

entities ought to possess the same legal right as a fully developed human being?"²³¹

Lupton²³² concludes that the "brain birth represents the most realistic and desirable basis on which to define the beginning of protected life", which theory should be applied while allowing for a margin of error, so that human life should be afforded state protection as from the twentieth week of gestation.

He writes:²³³

"It will be many years before science, theology and ethics can meet and decide jointly when "life begins" but in the mean time a satisfactory arrangement must be found to allow the scientific community to pursue the research which is in the interest of all mankind. In order to ensure that it takes place within controlled parameters it is submitted that experimentation on live embryos or foetuses should not be permitted beyond brain birth ed conservatively calculated at the 20 week limit."

In the search for future legal resolution to the debate surrounding the true status of the embryo, Knoppers and Le Bris²³⁴ have identified basic principles that could be recognized as guidelines. The first is that the human embryo must be respected for its intrinsic value.²³⁵ They secondly believe that the embryo's specificity should define the limits of its use. Although the embryo could never have an absolute right to life, its specific legal status can be tailored in relation to other rights and freedoms.

"Thus, independent of legal qualification or defined legal status, the human embryo is worthy of protection because of its very humanness (which is not synonymous with personhood)."²³⁶

Du Plessis²³⁷ believes that the moment of beginning of life is borne out by medical science and that increased knowledge of prenatal life will show the humanness of the unborn from a very early stage of its development: "Birth is not the beginning of life; it is simply a drastic switch

²³¹ Slabbert *op cit* p 253.

²³² *op cit* p 207.

²³³ Lupton, 1988. *op cit* p 215.

²³⁴ *op cit* p 336.

²³⁵ as having the potential to become a legal subject.

²³⁶ Knoppers and Le Bris *op cit* p 337.

²³⁷ *op cit* p 58.

in lifestyle.”²³⁸ He argues that the law must take account of the reality of human life before birth, not only focus on medical facts about the foetus, but appreciate that of pre-natal life is “a mode of being in its fullness.”²³⁹

4.2 Abortion in Germany

4.2.1 Historical background

Harrer²⁴⁰ reports that the validity of abortion contracts²⁴¹ have raised a number of controversial questions in Germany. He summarises the development of the abortion issue in Germany over the past few years:

- Period prior to 1975

The criminal law relating to abortion was based on the old section 218(a) of the STGB.²⁴² According to this section an abortion carried out by a physician with the consent of the pregnant woman was *not punishable*,²⁴³ if no more than 12 weeks have passed since conception.

- Period after 1975 and up to 1990

The above-mentioned section which *de facto* allowed eugenic abortion²⁴⁴ up to 12 weeks, was found unconstitutional by the Federal Constitutional Court in 1975 because it did not adequately protect the right to life of the foetus pursuant to article 2(II) of the German Constitution (GG).²⁴⁵ It was accordingly replaced with the new section 218(a), which was based on the principle that the destruction of human life, even in the form of a non-viable foetus, must principally be punished. Section 218(a) of the new Criminal Code StGB, however, did established four indications for abortion in terms of which an abortion could be legally obtained for medical, eugenic, criminological and

²³⁸ *ibid.*

²³⁹ Du Plessis *ibid.*

²⁴⁰ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 89.

²⁴¹ agreements in terms of which an abortion is performed.

²⁴² “*Strafgesetzbuch*”.

²⁴³ thereby not implying that abortion was legal under this sec.

²⁴⁴ note the difference between eugenic and therapeutic abortions.

²⁴⁵ “*Grundgesetz*”.

certain social reasons.²⁴⁶ The practical effect of this section was very constraining²⁴⁷ and mothers had no real freedom to choose abortion during the limited period in which it could be performed.²⁴⁸

- Period from 1990 to 1992

As a result of reunification on October 3, 1990 there existed a delicate and uncertain position concerning the legality of abortion in Germany because of conflicting policies between the former East German and West German legal systems. A new general solution had to be found.

- Period since June 1992

The German Parliament (*Bundestag*) voted for a new law on abortion and approved the new statute on July 10, 1992. Under this statute, abortion would not be unlawful, if it was to be performed by a physician, on request of the pregnant woman within 12 weeks of pregnancy and after providing a certificate of undergoing mandatory counselling at least three days prior to the abortion procedure.

On May 28, 1993 the²⁴⁹ German Federal Constitutional Court held with a vote of 6-2 that the new abortion law was partially unconstitutional and therefore issued a uniform transitional arrangement for all German states effective from June 16, 1993. The following transitional judicial rules would apply until the enactment of a new comprehensive abortion law by the legislator: Pursuant to these transitional provisions, an abortion will not be *criminally sanctioned*²⁵⁰ if it complies with the basic requirements set up by the existing abortion law. The mandatory counselling spoken of by the statute, purports to protect unborn life and has to be guided by a desire to encourage the woman to continue her pregnancy and to open her mind to the possibility of life with her child.

"The constitutional rights of the woman do not reach so far that the legal duty

²⁴⁶ sec 218 (a) (11) (1) - (3).

²⁴⁷ eg strict time limits were set up and mandatory consultations where required.

²⁴⁸ time limit for eugenic indication was 22 weeks criminology and social was 12 weeks medical - no time limit.

²⁴⁹ "whereas in the former West Germany territory, the described norms applied, in the former territory of German Democratic Republic the more liberal GDR law remained applicable until the end of 1992." *op cit* p 103.

²⁵⁰ note that abortion under these provisions are not lawful, it is merely not punishable.

to deliver a child is - even for a limited time - generally reversed.²⁵¹

Under all circumstances, except in the instance of rape, the expenses of an abortion may not be covered by public health insurance,²⁵² because the promotion of illegal activities²⁵³ are not part of public responsibilities.

After considering this background Harrer²⁵⁴ concludes that abortion contracts are currently without doubt void²⁵⁵ under German civil law and that surgeons who perform abortion procedures could in future be prosecuted, unless the abortion can be justified pursuant to exceptions that will be specified by the legislature in a new abortion act.²⁵⁶

Abortion contracts that will comply with the new abortion regulations, however, will not be unconscionable under German civil law because they will not violate the legal morals of the society at large. Accordingly, and under these circumstances not only sterilization contracts, but also abortion contracts may be held valid and therefore contractual liability will arise if a surgeon breaches the applicable standard of care and finds himself in breach of his contractual obligations.²⁵⁷

Van Tonder²⁵⁸ confirms in a recent discussion that the courts have found Germany's fifth Criminal Reform Act (which stated that abortions were not punishable under certain circumstances) to be unconstitutional. The court referred to the German Constitution, from which it was derived that the state has a duty to protect unborn children.²⁵⁹ It was further decided that the unborn's right to life enjoys priority above the mother's right to family

251 Harrer, *op cit* p 92.

252 refer to where a similar viewpoint is followed in the United States of America.

253 but not necessarily punishable.

254 *ibid.*

255 an important consequence of a void contract is that no contractual remedies are available to an innocent party prejudiced by breach of contract.

256 see ch 13.

257 Hamer concludes that apart from contractual claims, there may also be claims under tort law, eg in the event of sterilization or abortion without the patient's valid consent.

258 1995. Swangerskapbeëindiging: 'n Vergelyking van geskilpunte in Roe v Wade en die aborsieszaak. *Magistrate* 47.

259 *op cit* p 53.

4.2.2 Sterilization in Germany

Stoll²⁶¹ concludes that the predominant view in Germany there is nothing legally to prevent the voluntary sterilization of a woman or of a man for the purposes of family planning. Despite isolated opinions in the literature to the contrary, the Supreme Court has held a contract for sterilization to be legally valid.²⁶²

4.2.3 Another European viewpoint

Leenen²⁶³ writes from a Dutch perspective and conveys that the status of the pre-embryo changes as it progressively develops, in that better legal protection is afforded as it grows. He emphasises that this does not relate to the safeguard of subjective rights,²⁶⁴ but rather its physical protection and further draws an analogy between this position of the foetus and the increased legal protection (of subjective rights) of a child up to majority.

*"De progressieve bescherming van de vrucht berust op de opvatting dat de foetus meer bescherming verdient naarmate hij groeit...Hoewel het vóór de geboorte niet om subjectieve rechten maar om bescherming gaat, vertoont de toenemende rechtsbescherming van het (pre-)embryo analogie met de in het recht sinds lang bekende versterking van rechtspositie van een kind naar gelang de ontwikkeling naar en na de meerderjarigheid."*²⁶⁵

He²⁶⁶ sharply criticises the viewpoint that a pre-embryo could enjoy the same protection given to born persons and emphatically rejects the notion that a foetus could be the bearer of rights. In this respect he discusses the position of a pregnant woman with regard to her foetus. He sees the mother as being the "gastvrouw"²⁶⁷ of the foetus who extends a favour to the foetus

²⁶⁰ op cit p 57.

²⁶¹ op cit p 209.

²⁶² BGH 29 6 1976 BGHZ 67 48.

²⁶³ 1994. *Handboek Gezondheidsrecht, Deel I: Rechten van mensen in de gezondheidszorg* Tjeenk Willink, Alphen aan de Rijn (3de druk).

²⁶⁴ at this stage, ie before birth.

²⁶⁵ op cit p 122.

²⁶⁶ *ibid.*

²⁶⁷ or host.

to “use” her body to grow in, which privilege can be revoked²⁶⁸ at any time before viability of the foetus, when abortion is no longer legally obtainable. He explains, however, that the mother does not lose any other of her rights and therefore would not be subject to compulsory examinations and/ or treatment for the benefit of the foetus.

Gevers and Leenen²⁶⁹ is of the opinion that the legal status of an embryo is a key element in answering any legal question concerning genetic testing and manipulation. They write that although the embryo is neither recognized as a legal person nor is it the bearer of any subjective rights, it does have a legal status and does not merely form part of its mother's body.²⁷⁰ They believe that progressively increased protection should be given as the unborn child develops:

“..het stelde gedachtengang is sprake van progressieve rechtsbescherming: het niet geïmplanteerde of genideerde embryo verdient grotere bescherming dan de individuele gameten, terwijl anderszijds die bescherming minder kan zijn dan die van de genideerde vrucht.”²⁷¹

Schoonenberg,²⁷² when referring to the foetus as legal subject, conveys that in terms of section 2, book 2 of the Dutch Civil Code, a foetus can be “deemed to be born” whenever it is to the advantage of the foetus.²⁷³

Sluyters²⁷⁴ writes that legal protection of unborn children are currently not sufficient and suggests that this problem should be addressed by proper legislation. He conveys²⁷⁵ that because of current deficiencies in foetal protection, the parents of an unplanned child would have a wrongful conception action, while the child's wrongful life action has not yet been

²⁶⁸ ie by means of abortion.

²⁶⁹ 1986. *Rechtsvragen rond voortplanting en erfelijkheid* Kluwer - Serie Gezondheidsrecht no.19, 9.

²⁷⁰ a different view was held under Roman law.

²⁷¹ *ibid.*

²⁷² 1988. *De foetus, een toekomstige patiënt?* *Nederlands Juristenblad* (22), 798.

²⁷³ *“In art. 2 Boek I BW word bepaald dat de foetus, zo dikwijls zijn belang dit vordert, als reeds geboren wordt aangemerkt.”*

²⁷⁴ 1990. *Civielrechtelijke aansprakelijkheid voor medische fouten voor de geboorte. Grenzen aan de zorg; zorgen aan de grens*, (Onder redactie van: Gevers, J.K.M. en Hubben, J.H. Samsom H.D. Tjeenk Willink), 133.

²⁷⁵ *op cit* p 145.

recognized in the Netherlands.

4.3 Abortion in the United States

4.3.1 Historical background (through case law)

Similar to the position in Germany, the legality of sterilization and abortion procedures is also problematic in the United States of America. It is therefore crucial to consider a chronological summary of important court decisions and other significant events that have occurred throughout the past few decades in the American sterilization and abortion saga.

4.3.2 Phase of decisions accumulating in favour of pro-choice

- 1934 - **Christensen v Thornby**²⁷⁶ (Supreme Court of Minnesota): It was found that sterilization for personal medical benefit is not against public policy.
- 1957 - **Shaheen v Knight**²⁷⁷ (Pennsylvania State Court Decision): The court judged that sterilization for family planning purposes may not be legally denied.
- 1965 - **Griswold v Connecticut**²⁷⁸ (Supreme Court Decision): A statute forbidding the use of contraceptives was found to be unconstitutional.
- 1972 - **Eisenstadt v Baird**²⁷⁹ (Supreme Court Decision): The court decided that the use of contraceptives need not be restricted to married couples, reasoning that one's reproductive ability forms part of the individual's right to self-determination.
- 1972 - **Parker v Rampton**²⁸⁰ (Utah Supreme Court Decision): The prohibition of sterilization procedures was found to be unconstitutional.

²⁷⁶ 192 Minn 123 255 NW 620 (1934).

²⁷⁷ 11 Pa 2d 41 (1957).

²⁷⁸ 381 U.S. 479 (1965).

²⁷⁹ 405 U.S. 438 (1972).

²⁸⁰ 497 P. 2d 848 Utah. (1972).

- 1973 - *Roe v Wade*²⁸¹ (Supreme Court Decision): A then existing abortion law²⁸² was found to be unconstitutional. The court judged that it violated the due process clause of the 14th amendment protecting the right to privacy against state action. The *Roe* court created three legally relevant phases²⁸³ of pregnancy according to the varied stages of foetal development²⁸⁴ in order to address the question whether the state has a compelling interest in a specific foetus.

Grobe²⁸⁵ explains the practical consequences of the so-called "trimester system" introduced by *Roe*, quoting from the judgment itself.

- *First trimester:*

"The attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuate by an abortion free from interference by the State."²⁸⁶

- *Second trimester:*

"A State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."²⁸⁷

- *Third trimester:*

"If the State is interested in protecting foetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."²⁸⁸

²⁸¹ 410 U.S. 113 (1973).

²⁸² in Texas, as effective in many states at that time.

²⁸³ the "trimester system" introduced by *Roe* is currently used in many countries for application in abortion legislation.

²⁸⁴ see the discussion on foetal development *supra*.

²⁸⁵ 1992. "The future of the "wrongful birth" cause of action. *Pace Law Review* (12:3).

²⁸⁶ *Roe v Wade supra*, p 163.

²⁸⁷ *ibid*.

²⁸⁸ *ibid*.

This important decision has the following practical consequences: Prior to the end of the first trimester a mother, in consultation with a physician, is free to determine without state regulation whether a pregnancy should be terminated or not.

After the first trimester the state may regulate abortion procedures to the extent that the regulation "reasonably relates to protection of maternal health". If the state is interested in protecting foetal life after *viability*,²⁸⁹ it may go so far as to proscribe abortion during this period, except in the instance where abortion is necessary to preserve the life or health of the mother.

Slabbert²⁹⁰ reports that there is a specific reason why viability was chosen as the point at which the state could ban abortion,²⁹¹ namely "...because the foetus then presumably has the capacity of meaningful life outside the mother's womb."²⁹² It is further stated:

"It is often argued that the advanced gestational development of the 22 to 24 week old fetus justifies imposing certain moral demands. Abortion, for example, is believed to inflict suffering because of the fact that the brain and nervous system are integrated at this stage. At viability, a moral obligation to respect the fetus for its own sake can thus be imposed. At viability the state may protect the welfare of fetuses, and assure that they are born healthy, on the ground that there is now a reasonable basis for protecting the fetus in its own right, although there may be no legal obligation to do so."²⁹³

- (1977) - **Maier v Roe**²⁹⁴ (Supreme Court): Holding that states may use financial disbursement programs to favour live births over abortions.
- (1980) - **Harris v McRae**²⁹⁵ (Supreme Court): Where the court decided that states are

²⁸⁹ an interesting implication of fixing the right of the State to regulate abortion to the stage of viability of the foetus, is the fact that as medical science progresses this date becomes ever earlier - in this way the state's interests in unborn children are constantly accelerated and thereby also extended - see the discussion on the theories of the beginning of life *supra* (in the case of **Akron v Akron Centre for Reproductive Health** 462 US 416 (1983) the future validity of using viability as laid down in **Roe** was specifically questioned for this very concern).

²⁹⁰ *op cit*, p 247.

²⁹¹ and in so doing protect the potential personhood of the foetus.

²⁹² at 163 in the **Roe** judgment.

²⁹³ *ibid*.

²⁹⁴ 432 U.S. 464, 479 (1977).

²⁹⁵ 448 U.S. 297, 316 (1980).

not obliged to remove obstacles to abortion not of their own making.

4.3.3 Phase of pro-life decisions

- (1989) - **Webster v Director, Missouri Reproductive Health Services**.²⁹⁶ (Supreme Court): Here the court displayed a more restrictive view concerning abortions and permitted the Missouri state legislator to prohibit the public funding of non-lifesaving abortions by prohibiting the use of public facilities for abortion. The court emphasized that the due process clause of the 14th amendment does not give a right to public support²⁹⁷ for the performance of abortions. It is important to note with regard to a general sway against abortion that several justices suggested in minority opinions that the application of *Roe* should be restricted or even overruled.²⁹⁸
- (1991) - **Rust v Sullivan**²⁹⁹ (Supreme Court): The court upheld rules governing state benefits allocation, pursuant to the Public Health Services Act, not to promote abortion as method of family planning. The court's decision had the result that physicians may not counsel, refer or even provide information regarding abortion as a method of family planning to recipients of public health services. Grobe³⁰⁰ believes that the practical implications of this judgment would be far reaching in the context of public funding, as physicians will refrain from their duty to inform pregnant patients of the probabilities of their foetuses being genetically impaired since such action could be viewed as advocating abortion.
- (1992) - **Planned Parenthood of Southern Pennsylvania v Casey**³⁰¹ (Supreme Court): Although the court basically maintained the *Roe* decision,³⁰² the court also held as constitutional various provisions of the Pennsylvania Abortion Control Act, which

²⁹⁶ 492 U.S. 490 (1989).

²⁹⁷ in the form of financing abortions through medical aid schemes or by accommodating abortions in state medical institutions.

²⁹⁸ see further discussion on the effect of this case on wrongful life *infra*.

²⁹⁹ 111 S.Ct. 1759 (1991).

³⁰⁰ *op cit*, p743.

³⁰¹ 112 S.Ct. 2791 (1992). - see a detailed discussion on this important case in the ch 10, dealing with wrongful birth statutes.

³⁰² in that a woman retained the right to abort an unwanted child.

placed various restrictions on abortion in this state.³⁰³ The condoning of ever increasing restrictions on the right to abortion is seen by many³⁰⁴ as a gradual reversal of a woman's right to abortion.³⁰⁵

It is viewed³⁰⁶ by some that although lack of funds for abortion may influence the outcome of a woman's choice or affect her ability to implement a decision not to bear a child, lack of relevant and reliable medical information precludes informed choice altogether.

4.3.4 Relevance to Wrongful birth

Bodgan³⁰⁷ writes on the relevance of the abortion issue with regard to wrongful birth actions. He believes that the background controversy over the abortion issue does not affect the wrongful birth cause of action. He suggests that courts should treat these claims as ordinary negligence claims, as they would then be able to consider and decide wrongful birth suits without legislative authorisation.³⁰⁸

Bodgan³⁰⁹ further states:

"The purpose of abortion is to terminate pregnancy, and the purpose of sterilization is to prevent pregnancy. In the case of negligently performed abortion or sterilization, therefore, plaintiffs encounter few problems in proving the defendant proximately caused the injury. In the negligent genetic counselling situation, the parents' purpose in consulting physicians and taking tests often is to determine whether to continue the pregnancy. Victims of negligent genetic counselling thus have little difficulty in proving that the defendant's negligence resulted in injury. If the plaintiffs can prove the

³⁰³ *eg* that women seeking an abortion have to consent to being provided with certain information, that facilities providing abortions must comply with prescribed reporting requirements and that parental consent had to be obtained in cases where the mother seeking abortion is a minor.

³⁰⁴ amongst others, Kowitz, J.F. 1995. Not your garden variety tort reform: Statutes barring claims for Wrongful Life and Wrongful Birth are unconstitutional under The Purpose Prong of Planned Parenthood v. Casey. *Brooklyn Law Review* (61), 235.

³⁰⁵ see ch 10.

³⁰⁶ Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. *Harvard Law Review* (100), 2017.

³⁰⁷ 1983. Wrongful Birth: Who Owes What to Whom and Why? *Washington and Lee Law Review* (40), 125.

³⁰⁸ *ie* wrongful birth statutes.

³⁰⁹ *ibid.*

element of injury and the other elements of the wrongful birth cause of action, courts should award damages to the plaintiffs."³¹⁰

Grobe³¹¹ disagrees with this supposition³¹² and writes that the **Roe** judgment pertinently provided the missing element of causation³¹³ in wrongful birth actions. Plaintiff-parents' being able to indicate that their pregnancy could have been legally terminated "is essential for establishing a causal connection between defendant's failure to inform and plaintiff's damages."³¹⁴

Although it has been asserted³¹⁵ that wrongful birth actions are necessary to protect women's rights regarding procreation, Faircloth³¹⁶ severely questions the assertion that non-recognition of wrongful birth actions infringes upon the constitutional right to abortion. He believes that the origin of this reasoning can be traced back to the decision of **Gleitman v Cosgrove**³¹⁷ where the court found that wrongful birth should be rejected since abortion was still illegal at that time. He believes that an assumption thus surfaced ever since abortions were made legal,³¹⁸ that wrongful birth actions should accordingly be recognized.

Supporters of wrongful birth argue that liability on this ground is the only way in which medical practitioners can be reprimanded to provide proper genetic counselling and adequate procreative guidance.³¹⁹ Faircloth³²⁰ comments that those claiming that wrongful birth liability protects abortion rights are erroneously reasoning that physicians are under a affirmative duty to help mothers exercise a constitutional³¹⁶ right. He shows that this analysis:

³¹⁰ (as any other claim, based on the traditional tort elements) *op cit* p 135.

³¹¹ *op cit* p 718.

³¹² that the background controversy over the abortion issue does not affect the wrongful birth cause of action.

³¹³ or as the Americans say "proximate cause".

³¹⁴ I believe this premise to be correct.

³¹⁵ see wrongful birth statutes, ch 10.

³¹⁶ 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 545.

³¹⁷ 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

³¹⁸ in **Roe v Wade** *supra*.

³¹⁹ see wrongful birth ch 7.

³²⁰ *ibid*.

"...is tantamount to saying that not only must government allow you to abort, but it must also put you in the position to elect abortion. Under this reasoning, government must teach religion to ensure the free exercise thereof."

It is obvious that a close connection exists between a right to abortion and the success of wrongful life litigation in general. It could be accepted that the more liberal society considers abortion and emphasizes other individual rights, the more prevalent and successful wrongful life actions will be. In all these discussions, however, one must not lose sight of the main goal of law and morality, namely that the focus should be obtaining at the same time a better life for each person and society as a whole. It is therefore important that the interest of the unborn - the next generation - should also be taken at heart.

4.3.5 Importance of contraceptive measures

Reichman³²¹ believes the fact that American courts have granted contraceptive measures constitutional protection is significant in wrongful life litigation. He conveys that for this reason, the situation in Australia may be somewhat different as they do not enjoy the same constitutional guarantees relating to birth control. It is further submitted³²² that since non-therapeutic abortion is an indictable offence in Australia, wrongful life success would definitely be restricted.

4.3.6 Philosophical view on abortion

Kamm³²³ gives a philosophical look at the American Law regarding abortion. She questions the contention of the *Roe* court that the right to an abortion falls under the right to privacy,³²⁴ as privacy relates to "a right to be left alone" and the fact is that as the foetus develops, the woman will not be alone.

She further challenges the method used by the court to establish whether a foetus was a person according to the Constitution by asking if those who passed the fourteenth amendment intended to cover the foetus by looking at legislation on abortion at that time. She suggests that a more liberal approach would have been to consider other parts of the Constitution as basic values of the country as exhibited in its entire history of legal decision making to decide whether the amendment in question should apply to foetuses.

³²¹ 1983. Damages in Tort for Wrongful Conception - Who bears the cost of raising the child? *Sydney Law Review* 568.

³²² *op cit* p 576.

³²³ 1992. *Creation and Abortion - A study in Moral and Legal Philosophy* (Oxford University Press), 14.

³²⁴ as protected in the 14th amendment of the US Constitution.

Kamm³²⁵ writes that while the **Roe** court itself was unable to decide between conflicting religious and philosophical views of when human life begins, it argued that no state may choose a contested theory of human life as the one on which it will act. Despite the inability to solve the philosophical question, Kamm reports, the court decided that *viability*³²⁶ should be that point at which the state obtains a compelling interest to protect potential human life. She questions why viability is such a crucial point and states:

"Indeed, the whole question is problematic, whether concern for potential human life (at viability or earlier) should have the power to override a woman's interest in aborting a nonperson."³²⁷

In criticism of the varying developmental stages approach, Kamm³²⁸ argues that although the foetus changes significantly the same over time, it is still the same being as the later person. She writes:

"Either it³²⁹ and the later person are stages of a single human organism, or the fetus is already the human being in development. As such, it is in the interest of that single being not to lose its future, even if it changes radically. Whatever the right answer is to the significance of potential, there is no doubt that we may feel that we are wasting potential and acting against nature and life when we destroy a fetus with potential, though we do not believe it is a person."

4.3.7 The full circle

Romney³³⁰ believes that the most recent Supreme Court decision on the right to an abortion, **Webster v Reproductive Health Services**³³¹ could have the effect that wrongful birth and wrongful life causes of action might once again revert back to its pre-**Roe** position. In **Webster**, the Court upheld a Missouri statute which required viability testing before an abortion after the twentieth week of pregnancy. It also prohibited public employees from performing non-therapeutic abortions.

³²⁵ *op cit* p 16.

³²⁶ the capacity of a foetus to live outside the womb.

³²⁷ *ibid.*

³²⁸ *op cit* p 18.

³²⁹ *ie* a foetus.

³³⁰ 1990. *Medicine and Law: Recent Developments*. *Tort & Insurance Law Journal*, 351.

³³¹ 209 S. Ct. 3040 (1989).

The impact that **Webster** has on these causes of action remains to be seen. It is conveyed that the Supreme Court has by this decision sent a message to the states that they could promote policies that encourage the protection of human life. It is submitted³³² that the power to make policy determination as to a state's position on childbirth and abortion remains unquestionably with the state legislature. "The Court acknowledged that its holding would allow some governmental regulation of abortion that would have been prohibited under the language of earlier cases."³³³

"Given such an invitation, state legislatures will be busily defining and/ or redefining their positions on abortion. Just as *Roe v Wade* ripened the climate for wrongful birth and wrongful life actions, *Webster* has potential for putting a damper on the continued expansion and recognition of those tort actions."³³⁴

Romney³³⁵ concludes that this greater flexibility given to states in promoting policies of protecting potential human life will cause states to return to arguments that were prevalent before **Roe v Wade**, and deny wrongful birth and wrongful life actions based on the sanctity of human life.

4.4 Abortion in South Africa

4.4.1 Introduction

South African abortion legislation has always been relatively conservative when compared to that in other countries in the Western world.³³⁶ Up to recent times, only therapeutic abortions were legal and strict prerequisites had to be met before such procedures could be carried out and then only under specific circumstances.³³⁷ Many factors can be mentioned as possible

³³² *op cit* p 367.

³³³ **Colautti v Franklin** 439 U.S. 379 (1979); **Akron v Akron Centre for Reproductive Health Inc.** 462 U.S. 416 (1983).

³³⁴ *op cit* p 368.

³³⁵ *ibid.*

³³⁶ eugenic abortions were already legalised in America by 1973.

³³⁷ The circumstances under which a legal abortion could be obtained were in short the following:

- if continued pregnancy would be dangerous for the mother's life or detrimental to her health;
- if it would cause her grievous psychological harm;
- if there existed a determined risk that the child would be born with a physical handicap or psychological impairment and such disability is both serious and incurable;
- if the pregnancy was caused by illegal sexual intercourse or where the mother was

reasons for this rigid viewpoint. Abortion was seen as a criminal offence in South Africa's common law as the potential life of the unborn was protected under Roman-Dutch law.³³⁸ As a predominantly Christian society, much resistance was offered by church leaders and various other faith groupings and pro-life supporters.³³⁹ Also the government of the day, as a structure professed to be founded on Christian beliefs and values, were against abortion on demand. Voices propagating the decriminalization of abortion, however, grew ever stronger. Sarkin,³⁴⁰ for example, believed that although state interest in the protection of life is appropriate and laudable, this interest may be pursued through less repressive methods than infringing upon a pregnant woman's constitutional rights.

As recently as two years ago the South African abortion issue was regulated by the **Abortion and Sterilization Act**.³⁴¹ On 1 February 1997 the new **Choice on Termination of Pregnancy Act**³⁴² came into effect. This new act, in accordance with American and other Western countries, allows for abortion on request.³⁴³ Much discussion has taken place over the wisdom and acceptability of such a liberal viewpoint on the termination of foetal life in the South African context. Some have seen this act to be unconstitutional, as the right to life is emphatically protected in section 11 of the South Africa Constitution.³⁴⁴

It has been said that the main reason for the implementation of the new act is the fact that many unlawful or so-called "backstreet abortions" indeed took place under the old dispensation. The vast majority of these unfortunate woman were from the poorest and mostly black

not in the mental capacity to understand and appreciate the consequences of sexual intercourse as well as the responsibilities of parenthood.
see the provisions of the act *infra*.

³³⁸ In spite of foetal protection, the mother's life did enjoy prevalence to that of the unborn child and the termination of the pregnancy was lawful under circumstances where the mother's health was at risk. A physician's consent had to be obtained for such an abortion to be lawful. It is interesting to note that the prerequisite of a physician's approval has been kept in place for South Africa's new liberal abortion laws, albeit only for abortions from the 13th week onwards.

³³⁹ according to the vast majority of Christian beliefs, abortion is unacceptable and not only the Christian faith is against abortion, but also the Hindu and Moslem religions believe that it is murder to abort a live foetus.

³⁴⁰ 1996. Suggestions for a new abortion law for South Africa. **South African Journal of Criminal Justice**, 125.

³⁴¹ Act No.2 of 1975.

³⁴² Act No. 9 of 1996.

³⁴³ up to the 12th week of pregnancy.

³⁴⁴ see ch 9.

communities,³⁴⁵ many of whom simply did not have the means to afford a child. The regulations of the previous abortion act therefore had the most harsh effect on that group of the community in which the most unplanned pregnancies took place and which populace also could not afford proper genetic advice or medical treatment.³⁴⁶

4.4.2 Relevance of the Choice on Termination of Pregnancy Act to Wrongful life actions

It has been firmly established that access to an abortion is a *sine qua non* for the successful implementation of a wrongful life action.³⁴⁷ It is therefore obvious that the enactment of the new abortion legislation will contribute much to the cause of wrongful life plaintiffs in South Africa.³⁴⁸ In this section the new act will be dissected and discussed, while special reference will be made to the relevance of each provision in respect of correlating wrongful life matters. The value and consequences of the statute will be considered in the context of existing abortion regulations worldwide as well as the South African Constitution.

PREAMBLE

"Recognising the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa:

Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies:

Recognising that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and that women have the right of access to appropriate health care

³⁴⁵ (in Roberts, 1985. "Black fertility patterns in Cape Town and Ciskei" *SAMJ*, 481 it is mentioned that the figure of illegitimate children in one study proved to be under Black women 67%, under the Coloured community as high as 81,6%, whilst only 20% under the White community).

³⁴⁶ and certainly did not have the means to obtain an abortion legally overseas, as in fact many from the wealthier communities did.

³⁴⁷ see ch 8 - access to abortion, specifically the parent's conviction that an abortion would have been obtained, had there been sufficient and timely knowledge of abnormal foetal development, is one of the main foundations on which **wrongful life** and **wrongful birth** actions is based. (note, however, that it could not in all instances reasonably be expected from a mother to abort her child on account of a physician's negligence - see ch 4 for a discussion on this point).

³⁴⁸ it has been reported in *The Star* Oktober 22 1997, 1 that according to the "Reproductive Rights Alliance" 12887 have been performed within the first 6 months after enactment - the majority of the women (82%) were above the age of 18 years and (62%) of these abortions were carried out within the first 12 weeks of pregnancy: indicating the profound effect the act has on abortions in South Africa.

services to ensure safe pregnancy and childbirth:

Recognising that the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services:

Recognising that the State has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm:

Believing that termination of pregnancy is not a form of contraception or population control:

This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No.2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs."

It is interesting to note that the introduction to the preamble of the Choice on Termination of Pregnancy Act is very similar to that of the Constitution.³⁴⁹ It is clear that this act has as a goal not only the liberation of women concerning their bodies and their historically subdued and discarded freedom of choice concerning reproduction, but also the promotion of human rights and the concomitant liberal-humanistic ideas of equality and human dignity.

Specific reference is also made to the Constitution and especially section 12 is emphasised.³⁵⁰ For the purposes of this study it is also of great importance that the right to information is mentioned in the preamble. A lack of correct information is after all the basis of the vast majority of wrongful life actions.³⁵¹ The informed consent of the woman desiring to obtain an abortion is accordingly required in terms of the act, unless she is incapable of giving consent.³⁵² Another issue concerning the necessary informed consent required to obtain an abortion, is the question whether the patient's spouse should assist in the decision making process. The act

³⁴⁹ for a further discussion see ch 9 - the Constitution (act 108 of 1996) became effective 2 days after the new abortion bill and was promulgated on 3 Feb 1997.

³⁵⁰ **Freedom and security of the person**

12. (2) Everyone has the right to bodily and psychological integrity, which includes the right -
- a) to make decisions concerning reproduction;
 - b) to security in and control over their body; and
 - c) not to be subjected to medical or scientific experiments without their informed consent.

³⁵¹ see ch 5.

³⁵² § 5(1), eg where the mother is mentally disabled or in another way incapable of appreciating the consequences of her conduct.

makes it clear that no one's consent other than that of the pregnant mother is needed.³⁵³ Even if the pregnant woman is a minor³⁵⁴ she could make the final decision herself, albeit that a medical practitioner or registered midwife must advise her to consult with her parents, guardian, family members or friends before the abortion.³⁵⁵

In the preamble of the act a person's right of access to health care services is expressly guaranteed, as is the case in section 27 of the Constitution.³⁵⁶ The responsibility to cater for every citizen's reproductive health care is explicitly placed on the shoulders of state.³⁵⁷ In terms of the act, the final word concerning family planning is that of the woman. She has total freedom to make whatever procreative choice she wishes.

It is interesting to see that abortion³⁵⁸ as such is not acknowledged to be a form of contraception in this liberal statute. Whether it is admitted or not, I submit that the *de facto* end-result of this act is nothing less than a legal alternative to failed contraception and indeed an alternative form of family planning.

The main motivation for the enactment of the **Choice on Termination of Pregnancy Act** is to offer elevation of personal rights³⁵⁹ by repealing the restrictive and inaccessible provisions of the previous act.

Circumstances in which and conditions under which pregnancy may be terminated

- 2(1) A pregnancy may be terminated -
- a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy:

³⁵³ Strauss, *op cit* p 211 reports that in England a prospective father may similarly not legally restrain his wife from obtaining an abortion - **Paton v Trustees of British Pregnancy Advisory Service** (1978) 2 All ER 987.

³⁵⁴ *ie* generally a person under the age of 21 years, but in terms of the act's definition for a pregnant minor it is a female person under the age of 18 years.

³⁵⁵ note that an abortion can still be obtained even where no such consultation has in fact taken place.

³⁵⁶ see ch 9.

³⁵⁷ as mentioned earlier, I believe that such public acceptance of responsibility as to the issue of reproductive health care could lead to much litigation directed against the State in future.

³⁵⁸ on demand or eugenic abortion.

³⁵⁹ especially with the current focus on fundamental human rights advocated in the Constitution.

- b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that -
- (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy -
- (i) would endanger the woman's life;
 - (ii) would result in a severe malformation of the fetus; or
 - (iii) would pose a risk of injury to the fetus.

In terms of section 2 (1) of the Act, three periods³⁶⁰ are introduced in which an abortion may be obtained after the prerequisites of each stage have been met. As the fetal development reaches a more advanced stage, the statutory prerequisites become more strict.³⁶¹ In summary, abortions may be legally performed with reference to the three periods of fetal development as follows:

- *Conception up to 12 weeks of gestation:* Abortion on demand, without any prerequisites that have to be met.
- *13 weeks up to and including the 20th week of gestation:* Abortion with the prerequisite that the consent of a medical practitioner is obtained, based on his opinion that "the continued pregnancy would significantly affect the social or economic circumstances

³⁶⁰ this time framing into three stages of fetal development seems to be similar to the so-called "trimester system" introduced by the American *locus classicus* abortion case of *Roe v Wade* 410 U.S. 113 (1973).

³⁶¹ to use the word "strict" when discussing this statute is ironic, since it is so progressive that an abortion may be obtained even when a fetus has already achieved an advanced stage of development, technically up to the day before its birth! - it is submitted that the required prerequisites are also not stringent enough to ensure safe and humane abortion.

In the United States of America an abortion may technically be obtained only up to the second trimester, *ie* 24 weeks. From that time onwards the State attains a compelling interest in the unborn child, which interest is stronger than the mother's right to privacy and freedom of choice concerning reproduction. Various states have introduced restrictive measures to curtail the haphazard abortion of fetuses - see *infra* where the abortion issue in America is discussed.

of the woman".³⁶²

- *From the 20th week of gestation up to birth:* There is no limit placed on the maximum fetal development before which an abortion should be performed. In this instance a medical practitioner has to agree to an abortion, after discussing the matter with another physician or registered midwife. Here the physician has to be of the opinion that either the fetus or the mother's health would be at risk if the pregnancy is continued.³⁶³

Nöthling-Slabbert³⁶⁴ draws our attention to an inconsistency found in the act with regard to the basis referred to in section 2(1)(b)(ii).³⁶⁵ "there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality" and the provisions in section 2(1)(c)(ii).³⁶⁶ "would result in a severe malformation of the fetus" and (iii): "would pose a risk of injury to the fetus."

She³⁶⁷ shows that these two sections, each dealing with a different periodical slot in which an

³⁶² This regulation is so wide and open to subjective interpretation that I am of the opinion that it has little or no effect in limiting or restricting straightforward allowance of abortion on demand. It can be rightly argued that *all* pregnancies "significantly affect the social and economic circumstances of the mother" and therefore one can conclude that *all* mothers are in principle entitled to legal abortion up to 20 weeks of fetal development.

Not only is the abovementioned ground of justification much too wide and vague, but in addition the "abortion applicant" need simply require the blessing of any normal medical practitioner, of whom many have no special qualification to assist them in forming opinions of this nature. It is shocking that a matter of this great proportion and consequence is placed in the hands of ordinary physicians.

The other bases which a physician has to consider when approving an abortion in this period § 2(1)(b)(i-iii) resembles that of the previous abortion statute. Given the vague and therefore lenient alternative basis of § 2(1)(b)(iv), one would expect abortion applicants to conveniently use the latter basis, rather than the ones which are more difficult to adhere to.

³⁶³ I believe that the grounds laid down for abortion at such a advanced stage of development is too vague and accommodating. It is true that *all* births have a certain amount of risk implicitly involved. Therefore, "a risk of injury to the fetus" is not specific and stringent enough to accommodate and allow an abortion of a near fully developed fetus.

³⁶⁴ *op cit* p 62.

³⁶⁵ in terms of which a physician's consent has to be obtained for an abortion between the 13th and 20th week of gestation.

³⁶⁶ in terms of which the consent of either two physicians or a physician and a midwife has to be obtained for an abortion from the 20th week of gestation onwards.

³⁶⁷ *ibid.*

abortion may be obtained, overlap with regard to the risk of foetal impairments, as “physical abnormality” and “malformation” could have the same meaning.³⁶⁸ Such inconsistencies lead to confusion and is detrimental to the correct application of the act.

The inclusion of socio-economic circumstances of the pregnant mother as basis for an abortion is indicative of the legislator’s concern with unplanned pregnancies in the poorer communities. This aspect also has direct bearing on wrongful conception actions, where the glaring economic burden caused by the birth of an unplanned child is the main cause of action.

Counselling

4. The State shall promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy.

Consent

5. (1) Subject to the provisions of subsections (4) and (5), the termination of a pregnancy may only take place with the informed consent of the pregnant woman.
- (2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.

Information concerning termination of pregnancy

6. A woman who in terms of section 2(1) requests a termination of pregnancy from a medical practitioner or a registered midwife, as the case may be, shall be informed of her rights under this Act by the person concerned.

Offences and penalties

10. (1) Any person who -
 - a) is not a medical practitioner or a registered midwife who has completed the prescribed training course and who performs the termination of a pregnancy referred to in section 2(1)(a):
 - b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c): or
 - c) prevents the lawful termination of a pregnancy or obstructs access to a

³⁶⁸ Nöthling-Slabbert believes that a clearer and more precise description of the grounds upon which an abortion could be obtained after 20 weeks of gestation should be given.

facility for the termination or a pregnancy:
shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

Davel and Jordaan³⁶⁹ write that:

"The controversy surrounding the legislation entails on the one hand the viewpoint that the fetus has a right to life and that this enactment is therefore unconstitutional. The Constitutional Court has already decided that this is not the case. On the other hand there is the opinion of those with whom the constitutional rights of the particular woman is most important and they accordingly want her to choose. We adhere to the viewpoint that legal subjectivity only commences at birth, but where the Abortion and Sterilization Act previously at least protected potential life, it is no longer the case with the Choice on Termination of Pregnancy Act. In other words, we have reached the point where the unborn's interests are protected with the nasciturus fiction, a curator ad litem and several statutory provisions but if the mother chooses to terminate the pregnancy, nobody can stop her..."

4.4.3 Other relevant matters

Nöthling-Slabbert³⁷⁰ reports on the fact that a proposed "moral objection clause" has been omitted in the act. This clause were to be included to protect physicians whom have moral and/or religious objections to the performance of an abortion procedure. Such a clause would have assisted much in protecting physicians' fundamental human rights to freedom of association. Although private medical workers could effectively avoid this dilemma by simply not providing this type of procedure, physicians employed by the state could be contractually forced into performing abortions against their will.³⁷¹

4.4.4 Alternative perspective

Schoordijk³⁷² exposes an interesting question. He refers to a Belgium case, where a wrongful life action was rejected because of the fact that abortion is unlawful in that country and that the impaired child "would have been born anyway". An abortion, however, could³⁷³ easily have

³⁶⁹ *op cit* p 23.

³⁷⁰ *op cit* p 64.

³⁷¹ wrongful life plaintiffs will also be entitled to use this line of argument in propagating their cause of action.

³⁷² 1988. Wrongful life acties en het belang van het kind. Met het oog op het belang van het kind Kluwer-Deventer, 137.

³⁷³ objectively speaking.

been obtained³⁷⁴ if it were to be requested in the Netherlands. Schoordijk³⁷⁵ suggests that for this reason, a physician could still be held liable.

It is my submission that this principle is sound and could have worldwide application. Plaintiffs in countries, therefore, where abortions are not lawful should objectively still have a wrongful birth and wrongful life cause of action, since lawful abortions could be performed in other countries. There should accordingly be no defence for a physician to submit that an impaired foetus had to be born.³⁷⁶

5. Adoption Issues

5.1 Relevance of Adoption in wrongful life litigation

Adoption could generally be considered as "the lesser of two evils" when wrongful conception and wrongful birth plaintiffs are placed before the choice to mitigate their damages either by means of abortion or adoption.³⁷⁷ It is true that many religious and political organisations that oppose abortion support adoption as a morally acceptable alternative. Block³⁷⁸ writes that the American Congress has even expressed their support for adoption³⁷⁹ by funding states to provide financial assistance to persons who adopt children. He reports that by 1985 over 2 million American families were seeking to adopt, a clear indication that no public policy proscriptions exist in this respect.

³⁷⁴ without much effort or financial implications.

³⁷⁵ *ibid.*

³⁷⁶ The argument raised by some courts that wrongful life actions cannot be allowed for the reason that abortion are not legal in a specific country or state, is not convincing. Even though a legal abortion may not be performed in that specific jurisdiction, it does not preclude a parent wishing to abort a defective foetus from obtaining an illegal abortion or from crossing the border to a state or foreign country where abortion may be legally performed. In this regard critics would argue that such an opportunity is only available to the wealthy, while many wrongful life litigants do not fall into this group.

³⁷⁷ Although there is a general duty on plaintiffs to limit their damage, it has by no means been settled that typical wrongful conception parents will be expected to take such far-reaching steps in mitigation - Strauss *op cit* p 178: "No court would require parents to mitigate their loss by having the child adopted. An innocent party who has suffered loss as a consequence of breach of contract has to take only reasonable steps to mitigate loss. To require that parents should give away their child would not be reasonable. That would run counter to our accepted community values."

³⁷⁸ 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. *Fordham Law Review* (53:4), 1117.

³⁷⁹ Adoption Assistance and Child Welfare Act of 1980 - codified as amended at 42 U.S.C. §§ 670-676 (1982).

Strauss³⁸⁰ comments on the case of **Behmann** and declares that no South African court would require parents to mitigate their loss by having the child adopted,³⁸¹ as an innocent party who has suffered loss as a consequence of breach of contract has to take only reasonable steps to mitigate his loss. He suggests that to require that parents should give away their child would not be reasonable and would run counter to our accepted community values.³⁸²

Concerning the duty to mitigate, Heida³⁸³ is of the opinion that, although one cannot expect a wrongful conception plaintiff to undergo an abortion at an advanced stage in the pregnancy, a patient who has chosen for certain sterilisation devices could principally be seen as to have consented to "mini-abortions".

She believes³⁸⁴ that it would be unreasonable to expect a mother to place her unplanned up for adoption, as there exist unquestionable bonds between mother and child, as the pregnancy evolves. For this reason, it is submitted,³⁸⁵ a distinction should be made between early abortion³⁸⁶ and adoption and adoption.³⁸⁷

³⁸⁰ 1989. Failure of Hospital to perform sterilisation on woman as agreed. Damages awarded by South African Court. **South African Practice Management** (10), 7.

³⁸¹ or aborted.

³⁸² I agree with this submission.

³⁸³ 1997. Foutje...Bedankt?! **Nederlands Juristenblad** (26), 1176.

³⁸⁴ *op cit* p 1177.

³⁸⁵ *ibid.*

³⁸⁶ which is suggested *ibid* to be a reasonable mitigation step.

³⁸⁷ which would be unreasonable to require for purposes of mitigation, as strong ties already exist between mother and child.