

2. Surveys

- 1989 Current Law of South Africa (Review Five), 6
1990 Annual Survey of South Africa Law (Juta & Co.), 43, 147

3. Court Decisions

3.1 American Cases

- Akron v Akron Centre for Reproductive Health Inc. 462 U.S. 416 (1983).
Albala v City of New York 54 N.Y. 2d 269, 445 N.Y.S. 2d 108, N.E. 2d 786 (1981).
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Azzolino v Dingfelder 71 N.C. App. 289, 322 S.E. 2d 567 N.C. App (1984); 337 S.E. 2d 528, 537 N.C. (1985), *cert denied*, 475 U.S. 835 (1986).
Ball v Mudge 64 Wash 2d 247, 391 P. 2d 201 SC (1964).
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Becker v Schwartz 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).
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Bonbrest v Kotz 65F. Supp. 138 D.D.C. (1946).
Boone v Mullendore 416 So. 2d 718, 723 Ala. (1982).
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Bowman v Davis 48 Ohio 2d 41, 356 N.E. 2d 496 (1976).
Bruggeman v Schimke 718 P.2d 635 Kan. (1986).
Burke v Rivo 406 Mass. 764, 551 N.E. 2d 1 (1990).
Canterbury v Spence 464 F. 2d 772 (1972).
Christensen v Thornby 192 Minn. 123, 255 N.W. 620 (1934).
City of Akron v Akron Centre for Reproductive Health Inc. 462 U.S. 416 (1983)
Clegg v Chase 89 Misc. 2d 510, 391 N.Y.S. 2d 966 (1977).
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Cowe by Cowe v Forum Group Inc. 575 N.E. 2d 630 Ind. (1991).

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Custodio v Bauer 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).
Dietrich v Inhabitants of Northampton 138 Mass. 14 (1884)
Dorlin v Providence Hosp. 118 Mich. App. 831, 325 N.W. 2d 600 (1982)
Dumer v St Michael's Hospital 69 Wis. 2d 766, 233 NW 2d 372 (1975).
Edmonds v Western Pennsylvania Hospital Radiology Assocs. 607 A.2d 1083 Pa. Super. Ct. (1992)
Eisbrenner v Stanley 106 Mich. App. 351, 308 N.W. 2d 209 Mich Ct. App. (1981).
Eisenstadt v Baird 405 U.S. 438, 453 (1972).
Elliott v Brown 361 So. 2d 546 Ala. (1978).
Elliot v Joicey (1935) AC 209
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Estate Delponte v De Fillipo and Others (1910) CTR 649
Estate Lewis v Estate Jackson (1905) 22 SC 73
Fassoulas v Ramey 450 So.2d 822 Fla. (1984).
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Flowers v District of Columbia 478 A.2d 1073 D.C. (1984).
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Gallagher v Duke Univ. 638 F. Supp. 979 N.C. (1986).
Garrison v Foy 486 N.E.2d 5 Ind. App. (1985).
Gildiner v Thomas Jefferson University Hospital 451 F. Supp. 692 Pa. (1978).
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In re Baby X, 293 N.W.2d 736, 739 Mich. Ct. App. (1980).

- In re* Quinlan 70 N.J. 10, 355 A2d 647 (1978).
- Jackson v Anderson 230 So. 2d 503 Fla. App. (1970).
- Jacobs v Theimer 519 S.W. 2d 846 Tex. (1975).
- James v Caserta 332, S.E. 2d 872 W. Va. (1985).
- Johnston v Elkins 241 Kan. 407, 736 P. 2d 935 (1987).
- Johnson v Yeshiva Univ. 396 N.Y. 2d 818, 364 N.E. 2d 1340, N.Y.S. 2d 647 (1977).
- Jones v Malinowski 299 Md. 257, 473 A.2d 429 (1984).
- Karlsons v Guerinot 57 App. Div. 2d 73, 394 N.Y.S. 2d 933 (1977).
- Keel v Banach 624 So. 2d 1022 Ala. (1993)
- Kelly v Gregory 282 A.D. 542, 125 N.Y.S. 2d 696 N.Y. App. Div. (1953)
- Kingsbury v Smith 122 N.H. 237, 442 A. 2d 1003 (1982).
- Kosberg v Washington Hospital Center 394 F 2d 947, 949 D.C. Cir. (1978).
- LaPoint v Shirley 409 F. Supp. 118 Tex. (1976).
- Lifchez v Hartigan 735 F. Supp 1361, 914 F. 2d 260 Ill. (1990), 111 S. Ct. 787 (1991).
- Lininger v Eisenbaum 764 P. 2d 1202, 1210 n.10 Colo. (1988).
- Lovelace Medical Centre v Mendez 805 P.2d 603, 612 N.M. (1991).
- Macomber v Dillman 505 A.2d 810 Me. (1986).
- Maher v Roe 432 U.S. 464, 479 (1977).
- Marciniak v Lundborg 450 N.W. 2d 243, 248 Wis. (1990).
- Mason v Western Pennsylvania Hospital 499 Pa. 484, 453 A.2d 974 (1982).
- McKernan v Aasheim 102 Wash. 2d 411, 687 P. 2d 850 (1984).
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- Miller v Johnson 231 Va. 177, 343 S.E. 2d 301 (1986)
- Moore v Lucas 405 Fla. App. So. 2d 1022 (1981).
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- Nanke v Napier 346 N.W. 2d 520 Iowa (1984).
- Nelson v Krusen 678 S.W. 2d 918 Tex. (1984).
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- Obstetrics and Gynaecology Group v Abelson 398 S.E. 2d 557, 563 Ga. (1990).
- Ochs v Borrelli 187 Conn. 253, 445 A. 2d 833 (1982).
- O'Toole v Greenberg 64 N.Y. 2d 427, 477 N.E. 2d 445, 488 N.Y.S. 2d 143 (1985).
- P v Portadin 179 N.J. Super. 465, 432 A.2d 556 (1981).
- Park v Chessin 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977).
- Parker v Rampton 497 P. 2d 848 Utah (1972).
- Phillips v United States 508 F. Supp. 544 D.S.C. (1981); 575 F. Supp. 1309 D.S.C. (1983).
- Pinkney v Pinkney 198 So. 2d 52 Fla. Dist. Ct. App. (1967).

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Shaheen v Knight 11 Pa. 2d 41 (1957).

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Siemienic v Lutheran Gen. Hosp. 134 Ill. App. 3d 823, 480 N.E. 2d 1277 (1985)

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Slawek v Stroh 62, Wis. 2d 295, 215 N.W. 2d 9 (1974).

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Smith v Cote 128 N.H. 231, 513 A.2d 341 (1986).

Smith v Gore 728 S.W. 2d 738 Tenn. (1987).

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Sorkin v Lee 78 A.D. 2d 180, 184, 434 N.Y.S. 2d 300, 303 (1980).

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Spence v Seikel 742 P. 2d 1126, 1127 Okla. (1987)

Steward v Long Island College Hospital 58 Misc. 2d 452, 296 N.Y.S. 2d 41 (1968), *mod* 35 A.D. 2d 531 N.Y.S. 2d 502 (1970), *appeal dismissed* 27 N.Y. 2d 804, 264.

Stills v Gratton 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 Cal. Ct. App. (1976).

Story Parchment Co. v Paterson Parchment Paper Co. 282 U.S. 555, 563 (1931).

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(1982).

Sundi A. Greco v United States of America 893 P.2d 345 Nev. (1996).

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Turpin v Sortini 182 Cal. Rptr. 337 (1982).

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Viccaro v Milunsky 406 Mass. 777, 551 N.E. 2d 8 (1990).

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Wilbur v Kerr 275 Ark. 239, 628 S.W.2d 568 (1982).

Williams v State 18 NY 2d 481, 276 NYS 2d 885, 223 NE 2d 343 (1966)

Wilson v Kuenzi 751 S.W. 2d 741 Mo. (1988) at 745 - new case!

Wilson v Kuenzi 751 S.W. 2d 741, 746 Mo, *cert denied*, 488 U.S. 893 (1988).

Womack v Buckhorn, 187 N.W.2d 218 Mich. (1971).

Zepeda v Zepeda 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963).

Ziembra v Sternberg 45 A.D. 2d 230, 357 N.Y.S. 2d 265 (1974).

3.2 Australian Cases

F v R (1983) 33 SASR 189

Rogers v Whitaker (1993) 67 ALJR 47

3.3 Dutch Cases

1971	(30 december)	Den Haag
1972	(16 november)	Den Haag
1973	(15 januari)	Curaçao
1974	(28 november) no. 28	Arnhem

1976	(26 februari)		
1978	(10 juli)		Arnhem
1979	(2 november)		Hoge Raad
1979	(22 november)	no. 655	Maastricht
1983	(17 mei)	no. 240	Hertogenbosch
1984	(27 januari)	no. 536	Hoge Raad
1984	(1 maart)	no. 334	Leeuwarden
1989	(14 december)	no. 362	Arnhem
1990	(9 november)		Hoge Raad
1992	(4 juni)	no. 614	Arnhem
1992	(9 oktober)	no. 535	Hoge Raad
1994	(8 april)		Hertogenbosch
1994	(27 april)	no. 295	Utrecht
1994	(21 september)	no. 467	Gravenhage
1995	(12 januari)	no. 21	Maastricht
1995	(19 januari)		Arnhem
1995	(21 juni)		Dordrecht
1996	(18 maart)	no. 37	Hertogenbosch
1997	(21 februari)		Hoge Raad

3.4 *English Cases*

Blyth v Bloomsbury A.H.A.

Bolam v Friern H.M.C. (1957) 1 W.L.R. 582.

Chatterton v Gerson and Another (1981) 1 QB 432 at 443 D.

Clark v MacLennan (1983) 1 All ER 416.

Dendaas v Yackel (1980) 5 W.W.R. 272.

Emeh v Kensington and Chelsea and Westminster Area Health Authority (1984) 3 All ER 1044 (CA); (1985) 1 All ER 346 QB.

Eyre v Measday (1986) 1 All ER 488 (CA).

F. v R. (1983) 33 S.A.S.R. 189.

Gold v Haringey Health Authority (1987) 3 W.L.R. 649; (1987) 2 All ER 888; (1988) QB 481 (CA).

Greaves & Co (Contractors) Ltd v Baynham Mickle & Partners (1975) 2 All ER 99 (CA).

Janaway v Salford Health Authority and Another (1988) 3 All ER 1079.

Lee v South West Thames A.H.A. 1985, 1 W.L.R. 845, 850.

Maynard v West Midland Regional Health Authority 1984, 1 W.L.R. 634.

McKay and Another v Essex Area Health Authority and Another (1982) QB 1166 (CA),

(1982) 2 All ER 771.

Paton v Trustees of British Pregnancy Advisory Service (1978) 2 All ER 987.

Sidaway v Board of Governors of the Bethlehem Royal Hospital (1984), Q.B. 493, (1985) A.C. 871.

Thake & Another v Maurice (1984) 2 All E.R. 513, (1986) QB 644 (CA), (1986) 1 All ER 497 (CA).

T v T (1988) 1 All ER 613.

Udale v Bloomsbury Area Health Authority (1983) 2 All ER 522 QB.

Whitehouse v Jordan and Another (1981) 1 All ER 267 (HL).

3.5 A French Case

Cour de Cassation 26 March 1996, Recueil Dalloz 1997.

3.6 German Cases

BGH 18 3 80 VI ZR 105/78

BGHZ 76, 249; 18 3 1980, VI ZR 247/78

BGHZ 76, 259; 2 12 1980, NJW 1981 630; 18 1 1983

BGHZ 86, 240; 10 3 1981. NJW 1981, 2002; 22 11 1983

BGHZ 89, 95; 19 6 1984, NJW 1984, 2625; 27 11 1984, NJW 1985, 671; 25 6 1985 NJW 1985 2749; 9 7 1985,

BGHZ 95, 199; 7 7 1987, NJW 1987 2923.]

BGH, 1980 VersR 561

OLG Saarbrücken, 1986 VersR 1550.

Landsgericht Itzehoe 21 November 1968

(1969 Zeitschrift für das gesamte familierecht 90ff)

Bundesgerichtshof 18 March 1980

(Entscheidungen des Bundesgerichtshof in Zivilsachen 76, 249 en 76, 259)

BGH (Bundesgerichtshof) 13 oktober 1992, BGHZ 120, 1; NJW 1993, 781.

3.7 *Israeli Case*

Saul, Shmuel & Nvadra Katz v Dr R Zeitzov, Beilinson Hospital Civil Appeal 518/ 82, 540/ 82; 40 PD (2) 85.

3.8 *South African Cases*

A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd 1975 (2) SA 457 (W).

Aaron's Whale Rock Trust v Murray & Roberts Ltd & another 1992 (1) SA 652 (C).

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

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 825 (A).

Alexander v John 1912 AD 431

Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D).

Allot v Paterson & Jackson 1936 SR 221.

Applicant v Administrator Transvaal 1993 (4) SA 733 (W).

Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977 (2) SA 425 (A), 16.

Aronowitz v Atkinson 1936 SR 45.

Barclays Bank DCO v Straw 1965 (2) SA 93 (O).

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

Bayer South Africa (Pty) Ltd v Viljoen 1990 (2) SA 647 (A).

Behrmann & Another v Klugman 1988 WLD (unreported - judgment on 18 May 1988).

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A).

Berkemeyer v Woolf 1929 CPD 235.

Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SAG 769 (A).

Bitcon v Rosenberg 1936 AD 380.

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

Blyth v Van den Heever 1980 (1) SA 191 (A).

Boswell v Minister of Police 1978 (3) SA 268 (E).

Bozzoli v Station Commander, John Vorster Square, Johannesburg 1972 (3) SA 934 (T).

Bremer Meulens (Edms) Bpk v Floros 1966 (1) PH A36 (A).

Buls and Another v Tsatsarolakis 1976 (2) SA 891 (T).

Burger v Administrateur, Kaap 1990 (1) SA 483 (C).

Burger v Central South African Railways 1903 TS 571.

Burger v Union National South British Insurance Co Ltd 1975 (4) SA 72 (W).

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

- Castell v De Greef 1994 (4) SA 408 (C).
- Chalk v Fassler 1995 WLD (unreported, judgment in May 1995)
- Chisholm v East Rand Proprietary Mines Ltd 1909 TH 297
- Christian League of Southern Africa v Rall 1981 (2) SA 821 (O).
- Clinton-Parker v Administrator Transvaal 1995 (W) - unreported.
- Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A).
- Collins v Administrator Cape 1954 (4) SA 73 (C).
- Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd 1972 (4) SA 185 (T).
- Conradie v Rossouw 1919 AD 279.
- Coppen v Impey 1916 CPD 309.
- Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D).
- Correira v Berwind 1986 (4) SA 60 (Z).
- Croce v Croce 1940 TPD 251.
- Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A).
- Da Silva v Janowski 1982 (3) SA 205 (A).
- De Vos v Suid-Afrikaanse Eagle Versekeringsmaatskappy Bpk 1985 (3) SA 429 (A).
- Dekenah v Linton 1920 CPD 579.
- Dhanabakium v Subramanian 1943 AD 160.
- Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd 1970 (1) SA 228 (A).
- Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Geigy (Edms) Bpk case no 1 5452/1976 (T).
- Dube v Administrator, Transvaal 1963 (4) SA 260 (T).
- Dyszel NO v Shield Insurance Co Ltd 1982 (2) SA 1084 (C).
- Edouard v Administrator, Natal 1989 (2) SA 368 (D).
- EG Electric Co (Pty) Ltd v Franklin 1979 (2) SA 702 (E).
- Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W).
- Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A).
- Essa v Divaris 1947 (1) SA 753 (A).
- Estate Breet v Peri-Urban Areas Health Board 1955 (3) SA 523 (A).
- Estel v Novazi 1919 NPD 406.
- Esterhuizen v Administrator Transvaal 1957 (3) SA 710 (T).
- Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A).
- Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donnelly v Barclays National Bank Ltd 1995 (3) SA 1 (A).

Feinstein v Niggli & another 1981 (2) SA 684 (A).
Ferreira v Levin NO 1996 (2) SA 984; 1996 (1) BCLR (CC).
Fischbach v Pretoria City Council 1969 (2) SA 693 (T).
Friedman v Glicksman 1996 (1) SA 1134 (W).
G v Superintendent, Groote Schuur Hospital 1993 (2) SA 255 (K)
General Accident Insurance CO SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens; General Accident Insurance Co SA Ltd v Nhlumayo 1987 (3) SA 577 (A).
Gerke v Parity Insurance Co Ltd 1966 (3) SA 484 (W).
Gibson v Berkowitz 1996 (4) SA 1024 (W).
Goldblatt v Fremantle 1920 AD 123, 128.
Guardian National Insurance Co Ltd v Van Gool NO 1992 (4) SA 61 (A).
Hamman v Moolman 1968 (4) SA 340 (A).
Harrismith Board of Executors v Odendaal 1923 AD 530.
Hazis v Transvaal & Delagoa Bay Investment Co Ltd 1939 AD 372
Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A).
International Shipping Co (Ltd) v Bentley 1990 (1) SA 680 (A).
ISEP Structural Engineering and Planting (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A).
Jameson's Minors v CSAR 1908 TS 575.
Jayber (Pty) Ltd v Miller & others 1980 (4) SA 280 (W).
Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A).
Jooste v National Media Ltd 1994 (2) SA 634 (C).
Jordaan v Trollip 1960 (1) PH A25 (T).
Joubert v Enslin 1910 AD 6 23.
Jowell v Bramwell-Jones 1998 (1) SA 836 (W).
Kantor v Welldone Upholsters 1944 CPD 388.
Kahn v Raatz 1976 (4) SA 543 (A).
Karoo and Eastern Board of Executors and Trust Co v Farr 1921 AD 413.
Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A).
Kovalsky v Krige 1910 CTR 822.
Kriegler v Minitzer 1949 (4) SA 821 (A).
Kruger v Coetzee 1966 (2) SA 428 (A).
Lavery & Co Ltd v Jungheinrich 1931 AD 156.
Legogote Developments Co (Pty) Ltd v Delta Trust and Finance Co 1970 (1) SA 584 (T).
Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 448 (A).
Louw v MJ & H Trust (Pty) Ltd 1975 (4) SA 268 (T).
Lymbery v Jefferies 1925 A 236.

- Malelane Suikerkorporasie (Edms) Bpk v Streak 1970 (4) SA 478 (T).
Malilang & others v MV Houda Pearl 1986 (2) SA 714 (A).
Marine & Trade Insurance Co Ltd v Katz NO 1979 (4) SA 961 (A).
Masiba v Constantia Insurance Co Ltd 1982 (4) SA 333 (C).
McCallum v Hallen 1916 ODP 74.
McCulloch v Fernwood Estate Ltd 1920 AD 204.
Milne v Shield Insurance Co Ltd 1969 (3) SA 352 (A).
Minister van Polisie v Ewels 1975 (3) SA 590 (A).
Minister van Polisie v Skosana 1977 (1) SA 31 (A).
Mitchell v Dixon 1914 AD 519.
Modimogale v Zweni & another 1990 (4) SA 122 (B).
Mtetwa v Administrator Natal 1989 (3) SA 600 (D).
National & Overseas Distributors (Pty) Ltd v Potato Board 1958 (2) SA 473 (A).
National Union of Textile Workers and Others v Stag Packing (Pty) Ltd and Another 1982 (4) SA 151 (T).
Ned-Equity Insurance Co Ltd v Cloete 1982 (1) SA 734 (A).
Ngubane v South African Transport Services 1991 (1) SA 756 (A).
Novick v Benjamin 1972 (2) SA 842 (A).
Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A).
OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd 1993 (3) SA 471 (A).
OK Bazaars (1929) Ltd v Stern and Ekermans 1976 (2) SA 521 (C).
Oslo Land Co Ltd v The Union Government 1938 AD 584.
Otto v Heymans 1971 (4) SA 148 (T).
Palmer v Palmer 1955 (3) SA 56 (O).
Patel v Grobbelaar 1974 (1) SA 532 (A).
Payne v Minister of Transport 1995 (4) SA 153 (C).
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Pleat v Van Staden 1921 OPD 91.
Preller & others v Jordaan 1956 (1) SA 483 (A).
Prima Toy Holdings (Pty) Ltd v Rosenberg 1974 (2) SA 477 (C).
Pringle v Administrator, Transvaal 1990 (2) SA 379 (W).
Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A).
R v McCoy 1953 (2) SA 4 (SR).
R v Motomane 1961 (4) SA 569 (W).
R v Taylor 1927 CPD 16.
R v Van der Merwe 1953 (2) PH H 124 (W).
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5. Acts

Abortion and Sterilisation Act No.2 of 1975

Apportionment of Damages Act No. 34 of 1956

Choice on Termination of Pregnancy Act No. 9 of 1996

Constitution of the Republic of South Africa Act No. 108 of 1996

Conventional Penalties Act No. 15 of 1962

Prescription Act No. 68 of 1969

6. Addendum/ Appendix/ Annexure

6.1 Act No. 9 of 1996: CHOICE ON TERMINATION OF PREGNANCY ACT, 1996

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 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.

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:
 - 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.

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 facility for the termination of 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.

6.2 *Sterilisation Act, No. 44 of 1998*

An Act to provide for the right to sterilisation; to determine the circumstances under which sterilisation may be performed and, in particular, the circumstances under which sterilisation may be performed on persons incapable of consenting or incompetent to consent due to mental disability; and to provide for matters connected therewith.

Date of commencement: 1 February 1999.

6.3 *Abortion and sterilization Act No. 2 of 1975*

1. Prohibition of abortion - No person shall procure an abortion otherwise than in accordance with the provisions of this act.
3. Circumstances in which abortion may be procured: - (1) Abortion may be procured by a medical practitioner only, and then only -
- d. Where the continued pregnancy endangers the life of the woman concerned or

- constitutes a serious threat to her physical health, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy so endangers the life of the woman concerned or so constitutes a serious threat to her physical health and abortion is necessary to ensure the life or physical health of the woman;
- e. Where the continued pregnancy constitutes a serious threat to the mental health of the woman concerned, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy creates the danger of permanent damage to the woman's mental health and abortion is necessary to ensure the mental health of the woman;
- f. Where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will be irreparably seriously handicapped, and two other medical practitioners have certified in writing that, in their opinion, there exists, on scientific grounds, such a risk; or
- g. Where the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse, and two other medical practitioners have certified in writing after such interrogation of the woman concerned as they or any of them may have considered necessary, that in their opinion the pregnancy is due to the alleged unlawful carnal intercourse; or
- h. Where the foetus has been conceived in consequence of illegitimate carnal intercourse, and two other medical practitioners have certified in writing that the woman concerned is due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus.
4. **Sterilization of persons incapable of consenting thereto** - (1) a sterilization shall not be performed on any person who for any reason is incapable of consenting or incompetent to consent thereto, unless -
- a. Two medical practitioners, of whom one shall be a psychiatrist, have certified in writing that the person concerned -
- (1) is suffering from a hereditary condition of such a nature that if he or she were to procreate a child, such child would suffer from a physical or mental defect or such a nature that it would be seriously handicapped; or
- (2) due to a permanent mental handicap or defect is unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus;
- b. The person who may in law consent to an operation beneficial to that person has granted written consent to the sterilization or, if there is no such first-mentioned person or such person cannot after reasonable inquiry be found, the magistrate of the district in which the person concerned finds himself or herself has, after such

- investigation as he may deem fit, granted written authority for the sterilisation; and
- c. The minister, or a medical officer of the Department of Health authorized thereto by him in writing, has granted written authority for the sterilization.
 - (2) the person who may consent to an operation as contemplated in subsection (1)(b), is hereby authorized to grant the consent referred to therein.
 - (3) the provisions of this section shall not be construed as affecting the position in law of any person capable of consenting or competent to consent to an operation on himself.

6.4 German abortion indications

Stoll¹ gives us a better understanding of the German law concerning the lawfulness of abortion: Article 218a section 2 of the **German Criminal Code** provides for several indications under which the termination of a pregnancy by a doctor with the consent of the patient is not a crime.

“The eugenic indication covers the case where on medical grounds there are strong reasons to suppose that, as a result of hereditary factors or harmful pre-natal influences, the child would suffer from irremediable damages to its health. It only prevents the abortion being a criminal offence, if no more than twenty-two weeks have elapsed since conception. The ethical indication, that is, where the pregnancy is the result of a criminal act, and the social indication are both treated in the same manner. The social indication requires that with the birth of her child the expectant mother is threatened by the risk of an emergency, which can only be avoided by the termination of the pregnancy and which is so serious that the continuation of the pregnancy cannot be insisted upon. This also includes the risk of an economic crisis. In the case of both an ethical and a social indication, the abortion may only be performed prior to the end of the twelfth week of pregnancy (article 218a section 3 Criminal Code). It may be noted that the statute is worded in such a way that an abortion following a statutory indication is declared not to be a criminal offence, but not to be lawful. From this the conclusion has been drawn that even a statutorily indicated abortion is prohibited and that a contract made with a doctor for such an abortion is therefore illegal and invalid. That is, however, not the view of the majority of commentators nor that of the *Bundesgerichtshof*, which has held the contractual duty of a doctor to carry out an indicated abortion to be possible and legally effective. BGH 18 1 1983, 224 f; 27, 11, 1984. The contract can therefore form the basis of a claim for damages, if the abortion fails and the child is born.”

¹ 1989. A Doctor's liability for the unwanted birth of a child. *Comparative and International Law Journal of South Africa*, 208.

Die proefskrif "*The actions for Wrongful Life, Wrongful Birth and Wrongful Conception - a comparative study from a South African perspective*" ondersoek nuwe ontwikkelinge op die gebied van mediese nalatigheid en meer spesifiek die aksies wat ontstaan wanneer onbeplande en/ of gestremde kinders gebore word. Hierdie tipe aksies het die afgelope jare telkens groot opslae gemaak in regskringe en ook in die media. Die ontstaan van geboorteverwante aksies is grootliks toe te skryf aan die snelle ontwikkeling van die mediese wetenskap, asook die beskikbaarheid van akkurate genetiese toetse en effektiewe geboortebeperkingsmetodes. 'n Verdere rede waarom *wrongful life* litigasie plaasvind, is die klem wat deesdae geplaas word op die regte van die individu en die gevolglike ontstaan van 'n sogenaamde 'afwentelingskultuur' wat bepaal dat gelede skade van ander bronne verhaal behoort te word.

Ouers eis gevolglik die koste wat verband hou met die onderhoud van die kind. Ander skadeposte is verlies aan verdienvermoë, genoegdoening vir psigiese skok, verlies aan *consortium*, pyn en lyding (geboortepyn, pyn verbonde aan die uitvoer van 'n verdere sterilisasie *et cetera*). Hierdie aksie het relatiewe sukses oorsee geniet, waarna dit ook in die Suid-Afrikaanse reg erkenning ontvang het. 'n Vereiste wat vir die plaaslike eiser gestel word, is dat die motivering vir die besluit om nie verdere kinders te hê nie, ekonomiese oorwegings moes wees.

Beide die aksies vir *wrongful birth* en *wrongful life* ontstaan as gevolg van die geboorte van 'n gestremde kind. Eersgenoemde aksie word deur die ouers gevoer, wat die dokter aanspreeklik wil hou vir die feit dat hy nie genoegsame inligting verskaf het ten aansien van geboortefwykings of die risiko's van gestremdheid (of die moontlikheid van 'n aborsie) by die gebruik van sekere medikasie tydens swangerskap of swangerskap op 'n gevorderde leeftyd nie. Laasgenoemde aksie word namens die gestremde kind self ingestel. Sy eisoorzaak is uiters kontroversieel, aangesien hy aanvoer dat hy skade ly omdat hy gebore is en eerder sou verkies het om nie te bestaan nie.

Die *wrongful life* eiser blameer die dokter van sy ouers vir die se nalatige optrede wat sy (die gestremde se) bestaan veroorsaak het. Hoewel die ouers se aksie beperkte sukses gehad het (ook in Suid-Afrika), is die kind se vordering slegs in uitsonderingsgevalle toegestaan. Die hoewel in 'n handjievol Amerikaanse state, Israel en Frankryk gee die *wrongful life* eiser gelyk, maar beperk die skadevergoeding tot spesiale skade vir addisionele onkoste verbonde aan die opvoeding, versorging en medikasie van 'n gestremde persoon. Die hoof skadepos, naamlik genoegdoening vir die veroorsaking van lewe, word deurgaans verwerp. Howe vind

dit onmoontlik om skade vas te stel, aangesien dit onmoontlik is om 'n vergelyking te tref tussen 'n toestand van nie-bestaan en gestremdheid.

Gevolgtrekking: Hoewel die Suid-Afrikaanse reg die vraagstukke van *wrongful conception* en *wrongful birth* relatief progressief benader, bestaan daar 'n definitiewe behoefte om die regsposisie ten aansien van *wrongful life* vir toekomstige eisers seker te maak. Twee moontlike oplossings is: doeltreffende wetgewing wat die spesifieke vraagstukke (kenmerkend aan die besondere aksie) aanspreek en, tweedens, die alternatief van voldoende versekering vir professionele mediese nalatigheid.

Summary

The thesis entitled “*The actions for Wrongful Life, Wrongful Birth and Wrongful Conception - a comparative study from a South African perspective*” explores the new developments in the medical field arising from negligence, more specifically the legal actions that can result from the birth of an unplanned or handicapped child. The past few years these actions have had serious repercussions in law circles and made headlines in the mass media. The origin of birth-related actions can be attributed to the momentum of medical developments, the availability of accurate genetic tests and effective contraceptive methods. Another reason for wrongful life litigation is the emphasis that is placed on the rights of the individual and the consequence of a “passing the buck culture” that determines that losses incurred/experienced can be recovered from another source.

An unplanned birth can result in a legal action of wrongful conception. The parents subsequently claim maintenance costs linked to or connected with the unplanned child. Other costs claimed could include costs related to loss of income, psychological stress caused by the birth of the child, loss of consortium, pain and suffering caused by the birth (labour pain, pain associated with another sterilisation process *et cetera*.) These actions achieved relative success abroad and consequently gained some recognition in South Africa. A requirement for the local claimant is that the motivation for a decision not to have more children, should be an economic decision.

Actions for both wrongful birth and wrongful life originate as a result of the birth of a handicapped child. Wrongful birth legal actions are entered into by the parents who hold the medical practitioner responsible for the lack of information about medication taken during the pregnancy that could result in birth defects. Wrongful life actions are instituted on behalf of the handicapped children themselves. The origin of these claims are highly controversial as the child alleges that he/she suffered losses because of his/her birth and would, if given the choice, not have chosen to be born.

The claimant in a wrongful life action blames his/her parents' medical practitioner for negligent conduct that caused his/her handicapped existence. In contrast to the parents' legal actions that resulted in limited success (including South African cases), the actions taken by children have been far less successful. The courts in a few American states, Israel and France indulged the wrongful life claimant, but limited compensation in these law suits. Claimants were only reimbursed for losses brought about by special education, care and medication for their handicapped children. The main head of damages, *viz* satisfaction for the causing of life to commence, has consistently been rejected since courts find it difficult to determine loss incurred for wrongful life, as it is impossible to make a comparison between non-existence and a limited/restricted handicapped existence.

Conclusion: Although South African law has a progressive view of wrongful conception and wrongful birth cases, a need exists to ensure a definite legal view/position for future wrongful life actions and compensation. Two possible solutions could be: effective legislation that will address specific issues characteristic of these unique legal actions and, alternatively, sufficient insurance for professional medical negligence.