5. Various corresponding topics - International perspectives

5.1 Benefit rule and wrongful birth actions

Bodgan\textsuperscript{252} writes that some courts have attempted to reconcile the differing approaches generally followed when addressing damages, by permitting plaintiffs to recover damages for economic and emotional suffering, while at the same time reducing the damage award by the value of any benefit the plaintiffs have received because of the damage causing event.\textsuperscript{253} According to this approach courts have to weigh beneficial consequences of the parenthood such as joy, pride and affection against the \textit{economic} and emotional costs of raising a handicapped child. This balancing mechanism used by the courts is most often referred to as the so-called “benefits rule”.\textsuperscript{254} Bodgan is, however, not a great supporter of this approach and explains that it is often incorrectly applied.\textsuperscript{255} He notes that one objection to balancing pecuniary expenses and emotional suffering against the affection felt by the parents, is the “highly inexact and speculative nature of putting a price on the intangible rewards of parenthood.”

He\textsuperscript{256} criticises the inexact use of the benefit rule, stating that courts often fail to adhere to the rule’s requirement that the harm caused and the benefit conferred must affect the \textit{same interest} of the plaintiff.\textsuperscript{257} Under a strict interpretation of the benefit rule, therefore, emotional benefits should only be offset against emotional suffering.\textsuperscript{258}

\begin{flushleft}
SA 122 (B).
\end{flushleft}

\textsuperscript{252} 1983. \textit{op cit} p 125.

\textsuperscript{253} \textit{ie} the birth of a handicapped child.

\textsuperscript{254} “The benefits rule provides that when the defendant has harmed the plaintiff and by the same action conferred a benefit on the plaintiff, the court should consider the value of the benefits in mitigating damages.” \textit{op cit} p 136.

\textsuperscript{255} by balancing two issues from different classes of interest against each other, most courts have misapplied the benefits rule - the correct application of the benefit rule would allow emotional costs only be weighed up against emotional benefits, while economical costs should exclusively be taken into account with reference to economical benefits.

\textsuperscript{256} \textit{ibid}.

\textsuperscript{257} see fn 8 – “According to a strict interpretation of the benefit rule, courts should separate the benefits and injuries that a defendant’s negligence caused the plaintiffs, depending on the type of benefit or injury. Under the strict interpretation, courts should apply emotional benefits to offset only emotional suffering:” and \textit{visa versa}.

\textsuperscript{258} see \textit{supra}.
Some argue\textsuperscript{259} that concerning wrongful birth actions specifically, a defendant's negligence will not necessarily affect the plaintiff's economic, emotional or physical interests. Since the defendant's negligence caused the birth of a (handicapped) child, the plaintiff's affected interests are therefore parenthood or non-parenthood, which is clearly illustrated by the fact that the true injury complained of in wrongful birth is the deprivation of the right to reject a particular parental relationship.\textsuperscript{260}

"If a court were to find that the plaintiff parents sought to avoid or terminate the mother's pregnancy solely for her health or solely for economic reasons, however, then the interests affected is not parenthood or non-parenthood in general but only one aspect of parenthood."\textsuperscript{261}

Strauss\textsuperscript{262} refers to the South African case of Edouard\textsuperscript{263} were the court judged that the plaintiffs compliant in a wrongful conception action was an economic loss which cannot be weighed against the value of a child. The emotional benefits brought about by the child's birth do not increase the parents' patrimony and are irrelevant in the determination of the extent of damages. It is submitted that this is a correct viewpoint and a clear example of how different interests should be kept apart. The court explained that fathers of illegitimate children are regularly ordered to pay maintenance costs and these fathers cannot rely on the argument that the benefits and joy brought about by these illegitimate children negate the reality of substantial child-rearing expenses.

Faircloth\textsuperscript{264} states in conclusion that courts often have difficulty in allowing the plaintiff's cause of action when based on unlawful conduct (delict/tort). Many find it difficult to place these actions under a 'traditional tort framework'.

"The inability to reconcile the courts' treatment of cause, harm, and damages illustrates that, though framed in traditional tort language, wrongful birth is

\begin{itemize}
\item Bodgan refers to the viewpoint expressed by Barnett in "Liability for Wrongful Life: California Fashions a Compromise" National Law Journal (4:18), 19.
\item \textit{ie} parents of a handicapped child.
\item \textit{op cit} p 138.
\item \textit{op cit} p 178.
\item \textit{supra}.
\end{itemize}
6. Based on Contract

6.1 Background

A contract is an agreement which is intended to be enforceable by law\textsuperscript{266} and which comes into existence at the point where the contracting parties reach consensus \textit{ad idem}.\textsuperscript{267} Consensus is reached once an offer has been accepted\textsuperscript{268} unequivocally.\textsuperscript{269}

It is submitted that there are similarities between general business contracts\textsuperscript{270} and medical intervention agreements in terms of pre-conclusion negotiations,\textsuperscript{271} as in both these instances the parties to the proposed agreement have to furnish the necessary information regarding the desired essential terms of the agreement.\textsuperscript{272} With a contract of sale,\textsuperscript{273} a legally binding agreement is only reached after the parties have concluded negotiations and have agreed on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{265} \textit{Ibid}.
\item \textsuperscript{266} Christie, R.H. 1996. \textit{Digest of the Law of Contract} Lex Patria (1\textsuperscript{st} edition), 1.
\item \textsuperscript{267} Joubert \textit{v} Enslin 1910 AD 6 23, Swart \textit{v} Vosloo 1965 (1) SA 100 (A); Jordaan \textit{v} Trollip 1950 (1) PH A25 (T).
\item \textsuperscript{268} Estate Breet \textit{v} Perl-Urban Areas Health Board 1955 (3) SA 523 (A).
\item \textsuperscript{269} Kahn \textit{v} Raatz 1976 (4) SA 543 (A).
\item \textsuperscript{270} eg a contract of sale and purchase.
\item \textsuperscript{271} for the purpose of reaching consensus.
\item \textsuperscript{272} Strauss \textit{op cit} p 12, however, has a different viewpoint. He writes that, although the physician-patient relationship is one based on consensus, the law does not require the parties to go about as drawing up a deed of sale. He explains that consultations are often characterised by tacit agreement, whereby the patient consents to treatment/ examination after being properly informed of the risks involved. He suggests that only where treatment is very drastic or unusual the physician should obtain written and signed consent, having "considerable evidential importance."
\item \textsuperscript{273} In Tulloch \textit{v} Marsh 1910 TPD 453 it was decided that, at least regarding denture work, the transaction legally amounts to a sale agreement. \textit{In casu} it was relevant that the dental object was firmly/ permanently attached to the patient. Although Strauss \textit{op cit} p 70 expresses his doubts whether these procedures do in fact constitute sale, it is submitted that one should keep in mind that certain contraceptive devices are similarly attached to/ inserted in patients.
\end{itemize}
\end{footnotesize}
all the substantial terms. In the same way informed consent is given by a patient only after a proper informative explanation concerning all the relevant aspects of the medical condition/intervention has been provided by the doctor.

6.2 Contractual remedies?

As stated elsewhere, it should always be kept in mind when dealing with wrongful life issues, that the relationship between patient and physician is principally one based on contract. In medical examination-intervention agreements the patient and doctor basically enter into a contract of letting and hiring of work, or locatio conductio operis. In terms of specific contractual principles governing these contracts, the contractor can only recover his fee/contract price after completion of the work and is therefore prohibited from claiming the full amount if the work is incomplete or defective. The contract of letting and hiring of work can be described as a reciprocal agreement between a provider of work or lessor and an expert, the lessee, who undertakes to carry out the required assignment. The lessor renumerates the lessee for the work he completes independently.

When applied to an agreement to administer medical care in the wrongful life sphere, the patient is therefore the lessor of work as he gives an assignment to the physician or genetic counsellor to investigate his genetic fibre in order to make a diagnostic analysis of his suitability as a future parent. In a typical wrongful conception factual situation, a patient would consult with a physician to ensure that he/she does not conceive any further/future children. Such

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274 C.J. Nagel, Basic Principles of the South African Business Law Lex Patria, 98 - denture work is considered a contract of sale and it is asked whether the insertion of contraceptive devices should be similarly classified.

275 see ch 5 on informed consent.

276 see ch 4 infra.

277 Strauss op cit p 69, also S v Progress Dental Laboratory (Pty) Ltd and Another 1966 (3) SA 192 (T), 195 E.

278 is the physician in the medical sphere.

279 BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SAC 391 (A).

280 in terms of a medical relationship, the patient.

281 is the physician.

282 in contrast to an employment relationship where the employee renders his services subject to the control and supervision of the employer.

283 and to determine the risks involved should the patient decide to have a child - see ch 11 on medical aspects.
a commission would usually include the instruction to operate or administer less drastic alternative treatment to achieve this goal, which will then be performed by the medical provider as an expert.

7. In South Africa

When dealing with contracts relating to medical examination or treatment, a very important aspect of that consensus reached between the parties is the requirement that the patient is sufficiently informed of the nature and extent of the proposed medical procedure - to such an extent that he is able to give his informed consent thereto. In fact, one of the legal consequences of a medical intervention performed without the patient’s lawful consent is that the doctor or hospital may incur liability for breach of contract.

7.1 Contractual requirements

A valid contract is concluded if the parties to the agreement reach consensus and have the same intention of creating a legal obligation with legal consequences. These parties must have the necessary contractual capacity and must therefore have the ability to form their wills and appreciate the nature and consequences of their agreement. The contract must be a legal contract and performance in terms thereof must be physically possible and determined.

284 see ch 5 on informed consent.

285 other possible consequences are breach of contract, civil or criminal assault (a violation of physical integrity), civil or criminal injury (a violation of dignitas/privacy), professional negligence and the doctor or hospital may be unable to recover a professional fee (exceptio non edepenital, contractus, infra) - see also ch 4.

286 see ch 4 concerning vicarious liability.

287 Behrman v Klugman 1988 (W) -unreported, Castell v De Gref 1994 (4) SA 403 (C).

288 Nagel op cit p 14 ao.

289 an offer and its acceptance may be made tacitly (Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) and a valid contract can be proved by inference from the conduct of the parties, as is generally the case in medical agreements - Bremer Meulens (Edms) Bpk v Floros 1986 (1) PH A36 (A).

290 and therefore not in conflict with existing legal rules.

291 or determinable.
As a general rule no formalities are required, but if such formal prerequisites exist, they must be adhered to.

7.2 Factors that influence consensus

Although it might appear that contracting parties have reached consensus on all the relevant terms of their agreement, there might be certain factors present that either influence the consensus to the degree that no contract came into being, or that a contract did come into being, but is voidable.

In the first instance there is no contract and accordingly no legal obligation between the parties due to the fact that no real agreement was reached. A failure to reach true consensus may be because of error regarding the existence and contents of the contract, namely error with regards to the person of the other contracting party, error with regards to the nature of the agreement or error with regards to the performance or terms of a contract. The existence of a contract may only be contested where the mistake was reasonable and concerning an

Conradie v Rossouw 1919 AD 279.

Woods v Walters 1921 AD 303.

the terms of a contract are the promises agreed upon by the parties which together make up the contract - Kriegler v Minitzer 1949 (4) SA 821 (A).

a so-called “void” agreement - although this could be confusing as a void contract is really no contract at all (wherefrom no contractual rights or duties flow), ie where misrepresentation or fraud is material: Karoo and Eastern Board of Executors and Trust Co v Farr 1921 AD 413.

Nagel op cit p 27.

op cit p 28.

a misunderstanding or misconception by one or all the parties with regards to facts, events or circumstances - National & Overseas Distributors (Pty) Ltd v Potato Board 1958 (2) SA 473 (A).

eg where a patient wishes a particular specialist to perform a sterilisation operation and another less experienced physician actually performs the procedure.

eg where a patient merely wishes to obtain a preliminary diagnostic opinion and undergo a routine examination procedure, whereas the physician believes that the actual sterilisation procedure has to be performed.

eg where the patient believes that a specific guarantee was given by the physician with regards to the success and accuracy of a sterilisation operation or genetic screening procedure and consented thereto because of the guarantee, whereas the physician intended the reassurance merely to pacify the patient.
essential aspect. Where a contract is voidable an obligation does exist, but such a contract may be set aside by the prejudiced party because of the fact that consensus was reached in an unacceptable manner. This could be due to misrepresentation, duress or undue influence. Where an error in motive is caused by a misrepresentation, the contract is voidable due to this fact, an not because of the mistake. Note that a fraudulent or negligent misrepresentation entitles the misrepresentee to alternatively base a claim for damages on delict.

7.2.1 Misrepresentation by a physician
Although it is reasonably foreseeable that a patient could still be influenced to consent to an agreement due to misrepresentation, it would be vary rare indeed where a physician forces a patient into medical treatment by means of duress or undue influence.


304 where a false statement of fact induces the "innocent" party to enter into an agreement - eg where unrealistic prospects of accuracy or success of a medical test or intervention are used to sway a patient into consenting to such procedure - in Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A), the following requisites which a plaintiff must prove in an action based on misrepresentation are listed: a representation; which is, to the knowledge of the representor, false; which the representor intended the representee to act upon; which induced the representee so to act; and that the representee suffered damage as a result.

305 where a party is intimidated into agreement through threats - Malilang & others v MV Houda Pearl 1986 (2) SA 714 (A).

306 where a person's powers of resistance is weakened by another who has obtained a undue influence over him and in an unscrupulous manner induces such a party to enter into a prejudicial contract - Preller & others v Jordaan 1986 (1) SA 453 (A), Patel v Grobbelaar 1974 (1) SA 532 (A).

307 Ranger v Wykerd 1977 (2) SA 976 (A).

308 Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A).

309 a misrepresentation can be made expressly or by conduct and even an innocent misrepresentation can be made without fault, although a prejudiced party will only be entitled to claim consequential damages in the case of negligent and fraudulent misrepresentation.

310 It should be noted, however, that the discussion of physician paternalism v patient autonomy could be relevant in this respect. Many physicians in traditional, more conservative rural areas make decisions on behalf of their patients, without really obtaining the necessary consent and consequential consensus. Under these circumstances, undue influence could be possible as the physician holds a position of authority over the patient, who on his turn is in a weak position due to his illness and traditionally subordinate position - see ch 5 on informed consent.
When can one say that a physician has made a misrepresentation? It is submitted that physicians are often expected to motivate the necessity of a certain medical procedure,\textsuperscript{311} in which instance it could be possible that benefits or results of a particular procedure might be exaggerated to such an extent that a patient is moved by this report to agree to the specific procedure, which persuasion could possibly amount to a misrepresentation. Christie\textsuperscript{312} explains:

"A misrepresentation differs from a mere puff or commendation by being so seriously made as to invite reliance on it; it differs from a term of the contract in not being a promise intended by the parties to be enforceable...To found an action a misrepresentation must be a false statement of present or past fact. A statement of opinion on a question of fact or law or as to the future that turns out to be incorrect is not actionable unless the maker of the statement does not in truth hold that opinion and is therefore fraudulently misrepresenting the present fact of his state of mind, or unless the statement is negligent."\textsuperscript{313}

Another important principle regarding misrepresentation is that it must be material and not incidental or unimportant,\textsuperscript{314} but with the understanding that "the wrongdoer must take his victim as he finds him", which therefore does not mean that a unusually credulous person will be prejudiced because of this virtue.\textsuperscript{315}

7.3 Breach of contract

Breach of contract occurs when a contracting party fails to perform in terms of the agreement.\textsuperscript{316} A breach that also constitutes a delict entitles the aggrieved party to base a

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\item eg there is a variety of procedures available for a patient who requires sterilisation - some of which are more effective and lucrative than others.
\item \textit{op cit} p 75.
\item in wrongful life it is imaginable that a physician who is consulted regarding a possible future sterilisation may exaggerate the effectiveness of the procedure; or it might happen that a physician over confidently assures a patient that she carries a normal pregnancy; or prematurely convince a male patient that he is in fact sterile, while it is good practice to wait a few months before a final opinion can be given.
\item Service v Pondart-Diana 1964 (3) SA 277 (D).
\item Otto v Heymans 1971 (4) SA 148 (T).
\item recognised forms of breach of contract are: positive malperformance - see infra; mora debitoris or delay by debtor - Legogote Developments Co (Pty) Ltd v Delta Trust and Finance Co 1970 (1) SA 584 (T); mora creditoris or delay by creditor - Van Loggenberg v Sachs 1940 WLD 253; repudiation - OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd 1993 (3) SA 471 (A) and where performance is rendered impossible - Nagel \textit{op cit}, p 45 aq.
\end{itemize}
\end{flushright}
7.4 Positive malperformance

Proper performance of a debtor in terms of a contract discharges his obligation and when all parties have performed the whole contract is discharged. The onus of proving performance is on the debtor. It is suggested that in the majority of medical negligence cases based on breach of contract, the relevant type of breach is that of positive malperformance. This form of breach refers to a lesser quality of performance by a party than was required and expected in terms of the contract. The defaulting party therefore does perform, but the performance is defective, incomplete or deficient.

In a typical wrongful conception action where a physician is entrusted with the assignment to ensure that his patient(s) be rendered infertile, breach of contract would occur if the practitioner for example does bind off one of the fallopian tubes, but neglects to also secure the second tube, or where a vasectomy was performed successfully, but the patient was not informed that he could still be fertile for a period thereafter and first had to undergo a sperm count before resuming unprotected sexual relations.

If a physician or genetic counsellor involved in a wrongful life or wrongful birth matter was given the mandate to determine the likelihood of prospective parents to conceive a child with genetic anomalies, an insufficient performance would be the issuing of an unclear report/verdict or an uncommitted answer to a direct question from a patient.

If the directive was to do prenatal tests on a foetus and/or on its mother, the relevant medical

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317 Prima Toy Holdings (Pty) Ltd v Rosenberg 1974 (2) SA 477 (C) - note, however, that Christie op cit p 130 writes that "the Aquilian action will not be extended to a breach of a contractual duty to perform professional work with due diligence, when the breach has only infringed the contractual duty but has not infringed any of the plaintiff's rights of property or person." - see the discussion on pure economic loss.

318 Harrismith Board of Executors v Odendaal 1923 AD 530.

319 Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W).

320 or content.

321 When a contracting party fails to perform at all repudiation takes place whereby such a party in breach of contract declares his intention no longer to be bound by the agreement either by his words or through his conduct, without lawful justification. One must be careful when failure to perform is construed as repudiation, as it could be easily confused with mere delay or mora debitoris.
practitioner would act in breach of contract\textsuperscript{322} if the tests were either performed incorrectly or if incorrect conclusions were derived from such test results.

\textbf{7.4.1 No fault}

It is important to note that with regards to the question of fault in cases of breach of contract in the form of positive malperformance, the predominant view is that fault is not a requirement.\textsuperscript{323} In a medical negligence case based on contract, a plaintiff will accordingly \textit{not} have to prove that the physician in question had failed to apply his knowledge and skill to the specific medical issue below the governing level of proficiency expected from an intermediate professional in his field of expertise, as would be the case if the claim was based on delict.\textsuperscript{324} In order to establish whether the physician's performance was indeed deficient, however, one would still have to consult the relevant peer group of physicians or specialists to ascertain what would be regarded as an acceptable performance in each specific instance.\textsuperscript{325} The courts will, however, decide whether a particular physician has in fact conducted himself below the current standard of care that could reasonably be expected from him.

\textbf{7.5 Exceptio non Adimpleti Contractus}\textsuperscript{326}

Since an action in the sphere of wrongful life litigation is based on a reciprocal contract with an indivisible performance, neither of the parties would be entitled to claim performance from the other party if he himself has not yet properly performed or tendered such performance. A patient would therefore be able to raise the \textit{exceptio} against a claim for payment of the medical expenses\textsuperscript{327} where the said intervention or procedure was defective or deficient.

\textbf{7.6 Possible solutions}

\textsuperscript{322} in his performance/ conduct.

\textsuperscript{323} the party in breach to the contractual agreement, could therefore rely on the fact that malperformance was caused by the conduct of a third party, but will have to bear the burden of proving this fact - Nagel p 48.

\textsuperscript{324} or in an instance of breach of contract where negligence is a requirement - see ch 4 on medical negligence.

\textsuperscript{325} see ch on informed consent, especially the position in England, where the so-called "Bolam principle" applies, in terms of which the standard of medical proficiency is set by the medical fraternity itself.

\textsuperscript{326} Nagel \textit{op cit} p 53.

\textsuperscript{327} ie the counter-performance.
One perspective on wrongful life actions that seemingly address the fundamental argument that the plaintiff in these actions has no contractual relationship with the defendant, is to structure the medical agreement for genetic counselling as a contract for the benefit of a third party.\textsuperscript{328} Christie\textsuperscript{329} explains the operation of this legal phenomena and writes that "the nature of such a contract is that a promisor\textsuperscript{330} contracts with a promisee\textsuperscript{331} for the benefit of a third party, who is entitled to accept or reject the offered benefit which, although generically called a benefit, may consist of duties as well as rights,\textsuperscript{332} and must be accepted or rejected as a whole."

The third party need not have authorised the promisee to act on his behalf and may not even have been in existence at the time of the contract, such as an unborn child.\textsuperscript{333} Christie\textsuperscript{334} warns that this contract should also not be confused with either a normal contract of a guardian for a minor child,\textsuperscript{335} as the third party has to actually accept the benefit,\textsuperscript{336} or a contract where the third party is an \textit{adectus solutionis cause} with no rights to enforce the contract.\textsuperscript{337} Regarding the requirements for a contract for the benefit of a third party, it is important to note that the benefit cannot be accepted unless the promisor and promisee have contracted with the

\textsuperscript{328} \textit{stipulatio alteri/ ius quaesitum terio} - the third party being the handicapped child-plaintiff in wrongful life.


\textsuperscript{330} it is suggested that the medical professional who undertakes the responsibility of attending to the patient's request for genetic guidance, implicitly also accepts responsibility for the children that might be conceived, based on the genetic advise given - this acceptance of responsibility to act in the best interests of an unborn child could correlative be seen as a contract for the benefit of a third party.

\textsuperscript{331} it is suggested that parents seeking genetic advice and contracting with a medical professional to do the necessary tests and provide genetic guidance, contract not only for themselves, but also on behalf of their unborn and unconcepted children - therefore acting as promisee in that context.

\textsuperscript{332} it is suggested that the rights the third party/ wrongful life plaintiff would be entitled to include: the right to proper medical treatment, the right of parents to make an informed decision on procreation (including the rights to contraception, sterilisation and abortion), culminating in the right to not be in an unnecessary prejudicial physically state - see discussion on plaintiff's right \textit{infra}.

\textsuperscript{333} McCullogh v Fernwood Estate Ltd 1920 AD 204.

\textsuperscript{334} \textit{Ibid}.

\textsuperscript{335} where benefits will directly accrue to the child.

\textsuperscript{336} Dekenah v Linton 1920 CPD 579.

\textsuperscript{337} Malelane Suikerkorporasie (Edms) Bpk v Streak 1970 (4) SA 478 (T).
common intention\(^{338}\) that the third party would become a party to the agreement once the benefit is accepted.\(^{339}\) Acceptance of the "offer of benefit" can be made expressly or tacitly, but have to be communicated to the offeror/promisor unless the need of such information is waived.\(^{340}\)

A promisor may not unilaterally withdraw the offer and the promisee may obtain an interdict to preserve the offer effectively.\(^{341}\) A final important aspect to note is that although "a promise that a third party will perform is not enforceable against the third party, but against the promisor for personal performance or damages for non-performance."\(^{342}\)

8. Remedies for breach of contract

8.1 Cancellation

A plaintiff is entitled to cancel a contract if the malperformance/breach of the other party was substantial.\(^{343}\) Christie\(^{344}\) refers to judicial guidelines\(^{345}\) and states that cancellation is justified for a breach going to the root of the contract, i.e., a material breach of a vital term.

Note that from the viewpoint of the wrongful life litigant, it would be very unwise to annul an agreement, as such conduct would destroy the very foundation on which the claim is based.\(^{346}\) Cancellation of the contract under these circumstances would therefore not be recommended...

\(^{338}\) the parties' intention can be made expressly, by implication (Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A) or be inferred from the surrounding circumstances (Alexander v John 1912 AD 431) - it is submitted that although a physician/geneticist and patient do probably not expressly discuss their mutual responsibility towards the unborn child, it can naturally be deduced by the very nature of their relationship.

\(^{339}\) Total South Africa (Pty) Ltd v Bekker 1992 (1) SA 617 (A).

\(^{340}\) Croce v Croce 1940 TPD 251.

\(^{341}\) McCullogh v Fernwood Estate Ltd supra.

\(^{342}\) Christie op cit p 72 - referring to Aronowitz v Atkinson 1938 SR 45.

\(^{343}\) malperformance could be regarded as substantial if the innocent party to the breach of contract never would have concluded the contract had he known what kind/quality of performance he was actually going to receive - Nagel op cit p 56.

\(^{344}\) op cit p 130.

\(^{345}\) Octorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A).

\(^{346}\) see cancellation of agreement supra.
as the plaintiff would then prejudice himself by destroying the very basis of his claim - the contract itself. Cancellation alone would not be a sufficiently effective remedy as the cost of the relevant operation or treatment is insignificant when compared with the extensive damages resulting from the breach. Because of the nature of wrongful life matters and because of the serious consequences resulting from breach of contract in these cases, a consequential claim for damages could in principle be instituted in addition to cancellation.

8.2 Specific performance

It is principally possible for the innocent/ prejudiced party to a breach of contract to reject the delivered performance, enforce the contract and demand specific and proper performance. Strauss, however, states that South African courts have traditionally been reluctant to order specific performance in cases involving obligations of a personal nature and prefer to allow the plaintiff to sue for damages as an alternative. It is, however, also reported that specific performance could mean either an order to perform or an order to pay money, although the first-mentioned is more frequently found. The plaintiff may principally choose specific performance, albeit that the courts have a judicial discretion under certain circumstances.

Wrongful life litigation is very much relevant to the our discussion on specific performance where actual performance is impossible. A claim for specific performance will not be able to reverse the conception or birth of a child and will in wrongful life matters probably only practically manifest in the correction of an improperly performed operation. Whether the

347  *ie* either the birth of an unplanned child or the birth of a handicapped/ genetically diseased child.

348  specific performance forces a defaulting party to deliver performance in the very terms agreed upon by the parties.

349  *op cit* p 16.

350  National Union of Textile Workers and Others *v* Stag Packing (Pty) Ltd and Another 1982 (4) SA 151 (T).

351  Christie *op cit* p 134.

352  Carpet Contract s (Pty) Ltd *v* Grobler 1975 (2) SA 436 (T).

353  Benson *v* SA Mutual Life Assurance Society 1986 (1) SA 776 (A), namely impossibility, undue hardship, contract of employment or personal service and imprecise obligations.


355  but this would be a classic example of “too little too late” as an unwanted conception cannot be reversed, although it could be ended - see fn *infra*. 58
performance of an abortion would be seen as a solution to accomplish proper performance is an open question, although it is submitted that this would not always be an acceptable option. 356

8.2.1 Damages as alternative

The wrongful life plaintiff's focus should therefore be on damages as an alternative to specific performance. 357 In the event of a claim for specific performance, an injured party is naturally also entitled to additionally claim damages 358 to redress any losses 359 suffered as a result of the breach of contract. 360 Christie 351 reports in this regard that damages may also be claimed in the original action, either as an alternative to specific performance at the defendant's option or as an alternative only of specific performance proves impossible. 362 He writes that such damages must be proved in the ordinary way 363 and punitive damages 364 will not be awarded.

8.3 Damages

Damages are regularly claimed in conjunction with a claim for cancellation or specific performance, as remedies that are not inconsistent may safely be combined. 365 The main purpose for a claim of damages is to place the injured party in the same hypothetical position he would have been in had the breach of contract not taken place, 366 so far as that can be done with money and without undue hardship to the defaulting party. 367 The following principles

356 see abortion ch 3.

357 ISEP Structural Engineering and Planting (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A) - Nagel op cit p 52 states that there is uncertainty as to this possibility in South African law.

358 general issues regarding the nature of damages - Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd 1975 (1) SA 110 (A).

359 i.e patrimonial damages.

360 Nagel op cit p 57.

361 op cit p 136.

362 Estel v Novazi 1919 NPD 406.

363 see damages discussed infra.

364 Woods v Walters.

365 Total South Africa (Pty) Ltd v Bekker 1992 (1) SA 617 (A).

366 ibid - the plaintiff is therefore entitled to positive interesse, as opposed to the mere negative interesse that may be claimed in delict - Whitfield v Phillips & another 1957 (2) SA 318 (A).

367 Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1.
governing the extent of contractual damage should also be considered: An obvious principle is that mere breach of contract does not per se entitle the innocent party to claim damages - it must first be proved\textsuperscript{368} that actual loss was indeed suffered due to the breach, before an prejudiced party would be able to claim compensation for such loss. The calculation of damages is done by comparing the prejudiced party's financial position because of the breach, with the hypothetical financial position in which this party would have been had there been perfect fulfilment of the contract.\textsuperscript{369}

In the wrongful life scope of litigation, the obvious consequence of the physician's malperformance is an unwanted life, for which no straightforward amount can be claimed.\textsuperscript{370} Various calculations will be made depending on what type of action was instituted\textsuperscript{371} and consideration will also be taken as to what damage amounts were previously allowed by the courts. Regarding the extent and recoverability of damages, one must distinguish between general damages and special damages,\textsuperscript{372} as an injured party will only be entitled to claim damages that were actually foreseen or what reasonably should have been foreseen by the contracting parties at the conclusion of their contract.\textsuperscript{373}

\textbf{8.3.1 General damages}

Damages that naturally flow from a specific type of breach are classified as general damages\textsuperscript{374}

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\textsuperscript{368} proof of damage and damages - Aaron's Whale Rock Trust v Murray & Roberts Ltd & another 1992 (1) SA 652 (C), Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd 1970 (1) SA 228 (A).

\textsuperscript{369} ie fulfilment as initially intended by the parties - ISEP Structural Engineering and Planting (Pty) Ltd v Inland Exploration Co (Pty) Ltd, as opposed to delictual damages where a plaintiff is compensated in accordance with the diminution of his patrimony - Trotman v Edwick 1851 (1) SA 443 (A).

\textsuperscript{370} see wrongful life ch 8 and philosophical challenges consequential to a theoretical comparison between no life and disabled life.

\textsuperscript{371} varying heads of damage would be found in the different types of actions ie wrongful conception, wrongful birth, or wrongful life - see specifically ch 6, 7 and 8.

\textsuperscript{372} special damages must be proved by the plaintiff - one school supports the contemplation theory: Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 on p 22: "Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom." and the convention theory: Shatz Investments (Pty) Ltd v Kalovynas 1976 (2) SA 545 (A), which dictates that contracting parties must not only have foreseen special damages, but that "the parties must also have contracted on the basis of the defendant's assuming liability for such damages." op cit p 552.

\textsuperscript{373} Nagel \textit{op cit} p 58.

\textsuperscript{374} Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A).
and a prejudiced party may claim such damages based on the fact that the parties are presumed to have contemplated the possible occurrence of such specific damage, if breach should occur. For this reason general damages need not be proved, although it must be shown that the measure of damages claimed is appropriate in the circumstances.

8.3.2 Special damages

Special damages are those damages that could not be said to be an obvious or probable result of a specific type of breach and should for this reason be especially pleaded. The party claiming such damages has to prove that the parties actually did foresee these damages at the time of the conclusion of the contract and that an express or tacit agreement existed that such damage would be recoverable. Such an agreement can also be based on assumed consensus, where parties are deemed to have reached consensus on so-called implied terms, to the same effect.

Even if a specific agreement on the guaranteed success of a medical procedure was not reached, the foreseen damage estimated in a wrongful life action should in principle not pose too much of a problem. If a physician is namely asked to perform a vasectomy, it is glaringly obvious that failure to properly perform such an operation would most probably result in unwanted conceptions. It is similarly obvious that such a child will cause considerable expenses and it is submitted that such child-rearing expenses are also foreseen damages.

Similarly, a genetic specialist perfectly well knows that the very reason concerned parents require his expertise is to prevent the birth of a handicapped or genetically diseased child. Although the calculation of the damages suffered in these cases are more complex and pose

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375 eg that the birth of a child would necessarily have certain cost implications etc.

376 Katzenellenbogen Ltd v Mullin 1977 (4) SA 655 (A).

377 Lavery & Co Ltd v Jungheinrich 1931 AD 166.

378 ie real consensus.

379 Nagel op cit p 24 - a court may by implication include a missing stipulation in a contract if:

- the inclusion is fair and reasonable;
- the inclusion must be based on the common intention of the parties;
- both the parties must be deemed to have given their implicit consent to such a stipulation;
- the included term is necessary to give the contract business efficiency;
- the term must be clear and unambiguous as to its contents;
- it is not only desirable, but indeed essential.

380 for example a sterilisation operation.

381 a guaranteed medical intervention is very seldom found.
many additional legal, moral and ethical challenges, these damages were nevertheless foreseeable.\textsuperscript{382}

\textbf{8.3.3 Duty to mitigate damages}

Only damages caused as a direct consequence of the breach of contract may be claimed and all beneficial side effects deriving from the breach must be taken into account and accordingly deducted.\textsuperscript{383} Similar to the law of delict, a plaintiff in contract also has a corresponding duty to mitigate damages.\textsuperscript{384} A plaintiff consequently has to limit the extent of his losses as far as possible by taking reasonable steps and he would be unable to recover damages which could have been prevented through reasonable care.\textsuperscript{385} The onus is on the defendant to show that the plaintiff has failed to mitigate his damages and the courts should not be too harsh in consideration of this fact.\textsuperscript{386} The general principle of the mitigation of damages has been entrenched in the collateral source rule in the law of contract.\textsuperscript{387}

"In determining the consequences of the breach of contract and thus, in making the comparison, both the detrimental and beneficial (if any) results thereof must be taken into account."

\textbf{8.3.4 One claim}

Damages may be claimed only once.\textsuperscript{388} All current and future damages\textsuperscript{389} must therefore be calculated with precision, as no additional claims will be allowed even if further losses due to

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\textsuperscript{382} see Edouard supra where the question whether non-patrimonial damages can be claimed on basis of contract is answered in the negative.

\textsuperscript{383} note the similar principle found in delictual claims, commonly referred to as the "benefit rule", see supra.

\textsuperscript{384} Novick v Benjamin 1972 (2) SA 842 (A).

\textsuperscript{385} Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1.

\textsuperscript{386} Soar v JC Motors 1992 (4) SA 127 (A).

\textsuperscript{387} Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd & another 1985 (1) SA 248 (W), 253.

\textsuperscript{388} see the "once and for all" rule supra.

\textsuperscript{389} prospective loss is claimable - Burger v Union National South British Insurance Co Ltd 1975 (4) SA 72 (W).
the breach are only discovered at a later stage. It is reported:

“A plaintiff is not permitted to bring more than one action in respect of the same breach (unless the contract provides otherwise) so he must either wait until the full extent of his loss has become apparent, or claim past, present and prospective damages in the one action.”

8.3.5 Pecuniary loss

Only pecuniary loss can be claimed based on breach of contract. A plaintiff’s claim for damages in contract is therefore limited to patrimonial losses. Only financial damages may be recovered and although it is possible that a party could experience emotional trauma as a result of breach of contract, these personal injuries can not be compensated. This restriction when basing a claim on contract has serious implications for wrongful life litigants who commonly suffer extensive emotional trauma.

The Apportionment of Damages Act does not apply to claims based on contract. The Conventional Penalties Act, however, enforces contractually agreed penalties to the extent that it is not unfair or excessive and prevents both a penalty and damages being claimed in respect of the same breach of contract.

8.4 Illegal contracts

Harrer is of the opinion that abortion contracts are void under German law because they

390 Kantor v Welldone Upholsters 1944 CPD 388; Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A).

Christie op cit p 143.

392 Administrator, Natal v Edouard 1990 (3) SA 581 (A).

except by means of a claim in delict - this very issue was considered in the landmark decision of Administrator, Natal v Edouard: see ch 6.

393 an unwanted (normal) pregnancy could similarly cause psychological trauma, see wrongful life ch 8 and wrongful birth ch 7.

394 no. 34 of 1956.

395 Barclays Bank DCO v Straw 1965 (2) SA 93 (O) and OK Bazaars (1929) Ltd v Stern and Ekmans 1976 (2) SA 521 (C).

396 no. 15 of 1962.


398 op cit p 101 - see ch 3.
contravene relevant statutory prohibitions.\footnote{Nagel reports that, in terms of South African law, the basic principle regarding illegal agreements is that such contracts are null and void. He writes that illegality has two further important consequences:}

- in terms of the \textit{ex turpi causa} rule a party to the contract has no legal standing and does therefore not have the usual remedies such as a claim for specific performance, cancellation and damages;
- in terms of the \textit{in par delictum} rule a party whom has already performed has no right to reclaim such performance.

Christie\footnote{Christie reports that a statutory provision with the possible effect that a contract is void should be interpreted by examining the statute as a whole and by taking the scope and purpose of the act into consideration. Contracts could also be illegal or unenforceable at common law because they are \textit{contra bonos mores}.} reports that a statutory provision with the possible effect that a contract is void should be interpreted by examining the statute as a whole and by taking the scope and purpose of the act into consideration. Contracts could also be illegal or unenforceable at common law because they are \textit{contra bonos mores}.

8.5 \textbf{Guarantee of success}

Where a specific characteristic in a performance\footnote{Where a specific characteristic in a performance is elevated to a term of the agreement a guarantee is given and failure to deliver the agreed result would automatically constitute breach of contract. In the medical sphere such guarantee of success is very rare as medicine is generally not seen as an exact science and because the standard of care expected from a physician is not the highest possible degree of professional skill, but rather reasonable proficiency and care. In the English case of Greaves \& Co (Contractors) Ltd v Bayham} is elevated to a term of the agreement a guarantee is given and failure to deliver the agreed result would automatically constitute breach of contract. In the medical sphere such guarantee of success is very rare as medicine is generally not seen as an exact science and because the standard of care expected from a physician is not the highest possible degree of professional skill, but rather reasonable proficiency and care.\footnote{\textit{Ex parte Minister of Justice: in re} Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donelly v Barclays National Bank Ltd 1995 (3) SA 1 (A).} In the English case of Greaves \& Co (Contractors) Ltd v Bayham

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\textbf{400} these agreements possibly fall under contracts encouraging crime, delict or other unlawful acts, which is similarly void under South African law - \textit{Conradie v Rossouw} 1919 AD 279.
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\textbf{402} \textit{op cit} p 92.
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\textbf{403} \textit{Sutter v Scheepers} 1932 AD 165.
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\textbf{404} \textit{Ex parte Minister of Justice: in re} Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donelly v Barclays National Bank Ltd 1995 (3) SA 1 (A).
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\textbf{405} any aspect of performance can be guaranteed, \textit{eg} that a specific result would be obtained, that performance would be complete on a specific date or that a particular attribute to performance is true.
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\textbf{406} \textit{Buls and Another v Tsatsaralakis} 1976 (2) SA 891 (T) - see also ch 4 for a discussion on medical negligence.
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Mickle & Partners\textsuperscript{407} it was stated:\textsuperscript{408}

"The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case."\textsuperscript{409}

Berenson\textsuperscript{410} reports that French law recognizes a distinction between the obligation de resultat, where an obligor promises to achieve a particular result\textsuperscript{411} and the obligations des moyens, where an obligor promises merely to use appropriate means/ his best effort to achieve the promised result.

 Hondius\textsuperscript{412} similarly differentiates between so-called "resultverbintenis" or result based agreement and "inspanningsverbintenis" or agreement of proper exertion. He refers to the international recognition of a (medical) guarantee, as purported in the "Principles of International Commercial Contracts".\textsuperscript{413}

Article 5.4 (Duty to achieve a specific result/ Duty of best efforts)
1. To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
2. To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made

\textsuperscript{407} (1975) 2 All ER 99 (CA).

\textsuperscript{408} see also the wrongful conception cases of Eyre v Measday (1985) 1 All ER 488
CA and Thake & Another v Maurice (1986) QB 644 (CA), (1986) 1 All ER 497 (CA), where it was found that no guarantee of success was given for sterilisation procedures, discussed in ch 6.

\textsuperscript{409} It is submitted that although it is obvious that no physician can genuinely guarantee the healing of a disease or the successful correction of a medical condition of sorts, the examination for a hereditary trait and subsequent diagnosis and provision of information/ genetic counselling could be classified as medical intervention of a totally different nature, which might probably be guaranteed of a specific level of precision or success - in wrongful life litigation the physician is generally not required to cure a patient of a hereditary disease, but merely to establish its existence.

\textsuperscript{410} Berenson, M. A. 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". Tulane Law Review (64), 895.

\textsuperscript{411} in such cases, the person that gives a guarantee of success, also takes the risk involved with medical interventions upon himself.


\textsuperscript{413} of UNIDROIT, 2 European Review of Private Law (1994), 341.
by a reasonable person of the same kind in the same circumstances.

Article 5.5 (Determination of kind of duty involved)
In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among others, to:
(a) the way in which the obligation is expressed in the contract;
(b) the contractual price and the other terms of the contract;
(c) the degree of risk normally involved in achieving the expected result;
(d) the ability of the other party to influence the performance of the obligation.

The South African position regarding medical guarantees has considered in the unreported wrongful conception case of Behrmann & Another v Klugman, in casu the court found that although reassurances was given to a patient scheduled for a vasectomy, these confirmations cannot be seen to have constituted a guarantee of success.

BASIC PRINCIPLES

9. Related topics

9.1 Out of court settlements

Andrews reports that there are various reasons why so many English cases based on medical negligence are settled out of court. It is suggested that not only personal injury claims are affected by these considerations, but that wrongful life litigation should similarly be influenced. The author shows a variety of factors that weigh the scales of litigation in favour

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414 1988 WLD (unreported - judgment on 18 May 1988) - see ch 6 for a discussion on this case.

415 There is a fine line between so-called "puffing" or exaggeration of positive attributes of performance, and misleading a contracting party into believing that an actual guarantee of the beneficial result/ performance has in fact been given. The question is whether, in the particular case, the promised positive attribute has in fact been elevated to a contractual term or not.


417 This phenomenon is not only restricted to England, but corresponds with the position in America and South Africa as well.

418 See ch 4 where reference is made to the prevalence of settlements in medical negligence cases.
of defendants in these instances.

The first concern a plaintiff is faced with when instituting a claim is the general convention that a cost order is made against the loser in the case. An unsuccessful plaintiff will therefore have to pay both parties' legal costs, which probably will be a substantial amount. In this regard it should be remembered that whilst the plaintiff is almost always a private individual, the defendant is either a governmental institution or a professional negligence insurance company.

It is often difficult for a plaintiff in medical negligence cases to predict whether the facts to his disposal amount to negligence. Not only are plaintiffs restricted by the absence of pre-trial exchange of witnesses' proofs, but plaintiffs often have trouble in obtaining proper evidence.

Another drawback experienced by plaintiffs is the uncertainty how the application of the contributory negligence rule would affect the final outcome of the matter. It is often a real possibility that a substantial portion of the award will be compromised in this way. Van Oosten writes in this regard:

"The fact that the patient also contributed to the harm that has befallen him, affords the doctor who is guilty of negligence no defence. Contributory negligence can at best lead to an apportionment of damages or mitigation of sentence. Likewise, whether the degree of negligence established on the doctor's part is slight or gross, makes no difference to his civil and/or criminal liability, but may influence the quantum of damages awarded and/or severity of the punishment imposed."

There is generally an inherent imbalance of experience between the parties in this particular

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419 with limited financial resources.
420 where a state hospital or clinic was responsible for the negligent medical intervention.
421 under English law.
422 see ch 11 where it is mentioned that the very evidence of the negligence complained of is safely hidden away in the plaintiff's body, in many cases of improperly performed sterilisation procedures - unless a 'second-look' operation can be performed,
423 it is submitted that the liberal use of the benefit rule by many courts is another hurdle in the way to plaintiff's full recovery - see ch 8, 7 and 8.
field of litigation. It is mentioned that the defendant is invariably an insurance company which deals with hundreds of such claims and not only knows the expert counsels in the field, but also has the financial backing to afford the best there is. Defendants also have a host of physicians and other experts to assist them in building a strong case, writing reports and being available as possible future court witnesses.

The author further reports that plaintiffs often make use of attorneys who only do personal injury work from time to time and who are but too relieved to accept a settlement. If one takes into account the many factors that weigh the odds heavily in favour of defendant, one could perceive why most plaintiff-attorneys concede to much too low settlements.

It is submitted that further reasons why a plaintiff would prefer to settle a matter out of court, is the long waiting periods currently experienced in courts.

Strauss also recognises the phenomena that only a small percentage of medical negligence cases ever see the inside of a courtroom. “Most claims pressed are settled out of court, the incentive to settle being very strong on both sides.”

Possible solutions to overcoming some of the obstacles are the following: Giving instruction to specialist attorneys who brief specialist counsel is a definite step in the right direction. In this way the playing fields are levelled in at least one (and probably the most important) respect. Another improvement suggested by the author would be the institution of a specific class action. Finally, it is suggested, that judicial supervision over settlements should be considered. It is believed that plaintiff requires these forms of additional protection “for the scales of justice to be weighed less heavily in favour of defendants”.

9.2 Proving an unwritten contract

426 ibid.
426 in the Pretoria High Court a plaintiff could currently expect to wait anything up to two years before a court date can be finalized.
427 op cit p 243.
428 ibid.
430 see chs 10 and 12 in this regard, where regulating legislation is suggested as a long term solution to wrongful life challenges.
Christie reports that although an oral agreement is legally valid, it is in practice difficult for a party to discharge the burden of proving the contract. He writes:

"Proof of a written contract is simpler, because the plaintiff discharges his burden by proving the defendant's signature and the contents of the document at the time it was signed, and it is then for the defendant to prove his defence."

The general rule where a party has signed a document containing contractual terms is caveat subscriptor and a party so bound will have to prove a defence in order to escape liability on the contract.

9.3 Exemption clauses

It is legally possible to contractually exempt oneself from liability that could arise from negligence. Such an exemption clause may also exclude liability for a fundamental breach of contract although it is uncertain if total non-performance can be covered.

It is reported that an unambiguous exemption clause must be given its plain meaning and that specific legal grounds for liability for which exemption is given must be mentioned, failing which a narrow interpretation will be given to the exemption.

9.4 American delict based on fraud

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432 the party alleging that an agreement exists, must prove it - Bitcon v Rosenberg 1936 AD 380.
433 Da Silva v Janowski 1982 (3) SA 205 (A).
434 Ibid.
435 or "beware if you sign", as such a person is bound to the ordinary meaning and effect of the words appearing in the contract - Burger v Central South African Railways 1903 TS 571.
436 misrepresentation, fraud, illegality, duress, undue influence and mistake - see these concepts discussed infra.
438 Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A).
439 Essa v Divaris 1947 (1) SA 753 (A).
When damages based on fraud are claimed, the plaintiff must prove that the fraudulent misrepresentation was made with the actual or constructive intent to injure the misrepresentee or to benefit the misrepresentor. It is stated:

"Silence may amount to fraud when a party knows material facts or has diligently refrained from acquiring knowledge of them, and with intent to defraud the other party takes steps to conceal those facts, or deliberately remains silent either when he knows the other party is ignorant of them or when the other party is in a position of involuntary reliance on him for disclosure of material information. Telling a half-truth may also amount to fraud."

It is, as stated earlier, doubtful if a plaintiff would ever be successful in proving that a physician had deliberately misled him with the intent to injure.

9.5 Prescription

Contractual debts generally prescribe after three years in terms of South African law, which period begins to run when the debt is due, provided the creditor knows or ought reasonably have known the identity of the debtor and the facts from which the debt arises and the debtor has not wilfully prevented the creditor from coming to know of the existence of the debt.

9.6 Contract relationship

Berenson conveys that if the physician was indeed aware of the patient’s motive in contracting for the procedure, his failure to perform his duties as contracted should be a breach of contract.

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440 Berkemeyer v Woof 1929 CPD 235.

441 Christie op cit p 80.

442 (a delictual cause of action as well).


444 ibid sec 12.

445 1990 The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". Tulane Law Review (64), 913.
Lupton\textsuperscript{446}

The law has certainly not kept pace with the changes in the field of genetics and gene therapy.

"it is thus little wonder that in the search for security in the decisions forced on them, doctors and scientists often call for intervention in the form of legislation or regulations. In many instances such demands cannot be met, since the role of the law is not to make social problems disappear but rather to define what is considered to be socially acceptable behaviour."\textsuperscript{447}

9.7 Insurance alternative

Slagter,\textsuperscript{448} with regard to professional liability, writes that excessive claims and punitive damages need not necessarily follow, as was the case in the United States of America. He reports that in the Netherlands, section 6:110 of the Civil Code will sufficiently limit liability. Such legislative restrictions, it is submitted,\textsuperscript{449} is necessary and beneficial as it has a broad, general application and will also encompass liability based on tort toward third parties.

Van den Bergh\textsuperscript{450} states plainly that liability law will eventually be replaced by other systems of compensation, such as insurance.

"Een ontwikkeling van het aansprakelijkheidsrecht geschetst die uiteindelijk leidt tot vervanging van het aansprakelijkheidsrecht door andere vergoedingssystemen, zoals verzekering." 

It is mentioned\textsuperscript{451} that although compensation by an insurer has not yet replaced tort liability, first mentioned option has the following advantages: an insurance system is specifically focussed on the needs of a victim; a causal link is easier proved and is not as strict towards


\textsuperscript{447} ibid.

\textsuperscript{448} 1995. Beperking van beroepsaansprakelijkheid. TVVS (95:7), 173.

\textsuperscript{449} op cit p 178.

\textsuperscript{450} 1990 De invloed van verzekering op de civiele aansprakelijkheid Koninklijke Vermande BV. Lelystad, 101.

\textsuperscript{451} op cit p 101.
Van den Bergh believes that insurance aspects play an important role in both legislation and case law.

Van Zant believes that we must strive for a fair posting of risk, which could be achieved through a “pooling” into insurance of all parties involved. A producer of (medical) goods will therefore have to keep insuring himself, whilst still maintaining a policy of proper research into new products.

9.8 Limitation of damages

Stolker submits that basically two questions arise when the limitation of liability is under consideration: the first is whether the scope of the liability cannot possibly be restricted; the second, if it isn’t possible to restrict the number of plaintiffs.

10. Conclusion

Although it might not make any practical difference in the sought after result, whether a plaintiff receives damages based on delict or based on contract, it is nevertheless important for the study of wrongful life to distinguish the two bases. Different heads of damages are claimable...
and different facts must be proved.

1. Introduction

1.1 What is a legal profession?

According to the South African legal profession, a legal profession is a profession that is conducted by a person who is licensed to practice law. The legal profession is regulated by the Law Development Commission, which is responsible for ensuring that the legal profession operates in a fair and equitable manner.

1.2 The South African position

The South African legal profession is governed by the Legal Practitioners Act, which sets out the rules and regulations that govern the conduct of the legal profession. The Act states that the legal profession must operate in a manner that is consistent with the principles of justice, fairness, and equality.

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