramount importance that the rights set out in the Bill of Rights had to be protected and accordingly the Court had to be prepared to determine whether the constitutional rights of the applicant had been infringed or threatened and to apply the appropriate legal remedy and that neither the procedure nor the investigation nor the legal remedy should be hamstrung if the Constitution and the Bill of Rights were to be given their fullest meaning. The court held further that in applying section 38 of the

¹⁷⁹ *Faircape* fn 61 *supra*

¹⁸⁰ *NAPTOSA* 2001 (2) SA 112 (C)

¹⁸¹ *Gerber* 1998 (2) SA 559 (T)

Constitution, the nature of the remedy or what it was called was not important. Where the rights set out in the Bill of Rights were infringed by the conduct or decision of a lower court or a tribunal, council or official which exercised judicial, quasi-judicial or administrative functions, the person affected thereby could seek relief in terms of Rule 53 of the Uniform Rules of Court. In the event that the Court found that the applicant's rights in terms of the Constitution had been infringed, it could grant the appropriate relief.

Clearly the courts construe their power to grant appropriate relief as being wide and flexible. In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*¹⁸² the constitutional court observed that:

"There are several provisions in the Constitution which are important to bear in mind when considering constitutional remedies, in particular ss 38, 172(1), 8(3), and 39(2). Section 172 provides that if a court finds law or conduct inconsistent with the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the Court should develop a suitable remedy. No particular remedy, apart from the declaration of invalidity, is dictated for any particular violation of a fundamental right. Because the provision of remedies is open-ended and therefore inherently flexible, Courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity. An 'all-or-nothing' decision is therefore not the only option...The flexibility in the provision of constitutional remedies means that there is no constitutional straightjacket such as suggested in the High Court or in argument in this Court. The appropriateness of the remedy would be determined by the facts of the particular case. In a constitutional state with a comprehensive Bill of Rights protected by a Judiciary with the power and duty to do what is just, equitable and appropriate to enforce its provisions, it is not hard cases that make bad law, but bad cases that make hard law."

It is submitted that probably the most likely situation in which a constitutional delict will be recognised in future is that described by the court in *Soobramoney v Minister of Health, KwaZulu-Natal*¹⁸³ in reviewing the facts of the Indian case of *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and*

¹⁸² *Bel Porto* 2002 (3) SA 265 (CC)

¹⁸³ *Soobramoney* 1998 (1) SA 765 (CC)

*Another*¹⁸⁴. It was a case in which constitutional damages were claimed. The claimant had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. It appeared from the judgment that the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct. This is precisely the sort of case which would fall within s 27(3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilise his condition. The treatment was available but denied. In the South African context, however, it is most likely to occur in the context of the refusal by a private sector hospital of emergency medical treatment if the patient is unable to pay the exorbitant deposit which such hospitals tend to require in advance of treatment. The public sector is likely to turn away a patient requiring medical treatment only in circumstances where the particular facility is not equipped to give adequate assistance or where it is already at running at full capacity with regard to emergency medical services. In this latter scenario it will be a question of whether the facts sufficiently justify the refusal to provide emergency medical treatment, i.e. whether the resources where being adequately utilised, whether there were attempts to refer the patient to an alternative facility where treatment could be obtained, the availability of such alternatives etc, whereas in the former scenario the refusal is likely to be unconstitutional in the absence of arguments of lack of capacity.

The constitutional obligation to provide emergency medical treatment is a particularly good example because in terms of the common law of delict as it

¹⁸⁴ *Paschim* 1996 (AIR) SC 2426.

stands currently, there is no generally recognised obligation to render emergency medical treatment¹⁸⁵.

A further question of some importance in the context of health services delivery is whether a provider can contract out of delictual liability, whether this is in accordance with public policy and how this issue is dealt with by the courts. The Appellate Division, in the case of *Afrox Healthcare Bpk v Strydom*¹⁸⁶ answered this question in the affirmative for the private sector at least. The facts of this case are canvassed in detail in the section of the thesis that covers contracts within the private sector. The question is whether, in the light of the constitutional obligations of the state to provide access to health care services, the state could also contract out of delictual liability to patients in its care. In the *Afrox* case, the High Court tried, in what is, with respect, an ineptly reasoned judgment, to bring the matter within constitutional values and decided in favour of the plaintiff. The Supreme Court of Appeal, in what is with respect, a highly regressive judgment, chose to reverse the decision of the High Court and – notwithstanding the constitutional rights of the patient to bodily and psychological integrity, and human dignity - followed the well worn argument of the sanctity of contract under just about all circumstances except those that are essentially criminal. It is a great pity that this case never got as far as the constitutional court. The High Court and the Supreme Court of Appeal have been criticised by the Constitutional court on at least one occasion¹⁸⁷ for failing

¹⁸⁵ In the common law of delict the existence of a duty to rescue is a question of fact as much as it is of law since the duty to rescue can be inferred in certain circumstances. See *Minister of Police v Ewels* (fn 43 *supra*) The relevant passages (in translation) from the interpretation in *Ewels*' case at p 684 which provide assistance are the following (at p 597E): 'Just as a duty to rescue can sometimes be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal duty or not. *Clearly it is impossible to determine in general when such a legal duty would arise.*' [Writer's italics] The Constitution, it is submitted, imposes that general duty at least upon health care providers, to 'rescue' persons in need of emergency medical treatment. See also *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A). Strauss, *Doctor, Patient and the Law* p 24 points out that the traditional view that no liability will lie for mere omission came under attack in our law in the middle of this century (the 20th century). He states that a court may now well hold a doctor liable for harm suffered by an injured or ailing person where the doctor, aware of his condition, unreasonably refused or failed to attend. It is quite possible that even in the absence of the Constitution, the courts would infer on a case by case basis, a duty upon a health care provider to attend to a patient but, it is submitted that the Constitution still goes further in that it actively prohibits a refusal of emergency medical treatment.

¹⁸⁶ *Afrox* 2002 (6) SA 21 (SCA)

¹⁸⁷ *Carmichele* fn 15 *supra*

to take into account the provisions of section 39(2) of the Constitution and it is submitted that *Afrox* is another case in point. In *Afrox*, the admission document signed by the respondent during his admission to the hospital contained an exemption clause, providing that the respondent ‘absolved the hospital and/or its employees and/or agents from all liability and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient whatever the cause/causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents’. The appellant relied on such clause to avoid liability. The clause was extremely wide in its scope,¹⁸⁸ the applicant even apparently foregoing his constitutional right to life and waives a claim based on negligence and even, it would seem, intentional commission since the only exception is intentional omission. The judgment is discussed in detail elsewhere in this thesis. A study of the indemnity clause in *Afrox* reveals that the constitutional rights that the patient waived were those to life, bodily and psychological integrity and human dignity. As stated previously, it is not only the individual who has an interest in the observation of, and respect for, his constitutional rights but society as a whole. Individuals can find themselves in desperate circumstances, and in the health services context in particular their judgment is likely to be impaired in many instances. Their ability to resist inroads into their fundamental rights is not what it usually is due to physical and mental stress, they may believe that they have no choice but to sign the indemnity clauses if they want to receive treatment. It is submitted that the arguments of the Supreme Court of Appeal in its judgment in this case took none of the bargaining equalities between patient

¹⁸⁸ *Afrox* fn 186 *supra*. “Ek onthef die hospitaal en/of sy werknemers en/of agente van alle aanspreeklikheid en ek vrywaar hulle hiermee teen enige eis wat ingestel word deur enige persoon (insluitende 'n afhanglike van die pasiënt) weens skade of verlies van watter aard ookal (insluitende gevolgskade of spesiale skade van enige aard) wat direk of indirek spruit uit enige besering (insluitende noodlottige besering) opgedoen deur of skade berokken aan die pasiënt of enige siekte (insluitende terminale siekte) opgedoen deur die pasiënt wat ook al die oorsaak/oorsake is, net met die uitsluiting van opsetlike versuum deur die hospitaal, werknemers of agente.”

and provider into account in *Afrox*. It saw a contract for health services as no different to any other contract for goods and services - despite the fact that it has been widely and repeatedly recognised that such contracts are not just like any other.¹⁸⁹ If the values and the rights recognized by the Constitution are a reflection of public policy then it would surely be contrary to public policy to allow a waiver of those rights since such waiver would in effect be an attempt to sanction behaviour that is contrary to public policy. In the delictual context, behaviour that is contrary to public policy is wrongful or unlawful and, as has already been observed in the contractual context, provisions that are contrary to public policy are unlawful and therefore unenforceable. Agreements contrary to statutory provisions or purporting to exclude such provisions from the relationship are unlawful as they are contrary to public policy¹⁹⁰. It is important to point out in this context that a decision not to exercise a particular constitutional right on the part of the right holder should not be equated with a waiver of that right. It is part of the concept of a right that the holder is free to choose whether or not to exercise it in certain circumstances. Thus in the health care context, a patient who has been the victim of the negligence of a doctor in treating him or her has the power to decide whether or not to claim damages, i.e. to exercise the right to go to court to enforce the right to bodily and psychological integrity. A waiver is a contractual undertaking not to exercise a

¹⁸⁹ For the latest expression of this issue see *Redefinition of Negligence/Liability A Summary Paper prepared by the Australian Medical Association Queensland* 20 August 2002 in which it is stated: "The doctor-patient relationship cannot be seen as a normal commercial interaction even though a fee is paid. The service provided by a doctor has a readily visible and assessable component and a less tangible but nevertheless essential second component. The obvious first component consists of the basic facts of the patient's disorder conveyed in the consultation and the treatment parameters proscribed including measurable factors such as a discussion of potential adverse effects and compilations of the treatment recommended. Similarly a procedure or surgical operation falls into this first component and likewise is readily assessable and open to outside scrutiny. However, there is a second less measurable component to the doctor patient interaction that is just as important to the therapeutic outcome for the patient. In a consultation this consists of the ability of the medical practitioner to achieve a beneficial outcome for the patient and always involves several less measurable components such as

- persuading the patient to follow a prescribed course of treatment;
- persuading the patient to desist from other self-prescribed remedies which interfere with recovery;
- altering behaviour patterns which, although not immediately obvious to the present specific complaint will nevertheless significantly benefit that person in the longer term (losing weight, lifestyle changes)
- with medical procedures or surgical operations the preparation and post-operative management is often as important to the eventual outcome as the technical exactitude of the surgery itself"

¹⁹⁰ See for instance *ABSA Bank H/A Bankfin v Louw En Andere* 1997 (3) SA 1085 (C) in which it was held that an agreement whereby a party waives beforehand and in its entirety the protection of the Prescription Act 68 of 1969 is contrary to public policy and thus invalid. In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) the court said that "Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced." [writer's italics]

right in the event that it is contravened by someone else. In this sense it is almost a license to someone to contravene the right since in the event that he does so, no action will be taken against him¹⁹¹. In *Goodman Bros (Pty) Ltd v Transnet Ltd*¹⁹² the court stated that it is contrary to the spirit of the Constitution for the respondent to require anyone with whom it deals to waive his constitutional rights. It is submitted with respect that this is logically correct because in terms of section 2 of the Constitution it is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. If ordinary legislation cannot lawfully contradict or restrict the rights in the Constitution¹⁹³, even indirectly, then it is difficult to see why contractual provisions, at least as between the contracting parties, should be able to achieve this¹⁹⁴. A waiver of a constitutional right in a

¹⁹¹ The cases of *Community Development Board v Revision Court, Durban Central, And Another* 1971 (1) SA 557 (N) *Frames (Cape Town) (Pty) Ltd* 1995 (8) BCLR 981 (C) *Maharaj v Chairman, Liquor Board* 1997 (1) SA 273 (N); *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) are authority for the argument that waivers of constitutional rights are themselves unconstitutional and thus contrary to public policy.

¹⁹² *Transnet* 1998 (4) SA 989 (W) at p 997

¹⁹³ In terms of section 8 of the Constitution the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. It also binds a natural or 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. In terms of section 36(1) of the Constitution 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... Except as provided in subsection (1) or any other constitutional provision no law may limit any right entrenched in the Bill of Rights.

¹⁹⁴ See however, Hopkins K Constitutional Rights and Waiver (2001) 16 SAPR 122 who comments that the view of Olivier JA that the correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of section 36(1) of the Constitution is an 'oversimplification of what is in reality an extremely complicated issue'. Hopkins says that Olivier JA has seemingly attached equal importance to all of the fundamental rights. He says that he finds this reasoning untenable because it implied that all rights in the bill of rights are destined to receive the same treatment in issues of waiver. He argues that a more careful analysis reveals that a hierarchy of rights is prevalent within the Bill of Rights and that for this reason each right needs to be assessed on its own before assigning a weight of significance to it. Hopkins says that it makes no sense to attach the same weight of significance to all rights. He notes that Olivier JA states that a waiver is a limitation of a right and that, for this reason, strict adherence to the provisions of section 36(1) is warranted. Surely, says Hopkins, this cannot be correct because a waiver cannot be a limitation in the section 36 sense of the term because it is not a law of general application. A waiver is simply the operation of the law of contract that agreements must be upheld. Having said this it is true that enforcement of a waiver might constitute an infringement of a constitutional right in which case the courts ought not to be entitled to uphold them unless there is good reason to do so. With respect to Hopkins he is oversimplifying both the context in which constitutional rights operate and the law of contract since he does not pursue the logic further to state the essential principle of the law of contract that where a provision is contrary to public policy or the moral values of the community, it will not be enforced. Since the Constitution is the embodiment of these values it follows that a contractual provision that is contrary to the Constitution cannot be enforced. Hopkins also fails to appreciate that one cannot sit in the abstract and assign a hierarchy to the rights in the Bill of Rights since they only have real meaning in the various contexts in which they are played out in society. Their relative weights and significance, it is submitted, are dependent upon the context in which they are exercised and any attempt to state that one right has more weight than another ignores the polycentric structure of the Bill of Rights itself. Hopkins observes that Currie in the 1999 *Annual Survey of South African Law* p 54 -55, commenting on the case of *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society* 1999 (2) SA 268 (C) suggests that freedom rights such as the right to freedom of religion can be waived by a contractual undertaking. He explains this by saying: "This is because freedom rights can be positively or negatively exercised. Just as

one can exercise the right to freedom of expression by choosing to remain silent, one is free to practise one's religion and equally free to choose not to. A waiver therefore amounts as it were to an undertaking to exercise the right negatively. The undertaking in clause 20(b) [of the contract of sale] not to make calls to prayer would be similar to a contractual undertaking not to disclose certain information, or not to work in one's chosen profession, or to perform nude on stage or to attend religious instruction in a private school. These are respectively waivers of rights to freedom of expression, to occupational freedom, to privacy and to freedom of religion. There should in principle be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right." Hopkins notes that in addition to the distinction that Currie makes, it seems that there are also other factors that make it necessary to consider the content of the right in the debate as to whether or not such right is capable of being waived. He says that whenever one speaks of a waiver of fundamental rights, one is in effect referring to two concepts – 'waiver' and 'fundamental rights capable of being waived'. This complex issue is best understood, says Hopkins, in the context of an appreciation for both of these concepts. He goes on to define 'waiver' as 'in essence a unilateral decision made by one of the parties to a contract not to avail oneself of a right or power or benefit or opportunity'. This definition, he says, seems to be compatible with the Supreme Court of Appeal's consistent tendency to equate waiver with election – in other words when one waives then one is in effect electing not to enforce a remedy, for example, or not to claim a right. But a distinction needs to be maintained between two 'categories' of waiver argues Hopkins. He says that the first is a waiver of contractual rights and the second is a waiver of rights conferred by law. Hopkins notes that it may at first seem that waiver of constitutional rights is concerned with the second category of waiver only. However, he says, this is not necessarily the case. The second category applies to situations where the rightholder may for example choose not to rescind a contract for misrepresentation or elect not to cancel a contract for breach. In these examples the right being waived is one conferred by law and the waiver is by choice – the consent of the other party is not required in order to waive these rights. But, says Hopkins, where the waiver is of a constitutional right in terms of a contract then there is no longer a choice. There is no possibility of election to resort to a right that is ordinarily conferred by law. There is an agreement with the other contracting party that the constitutional right will not be claimed and the constitutional remedy will not be enforced. For this reason, says Hopkins, it seems that one is concerned with more than simply the second category of waiver identified earlier. However, he says, one is not strictly speaking dealing only with the first category either because the first category involves the waiver of a right conferred by a term in the contract. He gives as an example the landlord who despite the fact that the lease requires payment of the rent on the first day of every month, waives the right to be promptly paid by accepting late payment. He says that it seems as though the waiving of a constitutional right does not fall squarely into this category unless the provisions of the bill of rights are implied into all contracts as terms. The problem with this, notes Hopkins, is that terms can only be implied into contracts where they do not conflict with express terms that already exist. He says that this is problematic because all contracts that seek to waive the constitutional rights of one party do so with an express term. It is the inclusion of this express term that effectively disqualifies one from later trying to include, by implication, the very term expressly excluded. Thus it is difficult to slot constitutional waiver into the first category identified above.

It is submitted that this reasoning of Hopkins is guilty of a number of errors in logic. The first is that he conflates the concept of contractual waiver of a contractual or other right with the concept of waiver of a contractual or other right. Thus he says waiver of constitutional rights is not concerned with the second category of waiver only – i.e. the waiver of rights conferred by law, because even in the law of contract it is possible to waive the right to rescind a contract for misrepresentation, a right conferred not by the contract, but by law. This is a *non sequitur*. He is conflating the origin of the right with the 'origin' or basis of the waiver. It is submitted that there are four possible elements in this logical system. These are (a) a non-contractual waiver of a right conferred by law – whether by the common law, a statute or the Constitution (b) a non-contractual waiver of a right conferred by contract eg a unilateral decision, despite provision for breach in the contract itself, not to act upon that contractual provision and invoke the remedies for breach (c) a contractual waiver of a right conferred by contract for example an undertaking in the contract that if a certain event transpires, the party will waive a right conferred by that same contract (d) a contractual waiver of a right conferred by law i.e. the common law, a statute or the Constitution. It is category (d) with which one is most concerned in the question of contractual waivers of constitutional rights since contractual waivers of constitutional rights are binding. The person who waives the right is bound by that waiver, depending on the nature and terms of the contract either indefinitely or for a specific and identifiable period of time eg the term of the contract or a period identified by a term within the contract. It is submitted that even in terms of the two categories imposed by Hopkins upon himself, the waiver of a constitutional right falls clearly into the second category, whether it is contractual or non-contractual. The first and second categories are defined with reference to the source of the right and not with reference to the source or basis of the waiver. A constitutional right, logically speaking, should not be regarded as a contractual right because it is not a right conferred by the contract. Any attempt to include a constitutional right as a contractual right would be largely superfluous. At most, it may give the rightholder in question a platform from which to launch a claim for contractual (as opposed to delictual) damages for violation of a constitutional right. However it may be that, depending upon the nature of the contract in question, a particular constitutional right could be regarded as an implied term of the contract in any event. The second is that he is crossing the thread of a waiver of a contractual right, with the thread of an act of waiver of a right external to a contract. Thus he says, in speaking of a waiver of constitutional rights one is not dealing only with the first category – i.e. waiver of contractual rights because not every constitutional right is an implied term of the contract. There is in any event a tautology, which Hopkins himself points out, since potential implied terms are ousted by express terms to the contrary. It is submitted that this latter argument is not useful in that it simply

begs the question and ignores the fact that the Constitution is the substratum or grundnorm of all law in South Africa, including the law that upholds contractual arrangements. A contractual term could only oust an implied constitutional right if the law recognises that a contractual arrangement can oust or exclude a constitutional right from the relationship. If the law did so it would be conceding that contracts can be structured such that they are not subject to the Constitution which is a legal impossibility since all law (and a contract constitutes law between its parties) is subject to the Constitution and to the extent that it is inconsistent with it – invalid. Hopkins then draws another distinction which, it is submitted, is on firmer ground. There is a distinction he notes between the waiver of a fundamental right and a mere decision not to exercise it. Waivers are undertakings given to another person not to exercise a right at a future time. He notes further that if waivers are simply undertakings then waivers are themselves contracts and that it thus stands to reason that the enforceability of a waiver must be determined in the same way as it would be for any other type of contract. Considerations of public policy, says Hopkins, thus play a crucial role. He states that there can be no general rule on the validity of a contractual waiver of constitutional rights *per se* since each must be scrutinised to determine whether or not the waiver is contrary to public policy. He goes on to point out that public policy is not informed by the Constitution generally and the Bill of Rights in particular. This means, says Hopkins that the resourceful body of public policy doctrine will play a crucial role in determining the validity and enforceability of contracts. He observes that prior to the Constitution, the sanctity of contract was regarded as the pillar of public policy stating that it nevertheless remains to be discussed how public policy will treat agreements that expressly seek to waive the fundamental rights of one of the parties thereto. Hopkins states that this is an interesting question because of the apparent tension between the traditional pre-constitutional idea that sanctity of contract is public policy epitomised on the one hand and the new post-constitutional idea that the Bill of Rights represents a reliable statement of what public policy is on the other.

The writer submits that there is no question as to which is the correct view since the Constitution ushered in a new legal order for South Africa and to the extent that the common law, within which the notion of sanctity of contract is rooted, is in conflict or inconsistent with the Constitution, or constitutional values, it must be modified or adapted to the extent necessary to remedy that conflict or inconsistency. To suggest otherwise is to undermine the rule of law and the concept of the Constitution as the supreme law. The writer further submits that one must decide carefully what is meant by waiver and whether it is a concept that is grounded only in the law of contract and must therefore always be regarded as a contractual undertaking or whether it is wider than the law of contract and includes for instance a unilateral, non-binding decision of a person with no intention to contract, not to act upon or exercise a particular right. Hopkins seems not to appreciate the importance of this distinction consistently throughout the course of his article. Hopkins states that it is easily conceived that some of the fundamental rights can be waived without too much controversy and gives the example of an accused person in a criminal action waiving her right to silence. It is to be noted in passing that, in contradistinction to what Hopkins said earlier, such waiver is not contractual. (In fact it may not even be waiver in the technical sense at all, merely a choice to exercise a constitutional right in a particular way.) He then goes on to ask which rights are inalienable and by implication incapable of being waived and second, under what circumstances can the other (lesser) rights provided for in the Bill of Rights, not be identified as inalienable, be waived by the right-holder? As an observation in passing, it is submitted that the question of the waiver of constitutional rights is much more complicated an issue than even Hopkins suggests. It impacts upon the fact that the Constitution contains a list of non-derogable rights in section 37 dealing with states of emergency and that the Constitution is at pains to stipulate that no Act of Parliament that authorises the declaration of a state of emergency and no legislation enacted or other action taken in consequence of a declaration may permit or authorise (a) indemnifying the state or any person in respect of any unlawful act (b) any derogation from section 37 of the Constitution or (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights to the extent indicated opposite that section in column 3 of the Table. It is worth noting that section 37(4) of the Constitution stipulates that any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that – (a) the derogation is strictly required by the emergency and that legislation is consistent with the Republic's obligations under international law applicable to states of emergency. The question of waiver of constitutional rights also impacts upon the interests of South African society in the observation and fulfilment of constitutional rights, upon questions of balancing of rights faced by the constitutional and other courts when dealing with disputes involving constitutional rights, upon questions of equity in contracting and imbalances of power between contracting parties and upon the fact that the Constitution represents a fundamental and irreversible break with the past, which included a system of common law used to enforce and uphold inequality between persons at many different levels and in many different ways and which often did not recognise the rights now enshrined in the Bill of Rights at the fundamental levels of human dignity and equality. Hopkins then goes on to categorise certain rights as inalienable such as the rights to life and human dignity and that any waiver which either directly or indirectly impairs the right-holder's right to life and /or dignity must be invalid and consequently unenforceable. It is submitted that it is unfortunate that these kinds of discussions take place only in the abstract and only in the light of extremes. They are thus fruitlessly simplistic. It is submitted that more often than not, constitutional rights are not wholly alienated or 'waived' but more usually, limited to varying degrees by circumstances and by the consent of the rightholder. It is further submitted that such limitation and consent thereto does not constitute waiver at all, whether contractual or otherwise, but is more often a balancing exercise in which an individual weighs up the relative importance to him or herself of the various rights in play in a particular situation. The tragic case of the surgical separation in July 2003 of 29 year old Iranian conjoined twins Laden and Laleh Bijani is one of the more dramatic examples of the polarisation of two 'inalienable' rights- the right to life and the right to human dignity requiring a choice between the two. The women said that they wanted to be able to see each other face to face

and to pursue independent careers, one as a lawyer, the other as a journalist. They had different interests, different hobbies, different personalities. Due to the fact that they were conjoined at the head one of them was always forced to choose between her interests, career aspirations and hobbies and those of the other. For example although Ladan wanted to be a lawyer, Laleh wanted to be a journalist. They could not go to different classes at university and so Laleh chose to study law with her sister. They decided to undergo dangerous surgery, quite literally putting their lives at risk, for the sake of their human dignity and freedom. If they had signed an indemnity clause in the contract in terms of which the surgery was undertaken, acknowledging the risks and the chances of their survival of the operation were poor but saying that they were adamant that the operation should proceed would this have been unconstitutional in the South African context? A different question is whether in undergoing the surgery they waived their right to life. It is submitted that there was no waiver of any rights. There was only an exercise of choice – a balancing of rights and a decision to prefer a particular right over the other. According to news reports this is pretty much what happened. According to the reports the critical component of the surgery was how to deal with the thick vein that drained blood from their brain to their hearts. Several teams of experts had previously declined to operate on the Bijani sisters because they shared this important vein, which meant that the chances of both sisters surviving the separation surgery was "almost nil," according to Madjid Samii, president of the International Neuroscience Institute in Hanover, Germany. Samii had evaluated possibilities for separating the Bijani sisters in as early as 1988, but had decided against the procedure because it was "virtually impossible." In 1997, another team of doctors in Germany also decided against surgery because they "thought one of the twins would die and the other would be at risk" since there was only one vein. The team that actually operated on Laleh and Ladan attempted to solve the vein problem by using the vein grafted from Ladan's inner thigh in her brain, and "reroute" the shared vein inside Laleh's head. But soon, Ladan's grafted vein congested, signalling failure for this plan. Associated Press reports:... surgeons Monday night considered whether to call off the rest of the operation and leave the twins joined or "continue with final stage of the surgery, which we knew would be very, very risky," [Dr.] Loo said. "The team wanted to know once again what were the wishes of Ladan and Laleh," Loo said. "We were told that Ladan and Laleh's wishes were to be separated under all circumstances."

<http://www.ipdx.org/news/000031.html> There was some debate concerning the ethics of carrying out the operation. Jonathan Glover, professor of medical law and ethics at Kings College London was quoted as saying that every operation carries risks and unless the odds against success are overwhelming it is right to present patients with the choice. He said: The risks were high in this case. I would want to know a lot about what they were told, whether they understood it and what their quality of life was like. Were they both in agreement or was one dominant and hustling the other into the operation? ...Normally it would not be desirable to operate where the risks were so high. But these were exceptional circumstances. If they both wanted it over a long period of time and were unwavering then I feel it was their life and they had the right to make that decision." Michael Wilks, chairman of the British Medical Association's ethics committee said, "You cannot take the view that doctors should not do things because they are risky. Otherwise there would be no heart transplants. On the other hand, it is fair for doctors to say they won't do something because they do not believe it is in the patient's best interests. It was a pretty stark choice these sisters faced." (Laurance J, 'Questions raised about risks of operation to separate twins'(<http://www.nzherald.co.nz/>) See also the report in Guardian Unlimited entitled 'Doctors Reject Claims they Acted Unethically'

(<http://www.guardian.co.uk/international/story/>) by Aglionby J in which Dr Benjamin Carson, a surgeon from Johns Hopkins University is reported to have said he was struck by the determination of the twins to lead separate lives come what may. He apparently said that "even recognising that the odds were not good, I think it was a worthy humanitarian effort". He said that it became clear in his early deliberations about the situation that they were going to seek separation and continue to do so until it occurred. He said he felt compelled to become involved because he wanted to make sure they had the best chance. Dr Carson is reported to have rated the chances of success at only 50%.

In his article on waiver of constitutional rights, Hopkins does not take into account decisions taken every day by patients dying of terminal illnesses to take painkilling medication in the certain knowledge that it will shorten their lives. This does not constitute a waiver or partial waiver of the right to life. It is simply the exercise of an inescapable choice between rights. Hopkins states that it is not his submission that all the rights in the Bill of Rights are/ought to be inalienable and incapable of waiver but, he says, taken in context any right may become inalienable if, by losing the right the right-holder simultaneously loses the right to have his or her dignity respected and protected. See further his discussion of 'the essential substance level' and 'the process of loss level'. He argues in closing that the validity of waivers is determined by the ordinary rules of contract law. He states that to summarise the position of the waiver of a constitutional right (other than an inalienable right) is to reiterate his argument that contracts are enforceable unless contrary to public policy. Contracts whose enforcement would entail the violation of a right in the Bill of Rights says Hopkins, are unenforceable because they are contrary to public policy. Bewilderingly, he then goes on to contradict himself by saying immediately thereafter that enforcement of such a waiver would mean in effect the limitation of a contractant's constitutional right – this can only be done if the requirements for the valid limitation of a constitutional right in the limitations analysis are met. This totally ignores the fact that the limitations analysis referred to in section 36 of the Constitution is conducted only with regard to law of general application since it is only in terms of law of general application that the rights in the Bill of Rights may be limited. He argues that only 'alienable rights' are capable of being justifiably limited. It is submitted that the categorisation of the rights in the Bill of Rights is not only unconstitutional but inadvisable due to the fact that they are complex, interdependent and interrelated concepts that do not lend themselves, like the Bijani twins, to separation. Indeed, without straining the metaphor unduly, one could safely say that attempts to regard the individual rights in the Bill of Rights as separate and

contract essentially purports to authorise the person in favour of whom the waiver is made to act in a manner that is contrary to constitutional values and principles. Can such an action (the waiver on the part of the one party to the contract) ever have the effect of justifying what is basically an unconstitutional act on the part of the other party to the contract? Waiver of rights conferred by a statute or by a court order, as opposed to those conferred by a contract, has been recognised as legally possible¹⁹⁵. The problem with waiver is that as soon as a waiver of a right has been communicated to the opposite party it is irrevocable; the right has perished¹⁹⁶. How can a constitutional right be allowed to perish? How can it be revived once it has perished based as it is on a statute which is the foundation for all other law in South Africa and in which it is recognised as fundamental?

7.7 Res Ipsa Loquitur and Strict Product Liability

The *res ipsa loquitur* rule can be of considerable value in the context of the law relating to the delivery of health services in the sense that it can contribute to the evening out to some degree of the imbalance in the provider patient relationship. The effect of the rule is that the mere fact of a particular occurrence warrants an inference of negligence where the occurrence is due to a thing or means within the exclusive control of the defendant. It is described in Hoffmann and Zeffertt's *The South African Law of Evidence*¹⁹⁷ as follows: "If an accident happens in a manner which is unexplained but which does not ordinarily occur

independent concepts could well be ultimately fatal to the Bill of Rights as a whole. See further the discussion on page 352 with regard to the maxim *volenti non fit injuria*.

¹⁹⁵ See *Wright v Wright* 1978 (3) SA 47 (E) in which the court stated: "Where there is no prohibition against waiver the general rule is that any person can enter into a binding contract to waive benefits conferred upon him by law for his sole benefit: *McDonald v Enslin* 1960 (2) SA 314 (O) at p 17. This applies also to a benefit or right conferred by statute: *Tompkins v Goltz* 1978 (1) SA 88 (W) at p 90H. I see no difference in principle between waiver of a right conferred by statute and waiver of one which is derived from a Court order. To my mind both waivers are competent and valid. The only complication in the case where the right is conferred by a Court order is that, as far as the party who must pay maintenance is concerned, the order must be obeyed until it is discharged: *Hadkinson v Hadkinson* (1952) 2 All ER 567. However, that is a matter between the Court and the party owing the obligation and it is for the latter to liberate himself from the terms of the order by obtaining its discharge."

¹⁹⁶ *Mutual Life Insurance Co of New York v Ingle* 1910 TPD 540 at p 550; *Glaser v Millward* 1950 (4) SA p 587 (W); *Mouli v Minister of Agriculture and Forestry, Transkei* 1992 (1) SA 688 (Tk)

¹⁹⁷ Hoffmann and Zeffertt 4th ed at p 551

unless there has been negligence, the court is entitled to infer that it was caused by negligence.” Unfortunately, although South African courts have been applying the rule for more than a century to various other delictual claims, they have not applied it to claims for medical negligence on the basis of the majority judgment in *Van Wyk v Lewis*¹⁹⁸ in which it was held that the doctrine was not applicable to such claims¹⁹⁹. It seems that they have declined to apply the doctrine to medical negligence cases only because in the medical context, the requirement that the occurrence must fall within the scope of the ordinary knowledge and experience of the reasonable man cannot be met. Van den Heever observes that until the 1924 judgment is successfully challenged and overturned, lower courts are bound to follow its approach because of the principle of *stare decisis*²⁰⁰ followed by the South African legal system²⁰¹. Van

¹⁹⁸ *Van Wyk v Lewis* 1924 AD 438

¹⁹⁹ Van den Heever P ‘Should *res ipsa loquitur* ‘speak for itself’ in medical accidents?’ *De Rebus* November 2002 <http://www.derebus.org.za/archives/2002/Nov/articles/medical.htm> The article is an extract from van den Heever’s unpublished doctoral thesis: “The Application of the Doctrine of *Res Ipsa Loquitur* to Medical Negligence Actions: A Comparative Survey” 2002 University of Pretoria

²⁰⁰ It is submitted that the matter is not quite as simple as this. In *Shabalala v Attorney-General, Transvaal, And Another Gumevede And Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) Cloete J noted that: “All counsel appearing before me submitted that where a Court is called upon to interpret the Constitution, that Court can depart from other decisions on the same point in the same Division if it disagrees with such other decisions. I cannot agree with this submission. It is settled law that a Court can only depart from the previous decisions of a Court of equivalent status in the same area of jurisdiction where it is satisfied that the previous decision is ‘clearly wrong’: *S v Tarajka Estates (Edms) Bpk en Andere* 1963 (4) SA 467 (T) at 470A; and cf *R v Jansen* 1937 CPD 294 at 297 and *Duminij v Prinsloo* 1916 OPD 83 at 84 and 85.” Cloete J held that: “I see no reason to depart from this salutary principle simply because the point at issue involves an interpretation of the Constitution. I appreciate that s 4(1) of the Constitution provides that ‘This Constitution shall be the supreme law of the Republic . . .’ and that s 4(2) provides that ‘This Constitution shall bind all . . . judicial organs of State at all levels of government’; but those provisions do not in my view mean that the established principles of *stare decisis* no longer apply. Such an approach would justify a single Judge departing from a decision of a Full Bench in the same Division because he considered the interpretation given to the Constitution by the Full Bench to be in conflict with the Constitution, with resultant lack of uniformity and certainty until the Constitutional Court, whose decisions in terms of s 98(4) bind, *inter alia*, ‘all judicial organs of State’, had pronounced upon the question.”

This said, however, he went on to state that: “On the other hand, the interpretation given to s 241(8) in this Division cannot be said to have established a long-standing practice. The general difficulty which I have, with respect, with the decisions in the Transvaal which have hitherto interpreted s 241(8) is that the learned Judges who gave those decisions appear to have applied ordinary principles of statutory interpretation and not to have given sufficient weight to ‘the spirit and tenor of the Constitution’ (Acheson’s case *supra* loc cit). I also believe that I am justified in departing from those decisions for the following additional reasons.”

In *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) the Constitutional Court held that neither the fact that under the interim Constitution of the Republic of South Africa Act 200 of 1993 the Supreme Court of Appeal had no constitutional jurisdiction nor that under the (final) Constitution of the Republic of South Africa Act 108 of 1996 it did not enjoy ultimate jurisdiction in constitutional matters warranted a finding that its decisions on constitutional matters were not binding on High Courts. It stated that it did not matter that the Constitution enjoined all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts were bound to accept the authority and the binding force of applicable decisions of higher tribunals. Kriegler J held that High Courts were obliged to follow legal interpretations of the Supreme Court of Appeal, whether they related to constitutional issues or to other issues, and remained so obliged unless and until the Supreme Court of Appeal itself decided otherwise or the Constitutional Court did so in respect of a

den Heever²⁰² submits that there are reasonable grounds for advancing a persuasive argument that the judgment in *Van Wyk v Lewis*²⁰³ should be overruled. He states that although support for applying the doctrine to medical negligence actions can also be found with reference to constitutional and other considerations, he attacks the judgment in *Van Wyk* on the basis of the following principles.

Van den Heever points out that from the record of the court proceedings, the evidence of Dr Lewis was that he had never been made aware that a swab had been retained and he sought to exculpate himself further by *inter alia* testifying that it was a difficult operation, that time was of the essence and it was in the

constitutional issue. However, the question of the binding effect of decisions of higher tribunals given before the constitutional era was a different issue, was not under consideration in the present case.

In *Mcnally v M & G Media (Pty) Ltd And Others* 1997 (4) SA 267 (W) Du Plessis J observed that there is nothing in s 35(3) to suggest that the High Court is not, as it has always been, bound by precedent. On the contrary, both 'application' and 'development' imply that what must be applied and developed must be left intact at the outset. He noted that the decision in *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) held that 'the Constitution could never have envisaged such a fundamental rejection of precedent so as to empower an individual Judge to overturn decades of precedent developed by the Appellate Division' but that 'the Constitution mandates each Court to examine the common-law rules afresh and if necessary to ensure that the content thereof accords with the principles thereof', an examination which has to be done 'cautiously after a careful examination of the existing principles which underpin the common-law rules and a comparison thereof with the key principles of Constitution'. With these dicta there can be agreement, but with the addition that authorities ordinarily binding may only be deviated from if it can truly be said that they no longer constitute precedent. In order to determine whether a particular judgment is a precedent, it is necessary carefully to examine the full *ratio* of that judgment.

In *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) Cloete J made the point that while the Constitution required that its provisions and values be given primacy over the rules of the common law, even when those rules had been invested with the highest stature of pre-constitutional judicial authority, where a superior Court had decided what the effect of the Constitution on established law was, whether substantive or procedural, a lower court had to follow that decision, notwithstanding the supremacy of the Constitution.

In *Afrox Healthcare Bpk v Strydom* fn 186 *supra*, the Supreme Court of Appeal held that as far as pre-constitutional decisions of the Supreme Court of Appeal regarding the common law were concerned, a distinction had to be drawn between three situations which could develop in the constitutional context. First, the situation where the High Court was convinced that the relevant rule of the common law was in conflict with a constitutional provision. In that instance the Court was obliged to depart from the common law as the Constitution was the supreme law. Secondly, the situation where the pre-constitutional decision of the Supreme Court of Appeal was based on considerations such as boni mores or public interest. If the High Court was of the opinion that such decision, taking constitutional values into account, no longer reflected the *boni mores* or public interest, the High Court was obliged to depart from the decision. Such a departure would not be in conflict with the principles of *stare decisis* as it had to be accepted that *boni mores* and considerations of public policy were not static concepts. Thirdly, the situation where a rule of the common law determined by the Supreme Court of Appeal in a pre-constitutional decision was not in direct conflict with any specific provision of the Constitution; the decision was also not reliant on any changing considerations such as boni mores; but the High Court was nevertheless convinced that the relevant common-law rule, upon the application of s 39(2) of the Constitution, had to be changed to promote the spirit, purport and object of the Constitution. In this situation, the principles of *stare decisis* still applied and the High Court was not empowered by the provisions of s 39(2) of the Constitution to depart from the decisions of the Supreme Court of Appeal, whether such decisions were pre- or post-constitutional.

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Van den Heever fn 199 *supra*

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Van den Heever fn 199 *supra*

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Van Wyk fn 198 *supra*

patient's interest to be stitched up and removed from the operating table as soon as possible. He did not conduct his defence on the basis that he had to terminate the operation before finding the missing swab because of the plaintiff's critical condition. He was not even aware that there was a swab missing and if there was he averred that it was the responsibility of the theatre sister employed by the hospital and for whom he was not vicariously liable. Van den Heever argues that a balanced, objective consideration and evaluation of the evidence should have led the court to conclude that the swab was retained post operatively by the patient established a *prima facie* case of negligence (correctly acknowledged by minority judgment of Kotze JA). He observes that the defendant was able to escape liability by tendering acceptable exculpatory evidence and that the facts of the case provide a valuable example of circumstances where the plaintiff should have been permitted to rely on the doctrine of proving only that the swab was post-operatively retained. The *prima facie* inference of negligence based on the retention of the swab would merely have required Dr Lewis to provide an exculpatory explanation of why it had been retained and that it had not been his responsibility to count the swabs and make sure that none were missing. Thus while the outcome of the case may have been no different for Dr Lewis, the court could have avoided setting an undesirable and unfortunate precedent concerning *res ipsa loquitur* that unduly sways the balance of power even more in favour of the provider in the provider-patient relationship. He notes that the finding that *res ipsa loquitur* could not find application in *Van Wyk* on the fact that the court would – in view of the notion that the medical layman knows very little, if anything about complex abdominal surgery – have had also to consider the surrounding circumstances provided by expert medical opinion and submits that the court made two fundamental errors in this regard. The first is that the retention of the swab clearly bespoke negligence, even from the medical layman's point of view. It cannot be argued with any confidence that the court would have had to consider expert medical evidence to be persuaded that the swab should not have been left behind in the patient's body. The court considered the surrounding circumstances only at that stage when the defendant

provided his exculpatory evidence. The majority of the court compounded this material misdirection by elevating a speculative defence to accentuate the complexities of abdominal surgery which had the effect of placing the occurrence outside the realm of the ordinary experience and common knowledge of the medical layman. Secondly the court misconstrued the expert medical evidence in disregarding the evidence that a swab cannot be left in a patient even if it is left behind in a life-threatening intra-operative situation. The evidence was that as soon as the patient was up to a further operation the swab would in any event have to be removed. It is submitted that the judgment in *Van Wyk v Lewis* was possibly partially a consequence of the mystique that surrounded surgeons and other members of the medical profession at that time²⁰⁴ and that the court incorrectly focused on the complexities of abdominal surgery rather than on the much more simple fact that a swab which could logically not have entered the patient's body in any other way, except though surgery, coupled with a history of recent surgery, had evidently been retained in the patient's body consequent upon such surgery. It does not take a medically qualified person to draw the obvious conclusions. Van den Heever submits that the approach of the court conflated a question of law (whether an inference of negligence can be drawn from the occurrence itself) and a question of fact (whether the facts, including the evidence of the defendant, or the absence of such evidence, support the inference of negligence.) He notes that it cannot seriously be contended that the leaving behind of a surgical instrument in the

²⁰⁴ In more modern times medical practitioners are seen rather more as ordinary human beings capable of ordinary human error and rather less as the demigods they were perceived to be in times past. See for instance 'The Practice of Autonomy: Patients, doctors, and medical decisions' *NEJM* Vol 340: 821-822 No 10 March 1999 in which it is stated: "The process of making medical decisions in the United States today is, in theory, a neat and well-defined affair. Authority and responsibility are shared, as mentally and emotionally capable adults choose voluntarily and intelligently from among various options whose relative risks and benefits their personal physicians have fully explained to them. Gone are the days of medical paternalism, when arrogant health care professionals misused their power to force particular treatments on dependent patients who blindly trusted them." See also Patterson J and Conroy B 'New Breed of Informed Patients Put Pressure on Healthcare providers' Cap Gemini Ernst & Young http://www.us.cgey.com/news/current_news.asp in which it is noted that research by Cape Gemini Ernst & Young has found that informed patients are increasing pressure on physicians. Almost one third of doctors surveyed had been asked by patients to prescribe drugs about which they themselves had insufficient knowledge. Boudreau D 'Patient Power' *The Novartis Journal* notes that there is a new breed of healthcare consumers who are no longer content to rely solely on their doctor's word. Van den Heever P, 'Res Ipsa Loquitur and Medical Accidents : Quo Vadis?' *De Rebus* June 1998 makes the point that recognition of the application of *res ipsa loquitur* in respect of medical accidents would promote equity between parties by accentuating patient interest instead of medical paternalism and serve to combat the so-called conspiracy of silence among doctors. <http://www.derebus.org.za/archives/1998Jun/articles/accident.htm>

body of a patient after the completion of an operation does not create a *prima facie* inference of negligence.

Van den Heever argues that in terms of section 9 of the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law. In this regard, he says it could be argued that the victim of a medical accident is at a procedural disadvantage because of the fact that patients are usually anaesthetised or under the influence of an anaesthetic agent when the accident occurs as a result of which they are completely in the dark as to what actually happened. He says that to permit the plaintiff to rely on *res ipsa loquitur* in these circumstances would level the playing fields between the plaintiff and the defendant to a certain extent by promoting procedural equality. He points out that section 34 of the Constitution also recognises the right to fairness in civil litigation which provides further constitutional motivation for the application of the doctrine to medical negligence actions²⁰⁵.

Van den Heever states that the approach of South African courts to the doctrine of *res ipsa loquitur* with regard to medical negligence actions is out of touch with modern trends and that the more patient-oriented approach in *Castell v De Greef*²⁰⁶ is in line with developments in other common law countries with regard to health care law in general and creates an environment where further traditional and outdated approaches such the approach adopted in *Van Wyk v Lewis*²⁰⁷ can be challenged successfully.

In the spirit of optimism it is thus appropriate to examine in further detail the manner in which the doctrine has been applied in other contexts by South African courts and to explore the central principles. In *Stacey v Kent*²⁰⁸ the court

²⁰⁵ He refers to Carstens P ‘Die toepassing van *res ipsa loquitur* in gevalle van mediese nalatigheid’ 1999 *De Jure* 19 in this regard.

²⁰⁶ *Castell* 1994 (4) SA 408 (C). Discussed in chapter nine dealing with the private sector.

²⁰⁷ *Van Wyk* fn 198 *supra*

²⁰⁸ *Stacey* 1995 (3) SA 344 (E) at p 352

stated the principle as follows: the rule gives rise to an inference, not a presumption, of negligence. The court is not compelled to draw the inference. At the end of the case the enquiry is where, on all the evidence, the balance of probabilities lies. If it is substantially in favour of the party bearing the onus on the pleadings, he succeeds; if not, he fails. Once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary; he must tell the remainder of the story, or take the risk of judgment being given against him. How far the defendant's evidence need go to displace the inference of negligence arising from proof of the occurrence depends upon the facts of the particular case. Mere theories or hypothetical suggestions will not avail the defendant; his explanation must have some substantial foundation in fact and the evidence produced must be sufficient to destroy the probability of negligence inferred to be present prior to the testimony adduced by him. There is, however, no onus on the defendant to establish the correctness of his explanation on a balance of probabilities. The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.

In *Macleod v Rens* the court expressed some reservations about the rule²⁰⁹ and in *Madyosi and Another v SA Eagle Insurance Co Ltd*²¹⁰ the Appellate Division

²⁰⁹ *Mcleod* 1997 (3) SA 1039 (E) at p 1048 where it stated: As a particular form of inferential reasoning, *res ipsa loquitur* requires careful handling. It is not a doctrine, as it is sometimes referred to. It propounds no principle and is therefore strictly speaking not even a maxim. What it does do is pithily state a method of reasoning for the particular circumstance where the only available evidence is that of the accident. It boils down to the notion that in a proper case it can be self-evident that the accident was caused by the negligence of the person in control of the object involved in the accident. As such it is not a magic formula. It does not permit the Court to side-step or gloss over a deficiency in the plaintiff's evidence; it is no short cut to a finding of negligence: these are real dangers in the application of the expression. It seems to tempt Courts into speculation. Expressions such as 'in ordinary human experience', 'common sense dictates', and 'obviously', which are regularly employed in reasoning along the lines of the maxim, sometimes only serve to disguise conjecture. Moreover, there is a risk of false syllogism inherent in reasoning that, as the accident would ordinarily not have occurred without negligence on the part of the driver of the vehicle, the defendant, having been the driver, was therefore negligent. Finally, reasoning along the lines of *res ipsa loquitur* leads to the somewhat unsatisfactory finding that the defendant was negligent in some general or unspecific manner."

²¹⁰ *Madyosi* 1990 (3) SA 442 (A)

stated that: In our law the maxim *res ipsa loquitur* has no bearing on the incidence of proof on the pleadings, and it is invoked where the only known facts, relating to negligence, are those of the occurrence itself. It quoted from *Sardi and Others v Standard and General Insurance Co Ltd*²¹¹ where the court stated that:

“At the end of the case the court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probabilities, just as the court would do in any other case concerning negligence. In this final analysis, the court does not adopt the piecemeal approach of (a) first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b) deciding whether this has been rebutted by the defendant's explanation.”

The case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*²¹² involved the extent to which a manufacturer can be strictly liable in delict for unintended harm caused by defective manufacture of a product where there is no contractual privity between the manufacturer and the injured person. The appellant in the first appeal underwent shoulder surgery at a private hospital conducted by a trust. The surgical procedure involved administration of a local anaesthetic called Regibloc Injection ('Regibloc) which was manufactured and marketed by the respondent company. As an aftermath of the surgery the appellant was left with necrosis of the tissues and nerves underlying the site of the operation, and paralysis of the right arm. In an action for damages for personal injury which the appellant instituted in the Cape Town High Court, she sued the respondent and the trustees of the trust. She alleged, among other things, that her injury and its sequelae were caused by Regibloc. A virtually identical suit was brought by the appellant in the second appeal, another alleged victim of Regibloc. The two actions were consolidated. One of the causes of action the appellant relied on was that the Regibloc administered to her was defective as a result of negligent manufacture by the respondent. However, that was pleaded only in the alternative. Her main claim was based simply on the allegation that, contrary to the respondent's duty as manufacturer (obviously

²¹¹ *Sardi* 1977 (3) SA 776 (A) at p 780D - E and G – H

²¹² *Wagener* 2003 (4) SA 285 (SCA)

meaning legal duty in the delictual sense) the Regibloc administered was unsafe for use as a local anaesthetic because it resulted in the necrosis and paralysis. The court said that in deciding the issues raised by the appeal it must be accepted, as regards the facts, that the Regibloc in question was manufactured by the respondent, that it was defective when it left the respondent's control, that it was administered in accordance with the respondent's accompanying instructions, that it was its defective condition which caused the alleged harm and that such harm was reasonably foreseeable. It must also be accepted, as far as the law is concerned, indeed it was not disputed, first, that the respondent, as manufacturer, although under no contractual obligation to the appellant, was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from defectively manufactured Regibloc being administered to the first appellant and, secondly, that that duty was breached. In the situation pleaded there would therefore clearly have been unlawful conduct on the part of the respondent. The essential enquiry was whether liability attaches even if the breach occurred without fault on the respondent's part.

The court observed that if there were strict liability, it would not be open to a manufacturer to rely on proof that it had taken all reasonable care, but then one must ask what real difference that is likely to make. It stated that once there is *prima facie* proof, direct or circumstantial, that the product was defective at the various times material to the action, it is virtually inevitable that *res ipsa loquitur* will apply and require an answer from the manufacturer. It said that whilst the maxim comes into play only if the plaintiff's evidence is such that it can be said that the event (in this case, for example, the necrosis) would not ordinarily occur without there having been negligent manufacture (involving, perhaps, some scientific explanation in addition to the mere fact of the injury) it is perfectly conceivable that the Courts may develop reasons for being readier in some cases of alleged defective manufacture to draw the necessary *prima facie* inference of negligence where expert evidence is extremely difficult for the plaintiff to acquire, and perhaps even more so where administration of a

substance made to be applied to the human body has apparently had an effect quite contrary to the manufacturer's stated aim. If the law requires development to cater for this particular type of suit, then there would be the need for what is but an incremental shift and not a complete rejection of long-standing principle. The court pointed out that the question of that type and degree of development did not arise in the present case but said that it may arise if, and when, the litigation proceeded on the alternative claim. It stated that the same considerations pertain to the possibility that it might well be thought right in future for reasons of policy, practice and fairness between the parties to place the onus on the manufacturer to disprove negligence but noted that this was something for another day. The court ultimately expressed the view that it was the applicability of *res ipsa loquitur*, perhaps even in an extended way, and the possibility of a reverse onus, which militated against the conclusion that the Aquilian remedy was insufficient to achieve protection of the claimant's right in this kind of litigation.

The Supreme Court of Appeal refused to allow strict product liability in this case. It was of the view that the subject was more suited to legislation²¹³. Some of the objections it raised to the imposition of such liability were-

- It is difficult to understand how the Courts could logically, fairly or in principle confine the imposition in this way, whether one looks at the matter from the standpoint of the claimant or that of the manufacturer. Why should only the victims of defectively made medicines have the remedy or, conversely, why should their producers be the only manufacturers strictly liable?

²¹³ *Waegener fn 212 supra* at p 298 Howie P stated that: "What I find significant about all the arguments in favour of strict liability is that, virtually without exception, they would hold good were imposition to be by the Legislature. They do not begin to get to grips with the question which forum it should be. One finds in Neethling, Potgieter and Visser the statement that '(u)ltimately, products liability ought to be based on liability without fault'. The authors then, in support, quote from the article by J C van der Walt ['Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte' 1972 *THRHR* 224 at p 247 - 8, p 249] who in turn provides reasons why there should be strict liability but does not say why its imposition should be judicially achieved." [footnotes omitted]

- One of the difficulties which could arise were the Courts to impose strict liability is this. A decision in favour of the appellants would not merely have prospective effect. A finding that strict liability attaches to the respondent would, in effect, declare what the law on this point has always been even if it has never before been so stated. Accordingly, a manufacturer could now, by reason of such declaration, become strictly liable for a product defectively made some years ago in respect of which, absent proof of negligence, it stood in no jeopardy of an adverse judgment. There is no procedural mechanism available by which to avoid that unjust result if the imposition of strict liability were to be by judgment. Were that imposition to be legislative, the relevant statute would not operate retrospectively on a matter of substantive law.
- Howie P pointed out that it was not without significance that in other parts of the world, the imposition had been by way of legislation. The court said that it was no doubt recognised in the countries concerned that the subject of product liability is boundless as regards the possible structures and codes that can be put in place, that the investigation and debate which is part and parcel of the democratic process are the best measures by which to canvass the opinions of all interested parties and to produce a comprehensive set of principles, rules and procedures, all in force from one and the same date. By contrast, said the court, the result sought by the appellants would merely pertain to one type of product and only to manufacturers of such products. The fate of manufacturers of other products or of other articles, the fate of manufacturers of ingredients (as opposed to the manufacturers of entire medicines) and of components, would have to depend on the uncertain and unpredictable frequency with which future disputes spawned cases and those cases spawned judgments.

In the context of health service delivery in the public sector the court in *Pringle v Administrator, Transvaal*²¹⁴ refused to apply the principle of *res ipsa loquitur*, stating that it was clear on the authorities that the onus of proving that the doctor was negligent in one or more of the respects alleged in the particulars of claim rests throughout on the plaintiff. Blum AJ held that the maxim could only be invoked where the negligence alleged depends on absolutes. In the instant case the initial problem was caused by the perforation of the superior vena cava. If the evidence showed that by the mere fact of such perforation, negligence had to be present, then the maxim would have application. He noted that no such evidence had emerged and that since the question of whether negligence was present or not depends upon all the surrounding circumstances, this made the maxim totally inapplicable in cases such as *Pringle*.

In the context of health service delivery in the private sector Marais JA observed in *Broude v McIntosh and Others*²¹⁵ that the trial Judge concluded that the evidence did not establish on a balance of probabilities that the facial nerve was severed during operation. That conclusion, said Marais JA, rested upon a number of subsidiary findings and considerations which, if correct, amply justified it. It was clear that the facial nerve must have sustained some injury during the operation but severance could not be deduced solely by invoking the *res ipsa loquitur* doctrine because there were other potential causes of damage to the nerve which did not entail severance. In *Blyth v Van Den Heever*²¹⁶ counsel for the respondent argued that it is trite law that a practitioner may be negligent in making a wrong diagnosis, but a wrong diagnosis is not necessarily a negligent diagnosis. It may be due to a reasonable error of judgment²¹⁷. He said that triers of fact may tend, albeit unconsciously, to apply the maxim *res ipsa loquitur* to a situation such as the present case where plaintiff has suffered a major vascular catastrophe after being treated by defendant but that such an

²¹⁴ *Pringle* 1990 (2) SA 379 (W)

²¹⁵ *Broude* fn 26 *supra*

²¹⁶ *Blyth* 1980 (1) SA 191 (A)

²¹⁷ See *Mitchell v Dixon* 1914 AD at p 526; *Dube v Administrator, Transvaal* fn 156 *supra* at p 268A.

approach would not be warranted and should be guarded against. The court did not apply the maxim in this case. It also refused to apply the maxim in *Mitchell v Dixon*²¹⁸ stating that that the mere fact that the accident occurred was not in itself *prima facie* proof of negligence.

Strauss²¹⁹ observes that by a slender majority of two to one the Appeal Court in *Van Wyk v Lewis*²²⁰ held in effect that the rule of *res ipsa loquitur* does not apply to medical situations. He observes that generally speaking in the law of negligence “this rule is a great boon to the plaintiff but that even where a swab is post-operatively sewn up inside a patient, there is no presumption of negligence on the part of the doctor”. Strauss himself appears to have strongly criticised the judgment²²¹ but observes that it has nevertheless stood ever since and that in *Pringle*²²² the court once again held that there was no room for the application of *res ipsa loquitur* in medical negligence cases. He notes that in the USA the maxim has gained a strong foothold and has become a powerful tool in the hands of lawyers acting for dissatisfied patients. It has developed into a ‘rule of sympathy’ for the patient and been used to combat the ‘conspiracy of silence’ among doctors.

On the subject of strict liability in respect of products, Strauss²²³ comments that proof of negligence may be facilitated by the principle of *res ipsa loquitur*. He notes that the principle has been applied in South Africa for negligent services²²⁴ involving an exploding boiler in a power station and where a woman’s hair was scorched during a “perm” and that the liability of the person in control of the defective object was at issue in these two cases rather than the manufacturer.

²¹⁸ *Mitchell* fn 217 *supra*

²¹⁹ Strauss fn 34 *supra* at p245. See also Strauss SA ‘The Physician’s Liability For Malpractice: A Fair Solution to the Problem of Proof’ 1967 *SALJ* 419

²²⁰ *Van Wyk* fn 198 *supra*

²²¹ Strauss SA and Strydom MJ *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 279. See also Birrer C *The Medical Cop-out* (1976) p 118-119 to whom Strauss (fn 34 *supra*) refers in footnote 10 on p 245

²²² *Pringle* fn 214 *supra*

²²³ Strauss fn 34 *supra* at p 264

²²⁴ *Clair v Port Elizabeth Harbour Board*, *Kennedy v The Same* 5 EDC 311 (1887) and *Mitchell v Maison Libson* 1937 TPD 13.

Strauss points out that other systems of law have moved away from the notion of fault liability for defective products and have introduced the concept of strict liability as regards the manufacturer. He notes that this is a form of consumer protection since the manufacturer in marketing his product assumes the role of insurer of consumers who are harmed by the product. Strauss observes that it may be extremely difficult for a patient who alleges that a prescribed drug was defective to prove that his damage is attributable to the negligence of the manufacturer and that the doctrine of *res ipsa loquitur* may perhaps to a certain extent alleviate the burden of proof for the patient. He states that the apparently simply issue of proving a causal connection between the use of the drug and the patient's injury in itself may, however, still present the patient with an insurmountable obstacle.

Neethling *et al*²²⁵ observe that in *Bayer South Africa (Pty) Ltd v Viljoen*²²⁶ the Appellate Division was not in principle opposed to the application or *res ipsa loquitur* where policy considerations justify it. They state, however, that Milne JA, unlike Anglo-American law, wanted to restrict the doctrine to its "normal" application, that is, that it is only applicable in instances where the facts of the case give rise to an inference of negligence. They suggest that the *res ipsa loquitur* influence of negligence should at least be made where a consumer process that he was prejudiced by a defective (unreasonably dangerous) product and that the product was in this state when the manufacturer abandoned his control over it. Ultimately, they say, product liability ought to be based on liability without fault²²⁷. They refer to the statements of van der Walt²²⁸ to the effect that the acceptance of strict liability (non-fault based) in the case of product liability can be justified on the basis of various factors: the public interest in bodily and psychological integrity of a person requires the highest

²²⁵ Neethling *et al* fn 18 *supra* at p 224

²²⁶ *Bayer* 1990 (2) SA 647 (A) 661-662

²²⁷ Neethling *et al* fn 18 *supra* at p325

²²⁸ Van der Walt JC 'Die Deliktuele Aanspreeklikheid van die Vervaardiger vir Skade Berokken deur Middel van sy Defekte Produk' 1972 *THRHR* 224 at p242- 243

degree of protection against defective consumer goods; the manufacturer creates through marketing and advertising the belief in the public mind that his product is safe; strict liability serves as an incentive to ensure the utmost degree of care; the manufacturer is from an economic perspective, best able to absorb the risk of damages and to distribute it through price increases and insurance.²²⁹

Strauss refers to a point made by de Jager that the mere fact of registration of a medicine under the Medicines and Related Substances Act will probably be regarded by South African courts as a strong indication that the manufacturer has not been negligent in the design of his product. "After all extreme caution was built into the statutory machinery to ensure appropriate warnings and directions regarding their ultimate use". He notes that de Jager²³⁰ has indicated that manufacturers' liability for injuries to patients caused by defective medicines will probably be limited to the following types of cases:

- Where there has been negligent deviation from the formula submitted for official registration;
- When the manufacturer has failed to warn against adverse side-effects, or to give directions for use as prescribed by the Medicines Control Council;
- When registration of a medicine was cancelled and the manufacturer has failed to withdraw his product from the market within a reasonable time.

It is submitted that de Jager's suggestions are overly simplistic for a number of reasons. Firstly, product liability need not necessarily arise only from the *design* of the drug. This would involve largely patented drugs since generic drugs are not 'designed' to the same degree as much of the development work has already been done by the erstwhile patent holder. The generic drug market is a highly

²²⁹ Loosely translated from Afrikaans by the writer. The original reads as follows: 'Die aanvaarding van 'n skuldlose aanspreeklikheid in geval van produkte aanspreeklikheid kan deur verskeie faktore geregverdig word: die openbare belang in die fisies-psigiese welsyn van die mens vereis die hoogste mate van beskerming teen defektiewe verbruiksgoed; die vervaardiger skep deur sy bemarking en advertensie die vertroue by die publiek dat sy produk veilig is; die streng aanspreeklikheid dien as aansporing om die uiterste mate van sorg aan die dag te lê; die vervaardiger is, vanuit ekonomiese oogpunt gesien, die beste in staat om die skadelas te absorbeer en te versprei deur prysverhoging en versekering."

²³⁰ De Jager FJ "Defective Pharmaceutical Products" 1980 *Businessman's Law* 234

significant sector within the wider pharmaceutical manufacturing environment. There may not be negligent deviation from the formula of the drug so much as negligence in the manufacturing process itself so that certain active ingredients are for instance inadvertently rendered inactive, or that specific storage conditions for the drug, such as refrigeration at a specific temperature, are not followed.

Secondly, no matter how well designed the drug is, manufacturing processes can and do go wrong. Accidents happen on the production line. Contamination of raw materials can occur. The raw materials can be obtained from an inferior source. Insufficient quality guarantees may be obtained by the manufacturer from the supplier of the active pharmaceutical ingredients. It is in recognition of these dangers that the medicines control legislation in South Africa requires manufacturers to comply with what is commonly referred to as GMP or “Good Manufacturing Practice”. This comprises a set of fundamental rules that are essential for the manufacture of safe and effective medicines. The system of licensing of manufacturers of medicines in South Africa requires them to undergo inspections to ensure that they observe GMP. It may happen though that an inspection does not take place at the required time for some reason or that although GMP is generally followed in the manufacturing process there is a lapse on the part of the manufacturer. The GMP inspectors do not maintain a constant watch on the activities of every manufacturer in South Africa. Logistically speaking this is not feasible.

Thirdly there is the question of the indication for which the drug is registered in South Africa. It often happens that drugs are registered for more than one indication in other parts of the world or that new indications for existing drugs are subsequently discovered. The registration process requires approval of registration for specific indications of the drug and not just blanket registration for every possible indication. For example Nevirapine was a registered drug in South Africa for a while before it was registered in respect of the prevention of

mother to child transmission of HIV. It had been registered earlier in respect of other indications but not the prevention of mother to child transmission of HIV because conclusive clinical trial results with regard to this particular indication were still awaited. If a drug is marketed by a manufacturer as being suitable for use for an indication for which it was not registered it will not help the manufacturer to argue that it was registered for another indication and that it is therefore safe for the unregistered indication. Product liability could and, it is submitted, should arise in such a situation.

Fourthly, manufacturers often themselves conduct clinical trials on drugs they have researched and developed. There is clearly potential for a conflict of interests in such circumstances and there may be significant pressures to demonstrate that the drug does what it has been designed to do rather than to conduct objective and scientifically unbiased tests as to what the drug in fact does. There are of course rigorous standards that are set worldwide for clinical trials but it is not impossible for things to go wrong in a clinical trial, negating the results or findings of the trial. Clinical trials are themselves extremely expensive exercises. If an expensive clinical trial fails to meet the strict standards required for clinical trials it is worthless and there is the distinct possibility that some corporate executive's or senior researcher's head will roll. It does not take a psychologist intimately acquainted with human nature to appreciate the possibilities in such a situation. Liability on the part of a manufacturer could arise as a result of defective information obtained from a clinical trial that was presented to the medicines control authority when application was made for the drug to be registered. Facts can be concealed from the medicines registration authority and it is not always possible, despite all reasonable attempts, for that authority to detect defects in clinical trials that in most instances have been conducted on the other side of the world. Consequently the mere fact that a drug has been registered as safe and effective by the Medicines Control Council would not and it is submitted, should not necessarily preclude a claim on the basis of product liability against the

manufacturer. The extreme caution that was built into the medicines registration process is no guarantee of the same extreme caution in the manufacturing process occurring subsequent to registration.

It is submitted that the extreme reluctance of South African courts to apply the principle of *res ipsa loquitur* is based partly on an apparently fairly widespread misunderstanding of its effect in a delictual action and partly on a reluctance to even appear to be moving away from fault based liability. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* the court seemed to prefer the application and even extension of the *res ipsa loquitur* principle to the imposition of strict liability on the manufacturer of a product as being the lesser of two evils.²³¹ With due respect to the learned judge, the real questions in the context of health services delivery appear to be –

- (a) the likelihood of there ever being factual circumstances in which the maxim could be applied in the light of the view of the court in *Van Wyk v Lewis*²³² and more recently in *Pringle*²³³ that the maxim could only be invoked where the negligence alleged depends on absolutes; and
- (b) the chances of the courts being able to bring themselves to apply it in this specific context;

let alone the question of the further development of the maxim so as to resolve broader issues of product liability.

²³¹ *Wagener* 2003 (4) SA 285 (SCA). Howie P stated at p294 : "As regards the problem of proving fault, counsel for the respondent pointed out that even if strict liability were imposed a plaintiff would still have to prove that the product concerned was defective when it left the manufacturer. If that were indeed established, then application of *res ipsa loquitur* would suffice to place the manufacturer on its defence and, in effect, compel an exculpatory explanation, if one existed. In the circumstances it was submitted that proving fault was really no more difficult than proving defectiveness.

²³² *Van Wyk* fn 198 *supra*

²³³ *Pringle* fn 214 *supra*

Thus far, South African courts seem to be oblivious to the obvious²³⁴ imbalance in the provider-patient relationship and there is not yet even any certainty, when these relatively rare cases do come up for decision as to whether they will apply themselves to the process of judicial reasoning required by the Constitution so as to take into account the possibility of the development of the law in such a way as to lend weight, as van der Walt suggests, to the constitutional rights to bodily and psychological integrity. The predilection of the court in *Pringle* to apply the doctrine only where the alleged negligence depends on absolutes does not take into account that where the alleged negligence is so dependent upon absolutes it is probably a lot easier for the defendant to produce evidence of negligence in the normal way and the application of the doctrine in such circumstances is likely to be unnecessary in many instances. Part of the reason

²³⁴ Russell Levy, Joint Head of Leigh Day & Co's Clinical Negligence Department, addressed a seminar in the House of Commons on the 6th November 2002 on the subject of how proposed reforms to clinical negligence compensation will impact on patients. He expressed the obvious as follows: "Lord Woolf in his final report to the Lord Chancellor on the civil justice system in England and Wales had the following to say in the chapter concerning medical negligence: 'It would be difficult to exaggerate the effect on potential claimants of the problems that they encounter in obtaining information, coupled with the knowledge that defendants have easy access to medical information and opinion.' This reflects the fact that the relationship between a doctor and a patient is not an equal one. It is natural for any patient to feel apprehensive about dealings with healthcare professionals in relation to his or her health. It is also natural that patients will place a great deal of trust in the skill and ability of the healthcare professionals treating him or her. The new Civil Procedure Rules start with the overriding objective of enabling the Court to deal with cases justly. In defining such justice the first principle laid down is ensuring that the parties are on an equal footing. The question of who bears the burden of proof was not considered by Lord Woolf. Presumably this was because the burden of proof has traditionally been borne by a claimant and, without thinking further about it, lawyers regard it as axiomatic that this should be so. This blind acceptance that it is somehow right that a claimant should bear the burden of proof means that the resulting inequality in clinical negligence cases passed unnoticed. A modern society demands a modern approach to dispute resolution. It is high time that we examined critically what we currently take for granted and challenge orthodox assumptions where they entrench inequality. A good place to start would be by considering why it is that although one party has the vast bulk, if not all, of the knowledge and information relating to a clinical negligence case as well as the specialist expertise required to interpret that knowledge and information, the burden of proving the case is on the other party. This is on top of the fact that the party without the information and expertise is by definition an individual patient who has been injured or the family of a dead patient. The other party is by contrast an institution or (for general practitioners and in cases of private medicine) is represented by an experienced defence organisation or insurer." He proposes as an alternative a formula for the shifting of the burden of proof along the following lines " An injury to or unexpected death of a patient that occurs in the context of a duty of care relationship with a healthcare provider gives rise to an entitlement to compensation unless the healthcare provider can prove that the injury or death was not caused by a breach of that duty" It is of interest to note that he states that even the benefit of the long-established legal maxim of *res ipsa loquitur* is at present effectively denied to patients in clinical negligence cases. He refers to the case of *Ratcliffe v Plymouth & Torbay Health Authority & Another* (1998) 4 *Lloyds Rep Med* 162 where the Court of Appeal held that despite the judge finding that a spinal anaesthetic was the cause of a patient's neurological damage, he was entitled to conclude that he simply did not know what had happened, that *res ipsa loquitur* was not a principle of law and did not relate to or raise a presumption, and that the courts would be doing the practice of medicine a considerable disservice if, in such a case, because a patient has suffered a grievous and unexpected out-turn from a visit to hospital, a careful doctor was ordered to pay him compensation as it he had been negligent. Levy makes the point that this presumably well intentioned statement highlights the inequity of the position: because the patient was unable to discharge the burden of proof, even though he was asleep at the time the injury occurred, the Court of Appeal felt it right to assume that the doctor was careful rather than to compensate the patient despite the finding of fact that the spinal anaesthetic was the cause of the wholly unexpected adverse outcome.
<http://www.leighday.co.uk/upload/public/attachments/reversingtheburdenofproof.doc>

for the transfer of the evidentiary burden to the defendant by *res ipsa loquitur* is precisely that the plaintiff does not necessarily know what exactly happened and is not necessarily even in a position to identify such ‘absolutes’. If the object of the maxim is to give the patient the benefit of the doubt then how can one turn around and say that it should only be applied in circumstances where there can be little doubt to begin with? It is submitted that such an extremely narrow approach defeats the object of the maxim to a large degree since one is effectively saying that the circumstances of the case must be such that there is no significant doubt that there was negligence due to the presence of the ‘absolutes’ in question.

Given the fact that the maxim only shifts an evidentiary burden, as opposed to the plaintiff’s entire burden of proof, such a narrow approach in circumstances such as the provider-patient relationship in which there is a clear imbalance in favour of the provider is hardly justifiable. It is furthermore of some concern to note that the court in *Wagener* implied that an extended *res ipsa loquitur* application could be a viable substitute for strict liability. *Res ipsa loquitur* does not exclude the element of fault from a delictual claim. It simply translates the evidentiary burden of proving fault from the plaintiff into an evidentiary burden of proving an absence of fault onto the defendant. It creates a rebuttable presumption of negligence, regarding a specific fact or circumstance, on the part of the defendant²³⁵. Since the defendant, unlike the plaintiff, is in full possession of all of the facts, if he was not negligent this should not be difficult to prove. It

²³⁵ Richmond and Quinn a law firm in Alaska, point out in their *Litigation Overview*, that the doctrine of *res ipsa loquitur* is “a bridge dispensing with the requirement that a plaintiff specifically prove breach of duty, once that duty and proximate cause have been established” and applies only when an accident ordinarily does not occur in the absence of negligence. *State Farm Fire Cas. Co v Municipality of Anchorage* 788 P.2d 726, 730 (Alaska 1990); *Widmyer v Southeast Skyways, Inc* 584 P.2d 1, 10 (Alaska 1978); *Falconer v Adams*, 974 P.2d 406, 414 (Alaska 1999). They observe that the doctrine of *res ipsa loquitur* permits but does not compel an inference of negligence from the circumstances of an injury and that the doctrine should be applied when (1) the accident is one which does not ordinarily occur in the absence of someone’s negligence; (2) the agency or instrumentality is within the exclusive control of the defendant; and (3) the injurious condition or occurrence was not due to any voluntary action or contribution on the part of the plaintiff. They state that by shifting the burden of the production of evidence to the defendant without relieving the plaintiff of the burden of proof, the doctrine makes recovery possible where circumstances render proof of the defendant’s specific act of negligence impracticable and the defendant is the party in the superior if not the only position to determine the cause of an accident. *Ferrell v Baxter* 484 P.2d 250, 258 (Alaska 1971). They make the point that uncontradicted proof of specific acts of negligence which completely explain the circumstances and cause of the accident renders the doctrine superfluous and inapplicable. (<http://www.richmondquinn.com>)

by no means relieves the plaintiff of the ultimate burden of proving his case including the presence of fault on the part of the defendant. Strict liability, on the other hand, does exactly that. It is based on a public policy point of view that favours the consumer for the reasons mentioned by van der Walt²³⁶. There is a real danger, given the apparent lack of understanding in judicial circles of the import and application of *res ipsa loquitur*, that the two concepts will be become conflated and ultimately, once they have been pared down to mere shadows of their former selves, excised from the South African legal system with the razor of conservatism that presently seems to be a favourite logical tool of the Supreme Court and some of the divisions of the High Court in South Africa.

The maxim of *res ipsa loquitur* is not even remotely in the same league as strict (no-fault) liability in favouring the plaintiff. The one operates squarely within a fault-based framework whereas the other is completely outside of it. Judgments that suggest that the one, even in an extended form, could become a substitute for the other are problematic and unfortunate. It is submitted that the fixation of South African courts on fault, their too frequent lack of cognisance of constitutional values and principles and their failure to take seriously the constitutional injunction to develop the common law in accordance with the rights in the Bill of Rights is nowhere more clear²³⁷ than in the reasoning of Howie P in *Wagener*.

The circumstances of the case could not have been simpler. The Supreme Court of Appeal at the outset of its judgment stated that it must be accepted, as regards the facts, that the Regibloc in question was manufactured by the respondent, that it was defective when it left the respondent's control, that it was administered in accordance with the respondent's accompanying instructions, that it was its defective condition which caused the alleged harm and that such

²³⁶ Van der Walt fn 228 *supra*

²³⁷ Except possibly the judgments in the cases of *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) and *Afrax Healthcare Bpk v Strydom* fn 186 *supra*

harm was reasonably foreseeable. It must also be accepted, said the court, as far as the law is concerned, indeed it was not disputed, first, that the respondent, as manufacturer, although under no contractual obligation to the appellant, was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from defectively manufactured Regibloc being administered to the first appellant and, secondly, that that duty was breached²³⁸. The court opted for the view that the existence of instances of strict liability in the law of delict was attributable to special policy considerations obtaining in those cases. Their existence did not advance appellants' case. This conclusion appears to have been reached without any examination of public policy as reflected in the Constitution, specifically with regard to the right to freedom and security of the person including the right to bodily and psychological integrity and the right to human dignity and the provisions of section 39(2) of the Constitution. The court rejected the case of *Kroonstad*²³⁹ as precedent using the compartmentalization argument²⁴⁰ and demonstrating once again the objection that this argument

²³⁸ This was on the strength of the judgment in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) which was hailed as opening the way for strict product liability in South African law by Neethling J and Potgieter JM 'Die Hoogste Hof van Appel laat die deur oop vir strikte vervaardigersaanspreeklikheid' 2002 TSAR 582. Unfortunately it is a door that the same court in Wagener, effectively shut firmly at the first available opportunity.

²³⁹ *Kroonstad Westelike Boere Ko-operatiewe Vereeniging Bpk v Botha and Another* 1964 (3) SA 561 (A)

²⁴⁰ The predilection of the courts for the argument that one cannot allow elements or aspects of one area of law to 'contaminate' another is a purist based approach that takes insufficient cognisance of underlying policy considerations that are common to the legal system as a whole. It is submitted that particularly under South Africa's constitutional legal dispensation this argument is even less valid than it may have been in earlier times since it elevates form over substance often without offering any rational explanation for doing so. Whilst legal certainty is important and the value of *stare decisis* is not disputed, the courts themselves have acknowledged that a system which relies totally on precedent has its problems. It is submitted that when there is scant legal precedent upon a particular point the courts are finally forced to return to the wellspring of law in any society – public values and public policy. The building blocks of the law that has gone before or in another related area are taken into consideration and their logic is used to forge solutions to unprecedented cases. This is as it should be if the legal system as a whole is to be a credible and internally consistent framework. However the question in terms of the South African constitutional order is whether the courts should not be more actively considering past precedents in the light of constitutional values and principles in order to ascertain whether or not the former should still hold. After all, law that is inconsistent with the Constitution is invalid. It is not advisable for a court to superficially and without detailed analysis arrive at a conclusion that a right reflected in the Bill of Rights is the same as a similar right that is reflected in the common law – for example the right to bodily and psychological integrity. Whilst it is likely that in most if not all cases there will be some overlap it is not advisable or desirable for the future development of the South African law in a manner that is consistent with the Constitution to assume the extent of that overlap without explicitly exploring the possibility of potential differences. A more thoughtful and enquiring judiciary could greatly benefit and facilitate the constitutional development of the legal system in South Africa at present.

It is of some significance that even prior to the Constitution, in *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) the Appellate Division observed that: "Neither the Roman-Dutch law nor any other binding source of law deals specifically with this point. What approach then must this Court adopt? As to that, I agree with the following passage in *The South African Legal System and its Background*, by H. R. Hahlo and Ellison Kahn, p 304: "If there is no Roman-Dutch rule which appears to the court to be applicable to the case... how is the court, bereft of binding legislation, precedent and modern custom, to give a reasoned

values legal form over substance. Howie P stated that “contract and delict, being quite separate branches of the law, have their own principles, remedies and defences. One cannot, because of the absence of contractual privity between the injured party and the manufacturer, simply graft warranty liability onto a situation patently governed by the law of delict.” The court emphasised the binding force of precedent instead of conducting a detailed and comprehensive analysis of public policy and the relevant constitutional rights and values²⁴¹. It chose rather to accept that the right as embodied in the Constitution was the same as that recognised at common law and that since the common law had always required fault as an essential element of a successful claim, the position could be no different at this stage²⁴².

Howie P unconvincingly dismissed the judgement in *Loriza Brahman en 'n Ander v Dippenaar*²⁴³ with the sweeping statement that: “As regards the

judgment? Dealing with this problem, van der Keessel in his *Dictata* approvingly quotes Grotius' statement to the effect that ‘wanneer daar in bepaalde sake geen wetteregtelike bepalings, privileges, keure (oftewel stedelike regssreëls) of gebruikregssreëls aangetref word nie, is die Regters reeds van die vroegste tye af onder eed vermaan om in sodanige saak die beste rede te volg soos deur hulle pligsgetroouheid en verstand aan die hand gedoen’, adding that judgment will have to be given in accordance with natural law and equity – ‘secundum ius et aquitatem naturalem’. See van der Keessel, *Praelectiones*, 1.2.22, (Gonin's translation, vol. 1, p. 29). This does not mean that a Judge is at large to make new law. The learned authors rightly point out at p. 306 that he ‘fashions it as far as possible out of materials at hand... though in the process he may within the fabric of the law fashion a new rule’. The foregoing seems to me consistent with what was said by Schreiner, J.A., in *Crookes, N.O., and Another v Watson and Others*, 1956 (1) SA 277 (AD) at p. 290H, namely – ‘It is natural, when one is considering a branch of the law on which there is relatively little direct authority, to seek assistance from other portions of the law that seem to present useful analogies; but analogies are only useful if they provide, not merely some solution of the problem under enquiry, but a solution which is satisfactory... Care must be exercised not to force a legal instrument of great potential efficiency and usefulness into a mould that is not properly shaped for it.’”

²⁴¹ It noted at p294 that: “Most of the cases pre-date the Constitution but that of Ciba-Geigy was decided after the Constitution came into operation. The position is, therefore, that the right concerned enjoys the same importance now as it always did and because of the operation of stare decisis its enforcement must, subject to the consideration to which I next come, be governed by the same principles as applied before. The binding force of precedent is as effective now as it always was.”

²⁴² Howie P stated: “In evaluating the parties’ competing submissions one’s starting point is that the right which the appellants seek to protect and enforce is constitutionally entrenched. This is therefore one of the factors to be borne in mind when having regard to the injunction to shape the common law in accordance with the Constitution’s spirit, purport and objects. The next consideration is that this same right has also always existed at common law. In that law, its unintended infringement, where (among other consequences) bodily harm results, gives rise to a specific remedy, namely the Aquilian action. To succeed in the action, proof of fault in the form of negligence has always been necessary.”

²⁴³ *Loriza* 2002 (2) SA 477 (SCA). In that case the facts were that the respondent, while attending a cattle auction, was knocked over and injured by a Brahman heifer-calf named Alicia, the property of the first appellant, a stud farm. The respondent brought an action in a Provincial Division against the first appellant based on the *actio de pauperie* for the damages allegedly sustained by him as a result of Alicia’s conduct. The Court a quo made a declaratory order in the respondent’s favour. It appeared from the evidence that the respondent had entered the auction pen in which Alicia and about 25 other heifers were being kept pending auction. The respondent, who was busy studying a catalogue, did not see the heifers and was totally unaware of their presence in the pen. None of the other heifers followed Alicia’s example. On appeal to the Supreme Court of Appeal it was argued

appellants' reliance on other instances of strict liability, it was pointed out that these have either a long history or a policy-based reason for existence, in both cases peculiar to themselves, and not free from jurisprudential controversy in any event. Any analogy based on them would therefore be false." This is not, it is submitted, a singularly praetorian approach to the South African common law. It would seem that the court felt itself incapable of deducing any policy based approach for the remedy sought in *Wagener* and the fact that the *actio de pauperie* was a policy based remedy for some reason disqualified it as a valid precedent in *Wagener*. It is submitted that the complete opposite view should have prevailed i.e. that where there were significant policy considerations in favour of a particular remedy, the provisions of section 39(2) of the Constitution

on behalf of the appellant that the *actio de pauperie* was an anachronism that should no longer be recognised in our law, *inter alia* because it involved a primitive form of absolute liability; the *contra naturam sui generis* requirement was confusing and inconsistent; the *actio* was not logically justified; and it often led to unfair results. The second defence put up by the appellant was that Alicia had not acted *contra naturam* because her conduct had to be compared not with that of all other heifers, but specifically with that of the average Brahman heifer, a more highly-strung breed than average. The SCA held that the fact that the *actio*, which was more than 24 centuries old and still formed part of South African law, involved absolute liability was no reason to banish it: the phenomenon of risk-liability was becoming more prevalent and had a useful role to fulfil in areas such as the liability of owners for damages caused by domesticated animals. It held further that that the Court would not be astute to abolish a controversial cause of action that was not unconstitutional or *contra bonos mores* or fallen into desuetude: rather, it was the duty of the Court where necessary to adapt it and, depending on the circumstances, to either expand or curtail it. The court said that if, instead of the dogmatic view that all 'delictual liability' had to be based on fault, a broad view was adopted that encompassed risk-liability in deserving cases, the only remaining question was whether the *actio* had a useful role to play from a practical point of view. It pointed out that no practical reason relevant to the facts of the present case for the denial of the *actio* was raised and that the time for burying the *actio* had thus not yet arrived. Olivier JA quoted from *O'Callaghan NO v Chaplin* in which the court stated: 'It is satisfactory to find that the action de pauperie still forms part of our law. . . . I think the conclusion is a sound and just one, for if a man chooses to keep an animal, and injury or damage is caused by it to an innocent person, he must make adequate compensation. The owner of the animal and not the person injured must bear the loss. . . . After all, the result arrived at is but the natural development of a doctrine which, as we learn from eminent jurists, such as Wesenbeck, Vinnius, Matthaeus, Huber and others, had already been accepted in most places, notwithstanding the reception of the Roman law. These masters and expounders of the law rightly saw nothing unjustic in the view that, as the Roman law regarded *natae deditio* as merely an alternative mode of solution at the election of an owner, that is of discharging his liability for *pauperies*, the fact of its disappearance did not deprive an injured plaintiff of his right to full compensation to be paid him by the defendant. The doctrine, therefore, which they state was observed in actual practice in their time, has since been accepted by the more modern and maturer jurisprudence, and still prevails as existing law in several civilised European countries as well as in our own.' Howie P's emphasis on legal precedent and the principle of *stare decisis* is thus somewhat selective and once again focuses on form over substance. It is submitted that the rationale behind the *actio de pauperie* is not as peculiar as Howie P would have one believe. It runs like this: If one chooses to have in one's possession something which represents a potential danger to others, then one is liable in the event that the danger in question materialises. The same argument can quite easily be applied in the modern context to the manufacture of pharmaceuticals. If one chooses to be in the business of the manufacture of pharmaceuticals, many of which are essentially potentially dangerous substances, then, in the absence of any contributory negligence on the part of the defendant one should be liable in the event of the materialization of the risk. To put it another way, the fault, it could be said, lies in the choice of business activity. The word 'fault' is not used here in the moral or emotional sense but in the legal, public policy sense. In the policy context it is difficult to understand why the unsuspecting patient should sustain the loss caused by a defective drug especially when that patient's constitutional right to bodily and psychological integrity takes precedence over any right at common law.

should be invoked to develop the common law in keeping with those policy considerations.

If one studies the arguments of Howie P against an award based on strict liability they amount to the following:

- Even if one accepted that a case for strict liability could be made out, it is not for the courts to impose that liability but the Legislature despite the admission that: “One is sensitive to the criticism expressed by Prosser that to say that only the Legislature should make changes is to echo ‘the cry invariably raised against anything new whatever in the law’. Nevertheless, what needs to be done is to assess what the new development entails and how best to implement it.” It is submitted that this view is totally contrary to sections 8(3) and 39(2) of the Constitution which require the courts, not the legislature, to develop the common law.
- The court could impose strict liability only if it considered that this was what, in developing the common law, s 8(3) of the Constitution compelled. But, if the Court did so hold, the Legislature would be hamstrung by such conclusion even if the democratic parliamentary process in due course delivered up the conclusion that only certain manufacturers or certain instances of manufacture should be subject to strict liability. This is illustrative of the sort of problem that could indeed arise if the Courts were to alter the law in the respect proposed by the appellants rather than to leave it to Parliament. It is submitted that this argument demonstrates a lamentable lack of understanding of the role and power of legislation. The common law can never ‘hamstring’ the Legislature since it is free to legislate *inter alia* in order to alter the common law. Indeed one of the checks and balances within the doctrine of separation of powers is that in a situation where the Legislature does not approve of a court decision it may legislate to the contrary - provided of

course that such legislation is consistent with the provisions of the Constitution.

- The court's observation that it is not without significance that in the other parts of the world of which mention has already been made, the imposition has been by way of legislation, failed to take into account the imposition of strict liability at its own backdoor such as that in the *actio de pauperie* by courts removed in time rather more than geographical space.²⁴⁴ However, Neethling *et al*²⁴⁵ in fact observe that in Continental systems, liability without fault originated primarily from legislation (it is submitted that this is largely due to the preference by Continental systems for codification of law) while in Anglo-American law, case law played the dominant role. They state that in South Africa both the legislature and the courts contributed to the development of liability without fault. It is thus submitted that the court's reference is to mainly Continental systems of law as opposed to Anglo-American ones such as the South African system and that it has therefore drawn a false and thus invalid comparison. Continental systems are codified whereas the Anglo-American legal systems are common law based.
- There was extensive regulation of the manufacture of medicines without the imposition of strict liability by the Legislature. It could not therefore

²⁴⁴ Vicarious liability is another example of the imposition of strict liability for reasons of public policy. In *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (3) SA 170 (A), Botha JA stated: "It is necessary in this context to revert to the question of vicarious liability. It is seen in the majority judgment as a lesser evil than strict liability. Again, with respect, I am unable to agree. As I have indicated, I regard vicarious liability as but one form of strict liability. Notionally it may be possible to separate strict liability in the form of vicarious liability from the remaining field of strict liability (i.e. where the acts of employees are not involved), but I can perceive no practical profit in doing so. It does not appear from the majority judgment whether vicarious liability is postulated on the premise that there must be mens rea on the part of the servant. If it is, the same difficulties of proving negligence on the part of the servant will certainly be encountered as in the case of the employer. Yet another example is the Praetor's edict *de nautis cauponibus et stabularis* which imposes strict liability on innkeepers in respect of goods brought onto their property by guests and which was found to be still part of South African law by the court in *Gabriel And Another v Enchanted Bed And Breakfast CC* 2002 (6) SA 597 (C). See further the discussion in Neethling et al (fn 18 *supra*) p362-380 regarding the *actio de pastu*, *actio de feris*, *actio de effusis vel detectis*, *actio positii vel suspensi* and the discussions of the law of vicarious liability and agency all of which are common law concepts involving strict liability.

²⁴⁵ Neethling *et al* fn 18 *supra* at p363

have intended strict liability to apply. It is submitted that the existence of extensive regulation of the manufacture of medicines without the imposition of strict liability by the Legislature does not prove anything in terms of individual cases. By its nature, legislation is generic rather than specific. The possibility of the imposition of strict liability by a court cannot be said to have been excluded simply due to a failure on the part of the Legislature to include it in legislation.

- The court posed a series of questions in the judgment to demonstrate the complexities of trying to legislate judicially in the area of product liability. With respect, it is submitted that even if the court had decided in favour of strict liability in the present case, this would not necessarily have meant that every other manufacturer of every other product was also subject to strict liability neither would it have meant necessarily that only, manufacturers of medicines were strictly liable.

It is submitted with respect that the court lost sight of the fact that it was only being asked to ‘legislate’ upon one extremely limited set of facts and that whilst the essence of its reasoning could be extracted and applied to other cases²⁴⁶, those other cases would not necessarily be decided in the same way if the facts differed. For example, it could be argued that product liability for medicines in the same category as Regibloc should be strict for the following reasons:

- Such medicines are administered to the patient by a trained health professional as opposed to being self-administered. There is thus small chance of the medicines being administered contrary to the manufacturer’s instructions;

²⁴⁶ In *National Director of Public Prosecutions And Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) it was observed that “Whatever the case may be, the Court is obliged at all stages of the inquiry to give proper reasons for its conclusion. Such reasons will not only be binding on the litigants but will constitute an objective precedent, with such binding force on other courts as the principles of stare decisis and the status of the Court delivering the judgment dictate.” It is the reasons for the decision which are binding. Since the reasons are heavily dependent upon the facts of the individual case, the facts of other cases would have to be on all fours before the reasons in the particular precedent could be applied to those other cases.

- The patient had no choice as to the kind of local anaesthetic administered and even if consulted as to her preference, would not have been in any position to give a meaningful response unless by some quirk of fate, she was herself a health professional with extensive knowledge of local anaesthetics. The patient's role in the situation is therefore one of extreme passivity;
- The patient is not in a position to ascertain the merits of various local anaesthetics or to determine the chemical components of the medicine and whether it is defective or not;
- The patient is not in a position to read the labelling or other information or warnings on the packaging of the medicine. She is highly unlikely to have handled or inspected the medicine prior to its administration;
- The route of administration (by way of injection) represents a potentially greater danger to the patient than by some other less rapid and invasive route eg oral ingestion. If she decided that the medicine tasted 'bad'; for instance she could have spat it out. Once a medicine has been injected into the bloodstream, however it is impossible for the patient to reverse this process;
- The harm caused was severely disabling and constituted a violation of the patient's right to bodily and psychological integrity;
- It was established that the medicine was defective when it had left the manufacturer's premises;
- It was not disputed that the medicine had caused the injury in question;

- The harm caused was reasonably foreseeable.

This set of circumstances is highly specific to (a) medicines (b) medicines administered by injection (c) local anaesthetics (c) medicines that are not self-administered (d) medicines that are clearly defective upon leaving the control of the manufacturer. It is quite justifiably argued that in such circumstances the imposition of strict liability upon the manufacturer is entirely in accordance with public policy whereas with respect to other types of medicine, taken in different circumstances and with different potential for harm this argument may not apply. Thus the arguments of the court about the need to take into account different kinds of manufacturers of different products and the consequences for them if the court had to impose strict liability in the present case are largely, it is respectfully submitted, specious. The impact of the judgment would have been very much contained by the highly specific nature of the circumstances involved.

7.8 Imperitia Culpa Admumeratur

This maxim means that ignorance or lack of skill is deemed to be negligence. Neethling *et al*²⁴⁷ observe that the maxim is misleading because South African law does not accept that mere ignorance constitutes negligence²⁴⁸. They note that

²⁴⁷ Neethling *et al* fn 18 *supra* at p136

²⁴⁸ See also Boberg fn 18 *supra* p346 where he states that the maxim *imperitia culpa adnumeratur* is misleading. Lack of skill can never amount to negligence for no one can be skilful at everything. But it may be negligent to undertake work requiring a certain expertise without possession the necessary degree of competence. Van der Walt observes that the *maxim imperitia culpa adnumeratur* can apply only if the task or the engagement in an activity is itself blameworthy. He says that a layman who renders medical assistance in an emergency is not judged by the standard of a doctor. As long as he exercises the care of an ordinary layman in the same situation he is not negligent. Scott TJ in 'Die Reel Imperitia Culpa Adnumeratur As Grondslag Vir Die Nalatigheidstoets Vir Deskundiges' in *Die Deliktereg Petere Fontes: L C Stein Gedenkbundel* 124-162 deals with the question of whether the maxim is consistent with the reasonable man test of negligence or whether it introduces a subjective standard of negligence in taking into account the qualifications and skill of the professional person. Scott points out that it is not unreasonable for professionals to undertake tasks for which they are qualified and so the explanation that the negligence consists in the undertaking of a task without the necessary skill as opposed to the lack of skill itself does not apply to professionals. Scott says that the negligence of an expert should be determined by applying the test of the reasonable expert to the actual conduct of the expert. Although this introduces a subjective element to the usually objective reasonable man test for negligence, it will only have the effect of raising the standard – never lowering it. The personal characteristics of the expert remain irrelevant. The ultimate objectivity of the test for negligence is thus not compromised. The question of the layperson who renders emergency medical assistance is an interesting one. From a constitutional

the principle embodied in the maxim applies where a person undertakes an activity for which expert knowledge is required while such person knows or should reasonably know that he lacks the requisite expert knowledge and should therefore not undertake the activity in question. In *Durr v Absa Bank Ltd and Another*²⁴⁹ the court made reference to the maxim with regard to the expert activities of investment brokers²⁵⁰. The court said that the question as to whether the standard must be that of the specific subset of experts to which the defendant belonged or should it be the lower standard of the general set of experts to which the defendant belonged had to be resolved with regard to the standard implied in the defendant's public professions of skill and expertise in relation the nature of the services they were offering. The court said that those who undertake to advise clients on matters including an important legal component do so at their peril if they have not informed themselves sufficiently

perspective, the view has been discussed elsewhere in this thesis that the right contemplated in section 27(3) of the Constitution not to be refused emergency medical treatment is limited to such treatment from suitably qualified persons. A health professional cannot be expected or required to exceed his or her scope of practice in rendering emergency medical treatment in terms of section 27(3) and neither can a layperson be required to give emergency medical treatment since he is not qualified to do so. What would be the legal position where a layperson steps in to give emergency medical assistance of some kind and aggravates the situation for the victim? What would be the legal position of the health professional, such as a nurse, who exceeds her scope of practice in an emergency situation where she is the only person who can render any assistance? Where she handles such situations adequately it is unlikely that the question will ever be put before the courts or the South African Nursing Council but where she does not the maxim of *imperitia culpae adnumeratur* is likely to be raised. The situation of a medical specialist in an emergency medical situation in South Africa is just as interesting. General practitioners can perform a wide range of professional activities due to the extremely wide nature of their scope of practice. However medical specialists despite having greater levels of expertise in some areas and despite having been trained as general practitioners before specialising, have a far narrower scope of practice. What would be the position of a cardiologist faced with an emergency situation in which a woman is giving birth on board an aeroplane upon which he is the only medically trained passenger? If he refused to help could legal action subsequently be taken against him in terms of section 27(3) of the Constitution? Would it make a difference if he was employed by the State or if he was a private practitioner?

²⁴⁹ *Durr* 1997 (3) SA 448 (SCA)

²⁵⁰ Schutz JA observed that: "Imperitia culpae adnumeratur, says D 50.17.132 - lack of skill is regarded as culpable. That much is accepted by the respondents. But how much skill, they say. We have shown all the skill that an 'ordinary' or 'average' broker, or a bank employing such a one, need show. What more can be asked of us? Two questions arise in this case. (1) In general, what is the level of skill and knowledge required? (2) Is the standard required in judging that level that of the ordinary or average broker at large, or is it that of the regional manager of the broking division of a bank professing investment skills and offering expert investment advice? The answer to the first question is found in the judgment of Innes CJ in *Van Wyk v Lewis* (fn 198 *supra*) at 444 with reference, as it happens, to medical practitioners: 'It was pointed out by this Court, in *Mitchell v Dixon* (1914 AD at 525), that "a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care". And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that level.' 'But the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to the views of the profession, but it is not bound to adopt them.' For the purposes of this case I do not think that anything need be added to this statement. (Scott LJ in *Mahon v Osborne* [1939] 1 All ER 535 (CA) at 549D-E was to say of Innes CJ's judgment that it was one 'of which I should like humbly to express my admiration'.)

on the law. Schutz JA stated that in real life negligence is not a mere legal abstraction, but must be related to particular facts. However, as a matter of law set in the present factual context, he said he was of the opinion that the relevant standard was not that of the ‘average or typical broker’ as he has been defined. Schutz JA said that to accept that standard would be to allow a definition chosen by a witness for his own purposes to dictate the result, making the enquiry as to what is required of a particular kind of broker pointless. What is actually needed is first to determine what skills the particular kind of broker needs to exhibit, which must depend in large part on what skills he is held out to possess. If this were not so, then the reasoning advanced by the respondents would justify the neurosurgeon being judged by the standards of the general practitioner. That would be contrary to the reference by Innes CJ in *Van Wyk v Lewis* to ‘the branch of the profession to which the practitioner belongs’. He concluded that the appropriate standard is that of the regional manager of the broking division of a bank professing investment skills and offering expert investment advice.²⁵¹ The court quoted with approval the basic rule stated by Joubert (ed)²⁵², as follows:

“The reasonable person has no special skills and lack of skill or knowledge is not *per se* negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.”

The court held that given the rule of law concerning the undertaking of activity requiring skill, Stuart (the broker) was in a constant dilemma. Either he had to forewarn the Durrs where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have

²⁵¹ Schutz JA would not accept as a defence the fact that the broker (Stuart) was entitled to rely on regulatory authorities and officials to ensure that all of the risks had been eliminated. He stated at p467 of the judgment: “I would say something about reliance on the various regulatory bodies and officials. They do perform valuable functions in protecting the public against fraud. But for an investment advisor to assume that they have shot out all the predators is ingenuous. New ones always creep in under the wire. Those responsible for lending other people's money must be ever alert to this end, sometimes helped by the regulatory powers, make their own investigations to the extent reasonably necessary. These powers are not there, after all, to give individual and daily attention to particular lenders, and the grindings of their mills are sometimes slow. Individual attention fails to be given by individual advisors. And then there are also other aids to the investor and his advisor which the State has made available. To what extent did Stuart avail himself of them?”

²⁵² *The Law of South Africa First Reissue vol 8.1 para 94*

recommended the investment. What he was not entitled to do was to venture into a field in which he professed skills which he did not have and to give them assurances about the soundness of the investments which he was not properly qualified to give. Before he recommended the investment in question he should first have sought help which was readily available to him. The court found in favour of the appellant (the plaintiff).

In the public health sector in particular the maxim of *imperitia culpae adnumeratur* is of importance given the constant shortages of health care professionals experienced by this sector. The state is under great pressure, especially in deep rural areas in which it is sometimes almost impossible to recruit health professionals, to provide services with the barest minimum of human resources, and in the worst cases, in the complete absence of suitably qualified and adequately trained personnel. A number of questions arise in this regard which need to be explored in more detail. Health professionals are generally registered with regard to particular scopes of practice. A health professional who exceeds that scope of practice would almost certainly as a general rule fall foul of the law on the basis of the maxim as well as any other professional rules that may be involved.²⁵³ Are there any circumstances,

²⁵³ In terms of section 27 of the Nursing Act No 50 of 1978 -

- (1) A person who is not registered or enrolled in a particular capacity-
 - (a) who makes use of a title which only a person who is registered or enrolled in that capacity may use, whether he makes use of such title alone or in combination with any word or letter;
 - (b) who holds himself out or permits himself to be held out, directly or indirectly, as being registered or enrolled in that capacity; or
 - (c) who wears a uniform, badge or other distinguishing device, or any misleading imitation thereof, prescribed in respect of a person registered or enrolled in that capacity,
shall be guilty of an offence.
- (2) Subject to the provisions of subsection (4) and the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974), a person-
 - (a) who is not registered as a nurse or enrolled as a nurse or a nursing auxiliary and who for gain performs any act pertaining to the profession of nursing;
 - (b) who is not registered or enrolled as a midwife and who for gain performs any act pertaining to the profession of midwifery; or
 - (c) who is not registered or enrolled as a midwife and who makes any internal examination of the genitals of a woman while attending to the woman in relation to a condition arising out of or in connection with pregnancy,
shall be guilty of an offence.
- (3) A person who, knowing that another person is not registered or enrolled in a particular capacity-
 - (a) describes such person as the holder of a title which only a person who is registered or enrolled in that capacity may use, whether he describes such other person by making use of such title alone or in combination with any word or letter; or
 - (b) holds such other person out, directly or indirectly, as being registered or enrolled in that capacity,
shall be guilty of an offence.

however, in which there could be lawful defences to such *prima facie* illegal acts? With regard to nurses in particular, there is also the matter of section 38A of the Nursing Act²⁵⁴ which is quoted in full in the footnote for the sake of convenience²⁵⁵. A further question is whether the right to emergency medical treatment contemplated in section 27(3) of the Constitution limited by the qualifications of the health professional at the scene or would the health professional who in an emergency medical situation exceeds the bounds of his or her scope of service in coming to the rescue of a patient be able to use section 27(3) as grounds for justification of what would otherwise be an unlawful act?

Necessity or compulsion has been recognised as a defence in criminal law for some time²⁵⁶. It has not apparently arisen in the context of a health professional

²⁵⁴ **Nursing Act No 50 of 1978**

²⁵⁵ Notwithstanding the other provisions of this Act and the provisions of the Medicines and Related Substances Act *fin 12 supra* of the Pharmacy Act, 1974 (Act 53 of 1974), and of the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974), any registered nurse who is in the service of the Department of Health, Welfare and Pensions, a provincial administration, a local authority or an organization performing any health service and designated by the Director-General: Health, Welfare and Pensions after consultation with the South African Pharmacy Board referred to in section 2 of the Pharmacy Act, 1974, and who has been authorized thereto by the said Director-General, the Director of Hospital Services of such provincial administration, the medical officer of health of such local authority or the medical practitioner in charge of such organization, as the case may be, may in the course of such service perform with reference to—
 (a) the physical examination of any person;
 (b) the diagnosing of any physical defect, illness or deficiency in any person;
 (c) the keeping of prescribed medicines and the supply, administering or prescribing thereof on the prescribed conditions; or
 (d) the promotion of family planning.

any act which the said Director-General, Director of Hospital Services, medical officer of health or medical practitioner, as the case may be, may after consultation with the council determine in general or in a particular case or in cases of a particular nature: Provided that such nurse may perform such act only whenever the services of a medical practitioner or pharmacist, as the circumstances may require, are not available.

²⁵⁶ In *S v Adams S v Werner* 1981 (1) SA 187 (A), Counsel CJM Dugard and J M Burchell acting for the appellant, Werner, observed the following with regard to necessity: "In Roman law there was no systematic discussion of the defence of necessity but there are isolated instances in which such a defence was recognized. See D 47.9.3.7; D 9.2.49.1; D 43.24.7.4; D 9.2.29.3; D 19.5.14 pr. Several Roman-Dutch writers considered necessity as a general defence. See Grotius *De Jure Belli ac Pacis* 2.2.6 - 9; Puffendorf *De Jure Naturae et Gentium* 2.6.4 and 5; Van der Keessel *Praelectiones* 47.2.8. Necessity has been recognized as a general defence in modern South African law. See *S v Mahomed and Another* 1938 AD at 34 - 35; *S v Rabodila* 1974 (3) SA 324; *S v Pretorius* 1975 (2) SA 85; Chetty v Minister of Police 1976 (2) SA at 452 - 3; *Minister of Police v Chetty* 1977 (2) SA 885; *S v Adams* 1979 (4) SA at 796A - C; Burchell and Hunt *South African Criminal Law and Procedure vol I General Principles* at 283 et seq; De Wet and Swanepoel *Strafreg* 3rd ed at 87 - 88; J V van der Westhuizen *Noordtoestand as Regverdigingsgrond in die Strafreg* (1979) LLD dissertation (Pretoria) 730. Compulsion or duress is a form of necessity and is recognized as a general defence. See *S v Goliath* 1973 (3) SA 1; *S v Mtetwana* 1977 (3) SA 628; *S v Kibi* 1978 (4) SA 173; *S v Alfeus* 1979 (3) SA 145; *S v Petersen* 1980 (1) SA 938. Necessity is *prima facie* available as a defence to common law crimes and statutory offences. It is, therefore, available to a contravention of the Group Areas Act 36 of 1966 unless the Legislature expressly or impliedly provides otherwise. See *S v Adams* (*supra* at 798F - H); Burchell and Hunt (*op cit* at 284); Glanville Williams *Text Book of Criminal Law* (1978) at 555. There is no express exclusion of the defence of necessity and the provision for permits (s 26 (1) of the Group Areas Act 36 of 1966) does not impliedly exclude the defence. See Steyn *Uitleg van Wette* 4th ed at 102 - 106 (and cases cited by the learned author). As to the requirements of the defence of necessity, see Burchell and Hunt (*op cit* at 285), approved in *S v Pretorius* (*supra* at 89); *S v Alfeus* (*supra* at 152H); *S v Adams* 1979 (4) SA at 796A - C. The appellant does not rely on economic

rendering health care services in an emergency situation or otherwise. In a society which still tends to be non-litigious, whether due to the prohibitive costs of legal action or for other reasons, it is unlikely that a health professional who assists someone in a medical emergency in a way that goes beyond his or her scope of practice will be sued on this basis unless the harm caused by the intervention is serious relative to that initially anticipated as a consequence of the emergency itself. Strauss discusses necessity with regard to a situation in which the treatment is against the will of the patient but where the interests of society are at stake for example where medical intervention is necessary to prevent the spreading of a contagious disease. He does not raise the defence in the context of a violation of the provisions of the Health Professions Act or the Nursing Act with regard to scope of practice in circumstances where there was patient consent and for instance the patient's life was at stake. It is submitted that this is the context in which the applicability of the defence of necessity is more likely to arise in practice, especially in the public sector in which there is a severe shortage of suitably qualified personnel in some areas. There is a constitutional right to life which, it could be argued, a health professional was seeking to uphold in acting outside of his or her scope of practice in an emergency situation. Even, however, where the risk was not to life but to limb there is the constitutional right to bodily and psychological integrity. The question is how far these rights would go as justification for the actions of a health care provider in exceeding his scope of practice when assisting a patient. Even if the patient is begging for assistance, there is no-one else to help and the

necessity which "is not a form of necessity that the law recognizes". See *R v Canestra* 1951 (2) SA at 324. The list of legally protected interests is not closed. See JV van der Westhuizen Noodtoestand as Regverdigingsgrond in die Strafreg at 553; Burchell and Hunt (op cit at 285 - 8); Glanville Williams *Criminal Law - The General Part* 2nd ed at 756 - 7. Health is a legally protected interest. See *S v Pretorius* (supra at 89 - 90); *R v Bourne* (1939) 1 KB at 692; *S v Johnson* 53 A 1021 (1902) dealt with in Jerome Hall *General Principles of Criminal Law* 2nd ed 426. Family life is a legally protected interest. See *Levy NO and Another v Schwartz NO and Others* 1948 (4) SA at 933; art 6 of the Constitution of the Federal Republic of Germany. The family life of the appellant and his wife was threatened. Privacy is a legally protected interest. See J Neethling *Die Reg op Privaatheid* at 380; D J McQuoid-Mason *The Law of Privacy in South Africa* at 98; *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244; Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461; *S v A* 1971 (2) SA 293; *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590; *S v I* 1976 (1) SA at 783G; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA at 383 - 4. The legally protected interest may be threatened by force of surrounding circumstances. See *S v Pretorius* (supra at p 89 - 90); *Stoffberg v Elliott* (fn 27 *supra*) at p150. As to the threat having commenced or being imminent, see *S v Miewtwa* 1977 (3) SA at 631A - B."

health professional knows what must be done to assist the patient, must he refuse treatment on the grounds that he is not qualified to administer it? What constitutes necessity in such a situation? In this regard there is also the difficult distinction between situations of emergency and urgency. A balancing exercise is required with the constitutional rights of the patient being weighed against the transgression by a health professional of the law or at the least, the rules of his or her professional body for which he or she can be disciplined. In the context of the public sector this is most likely to arise where there is no doctor available and the nurses are the only health professionals around who can help the patient. Would the situation be any different if the patient was unable to consent because he or she was unconscious? If so would it be worse or better, for the health professional concerned, than a situation in which there is patient consent in the clear knowledge that the nurse is not qualified to perform a particular procedure but there are no alternatives? Generally speaking the law sanctions actions and omissions in an emergency situation which it would not otherwise. An example is the doctrine of *negotiorum gestio* which allows the interference of one person in the affairs of another (the *dominus*) in the interests of the latter. What is the position then of a health professional who exceeds his or her scope of practice in such a situation. It is submitted that, if the circumstances were such that there was no alternative, that the patient consented to the risks of the treatment and that the health professional in question exercised the same degree of care and skill in administering the treatment as would have been exercised by a reasonable person in the circumstances, a subsequent delictual action against the health professional is not only unlikely but also should not succeed if his or her actions were in accordance with public policy and constitutional values. The maxim *imperitia culpae adnumeratur* should be defeated by the maxim *volenti non fit injuria*. In similar circumstances, where the patient is unable to give consent for some reason, a subsequent action in delict against the health professional could obviously not be defeated by the maxim *volenti non fit injuria* and the health professional runs a greater risk of having the claim against him or her succeed on the basis of the maxim *imperitia culpae adnumeratur*.

However, it remains to be seen how the court will interpret the right not to be refused emergency medical treatment in practice.

Strauss²⁵⁷ observes that medical treatment against the will of the patient is legally permissible within very narrow limitations only. The legal ground of justification upon which the doctor or other person may rely in these cases is necessity. He states that a feature of the typical situation to which the doctrine of necessity generally applies is that the interest of a person (the so-called innocent third person) is sacrificed to protect or rescue the lawful interest of another who is endangered either by a natural force ("inevitable evil") or by human agency. Therefore, says Strauss, where a doctor – in order to protect the social interest – administers medical treatment to a person against the latter's will, he (the doctor) may raise the defence of necessity against a charge of assault. Thus a doctor may treat a patient suffering from a dangerous infectious disease against the patient's will, to prevent the disease from spreading. So too, a doctor may vaccinate healthy persons to prevent the outbreak of a dangerous disease in the community. Strauss notes that although the defence of necessity may be relied upon even where the act intended to ward off the danger is directed not against the interest of an innocent third person but against other interests of the person threatened with the danger, such action, if undertaken against the will of the latter, can in his opinion only in exceptional circumstances be justified on the basis of the doctrine of necessity.²⁵⁸

In the case of *negotiorum gestio* the courts have observed that the gestor is only entitled to reimbursement of expenses and not to remuneration, the underlying principle being that *negotiorum gestio* arises from an act of generosity and friendship and is not aimed at allowing the *gestor* to make a profit out of his

²⁵⁷ Strauss fn 34 *supra*

²⁵⁸ Strauss (fn 34 *supra*) refers to Van der Westhuizen JV *Noodtoestand as Regverdigingsgrond in die Strafreg* (LLD thesis, University of Pretoria 1979) p 585, p 609 in this regard

administration.²⁵⁹ The *gestor* must have a clear intention to serve the *dominus*²⁶⁰. The actions of the *gestor* were usually understood to be in situations of urgency in which there was no time or opportunity to contact the *dominus*.²⁶¹ The *negotiorum gestor* has a right to be compensated for necessary and useful expenses²⁶². This principle is clearly support for the proposition that where a person renders emergency medical treatment in term of section 27(3) of the Constitution, such person is subsequently entitled at least to compensation for necessary and useful expenses. Indeed it is submitted that the concept of *negotiorum gestio* takes on a certain constitutional significance in the light of section 27(3) of the Constitution. *Negotiorum gestio* is informed by the morals or values of society. Thus Hahlo observes that in *negotiorum gestio*, it is generally a good defence to the *gestor*'s claim that the principal had forbidden him to act, but this defence will not avail if the action was morally demanded²⁶³. The values of South African society are reflected in the Constitution. The right

²⁵⁹ *Mt Argun; Sheriff Of Cape Town And Another v Mt Argun, Her Owners And All Persons Interested In Her And Another* 2000 (4) SA 857 (C) *Williams' Estate v Molenschoot and Schep (Pty) Ltd* 1939 CPD 360 at 370 - 2; Blommaert 1981 Tydskrif vir Suid-Afrikaanse Reg 123 at 134

²⁶⁰ In *Standard Bank Financial Services v Taylam* 1979 (2) SA 383 (C) at 387 in Van Zijl JP set out the law in regard to *negotiorum gestorum* as follows: "Our law in regard to negotiorum gestorum is based firmly, with but minor divergencies, upon the Roman law. In Roman law the payment of the debt of another without a mandate to do so gives rise to the *actio negotiorum gestorum contraria* and the *gestor* could recover the amount of such payment together with the interest thereon unless the debtor had some interest in the payment not being made. (See Digest 3.5.43 and 22.1.37.) This quasi-contractual relationship was brought about where the *gestor*, acting without a mandate, rendered a service to the *dominus* - in this instance the debtor - and in doing so acted reasonably and in the interest of the *dominus* with the intention not only of administering the affairs of the *dominus* but also of being compensated for such administration. This action fell away if the *gestor* did not intend to serve the *dominus*, i.e. the *gestor* mistakenly thought he was administering his own affairs or made payment of a debt *sui lucri causa*. There is a basic difference between the *gestores* in these two instances. In the first the *gestor* acted bona fide, but in the mistaken belief that he was serving the *dominus*. In the latter instance he acted mala fide in his own interest. These two classes of *gestor* can be described respectively as the bona fide *gestor* and the mala fide *gestor*. Neither of them could sue as negotiorum gestoris as neither had the intention to serve the *dominus*. If, however, the *dominus* had been enriched at their expense they were each given the right to recover from the *dominus* on the grounds of unjust enrichment."

²⁶¹ In *Maritime Motors (Pty) Ltd v Von Steiger And Another* 2001 (2) SA 584 (SE) the court observed at p 599 that :"He [the counsel for the plaintiff] referred to the following passage in Silke De Villiers and Macintosh The Law of Agency in South Africa 3rd ed at 274: 'Not only can a person (gestor) recover expenses on the ground of unjust enrichment when he has paid another's debt (that of his dominus) for his own benefit (*sui lucri causa*), but also when he has done so against the express wishes of the debtor (dominus). The circumstances in which the payment was made contrary to the wishes of the *dominus* are always an important factor in determining whether the payment was or was not justly done.'

It appears from the same work that the term *negotiorum gestor* was originally used to describe the person who acts on behalf of another and solely for the latter's benefit in circumstances of urgency, knowing that he had no such authority to act. There was and could be no question of any relationship arising between the parties by consent. It was further emphasised by the learned authors that the *negotiorum gestor* plays a constantly shrinking role in the world of ever-improving communications because it is quite clear that an unauthorised person should not interfere in another's affairs if it is possible to get in touch with that other.

²⁶² See *Van Zyl D H Negotiorum Gestio in South African Law* (1985) at p 67 - 71.

²⁶³ Hahlo HR 1960 *Annual Survey of South African Law* at p 66 - 7

to life, the right to human dignity and the right not to be refused emergency medical treatment are all suggestive of a greater duty to rescue than previously existed at common law. Whilst it is not suggested that the values in the Constitution require members of society to go about poking their noses into other people's business, they may well expect positive intervening action in circumstances where public mores require it²⁶⁴.

Negotiorum gestio is often associated with actions for unjust enrichment²⁶⁵. It was referred to in the context of health care services in *Behr v Minister of Health*²⁶⁶.

²⁶⁴ They would in other words, inform situations such as that in *Minister van Polisie v Ewels* (fn 63 *supra*) in which Rumpff JA observed that: "Dit wil voorkom of die vraagstuk van 'n late, as deliktuele onregmatige gedrag, tot 'n mate van klaarheid ontwikkel het, vgl. *Silva's Fishing Corporation (Pty.) Ltd. v Maweza*, 1957 (2) SA 256 (AA); *Regal v African Superslate (Pty.) Ltd.*, 1963 (1) SA 102 (AA); *Minister of Forestry v Quathlamba (Pty.) Ltd.*, 1973 (3) SA 69 (A). As uitgangspunt word aanvaar dat daar in die algemeen geen regspieg op 'n persoon rus om te 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 suwer morele gronde, dat hy daadwerklik optree om die skade te verhinder. Ook word egter aanvaar dat in sekere omstandighede daar 'n regspieg 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. Hierdie gevalle is nie beperk tot 'n eienaar van grond wat deur sy late veroorsaak dat iemand anders deur iets wat in verband staan met sy grond skade ly nie of, in die algemeen, tot gevalle waar daar 'n sekere voorafgaande gedrag ("prior conduct") was nie. 'n Sekere voorafgaande gedrag of die beheer oor eiendom mag 'n faktor wees in die totaal van omstandighede van 'n bepaalde geval waarvan onregmatigheid afgelei word, maar is nie 'n noodwendige onregmatigheidsvereiste nie. Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike "nalatigheid" van die bonus paterfamilias nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regspieg was om redelik op te tree.

²⁶⁵ Rubin L, *Unauthorised Administration in South Africa*, pp. 72 - 73, emphasises the distinction between the true action based on *negotiorum gestio* and an action based on enrichment: "There can be little doubt that in most cases a *negotiorum gestio* results in actual enrichment of the dominus. The destruction of the beneficial service rendered by the gestor before the dominus could enjoy it may safely be regarded as a rare occurrence. It is clear, also, that in some cases the same result would be achieved whether the person rendering the service claimed as a gestor or relied on the principle of unjust enrichment; furthermore, that in such cases, the latter course must be recommended because the intention of the plaintiff would be irrelevant, and to that extent the proceedings would be simplified. It must be borne in mind, however, that in the one case the claim is for all the useful and necessary expenses incurred; in the other, it is based upon an entirely different criterion, namely, the extent to which the dominus has been enriched. In the first case the question is whether they are expenses which the dominus would, himself, have incurred, whether the amount thereof represents his actual enrichment or not; in the second case all considerations other than the actual enrichment of the dominus fall away. It follows, therefore, that there are circumstances in which a plaintiff who, able to base his claim on *negotiorum gestio*, nevertheless chose to rely on the principle of unjust enrichment, would, thereby, deprive himself of the right to recover part of the amount which he had expended in the course of the gestio. In fact, such a plaintiff would be ill advised to base his claim on the principle of unjust enrichment, unless he had first satisfied himself that he would be entitled to recover no less on that basis than on the basis of *negotiorum gestio*."

²⁶⁶ *Behr* 1961 (1) SA 629 (SR). The court said with regard to a husband's duty to pay for his wife's medical treatment: "If she had such cause, the husband's legal duty to support his wife and provide her with necessaries continues despite the cessation of the joint household, and the tradesman who supplies her with necessaries such as food or clothing, the landlord who lets her a lodging, the professional man who renders her necessary service, are entitled to recover from the husband. As it is put by Dr. Rubin in his handbook on *Unauthorised Administration (negotiorum gestio)* at p. 62, the tradesman or landlord or professional man is discharging a

7.9 Class Actions

In *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others*²⁶⁷ the applicants decided to proceed with a class action under section 38(c) of the Constitution. This case is currently the leading case on class actions in South Africa. In previous cases, to which Cameron J refers in his judgment in *Ngxuza*, the courts had been reticent or reluctant to recognise the possibility of a class action despite the provisions of section 38(c) of the Constitution. *Ngxuza* is interesting because it is a case which demonstrates the risks run by the public sector in terms of class actions for logistical systems failure and for ill advised policy decisions. The court did not consider the merits of the case since the application was for leave to institute representative, class action and public interest proceedings against the provincial authorities, with the assistance of the Legal Resources Centre in terms of s 38(b), (c) and (d) of the Constitution on behalf of everyone else in the province who had also had their grants unfairly and unlawfully terminated. The respondents were among tens of thousands of recipients of social disability grants whose grants had unilaterally and without notice been terminated by the Eastern Cape provincial authorities.

The order the applicants in *Ngxuza* applied for had three essential features. First, it permitted the applicants, assisted by the Legal Resources Centre, to litigate as representatives on behalf of anyone in the whole of the Eastern Province whose disability grants were between specified dates cancelled or suspended by or on behalf of the Eastern Cape government ('the class definition'). Associated with this was an order requiring the Eastern Cape government to provide the Legal Resources Centre with the details of the members of the class kept on computer or physical file in governmental records ('the disclosure order'). The order

legal duty resting upon the husband; he is a gestor who has administered the affairs of the dominus, i.e., the husband, and is therefore entitled to compensation from him. This is the basis upon which the judgment of Benjamin J, in *Gammon v McClure*, 1925 CPD 137 at p 139, is based, and the husband's liability to pay compensation to the gestor was enforced in *Coetzee v Higgins*, 5 E.D.C. 352, a case which has subsequently been referred to with approval (see e.g., *Excell v Douglas*, 1924 CPD 472 at p 481)."

²⁶⁷ *Ngxuza* 2001 (4) SA 1184 (SCA)

lastly required the applicants to disseminate through various print and radio media in the Eastern Cape and (with the assistance of the provincial government) by notices at pension pay points information about the class action ('the publication order'). The object of publication was to give members of the class the opportunity, if they wished, to opt out of the proceedings envisaged on their behalf.

Cameron JA observed that in the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. He said that the most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it.²⁶⁸ Cameron JA pointed out that although the Constitutional Court had not dealt with the class action specifically, it had pronounced pertinently on the ambit to be accorded all the standing provisions of the interim Constitution, which in material respects are identical to those of the Constitution. He noted that in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and*

²⁶⁸ Cameron JA observed at p 1192 in *Ngxuza* (fn 267 *supra*) that: "The class action was until 1994 unknown to our law, 6 where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process create are well described in an analysis that appeared after the class action was nationally regularised in the United States through a Federal Rule of Court 8 more than 60 years ago: 'The cardinal difficulty with joinder . . . is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints - they may never come. What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.'

The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country of origin, the United States of America, where detailed rules governing its use have developed, but in other countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures and the attendant cost of legal proceedings:

'Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.' [footnotes omitted]

*Others*²⁶⁹, the majority of the court held that these provisions must be interpreted generously and expansively, consistently with the mandate given to the courts to uphold the Constitution, thus ensuring that the rights in the Constitution enjoy the full measure of protection to which they are entitled. Cameron JA stated that the circumstances of this particular case - unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation - should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class-action proceedings was unassailable. He said that the applicants' averments about the predicament of other members of the class to some extent rest on hearsay evidence was obvious but that few class actions could be maintained without some element of hearsay. Indeed, he said, if first-hand evidence could be obtained from all those sought to be included, they could as readily be joined, and the need for class proceedings would fall away. He observed that hearsay evidence in any event varies in its import and quality. That produced in this case - from district surgeons, advice offices, civic and political organisations and public authorities - left little doubt that the province's methods were causing widespread misery and injustice. He pointed out that it is precisely because so many people in South Africa are in a 'poor position to seek legal redress' and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution and the Constitution created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons'. Cameron JA held that insofar as the judgments in *Lifestyle Amusement Centre (Pty) Ltd and Others v Minister of Justice and Others*²⁷⁰ and *Maluleke v MEC, Health and Welfare, Northern Province*²⁷¹ questioned the availability of the class action in South African law, or suggested different criteria for constituting and defining a class for the

²⁶⁹ *Ferreira* 1996 (1) SA 984 (CC)

²⁷⁰ *Lifestyle* 1995 (1) BCLR 104 (C)

²⁷¹ *Maluleke* 1999 (4) SA 367 (T)

purposes of a class action, he was unable to agree with them, and to the extent that they are inconsistent with his judgment in *Nguxa*²⁷² they must be regarded as overruled. He observed that there could be no doubt that the Constitution requires that, once an applicant has established a jurisdictional basis for his or her own suit, the fact that extra-jurisdictional applicants are sought to be included in the class cannot impede the progress of the action. He noted that this is the position also in the United States of America, to the laws of which, together with other foreign countries, the Constitution permits the courts to look when interpreting the Bill of Rights and pointed out that in the USA a plaintiff class action (which is materially different from a defendant class action), the presence of a large preponderance of out-of-state plaintiffs does not impede the proceedings once the original litigants have established jurisdiction in the forum court. It was held that it was clear that the order of the Court *a quo* encompassed only those whose social benefits had unlawfully been discontinued in the same manner as those of the respondents. Cameron JA also held that the appellants' objections had no substance. He said the matter in issue was no ordinary litigation- it was a class action expressly mandated by the Constitution and that the Courts were enjoined by section 39(1)(a) of the Constitution to interpret the Bill of Rights, including those provisions relating to standing, so as to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. He stated that the Courts were also enjoined by section 39(2) to develop the common law, which included the common law of jurisdiction, so as to 'promote the spirit, purport and objects of the Bill of Rights'.

From this case it is clear therefore that class actions are permissible and must be recognised in South Africa and also that the problem of provincial boundaries and the jurisdiction of the different divisions of the High Court could be addressed and need not be an obstacle to class actions.

²⁷² *Nguxa* fn 267 *supra*