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The actions for Wrongful Life, Wrongful Birth and Wrongful Conception - a comparative study from a South African perspective.

by

Etienne de Villiers Hugo

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Foreword

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Opsomming

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 geboorte-verwante 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 geboorte-afwykings 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 eisoorsaak 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 díe 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 howe in 'n handjievol Amerikaanse state, Israel en Frankryk gee die *wrongful life* eiser gelyk, maar beperk die skadevergoeding tot spesiale skade vir addisionele onkostes 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-Afrikaane 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 besonderse 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.

CHAPTER 1

Introduction

With the recent announcement that the global population has reached the six billion mark, the world's attention was only briefly focussed on this "achievement" before "more important matters" were, once again, given pre-eminence. A few words of concern were raised with regard to the detrimental consequences of over-population and the importance of proper family planning also received some recognition. But do the governments of the world take sufficient heed to the vital necessity of procreative responsibility?

Medical science has evolved rapidly over the past few years as man has acquired a wealth of revolutionary knowledge and has achieved power over life[1] to such an extent that ethical, moral, religious and, certainly, legal dilemmas have arisen as a result. In every-day life uncertainties created by this newly acquired know-how lead to the clashing of interests between patients and physicians which have to be resolved by the legal system in a just and equitable manner. Medical negligence forms the basis of a new class of litigation that has evolved to solve specific intricacies created by advances in genetic science, which in general is collectively referred to as "wrongful life litigation".[2]

The *wrongful conception action*[3] is the first branch of this cluster of actions. Such an action is instituted where the parents of a healthy but unplanned child argue that their physician breached a pre-conception duty of care when he failed to perform a sterilization procedure with due care. In other instances the parent-plaintiffs submit that a pharmaceutical manufacturer or pharmacist negligently prepared or dispensed a contraceptive prescription. Plaintiffs usually

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1 geneticists can perform with great accuracy various prenatal tests to learn within a few weeks of gestation whether a specific foetus will be born normal or physically/ psychologically challenged, (tests can even be done on prospective parents to indicate any genetic aberration or increased risk of transferring family frailties or hereditary diseases) - for detailed information on the various genetic tests and anomalies, see ch 11.

2 basically, three divergent actions are grouped under this general term to note: wrongful life, wrongful birth and wrongful conception actions - Stolker, in 1997 **Weekblad voor Privaatrecht, Notariaat en Registratie** (6262:128)on p 193 writes with regards to the various terms used to describe "wrongful life actions" and with special reference to the terms wrongful conception or wrongful pregnancy, that some American writers prefer to use the term "wrongful sterilization" because it sounds more neutral (the previously mentioned and generally used term would seem to be too unsympathetic).

3 also regularly referred to as "wrongful pregnancy actions".

sue for full child-rearing expenses. This action is commonly recognized in South Africa.[4]

In *wrongful birth actions* the parents of an impaired child brings to court the fact that they have extraordinary expenses in child-rearing because of the failure of their physician or genetic counsellor to timely an accurately inform them that their child will be born disabled and accordingly infringed upon their right to abort the afflicted foetus. The South African courts have recently recognized this cause of action.[5]

The *action for wrongful life* is instituted by a disabled child against a medical practitioner, not because the latter caused the defect, but because of his omission to inform its parents about the impairment or counsel them with regard to genetic tests and risks, which prevented them from taking steps to terminate the pregnancy when it was still legally possible. Thus, the defendant's wrongful act is allowing a disabled child to be born. Here the question arises whether the existence or life can ever be equated with damage or loss. Because of difficulties inherent in comparing no life with a defective life, only special damages have been awarded in the few states where the action for wrongful life has been acknowledged. In South Africa the action has not yet been successful.[6]

Various relevant aspects to the legal phenomena of wrongful life litigation are current issues of public and legal debate, such as the shift of public policy concerning sterilization as an accepted form of contraception, the abortion question, divergent opinions about the commencement of legal personality, the medical-legal discussion on physician paternalism *versus* patient autonomy, the right of a patient to comprehensive information and the concomitant right to give an informed consent. Another interesting challenge inherent in all these actions is the calculation of *quantum*.

In this study the researcher will investigate all the abovementioned corresponding aspects as well as the aggregate of legal principles, problems, current approaches and possible alternative solutions to wrongful life litigation in South Africa, Europe and the United States of America. The researcher will attempt to summarise the South Africa legal position by debating past court judgements and by discussing the merits of unknown and unsuccessful actions through comparative legal analysis.

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

5 **Friedman v Glicksman** 1996 (1) SA 1134 (W).

6 *ibid.*

Legal comparison is of vital importance when relatively new legal concepts are studied. This truth is emphasised even more in South African medical law, as medical negligence litigation seldom occurs and, when it does, rarely reaches the courtrooms as these cases are commonly settled out of court. Solutions found in other legal systems can be fruitfully applied to and integrated in our management of the challenges pertaining to medical negligence cases.

The South Africa legal system has in the past and will in future continue to benefit from foreign examples and judgments of courts abroad. It is true that international contributions to local problems is of great assistance in all spheres of life. The researcher is of the opinion that this tendency towards international co-operation and unanimity concerning legal and other matters will increase in future. This can be attributed to the well advanced communication facilities currently available and the overall dwindling and communal solving of international issues in the "global village" in which we live. Uniformity and general collaboration between countries with regard to important affairs emphasise the importance of a legal comparative study.

From the title of the thesis it is clear that this study is undertaken from a South African perspective and therefore exclusive research of foreign legal systems would be insufficient. Recent developments in the South African legal sphere contribute to the importance and relevance of a study into wrongful life litigation locally. The first fundamental development was the enactment of a new constitution[7] in which South Africa's first Bill of Human Rights[8] has been incorporated. This new constitution constitute the supreme law of the land which has fundamental legal implications on current and future legislation and practical legal issues. Another progression in the domestic legislative sphere which magnifies the relevance of wrongful life litigation is the dramatic shift in public policy concerning abortion brought about by a new and exceptionally liberal abortion act.[9]

Therefore, taking into account the inherent complexity of wrongful life litigation,[10] which is manifested in a general sense of confusion and uncertainty clouding the various actions and relevant issues, one must admit that it is of great importance that legal certainty must urgently be sought. In this study the researcher attempts to achieve this prodigious goal.

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7 **Constitution of the Republic of South Africa** Act 108 of 1996 - find a copy of the relevant sections of the bill of fundamental rights in ch 9.

8 ch 2 of the constitution.

9 **Choice on Termination of Pregnancy Act** 9 of 1996 - see ch 3.

10 note that researcher, when referring to this new class of litigation in general terms, will use the collective term "wrongful life litigation" - thereby including wrongful conception, wrongful birth and wrongful life actions, as well as other birth related medical negligence based actions.

Because of the immense scope of the study topic and a seemingly endless list of related aspects of interest (from a diverse range of human sciences), it is submitted that this report is but an introduction to some of the facets of wrongful life. Out of concern that this study might continue indefinitely, researcher has left many issues unanswered for the present. I undertake to address further relevant issues in future.

Research Proposal

Title

The actions for Wrongful life, Wrongful birth and Wrongful conception - a comparative study from a South African perspective.

Motivation for choice of study

A pilot study on the topic of wrongful life was done for a dissertation as partial fulfilment of the degree LLB. Because of the extent of this study field however, further research is required at the LLD level. During undergraduate studies I realised that there is a general lack of certainty in law concerning wrongful life litigation in South Africa. A possible reason for this is the rapid development of medical science, especially in respect of genetic analyses and counselling, contrasted against the relative conservative legal system which traditionally adapts slower in comparison. Although helpful research on this topic has already been done locally, very little case law exists which makes legal solution of the inherent problems exceedingly difficult.

Aim of the study

- To evaluate the present South Africa legal system's approach to wrongful life litigation and clarify legal uncertainty in this respect;
- To examine foreign legal systems' solution and handling of the problems associated with wrongful life, wrongful birth and wrongful conception actions abroad;
- To compare the relevant legal backgrounds and draw certain parallels between the foreign law and the South African law in respect of the study topic;
- To assess whether within the South African legal system these actions are viable;
- To formulate proposals for law reform in this field, if they were to be desirable.

Research methodology

Qualitative research methodology will be used, involving detailed examination of all the relevant Dutch cases and legal principles and a detailed analysis of American law which will enable me to ascertain the context and ambit of the relevant rules of law.

Three different types of research are combined to guide this study:

Firstly, **basic research** which deals with comparative law. The different legal systems consists of different legal prepositions in addressing certain problems. Thus, the Roman-Dutch system which is used in South Africa, allows wrongful life actions on different bases as would the Anglo-American legal system.

Secondly, **applied research** will be necessary to accommodate the possibility of these actions which established a totally new branch of private law. The research and evaluation of the foreign legal principles will substantiate this phenomena. The existence of wrongful life litigation also necessitates a culture of medical expertise and technology. It is vital for these actions that certain medical procedures can be performed and that the expertise and resources are available to implement these procedures. Thus, interviews with experts in the field of medical technology and even more so, experts in this specific field of medical law which does not exist in South Africa, was of the utmost importance.

Lastly, **developmental research** enables the researcher to indicate at a larger stage the impact of recent abortion legislation in South Africa and the legal implications it will have on wrongful life litigation.

The overlapping of the law of delict, medical law and the law of contract in this field poses an interesting study.

Research strategy and procedures

- Data collection by means of extensive literature study;
- Interviews with experts in the Netherlands consisting of academics and practitioners.

Process of data analysis:
Classification of data into relevant subsections namely wrongful life, wrongful birth and wrongful conception actions with reference to their American, European (mainly Dutch) and South African origin. Due to the fact that a qualitative research approach is used there will not be statistical results to analyse, rather summaries of expert opinions.

Interpretation of data:
The gathered data will be examined and reviewed in the light of studied literature and theoretical knowledge obtained.

Value of research

- Because of great uncertainty in the South African courts with regards to wrongful life litigation locally and since academics can at present merely speculate as to what the position should be, it is of utmost importance that clarity should emerge through an objective and extensive scientific analysis of the legal position abroad. In the Netherlands and the United States of America especially, a considerable amount of research has been done in this field.

- The nature of wrongful life challenges is such that no fruitful results can be gained from research into the Roman-Dutch common law. To date no extensive research on this topic has been done in South Africa, although invaluable works of local academics have contributed much to an initial view of the problem. By implication the existing research done locally on this topic will be expanded and hopefully enriched.

- The fact that medical negligence is becoming an increasing problem in South Africa and that more and more cases will be brought to court, accentuates the importance of this research project. The research results will probably be of use for direct implementation by lawyers, courts and academics. These findings may lead the field for possible law reform, if such should be desirable.

- From a developmental point of view, abortion on demand is new in South Africa and by far the majority of people benefiting from the new dispensation will be poor and black. The legal system has to ensure that maximum care is taken by way of accurate assessment and proper counselling. The only way this can be ensured legally is to make provision for relevant actions in cases of negligence. Even if few people have the means to go to court, which is the case with all aspects of the law, at least the principle would have been established and the general public legally protected.

Progress of study

A period of four years was planned to complete this research project of which five months were spent in the Netherlands between August and December 1997. The research commenced in January 1996 at the University of Pretoria. During 1997 I had the privilege to receive doctoral scholarships from the CSD and the University of Pretoria to do research abroad for specific research in and guidance from various academic centres in the Netherlands. This overseas working period was vital in order to collect the necessary data and consult with experts in this field of study. This collection of foreign data and information was necessary for the completion of a thesis based on comparative law.

The main objectives of the research in the Netherlands were to establish contact with and do basic research at primarily two academic institutions, namely The Free University, Amsterdam (Vrije Universiteit) and Erasmus University, Rotterdam. Amsterdam was chosen as the head base of activities and the entire project was planned and executed from the Vrije Universiteit, under supervision from and with the assistance of Prof. J.E. Doek. The following contacts were made and research facilities used:

- **Vrije Universiteit**
  Prof. Soeteman (Dean: Faculty of Law);Prof. J.E. Doek (Head: Department of Medical Law);
  Prof. Schrage (Professor of Law);
  Mrs. H.J.C. Smink (Lecturer in Department of Medical Law);
  Mrs. Op't Einde van Dolen (Faculty administrator and initial contact person).

- **Erasmus Universiteit**
  I met with the following contact persons in Rotterdam:
  Dr. C.G.M. van Wamelen (Lecturer: Law of Persons, Family Law and Youth Law);
  Prof. A.I.M. van Mierlo (Professor of Law);
  Prof. A.J.M. Nuytinck (Law of Persons, Family Law and Law of Succession);
  Prof. J.E.M. Akveld (Medical Law);
  I was familiarized with the library of the Sanders Institute as well as the University library and received the necessary passes and assistance.

- **University of Amsterdam**
  Prof. S. Gevers (Professor of Health Law, Academic Medical Centre)

- **Rijks Universiteit, Leiden**
  Contact persons:
  Prof. C.J.J.M. Stolker (Director: E.M. Meijers Institute of Legal Studies)
  Prof. Veenstra (Study Centrum Gravensteen)
  Prof. B. Sluyters (Hugo de Groot Study Centrum)

- **Peace Palace Library, The Hague**
  Contact person:
  Me. F. Markx-Veldhuijzen (Head: Reading Room Collection Development)

- **Het Nederlands Instituut voor Wetenschappelijke Informatiediensten, Amsterdam**

Interim findings/innovative insights/new directions

Interm findings

Various new ideas from Dutch academics as to the solution of the problems concerning wrongful life, wrongful birth and wrongful conception actions were recorded. From the large selection of literature gathered in selected centres, many diverse opinions can be identified. I have formulated a number of opinions on the handling of the multifaceted issues and problem areas associated with these actions.

I have found that the Dutch legal system is much more conservative in their approach to the moral/ ethical questions that arise from these actions, than I originally anticipated. A relevant example of this statement is their relative strict abortion laws, compared with the new abortion legislation in South Africa.

An interesting discovery concerning the Dutch approach in wrongful life actions, was their different (and sometimes confusing) use of internationally recognized terminology. They incorrectly refer to wrongful conception actions as wrongful birth actions. This unclear position should not be allowed, as it is of vital academic importance that the correct terms be used to describe specific legal phenomena. Because of the superficial resemblance between the varying wrongful life actions (in the broad sense) it is necessary that specific reference is made to specific actions. The actions under discussion differ in a number of fundamental issues.

CHAPTER 2

Basis of Claim

1. Introduction

In this chapter the theoretical bases of the relevant actions constituting wrongful life litigation will be discussed and principal differences between them exposed.[1] Both the delictual and contractual bases will be considered and the requirements of each will be briefly discussed in terms of the South African law, while its specific application to wrongful life will be illustrated. No attempt will be made to fully discuss all the applicable principles of the varying fields of law and only a selection of relevant issues will be mentioned in order to familiarise readers with the applicable South African legal principles. Various relevant aspects of delict and contract relating to the specific actions in overseas jurisdictions will also be considered.

1.1 General position

According to Harrer,[2] the vast majority of medical negligence claims in the United States of America are based on delict. Possible reasons for this phenomenon is that physicians very seldom guarantee the successful outcome of their therapy or medical interventions and because a very small percentage of these agreements are in writing.[3] Another reason could be the fact that contractual damages[4] are limited to patrimonial losses[5] which leave wrongful life plaintiffs, who generally suffer extensive emotional trauma, without a suitable remedy.

Concerning the recovery of extraordinary expenses in wrongful life litigation in general, it is

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1 see research proposal for an initial description and distinction between the actions for wrongful conception, wrongful birth and wrongful life.

2 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 111.

3 although an oral agreement is legally binding, also in terms of South African law: **Goldblatt v Fremantle** 1920 AD 123, 128; **Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd** 1977 (2) SA 425 (A), 16 - it is submitted that it is almost impossible to prove the specific terms of such a contract in an ensuing court case, see ch 5 on informed consent.

4 in terms of South African law.

5 whereas satisfaction for non-patrimonial loss can additionally be claimed in delict - discussed *infra.*

reported[6] that, whereas courts normally hold that ordinary child-rearing costs are not recoverable,[7] it is generally recognized that parents may recover extraordinary expenses necessary to "treat the birth defect and any additional medical or educational costs attributable to the birth defect."[8]

Harrer[9] further states that under German law, compensation for actions based on contract and delict are awarded on the same principles. He writes that because a valid agreement is a prerequisite for damages to arise from breach of contract, the vast majority of wrongful life litigation in Germany is also based on delict. This is an important consideration, as Harrer reports that abortion contracts[10] are generally void under German law, either because they contravene relevant statutory prohibitions[11] or alternatively because they are unconscionable.[12]

Hondius[13] reports on recent developments in Europe whereby legislative guidelines for medical legal issues will be introduced that will have a profound influence on the legal position of medical treatment agreements and accordingly the potential patient-plaintiff in the Netherlands. He believes that patients are medical-scientifically and legally in a much better position today than in years gone by.[14] A relevant aspect in this regard is the increasing importance placed

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6 Smith-Groff, M.K. 1996. Wrongful Conception: When an unplanned child has a birth defect, who should pay the cost? **Missouri Law Review** (61), 139.

7 "Some courts denying child-rearing costs for a healthy child have indicated that 'differing circumstances, including but not limited to the birth of an abnormal or injured child, might lead us to a different conclusion." *ibid.*

8 **James G. v Caserta** 332 S.E. 2d 872, 882 W. Va. (1985) (wrongful pregnancy); also **Turpin v Sortini** 643 P.2d 954, 965 Cal. (1982) (wrongful birth); **Fassoulas v Ramey** 450 So.2d 822, 824 Fla. (1984) (wrongful conception, although court labelled action wrongful birth); **Blake v Cruz** 698 P.2d 315, 321 Idaho (1984)(wrongful birth); **Schroeder v Perel** 432 A.2d 834, 841 (N.J. 1981) (wrongful birth); **Becker v Schwartz** 386 N.E. 2d 807, 814 N.Y. (1978)(wrongful birth, although court labelled action wrongful life); **Jacobs v Theimer** 519 S.W.2d 846, 850 Tex. (1975)(wrongful birth); **Naccash v Burger** 290 S.E.2d 825, 830 Va. (1982)(wrongful birth); **Harbeson v Parke-Davis, Inc.** 656 P.2d 483, 493 Wash. (1983)(wrongful birth and wrongful life); **Drumer v. St. Michael's Hosp.** 233 N.W.2d 372, 377 Wis. (1975)(wrongful birth and wrongful life).

9 *op cit* p 101.

10 in a wrongful life or wrongful birth action the plaintiff argues that an abortion would have prevented the prejudicial result of the physician's negligence.

11 see *infra* concerning the effect of illegal contracts.

12 see ch 3 dealing with abortion, specifically in Germany.

13 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1679.

14 *op cit* p 1681.

on the patient-medical insurer relationship.[15]

It is further reported[16] that a patient whishing to hold a medical professional[17] liable in the Netherlands could do so based on primarily two grounds, namely contract and delict.[18] It is mentioned that there is currently very little difference between these two bases as both are regulated by the same principles, such as the rules concerning damage.[19]

Arisz[20] confirms this viewpoint and writes that the basis of liability of a medical practitioner, flowing either from breach of contract or delict, has no practical consequence in Dutch law, as the required standard of care by which the professional's conduct will be weighed is the same in both instances.

> *"Aansprakelijkheid van de medicus kan voortvloeien uit wanprestatie of onrechtmatige daad (of zaakwaarneming, maar die grondslag is praktisch niet van betekenis). Het verschil in grondslag heeft in het algemeen geen verschillende gevolgen. De maatstaf van zorg is dezelfde."*

Schoonenberg[21] believes that in both wrongful life and wrongful birth actions the most important head of damage is that of medical treatment and care of an impaired child born with a genetic defect. She writes that although these cost are generally claimed by the parents in wrongful birth actions in America, she is of the opinion that under Dutch law these expenses will not be compensable by any other person than the impaired person himself.[22] It is accordingly submitted that wrongful life actions should have more scope and support in the Netherlands[23] as the parents will merely be allowed to act as legal representative of the child,

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15 see *infra* where the value of proper medical insurance is discussed.

16 *op cit* p 1687.

17 *"hulpverlener".*

18 although he mentions that another basis could be because of failed duty to benefit a third party, "saakwaarneming" - sec 6:198-202 NBW (23) in the Dutch Civil Code.

19 calculation, causal link, expert costs *etc* found in sec 6.1.9 NBW.

20 1991. Inleiding: Beroepsaansprakelijkheid. **Beroepsaansprakelijkheid: Recht op een scheve schaats**, 1 Jonge Balie Congres- W.E.J. Tjeenk Willink, Zwolle.

21 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 62.

22 and not the parents of the impaired child in their own capacity.

23 than wrongful birth actions - "Daarmee zou het aan erkenning van WL acties verbonden belang in ons recht zelfs zwaarder kunnen wegen dan in de VS." *ibid.*

on its behalf.[24]

Cleaver[25] explains that local wrongful life litigation could be instituted on either a delictual or contractual basis:

> "Surely professional contracts must fall within the class of contracts in which a beach of a contractually assumed duty can be both a delict and a breach of contract. Allowing an overlap of delictual and contractual liability in the sphere of professional contracts will still not mean that every culpable breach of contract is a delict - an undesirable position that the Appellate Division in *Lillicrap*[26] rightly felt it necessary to avoid."

Strauss[27] reports that while malpractice litigation has assumed huge dimensions in certain jurisdictions, particularly in the United States of America, in the United Kingdom "judicial attitudes in the medical malpractice field have been conspicuously more reserved". It is mentioned that South African courts have been similarly lenient towards physicians, "in the sense that there has been consistent application of traditional legal principles."[28]

Stolker[29] supports the view that varying actions, such as wrongful conception[30] and wrongful life should be totally separated because of their fundamental theoretical differences. He also remarks that the latter has much more complex juridical questions.

Chapman[31] believes that until the courts address issues such as the use of correct terminology and note to "to take greater care in the vocabulary" of wrongful life litigation with more

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24 *ie* in a wrongful life action on behalf of the child-plaintiff.

25 1991. Wrongful Birth - The Dawning of a New Action. **South African Law Journal**, 64.

26 **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 448 (A).

27 Strauss, S.A. 1993. Medical Negligence in South Africa. **South African Practice Management** (14), 12.

28 *ibid.*

29 1997. Een onrechtmatig bestaan in Nederland - een stand van zaken. **Aansprakelijkheid en Verzekering** (5:2), 40.

30 Stolker, however, uses the term "wrongful birth" to describe an actual wrongful conception action, such as most Dutch academics and courts - see research proposal.

31 1982. Debating the Question of "Wrongful Conception". **Medicine and Law**, 106.

precision, we will no doubt continue to have decisions in which these questions are intertwined.

It is commonly acknowledged[32] that "the lack of definitional uniformity, dissimilar application of tort doctrine, and theoretical obstacles to ascertaining damages have resulted in confusion and haphazard treatment of the torts. A consistent judicial response to these actions, however, requires a clear understanding of the underlying legal doctrines". Berenson[33] similarly distinguishes between the various genres of wrongful life, and emphasises the importance of recognition between the underlying differences between them.

2. Basic concepts

2.1 Definitions

In order to better understand the different theoretical bases of the various actions found in wrongful life litigation, as proposed by De Vries and Rifkin,[34] it is helpful to look at their suggested legal framework. They classify certain foundational concepts and compare the influence of these principles in the various actions.

2.1.1 Foetal rights

Although wrongful conception and wrongful birth actions are based on the fact that parents have established rights concerning conception and procreation, wrongful life actions are predicated on the theory that the foetus also has certain recognisable rights.[35]

2.1.2 Theories of law

Wrongful birth and wrongful pregnancy claims are based on either breach of contract/ warranty or on delict, whereas wrongful life actions are always based on delict, because no contractual relationship exists between the foetus and the defendant.[36]

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32 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. **The Forum**, 220.

33 1990. The Wrongful Life Claim - The legal dilemma of existence versus non-existence: "To be or not to be" **Tulane Law Review** (64), 895.

34 De Vries and Rifkin, *op cit* p 207.

35 such as recognised in the **Bonbrest v Kotz** 65F. Supp. 138 D.D.C. (1946) decision - see ch 8.

36 see discussion on the contractual relationship (or the lack thereof) between wrongful life plaintiff and physician *infra*.

2.1.3 Recoverable damages

Under both wrongful birth and wrongful pregnancy claims the parent-litigants are entitled to claim damages for: pecuniary expenses of pregnancy and birth, loss of consortium, interference with established family relationship, general raising costs, extra expenses related to handicapped child (including- medical, educational expenses, satisfaction for mental pain and suffering). For the unwanted birth of a healthy child the parents can expect either to be awarded the total of child rearing costs, costs minus benefits, or no award at all. In a wrongful life action the plaintiff-child's damages are restricted to costs of additional medical expenses and satisfaction for various non-patrimonial damages. De Vries and Rifkin[37] report that few courts have in fact allowed special damages in wrongful life actions[38] and refer to the **Turpin** case[39] where only extraordinary expenses were compensated. In the **Harbeson** case[40] and also the **Procanik** case,[41] however, recovery for general damages were explicitly rejected, while special damages were awarded. They are of the opinion that courts that have allowed special damages for wrongful life, have done so under equitable notions and humanitarian ideals, rather than by an explicit approval of the cause of action.

2.1.4 Relevance of abortion

They[42] write that wrongful birth actions are premised on pre-conception negligence of a medical worker and dependant on the plaintiff's right to abortion. Wrongful pregnancy cases aren't dependant on a right to abortion, since it is merely an extension of traditional tort doctrine. Wrongful life actions are based on a doctor's breach of current medical standard of professional conduct, whereby parents are precluded from an informed decision. The very existence of the plaintiff is the injury complained of, which injury would not have taken place if a timely abortion could have been obtained.

2.2 Similarities

Gevers[43] conveys that a common denominator between wrongful life and wrongful birth actions

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37 *ibid.*

38 in cases of limited recovery.

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

40 **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983).

41 **Procanic v Cillo** 97 N.J. 339, 478 A. 2d 755 (1984).

42 De Vries and Rifkin *ibid.*

43 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 22.

is that both actions are instituted because of the negligent conduct of a medical professional. He explains that liability could arise either from the breach of the agreement between advice seeker and advice provider or on the basis of delict. In the first instance failure to properly inform a patient could constitute malperformance, which same omission could comprise an unlawful act or delict. He indicates that this conduct of the physician infringes upon the patients' right to self-determination and freedom of choice concerning procreation,[44] which is dealt with in section 6.1.9.11, sub b of the Dutch Civil Code.[45]

An important aspect of Dutch law mentioned by Gevers[46] is that a physician under these circumstances not only commits a delict against the patient-parent, but potentially also against the handicapped or diseased child. He explains that a physician in the circumstances in question could be held accountable for his failure to take into account the interests of the unborn or yet-yo-be-conceived child, which he reasonably could have foreseen would be directly influenced by the exercise of his profession.

In previous Dutch decisions[47] the courts have found that a physician's negligence could be deemed unlawful towards third parties. The question to be asked in each instance is whether the interests of the unborn child should be so highly considered and have accordingly become such a generally recognised norm that a legal duty has in fact evolved whereby the community expects a physician to take notice and care in these circumstances. Gevers[48] remarks that it is in each case for the judge to decide whether such a legal duty actually existed. He personally believes the fact that the plaintiff child has not yet been born at the commission of the unlawful act, should not bar recognition of the claim.[49]

With regard to the overall Dutch academic opinion of the success of wrongful life and wrongful

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44 additionally, it is reported, the unnecessary abortion of a healthy foetus because of inaccurate genetic advice would be an infringement of the plaintiff's personal integrity which would in principle entitle a Dutch plaintiff to claim non-patrimonial damages over and above the obvious patrimonial losses.

45 in the relevant section specific mention is made of the right to claim non-patrimonial damages.

46 *op cit* p 23.

47 Rb. Den Haag 30 december 1971, 16 November 1972.

48 *op cit* p 25.

49 this viewpoint can be supported - see the legally precise explanation given by Joubert in ch 3, in support of this premise.

birth actions, it is reported[50] that although Sluyters[51] is weary of accepting the wrongful life plaintiff's premise that he should not have been born, Leenen[52] is of the opinion that both could be met with success in the Netherlands. Schoonenberg's similar positive outlook on these actions is based on the fact that there seems to be no prohibition of these actions from either the case law or legal policy perspectives.

Schoonenberg[53] writes that wrongful life and wrongful birth actions are principally founded on the failure by a physician to provide proper genetic information, although failed sterilization or abortion could also constitute liability. She reports that although wrongful birth actions are commonly allowed in the United States of America, wrongful life actions have generally had less success in that country. She is of the opinion, however, that a different state of affairs will develop in the Netherlands and explains why wrongful life actions would probably receive more recognition than wrongful birth.

According to Fain[54] the principle wrongful life and wrongful birth cause of action is based on essentially the same type of negligent conduct. She writes[55] that the child's claim in wrongful life is unique, however, in the sense that its life *per se* is the wrong complained of. In the mother's[56] claim for wrongful birth the actionable injury is consequential to the deprivation of her right to make an informed decision regarding normal childbirth and/ or a possible abortion.

3. General

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50 De Vries and Rifkin, *ibid.*

51 see wrongful conception ch 6 where the opinion of Sluyters is more closely considered.

52 see wrongful conception ch where the opinion of Leenen is more closely considered.

53 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 61.

54 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

55 *op cit* p 588.

56 Wrongful birth actions are often instituted by both the father and mother of the physically or mentally impaired child. Fain believes that the father's claim is derived from the mother's action. The father's damages are generally more of a financial nature, often arising from his obligation to support the handicapped child.

Fain[57] emphasizes the importance of distinguishing between three unfamiliar terms which are used to describe specific types of wrongful life actions. They are the so-called actions for "stigmatised life",[58] "unwanted life"[59] and "diminished life".[60]

One writer[61] warns that wrongful birth has often been confused with other pregnancy-related causes of action such as foetal injury, wrongful life, and wrongful pregnancy. He distinguishes the first cause of action form wrongful birth:

> "Claims for fetal injury allege that the physician's negligence caused an otherwise normal child to be born in a defective condition, or increased the chances that the child would be born with defects."[62]

3.1 General definitions

Collins[63] gives definitions for various relevant aspects pertaining to wrongful life litigation:

3.1.1 Prenatal tort:

"A tort that occurs when a child, who is born alive, is harmed before or during its birth, but after its conception, by the wrongful post-conception conduct of someone other than its parents."

3.1.2 Preconception tort:

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57 *op cit* p 587.

58 where illegitimacy is usually the injury complained of *eg* **Zepeda v Zepeda**, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (Ill. App. Ct. 1963) - a plaintiff could also base an action under the same category if it is born under any other stigmatised circumstance, for example extreme poverty or suffering from Aids.

59 basically is founded on the factual circumstances leading to wrongful conception litigation *eg* **Troppi v Scarf**, 187 N.W. 2d 511 Mich. (1971).

60 facts leading to either wrongful birth or wrongful life actions *eg* **Procanik v Cillo**, 478 A.2d 755 N.J. (1984).

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

62 see *eg* **Seattle-First National Bank v Rankin** 59 Wash 2d 288, 367 P 2d 835 (1962); **Restatement (Second) of Torts** § 869 (1965 & App. 1982) and the South African case of eg. **Pinchin and another NO v Santam Insurance Co. Ltd** 1963 (2) SA 254 (W).

63 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

"Occurs when a child, who is born alive, is harmed before or during its birth by the wrongful preconception conduct of someone other than its parents."

3.1.3 Action for wrongful death:

"May lie if the death of a newborn, or an unborn, is caused by tortious conduct."

3.1.4 Wrongful impairment:

"A child, who is born alive, may have such a cause of action if it suffers from impairments which are the result of wrongful post-conception or preconception conduct of, generally, one other than its parents."[64]

3.2 Wrongful life related rights

Collins[6566] further states that a child, who is born alive, may have a **wrongful impairment** cause of action if it suffers from impairments which are the result of wrongful post-conception or preconception conduct of, generally, one other than its parents.[67] Parents may have a **wrongful formation** cause of action if their procreative rights have been denied by the wrongful conduct of another.

It is reported[68] that the term "injury" when used in wrongful life refers to the harm which results when wrongful conduct of another alters the natural course of a child's formation. She explains that the term **formation** includes: fertilization of an ovum by a sperm; implantation of the blastocyst in an environment conductive to continued development, such as a natural or an artificial womb; and foetal development until live birth.

Collins[69] writes that the child's **right to be born "free from reasonably foreseeable defects"** means the child has a right to be born free from naturally occurring birth defects which are reasonably foreseeable:

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64 the term wrongful impairment includes the concepts of wrongful alteration and wrongful form.

65 *op cit* p 678.

66 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

67 the term "wrongful impairment" includes the concepts of wrongful alteration and wrongful form.

68 Collins *op cit* p 684.

69 *ibid.*

> "The statement "naturally occurring birth defects" refers to defects in a child such as those which arise because of the union of a genetically faulty ovum and sperm, or because of a viral infection of the child's mother, as in the case of rubella. A child would have a cause of action if its birth in a defective form was the result of another's negligence in areas such as preconception genetic testing or genetic counselling, and post-conception monitoring of fetal development."

A distinction is drawn[70] the closely related terms of wrongful conception and wrongful pregnancy. **Wrongful pregnancy**: generally applied to cases in which a heathy, but unplanned child is born because the wrongful conduct of one other than the parents results in an undetected pregnancy or in an unsuccessful abortion, sterilization, or contraceptive. **Wrongful conception**, on the other hand, generally covers cases in which conception of a healthy child takes place because of the wrongful conduct of one other than the parents.[71]

In Collins' view, the term **wrongful birth** in its narrow sense covers cases "in which a defective child is born because someone's wrongful conduct prevents the child's parents from having the option of preventing conception or of terminating the pregnancy", while in its broader sense wrongful birth includes the areas covered by wrongful pregnancy and wrongful conception.[72]

In a general sense the term **wrongful formation** covers cases in which an individual seeks to assert his or her right to prevent the formation of a child, to terminate the formation of a child, or to alter the formation of a child. **An action in wrongful formation**, therefore, will lie for a violation of an individual's procreative rights.[73]

3.3 Wrongful birth actions

Some[74] describe wrongful birth actions as "actions in which the parents of a child suffering from birth defects sue a health care provider (most often a physician, but possibly a genetic counsellor, cytogenic laboratory or hospital) for:

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70 Collins *op cit* p 690.

71 it is clear from these definitions that the only real difference between them is the fact that the unplanned child is not necessarily born in a wrongful conception action.

72 *op cit* p 691.

73 *ibid.*

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

- failing to impart adequate information about their risk of producing a child who has a serious defect; or
- failing to perform prenatal diagnostic procedures with due care; or
- failing to report accurately the results of tests already performed.

The parents claim that such failures deprived them of the opportunity to make a meaningful decision whether to conceive or bear a handicapped child. Damages for wrongful birth typically include the extraordinary medical, educational, and other expenses reasonably related to the care associated with the child's impairment, as well as damages for parental emotional stress."

Faircloth's[75] definition is:

> "Wrongful birth is an action brought by parents alleging that a doctor negligently failed to diagnose a fetus's defects or failed to advise the parents of their particular genetic risk during the first two trimesters of pregnancy."

He states that wrongful birth and wrongful life actions are both premised on the contention that with complete information the parents would have opted for an abortion.

3.4 Wrongful life actions

One author[76] summarised wrongful life as:

> "a claim brought by or on behalf of a child with birth defects. The child alleges that but for the defendant's negligent advice to or treatment of the child's parents, the child would not have been conceived, or, once conceived, would not have been born to experience the pain and suffering attributable to deformity. Most jurisdictions have refused to recognize a cause of action for wrongful life on the ground that in order to restore the infant to the position he or she would have occupied were it not for the defendant's negligence, the court must perform a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence."

Faircloth[77] defines wrongful life as:

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75 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 545.

76 Anon. 1987. *ibid.*

77 *op cit*, p 546.

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> "...an action brought by or on behalf of a deformed child, alleging that but for the doctor's negligence in performing or failing to perform genetic testing and counselling, the child would not have been born to experience a defective existence."

Grobe[78] has an interesting viewpoint in considering the action for wrongful life. He believes wrongful life and wrongful birth actions are precisely the same, except for one aspect namely the person of the plaintiff.[79] He gives a generally acceptable and sound definition of wrongful birth and then states: "Wrongful life is the corresponding action brought by the deformed child to recover damages."

3.5 Wrongful conception actions

One writer[80] declares:

> "Wrongful pregnancy or as it is sometimes called, wrongful conception, alleges that negligence in the performance of a sterilisation operation or abortion, or in the provision of contraceptives, led to the birth of an unwanted child. Wrongful pregnancy typically involves the birth of a healthy, though unplanned, baby. There are, however, a few cases involving the birth of unplanned and congenitally defective[81] children."

Faircloth's[82] description of wrongful pregnancy or wrongful conception actions is:

> "...an action brought by parents alleging that but for the doctor's negligence in prescribing birth control or performing sterilization procedures, their healthy child would not have been born."

3.6 Wrongful pregnancy/ wrongful conception actions

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78 1992. The future of the "wrongful birth" cause of action. **Pace Law Review** (12:3), 717.

79 my personal opinion is that this is a slight over simplification of matters: in each action different issues are important, *eg* the unique dilemma of a wrongful life plaintiff having to choose between two impossible contingencies.

80 Anon. 1987. Op cit p 2018.

81 *eg* **La Point v Shirley** 409 F. Supp 118 W.D. Tex. (1976) and **Speck v Finegold** 497 Pa. 77, 439 A. 2d 110 (1981).

82 *ibid.*

Bopp[83] distinguishes between these two closely related claims by stating:

> "Wrongful conception is an action based on negligent birth control or sterilization procedures, and wrongful pregnancy is an action based on negligent performance of an abortion procedure."

Grobe[84] deals with both wrongful conception and wrongful pregnancy actions under the same description and lays special focus on the role of pharmaceutical providers in these actions:

> "An action for 'wrongful pregnancy' or 'wrongful conception' is generally brought by the parents of a healthy, but unwanted, child against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription, or against a physician for negligently performing a sterilization procedure or an abortion."

4. Based on Delict

4.1 South African position

The South African law recognises three basic delictual actions that can be instituted by any person who was legally wronged[85] and who is able to satisfy the conditions of the particular action. These actions are the *actio legis Aquiliae*,[86] the *action iniuriarum*,[87] and the action for pain and suffering,[88] all three of which are important for purposes of wrongful life litigation.

4.1.1 Conduct

The first obvious element that a plaintiff in delict has to prove is that an injury was caused by

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83 1989. The Rights and Wrongs of Wrongful birth and Wrongful life: A jurisprudential analysis of birth related torts. **DUQ. Law Review** (27), 461.

84 *op cit* p 721.

85 who can prove the required elements of delict, which is per definition, an *unlawful* act.

86 a broadly applied action with which both general and special patrimonial damages, caused by negligent conduct, can be claimed.

87 with which satisfaction for immaterial (non-patrimonial) loss such as loss of amenities can be claimed, if injury was *intentionally* inflicted.

88 to redress loss associated with physical anguish and psychological affliction.

another's conduct.[89]

4.1.2 Wrongfulness

The question of wrongfulness has been a contentious issue in wrongful life litigation from the start. In order to succeed with an action based on delict, a plaintiff must be able to prove that defendant has infringed upon his subjective right(s) or has failed to adhere to a legal duty, which occurred contrary to the legal will/ approval[90] of the community.[91]

Whereas there are common circumstances for which clear legal duties have evolved over the centuries, highly unusual or altogether new situations[92] do not have a straightforward answer whether it is unlawful or not and then one is obliged to refer to the legal convictions of the community.[93]

4.1.3 Fault

It must be established that the defendant has acted differently from what would be expected from a reasonable person in the same circumstances, in order to find that a wrongdoer has acted negligently.[94] It must be proved that a reasonable person would have foreseen that certain conduct could cause damage (to another) and subsequently that the reasonable person would have taken steps to prevent the realisation of this foreseeable damage.[95] Intentional wrongful conduct obviously also satisfies the fault requirement of delict, but is not commonly applicable in medical negligence cases.

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89 see specific actions in ch 6, 7 and 8.

90 *ie* that conduct is "blameworthy".

91 Neethling, J. Potgieter, J.M. and Scott, T.J. 1991. **Case Book on the Law of Delict** Juta & Co. (1st edition) comment on **Regal v African Superslate (Pty) Ltd** 1963 (1) SA 102 (A) regarding legal duties: "Steyn CJ was of the opinion that the criterion to determine a legal duty to act positively should rather be reasonableness and fairness. Rumpff JA concurred by stating that the existence of such a duty is dependant on the opinion of the community, which exists at a particular time." *op cit* p 34, and also on **Minister van Polisie v Ewels** 1975 (3) SA 590 (A) that: "The Appellate Division, in connection with liability for an omission, rejected the viewpoint that prior conduct is indispensable. Rumpff CJ was of the opinion that wrongfulness in the case of an omission or the question as to the existence of a legal duty to act positively must be determined with reference to the legal convictions of the community (the general *boni mores* test for wrongfulness)." *op cit* p 38.

92 such as wrongful life.

93 the so-called *boni mores*, which reflects public policy.

94 **Pringle v Administrator Transvaal** 1990 (2) SA 379 (W), **Van Wyk v Lewis** 1924 AD 438, **Blyth v Van den Heever** 1980 (1) SA 191 (A).

95 **Kruger v Coetzee** 1966 (2) SA 428 (A).

4.1.4 Causation

A plaintiff has to prove a causal *nexus* or link between conduct and damage in order to succeed with an action based on delict.[96] Not only must a factual causal *nexus* be established, but there should also be a sufficiently close relationship between cause and consequence so that the consequence may be imputed to the wrongdoer. Determining sufficient proximity allows for legal causation, which can be ascertained through application of various theories.[97]

Van Oosten[98] reports that the South African courts have in the vast majority of cases applied the "proximate cause" or "direct consequences" principle to establish legal causation.[99]

4.1.4.1 Wrongful life actions:

If the reasonable foreseeability theory should be applied to wrongful life factual situations, one can argue that a physician could have reasonably foreseen[100] that a medical mistake in his treatment or advise, could lead to the birth of a handicapped child. One can even argue that the birth of a handicapped child could be marked as a "direct consequence" of the physician's negligent conduct.

It is my submission that all three limitation requirements[101] implemented to limit the exceptionally wide liability under this theory are satisfied in an average wrongful life action-factual situation. The handicapped birth of a child is namely a direct physical consequence of

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96 1993. Neethling, Potgieter and Visser **Law of Delict**, 132; **International Shipping Co (Ltd) v Bentley** 1990 (1) SA 680 (A).

97 such as the theory of adequate causation, the direct consequence criterion, the theory of fault and the reasonable foreseeability criterion, (which theories will not be discussed further in this work).

98 1982. Oorsaaklikheid in die Suid-Afrikaanse strafreg - 'n prinsipiële ondersoek. **De Jure** (239), 37.

99 Van Oosten *op cit* p 55 writes, however, with regard to the *conduction sine qua non* test as test for legal causation that it is the only theory that has stood the test of time. This is so in spite of valid objections that could be raised against it, such as that there is a logical contradiction in the fact that something that is to be "though away" should be considered as a condition.

100 it is submitted that, because the facts of many wrongful life actions show that the parents of the eventually born plaintiffs are usually parents who were planning on getting children or who were already pregnant with the plaintiff, it can objectively and clearly be seen that the birth of a handicapped child could be an obvious and expected result of failed genetic testing or medical informative duty.

101 *ie* concerned consequence limited to a direct physical consequence, where the immediate nature of the causal link between cause and detrimental consequence is not broken by a *novus actus interveniens* (see *infra*) and where the wrongdoer could foresee that a particular plaintiff would be injured by his conduct - Neethling *et al op cit* p 203.

the failed medical advice of the physician. The physician could naturally have foreseen that his conduct could have detrimental consequences for the particular plaintiff. In wrongful life circumstances a physician defendant could, however, assert that the plaintiffs parent's failure to abort the handicapped foetus is a *novus actus interveniens*[102] that breaks the causal link[103] of his conduct with the complained-of handicapped birth. In order to succeed with this argument, it will have to be established that it is morally and socially acceptable to expect such a difficult and excruciating decision from parents.

I believe that South African society as a whole will not expect such drastic action from parents and failure to abort will therefore not be seen as unreasonable conduct and accordingly the continuance of the pregnancy (although unwanted), will not be marked as a *novus actus interveniens.* It should be remembered that a *novus actus* can be brought about by the culpable conduct of the plaintiff,[104]a third party,[105] or by natural factors.[106] I therefore submit that an average wrongful life plaintiff will be able to establish not only a factual causal link between the physician's conduct, but also will be able to prove that the harmful consequence of the physician's conduct is sufficiently close that it may be imputed to him.

4.1.4.2 Wrongful conception actions and Wrongful birth actions:

Similar to the action of a handicapped child discussed above, I believe that the plaintiff-parents in wrongful conception actions and wrongful birth actions will also be able to establish a causal link between the physician's conduct and the resultant detrimental consequence.[107]

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102 "A *novus actus interveniens* (new intervening cause) is an independent event which, after the wrongdoer's act has been concluded, either caused or contributed to the consequent concerned." *ibid.*

103 only a intervening occurrence that completely extinguishes the causal connection has the result that the wrongdoer's act can no longer be considered the factual cause of the consequence.

104 it seems as if a plaintiff's contributory negligence *prior* to the harmful event necessitates the application of the apportionment of damages, whilst negligence *thereafter* will affect the principles of legal causation, which may reduce his damages - **Gibson v Berkowitz** 1996 (4) SA 1024 (W) - see position of **Apportionment of Damages Act** No. 34 of 1956 with regard to contractual claims *infra.*

105 such as where medical treatment causes further injury - **R v Motomane** 1961 (4) SA 569 (W), *eg* where the autonomous diagnosis of another geneticist is also incorrect and leads to unnecessary additional tests, failed abortion procedures *etc*, see also Van Oosten 1983. **De Jure** 44-45.

106 Neethling *et al, op cit* p 206 - in wrongful conception cases the natural re-canalisation of a woman's fallopian tubes, severed during a sterilisation procedure comes to mind.

107 namely either an unexpected birth of a normal child (wrongful conception) or the birth of a handicapped child where a healthy child was expected (wrongful birth).

In the same way as mentioned earlier, literally all the causation theories[108] could be applied with success to the average factual situation experienced by these plaintiff- parents. To illustrate: If a physician fails to warn his patient of the fact that the success of a sterilisation operation should first be acknowledged before sexual relations without alternative contraceptive measures are continued, then it could be *reasonably expected* that the patient could possibly conceive a child.[109] This distinct possibility as a consequence of the physician's omission is therefore not only reasonable foreseeable, but is also a natural consequence, according to human experience in the normal course of events.[110]

4.1.5 Damage

A prejudiced person[111] is entitled to be compensated to the extent, so as to place him in the same position he would have been, was it not for a damage causing event.[112] A plaintiff may claim patrimonial damages[113] as well as non-patrimonial damages[114] and the following heads of damage are compensable:

- compensation for medical expenses and non-patrimonial loss[115]
- damages for loss of earnings, rearing capacity, medical and related expenses and non-

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108 *supra.*

109 regarding the influence of a *novus actus*, it should be remembered that "if the intervening cause was indeed reasonably foreseeable at the moment of the act (or if it reasonably formed part of the risks inherent in the conduct of the defendant), such an event may not be considered to be a *novus actus interveniens* which may influence the imputability of harm to the actor." - Neethling *et al, op cit* p 206.

110 (*ie* it is a natural consequence of unprotected sexual intercourse that conception could take place) - thereby establishing a legal causal link in terms of the adequate causation theory, Neethling *op cit* p 172.

111 the question who may sue for damages was answered in **Guardian National Insurance Co Ltd v Van Gool NO** 1992 (4) SA 61 (A).

112 in **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), the court stressed the fact that in the process if making an award for damages, the court must endeavour to arrive at an amount which is fair to both the plaintiff and the defendant.

113 pecuniary loss may be claimed in terms of the Aquilian action - **Union Government (Minister of Railways and Harbours) v Warneke** 1911 AD 657.

114 it is well established that compensation for non-patrimonial loss can be claimed: **Dyssel NO v Shield Insurance Co Ltd** 1982 (2) SA 1084 (C); **Protea Assurance Co Ltd v Lamb** 1971 (1) SA 530 (A); **Ned-Equity Insurance Co Ltd v Cloete** 1982 (1) SA 734 (A) and **Reyneke v Mutual & Federal Insurance Co Ltd** 1991 (3) SA 412 (W).

115 **Blyth v Van den Heever** 1980 (1) SA 191 (A); **Marine & Trade Insurance Co Ltd v Katz NO** 1979 (4) SA 961 (A).

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patrimonial loss.[116]

4.2 General considerations regarding damage

4.2.1 Wrongful conception actions

The general claim instituted in the wrongful conception sphere of action is one for special damages resulting from expenses for child-rearing and other costs incurred due to an unexpected addition to the family. In South Africa, therefore, this type of loss will necessitate the use of the *actio legis Aquiliae*. In some cases the plaintiff-parents also claim satisfaction for loss of amenities and shock,[117] as well as for depression and loss of *consortium*[118] during and directly after the additional sterilisation operation and similarly after a possible failed abortion. To redress the suffering occasioned by the unnecessary duplication of operations, the action for pain and suffering could additionally be commissioned.

4.2.1.1 Challenges regarding the assignment of damages in wrongful conception actions

In a wrongful conception action the plaintiff mainly claims patrimonial damages[119] which can be calculated without much trouble. What is difficult to ascertain in these actions, is the question what heads of damages should be allowed.[120] Once these heads have been designated the calculation of the *quantum* is only a matter of applying actuarial principles and adding up relevant expenses.

4.2.2 Wrongful birth actions

In wrongful birth actions plaintiff-parents are confronted with the birth of a disabled child.[121] If one considers the true basis of these actions, one observes that these plaintiffs in fact did want a child, but only a normal and healthy child. It is accordingly submitted that it would therefore be unfair to allow normal *child-rearing costs* in these instances. All additional expenses caused

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116 **Ngubane v South African Transport Services** 1991 (1) SA 756 (A); **Sigournay v Gillbanks** 1960 (2) SA 552 (A); **Southern Insurance Association Ltd v Bailey NO** 1984 (1) SA 98 (A); **Sandler v Wholesale Coal Suppliers Ltd** 1941 AD 194.

117 to succeed with a claim for shock, plaintiff must prove that actual physical or psychological damage resulted from said trauma.

118 marital rights, incl love and mutual affection.

119 see ch 6 on wrongful conception.

120 many viewpoints exist, amongst others those who say that child-rearing expenses should be allowed and those who disagree, believing that only additional medical expenses must be compensated, see ch 6.

121 see ch 7 on wrongful birth.

by the handicapped condition of the child or its treatment,[122] however, should be awarded as these expenses[123] were in fact caused by the negligent conduct of the physician.[124] In addition to these heads of damage, parents usually claim satisfaction for the infringement of their personality rights in this regard, such as loss of amenities *et cetera*.

4.2.2.1 Challenges regarding the assignment of damages in wrongful birth actions

Although the parents in wrongful birth actions are shocked by the birth of a disabled or genetically impaired child, they nevertheless expected the actual birth of a child and were accordingly prepared to incur the obvious child-rearing expenses associated with such an event.[125] What is true in the majority of their circumstances, is that they had no reason to expect that their child could be affected by some genetic impairment or disease.[126]

Bodgan[127] reports on the fact that certain American courts[128] are not willing to award "emotional suffering damages" or satisfaction for emotional injuries in these cases, since the calculation of emotional anguish is too speculative and difficult. Bodgan answers in reply, that these damages are not more difficult to estimate in financial terms than, for example, to calculate damages for physical pain. He reminds us that emotional injuries are real injuries that should be compensated. He further asserts that because wrongful birth is in essence a negligence claim, courts should not approach it differently from any other similar claim in tort.[129]

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122 for the genetically transmitted disease/ condition.

123 note that it is stated that the physician's negligent conduct directly causes the *expenses* relating to a handicap and not that it directly caused the *handicapped condition* itself
- see ch 7.

124 many negligent actions could be the possible cause of wrongful birth.

125 a recent study has shown that the total cost incurred for the birth, development, care, education *etc* of a normal, average child (up and until graduation), in the United States of America, amounts to a staggering $ 400 000.

126 As any responsible parents, wrongful birth plaintiffs consult their physician or gynaecologist to be informed about the possibility/ risks of any abnormal foetal development in their planned pregnancy. In addition to this, genetic counsellors are generally consulted with the express instruction of investigating the possibilities of higher than normal risks involved in the development of their foetus, during which both parents usually undergo genetic testing.

127 1983. Wrongful Birth: Who Owes What to Whom and Why? **Washington and Lee Law Review** (40), 125.

128 such as in **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967) and **Turpin v Sortini** 182 Cal. Rptr. 337 (1982).

129 it should be noted, however, that whereas this directive might be sound, the fact remains that the unique characteristics of wrongful birth actions should not be overlooked by a general application of compensative principles.

Bodgan[130] believes that wrongful birth litigation is analogous to all other ordinary personal injury claims, in that the plaintiffs have been deprived of the opportunity to live life without pain and suffering. He distinguishes these cases from wrongful life actions which according to him does not fall in the same category, as the wrongful life plaintiff does not complain of the lost opportunity to live without mental pain and suffering, but rather complains of a unrealised preference not to have been born.[131] It is suggested by Bodgan[132] that for this reason the **Turpin** court's[133] objection to award satisfaction for emotional suffering should not be applied and extended to wrongful birth actions.[134]

> "Because wrongful birth *claims* are common law negligence claims, ordinary negligence damages rules should apply to wrongful birth claims."[135]

4.2.3 Wrongful life actions

In a wrongful life action the plaintiff is a child who argues that life in his/ her case is not worth living. The basic claim is one of satisfaction, aiming to redress the current prejudiced condition in which the plaintiff must live.[136] In many cases damages are also claimed for the additional expenses brought about by the disability or impairment. Because of the inherent difficulty in establishing loss by comparing the plaintiff's condition with that of no-life, many courts refuse to award these general damages and rather allow special damages associated with the additional living and medical expenses.

Andrews[137] writes that the current[138] trend in American courts decisions is to allow both wrongful life and wrongful birth actions, but to only allocate additional costs, medical expenses and a special resource fund for the plaintiff-child. He agrees that general damages such as basic

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130 *ibid.*

131 or a defunct status of non-existence.

132 *ibid.*

133 a wrongful life action.

134 as it was primarily a wrongful *life* action.

135 *op cit* p 140.

136 various theories behind the awarding of satisfaction, are discussed *infra* - it is submitted that the so-called *"oorwinnings teorie"* or *"Uberwindungsgedanke"*, the theory whereby an injured person must receive an amount of money which will assist him in overcoming his problems, would be the most applicable to wrongful life cases.

137 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

138 commentary was written in 1992.

child-rearing expenses until majority, are usually not allowed.

4.2.3.1 Challenges regarding the assignment of damages in wrongful life actions

There are at least two crucial obstacles inherent to the assignment of damages in wrongful life actions. The first difficulty that arises is the fact that a presiding court has to make a value judgement on the life of a handicapped child in order to appoint a lesser value or a lower level of living standard,[139] to thereby be in the position to find that the plaintiff has indeed suffered loss by being born. This implies the deliberation of a human life's worth and value in society.[140] To further complicate matters, such a handicapped life has to be compared with a state of non-existence.[141] In order to establish damage the court must be convinced that a state of non-existence is preferable to being disabled or genetically impaired.[142] If this is found to be so, the second predicament arises as the extent/ *quantum* of the damages now has to be fixed.

4.3 Various compensation theories

It is important that one considers the different theories behind the awarding of damage claims[143] and claims for satisfaction.[144] It is also interesting to superficially look at the reasoning behind the awarding of satisfaction claims. Visser[145] explains that the basic operation of satisfaction: "that a wrongdoer is compelled to pay an amount of money to an aggrieved person in order to neutralise his unhappiness on account of the injustice done to

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139 for reasons of comparison.

140 as weighed against the alternative of no life.

141 Note that it would be incorrect to compare impaired life with normal life for reason of calculating the quantum - such a comparison will not reflect the actual possible conditions in which the plaintiff could theoretically exist.

For reasons of keeping this discussion simple, we will accept that each person only has one opportunity to live life on earth, at a specific period in time, so that a plaintiff in a wrongful life action could not have any chance of living life in a normal/ healthy body (at a possibly other stage in time) - see ch 9 for a philosophical discussion on life and whether it would be possible for a specific person to live in another body, under different circumstances, was it not for certain facts, eg if you were born a year earlier or later (when your mother were not ill with German measles). See also the wrongful life ch 8, where the dilemma created by the need to determine non-existence is discussed.

142 such a conclusion goes directly in conflict with the established rights of the handicapped community, as well as honourable policies of equality as is protected in human rights around the world.

143 *ie* patrimonial damages.

144 *ie* non-patrimonial damages.

145 1988. Genoegdoening in die Deliktereg. THRHR (51), 468.

him." He[146] writes that satisfaction does not place the emphasis on damage,[147] but on wrongdoing and points out that satisfaction without the idea of atonement is not viable. For this reason, the suggestion that satisfaction merely refers to some kind of consolation payment[148] cannot be accepted.

In South African law the *actio iniuriarum* is applied to claim satisfaction. Visser[149] believes that the modern application of this action still clearly reveals its penal elements. It is further reported that the action for pain and suffering, however, has developed as an action with a compensatory nature without any penal elements.

> "The function of this action is compensatory and any suggestion that it is also an action providing for satisfaction ("genoegdoening") must be dismissed. The view that is sometimes put forward that non-patrimonial loss can never be the subject of compensation, is also incorrect in terms of South African theory and practice."

Visser[150] conveys that the main function of the law of delict is to provide for compensation and for satisfaction:

> "With compensation the law attempts to achieve (financial) restitution to cancel out the harmful effects of a delict. The object of satisfaction is to soothe the feelings of the person subjected to a delict and to confirm the authority of the law. The relevance of restitution in the sphere of non-pecuniary loss (where factual restitution is impossible) is only to be found in the idea providing restitution: an imperfect attempt at restitution is made."[151]

Various motivations why compensation should be awarded exist - according to one theory, for

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146 *ibid.*

147 (as in the case of compensatory damages).

148 *solatium*.

149 *ibid.*

150 1983. Kompensasie van nie-vermoënskade. **THRHR** (46), 43.

151 it is my submission that this truth should be taken into consideration when awards for wrongful life plaintiffs are assessed - these plaintiffs, although true redress cannot be ordered (whole, functional human being), should nevertheless be compensated financially in order to be placed in a position from where they can overcome their detrimental circumstances (even if money is only an imperfect attempt at restitution).

example, a "market value" is given to interests of personality.[152] Another theory is the so-called "pain-for-pleasure" approach, whereby the money which an injured person receives represents a measure of happiness which has to cancel out the unhappiness flowing from his injuries. Visser[153] explains that this theory approaches the problem of compensation with too much emphasis on subjective factors.

A better approach is suggested in terms of the so-called *"Uberwindungsgedanke"*, which dictates that an injured person must receive an amount of money which will assist him in overcoming his problems. The theory suggests that the plaintiff will be able to develop the will-power to triumph over his setback by means of his greater economic freedom made possible by the receipt of an amount of money. It is submitted that in South Africa law both the pain-for-pleasure theory and the *"Uberwindungsgedanke"* are accepted. The author suggests that these two approaches be combined to provide for a comprehensive theory of compensation of non-pecuniary loss. Visser[154] remarks:

> "Real" compensation in the situation under discussion can be achieved only if a plaintiff's injuries are not too serious and if he has the intellectual ability to develop enough willpower to fight back and triumph over his set-back. Where compensation is impossible, only (objective) satisfaction can be relevant."

4.4 Delictual claim for emotional shock

In terms of South Africa law, the following principles are important with regard to emotional shock: Physical harm to a plaintiff is not a requirement to succeed with a claim, as the Appeal Court[155] have found that the brain and nervous systems are as much part of the human body than any other member. Also the premise that a plaintiff must have been in personal physical danger has been rejected[156] and replaced by a yardstick of the reasonable foreseeability of emotional shock. The shock must have had a substantial effect[157] on the health of the plaintiff

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152 according to Visser *ibid*, however, personality interests (in this connection) have no market value.

153 *ibid.*

154 *ibid.*

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

156 as a prerequisite, although personal danger may be indicative of the foreseeability of the emotional shock - Neethling *et al, op cit* p 475.

157 *ie* an actual injury had to take place and the shock must have been serious enough to justify an action.

before a claim will be awarded.[158]

Another relevant aspect concerning liability for emotional shock is that the so-called "thin-skull" and "take your victim as you find him" rules are applicable.[159] If, because of certain conduct, shock was reasonably foreseeable, the wrongdoer will accordingly be liable for all consequential harm resulting from such conduct, regardless of whether these specific consequences were foreseeable or not.[160]

4.5 Pure economic loss

Although the Aquilian actions were traditionally only available to redress damage caused by physical and psychological injury, the need to widen its scope has become so compelling that so-called "pure economic loss"[161] has also been principally acknowledged in South African law.[162] As there is no general duty to prevent pure economic loss for others, wrongfulness must be established in each case by assessing whether there was a legal duty to avoid the loss. The courts[163] have applied the legal-duty approach to wrongfulness and established that the general criterion of reasonableness or *boni mores* should be used to ascertain whether a duty existed to avoid pure economic loss in a particular instance. All relevant factors should be taken into account,[164] including public interest, but especially two factors would be highly regarded: the

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

159 **Masiba v Constantia Insurance Co Ltd** 1982 (4) SA 333 (C).

160 **Boswell v Minister of Police.**

161 Neethling *et al, op cit* p 294 explains that: "On the one hand, pure economic loss may comprise patrimonial loss that does not result from damage to property or impairment of personality. On the other hand, pure economic loss may refer to financial loss that does flow from damage to property or impairment of personality, but which does not involve the *plaintiff's* property or person; or if it does, the *defendant* did not cause such damage or injury." In wrongful life situations, plaintiff's person is indeed injured, but the injury is not directly caused by defendant's negligence. Extraordinary expenses regularly claimed in wrongful life is a typical instances of pure economic loss.

162 **Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd** 1982 (4) SA 371 (D), also **Shell & BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA** 1980 (3) SA 653 (D).

163 **Coronation Brick** *ibid* and **Jowell v Bramwell-Jones** 1998 (1) SA 836 (W).

164 Neethling *et al, op cit* p 297 lists various important factors that indicate the existence of a legal duty: knowledge that negligent conduct would cause damage to the plaintiff; whether practical measures could have been taken to prevent the economic loss; the professional knowledge and competence professed and exercised by defendant in rendering professional services creates a legal duty not to cause financial loss to others; the extent of the risk, indicating the need for protection; the extent of loss suffered; statutory provisions prescribing the prevention of loss may also constitute a duty to act.

fact that the defendant knew that the plaintiff would be harmed by his negligent conduct and secondly policy considerations that the liability of defendant would be too extensive.[165]

Cleaver[166] writes:

> "The question to be answered in the context of wrongful birth is whether Aquilian liability should be "extended" into the field of pure economic loss caused by the negligence of a physician."

It is submitted that this could have an important influence on wrongful life litigants as many critics of wrongful life actions state that the plaintiff has not suffered any "legally cognisable injury". An indisputable fact, however, is that definite economical loss is suffered. It is submitted that the application of pure economic loss principles to these actions could pose an alternative ground to allow compensation.

4.5.1 American position

Spier[167] reports that pure economic loss is probably one of the main problems in expanding tort law. He writes[168] that under American law, economic loss flowing from physical damage to the plaintiff's person or property caused by negligence is fully recoverable, whereas purely economic harm is usually not actionable,[169] in the absence of some special relationship between plaintiff and defendant that requires the defendant to use care for the plaintiffs purely economic loss.

4.6 Aquilian liability for negligent misrepresentation

The Appeal Court[170] has confirmed that liability could ensue if incorrect or misleading statements have caused damage to a party acting on such misrepresentation and suggested that the delictual elements be applied to limit such liability to acceptable bounds. The court

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165 obviously the wrongdoer's conduct must comply with the general delictual requirements - **Jowell v Bramwell-Jones**.

166 *op cit* p 62.

167 1995. **The Limits of Liability. Keeping the Floodgate Shut.** Kluwer Law International, 8.

168 *ibid.*

169 "a few US Courts, however, have approved liability for negligently inflicted, stand-alone economic losses in particular cases" *ibid.*

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

affirmed that circumstances could exist[171] where a legal duty rests on a defendant to furnish correct information to the plaintiff.[172]

The following delictual elements must be proved:[173]

- there must have been negligent misrepresentation (conduct);
- the plaintiff's damage must have been caused by the negligent misrepresentation (factual causation);
- the defendant must have acted negligently (fault).

In **EG Electric Co (Pty) Ltd v Franklin**[174] the court stated that the fact that a defendant had exclusive information[175] and knew that the plaintiff would act on the information, should be taken into account when considering whether a legal duty existed to supply the correct information.[176] When the identity of the plaintiff is certain, liability can only follow from a single claim and therefore there should be no fear for a multiplicity of actions.

4.7 "Once and for all"

Damages must be claimed "once and for all", meaning that all past and future damages arising from a single cause of action must be calculated and claimed at the trial.[177]

4.8 Manufacturer's liability

The courts[178] have found that manufacturer's liability does fall within the field of application of

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171 here, policy considerations should be taken into account - it was suggested that no duty to correctly inform would exist if information is furnished informally or in a social context.

172 in this respect, it is submitted, that the physician's duty to inform his patient and the entire informed consent debate is unquestionably relevant.

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

174 1979 (2) SA 702 (E).

175 because of his particular occupation, *in casu* an electrician.

176 this indication given by the court seems to have specific application to the physician-patient relationship.

177 **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 (A); **Oslo Land Co Ltd v The Union Government** 1938 AD 584; **Custom Credit Corporation (Pty) Ltd v Shembe** 1972 (3) SA 462 (A).

178 **Bayer South Africa (Pty) Ltd v Viljoen** - note that *in casu* a pharmaceutical manufacturer was sued for damages resulting from its alleged incorrect misrepresentation that a product was suitable for a specific use, while in fact, it

the Aquilian action. In **A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd**[179] the court had to, for the first time in South Africa, consider whether a manufacturer could be held liable for damage suffered by a third party as a result of a defect in a product. The court found that a dealer could in principle be held liable in delict.[180] Because of the novelty these actions locally, the court emphasised the importance of comparative law for guidance.[181]

Neethling *et al*[182] considers the most important delictual requirements founding manufacturer's liability. With regard to wrongfulness he writes that the manufacturer has a duty, according to the legal convictions of the community[183] to ensure that defective or dangerous products[184] do not enter or remain in the marketplace.[185] Proving fault on the side of the manufacturer is a difficult task as a plaintiff will have to prove that their conduct was not in accordance with that of the reasonable person in the same circumstances, with respect to foreseeability and preventability of possible damage.

It has suggested[186] that the doctrine of *res ipsa loquitur*[187]could alleviate the plaintiff's burden of proof of manufacturer's liability.[188] It was found that a deduction of negligence could only be made if the damaging events would not, according to general experience, have taken place if someone had not acted negligently.

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was not, and **Doornbult Boerdery (Edms) Bpk v Bayer South Africa (Edms) Bpk en Ciba-Geigy (Edms) Bpk** case no 1 5452/1976 (T).

179 1975 (2) SA 457 (W).

180 *in casu,* plaintiff was unable to prove negligence.

181 see introduction where a similar comparative approach with regard to wrongful life is suggested for the same reason.

182 *op cit* p 322.

183 *boni mores.*

184 an unreasonably dangerous product (which does not meet the expectations of the reasonable consumer regarding safety) can be considered defective, together with products with design shortcomings and products with insufficient warnings and instructions.

185 where a defective product therefore causes damage, such occurrence is in violation of a legal duty and therefore, unlawful.

186 *ibid.*

187 the facts speak for themselves - note that this doctrine does not apply to medical negligence cases in South Africa, *eg* where a surgeon who leaves a task to a competent sister is on that account guilty of negligence - **Van Wyk v Lewis** 1924 AD 438, see ch 4 on medical negligence.

188 the same premise was expressed in **Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd** 1972 (4) SA 185 (T).

Giesen[189] also reflects on the application of *res ipsa locquitur* rule and writes that in Dutch law the judge should first ascertain whether the same harmful situation would not also have existed without improper conduct, before the facts in question can be taken as the truth. It must be calculated what influence the improper conduct actually had on the occurrence of the damage and also measure the contributory negligence of the plaintiff:

Strauss[190] reports that although "strict liability"[191] in respect of products does not form part of South African law, he agrees that the *res ipsa loquitur* principle could greatly assist a plaintiff in a medical malpractice suit in proving that the manufacturer was negligent.[192]

He[193] discusses the delictual liability for defective drugs and state that it would be hard to envisage an instance where a pharmaceutical manufacturer would intentionally[194] produce defective products and therefore contends that a plaintiff will have to prove negligence. He reports that American courts[195] apply strict liability in cases where a manufacturer produces a product without inspection for defects, which could be seen as a type of consumer protection.

Schoonenberg[196] reports that manufacturers liability in the Netherlands is founded on section 1401 BW of the Dutch Civil Code, and supplemented by the new Code section 6.3.3 NBW. In terms of these sections, a consumer or user of a defective product[197] can sue the manufacturer for any damages suffered as a result of the use of the product. She refers to the

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189 1997. Res ipsa loquitur, een bijzonder vermoeden in het aansprakelijkheidsrecht. **Weekblad voor Privaatrecht, Notariaat en Registratie** (6265:128), 241.

190 *op cit* p 264.

191 *ie* that a manufacturer or supplier of a product is held liable for losses suffered because of its use, without the need to prove that they were negligent in manufacturing or distributing.

192 Strauss *ibid*: "This is a legal principle whereby an inference of negligence is drawn in the absence of explanation by the defendant, if injury was caused by a thing under the control of the defendant and the nature of the occurrence was such that it would not have happened if proper care had been exercised."

193 Strauss *op cit* p 292.

194 it is mentioned that *dolus eventualis* (where a wrongdoer actually foresees the possibility that his conduct might cause harm to another, but proceeds regardless of whether or not such harm ensues) might be possible, but highly unlikely.

195 **Greenman v Yuba Power Products Inc** 59 Cal. 2d 57, 13 ALR 3d 1049 (1963).

196 *op cit* p 71.

197 there could either be a deficiency in the composition of the product or its use could be detrimental to the user in an unforeseeable manner.

implementation of European Community guidelines on product liability and explains that the most important consequence thereof was the reversal of evidential burden in favour of the consumer.[198] This has the practical effect that a producer is liable for a defective product unless the producer can prove that, based on the then prevailing technological and scientific knowhow, there was no chance of detecting the defect in question. It is further stated[199] that a product is deemed defective when it is not safe for use while consumers are led to believe or reasonably could have been expected to believe that it is safe.

Schoonenberg[200] believes that a physician has a duty thoroughly inform a patient of any genetic side-effect that prescribed medication may have and concurrently have a duty to research the composition of new medication for such possible influences.[201] Where a physician is held liable for failure to warn patients of negative side-effects, the medical professional insurer responsible will in principle have a right of recourse against the drug manufacturer.

Because the relationship between physician and patient is primarily one of contract, Schoonenberg writes that this could also be indicative of a risk-liability, which would be based, in Dutch law, on sec 6.1.8.3a (NBW). Not only a physician , but also the hospital in question could incur liability in this fashion, although it would seem as if increasing focus of accountability will be on the manufacturers.[202] Evidence for this view is found in section 6.3.2.5 sub 2 (NBW), whereby liability for potentially dangerous products could follow even outside a contractual relationship.[203]

Wansink[204] refers to a recent Dutch case[205] where the High Council found a manufacturer liable

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198 in terms of sec 7, sub e of the guideline - est 30 July 1988.

199 sec 6.

200 *ibid.*

201 *"De reikwijdte van de informatieplicht an de arts wordt bepaald door hetgeen de producent van het geneesmiddel binnen de kring van medici aan informatie verschaft en door de beschikbare wetenschappelijke literatuur op dit gebied." ibid.*

202 *"De minister stelt de aansprakelijkheid van de producent op grond van de toekomstige afdeling 6.3.3 NBW tegenover de patiënt/ gebruiker voorop."*

203 this would typically be the case where a pregnant consumer unwittingly uses a drug that has a detrimental influence on foetal development - *"Ergo, het kind dat gehandicapt geboren wordt ten gevolge van het gebruik van een medicijn met schadelijke genetische bijwerking door de moeder, wordt verwezen naar de producent van dat geneesmiddel." ibid.*

204 1995. De aanssprakelijkheidsverzekering en de dekking voor "long tail- risico's". **Aansprakelijkheid en Verzekering** (3:1), 1.

205 HR 9 Okt. 1992, NJ 1994, 535.

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for the production of the drug DES, which would only cause noticeable detrimental effect in future generations.

With regard to legal liability for defective drugs under South Africa law, it is submitted that established negligence on the side of a manufacturer cannot be transferred to the physician who has prescribed the product in question. The physician's liability would depend on the extent to which he could have foreseen possible harm, taking into consideration what could reasonably have been expected from any physician under the same circumstances.[206] Possible liability could arise where a physician has personally dispensed medicine past its due date or that has become unsafe because of contamination or chemical reaction, or in the instance where a specific medicine is prescribed after it has come to light that the medicine in question is unsafe or inappropriate under certain circumstances.

It is reported that a pharmacist[207] can also be held liable for dispensing incorrect medicine or products that have become unsafe. Because the pharmacist is a specialist in his particular field, it is expected from him to keep abreast of all new developments and acquired knowledge. It is even possible for a pharmacist to be sued based on breach of contract, typically where there is a latent defect in the medicine sold, as he is seen as a merchant professing skill and expert knowledge of the produce dispensed.

In conclusion the possibility is mentioned[208] that environmental pollution could be earmarked as the cause of birth defects.[209] Liability based on this cause of action is, although very possible in future, currently not a serious consideration for the wrongful life plaintiff.

4.9 Influence of awareness on satisfaction

In **Gerke v Parity Insurance Co Ltd**[210] the court found that an abstract or objective approach

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206 as there are very strict controlling measures in place restricting and monitoring the development and manufacturing of medical products, it is submitted that negligence would be extremely difficult to prove.

207 in principle, any provider of dangerous or defective products can be held liable based on contract, having the advantage for the plaintiff of not being required to prove negligence.

208 Schoonenberg *op cit* p 75.

209 see ch 11 where the influence of environmental teratogens on foetal development is discussed.

210 1966 (3) SA 484 (W).

should be followed when considering a claim for loss of amenities of life[211] in instances where the plaintiff is unconscious.[212] With regard to the *quantum* for such a claim, it was suggested that subjective considerations[213] should, however, be taken into account. The Appeal Court has on two occasions left this viewpoint uncriticised.[214]

4.10 Cognisance - satisfaction

Schoonenberg[215] reports that a lessened consciousness experienced by a plaintiff does not in any way influence or diminish an award of compensation for pain and suffering.

Compensation for non-patrimonial loss in South Africa, however, is influenced by the plaintiff's ability to take notice of his circumstances.[216] Visser[217] conveys that:

> "Real' compensation in the situation under discussion can be achieved only if a plaintiff's injuries are not too serious and if he has the intellectual ability to develop enough willpower to fight back and triumph over his set-back."[218]

4.11 Satisfaction based on contract or delict?

The question whether compensation for inconvenience, pain and suffering and loss of amenities of life could be claimed as a result of breach of contract was answered negatively in the Appeal Court decision of **Administrator, Natal v Edouard**[219] There were apparently not sufficient reason of policy or convenience for the court to extend contractual liability in this

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211 or a claim for diminished life expectation - both with great relevance for typical wrongful life litigants.

212 *ie* a claim is in principle possible.

213 such as the level of the plaintiff's awareness and ability to appreciate his specific circumstances.

214 **Milne v Shield Insurance Co Ltd** 1969 (3) SA 352 (A), and also **Southern Assurance Association v Bailey** 1984 (1) SA 98 (A).

215 *op cit* p 70.

216 **Dyssel NO v Shield Insurance Co Ltd** 1982 (2) SA 1084 (C); **Protea Assurance Co Ltd v Lamb** 1971 (1) SA 530 (A); **Ned-Equity Insurance Co Ltd v Cloete** 1982 (1) SA 734 (A); **Reyneke v Mutual & Federal Insurance Co Ltd** 1991 (3) SA 412 (W) - see Visser's discussion on the various compensation theories *supra*.

217 1983, *op cit* p 43.

218 *ibid*.

219 1990 (3) SA 581 (A).

manner. The court stated that this would import delictual principles in a contractual setting, which is unnecessary, as a plaintiff could in any event be compensated through the appropriate Aquilian action:

> "(1) *Ex delicto* such damages may only be claimed if the tortfeasor acted intentionally or negligently. By contrast, fault is not a requirement for a claim for damages based upon breach of contract. The proposed extension of liability would therefore result in the anomalous situation that damages may be recovered *ex contractu* under circumstances where no action *ex delicto* would lie. (2) A contractual action for damages is always actively transmissible. By contrast, a delictual claim for pain and suffering is not."[220]

Although there are therefore differences between the delictual and contractual measures of damage,[221] both delictual and contractual damage is established by means of the sum-formula[222] or method or differentiation.[223]

4.12 A global perspective on awards of satisfaction for immaterial damage

Tjittes[224] discusses the requirement of consciousness or awareness[225] of a plaintiff when immaterial damage (*smartegeld*) is awarded. He mentions that the current most pervasive viewpoint on this question in the Netherlands is that the plaintiff must be *aware* of his loss of amenities, pain and suffering before an award is possible.

He[226] is further of the opinion that the current trend to highly take the young age of a plaintiff into account when considering immaterial damages, should be reconsidered for the same reason. The logic behind this trend is that plaintiffs of very young age[227] can not fully realise

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220 *op cit* p 597 E-G.

221 **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475 (A).

222 *"sommerskadeleer".*

223 **De Vos v Suid-Afrikaanse Eagle Versekeringsmaatskappy Bpk** 1985 (3) South Africa 429 (A).

224 1996. Wat niet weet, wat niet deert? Een kritische beschouwing over het bewustheidsvereiste bij de vergoeding van immateriële schade. **Weekblad voor Privaatrecht, Notariaat en Registratie** (6239), 699.

225 regarding his loss.

226 Tjittes *op cit* p 699.

227 as is often the case in wrongful life actions.

and appreciate the consequences and full effect of immaterial loss. Although an award of satisfaction therefore can be allowed, the amount should be reduced according to the age and the level of consciousness and appreciation of the plaintiff. This consideration should be kept in mind when the maturity of wrongful life plaintiffs could influence the *quantum* of an award for non patrimonial damages.

Tjittes[228] reports that many foreign countries view this aspect in a different light and accordingly do not require (full) consciousness of a plaintiff before allowing satisfaction for immaterial damage. He refers to French law which does not even require a sense of loss or pity for immaterial damage to be awarded[229]. Similarly, under Belgian law consciousness is no requirement for immaterial damage[230]. He is of the opinion that, because of these circumstances, it would seem the notion that satisfaction is only allowed for reasons of compensation, has finally been defeated.

It is further reported[231] that under German law, which is generally closely related to Dutch law, satisfaction seems to have a double edged rational, namely to redress damages *and* to satisfy the plaintiff.[232] The German courts no longer require consciousness as a requirement for full satisfaction,[233] while t he English courts have again objectivised the actual experience of loss of amenities and simply require that a plaintiff should be aware of the loss. This has the effect that an unconscious plaintiff would have no claim for satisfaction. The Pearson Commission[234] has confirmed this position.

In the American law the same principle is established,[235] namely that a plaintiff must be aware of any loss experienced before satisfaction can be awarded. Two exceptions to this requirement apparently exist,[236] namely that any sign of consciousness, such as the making

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228 *ibid.*

229 De Cour de Cassation (Cass, 2e civ., 22 February 1995, D. 1996, Jur., p.69).

230 Hof van Cassatie, 2e kamer, 4 April 1990, Pas. 1990, no. 468, p. 913

231 Tjittes *op cit* p 700.

232 see *supra*, where the various theories of compensation is discussed.

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

234 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054, Vol 1, 1978, nr. 393-398.

235 according to Tjittes, *ibid.*

236 softening the effect thereof.

of sounds or movement of legs, is seen as sufficient proof of awareness.[237] The other exception is that a distinction is made between a claim for pain and suffering on the one hand and a claim for loss of enjoyment of life on the other hand. The prerequisite of consciousness does not apply to the last mentioned instance.

With regard to Dutch law, Tjittes[238] declares that the condition of consciousness for the awarding of satisfaction is found neither in their Civil Code[239] nor in their parliamentary history, but rather in the presumption that satisfaction is awarded only on grounds of compensation. For only according to this presumption is it relevant whether the plaintiff actually suffered/ experienced pain and loss of amenities of life. Accordingly, if loss is proved, the question must further be answered whether the plaintiff as victim of this infringement could meaningfully be redressed by the award of satisfaction.[240]

In contrast to this view we find the theory that a claim for satisfaction is awarded, not only to personally benefit the plaintiff in order to soften his feeling of loss and pain, but also to redress his injured sense of justice. Tjittes[241] is of the opinion that the satisfaction element of redressing the immaterial loss of a plaintiff should be seen objectively. The function of satisfaction does not always have to be subordinate to the function of compensation when immaterial damages are awarded. *Especially in cases of unconscious plaintiffs, the character of satisfaction should play an important part.*

According to section 6:106 of the Dutch Civil Code, the principle of "fairness" must be used to guide the courts in awarding immaterial damages. Tjittes therefore concludes that a full award for immaterial loss should also be to the benefit of unconscious plaintiffs. It is submitted that this discussion is relevant to wrongful life actions, because of the fact that it is possible for a plaintiff in such an action to be unconscious, due to his existing condition of affliction.

4.13 Dual based liability?

In South African law it is possible for delictual and contractual liability to co-exist.[242] This is

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237 which would be sufficient to principally entitle a plaintiff to full satisfaction.

238 *ibid.*

239 Burgerlijke Wetboek art. 6:106 BW.

240 see theories of compensation *supra*.

241 *ibid.*

242 **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 448 (A).

possible where breach of contract at the same time constitutes a delict[243]against the prejudiced contracting party, causing of patrimonial damage.[244] Under these circumstances a plaintiff would have a choice to either sue on ground of the contract or based on delict. Neethling *et al*[245] writes:

> "The *actio legis Aquiliae* is, however, available alongside the contractual action only if the conduct complained of, apart from breach of contract, also wrongfully and culpably infringes a legally recognised interest which exists independently of the contract."

An important issue that came under scrutiny *in casu* was whether the Aquilian action should be extended in South African law to cases where pure economic loss result because of misrepresentation. It appears that where breach of contract is not accompanied by damage to property or injury to personality,[246] the courts will "not readily construe an interest that exists independently of the contract."[247] The effect of the judgement was that, in cases where professional services are rendered negligently, the prejudiced party would as a rule only have a contractual claim to base his claim on.[248]

4.14 Duty to mitigate damages

Block[249] has an interesting viewpoint on the relevance of the duty to mitigate damages with regard to wrongful conception actions.[250] It is trite law that a plaintiff must limit his damages.[251]

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243 *damnum iniuria datum.*

244 see **Administrator, Natal v Edouard** *supra.*

245 *op cit* p 445.

246 *ie* typical instances of pure economic loss.

247 *ibid.*

248 the minority judgement was of the opinion that, based on public policy or other valid considerations, there is no reason why a delictual action should be disallowed "on the ground of negligent misrepresentation or the negligent breach of a contractual undertaking on the case of a professional person merely because he bound himself contractually to deliver professional services." *op cit* p 446.

249 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. **Fordham Law Review** (53:4), 1107.

250 note that Block uses the term "wrongful birth" to describe wrongful conception actions.

251 **Hazis v Transvaal & Delagoa Bay Investment Co Ltd** 1939 AD 372; **Jayber (Pty) Ltd v Miller & others** 1980 (4) SA 280 (W); **Swart v Provincial Insurance Co Ltd** 1963 (2) SA 630 (A); **Modimogale v Zweni & another** 1990 (4)

5. Various corresponding topics - International perspectives

5.1 Benefit rule and wrongful birth actions

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

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

SA 122 (B).

252 1983. *op cit* p 125.

253 *ie* the birth of a handicapped child.

254 "The benefits rule provides that when the defendant has harmed the plaintiff and by the same action conferred a benefit on the plaintiff, the court should consider the value of the benefits in mitigating damages." *op cit* p 136.

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

256 *ibid.*

257 see fn 8 - "According to a strict interpretation of the benefit rule, courts should separate the benefits and injuries that a defendant's negligence caused the plaintiffs, depending on the type of benefit or injury. Under the strict interpretation, courts should apply emotional benefits to offset only emotional suffering." and *visa versa.*

258 see *supra.*

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

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

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

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

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

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259 Bodgan refers to the viewpoint expressed by Barnett in "Liability for Wrongful Life: California Fashions a Compromise" **National Law Journal** (4:18), 19.

260 *ie* parents of a handicapped child.

261 *op cit* p 138.

262 *op cit* p 178.

263 *supra.*

264 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 545.

anything but traditional."[265]

6. Based on Contract

6.1 Background

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

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

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265 *ibid.*

266 Christie, R.H. 1996. **Digest of the Law of Contract** Lex Patria (1st edition), 1.

267 **Joubert v Enslin** 1910 AD 6 23, **Swart v Vosloo** 1965 (1) SA 100 (A); **Jordaan v Trollip** 1960 (1) PH A25 (T).

268 **Estate Breet v Peri-Urban Areas Health Board** 1955 (3) SA 523 (A).

269 **Kahn v Raatz** 1976 (4) SA 543 (A).

270 *eg* a contract of sale and purchase.

271 for the purpose of reaching *consensus*.

272 Strauss *op cit* p 12, however, has a different viewpoint: He writes that, although the physician-patient relationship is one based on consensus, the law does not require the parties to go about as drawing up a deed of sale. He explains that consultations are often characterised by tacit agreement, whereby the patient consents to treatment/ examination after being properly informed of the risks involved. He suggests that only where treatment is very drastic or unusual the physician should obtain written and signed consent, having "considerable evidential importance."

273 In **Tulloch v Marsh** 1910 TPD 453 it was decided that, at least regarding denture work, the transaction legally amounts to a sale agreement. *In casu* it was relevant that the dental object was firmly/ permanently attached to the patient. Although Strauss *op cit* p 70 expresses his doubts whether these procedures do in fact constitute sale, it is submitted that one should keep in mind that certain contraceptive devices are similarly attached to/ inserted in patients.

all the substantial terms.[274] In the same way informed consent is given by a patient only *after* a proper informative explanation concerning all the relevant aspects of the medical condition/ intervention has been provided by the doctor.[275]

6.2 Contractual remedies?

As stated elsewhere,[276] it should always be kept in mind when dealing with wrongful life issues, that the relationship between patient and physician is principally one based on contract. In medical examination-intervention agreements the patient and doctor basically enter into a contract of letting and hiring of work, or *locatio conductio operis*.[277] In terms of specific contractual principles governing these contracts, the contractor[278] can only recover his fee/ contract price after completion of the work and is therefore prohibited from claiming the full amount if the work is incomplete or defective.[279] The contract of letting and hiring of work can be described as a reciprocal agreement between a provider of work or lessor[280] and an expert, the lessee, who undertakes to carry out the required assignment.[281] The lessor renumerates the lessee for the work he completes independently.[282]

When applied to an agreement to administer medical care in the wrongful life sphere, the patient is therefore the lessor of work as he gives an assignment to the physician or genetic counsellor to investigate his genetic fibre in order to make a diagnostic analysis of his suitability as a future parent.[283] In a typical wrongful conception factual situation, a patient would consult with a physician to ensure that he/ she does not conceive any further/ future children. Such

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

275 see ch 5 on informed consent.

276 see ch 4 *infra*.

277 Strauss *op cit* p 69, also **S v Progress Dental Laboratory (Pty) Ltd and Another** 1965 (3) SA 192 (T), 195 E.

278 *ie* the physician in the medical sphere.

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

280 in terms of a medical relationship, the patient.

281 *ie* the physician.

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

283 and to determine the risks involved should the patient decide to have a child - see ch 11 on medical aspects.

a commission would usually include the instruction to operate or administer less drastic alternative treatment to achieve this goal, which will then be performed by the medical provider as an expert.

7. In South Africa

When dealing with contracts relating to medical examination or treatment, a very important aspect of that consensus reached between the parties is the requirement that the patient is sufficiently informed of the nature and extent of the proposed medical procedure - to such an extent that he is able to give his informed consent thereto.[284] In fact, one of the legal consequences[285] of a medical intervention performed without the patient's lawful consent is that the doctor or hospital[286] may incur liability for breach of contract.[287]

7.1 Contractual requirements[288]

A valid contract is concluded if the parties to the agreement reach consensus[289] and have the same intention of creating a legal obligation with legal consequences. These parties must have the necessary contractual capacity and must therefore have the ability to form their wills and appreciate the nature and consequences of their agreement. The contract must be a legal contract[290] and performance in terms thereof must be physically possible and determined.[291]

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284 see ch 5 on informed consent.

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

286 see ch 4 concerning vicarious liability.

287 **Behrmann v Klugman** 1988 (W) -unreported, **Castell v De Greef** 1994 (4) SA 408 (C).

288 Nagel *op cit* p 14 ao.

289 an offer and its acceptance may be made tacitly (**Collen v Rietfontein Engineering Works** 1948 (1) SA 413 (A) and a valid contract can be proved by inference from the conduct of the parties, as is generally the case in medical agreements - **Bremer Meulens (Edms) Bpk v Floros** 1966 (1) PH A36 (A).

290 and therefore not in conflict with existing legal rules.

291 or determinable.

As a general rule no formalities are required,[292] but if such formal prerequisites exist, they must be adhered to.[293]

7.2 Factors that influence consensus

Although it might appear that contracting parties have reached consensus on all the relevant terms[294] of their agreement, there might be certain factors present that either influence the consensus to the degree that no contract came into being,[295] or that a contract did come into being, but is voidable.[296]

In the first instance there is no contract and accordingly no legal obligation between the parties due to the fact that no real agreement was reached.[297] A failure to reach true consensus may be because of error[298] regarding the existence and contents of the contract, namely error with regards to the person of the other contracting party,[299] error with regards to the nature of the agreement[300] or error with regards to the performance or terms of a contract.[301] The existence of a contract may only be contested where the mistake was reasonable and concerning an

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292 **Conradie v Rossouw** 1919 AD 279.

293 **Woods v Walters** 1921 AD 303.

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

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

296 Nagel *op cit* p 27.

297 *op cit* p 28.

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

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

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

301 *eg* where the patient believes that a specific guarantee was given by the physician with regards to the success and accuracy of a sterilisation operation or genetic screening procedure *and consented thereto because of the guarantee*, whereas the physician intended the reassurance merely to pacify the patient.

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essential aspect.[302]

Where a contract is voidable an obligation does exist, but such a contract may be set aside by the prejudiced party because of the fact that consensus was reached in an unacceptable manner.[303] This could be due to misrepresentation,[304] duress[305] or undue influence.[306] Where an error in motive is caused by a misrepresentation, the contract is voidable due to this fact, an not because of the mistake. Note that a fraudulent[307] or negligent[308] misrepresentation entitles the misrepresentee to alternatively base a claim for damages on delict.

7.2.1 Misrepresentation by a physician

Although it is reasonably foreseeable that a patient could still be influenced to consent to an agreement due to misrepresentation,[309] it would be vary rare indeed where a physician forces a patient into medical treatment by means of duress or undue influence.[310]

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302 **Trollip v Jordaan** 1961(1) SA 238 (A), **Allen v Sixteen Stirling Investments (Pty) Ltd** 1974 (4) SA 164 (D).

303 Nagel *op cit* p 29, **Feinstein v Niggli & another** 1981 (2) SA 684 (A).

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

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

306 where a person's powers of resistance is weakened by another who has obtained a undue influence over him and in an unscrupulous manner induces such a party to enter into a prejudicial contract - **Preller & others v Jordaan** 1956 (1) SA 483 (A), **Patel v Grobbelaar** 1974 (1) SA 532 (A).

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

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

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

310 It should be noted, however, that the discussion of physician paternalism v patient autonomy could be relevant in this respect. Many physicians in traditional, more conservative rural areas make decisions on behalf of their patients, without really obtaining the necessary consent and consequential consensus. Under these circumstances, undue influence could be possible as the physician holds a position of authority over the patient, who on his turn is in a weak position due to his illness and traditionally subordinate position - see ch 5 on informed consent.

When can one say that a physician has made a misrepresentation? It is submitted that physicians are often expected to motivate the necessity of a certain medical procedure,[311] in which instance it could be possible that benefits or results of a particular procedure might be exaggerated to such an extent that a patient is moved by this report to agree to the specific procedure, which persuasion could possibly amount to a misrepresentation. Christie[312] explains:

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

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

7.3 Breach of contract

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

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311 *eg* there is a variety of procedures available for a patient who requires sterilisation - some of which are more effective and lucrative than others.

312 *op cit* p 75.

313 in wrongful life it is imaginable that a physician who is consulted regarding a possible future sterilisation may exaggerate the effectiveness of the procedure; or it might happen that a physician over confidently assures a patient that she carries a normal pregnancy; or prematurely convince a male patient that he is in fact sterile, while it is good practice to wait a few months before a final opinion can be given.

314 **Service v Pondart-Diana** 1964 (3) SA 277 (D).

315 **Otto v Heymans** 1971 (4) SA 148 (T).

316 recognised forms of breach of contract are: positive malperformance - see *infra*; *mora debitoris* or delay by debtor - **Legogote Developments Co (Pty) Ltd v Delta Trust and Finance Co** 1970 (1) SA 584 (T); *mora creditoris* or delay by creditor - **Van Loggenberg v Sachs** 1940 WLD 253; repudiation - **OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd** 1993 (3) SA 471 (A) and where performance is rendered impossible - Nagel *op cit*, p 45 ao.

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claim either on contract or delict.[317]

7.4 Positive malperformance

Proper performance of a debtor in terms of a contract discharges his obligation[318] and when all parties have performed the whole contract is discharged. The onus of proving performance is on the debtor.[319] It is suggested that in the majority of medical negligence cases based on breach of contract, the relevant type of breach is that of positive malperformance. This form of breach refers to a lesser quality[320] of performance by a party than was required and expected in terms of the contract. The defaulting party therefore does perform,[321] but the performance is defective, incomplete or deficient.

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

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

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

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

318 **Harrismith Board of Executors v Odendaal** 1923 AD 530.

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

320 or content.

321 When a contracting party fails to perform *at all* repudiation takes place whereby such a party in breach of contract declares his intention no longer to be bound by the agreement either by his words or through his conduct, without lawful justification. One must be careful when failure to perform is construed as repudiation, as it could be easily confused with mere delay or *mora debitoris*.

practitioner would act in beach of contract[322] if the tests were either performed incorrectly or if incorrect conclusions were derived from such test results.

7.4.1 No fault

It is important to note that with regards to the question of fault in cases of breach of contract in the form of positive malperformance, the predominant view is that fault is not a requirement.[323] In a medical negligence case based on contract, a plaintiff will accordingly *not* have to prove that the physician in question had failed to apply his knowledge and skill to the specific medical issue below the governing level of proficiency expected from an intermediate professional in his field of expertise, as would be the case if the claim was based on delict.[324]

In order to establish whether the physician's performance was indeed deficient, however, one would still have to consult the relevant peer group of physicians or specialists to ascertain what would be regarded as an acceptable performance in each specific instance.[325] The courts will, however, decide whether a particular physician has in fact conducted himself below the current standard of care that could reasonably be expected from him.

7.5 *Exceptio non Adimpleti Contractus*[326]

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

7.6 Possible solutions

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322 in his performance/ conduct.

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

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

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

326 Nagel *op cit* p 53.

327 *ie* the counter-performance.

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

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

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328 *stipulatio alteri/ ius quaesitum terio* - the third party being the handicapped child-plaintiff in wrongful life.

329 1996. **Digest of the Law of Contract** Lex Patria (1st edition), 71.

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

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

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

333 **McCullogh v Fernwood Estate Ltd** 1920 AD 204.

334 *ibid.*

335 where benefits will directly accrue to the child.

336 **Dekenah v Linton** 1920 CPD 579.

337 **Malelane Suikerkorporasie (Edms) Bpk v Streak** 1970 (4) SA 478 (T).

common intention[338] that the third party would become a party to the agreement once the benefit is accepted.[339] Acceptance of the "offer of benefit" can be made expressly or tacitly, but have to be communicated to the offeror/ promisor unless the need of such information is waived.[340]

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

8. Remedies for breach of contract

8.1 Cancellation

A plaintiff is entitled to cancel a contract if the malperformance/ breach of the other party was substantial.[343] Christie[344] refers to judicial guidelines[345] and states that cancellation is justified for a breach going to the root of the contract, *ie* a material breach of a vital term.

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

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

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

340 **Croce v Croce** 1940 TPD 251.

341 **McCullogh v Fernwood Estate Ltd** *supra*.

342 Christie *op cit* p 72 - referring to **Aronowitz v Atkinson** 1936 SR 45.

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

344 *op cit* p 130.

345 **Oatorian Properties (Pty) Ltd v Maroun** 1973 (3) SA 779 (A).

346 see cancellation of agreement *supra*.

as the plaintiff would then prejudice himself by destroying the very basis of his claim - the contract itself. Cancellation alone would not be a sufficiently effective remedy as the cost of the relevant operation or treatment is insignificant when compared with the extensive damages resulting from the breach. Because of the nature of wrongful life matters and because of the serious consequences resulting from breach of contract in these cases,[347] a consequential claim for damages could in principle be instituted in addition to cancellation.

8.2 Specific performance

It is principally possible for the innocent/ prejudiced party to a breach of contract to reject the delivered performance, enforce the contract and demand specific and proper performance.[348] Strauss,[349] however, states that South African courts have traditionally been reluctant to order specific performance in cases involving obligations of a personal nature and prefer to allow the plaintiff to sue for damages as a alternative. [350] It is, however, also reported[351] that specific performance could mean either an order to perform or an order to pay money, although the first-mentioned is more frequently found.[352] The plaintiff may principally choose specific performance, albeit that the courts have a judicial discretion under certain circumstances.[353]

Wrongful life litigation is very much relevant to the our discussion on specific performance where actual performance is impossible.[354] A claim for specific performance will not be able to reverse the conception or birth of a child and will in wrongful life matters probably only practically manifest in the correction of an improperly performed operation.[355] Whether the

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

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

349 *op cit* p 16.

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

351 Christie *op cit* p 134.

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

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

354 *lex non cogit ad impossibilia* - **Rissik v Pretoria Municipal Council** 1907 TS 1024, **Wheeldon v Moldenhauer** 1910 EDL 97.

355 but this would be a classic example of "too little too late" as an unwanted conception cannot be reversed, although it could be ended - see fn *infra.*

performance of an abortion would be seen as a solution to accomplish proper performance is an open question, although it is submitted that this would not always be an acceptable option.[356]

8.2.1 Damages as alternative

The wrongful life plaintiff's focus should therefore be on damages as an alternative to specific performance.[357] In the event of a claim for specific performance, an injured party is naturally also entitled to additionally claim damages[358]to redress any losses[359] suffered as a result of the breach of contract.[360] Christie[361] reports in this regard that damages may also be claimed in the original action, either as an alternative to specific performance at the defendant's option or as an alternative only of specific performance proves impossible.[362] He writes that such damages must be proved in the ordinary way[363] and punitive damages[364] will not be awarded.

8.3 Damages

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

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356 see abortion ch 3.

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

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

359 *ie* patrimonial damages.

360 Nagel *op cit* p 57.

361 *op cit* p 136.

362 **Estel v Novazi** 1919 NPD 406.

363 see damages discussed *infra.*

364 **Woods v Walters.**

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

366 *ibid* - the plaintiff is therefore entitled to positive *interesse*, as opposed to the mere negative *interesse* that may be claimed in delict - **Whitfield v Phillips & another** 1957 (3) SA 318 (A).

367 **Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd** 1915 AD 1.

governing the extent of contractual damage should also be considered: An obvious principle is that mere breach of contract does not per se entitle the innocent party to claim damages - it must first be proved[368] that actual loss was indeed suffered due to the breach, before an prejudiced party would be able to claim compensation for such loss. The calculation of damages is done by comparing the prejudiced party's financial position because of the breach, with the hypothetical financial position in which this party would have been had there been perfect fulfilment of the contract.[369]

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

8.3.1 General damages

Damages that naturally flow from a specific type of breach are classified as general damages[374]

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

369 *ie* fulfilment as initially intended by the parties - **ISEP Structural Engineering and Planting (Pty) Ltd v Inland Exploration Co (Pty) Ltd**, as opposed to delictual damages where a plaintiff is compensated in accordance with the diminution of his patrimony - **Trotman v Edwick** 1951 (1) SA 443 (A).

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

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

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

373 Nagel *op cit* p 58.

374 **Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd** 1977 (3) SA 670 (A).

and a prejudiced party may claim such damages based on the fact that the parties are presumed to have contemplated the possible occurrence of such specific damage, if breach should occur.[375] For this reason general damages need not be proved, although it must be shown that the measure of damages claimed is appropriate in the circumstances.[376]

8.3.2 Special damages

Special damages are those damages that could not be said to be an obvious or probable result of a specific type of breach and should for this reason be especially pleaded.[377] The party claiming such damages has to prove that the parties actually did foresee these damages at the time of the conclusion of the contract and that an express or tacit agreement[378] existed that such damage would be recoverable. Such an agreement can also be based on assumed consensus, where parties are deemed to have reached consensus on so-called implied terms, to the same effect.[379]

Even if a specific agreement on the guaranteed success of a medical procedure[380] was not reached,[381] the foreseen damage estimated in a wrongful life action should in principle not pose too much of a problem. If a physician is namely asked to perform a vasectomy, it is glaringly obvious that failure to properly perform such an operation would most probably result in unwanted conceptions. It is similarly obvious that such a child will cause considerable expenses and it is submitted that such child-rearing expenses are also foreseen damages.

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

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

376 **Katzenellenbogen Ltd v Mullin** 1977 (4) SA 855 (A).

377 **Lavery & Co Ltd v Jungheinrich** 1931 AD 156.

378 *ie* real consensus.

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

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

380 for example a sterilisation operation.

381 a guaranteed medical intervention is very seldom found.

many additional legal, moral and ethical challenges, these damages were nevertheless foreseeable.[382]

8.3.3 Duty to mitigate damages

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

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

8.3.4 One claim

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

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

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

384 **Novick v Benjamin** 1972 (2) SA 842 (A).

385 **Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd** 1915 AD 1.

386 **Soar v JC Motors** 1992 (4) SA 127 (A).

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

388 see the "once and for all" rule *supra*.

389 prospective loss is claimable - **Burger v Union National South British Insurance Co Ltd** 1975 (4) SA 72 (W).

the breach are only discovered at a later stage.[390] It is reported:[391]

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

8.3.5 Pecuniary loss

Only pecuniary loss can be claimed based on breach of contract.[392] A plaintiff's claim for damages in contract is therefore limited to patrimonial losses. Only financial damages may be recovered and although it is possible that a party could experience emotional trauma as a result of breach of contract, these personal injuries can not be compensated.[393] This restriction when basing a claim on contract has serious implications for wrongful life litigants who commonly suffer extensive emotional trauma.[394]

The Apportionment of Damages Act[395] does not apply to claims based on contract.[396] The Conventional Penalties Act,[397] however, enforces contractually agreed penalties to the extent that it is not unfair or excessive and prevents both a penalty and damages being claimed in respect of the same breach of contract.[398]

8.4 Illegal contracts

Harrer[399] is of the opinion that abortion contracts are void under German law because they

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

391 Christie *op cit* p 143.

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

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

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

395 no. 34 of 1956.

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

397 no. 15 of 1962.

398 **Van Staden v Central South African Lands and Mines** 1969 (4) SA 349 (W).

399 *op cit* p 101 - see ch 3.

contravene relevant statutory prohibitions.[400] Nagel[401] reports that, in terms of South African law, the basic principle regarding illegal agreements is that such contracts are null and void. He writes that illegality has two further important consequences:

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

Christie[402] reports that a statutory provision with the possible effect that a contract is void should be interpreted by examining the statute as a whole and by taking the scope and purpose of the act into consideration.[403] Contracts could also be illegal or unenforceable at common law because they are *contra bonos mores.*[404]

8.5 Guarantee of success

Where a specific characteristic in a performance[405] is elevated to a term of the agreement a guarantee is given and failure to deliver the agreed result would automatically constitute breach of contract. In the medical sphere such guarantee of success is very rare as medicine is generally not seen as an exact science and because the standard of care expected from a physician is not the highest possible degree of professional skill, but rather reasonable proficiency and care.[406] In the English case of **Greaves & Co (Contractors) Ltd v Baynham**

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400 these agreements possibly fall under contracts encouraging crime, delict or other unlawful acts, which is similarly void under South African law - **Conradie v Rossouw** 1919 AD 279.

401 1997. **Basic Principles of the South African Business Law** Lex Patria (1st edition), 40.

402 *op cit* p 92.

403 **Sutter v Scheepers** 1932 AD 165.

404 **Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donelly v Barclays National Bank Ltd** 1995 (3) SA 1 (A).

405 any aspect of performance can be guaranteed, *eg* that a specific result would be obtained, that performance would be complete on a specific date or that a particular attribute to performance is true.

406 **Buls and Another v Tsatsarolakis** 1976 (2) SA 891 (T) - see also ch 4 for a discussion on medical negligence.

Mickle & Partners[407] it was stated:[408]

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

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

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

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

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407 (1975) 2 All ER 99 (CA).

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

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

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

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

412 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1707.

413 of **UNIDROIT,** 2 European Review of Private Law (1994), 341.

by a reasonable person of the same kind in the same circumstances.

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

The South African position regarding medical guarantees has considered in the unreported wrongful conception case of **Behrmann & Another v Klugman.**[414] *In casu* the court found that although reassurances was given to a patient scheduled for a vasectomy, these confirmations cannot be seen to have constituted a guarantee of success.[415]

BASIC PRINCIPLES

9. Related topics

9.1 Out of court settlements

Andrews[416] reports that there are various reasons why so many English cases based on medical negligence are settled out of court.[417] It is suggested that not only personal injury claims are affected by these considerations, but that wrongful life litigation should similarly be influenced.[418] The author shows a variety of factors that weigh the scales of litigation in favour

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

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

416 1988. Hard Bargaining: Out of court settlement in Personal Injury Actions. **The Cambridge Law Journal**, 506.

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

418 see ch 4 where reference is made to the prevalence of settlements in medical negligence cases.

of defendants in these instances.

The first concern a plaintiff is faced with when instituting a claim is the general convention that a cost order is made against the loser in the case. An unsuccessful plaintiff will therefore have to pay both parties' legal costs, which probably will be a substantial amount. In this regard it should be remembered that whilst the plaintiff is almost always a private individual,[419] the defendant is either a governmental institution[420] or a professional negligence insurance company.

It is often difficult for a plaintiff in medical negligence cases to predict whether the facts to his disposal amount to negligence. Not only are plaintiffs restricted by the absence of pre-trial exchange of witnesses' proofs,[421] but plaintiffs often have trouble in obtaining proper evidence.[422]

Another drawback experienced by plaintiffs is the uncertainty how the application of the contributory negligence rule would affect the final outcome of the matter. It is often a real possibility that a substantial portion of the award will be compromised in this way.[423] Van Oosten[424] writes in this regard:

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

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

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419 with limited financial resources.

420 where a state hospital or clinic was responsible for the negligent medical intervention.

421 under English law.

422 see ch 11 where it is mentioned that the very evidence of the negligence complained of is safely hidden away in the plaintiff's body, in many cases of improperly performed sterilisation procedures - unless a 'second-look' operation can be performed,

423 it is submitted that the liberal use of the benefit rule by many courts is another hurdle in the way to plaintiff's full recovery - see ch 6, 7 and 8.

424 1991. The Legal Liability of Doctors and Hospitals for Medical Malpractice. **SAMJ** (80), 26.

field of litigation. It is mentioned that the defendant is invariably an insurance company which deals with hundreds of such claims and not only knows the expert counsels in the field, but also has the financial backing to afford the best there is. Defendants also have a host of physicians and other experts to assist them in building a strong case, writing reports and being available as possible future court witnesses.

The author[425] further reports that plaintiffs often make use of attorneys who only do personal injury work from time to time and who are but too relieved to accept a settlement. If one takes into account the many factors that weigh the odds heavily in favour of defendant, one could perceive why most plaintiff-attorneys concede to much too low settlements.

It is submitted that further reasons why a plaintiff would prefer to settle a matter out of court, is the long waiting periods currently experienced in courts.[426]

Strauss[427] also recognises the phenomena that only a small percentage of medical negligence cases ever see the inside of a courtroom. "Most claims pressed are settled out of court, the incentive to settle being very strong on both sides."[428]

Possible solutions to overcoming some of the obstacles are the following: Giving instruction to specialist attorneys who brief specialist counsel is a definite step in the right direction. In this way the playing fields are levelled in at least one (and probably the most important) respect. Another improvement suggested by the author[429] would be the institution of a specific class action.[430] Finally, it is suggested, that judicial supervision over settlements should be considered. It is believed that plaintiff requires these forms of additional protection "for the scales of justice to be weighed less heavily in favour of defendants".

9.2 Proving an unwritten contract

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425 *ibid.*

426 in the Pretoria High Court a plaintiff could currently expect to wait anything up to two years before a court date can be finalized.

427 *op cit* p 243.

428 *ibid.*

429 Andrews, 1988. *op cit* p 506.

430 see chs 10 and 12 in this regard, where regulating legislation is suggested as a long term solution to wrongful life challenges.

Christie[431] reports that although an oral agreement is legally valid, it is in practice difficult for a party[432] to discharge the burden of proving the contract.[433] He writes:[434]

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

The general rule where a party has signed a document containing contractual terms is *caveat subscriptor*[435] and a party so bound will have to prove a defence[436] in order to escape liability on the contract.

9.3 Exemption clauses

It is legally possible to contractually exempt oneself form liability that could arise from negligence.[437] Such an exemption clause may also exclude liability for a fundamental breach of contract although it is uncertain if total non-performance can be covered.[438]

It is reported that an unambiguous exemption clause must be given its plain meaning and that specific legal grounds for liability for which exemption is given must be mentioned, failing which a narrow interpretation will be given to the exemption.[439]

9.4 American delict based on fraud

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431 1996. **Digest of the Law of Contract** Lex Patria (1st edition), 35.

432 the party alleging that an agreement exists, must prove it - **Bitcon v Rosenberg** 1936 AD 380.

433 **Da Silva v Janowski** 1982 (3) SA 205 (A).

434 *ibid.*

435 or "beware if you sign", as such a person is bound to the ordinary meaning and effect of the words appearing in the contract - **Burger v Central South African Railways** 1903 TS 571.

436 misrepresentation, fraud, illegality, duress, undue influence and mistake - see these concepts discussed *infra.*

437 **South African Railways and Harbours v Lyle Shipping Co Ltd** 1958 (3) SA 416 (A).

438 **Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd** 1993 (3) SA 424 (A).

439 **Essa v Divaris** 1947 (1) SA 753 (A).

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When damages based on fraud are claimed, the plaintiff must prove that the fraudulent misrepresentation was made with the actual or constructive intent to injure the misrepresentee or to benefit the misrepresentor.[440] It is stated:[441]

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

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

9.5 Prescription

Contractual debts[442] generally prescribe after three years in terms of South African law,[443] which period begins to run when the debt is due, provided the creditor knows or ought reasonably have known the identity of the debtor and the facts from which the debt arises and the debtor has not wilfully prevented the creditor from coming to know of the existence of the debt.[444]

9.6 Contract relationship

Berenson[445] conveys that if the physician was indeed aware of the patient's motive in contracting for the procedure, his failure to perform his duties as contracted should be a breach of contract.

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440 **Berkemeyer v Woolf** 1929 CPD 235.

441 Christie *op cit* p 80.

442 (a delictual cause of action as well).

443 **Prescription Act** 68 of 1969, sec 11.

444 *ibid* sec 12.

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

Lupton[446]
The law has certainly not kept pace with the changes in the field of genetics and gene therapy.

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

9.7 Insurance alternative

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

Van den Bergh[450] states plainly that liability law will eventually be replaced by other systems of compensation, such as insurance.

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

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

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446 1996. Genetic engineering: The legal implications. **Tydskrif vir Suid-Afrikaanse Reg**, 66.

447 *ibid.*

448 1995. Beperking van beroepsaansprakelijkheid. **TVVS** (95:7), 173.

449 *op cit* p 178.

450 1990.**De invloed van verzekering op de civiele aansprakelijkheid** Koninklijke Vermande BV. Lelystad, 101.

451 *op cit* p 101.

a victim's own fault.[452] Van den Bergh[453] believes that insurance aspects play an important role in both legislation and case law.[454]

Van Zant[455] believes that we must strive for a fair posting of risk, which could be achieved through a "pooling" into insurance of all parties involved. A producer of (medical) goods[456] will therefore have to keep insuring himself, whilst still maintaining a policy of proper research into new products.[457]

9.8 Limitation of damages

Stolker[458] submits that basically two question arise when the limitation of liability is under consideration: the first is whether the scope of the liability cannot possibly be restricted;[459] the second, if it isn't possible to restrict the number of plaintiffs.

10. Conclusion

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

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452 a paraphrased summary of this quotation is: "Aansprakelijkheids-verzekeringen maken sterk slachtofferbeschermende regelingen aanvaardbaar en leiden er toe bijvoorbeeld snel causaal verband aan te nemen en een beroep op eigen schuld van het slachtoffer te beperken."

453 *ibid.*

454 a paraphrased summary of this quotation is: *"Zo ver zijn we nog niet of willen we nog niet gaan, maar dat verzekeringen een belangrijke plaats innemen zal inmiddels duidelijk zijn. Verzekeringsaspecten spelen zowel een rol bij wetgeving als in de rechtspraak."*

455 1981. Produktenaansprakelijkheid, en de geneesmiddelen- fabrikant: stand van (gebrekkige) zaken. **Tijdschrift voor Gezondheidsrecht** (5:1), 9.

456 contraceptives *etc.*

457 *"Er zal gestreefd moeten worden naar een redelijke verdeling van het risico, waarbij het hierboven aangestipte verzekeringsaspect en de genoemde "fondsvorming" een rol van betekenis zullen gaan spelen. De fabrikant moet zich kunnen blijven verzekeren, willen wij niet voorkomen dat hij zijn research afbreekt waardoor het op de markt brengen van nieuwe produkten stagneert." op cit* p 24.

458 1995. Aansprakelijkheid voor beroepsfouten - van droom-carrière naar nachtmerrie. **Ars Aequi** (44:1), 13.

459 *eg* by means of partial exclusions or statutory limits, as in sec 6:110 of the Civil Code.

and different facts must be proved.

CHAPTER 3

Legal Subjectivity

1. Introduction

For this study to be complete, it is necessary that aspects concerning legal subjectivity and abortion be discussed. These two integrated subjects will be addressed in tandem as many points of reference exist between them, and because many corresponding concepts and similar legal foundations are to be found. Before one can establish whether the rights of a foetus[1] have been infringed, one must first ascertain whether such a foetus has rights.[2] The actual legal status of a foetus is therefore crucial to determine the extent of authority that may be exercised over such a foetus. It is an indisputable fact that if foetuses were to be regarded as legal persons today, many societal dilemmas would arise.[3] One can therefore accept that a lesser form or an inferior level of protection is available to the unborn.[4]

With particular focus on wrongful birth and wrongful conception actions, one must concede that the issue of legal subjectivity regarding the *locus standi in iudicio*[5] of a wrongful life plaintiff is rather insignificant[6], since it is the parents of impaired children who usually seek compensation for their own losses because of infringement to their own interests.[7] An instance where foetal rights do have significance in these actions, is regarding the protection of foetal interests where the mother's right to abortion is considered. In wrongful life actions the question whether a

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1 or even a future foetus, in instances where damage causing conduct has occurred before conception.

2 As quoted by Slabbert in 1997. The foetus and embryo: Legal status and personhood. **Tydskrif vir die Suid-Afrikaanse Reg** (2), 234: "Few will oppose that views that life cannot be defined philosophically or scientifically. Life, whether pre- or postnatal, is one of *the* fundamentals of human existence which can at most be recognised at the level of human intuition or accumulated human experience. The problem arises that a definition of life must be attempted in the field of law, for the law needs to know what it is protecting."

3 *eg* abortions would constitute murder and foetal testing amount to assault.

4 as opposed to increasing comprehensive legal protection of the individual, as much focus is placed on fundamental human rights.

5 legal standing.

6 where the interests of a foetus do become important in these actions, is where parents decide to abort.

7 with majority status, generally having full capacity to act and litigate as there is a presumption that legal subjects do have the capacity to act in the legal sphere.

foetus is a legal subject[8] is of vital importance as it is the child itself who asserts after birth that it should not have been born.[9]

2. South African Position

2.1 What is a legal subject?

Davel and Jordaan[10] define a legal subject in South African law as "the bearer of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties".[11] In conjunction with this definition they state that legal subjectivity is "that characteristic of being a legal subject in legal intercourse".[12] Other important legal concepts that are similarly crucial for this study are issues such as the capacity to act, which is the judicial capacity to enter into legal transactions[13] and the capacity to litigate which enables a person to act in the realm of civil litigation.[14]

2.2 Incapacity to act and litigate

A legal subject's[15] capacity to act may be influenced by many factors[16] such as age,[17] which plays an important part in determining whether a person has full, restricted or no capacity to act. A child under seven years of age has no capacity to act and therefore a parent or guardian

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8 and, therefore, a bearer of subjective rights.

9 *ie* the right not to be born - see ch 8.

10 1998. **Law of Persons** Juta & Co, Ltd. (2nd edition).

11 *op cit* p 3.

12 *op cit* p 4.

13 such as an agreement with a physician - every party entering into a contract is presumed to have contractual capacity, unless the contrary is proved: **Serobe v Koppies Bantu Community School Board** 1958 (2) SA 265 (O).

14 as plaintiff defendant in an action procedure or as applicant respondent in a motion procedure.

15 *in casu* only natural persons are referred to.

16 severe intoxication or psychological impediments could legally incapacitate a person to act at the point where one cannot appreciate the nature or consequences of one's actions.

17 the age of a legal subject will obviously only be relevant in the case of a natural person (as opposed to a juristic person *eg* a company).

has to act on the *infant's* behalf.[18] A minor[19] has restricted capacity and has to be assisted by a parent or guardian[20] to make a binding contract and the court, as upper guardian, may also be asked to intervene.[21] The same differentiations apply to the capacity to litigate.[22]

Todd Ulmer[23] explains that because a foetus is incapable of expressing its rights and desires, its interests are ascribed, not discovered.

> "The perceptions, beliefs, and biases of the parents are aggregated into a subjective projection of a choice of interests upon the foetus. It does not necessarily follow that the parents' decision will coincide with the fetus' best interest."[24]

The restrictions on *infantes* to function in the legal sphere have important consequences concerning the institution of litigation in wrongful life matters. In most wrongful life cases the parents or guardians of the plaintiffs institute action to protect the interest[25] of their children, but suing in their own name.[26] In other instances a curator *ad litem* is appointed by a court to protect the rights of children by acting on their behalf in litigious affairs.[27]

With regard to the Dutch legal position, Sassenburg[28] reports that section 6 of the European

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18 Voet 26 8 9.

19 an unmarried and un-emancipated person under the age of 21.

20 **Dhanabakium v Subramanian** 1943 AD 160.

21 **Wood v Davies** 1934 CPD 250.

22 see the **Christian League of South Africa v Rall** 1981 2 SA 821 (O), (case discussed *infra)*, where it was found that there were no legal grounds for the appointment of a *curator ad litem* to represent an unborn child in regard to a planned termination of its mother's pregnancy - it is, however, not settled whether a minor's fraudulent misrepresentation that he is of full age renders him liable in contract (**Pleat v Van Staden** 1921 OPD 91) or only in delict (**Louw v MJ & H Trust (Pty) Ltd** 1975 (4) SA 268 (T).

23 1991. A Child's Claim of Wrongful Life: A Preference for Nonexistence. **Medical Trial Technique Quarterly** (38), 225.

24 *op cit* p 235.

25 and on behalf *of.*

26 as the newborn children have no legal capacity whatsoever to litigate in their own name.

27 *eg* where a claim is instituted against a negligent parent.

28 1985. Evolutie van recht voor jeugdigen. **Weekblad voor Privaatrecht, Notariaat en Registratie** (116:5746), 477.

Convention affords a child the right to act as a litigant in court procedures. It is reported[29] that Doek suggests a method whereby the presiding judge should first determine whether such a child would be able to independently act in its own best interests. Criteria that would be taken into consideration would be the independence of the child; its financial standing and also its vested interests in the case at hand.

Fain[30] believes that the wrongful life plaintiff's right to recover for his injuries should not depend on the parent's right to sue, which right is often barred by statutes of limitations.[31]

Strauss[32] addresses the question whether an unborn child could have *locus standi* in instituting an action.[33] He reports that in terms of South African law, only a person with a special interest in the subject-matter of the case may institute action,[34] unlike American law, where class actions are recognised.

2.3 Conflict of interests

Adverse consequences resulting from the infant's incapacity to litigate are possible in instances where a parent, guardian or curator *ad litem* does not act in the best interests of the child. Such possible injustices stem from the fact that the identity of a plaintiff is important when considering the instigation of an action, in the sense that conflicting interests[35] may influence the inception and nature/ extent of the litigation in question.

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29 *op cit* p 482.

30 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

31 as was the case in **Procanik**.

32 1991. **Doctor, patient and the law** JL van Schaik (3rd edition), 202.

33 whereby a *curator ad litem* would be appointed to protect the interests of an unborn plaintiff - see **Christian League of Southern Africa v Rall** 1981 (2) SA 821 (O), where it was found that no such appointment will be made as the unborn does not have *locus standi in iudicio* or legal standing, also discussed in ch 3.

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

35 because each person has individual interests, different litigants will seek to advance varying interests.

Van der Vyver[36] states that it is a well-known rule in South African law[37] that a parent will not be allowed to act as guardian where there is a conflict of interest with the child - it is for this reason that a court will then appoint a *curator ad litem*.[38]

2.3.1 Wrongful life or wrongful birth?

Bey-Berkson[39] reports on concerns that have been raised with regard to parent-plaintiffs and believes that the child's wrongful life action should receive priority above the parents' wrongful birth action:

> "...one of the 'horribles' in allowing parents to recover for wrongful birth and not the child, i.e., parents may obtain a multimillion-dollar verdict and then put the child up for adoption."[40]

An example where such conflict of interests[41] can clearly be seen is in the debate of whether a wrongful *birth* or wrongful *life* action should be instituted, particularly with regards to damages claimed for maintenance and medical expenses.[42] This is so because a court may only grant one plaintiff[43] the requested compensation for a particular head of damage[44] and therefore the

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36 1981. Vonnisse: Christian League of South Africa v Rall 1981 2 SA 821 (O) **Tydskrif vir Hedendaagse Romeins-Hollandse Reg** (44), 305 Juta en Kie, Bpk (1 ste uitgawe).

37 **Wolman v Wolman** 1963 2 SA 452 (A), 459.

38 *op cit* p 312.

39 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 69.

40 Annas, Medical Paternity and "Wrongful Life", 9(3) **Hastings Centre Report** 15 (1979).

41 due to the fact that a parent/ guardian is required to act on the behalf of the child in actions involving *infantes* (children under 7 years of age).

42 It should be remembered that past medical expenses that have already been incurred by the parents obviously entitle such *parents* to compensation with regard to these expenses. When an award is made in favour of the child, these expenses should therefore not be included in the child's award. As parents are legally obligated to provide maintenance for/ to their children as long as they need such maintenance, also future expenses may be claimed.

43 in wrongful life actions, the child itself, as opposed to the parents in the wrongful birth action.

44 ito the so-called "once-off rule".

award will accrue to either the parents' or the child's estate.[45]

It has been said that it would be preferable under these circumstances[46] to grant the impaired child the award for living expenses and medical costs,[47] as his handicapped condition is likely to remain a reality far beyond the age of majority[48] and usually necessitates such a restricted person to have financial provision until the end of his life.[49] It is accordingly suggested that a trust be erected to manage the financial affairs[50] of the impaired plaintiff when under majority age. The use of such a trust can be extended beyond majority of the plaintiff, if the beneficiary is then still unable to administrate his own affairs and trustees may be appointed from the ranks of either concerned and caring family members or relatives, or in absence of such persons, a curator *bonis*[51] may be appointed.

The viewpoint does exist,[52] however, that a child should be able to maintain a cause of action for wrongful life simultaneous with the parents' cause of action for wrongful birth.

An alternative solution to a conflict of interests between the estates of a parent and a child in a wrongful life/ wrongful birth matter, is to award both interested parties a portion of the damages for support and maintenance in dividing particular heads of damages between them.

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45 It should be remembered that once damages have been awarded, the use and application of that sum of money lie totally in the hands of the successful plaintiff. Although damages were awarded to remedy a specific need, the successful litigant has the full discretion and management of that amount, which means that such funds could in principle be applied for selfish gain. It is therefore possible that self-indulgent parents may claim a substantial amount of money in a wrongful life claim based on vast expenses they expect to incur on medical treatment, the development and education of their handicapped child, while in actual fact they intend to use the bulk of the money on themselves and in so doing deprive the rightful beneficiary of has much-needed maintenance fund.

46 *ie* where, although an infant does in principle have a wrongful life claim, its parents prefer rather to institute a wrongful birth action (possibly for their own benefit).

47 instead of awarding the damages to the parents and therefore electing the wrongful life action (of the child) in favour of the wrongful birth action.

48 until which age the parents are generally expected to maintain their children.

49 an impaired child could be severely prejudiced if its parents for example, would invest the award amount in a high-risk investment, and could consequently lose the bulk of the amount, or if their entire estate is sequestrated on account of their other debts/ mismanagement of their estate, and the award amount is accordingly lost.

50 ideally the court's award for maintenance and medical expenses would be sufficient to foot all the reasonable bills of the plaintiff.

51 usually an attorney who is appointed to administer a person's (incapable to managing his own matters) property and general affairs.

52 J.C.F. 1986. Wrongful Birth/ Life. **Journal of Family Law** (24), 110.

The court may grant an award in favour of the parents[53] suitable to provide for their child's maintenance until majority, while allocating another amount to the child's[54] estate to provide sufficient funds for self support from the date of majority.

2.3.2 Actions against parents

Another example of where an obvious conflict of interest would arise if the duty to protect the child's concerns in litigious matters would rest squarely on its parents, is where a child needs to institute action against its parents. Under such circumstances a curator *ad litem*[55] should manage the litigation on behalf of the infant.[56]

2.3.3 Inappropriate representation

A final prejudice that a wrongful life child might suffer when an action is instituted by his parents on his behalf, is the following: If the parents haphazardly decide to institute action in their representative capacity as parents of the child and fail with such litigation, the child's claim is *res iudicata* and therefore he will be unable ever to institute a wrongful life action on the same cause of action in future.[57] The child will similarly be precluded from receiving another or an additional damage award because of the working of the "once and for all" rule.[58] In an instance were the unwitting parents claimed for an insufficient amount of damages, a wrongful life child could be severely prejudiced.

It should always be remembered that in the vast majority of cases parents are genuinely concerned about the welfare of their children and would sacrifice anything for the well-being of their offspring. It is only in extremely rare instances where parents would place their own interests first, but to prevent injustice in these cases, it would be beneficial to appoint a objective and responsible person in the form of a curator.

2.3.4 Constitutional right to representation

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53 the plaintiffs in a wrongful birth action.

54 plaintiff in the wrongful life action.

55 a responsible person, usually an advocate.

56 there are examples in American case law such as **Zepeda v Zepeda** 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963), where children have sued their parents in wrongful life actions, although public policy generally dictates that actions against parents should not be allowed.

57 an action based on a particular cause of action may be instituted only once.

58 this rule states that damages may only be claimed once-off, therefore all past and future damages must be calculated and claimed when a plaintiff seeks compensation.

It is interesting to note that the South African Constitution specifically provides for the right of a child to legal representation. De Waal[59] writes:

> "Section 35(3)(g) provides a right to accused persons in criminal proceedings to legal representation at state expense 'if substantial injustice would otherwise result'. This right applies equally to children as it does to adults, and it seems clear that in most cases substantial injustice would result from allowing a child to attempt to conduct criminal proceedings without legal assistance. Section 28(1)(h) extends this right to children involved in civil litigation."

2.4 When does legal subjectivity commence?

It is of vital importance that the moment at which a foetus attains personhood[60] be set and defined by law. Slabbert[61] mentions that this is an extremely difficult assessment to make since there are various theories[62] propagating different stages of foetal development as the most acceptable point of personhood-recognition and because gestational development consists of various significant moments and phases.[63]

In South African law, legal subjectivity begins at birth.[64] The legal meaning, definition and attributes of birth are basically determined by common law requirements stating that the foetus must be separate from the mother's body[65] and that the foetus must have lived[66] independently after separation.[67] Prior to birth, the foetus is generally not regarded as a legal subject but is

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59 1999. **The Bill of Rights Handbook** Juta & Co. Ltd. (2nd edition), 436.

60 *ie* when a person acquires legal subjectivity.

61 *op cit* p 238.

62 as briefly mentioned *infra*, dealing specifically with abortion.

63 see discussion *infra*, also ch 11 where a brief summary of the human gestational development is given.

64 some writers argue that legal subjectivity could, in terms of the *nasciturus* rule, originate as early as conception under certain circumstances - see Van der Vyver's opinion *infra*.

65 the cutting of the umbilical cord need not have taken place.

66 although there are various tests available to ascertain whether a child actually lived for a brief period of time, there is no formal description of human existence/ life in the South African law - the existing definitions merely give us vague parameters *ie* a period between birth and death.

67 only a moment of independent life is sufficient to meet this requirement for birth.

considered to form part of the mother's body.[68] In each case it must be determined whether and when legal subjectivity has in fact begun.[69] Davel and Jordaan[70] mention that certain authors[71] have added viability[72] as a third requirement to the beginning of legal subjectivity.[73]

2.5 *Nasciturus* fiction

The South African legal system has received from its Roman-Dutch common law the *nasciturus* fiction which is based on the phrase: "*nasciturus pro iam nato habetur quotiens de commodo eius agitur*". This rule states that in certain circumstances[74] interests or potential interests[75] of a foetus are kept open dependant on the live birth of the child involved. Today the *nasciturus* fiction is used in various spheres of private law, including the law of delict which is primarily relevant for the purposes of this study.

Since a person[76] is clothed with legal subjectivity only from the point of birth, this fiction keeps the interests of the still-to-be-born potential legal subject in abeyance. If all the requirements[77]

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68 this concept was established in Roman law, *D* 25 411:35 2 9 1: "*partus enim antequam edatur, mulieris portio est vel viscerum*".

69 it should be noted that many differing opinions exist as to when a foetus actually becomes a person or legal subject - see the discussion of the main viewpoints *infra.*

70 *op cit*, p 11.

71 *eg* Smit. 1977. **Tydskrif vir Regswetenskap** (180-9).

72 "Viability in this context means that the child must have reached a certain stage of development within the mother's body. The most important organs must have developed to such a degree that the child could live independently, with or without aids, but definitely without being fed from the mother's bloodstream. We agree, however, with those who are of the opinion that viability should not be regarded as separate requirement for birth as a the moment of origin of legal subjectivity." Davel & Jordaan *ibid* - note also Slabbert *op cit* p 246: "Fetal viability can conservatively be described as 'that stage of fetal development when the life of the unborn...may be continued indefinitely outside the womb by natural or artificial life-support systems." - see further the discussion of viability as starting point of foetal protection in American law *infra.*

73 compare this assertion with the requirement of viability in American law.

74 in instances where it is beneficial to the unborn child such as entitlement to a testamentary inheritance, a right to maintenance in divorce proceedings, a claim for the loss of support where the household's breadwinner is killed, and more importantly, personal claims for injuries sustained prenatally.

75 it should be remembered that these interests are that of the unborn child.

76 *ie* a natural person.

77 see *infra.*

for the fictitious advancement of legal subjectivity are fulfilled, the benefit(s) accruing to the child is effected.

The requirements set for the application of the *nascitutrus* fiction are:

- the use of the fiction is restricted to instances where it would be beneficial for the child;[78]
- the benefit must have accrued to the *nasciturus* after the date of conception;[79]
- the *nasciturus* must be born in the legal-technical sense.[80]

Slabbert[81] describes the application of the fiction as follows:

> "The fiction protects the interests of the (future) *persona iuris* in a flexible manner by anticipating that the fetus or embryo *in utero*, by virtue of its unique position must be afforded some form of protection. The rationale behind the protection is a future directed one: to protect interests which can only really be at stake *after the birth*, in other words, when legal subjectivity has commenced. The fiction thus remains only a fiction: by affording the *nasciturus* this form of protection, no legal subjectivity is in fact afforded. It is the child, who has already been born and who has become a legal subject, whose interests are protected in a conditional manner."

2.5.1 Nasciturus fiction in the case law

The varying applications of the *nasciturus* fiction in cases based on delict, especially where pre-birth injuries have taken place, illustrates the difficulty experienced by courts in deciding

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78 It is interesting to note that this requirement is still complied with if a third party likewise benefits from the same advantage, so long as a third party is not the sole beneficiary of the application of the fiction. Therefore, where a wrongful birth action is instituted in tandem with a wrongful life action, both the child and a third party (the parents) have an expected interest/ benefit flowing from the application of the *nasciturus* fiction. If a wrongful birth action is however instituted by itself, only a third party would *directly* benefit and therefore it is submitted that in such an instance this requirement will not be complied with.

79 In wrongful life litigation this would entail that a plaintiff would only receive its right to compensation (the benefit) after conception, although its right not to be born as a handicapped child might have been infringed at an earlier stage, *eg* when a medical professional failed to give the parents proper genetic counselling. This anomaly places a serious question mark over the theoretically acceptable use of the *nasciturus* fiction as a solution to the wrongful life plaintiff. The "advantage or benefit" accruing to the plaintiff in these cases is the entitlement to non-existence.

80 the newborn therefore had to live independently, even if it was for a short while.

81 *op cit* p 245.

on such contentious issues.[82] **Chisholm v East Rand Proprietary Mines Ltd.**[83] was the first case in which the courts extended the application of the *nasciturus* fiction to the sphere of the law of delict. *In casu* the question in law was whether an unborn's rights to maintenance could be infringed. The facts were that a third party negligently caused the death of a breadwinner and subsequently his dependants[84] suffered loss of maintenance.

The special circumstances of this case begged the question whether the unborn child had a separate claim independent of the mother's established and well recognized right to maintenance. The court found that the unborn child had a separate claim for damages[85] and extended the use of the *nasciturus* fiction to include delictual claims. This new application had the result that the unborn child in an action for damages is in the same legal position as other children.[86]

A further development in the recognition of foetal rights came through the judgment given in **Pinchin v Santam Insurance Co Ltd.**[87] where it was found that also non-patrimonial damages[88] were in principle recoverable by a plaintiff who suffered damages before birth. The court ruled that the *nasciturus* fiction could be applied to claim compensation for the infringement of a person's physical integrity, even in the instance where the loss arose out of pre-natal injuries.

The facts *in casu* were that the husband of a pregnant woman who was physically injured in a motorcar accident subsequently instituted action on behalf of their child when it was discovered after its birth that the child suffered from cerebral paralysis. The claim for non-patrimonial damages suffered by the child was based on the assumption that the injuries were sustained in the accident.[89] The court ruled that a child would in principle be entitled to

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82 such as foetal rights and wrongful conduct against plaintiffs in a pre-conception stage.

83 1909 TH 297.

84 at the time of the accident the deceased's wife was pregnant with their first child, for whom loss of maintenance was also claimed.

85 and thereby acknowledged the fact that unborn children do acquire and have subjective rights, which rights can be infringed.

86 who have already been born.

87 1963 2 SA 254 (W).

88 so-called cases of reparation.

89 plaintiffs could, however, not prove that the child's brain damage was caused by the tortfeasor's negligent conduct and the claim accordingly failed.

compensation for injuries sustained as a foetus and established the principle that a person's right to physical integrity is protected even where the unlawful conduct took place prior to birth.[90] Justice Hiemstra declared:

> "I hold that a child does have an action to recover damages for prenatal injuries. This view is based on the rule of Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage."[91]

The next important judgment concerning the commencement of legal subjectivity was that of **Christian League of South Africa v Rall.**[92] *In casu* the Christian League applied to the Supreme Court[93] to be appointed as a curator *ad litem* for an unborn child who was to be aborted. The mother had previously applied for a legal abortion to be carried out in terms of the **Abortion and Sterilization Act,**[94] based on the fact that her pregnancy was brought about by being raped.

The question in law was whether there were legal grounds for the appointment of a curator *ad litem* to represent a foetus in matters regarding the termination of the pregnancy. In its judgment the court made it clear that legal subjectivity begins at birth. Davel and Jordaan aptly summarises the essential basis of the court's decision:

> "Preference should be given to the view which recognizes that the Aquilian action would grant damages to a person against whom a delict had been committed even prior to his birth. Judge Steyn continued by stating emphatically that the *nasciturus* fiction does not confer legal subjectivity on the unborn, but that it only ensures that any benefits due to it should be held *in suspenso* until its birth. In so doing, Judge Steyn confirmed the view that the Latin *adagium* establishes a *fiction* and that it is not an exception which provides for the putting forward of legal subjectivity. In this case, the court concluded that the *nasciturus* fiction should not be extended any further and pointed out that the Abortion and Sterilisation Act expressly protects the fetus by means of several prescriptions and administrative procedures, linked to penal

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90 Judge Hiemstra mentioned possible future applications in passing, which included claims of children against their parents where such parents caused the deformation of their children through the intake of damaging substances.

91 at 260 B of judgment.

92 *supra.*

93 note that the South African "Supreme Court" has recently changed to "High Court".

94 Act 2 of 1975 - see further a discussion on the vast differences between this act and the new abortion act *infra.*

sanction."[95]

The recent judgement of **G v Superintendent, Groote Schuur Hospital**[96] has taken a different stance on the appointment of a *curator ad litem* for a foetus and allowed such an appointment to protect the interests of the unborn child.

2.5.2 *Nasciturus* fiction: Different opinions

It is interesting to consider the varying comments and the different points of criticism raised by legal writers in reaction to foetal rights in general, as well as the case law dealing with the *nasciturus* fiction[97] in particular. One can easily observe that the same basic questions are raised by scholars worldwide concerning the difficult issues associated with wrongful life litigation *per se*, as well as the concomitant endowment of legal subjectivity to unborn children.

A challenging alternative to the use of the *nasciturus* fiction, as advocated by Joubert,[98] could be of great importance to assist in answering some of the fundamental questions raised by the wrongful life phenomena. Joubert[99] is of the opinion that the use of the *nasciturus* fiction is totally unnecessary when dealing with delictual claims.[100] In his opinion the *actio legis Aquiliae*[101] is flexible enough to embrace all the challenges presented to it by pre-natal injuries and infringements of subjective rights of the unborn. Because all the elements of delict[102] can function independently and since all these elements occur at different times and are separated by distance and space, the correct application of the delictual action should solve all foreseeable problems.

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95 *op cit* p 18.

96 1993 (2) 255 (K).

97 as discussed by Davel & Jordaan *ibid.*

98 1963. Pinchin and Another NO v Santam Insurance Co. Ltd. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg**, 295.

99 *ibid.*

100 and that it should be restricted to its initial sphere of operation, namely the law of succession.

101 the main action for delict in South Africa.

102 *ie* conduct, unlawfulness, fault, causative link and damage.

The wrongful life plaintiff will according to this reasoning have an action directly after its birth[103] for the damage caused by the defendant's unlawful and negligent[104] conduct prior to birth, which conduct can be causally linked to the eventual manifestation of the damage.[105] The plaintiff therefore need not acquire rights after birth which he became entitled to at an earlier stage, he simply wishes to claim damages for the loss he is experiencing as a living legal subject. Since the different elements of delict occur independently and because there is no reason why this separation of elements should be limited, this viewpoint is broad enough to even cater for the possibility where the wrongful conduct took place *before* conception.[106] Many of the wrongful life cases show that the wrongful act complained of was in fact committed before conception, such as where a physician failed to give proper pre-conception counselling or neglected to do proper genetic tests on prospective parents.

Joubert[107] summarises that the child, as a *persona iuris*, under these circumstances has an action based on the fact that the wrongdoer's conduct was the cause of his injury.

> *"In die onderhawige soort geval het die kind as persona iuris dus 'n aksie op grond van die feit dat die dader se handeling oorsaak was van die kind se nadeel."*

Other writers have different thoughts on the relevance of the *nasciturus* fiction. Boberg,[108] for example, feels that the *nasciturus* fiction could be implemented with success if its scope could be extended to include actions based on pre-natal injuries. The reason why he supports this viewpoint is because he believes that the child does not only suffer from the consequences of the injury from the moment of birth, but has already begun suffering since the actual time of infliction.[109]

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103 after having obtained legal subjectivity in the traditional fashion, namely at birth.

104 negligence is off course but one form of fault (the other being intent), but it is still sufficient for the purposes of the *actio legis Aquiliae*.

105 (at birth) - the damage causing event in the past is therefore still causally linked to the loss of the child in the present and in the future.

106 it is important to consider the advantage of Joubert's viewpoint with regard to pre-conception delicts, as the nasciturus fiction would be unable to pose a solution to such a factual situation - see requirements of *nasciturus* fiction *supra*.

107 Davel & Jordaan, *ibid.*

108 as discussed in Davel & Jordaan, *ibid.*

109 Davel & Jordaan reports that this viewpoint seems to assume that the foetus is a person in the legal technical sense of the word based on the fact that it has rights which can be infringed.

2.5.3 *Nasciturus* rule

Davel and Jordaan[110] report on writers such as Van der Vyver who believe that the *nasciturus* fiction should be interpreted to award legal subjectivity at a developmental stage as early as conception.[111] This viewpoint advocates the existence of a legal rule which makes conditional provision for the advanced[112] acquisition of legal subjectivity, having the practical effect that subjective rights can be awarded prior to birth. Van der Vyver asserts that the *nasciturus* fiction has already developed to such an extent that a legal rule has been created.[113] This rule implies that it is not the birth of the interested party which is fictitiously advanced to the date of conception, but rather that an advanced beginning of legal subjectivity is recognized at conception.[114] Scholars endorsing this viewpoint state that it is undesirable to work with fictions in law and therefore the *nasciturus* rule should be preferred to the *nasciturus* fiction.

Du Plessis[115] believes that law reform should keep pace with social and scientific development and that new legal principles should be devised for unconventional problems:

> "Developments in medicine have vastly increased our knowledge of foetal life, and the law is bound to reflect this. The common law has become a totally inadequate source of solutions to problems involving pre-natal life such as in vitro fertilization, surrogate motherhood et cetera. As suggested earlier, it is much more realistic to accept that these developments have caused the *nasciturus* fiction to grow into a full-fledged legal rule."[116]

It is, however, generally conceded that a certain amount of uncertainty is created by this rule since the exact moment of conception cannot be established. Another point of criticism against the *nasciturus* rule is that it does not accommodate instances where the unlawful conduct has occurred prior to conception.[117] Finally, there are legal academics[118] who believe that since

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110 *ibid.*

111 under certain circumstances.

112 legal subjectivity generally commences at birth.

113 the so-called "*nasciturus* rule".

114 in certain circumstances.

115 Du Plessis, L.M. 1990. Jurisprudential reflections on the status of unborn life. **Tydskrif vir die Suid-Afrikaanse Reg**, 44.

116 *op cit* p 53.

117 *supra.*

118 Van der Merwe, 1963. **THRHR** 292.

legal development in protecting the unborn's interests has been established and recognized by courts,[119] the application of the *nasciturus* fiction has become superfluous.

2.6 Conclusion

In conclusion one might say that if all factors are taken into account, the opinion of Joubert should stand out as the most desirable. This viewpoint makes use of the traditional elements of delict to accommodate all possible challenges brought about by wrongful life litigation without the need to lean on legal fictions or other philosophical constructions.

3. In the United States

3.1 Historical development of prenatal torts in the United States of America

Collins[120] writes on the interesting historical development of prenatal torts law in the United States of America. As early as 1884 the prenatal injury case of **Dietrich v Inhabitants of Northampton**[121] came before the courts in which a claim for *wrongful death*[122] was denied because a foetus was found not to be a "separate legal entity" when the injury occurred. Much legal development concerning prenatal rights took place in the years following this decision.

Collins[123] reports that **Bonbrest v Kotz**[124] is generally considered to be a pivotal case in American prenatal tort law. Here the court introduced *viability* of the foetus as a decisive factor in determining whether an injury was in fact incurred when dealing with prenatal tort claims. Many later courts, however, in reaction to this criterion found that viability was not only difficult to determine, but also an irrelevant fact to prove in terms of the establishment of causation.

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119 see the **Chisholm**, **Jameson** and **Pinchin** cases *supra*.

120 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

121 138 Mass. 14 (1884).

122 wrongful life and wrongful death cases have an interesting touching-point: in both discussions it is of vital importance whether foetal rights are recognized and to what extent the interests of unborn children are protected - in a wrongful death action a deceased child's estate sue a physician/ other tortfeasor for negligently causing its death.

123 *ibid.*

124 65 F. Supp. 138 D.D.C. (1946).

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The first court to reject this viability premise was **Kelly v Gregory**,[125] where it was judged that a child is a biological entity separate from its mother from the moment of conception.

Collins[126] discloses that by 1984, of the 36 jurisdictions that actually allowed a cause of action for prenatal torts,[127] 17 did not any longer require a plaintiff to be viable at the time of injury.[128] He notes that it seems as if the recent trend is to, at least in principle, grant awards for prenatally injured plaintiffs.

Some courts have gone a step further by even allowing *pre-conception* actions.[129] The first court that entertained this radical concept was **Renslow v Mennonite Hospital**,[130] where a mother received blood of an improper blood type during a transfusion years before conception which resulted in the eventual birth of a handicapped child some time later. It seems as if one could derive from the above-mentioned judgments that in the United States of America, there is principally a right to sue for any wrongful and negligent act committed before or after conception.

Common problems and fears associated with pre-conception actions[131] include concerns of fraudulent actions, seemingly unlimited liability, ever increasing litigation *et cetera*.[132]

4. Abortion Issues

4.1 Background

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125 282 A.D. 542, 125 N.Y.S. 2d 696 N.Y. App. Div. (1953).

126 *ibid.*

127 according to Collins nearly all jurisdictions disallow wrongful life actions.

128 If a court demands that a foetus must be viable at the time of injury, a foetus therefore has to be developed to the stage where it could survive outside its mother's womb (with or without medical assistance) and have a reasonable prospect for survival, in order to be eligible for compensation.

129 where it is acknowledged that a damage causing event could happen even before the plaintiff's conception - other courts support a right to be born as a whole functional human being, such as the court in **Turpin v Sortini**, 182 Cal. Rptr. 337 (1982).

130 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977).

131 incl wrongful life litigation in general.

132 see ch 8 where the various obstacles to wrongful life actions are discussed in detail.

Knoppers and Le Bris[133] write that the status of the human embryo is essentially a ethical question and that both legal and scientific reductionism is destructive since "underlying ethical choices need to be clarified before any legal solutions can be understood."[134]

They[135] also reports on the three mainstream philosophical orientations[136] on the starting point of personhood, but state that none of these is sufficient to provide the ethical basis for the legal status of the embryo. With regard to the reasons for the importance of establishing the moment of personhood, they write that "the status of the embryo is relative only when it enters into conflict with other protected rights, such as that of self-determination."[137] Knoppers and Le Bris[138] informs that although legal personality is granted to the embryo in only exceptional cases,[139] the vast majority of legal systems affirm the embryo's specificity and potential to become a human being.

4.1.1 Historical development

Slabbert[140] conveys the fact that legal attitudes concerning certain aspects of life have dramatically fluctuated over the ages. Concerning abortion she reports that various ancient civilizations have for instance banned it,[141] whilst other cultures such as the Greeks and the Romans regarded this practice as "an acceptable solution to problems of adequate resources,

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133 1991. Recent Advances in Medically Assisted Conception: Legal, ethical and social issues. **The American Journal of Law and Medicine**, 328.

134 *op cit* p 334.

135 *op cit* p 335.

136 being that of immediate personification, personification at birth and lastly those who gradually recognizes the status of the embryo as linked to certain stages of biological development.

137 Knoppers and Le Bris *op cit* p 336.

138 *op cit* p 336.

139 Louisiana State in LA. Rev. Stat. §§ 9:121-9:133 (Wets 1991), and also Denmark do recognize legal personality - under § 1 of Danish law there is a basic assumption that human life begins at the moment of fertilization.

140 1997. The fetus and embryo: Legal status and personhood. **Tydskrif vir die Suid-Afrikaanse Reg** (2), 239.

141 as abortion was commonly grouped together with the practice of infanticide.

birth defects[142] and maintaining a gender balance in society."[143] One observes that the Christian influence[144] played an important part in changing these attitudes to the point where abortion was considered to be murder. It is reported[145] that under common law a pregnancy could only be medically terminated to save the live of the woman.

Clarke[146] mentions regarding reproductive decisions in general that:

> "Individuals or couples making reproductive decisions in the face of a risk of genetic disease often experience their predicament as being a no-win situation; they can take a chance, and risk having a child (perhaps a second child) affected by a cruel disease, with the sorrow and suffering this may cause; or they can decide to subject a pregnancy tp prenatal diagnosis, and perhaps to terminate the pregnancy if the test result is unfavourable."[147]

An important question that all parents ask when an abortion is considered because of possible foetal impairment, is: what is a substantial risk? Berry[148] draws our attention to the difficult decision that often has to be taken when parents have to decide on *abortion* based on the abnormalities of the foetus. There is often a fine line between anomalies that warrant abortion and others that are not that serious. In England, she writes, the current abortion law dictates that abortion will be lawful only if there is a "substantial risk of a serious handicap" in the foetus.[149] It is suggested that this benchmark is a reasonable guideline, although arbitrary, as explained by Berry:

> "With a condition such as Klinefelter's syndrome, severe learning difficulties may occur but usually do not. Is a 1 in 20 risk of Duchenne muscular dystrophy a

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142 such intolerable and merciless attitudes are scorned today by modern humanitarian philosophies - or is it? see ch 9, where the philosophical reasoning behind contemporary abortions are discussed.

143 the *paterfamilias* or the male head of a family had the *ius vitae necisque* or, quite literally, the right to choose between life or death concerning any of the family members.

144 as characterised by the Justinian era, falling in the so-called post-classical period of between 284 AD - 565 AD.

145 Strauss *op cit* p 207.

146 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge.

147 Clarke *op cit* p 3.

148 *op cit* p 38.

149 a similar requirement as in the previous South African act discussed on *supra*.

'substantial' risk,[150] bearing in mind the devastating nature of the disease? We need to keep the balance remembering that it is the client not the geneticist who has to live long term with her decision, guilt at an unnecessary abortion or a lifetime with a handicapped child. On the other hand, we must beware of the consumerism attitudes that often characterize present-day society. It is entirely right and natural for parents to desire a healthy child and strive for that, but pregnancy remains full of uncertainties."

Hawthorne[151] reports that the common opinion regarding induced abortion has disintegrated as a result of a changing attitude towards life in general, the waning influence of the church on moral issues and the progress of medical science. Hawthorne further observes[152] that society's attitude towards abortion is not static but dynamic and that this dynamism is constantly reflected in the ever changing law regarding abortion.

4.1.1.1 Society's dealing with disabled children

Throughout history, various societies have dealt in different ways with their disabled community. More often than not these people were cruelly treated, as shown by historians.[153] Infanticide of children suffering from genetic impairments and involuntary euthanasia of the old or diseased, were not uncommon. In neither of these classes (of suffering people) were the "right not to suffer" plausibly enforced. Even less so, could one say that justice was done?

Not very dissimilar to these barbaric actions, we are today advocating concern for "suffering people" by awarding them rights to die and rights to be born with a sound body and mind (and effectively orchestrating the elimination of disabled people or people belonging to a group with diminished abilities, by setting up public concern and support to end affected pregnancies and propagating abortion of future disabled foetuses by allowing wrongful life actions).[154]

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150 my emphasis.

151 1985. Abortion in Roman Law. **De Jure** 261.

152 *op cit* p 272.

153 Moseley, K.L. 1986. The History of Infanticide in Western Society. **Issues of Law & Medicine** (1), 345: "..infanticide of the handicapped newborn has been relatively common in Western society...Ancient attitudes continue to have an impact on our notions of the value of disabled newborns and continue to play a role in their loss of life" and "In Greco-Roman civilization, the infanticide of children with disabilities was common because people believed such children were harbingers of the future, and that an undesired future could be changed by killing the child".

154 see ch 9.

Shepherd[155] remarks:

> "But we do seem to be willing to talk about rights to die or rights not to be born when the individual asserting that right (or on whose behalf it is being asserted), appears to have a reduced quality of life.[156] And this, it appears, goes under the name of progress."[157]

Closely connected to the question of whether abortion should be legal or not, is the issue of what rights are awarded to an unborn child. The answer to this question is influenced by various factors, such as society's moral beliefs, religious viewpoints, political persuasions and economical needs.[158] Many countries believe that the state's interest in protecting a human life is limited to existing human beings, which protection only becomes compelling in unborn children at a stage where an acceptable prospect of survival is certain.[159] Many constitutions also protect the right to life, although this right is often not extended to those individuals not yet born.[160]

Laudor[161] expresses her views on inter-generational justice and declares that religious faith makes it clear that we are obligated to future generations and also that, in the timelessness of

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155 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Dame Law Review** (72:1), 103.

156 we have already seen how uncertain and subjective the tests, used to measure the quality of life of others are.

157 *op cit* p 142.

158 Nothling-Slabbert, *ibid.*

159 As established by **Roe v Wade** 410 U.S. 113 (1973) in American law. Viability seems to place a moral duty on society to start respecting the foetus as an potential person - see *infra*. The Irish Constitution expressly affords and protects the unborn's right to life in § 40 (3)(3) and even goes so far as to prohibit medical clinics from advising patients of abortion clinics across the border.

160 South Africa's Constitution, *eg* protects the right to life in § 11: "Everyone has the right to life." Obviously "everyone" only includes those who have already been born. Note also that in the preamble of the new abortion act it is concisely stated that the Constitution does afford a mother the right to make family planning decisions : "Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies" and also "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".

161 1994. In defence of Wrongful life: Bringing political theory to defense of a tort. **Fordham Law Review** (62:6), 1675.

God, future people are as important as we are. She declares,[162] however, that the comfortable certainty of faith, does not describe just how we are obligated to future people or what specific actions or in actions our obligations may entail.

Most of American society[163] today does not consider abortion at an early stage of development[164] to be unlawful or even immoral.[165] Andrews[166] discloses the tendency in American society to abort foetuses affected by serious genetic anomalies. He believes that as many as 74% of Americans are in favour of abortion in such circumstances. In spite of these statistics, there are many anti-abortion groups that have gained much ground in limiting the effect of the **Roe**[167] decision, by achieving the implementation of various abortion-limitation statutes. In the same way, many American states have already accepted so-called wrongful birth and wrongful life statutes prohibiting these actions.[168] Many believe that these statutes are an unacceptable infringement on an individual's right to privacy.[169]

There are groups that do not believe that pre-natal tests should be done on foetuses because they fear it would dramatically increase the number of foetuses aborted. It is stated[170] that this premise is, to a great extent, unfounded and is mainly based on emotional and/ or religious considerations. On average, only 3% of all amniocentesis tests[171] performed indicate that the foetus has an abnormality of some kind or another and even then not all parents choose to abort. One can therefore say that only a very small percentage of foetuses that are tested for

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162 *ibid.*

163 South Africa traditionally has claimed to have a large Christian community, which community consequently has frowned upon abortion.

164 *ie* within the first trimester of pregnancy - see the various theories on the actual moment of inception of life *infra.*

165 see, however, a new thrust in the American pro-life rally limiting the effect of the **Roe** decision *infra.*

166 *op cit* p 159.

167 in **Roe v Wade** 410 U.S. 113 (1973), the American Supreme Court laid down the principle that mothers have a right to undergo abortions - see the detailed discussion dealing with abortion issues (incl the position in South Africa and Europe).

168 *eg* Minnesota has wrongful life and wrongful birth statutes, while Idaho and Utah both have legislation prohibiting wrongful life actions.

169 see the discussion on wrongful birth statutes, ch 10.

170 *ibid.*

171 see ch 7 and 8.

genetic anomalies are indeed found to have some kind of impairment and many of these are not serious or indeed curable or treatable. If pre-natal tests are not done, parents are uninformed and many foetuses are aborted because of ignorance and out of the fear for a possible abnormal development, especially where the couple in question has already had developmental problems with previous children. One could therefore argue that possibly *more* children will actually be born if genetic tests are performed, than would otherwise be the case.

Grobe,[172] is of a similar opinion and reports that: "by restricting a physician's speech in order to 'reduce the incidence of abortion', the Supreme Court presents the parents of deformed children with a double obstacle in a successful wrongful birth action. Parents will now be unable to establish te requisite duty of the physician to inform. Thus, these parents will never even reach the merits of their cause of action based on the constitutional right to an abortion."[173]

Alternative modern technology consistently create new questions and novel controversies to trouble the philosophers and public policy estimators of the day.[174] Lupton[175] mentions, for example, the development of the embryo as a patient. He writes that, although it is still premature to make a firm statement in this regard, it is likely that embryo diagnosis is the first step towards embryo therapy, and that the latter is an emerging body of applied knowledge with an as yet uncertain identity.

> "Envisaging the embryo as a "patient" complements currently evolving notions of the foetus as a patient. Both concepts advance the idea that entities can be subject to protection and care before birth."[176]

Block[177] reports that it is impossible to conclude that the reasonable prudent person would

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172 Grobe, R.T. 1992. The future of the "wrongful birth" cause of action. **Pace Law Review** (12:3), 746.

173 "The parents must establish that, had they been informed by their physician of the genetic defect, they would have obtained an abortion. This would satisfy the requisite causal connection between the doctor's failure to inform and the plaintiff's damages. Now, however, the parents are faced with the added obstacle that the physician's speech is restricted." *ibid.*

174 *eg* the current debate surrounding the morality of human cloning.

175 1996. Genetic engineering: The legal implications. **Tydskrif vir Suid-Afrikaanse Reg**, 62.

176 *ibid.*

177 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. **Fordham Law Review** (53:4), 1117.

always choose to abort an unplanned pregnancy.[178] Strauss[179] conveys that possible liability based on wrongful life could follow if the superintendent of a hospital wilfully or negligently delayed making available his hospital facilities for a lawful abortion.

4.1.2 When does a foetus obtains personhood?

Various theories exist as to when the autonomous life of an individual actually begins. Different viewpoints attach varying milestones in gestational development[180] as *the* most significant moment and accordingly choose such point as the "instant of origin".[181] Rothley[182] states that because an embryo or foetus has human potential, it is certainly not "ethically neutral material" which can be dealt with and disposed of at will.

Ford[183] believes that it is necessary to realise the importance and relevance of modern science in answering the question of when personhood commences. Ford states that even though this problem closely pertains to philosophical reasoning, one cannot proceed without basing one's reasoning on findings of modern embryology. The main thrust of Ford's viewpoint on when personhood begins, can be outlined as follows: She[184] supports the belief that a human being consists of both soul and matter, which oneness constitutes a so-called characteristic psychosomatic unity of the human individual, namely a living human body and a unique ontological entity. The important question in this line of reasoning concerns what is meant by ontological individuality or identity[185] and also how far we can trace back our own personal identity as the same continuing individual living body, being or entity. She writes:

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178 he writes that the majority of women considering an abortion today have no religious, ethical or moral opposition to the procedure - note, however, that the Catholic Church even today equates abortion with murder.

179 *op cit* p 214.

180 "Upon fertilisation, or at the twenty-second week when mental functioning commences, or when the fetus becomes viable if sustained with the help of modern technology? Or maybe only upon parturition when the fetus starts breathing independently?" Slabbert, *op cit* p 239.

181 one must be weary to solely consider the factual changes in the foetus as basis for a specific viewpoint, what is more important is the subjective significance attached to each possible change and development.

182 1990. Ethical and legal problems of genetic engineering and human artificial insemination. **European Parliament: Committee on Legal Affairs and Children's Rights**, 41.

183 Ford, N.M. 1988. **When did I begin? Conception of the human individual in history, philosophy and science.** Cambridge University Press, xii.

184 *ibid.*

185 of a living person.

> "A human person is a distinct living ontological individual with a truly human nature. A human person cannot exist before the formation of a distinct living ontological individual with a truly human nature *that retains the same ontological identity throughout successive stages of development*...It will be necessary to consider the relevant embryological facts before determining *that stage in embryological development before which there could be abortion individual living body with a truly human nature that retains the same ontological identity from that point onwards.*"[186]

Therefore one can conclude that a distinction must be made between human genetic individuality[187] and human ontological individuality. The first pertains to physical uniqueness and the latter to personal identity.[188]

Lupton [189] mentions the various theories on the inception of life. He refers to the view that life begins at conception,[190] the live birth theory;[191]and also distinguishes these from so-called "judicial theories", such as the brain birth theory and the view that any living human organism should indicate inception of life.

4.1.2.1 Conception

Supporters[192] of this opinion believe that the most important consideration of a foetus is that it is deem to be human, irrespective of the fact that it is still in a early stage of development. Many Christian religions, including the Roman Catholic Church, believe this to be the correct

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186 my emphasis.

187 which is well known to begin at fertilisation.

188 as a unique continuing individual, being or entity, *ie* the soul - *eg* Although twins could be genetically identical, they are nevertheless different ontological individuals.

189 1988. The legal status of the embryo. **Acta Juridica**, 197.

190 a theory reflecting the official view of the Catholic Church.

191 supported by certain segments in both the Jewish and the Protestant community and holding the position that life does not commence until the completion of live birth - (he states that these pronouncements are entirely in keeping with the Roman law as enunciated in *D 25.4.1.1.*).

192 conception as possible point of departure for personhood has found some recognition in legal systems worldwide (both the English and German legal systems take into consideration all relevant factors that could shed some light on the moment of conception, whereas other countries such as South Africa, have calculated the date of conception by counting back 300 days from the date of birth) - as the precise moment of conception can't be emphatically pinpointed, various methods have been employed to calculate most accurately the point of conception.

point of view, as Biblical support[193] can be found for this premise.[194] This approach believes that conception is the origin of a new life of a human being with potential rather than "a potential human life". One reason given in support of this premise is that a foetus undergoes various stages of progression as its potential expands and no one can at any other point of development say that *this* is the exact moment where life begins.[195]

Nöthling-Slabbert[196] warns of obvious problems that will surface if this viewpoint will be emphatically embraced, for example society's current opinion on abortion which will constitute murder in every instance.[197] Other dilemmas will arise from scientific experimentation on foetuses, the use of intra-uterine devices detrimental to the foetus and contraceptives that prevent the fertilised ovum from implanting in the lining of the womb.

Slabbert[198] reports that such an approach, which is mainly based on religious foundations, cannot be followed by the state since principles based solely on religious faith will only convince adherents to that specific faith. Such conduct will also constitute a glaring infringement of others' right to freedom of religious beliefs. She further states:[199]

> "The Roman Catholic Church's metaphysical approach is rejected by the majority of moral philosophers who believe that personhood cannot be defined by reference to the presence of an immaterial human soul but by reference to an intricate combination of mental and physical properties. Furthermore, since conception or fertilisation is a process which extends over several hours (and not a clearly marked point), the personification of the fertilised egg becomes problematic. One can only be sure that the egg is truly fertilised once it cleaves and forms two cells."

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193 Exodus 21:22.

194 this is the so-called metaphysical approach whereby "ensoulment" takes place at the moment of fertilisation, the point where the fertilised ovum is infused with a soul.

195 although it could be stated that conception is the beginning of life, the argument has been raised that there is no unique genetic being at the point of conception as human genetic characteristics can only be identified from the 4 to 8 cell stages of development.

196 1997. Enkele regsaspekte rakende aborsie in die lig van die nuwe aborsie wetgewing. **Codicillus**, 52.

197 not even early abortion will be acceptable, as conception and "ensoulment" have then already taken place.

198 *op cit* p 241.

199 *ibid.*

Although conception is seen by most Christian groups as the beginning of life and personhood, one cannot reject this viewpoint for the fear of infringement of freedom of religion. The fact remains that the merger of the male and female cells does initiate a new potential life. What rights should be afforded to such a small beginning or what level of protection it should enjoy, is a totally separate question altogether.

4.1.2.2 Implantation

After conception[200] has taken place, the fertilised egg journeys down the fallopian tubes to the uterus where it arrives approximately a week later. The embryo is fixed to the uterine wall in a process[201] that is usually takes another week. A large percentage[202] of embryos do not anchor to the womb and such embryos are invariably discarded by means of spontaneous abortion. If implantation does not take place, no pregnancy therefore occurs and accordingly it is suggested that this point should be considered as the starting point of personhood.[203]

Nöthling-Slabbert[204] advances a possible point of criticism against this theory, as it is based solely on external circumstances. There is no addition or any real developmental change in the embryo associated with implantation and it could frankly be described as the mere method whereby the embryo receives nutrition and oxygen from its mother. The following developmental advancement by an embryo is the development of the spinal cord and the brain,[205] as is discussed below. Similar to the shortfall experienced with the explication of the importance of implantation, one could unvaryingly criticise the observation of this phase as superficial, as one cannot substitute the ability to detect a further growth process with the actual commencement of a life.

4.1.2.3 Primitive streak developed

At approximately 14-15 days after conception, an embryo develops a primitive neural streak,[206]

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200 when the female *ovum* has been fertilised by the male sperm.

201 called "nidation".

202 it is estimated that as much as 50% of fertilised ova do not become implanted in the womb.

203 from this point onwards one can at least speak of a pregnancy.

204 *op cit* p 59.

205 the so-called development of the "primitive streak".

206 see ch 11 for further information on foetal development and specifically concerning the forming of the primitive streak.

which is the first indication that further foetal development will take place.[207] Some philosophers argue that this phase of foetal growth is a crucial hurdle that an embryo must overcome and should therefore be taken as starting point of personhood. This point in embryonic development has received some legal recognition, as it is encompassed in the English Human Fertilisation and Embryology Act 1990.[208]

4.1.2.4 Ontological individuality

Ford[209] supports the viewpoint that human personhood only begins weeks after conception and reports on the findings of Professor Carl Wood that:

> "Since persons, as usually defined, are multicellular individuals, it is difficult to maintain scientifically that a person has come into existence before the eight-cell stage. At least in a developmental sense, the early embryo is pre-individual."

She[210] believes that ontological individuality of a zygote is retained from the first mitotic division and onwards.

> "It is argued that a human individual cannot be present before it is actually formed. The traditional insight over the centuries remains ever valid: a potential human individual cannot be an actual human individual." She concludes:
>
> "With the appearance of the primitive streak after the completion of implantation and about 14 days after fertilization identical twinning can no longer occur. This is when the human body is first formed with a definite body plan and definite axis of symmetry. Prior to this stage it would seem to be quite unreal to speak of the presence of a distinct human individual...It seems that the biological evidence leads to the philosophical conclusion that a human individual, our youngest neighbour and member of the human community, begins at the primitive streak stage and not prior to it, but most certainly by the stage of gastrulation when the human body embryo's primitive cardiovascular system is already functioning and blood is circulating."

4.1.2.5 Foetal viability

The point of viability can be described as that stage of foetal advancement when the life of the

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207 if the primitive streak does not form, no further development will take place and such failure consequently marks the end of the potential life.

208 § 11(1)(c), 3(3).

209 *op cit* p xii.

210 *ibid.*

foetus could continue indefinitely outside its mother's womb, even if it need be assisted by life-support systems. The influential American court decision of **Roe v Wade**[211] chose viability as the point at which state interests in an unborn life become compelling and henceforth from which time the potential personhood of the foetus must be protected.[212]

Taking this into account, Slabbert[213] states, one may argue that this judicial view by implication confers legal personality on the foetus at viability because the foetus is at that point so close to human that one might consider it a human being. The question remains wether this likeness is sufficient to confer the foetus with constitutional rights.

As all other theories, viability as point of personhood is not without complications. A significant concern in this regard is the fact that a precise moment cannot be established because, as medical science progresses, the point of viability is achieved earlier and earlier in the pregnancy.[214] The successful use of artificial wombs has also given a new perspective on the question of viability as foetuses will now be viable throughout pregnancy.[215]

4.1.2.6 Brain birth

In this phase neocortical brain activity begins and the human cortex begins producing electro-encephalograph waves.[216] Supporters of this theory argues that only once a person becomes a rational being, can one declare it a human being.[217]

> "From a moral point of view, individuation and implantation represents a point which the embryo is regarded as an entity with a decided individuality. The categories 'potential person', 'psychic person', 'strict' and 'proper person' are proposed to denote these differences. A 'proper person' would indicate a person in the proper sense of the word, *ie* a rational and self conscious agent. 'Physic personhood' would only be possible in the late trimester of fetal development, when the neurological system becomes capable of integrated function. An individual with psychic personhood is

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211 *supra.*

212 *ie* from after the 1st trimester when a state may regulate and principally prohibit abortion.

213 *op cit* p 58.

214 *eg* where the minimum foetal weight for viability was previously found to be 1500 gr, this weight has now been decreased to a mere 500 gr.

215 Nöthling-Slabbert, 1997 *ibid.*

216 between week 22 and 24 of the pregnancy.

217 *cogito ergo sum?*

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believed to carry the moral status of a person."[218]

An apparent parallel can be drawn between the point of a person's death, namely brainstem death and the correlative thereof, namely the inception of brain activity as the start point of life. Slabbert[219] warns that this perspective might oversimplify things by associating a person or *self* with the brain and therefore disregarding the human being as a whole.[220] She writes, however, that a great advantage of this theory is that the various foetal development stages can be morally differentiated:

> "[T]he biological differences between an eight-week old embryo and the twenty-week old fetus provide the cue to the moral significance of each: the eight-week old embryo manifests early stages of neural activity, thus forming the basis for the earliest possibility of personal identity, whereas the twenty-week old fetus boasts an integrated neural system which forms the basis of self-consciousness. The gap between potentiality and actuality can thus be illustrated."[221]

Others[222] advocate brain birth as a more beneficial starting point of personhood than viability because the advent of neocortical brain activity is a static and unchanging standard which cannot be accelerated by human intervention.[223] Other advantages of the brain birth theory is that a criterion needs to be fixed only once,[224] as opposed to periodic assessment of the viability point of reference. Lupton[225] further believes that such a clear standard would facilitate research of embryology, as tests could then be legally performed on embryos up to twenty weeks of gestation, as opposed to the current limit of two weeks.

Such a certain criteria for personhood of a foetus has an important consequence for potential wrongful birth plaintiff-parent: Potential parents who are themselves carriers of genetic

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218 "Ethical Issues in Judaeo-Christian perspective", "In vitro: A symposium" **Loyola Law Review** 311, 349.

219 *op cit* p 249.

220 according to Munroe, M. 1996. **Understanding your potential** Destiny Image Publishers, man is a tri-union being, namely spirit, soul and body - the normal brain functions would fall into the soul dimension, consisting of intellect/ reasoning, will and emotion.

221 *ibid.*

222 Lupton. 1988. The legal status of the embryo. **Acta Juridica** 197.

223 as viability is increasingly shifted to earlier stages of development.

224 twenty weeks gestation is proposed as a suitable stage.

225 *ibid.*

diseases could undergo genetic screening[226] without concern or moral objection and make a decision regarding the termination of the pregnancy free from considerations of ethics.

4.1.2.7 Live birth

This theory is supported by many legal systems worldwide, including South Africa. The South African common law clearly determines that legal subjectivity begins at birth.[227] Approval from other sources for this viewpoint are modern American Protestant churches who tend to support maternal and familial rights and interests over the value of foetal life[228] and also certain American Jewish teachings.[229]

Criticism that may be raised against the belief that an individual's life commences at birth, is that it is too obvious and simplistic. Advanced medical knowledge has changed the understanding and perception of foetal life which developments has to be reflected by the law. Some writers[230] believe that the South African common law has become a totally inadequate source of solutions to the problems involving prenatal life, as is evident in situations such as *in vitro* fertilisation and surrogate motherhood.

4.1.3 Conclusion

This difficult deliberation as to when a foetus could actually be considered a person is of such a complicated nature that very limited legislation exist worldwide defining the legal status of a foetus. It is submitted that none of the theories mentioned can be singled out as the only correct premise.

> "The recognition of the embryo and the fetus as a form of life for biological purpose does not resolve the legal question of whether these entities were intended and are able to enjoy the rights entrenched in the various bills of rights. It needs to be recognised that all forms of life do not receive a uniform level or type or legal protection. Of course the potential of the embryo and the fetus to become human persons must be valued and respected. But should this potential dictate that these

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226 see ch 11 for the various types of genetic screening procedures available.

227 until birth takes place, the foetus is deemed to form part of its mother - "*partus enim antequam edatur mulieris portio est vel viscerum*" from D.25.4.1.1, 35.2.9.1. (live birth is also a requirement for the *nasciturus* doctrine) - *supra*.

228 at least into the 2nd trimester.

229 who are hesitant to accord the embryo significant value in instances where maternal interests prevail.

230 Such as Du Plessis, L.M. 1990. Jurisprudential reflections on the status of unborn life. **Tydskrif vir die Suid-Afrikaanse Reg**, 44.

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

Lupton[232] 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 onlive 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 Bris[234] 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 Plessis[237] 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

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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

Harrer[240] reports that the validity of abortion contracts[241] 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 abortion[244] 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

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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 constraining[247] 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 the[249] 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 mandatary 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*

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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 activities[253] are not part of public responsibilities.

After considering this background Harrer[254] concludes that abortion contracts are currently without doubt void[255] 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 Tonder[258] 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

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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 aborsiesaak. **Magistrate** 47.

259 *op cit* p 53.

planning.[260]

4.2.2 Sterilization in Germany

Stoll[261] 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

Leenen[263] 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]

He[266] 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

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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 revoked[268] 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 Leenen[269] 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 andersijds 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]

Sluyters[274] writes that legal protection of unborn children are currently not sufficient and suggests that this problem should be addressed by roper legislation. He conveys[275] 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

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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 fond 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 ones 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.

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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 law[282] 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 phases[283] of pregnancy according to the varied stages of foetal development[284] in order to address the question whether the state has a compelling interest in a specific foetus.

Grobe[285] 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]

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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.

Slabbert[290] 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) - **Maher 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

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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 support[297] 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. Grobe[300] 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

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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 many[304] as a gradual reversal of a woman's right to abortion.[305]

It is viewed[306]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 chid, lack of relevant and reliable medical information precludes informed choice altogether.

4.3.4 Relevance to Wrongful birth

Bodgan[307] 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]

Bodgan[309] 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

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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]

Grobe[311] disagrees with this supposition[312] and writes that the **Roe** judgment pertinently provided the missing element of causation[313] 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 asserted[315] that wrongful birth actions are necessary to protect women's rights regarding procreation, Faircloth[316]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] Faircloth[320] 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 constitutional right. He shows that this analysis:

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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 he success of wrongful life litigation in general. It could be accepted that the more liberal society considers abortion and emphasize 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

Reichman[321] 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 submitted[322] 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

Kamm[323] 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 develop, 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.

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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.

Kamm[325] 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, Kamm[328] argues that although the foetus changes significantly the same over time, it is still the same being as the later person. She writes:

> "Either it[329] 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

Romney[330] 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.

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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 submitted[332] 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]

Romney[335]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

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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 believes 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

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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

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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

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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 minor[354] 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 abortion[358] 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 rights[359] 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:

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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 periods[360] 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

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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-Slabbert[364] 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."

She[367] shows that these two sections, each dealing with a different periodical slot in which an

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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

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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 Jordaan[369] 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-Slabbert[370] 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

Schoordijk[372] 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, could[373] easily have

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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 obtained[374] if it were to be requested in the Netherlands. Schoordijk[375] 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. Block[378] writes that the American Congress has even expressed their support for adoption[379] 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.

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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 whishing 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 plaintiff's 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).

Strauss[380] comments on the case of **Behrmann** 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, Heida[383] is if 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 believes[384] 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 abortion[386] and adoption and adoption.[387]

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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 s reasonable mitigation step.

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

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CHAPTER 4

Medical Negligence

1. Introduction

Strauss[1] explains with regard to the scope of medical malpractice law that it is not narrowly confined to the instances where liability flows from professional negligence only,[2] but also includes various other causes of action. He mentions that liability for assault;[3] liability for the invasion of a patient's privacy;[4] liability for the performance of an altogether unnecessary operation[5] and also liability for breach of contract[6] are all possible grounds for litigation. When malpractice liability is therefore considered, one should always keep in mind that a medical professional could principally be held accountable for damages based not only on delict but also on a contractual basis.[7]

Professional liability is therefore defined[8] as an individual's accountability before a court of law which may take the form either of a civil judgement for delictual damages[9] to compensate for harm wrongfully caused, or of a civil judgement compelling him to refrain from continuing with an unlawful course of action, or of a criminal conviction for an offence which was found to have been committed. The scope of the thesis, however, is restricted to civil liability.

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1 1991. **Doctor, patient and the law** JL van Schaik (3rd edition), 243.

2 as is often believed.

3 *ie* treatment/ performance of a medical intervention with proper skill and proficiency, but without the patient's informed consent - see ch 5 on liability for not obtaining an informed consent.

4 *eg* an unwarranted disclosure of medical information of a patient to outsiders, especially relevant in cases of genetic/ hereditary diseases where there are often relatives with vested interests in the results of genetic tests - see ch 11.

5 even though the physician was not negligent in performing the procedure.

6 a breach of contract that causes financial loss (non-patrimonial damages may not be claimed, based on contract) to a patient can constitute liability for such damages - see ch 2 where breach of contract is discussed and also **Administrator, Natal v Edouard** 1990 (3) SA 581 (A).

7 see ch 2.

8 Strauss *op cit* p 193.

9 or contractual.

McLean[10] conveys her thoughts on the philosophy behind medical negligence law:

> "Undoubtedly, medicine is seen as a valued social good. The law and society, therefore, might not unreasonably be expected to protect this good from unnecessary or inappropriate challenge. On the other hand, the rights of the individual are valued by law and society, and their vindication can also represent a social good."

2. Physician-patient relationship

Concerning the precise relationship between doctor[11] and patient, Van Oosten[12] explains that it is primarily one of contract,[13] but that it may also be based on a duty of care[14] flowing from particular circumstances.[15] Considering the fact that the physician and patient are involved in a contractual relationship and taking into account the basic principle of freedom of contract, one could say that both parties are free agents.[16] This fact has the effect that a physician has neither a professional right,[17] nor generally speaking,[18] a legal duty to medically intervene in a patient's life.[19]

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10 1989. **A Patient's right to know - Information Disclosure, the Doctor and the Law** Dartmouth - Medico Legal Series, 7.

11 or hospital - see vicarious liability discussed *infra*.

12 1991. The Legal Liability of Doctors and Hospitals for Medical Malpractice. **SAMJ** (80), 23.

13 **Correira v Berwind** 1986 (4) SA 60 (Z) 63 - the contractual relationship between physician and patient is discussed in ch 2 (in most cases the patient and doctor enter into a contract of letting and hiring of work, or *locatio conductio operis*).

14 if a physician fails to execute a medical intervention with professional , skill (see standard of care *infra*), delictual liability could follow.

15 eg where a seriously injured person in an unconscious condition is brought to a casualty ward for emergency treatment.

16 the unreported South African case of **Phillips v De Klerk** 1983 (T), has established the principle that a patient may refuse life-saving treatment.

17 a physician must obtain the valid consent from a patient to ensure lawful medical treatment - see ch 5 for a discussion on consent.

18 it is submitted that a physician does, however, have a legal duty to treat a patient in the following circumstances; where the doctor assumes control over a potentially dangerous situation /object; where a physician is under a statutory duty to act; where he is under a contractual duty to act; or where an emergency situation exists.

19 Strauss, *op cit* p 3.

Specifically in the field of genetic counselling[20]one can clearly see the contractual character of the physician-patient relationship.[21] Parents who request procreative guidance and who are involved in these actions either consult their practitioner concerning birth control in general, or ask his opinion on sterilization options and procedures.[22] Alternatively, concerned parents seek professional genetic advice from genetic counsellors or gynaecologists regarding possible genetic abnormalities in their future offspring.[23]

Due to the fact that specific instructions are given by patients to the medical professional in terms of a contractual agreement, it is generally possible to base the subsequent action on breach of contract[24] or breach of guarantee.[25]

It is reported[26] that whether health care services are provided by state or private hospitals in South Africa, " a doctor who, or hospital which, takes charge of a patient assumes a duty of providing reasonable care of the patient. The duty of care relates to the examination, diagnosis and treatment of patients, and a failure to exercise reasonable care may result in contractual and/ or delictual liability." What reasonable care entails has been established in a variety of local decisions.[27]

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20 and therefore in the realm of wrongful life actions - see ch 5 for a discussion on the scope and general extent of genetic counselling.

21 it would be difficult to imagine a wrongful life type case where the physician-patient relationship is based on a *duty of care* not flowing from the contract, as discussed *supra*.

22 in a typical wrongful conception action.

23 typical wrongful birth and wrongful life actions.

24 in most cases in the form of positive malperformance - good example is found in the landmark South African case of **Edouard v Administrator, Natal** 1989 (2) SA 368 (D), where a provincial hospital has partially performed by conducting a Caesarian section on a patient, but neglecting to perform the desired sterilization operation altogether - see also ch 2 concerning suing for wrongful life on the basis of breach of contract.

25 note the distinction that Berenson, M. A. 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". **Tulane Law Review** (64), 895. reports on in French law, which recognizes a difference between the *obligation de resultat* (where an obligor promises to achieve a particular result) and the *obligations des monyens* (where an obligor promises merely to use appropriate means/ his best effort to achieve the promised result).

26 Van Oosten, F.F.W. 1996. Patient Rights: A status report on the Republic of South Africa. **Law in Motion - International Encyclopaedia of Laws** - World Law Conference, 990.

27 **Van Wyk v Lewis** 1924 AD 438; **Allot v Paterson & Jackson** 1936 SR 221; **Kovalsky v Krige** 1910 CTR 822; **Coppen v Impey** 1916 CPD 309; **Buls and Another v Tsatsarolakis** 1976 (2) SA 891 (T); **Applicant v Administrator Transvaal** 1993 (4) SA 733 (W); **Collins v Administrator Cape** 1954 (4) SA 73

Van Wijmen[28] is of the opinion that a patient's position is so special that it should be especially protected by the legislator,[29] which would have the additional benefit that the health care providers' position would also improve.[30]

3. Medical negligence

The South African law of delict is based on a fault principle and in the medical malpractice arena it is usually negligent conduct[31] that physicians are guilty of.[32] If a physician's diagnosis, treatment or any other conduct carried out in his capacity as medical professional is performed negligently[33] and causes the patient physical or mental harm,[34] the negligent physician may in principle be held liable.[35] As the facts of every case are different, there is in principle no limit to the form negligent medical performance may take. According to Van Oosten,[36] negligence implies in any given context:

- that the defendant failed to foresee and guard against the possibility of harm to the plaintiff, and
- that the reasonable person in his position would have foreseen that possibility of harm

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(C); **Clinton-Parker v Administrator Transvaal** 1995 (W) - unreported. see discussions on these cases *infra*.

28 1985. Hoe bijzonder is de rechtspositie van de patiënt? **Nederlands Juristenblad** (17), 541.

29 *eg* by means of a special agreement.

30 *"De rechtspositie van de patiënt is bijzonder genoeg om zicht te laten beschermen door een eigen overeenkomst, die bovendien aan de bijzondere positie van de hulpverlener recht kan doen." op cit* p 547.

31 it must be proved that defendant's reprehensible lack of foresight has caused harm to the plaintiff and to establish this, the court apply the test of the "reasonable man" - see *infra*.

32 intentional infliction of harm or loss by a physician is almost unthinkable.

33 before the question of negligence is relevant, the wrongfulness of the conduct, (implicitly) should already have been established - see ch 2.

34 note that the fact that harm or injury was caused does not *per se* constitute or lead to an inference of negligence and the onus to prove negligence still firmly rests on the plaintiff.

35 Strauss *op cit* p 290: "The law on medical negligence is simple to state: the doctor must exercise reasonable care and sill. What is reasonable in a particular situation, is essentially a matter of expert medical evidence. It is the medical profession which lays down what the appropriate standard of care is."

36 *op cit* p 25.

and would have guarded against it, by taking steps to prevent the harm from occurring.

He[37] writes with regard to the fundamental test for negligence:

> "Fundamentally the test is an objective one in so far as the hypothetical or fictitious 'reasonable man' sets the standard, but it also comprises a subjective element inasmuch as it requires, in addition, that the reasonable man be placed in the same position as the defendant or accused found himself at the time. In turn, the reasonable man is commonly defined not as the perfect man, but as the man of average intelligence, knowledge, competence, care, skill and prudence."

Earle[38] reports that the benchmark case in medical negligence in South Africa remains to be **Van Wyk v Lewis**,[39] where the Appeal Court accepted that the degree of skill to be expected is the customarily adopted by the relevant branch of the profession concerned and not the highest possible degree.

The basic objective test of the reasonable person[40] is adjusted in cases where a person professes expertise in a particular field.[41] In such cases the level of care and prudence is raised to the level that could be expected from a fellow professional in the same field, practising under the same circumstances. The test would therefore be that of the "reasonable expert". It is important to note that a physician will not be compared to an exceptionally brilliant colleague or specialist in the same field, but rather on what could be expected from the average medical practitioner, bearing in mind that doctors are human beings.

If a doctor, however, professes himself to be a specialist in a particular field, his actions will be judged by that of the average specialist in the same field.[42] Thus, a higher level of competence is expected from these professionals who venture in a particular field of speciality. The fact that a doctor engages in an undertaking that requires a certain degree of experience,

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37 Strauss *ibid.*

38 1995. 'Informed consent': Is there room for the reasonable patient in South African Law? **SALJ** (112), 639.

39 1924 AD 438.

40 here one must be careful not to confuse the objective *ex post facto* test for wrongfulness, with the so-called 'test of the reasonable man" used to establish fault - see ch 2 for a brief discussion on basic tort principles.

41 *op cit* p 26.

42 1999. Neethling, Potgieter and Visser. **Law of Delict** Butterworths (3rd edition), 135; **Van Wyk v Lewis**.

knowledge, skill or training has the effect that his actions will be judged by the higher degree of prudence[43] (whether he actually has the additional skill or not). In wrongful life cases, the defendant is usually a specialist in the field of gynaecology or genetic science, raising the appropriate standard of care and expertise by which his actions will be judged.

Schoonenberg[44] writes that the determination whether a particular physician acted below the applicable standard of care should be made with reference to the level of proficiency taken on a national level. Michiels van Kessenich-Hoogendam[45] refers to the Dutch Civil Code section 7:401 in determination of whether a physician has properly carried out his duty of care. He conveys that current circumstances will influence the decision. It is reported[46] that the *Hoge Raad* has formulated the criteria of "reasonably proficient" and "as a reasonable colleague" in a recent decision.[47] He explains that while the criterion established in the code is a general standard, the decision of the court could be deemed as the practical implementation thereof.

3.1 Error of judgement

It has been established in the English case of **Whitehouse v Jordan and Another**[48] that a physician's mere error in judgement does not necessarily constitute negligence,[49] which principle is best summarised as follows:

> "To say that a surgeon has committed an error of clinical judgment is wholly ambiguous ans does not indicate whether he has been negligent, for while some errors or clinical judgment may be completely consistent with the due exercise of professional skill, others acts or omissions in the course of exercising clinical judgment may be so glaringly below proper standards as to make a finding of negligence inevitable."

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43 on account of the rule *"imperitia culpae adnumeratur"* Gaius: Dig. 50.17.132; Inst. 4.3.7; - meaning that ignorance or lack of skill is deemed to be negligence (an excellent discussion on this topic is found in: T.J. Scott **Petere Fontes:** LC Steyn - Gedenkbundel (DJ Joubert, ed) 124).

44 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 62.

45 1995. **Beroepsfouten** W.E.J. Tjeenk Willink, Zwolle (3de druk), 6.

46 *ibid.*

47 HR 9 November 1990, NJ 1991, 26.

48 (1981) 1 All ER 267 (HL).

49 the saying *errare humanum* est - to err is human, springs to mind.

This same principle has also been followed in South Africa courts and specific reference to the **Whitehouse** case was made in **Pringle v Administrator, Transvaal.**[50] It would therefore seem that where a physician does make an error in clinical judgement, his mistake does not constitute negligence as long as such a misjudgement could also reasonably have been made by any physician under the same circumstances. The conventional negligence test is therefore applied, with the effect that only misjudgements that are obviously/ exceptionally below the standard of care[51] would be classified as negligent conduct.

3.2 Failure to inform

A physician's failure to adequately inform a patient does on the same account not necessarily constitute negligence.[52] Strauss[53] states that such a principle would be anomalous in South African law, as our courts deal with non-compliance of the duty to obtain an informed consent on the basis of assault.[54] He conveys that "the essence of negligence in the medical context is unskilful treatment."[55] What is reported,[56] however, is that liability based on absence of informed consent is, apart from this "traditional medical negligence", the most important and prevalent basis of liability.[57] Strauss[58] conveys with special reference to the **Edouard** case:

> "A doctor who undertakes a sterilisation and wants to protect himself against liability should take a proper informed consent, in writing, by which the patient and his/her spouse also waives any eventual claim."[59]

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50 1990 (2) SA 379 (W).

51 expected from medical professionals in the particular field of the defendant.

52 **Richter v Estate Hamman** 1976 (3) SA 226 (C), **Esterhuizen v Administrator Transvaal** 1957 (3) SA 710 (T) and **Lymbery v Jefferies** 1925 A 236 - *ie* failure to inform cannot be equated with negligence, as *culpa* entails a failure to foresee damaging consequences and accordingly take steps to avoid such occurrence.

53 *op cit* p 268.

54 see ch 5, where the legal consequences of treatment without consent is discussed.

55 *ibid.*

56 *op cit* p 289.

57 it is submitted that this trend has developed as it is simpler to prove a cause of action based on lack of information, than proving negligence on the part of a physician.

58 1990. Unsuccessful sterilisation of woman: Doctor liable for child - rasing costs. **South African Practice Management** (11), 16.

59 *op cit* p 17.

He declares:[60] "It must be noted, however, that such a consent will be of no avail if the doctor has forgotten to perform the sterilization, (as was the case in **Edouard**.) The enforceability of a waiver in a case of negligence (in particular where the negligence was "gross") is also doubtful."

A different view has been taken by the English courts.[61] In this case where the facts were very similar to that of **Richter's** case, the physician's failure to supply adequate information was found to have been negligent. *In casu* the patient-plaintiff based her claim for damages on trespass[62] and negligence.[63] The court found that the plaintiff in this case was not only able to prove that the physician had in fact breached his legal duty to inform, but also that his failure has influenced her decision to consent to the medical treatment. Failure to inform a patient of the risks and the implications of a specific procedure, therefore, was deemed to constitute negligence.[64]

Earle[65] conveys that the nature and extent of the duty to warn a patient of consequences of a surgical procedure as outlined in the **Richter** has been affirmed in **Castell v De Greef**[66] as embracing the normal and expected consequences.[67] Van Oosten,[68] reporting on the **Castell** decision explains that Ackermann J. found that there is not only a justification, but indeed a necessity for introducing the patient-orientated doctrine of informed consent into South African law. The learned judge also made it clear that "the issue of the doctor's duty of disclosure is in South African law... treated not as one of negligence, rising from the breach of a duty of care, but as one of consent to the injury involved and the assumption of an unintended risk. In the South African context the doctor's duty to disclose a material risk must be seen in the

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60 Strauss *ibid*.

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

62 no consent was obtained prior to the medical intervention.

63 that the physician's provision of information was below the standard required from a reasonable physician.

64 it is reported *ibid* that a similar viewpoint to that of the English has been followed in America.

65 *op cit* p 639.

66 1994 (4) SA 408 (C) - see ch on informed consent.

67 Earle *ibid* draws special reference to the fact that the **De Greef** court affirmed the English cases of **Sidaway** and **Bolam** - see previous fn.

68 1996, *op cit* p 995.

contractual setting of an unimpeachable consent to the operation and its *sequelae*."[69]

It is further reported by Earle, regarding the duty to inform, that the important **Castell** case applied the principle laid down in **Lymbery v Jefferies** in that it is not necessary to inform a patient of *all* complications which could possibly arise from a procedure as informed consent implies a certain sophistication on the part of the patient which is an indeterminate factor. He summarises:[70]

> "The doctrine of informed consent suggests that a doctor's role is simply to inform, whereas knowledge of the patient should be the emphasis. In communication terms, this would mean that ideally the practitioner would take steps to become aware of how much information the patient requires for his or her decision to have been adequately informed."

Earle[71] supports a middle ground approach between the strict American view on consent and the "physician-based gospel" followed in the English cases of **Bolam** and **Sidaway**. The correct perspective, according to Earle, would therefore be that the normal intelligent patient would want an objectively reasonable explanation of the risks involved according to a patient-based standard.

Pearson[72] affirms the principle that increased knowledge involves greater responsibility. Physicians should take the duty to inform seriously and take note of the maxim: " the more information given, the less the scope for liability." It is once again commented that: "It is indeed the provision of information that is the central theme in the wrongful life (and, it is submitted, wrongful birth) cases".[73]

3.3 Negligence in genetics/ birth control

In medical law therapeutic procedures[74] have traditionally been favoured above non-

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69 *ibid.*

70 *op cit* p 642.

71 *ibid.*

72 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 94.

73 *op cit* p 106.

74 *ie* medically necessary procedures, *eg* an abortion where the mother's life would be placed in danger if the pregnancy would continue, or where a sterilization operation is performed to prevent the conception of a seriously handicapped foetus.

therapeutic interventions[75] (where legal requirements of skill and care are generally more stringent).[76] It is therefore important that patients consenting to non-therapeutic interventions should adhere to all the requirements for legal consent.[77] As procreative interventions could mainly be classified as non-therapeutic, one could likely make the inference that a more demanding application of skill and care would be expected by the courts than would normally be the case.

An interesting aspect with regard to wrongful conception liability in South Africa is the diverse reasons[78] and motivations for which sterilization or abortion is requested. It has been pertinently decided[79] that only patients who have sought sterilization[80] for economic reasons would be entitled to institute a wrongful conception action locally. Although such procedure would therefore not technically be considered a therapeutic intervention, it is submitted that sterilizations for economic reasons should also be acknowledged as having a similar legally justifiable object.[81]

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75 *ie* interventions consented to for reasons other than medical necessity or benefit, *eg* abortion because of an untimely/ unplanned pregnancy.

76 as illustrated by the requirements for abortion in the **Choice on Termination of Pregnancy Act**, Act No. 9 of 1996, see ch 3 - note that increasingly stringent prerequisites are demanded for termination as the pregnancy progresses. Initially so-called "eugenic" abortion on demand is acceptable, whilst therapeutic motivations are required for more advanced pregnancies.

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, if:
(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, if:
(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.

77 such as the requirement that the infringement must be legally justifiable and in accordance with the *boni mores*: non-therapeutic procreative procedures such as sterilization and contraception is undoubtedly acceptable in terms of current societal perceptions, as the importance of family planning and small families becomes increasingly compelling.

78 therapeutic or non-therapeutic.

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

80 the same principle applies to abortion.

81 falling in the same category as therapeutic procedures.

Strauss[82] reports that a physician who is instructed to provide a specific task[83]is faced with a different mandate than the normal run-of-the-mill complaints of ailments. He explains that if the physician "departs from the patient's express instructions or fails to treat him in the manner tacitly agreed upon, the physician will be guilty of breach of contract and may be sued for damages".[84] It is obvious that a special risk of liability is assumed by the physician if he guarantees the successful outcome of the procedure.[85]

3.4 Diagnostic errors

Medical science has developed much over the past few decades and especially in the field of genetic research, great breakthroughs have been achieved.[86] The knowledge of human genes and cells has increased dramatically, but in spite of this many experts believe that we now know only a fraction of what there is to know.[87] The importance of research in this field is magnified by the expected control that scientists could have[88] over general human weaknesses and genetically transferred diseases. All the medical prospects made possible by advanced genetic information are currently not even conceivable. Scientists believe that prenatal operations and treatment[89] for genetic impairments will be possible, as well as genetic manipulation of cells whereby unwanted characteristics or hereditary diseases may be

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82 *op cit* p 288.

83 such as plastic surgery or, it is submitted, genetic counselling/ birth control.

84 *ibid.*

85 see ch 2 for a discussion on guarantees.

86 consider the recent debacle surrounding the first successful cloning of the sheep "Dolly" and also reports of planned human clones in the near future.

87 see medical ch 11.

88 if sufficient knowledge and expertise have been obtained (in the maybe not so distant future).

89 If prenatal genetic treatment would be possible and successful in future, a new legal duty may be introduced in terms of which parents and physicians alike (and possibly even the state) will have to take positive steps in "curing" or "rectifying" the expected genetic disease detected in a foetus, in order to escape liability. Under these conditions wrongful life actions as we know them now will be outdated and the plaintiff-child will base his/her action on a real and feasible right "to be born with a sound mind and body". The difference between this type of action and the current wrongful life action would be that the plaintiff will not argue that it would be better for him not be have been born, but rather that he had the legitimate expectation (and real possibility of an attainable goal) to be born without any genetic impairment whatsoever. There would probably also be much less legal opposition and discussion in allowing these actions, since it would be based on traditional/ general delictual principles. These cases could in theory be treated like any other where a person is caused harm through the negligent or intentional conduct of another.

rectified.[90]

Andrews[91] reports on financial support by the United States Congress of $3 billion for the "Human Genome Project". This project has the goal to establish the position and pattern of each of the 50 000 to 100 000 genes found in a single human cell. With the newfound knowledge derived from this project, scientists expect to be able to detect and cure up to 5000 genetic ailments.

Others[92] have also made mention of this project and believe that the insights and technology which it has generated create new opportunities for the early diagnosis of patients and the identification of carriers of chromosome abnormalities and gene mutations. The next step would be to determine the function of each gene and also the composition of the protein produced by it. Such knowledge could then be used to develop new therapeutic techniques. To date, about 6 000 genes have been described and located. Associated hereditary disorders have been described for about 3 000 of these disorders which are associated with mutations in those genes.

The suggestions that extraordinary advancement in medical science has only exposed how little we actually know of the human body emphasises the fact that diagnosis of hereditary weaknesses and genetic aberrations is not a simple task and it is not uncommon that genetic malformations are overseen and an incorrect diagnosis accordingly made. It should be remembered that wrong diagnosis by itself does not constitute a cause of action and only once a patient has suffered loss or injury because of consequential incorrect treatment/ genetic advice and has succeeded in proving that the physician's conduct was negligent in the particular instance,[93] will liability follow.

3.5 In South Africa

In the South African case of **Mitchell v Dixon**[94] it was confirmed that a physician can only be

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90 liability flowing from actions that might arise from these medical advances, however, does nor fall within the scope of this study.

91 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

92 Anon. 1994. Genetic screening. **Report: Health Council of the Netherlands: Committee Genetic Screening** (Publication no. 1994/22E).

93 all elements of delict/ contract must be proved, depending on what basis the action is instituted - see ch 2.

94 1914 AD 519.

held liable if a diagnosis is so apparently/ obviously wrong that it not only encompasses a mistake, but also negligence.[95] Strauss[96] refers to other cases[97] of similar view and writes that:

> "If a doctor were to fail in observing proper standards of care in examining a patient or if the doctor knows he is not properly equipped at all to make a proper examination, and fails to refer the patient to a colleague who is so equipped, the doctor may of course be held liable."[98]

3.6 Accuracy of tests

An important aspect relevant to proper diagnosis involving modern genetic expertise, is the question whether genetic tests are "accurate enough"[99] to be used in detecting genetic anomalies. In **Simmons v West Covina Medical Clinic**[100] a physician was excused by the court for not suggesting the possible performance of a "AFP" test[101] to the parents of a child later born with *Down's syndrome.* Although the test posed no risk to the foetus, the court found that there was no duty on the defendant to suggest such a test being carried out, because of the relative inaccuracy thereof. The court found that a mere 20% accuracy for detecting the disease was not sufficient and laid down a minimum of at least 50% accuracy for similar tests

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95 *ie* that the mistake is of such a nature as to imply an absence of reasonable skill and care, taking into account the ordinary level of skill and competence in the profession.

96 *op cit* p 253.

97 **Blyth v Van den Heever** 1980 (1) SA 191 (A), where the Appeal court held a physician liable for the losses caused by an incorrect diagnosis of an impending *ischemia* in the arm of the plaintiff - also **Dube v Administrator Transvaal** 1963 (4) SA 260 (T); **Buls v Tsatsarolakis** 1976 (2) SA 891 (T).

98 this comment has an obvious application to wrongful life cases, where a general practitioner may not have the required expertise or specialised equipment to perform genetic tests, which could lead to an incorrect diagnosis - Strauss *ibid* continues his discussion on mis-diagnosis and explains that: "It must also be pointed out that a doctor may be held liable for failure to inform a patient of the diagnosis, where the circumstances are such that it would be reasonably necessary to inform the patient in order to bring to his attention the need of taking certain precautions or to take certain positive measures to protect his health."

99 it is submitted that it would be fair to reason that if a certain test is too unreliable and inaccurate, its usefulness in the implementation of genetic diagnosis could be questioned and no action for wrongful birth or wrongful life could be based on it: the question remains, however, what precisely is "too unreliable".

100 260 Cal. Rptr. 722, 755 Ct. App. (1989).

101 alpha-feto protein test - see ch 11 where the so-called "triple test" is discussed which involves the measuring of the levels of *alphafoetoprotien*, hCG and *oestriol.*

in order to establish a duty[102] on physician to apply it that would be recognized by the courts.[103]

Strauss[104] discusses whether a gynaecologist would incur liability for damaging a foetus while performing genetic testing procedures, such as an amniocentesis with proper skill and care.[105] He is of the opinion that, because the risk to the mother and foetus is very slight[106] and since the objective sought is "scientifically, medically and socially recognized as not only fully justifiable, but indeed commendable", a physician would therefore not incur liability if the procedure was properly performed. Another factor that would support the view against liability would be the fact that there are no alternatives to a specific test that would enable the physician to make the same accurate diagnosis.

3.7 Incorrect prescription of medicine

Meyer[107] writes that in the light of present knowledge as to the possibly tragic consequences of the administration of drugs such as thalidomide to pregnant women, the holding as to foresee-ability in previous cases should serve as a warning to doctors and pharmacists to exercise the utmost caution when prescribing medicines to women whose status and condition are not known to them.

3.8 Prevalence of genetic disorders/ value of tests

The new/ extended information available to geneticists will probably also create an extended duty to inform patients and clients of additional risks of genetic disease or of a more accurate interpretation of tests done in the past.[108] The following questions will invariably arise: who will

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102 a duty on defendant to suggest such a test from being performed or at least a duty to inform parents of the existence of such test.

103 It is submitted that courts dealing with the science of genetics should realise that percentages are often minute, due to the extreme complexity of human genetic maps, emphasized by the relative little knowledge we currently possess. Calculations are therefore often not precise, but rather "informed guesswork." Some diseases are also very rare, but so serious that genetic screening is sometimes obligatory, eg tests for *phenylketonuria*, found only once in every 12 000 to 15 000 newborns - see ch11 for a discussion on this condition.

104 *op cit* p 194.

105 see medical ch 11.

106 it is accordingly submitted that such a risk would be lawful.

107 1963. A Delictual Remedy for the Unborn Child. **South African Law Journal**, 449.

108 refer to ch 5 on informed consent.

be expected to provide and communicate the newly interpreted genetic results and to what variety of groups of people with a legitimate interest to be informed? Andrews[109] is of the opinion that traditional health care workers are not the solution for this enormous task and suggests that societal mechanisms may be more effective in this respect.

Strauss[110] agrees that liability involving negligence in respect of contraception, sterilization, genetic screening and abortion has become increasingly prominent. He believes that modern methods of genetic screening not only raise many difficult legal, but also ethical questions which are to be answered by ethicists and lawyers.[111]

Fain[112] is of the opinion that because most genetic diseases and birth defects are from an individual viewpoint quite rather rare, their cumulative prevalence is not fully appreciated. He writes that over 3000 genetic diseases have been catalogued up to date and that approximately 5% of all newborns suffer from a major or minor malformation of some sort. The relevance of these statistics to wrongful life actions generally is emphasized by the fact that genetic disorders and diseases are so commonly found in society today, that of all the children admitted to pediatric wards, 25%-30% have an underlying genetic disease, chromosomal disorder or birth defect. Fain[113] stresses that until the late 1960's, methods of detecting genetic disorders were very inexact but have fortunately improved drastically in the past few years.[114] He writes that amniocentesis and karyotype analysis of foetal cells have made the detection of *Down's syndrome* and many other chromosomal abnormalities almost routine.

Fain[115] is convinced that the modern tests available to concerned parents are accurate enough to be used and trusted with confidence. Amniocentesis tests, *fetoscopy* analyses and ultrasound probing head the list as most widely recognized prenatal examinations. Approximately 60 genetic disorders can at present be accurately detected through an amniocentesis and the number is ever increasing with each new application discovered by breakthroughs in technology.

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109 *op cit* p 151.

110 *op cit* p 196.

111 *op cit* p 203.

112 Fain, C.F. 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

113 *ibid.*

114 see ch 11.

115 *ibid.*

Medical workers and geneticists utilize an assortment of instruments and data bases to estimate the chances of a given couple parenting a child with a particular disorder: they could review old medical records; take comprehensive medical histories of both parents and blood relatives and finally do a battery of tests[116] after which counselling, based on the total picture, follows.

It is extremely important that counselling, in whatever form it may be, should be based on the aggregate of all relevant facts discovered and that all facets of the patient's individual, religious, cultural and financial, as well as family interests should be taken into account.[117]

Although prenatal testing is usually safe for both the mother and the foetus, there have been isolated instances of needle damage to the foetus, miscarriages and bleeding where amniocentesis have been performed.[118] For this reason it must be stressed, that in order to gather and analyse data properly, the physician should possess special/ superior skills in performing these potentially dangerous procedures.[119]

3.9 Medical standard of care

Much have been said about the appropriate standard of skill and care a medical professional should adhere to in practice. It should be noted that the standard of skill required is not the highest possible degree of professional skill, but rather "reasonable" proficiency.[120]

Earle[121] writes that if legal negligence is based on a professional standard, that standard might be prone to lowering in order to protect the profession from within against medical malpractice liability. For this reason, Earle states, proponents of the objective tests advocate a 'prudent patient' test.[122]

3.9.1 Diagnostic errors

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116 see p 11 where the various genetic test are discussed.

117 see ch 5 on informed consent.

118 see ch 11.

119 see *supra*, regarding medical negligence and the higher level of competence required from specialists.

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

121 *op cit* p 641.

122 such as was introduced by the **Richter** case.

Fain[123] predicts that since parents rely more and more on genetic information to guide their procreative decisions, it seems likely that diagnostic errors will pave the way for increased litigation based on this tort. He writes that the St. Paul Companies (America's largest medical malpractice insurer) found that failure to properly diagnose patients was alleged in 25% of all malpractice cases filed. The American Department of Health, Education and Welfare similarly found that 25% of all claims filed and 50% of claims filed against internists and general practitioners, involved diagnostic errors.[124] In malpractice cases based on non surgical errors, claims involving insufficient testing were the highest in number. Fain[125] foresees that as new technology is developed, physicians will be forced to keep abreast of the times, by correctly applying the new techniques and procedures with the proper standard of care in order to escape liability.

Kortmann[126] gives various suggestions why more and higher claims are awarded against medical practitioners, some of them are: he believes patients have become more aware of their rights, and also more critical; the relationship between patient and physician has changed in the sense that it has become more business-like; he suggests that we live in a culture of "passing-the-buck",[127] where no one expects to carry his own losses.

3.10 In the United States of America

For physicians in the United States of America, the recognized standard of care has been the "standard of professional competence and care customary in similar communities".[128] An increasing number of courts in America, however, rule that a minimum national standard should be applied, especially in the case of specialists.

It is submitted that physicians should be up to date with current medical developments and aware of any new causes and forms of genetic diseases and other circumstances or conditions that could engender birth defects. This necessity is even more obvious in cases where the parents are existing patients of a particular physician requiring a medical opinion concerning the matter of family planning.

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123 *op cit* p 623.

124 supporting the facts and trends found by the medical insurers.

125 *ibid.*

126 1995. Beperking van de (verhaals-) aansprakelijkheid van de vrije beroepsbeoefenaar. **De Naamloze Vennootschap** (73), 14.

127 *"afwentelingscultuur".*

128 called the "locality rule".

3.11 In the Netherlands

Hondius[129] considers what the correct standard of medical care in the Netherlands should be. He refers to a decision of the *Hoge Raad*[130] which stated: *"De zorgvuldigheid die van een redelijk bekwaam en redelijk handelend specialist mag worden verwacht"*,[131] or the care expected from a reasonably skilled specialist acting with reasonable proficiency. The statutory regulation on medical treatment agreements or "WGBO"[132] states: *"De hulpverlener moet bij zijn werkzaamheden de zorg van een goed hulpverlener in acht nemen"* or a medical assistant should exercise his level of care in accordance with that of a good assistant. This standard seems to be in accordance with the globally expected level of professional proficiency.

3.12 Types of negligent genetic counsellors

Fain[133] mentions that it is difficult to classify the various possibilities of inappropriate conduct by geneticists into definite stereotypes and accordingly rather places the physicians themselves into varying classes of effectiveness to illustrate different possibilities of negligence. He does so, in the following manner:

3.12.1 "Out-of touch practitioners"

These are practitioners who have lost touch with modern techniques and procedures or who, in respect of a certain conduct, have acted below the current standard of competence by applying dated techniques or by prescribing obsolete medication or treatment. Under wrongful life circumstances, it could be possible that pertinent genetic data is not obtained because conventional/ outdated tests are utilized instead of applying more accurate modern tests. A physician guilty of such misconduct is more likely to be held liable for negligence, if damage should result, than a physician keeping up with medical science. Malpractice is determined

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129 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1687.

130 1990 (9 november) Hoge Raad (NJ 1991, 26).

131 and also: *"De hulpverlener moet bij zijn werkzaamheden de zorg van een goed hulpverlener in acht nemen."* translated - an assistant should exercise his level of care in accordance with that of a good assistant.

132 *"Wettelijke regeling van de geneeskundige behandelingsovereenkomst."*

133 *op cit* p 624 90.

where the physician neglects to acknowledge an ever-changing standard[134] of medical practice. Physicians, for example, who fail to at least mention the possibility/ availability of a genetic evaluation because of mistrust in modern tests to a 35-year old[135] mother-to-be, should be found to have acted "below the standard of care expected from physicians in general".

3.12.2 "Reluctant practitioners"

They are physicians who are unwilling to embrace the relevant medical standard of care at any given time. An example of such conduct would be where physicians do not employ or advise the application of foetal monitors during childbirth even though monitoring is at that stage customary in the profession. This conduct could lead to legal responsibility, unless the court is convinced that foetal monitoring is not a standard procedure within the medical profession. Such physicians contest conformance with conventional practice by asserting that their refusal to employ such measures is reasonable. They might assert application of the "best judgement" rule[136] in support of their actions or inactions.

3.12.3 "Faithful followers"

This group of doctors embrace every medical procedure that exemplifies the prevailing current trend or direction in the medical profession. They generally adhere to acceptable practice and argue that others have laid the research groundwork necessary to support the particular current medical procedure. A problem might evolve where they depend so heavily on new/ breaking technology, that they abandon other more conventional, but effective and proven diagnostic checks and balances. Under such circumstances, for example, faulty laboratory tests may go undetected as in **Curlender** case.[137]

3.12.4 "Innovative physicians"

This group of doctors is delighted and intrigued by all new techniques, equipment, diagnostic tools and procedures, even though these new developments have not necessarily yet been accepted by the mainstream medical profession. If a particular procedure has not garnered significant support in medical periodicals and in medical circles, these physicians might find

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134 as medical technology advances, the knowledge of diseases and conditions is broadened and new medicines/ treatments are accordingly developed as new research is done - a prudent physician is expected to keep in touch with these new developments.

135 taking into consideration the (now) well established fact that the possibility of *Downs' syndrome* increases dramatically in mothers older than 30 years of age - for further information on this premise, see ch 5.

136 see the discussion of medical paternalism v patient autonomy *infra*.

137 **Curlender v Bio-Science Laboratories** 106 Cal. App. 3d 811 (1980), where personnel were not familiar with new testing procedures.

themselves liable if damage should result from the implementation of such new procedures. In such instances, physicians may not even be fully protected by complete disclosure of the experimental nature of the procedure, because of public policy[138] reasons.

3.12.5 Keep in pace

Leenen[139] acknowledges the fact that new methods for genetic diagnosis and therapy are constantly being developed. He warns that physicians must in this regard embrace the expected medical-professional standard, while patients' interests should be highly considered. Physicians should also conduct themselves in subjection to the current social norms. He believes that this application is primarily important for genetic counselling and genetic screening.

3.13 A Dutch perspective on medical negligence

Legemaate[140] writes with regard to wrongful conception actions for failed sterilization procedures that certain questions should be asked to determine the true basis of liability. He is of the opinion that these questions could assist in determining in what way the physician in question acted negligently:

- *Is de diagnose juist gesteld? Heeft er voldoende onderzoek plaats gevonden om op een verantwoorde wijze tot een diagnose te kunnen komen?*[141]
- *Welke behandeling is er, gegeven de diagnose, geïndiceerd?*[142]
- *Is de geïndceerde behandeling correct uitgevoerd? Heeft de hulpverlener de juiste methode of techniek gebruikt? Indien er complicaties zijn, zijn deze dan inherent aan de behandeling of gaat het om het gevolg van onjuist handelen?*[143]
- *Heeft de hulpverlener in het traject na het onderzoek, de behandeling of de ingreep voldoende zorg en aandacht aan de patiënt besteed? Is voldoende*

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138 full disclosure is not a shield to legal responsibility for such innovation.

139 1984. Nieuwe wetenschappelijke ontwikkelingen rond het begin van het leven; problemen voor het gezondheidsrecht. **Tijdschrift voor Gezondheidsrecht**, 116.

140 1996. **Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg** W.E.J. Tjeenk Willink, 104.

141 has a proper diagnosis been made? has the physician conducted sufficient tests from which an accurate diagnosis could be made?

142 what treatment has followed the given diagnosis?

143 has the treatment been effectively administered or procedure executed?

gereageerd op complicaties en ontwikkelingen in het natraject?[144]

Gevers[145] emphasises the fact that medical negligence in the genetic testing and counselling arena could have serious consequences. He states that a physician could be negligent either in the failure to provide relevant information, such as making the patients aware of the possibility of prenatal diagnosis or in giving incorrect information, because of insufficient examination, a laboratory mistake, an inaccurate interpretation of test results or even a miscalculation in computing hereditary risk. He[146] indicates that an incorrect diagnosis could not onlybe prejudicial in the instance where a high risk couple is given the go-ahead for safe procreation,[147] but also where a healthy couple is prohibited from having children based on an erroneous report that their children would probably be affected by a dangerous hereditary disease.[148]

Hondius[149]reports on the most important sections found in the statutory guidelines relating to model medical care are: Section 11 dictates that a physician should, in as far as it is his responsibility, make use of the appropriate and best materials and equipments available; section 12 directs that in instances where more than one physician is responsible for a patient, only one should be indicated as the contact person; section 14 restricts the cost factor for patients; section 27 has in view the attainability of physician guarantee; section 32 compels the physician to ensure an adequate observation; section 36 entitles a patient to a second opinion and section 38 obligates a physician to specification of any declarations. It is submitted that guidelines like these contribute much to clarify what conduct is expected from physicians, which will certainly extend the improvement of medical service, progress the physician-patient

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144 in summary:
- has a proper diagnosis been made and communicated?
- what treatment/ intervention has been indicated, based on the diagnosis?
- has the chosen treatment/ intervention been properly performed? have complications been caused by the inherent nature of the treatment or because of improper application of the physician?
- did the physician take necessary care in examining the patient or in performing the chosen intervention?

145 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 21.

146 *ibid.*

147 as is commonly found in the wrongful life sphere of litigation.

148 liability for this type of injury will not be discussed in this work.

149 *op cit* p 1688.

relationship and increase the protection of patient's rights.[150] It is my submission that similar legislative guidelines will in the same way address the wrongful life debate, clarify the various parties' legal positions and accordingly solve much of the contention currently experienced.

4. Related aspects

4.1 Disclaimer agreements

Lodeizen-Schoonenberg and Stein[151] is of the opinion that disclaimer clauses in the medical negligence sphere is generally *contra bonos mores* and unenforceable. A contractual limitation of damages, however, should be valid and enforceable. They believe that medical professionals have a sufficient alternative to protect their interests, namely liability insurance.

> *"In onze gedachtegang vormt het verzekeringaspect het sluitstuk m.b.t. de onderhavige problematiek. Wij zijn daarbij gekomen tot het aannemen van een algemene verkeersopvatting in onze sameleving, inhoudende dat ziekenhuizen en medici zich toereikend dienen te verzekeren voor medische aansprakelijkheidsrisico's, een verkeersopvatting die o.m. tot uiting komt in het thans gevestigd verzekeringsgebruik terzake. Hieruit leiden wij af, dat beperking van medische aansprakelijkheid tot een bepaald bedrag, namelijk het redelijkerwijs maximaal verzekerd bedrag per gebeurtenis, tegenover de patiënt wel toelaatbaar kan worden geacht."*

4.2 Vicarious liability

Hospitals and provincial administrations[152] often incur legal liability for the negligent exercise of professional duties by physicians under their auspice. Although South African hospitals could initially not incur liability for damage caused by the negligence of their professional personnel as they were deemed independent contractors, this position was eventually changed.[153] Plaintiffs often find this an attractive option, especially when the physician is

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150 it is suggested that a clear-cut understanding of expected conduct and a parameter of acceptable behaviour within clear bounds, will concomitantly protect physicians interests and will thereby reduce their possibility of medical negligence liability.

151 1983. Uitsluiting van medische beroepsaansprakelijkheid. **Tijdschrift voor Gezondheidsrecht** (4:7), 184.

152 **Esterhuizen v Administrator Transvaal** 1957 (3) SA 710 (T); **Dube v Administrator Transvaal** 1963 (4) SA 260 (T).

153 **Mtetwa v Administrator Natal** 1989 (3) SA 600 (D).

financially incapable of paying the damages in full.[154] In wrongful life cases, hospital authorities or genetic laboratories are also frequently sued for negligent conduct by their employees.[155]

The fundamental principle concerning vicarious liability is that a person[156] is not liable for the wrongful act of an independent contractor engaged by him, although circumstances may dictate that a legal duty is placed on an employer to take steps to prevent such harm to members of the public.[157] An important indication of a position of authority, is the existence of an employment relationship. A person can subsequently not be held accountable for damage caused by an independent contractor[158] engaged by him. One must therefore consider each case individually to establish whether a relationship of authority has in fact existed, before vicarious liability becomes applicable. These principles are applicable to hospital authorities *vis a vis* physicians, where in some instances an employment relationship exists between the parties[159] and in other cases an independently practising physician merely makes use of hospital infrastructure and equipment.[160]

Schoonenberg[161] discusses the possibility that a genetic laboratory be held liable for either the inaccurate performance of genetic tests or the incorrect calculation of risk percentages. Such liability has been recognized in the past[162] and it is reported that in terms of Dutch law a physician would also be held accountable for such mistakes where he has chosen the particular facility, received the incorrect information and has applied faulty treatment based on this

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154 Van Oosten, 1991 *op cit* p 26: "Since hospitals are ordinarily in a better position to compensate patients for the harm they suffer as a result of the negligence of their professional personnel, this means that the patient is not simply left without a remedy where the doctor or nurse is financially incapable of footing the bill. It hardly needs any mention that there is nothing that prevents the patient from seeking his redress against the doctor or nurse concerned instead of against the hospital, but at least he now has a choice."

155 see table of authority.

156 or an institution/ legal person, such as a hospital.

157 vicarious liability flows from the doctrine *respondeat superior* - where a person in a position of authority over another is legally capable of exercising control over the latter's actions, he is expected to exercise control in such a way as to prevent harm to others.

158 executes an assignment in accordance with his own skill, proficiency and judgment.

159 where vicarious liability could follow.

160 where vicarious liability is not possible, although a hospital may be directly liable for its own negligence, *eg* provision of defective theatre equipment.

161 *op cit* p 65.

162 **Curlender v Bio-Science Laboratories** 106 Cal. App. 3d 811 (1980).

information. This opinion is based on section 6.1.8.3 of the Dutch Civil Code, whereby:

> *"...ene contractspartij tegenover de andere op gelijke wijze als voor eigen gedragingen aansprakelijk is voor gedragingen van degenen, die hij inschakelt bij de uitvoering van het contract."*[163]

Vansweevelt[164] reports that some have rejected the concept that a hospital could be causally linked to a result-based agreement between a physician and patient. He conveys that the well-known " duty of care" found in Common law countries is very similar to the Dutch system's approach that a physician should act proficiently. Although the parties are free to expressly enter into a result-based agreement, this would not occur automatically.

It is suggested[165] that "fairness requires that the malpractice burden be borne by hospitals as well as physician's, because of their shared responsibility for medical mishaps that results from cost-cutting measures." The following solution is proposed:

> "In order to allocate this burden fairly while not depriving victims of compensation, lawmakers should create a rebuttable presumption of joint hospital-physician liability in cases in which malpractice claims arise from a failure to order tests, procedures, or hospitalization that may have been forgone because of cost-cutting concerns. Such legislation would encourage hospitals and physicians to cooperate in reducing health care costs without compromising quality, and would alleviate the conflicts engendered by the current system."

4.3 Defensive medicine

In the Netherlands, professional liability is regulated by a system of obligatory insurance schemes. This system has the advantage that a plaintiff always will receive his award of damages because of the financial strength of these insurers.

In the United States of America, where extremely high amounts of damages are awarded in medical malpractice cases (compared to the position in South Africa and Europe), physicians

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163 or, where a contracting party is liable for any damage caused to the other contracting party in the performance of such sterilization for the conduct of another that has been introduced to the contract by himself.

164 1992. **De Civielrechtelijke Aansprakelijkheid van de Geneesheer en het Ziekenhuis** Maklu Uitgevers - Reeks Aansprakelijkheidsrecht.

165 Anon. 1985. Rethinking medical malpractice law in light of medicare cost-cutting. **Harvard Law Review** (98:5), 1022.

and especially experts in medical science[166] suffer under the burden of exorbitant liability insurance premiums. This troublesome situation has led to fears that so-called "defensive medicine" practices will increase.

It is mentioned[167] that excessive damages awarded in medical negligence cases has various negative consequences: the high insurance premiums are eventually passed on to the patients;[168] physicians are possibly reluctant to be involved in unknown cases of accidental injury; physicians tend to become over-cautious[169] in an attempt to rule out any possibility of negligence whatsoever[170] and some physicians refuse to attend to "high risk" patients.

4.4 Response from physicians to wrongful life suits

Fain[171] reports that although plaintiff's have had only limited success with wrongful life actions against medical practitioners, compensation allowed for successful wrongful birth and wrongful conception actions has in fact increased liability-anxiety in medical ranks. He mentions possible negative consequences that might result from excessive liability for wrongful life:

- increase the number of diagnostic tests ordered by physicians in order to defend their conduct and rule out any possibility of negligent failure on their side to investigate even the most remote, but theoretically possible, abnormal condition;[172]
- heightened malpractice insurance premiums;
- increased medical expenses; and
- unnecessary abortion of healthy embryos and foetuses, as a "precautionary measure".

4.5 Increased litigation

It is reported that there is an increasing incidence of medical malpractice suits in all Western

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166 of all the medical specialists, the gynaecologists in America generally have to pay the most for liability insurance- of up to $ 50 000 per year - Strauss *op cit* p 243.

167 Strauss *op cit* p 243.

168 or medical schemes that often cannot coupe with increased medical costs.

169 so-called "defensive medicine", whereby totally unnecessary tests are done and preventative medication is administered.

170 over-caution also leads to protracted consultations and excessive documentation of cases.

171 *ibid.*

172 so-called "defensive medicine".

countries. Various reasons can be offered as explanation for this litigation lust that seems to be a characteristic of our time. It is suggested that one of the most important reasons is the technological development of medical science. People have great trust and high expectations in modern medicine and have become conditioned to demand more from their physicians. People seem to be fascinated with media coverage of malpractice trials and closely follow the papers to seek "how much the newest litigant got." There might yet be truth in the perception that plaintiffs in medical negligence cases do not take on the physician as such, but rather a professional insurance company, which are more than capable of footing the legal bill.

Another consideration why people might more easily decide to litigate is the awareness of human rights in modern-day society.[173] It is my submission that an informed people that are aware of their rights is a vast improvement on an obtuse society ignorant of their rights. One should not necessarily attach a negative stigma to increased cognizance of one's legal rights and focus on the adverse consequences of increased litigation. It is praiseworthy that wrongs are exposed and wrongdoers held accountable It should also not be forgotten that the reality of professional accountability increases existing levels of proficiency ans ensure that high standards of work ethics are maintained.

Verkruisen[174] calculates that medical negligence claims will greatly increases, despite a noticeable elevation in the quality of medical services. He explains that there are basically two main reasons for this prediction: the expected decrease of the number of avoidable medical injuries; but an improved percentage of successful claims.[175]

Hondius[176] believes that although the current developments[177] in the European protection of patient rights will probably increase medical malpractice liability, he is adamant that it will not reach the excessive levels known to America. As reasons for his viewpoint he notes that the following aspects of American law accommodate abundant litigation: the differences in the law of obligations relating to plaintiff's entitlement to claim satisfaction and the application of

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173 in South Africa this is especially true.

174 1997. De medische aansprakelijkheidsexplosie in Nederland: de voorgeschiedenis en het te verwachten vervolg. **Nederlands Juristenblad** (19:72), 846.

175 *"Op basis van het tegen elkaar inwerken van deze twe processen - vermindering van het aantal vermijdbare gevallen van gezondheidsschade, maar een groter percntage van deze gevallen dat zal worden verhaald - mag worden verwacht dat het aantal verhaalszaken van medische letselschades de komende jaren - ondanks de grote kwaliteitsinspanningen in de zorgsector - fors zal groeien." op cit* p 852.

176 *op cit* p 1710.

177 implementation of legislative guidelines for medical treatment agreements - see this ch *supra*.

punitive damages; the differences in procedural law, including pre-trial discovery and class actions and also the recognition of contingency fees. Hondius[178] suggests that plaintiffs in Europe have to a greater extent than their American counterparts, the additional advantage of alternative venues to redress their injuries such as effective social and also particular insurance.

4.6 Patient's challenges

Van Aller[179] mentions difficulties generally experienced by patients in medical negligence cases: difficulty in reconstructing the facts of the consultation and procedure; proving that the physician's conduct was below standard; deciding who to hold accountable - the physician or hospital; proving a causal link between conduct and damage and finally establishing damage.

4.7 Contributory negligence of patient

It has been found[180] that a patient's failure to carry out medical instructions does not necessarily amount to contributory negligence.[181] Van Oosten[182] writes in this regard: that once it is established that a physician has been negligent, the patient's contributory negligence is no defence to liability and can at best lead to an apportionment of damages or mitigation[183] of sentence. The degree of negligence also has no effect on liability, although it may influence the quantum[184] of damages.[185] It should always be kept in mind that the onus of proving the requirements of a particular cause of action,[186]as well as the damages claimed, rests on the plaintiff.[187]

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178 *ibid.*

179 1989. **Schadevergoeding na medische fout: Geluk bij een ongeluk?** Koninklike Vermande BV. Lelystad, 20 ao.

180 **Soumbasis and Another v Administrator of the Orange Free State and Another** (unreported - 1989 OPD).

181 note that plaintiff's contributory negligence is not taken into account when his action is based on contract, as the **Apportionment of Damages Act** No. 34 of 1956 does not apply to breach of contract - see ch 2.

182 *op cit* p 26.

183 reduction/ moderation/ easing of a judgement.

184 quantity/ amount of damages.

185 *op cit* p 26.

186 whether liability is based on delict or contract.

187 usually, the patient - **Blyth v Van den Heever** 1980 (1) SA 191 (A).

5. Conclusion

Harrer[188] conveys, and rightly so, that the birth of a child is no longer considered an inevitable act of nature, but as a perfectly plannable enterprise. It is the task of physicians to act in accordance with the proper medical standards and thereby ensure that this goal is maintained. It is reported that[189] if we are to maintain high standards of care while lowering medical costs, current malpractice law should be modified to bring these conflicting incentives int alignment.

188 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 89.

189 Anon. 1985. Rethinking medical malpractice law in light of medicare cost-cutting. **Harvard Law Review** (98:5), 1004.

CHAPTER 5

Physician's duty to inform

1. Introduction

A legal duty rests on all medical professionals to fully inform their patients about the nature and extent of any medical procedure planned for the specific patient.[1] This information is necessary to enable a patient[2] to make a rational choice whether or not to proceed with the proposed medical intervention[3] and then to give the required informed consent thereto.[4] This principle is trite law in legal systems all over the world.[5] Van Oosten[6] remarks that in terms of

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1 Van Oosten, F.F.W. 1995. Castell v De Greef and the Doctrine of Informed Consent: Medical Paternalism ousted in favour of Patient Autonomy. **De Jure** 166.

2 Clarke,1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge, draws our attention to the fact that "the persons seeking information are usually known as 'clients'; the word 'patient' would suggest that they were suffering from a disease, which is very often not the case." - because either the parents or their children are in fact affected by genetical abnormality in wrongful life litigation, both the terms patient and client are used in this study.

3 or rather choose an alternative procedure.

4 see *infra* on the requirements for lawful consent.

5 for references to the same position in other countries, see:
Harrer, H. 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 112: "On the other hand a surgeon may be liable if a procedure is undertaken without the patient's valid 'informed consent', in other words, in violation of the patient's right to self-determination." and also
Leenen, H.J.J. 1994. **Handboek Gezondheidsrecht, Deel I: Rechten van mensen in de gezondheidszorg** Tjeenk Willink, Alphen aan de Rijn (3de druk), 162.
Legemaate, L. 1997. Het recht van de patiënt op informatie, mede in relatie tot de dossierplicht van de arts. **Advocatenblad** (77:5), 202;
Earle, M. 1995. 'Informed consent': Is there room for the reasonable patient in South African Law? **SALJ** (112), 629: "Within medical practice, a patient's informed consent is necessary for the physician's actions to be legal, but different jurisdictions interpret the doctrine of informed consent differently."
see, however, Strauss, S.A. 1991. **Doctor, patient and the law** JL van Schaik, (3rd Edition), 15: "As a point of departure it may be stated that the doctor's duty of disclosure to the patient is a relative one only. On the basis of case law as it has evolved in a number of countries, including South Africa, it can be said that there is no absolute duty on the doctor to inform the patient on all aspects of his examination, the findings made in the course of the examination, the doctor's diagnosis, the treatment given or envisaged and the general prognosis."

6 *op cit* p 166.

both the South African law of contract[7] and delict, a patient's proper consent is fundamental to lawful medical intervention.[8]

> "In fact, barring special circumstances, such as emergency situations, statutory authority and, conceivably, authorisation by the court, the general rule is that in the absence of lawful consent of either the patient personally or someone acting on his behalf, medical interventions are wrongful or unlawful."[9]

This aspect of forensic medicine is of great relevance to the study of wrongful life litigation. In a wrongful conception action, the plaintiff would typically argue that the physician neglected to inform him of the known failure rate for the particular sterilization procedure, or failed to warn of possible natural reversal or about more assured alternatives, or failed to advise that additional contraceptive measures should be used until the success of the intervention has been established beyond any doubt *et cetera.*[10]

In wrongful birth and wrongful life actions various possible information breaches could occur.[11] A physician could neglect to inform a patient in a high-risk group of genetic disease of available genetic tests or a genetic counsellor could have omitted to properly inform a client about the actual risks of a planned pregnancy *et cetera.*

It is important to note that, as the medical professional's duty to inform his patient will be discussed comprehensively, one should distinguish between the varying focuses/ aspects discussed from time to time. Concomitant issues will also be addressed, such as the boundaries of people entitled to receive genetic information, the influence of subjective viewpoints of the medical practitioner on the effective provision of information, the specific duties of genetic counsellors regarding procreative decisions and so forth.

1.1 Background

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7 see *infra* where the contractual relationship between physician and patient is discussed.

8 **Palmer v Palmer** 1955 (3) SA 56 (O), **Correira v Berwind** 1986 (4) SA 60 (Z) and **Administrator Natal v Edouard** 1990 (3) SA 581 (A).

9 Van Oosten *op cit* p 166.

10 for specific references and case law, see ch 6.

11 for specific references, see ch 7 and ch 8.

Earle[12] writes that the doctrine of informed consent initially came from America and was only later-on embraced by certain Commonwealth countries.[13] He notes that legal consent has attached to it facets of contract. This contractual basis and freedom of agreement has been highly esteemed since Roman law times and confirms the concept of freedom of will.[14]

Wear[15] writes:

> "The law regarding informed consent varies across jurisdictions and countries, so in a global sense there is no single and settled sense of the law to explicate, not even on the level of basic principles and criteria."[16]

Bensing[17] reflects the importance of communication between physician and patient in the medical sphere. Special reference is made to the significance of proper information as invaluable assistance in making an accurate diagnosis. Bensing[18] elevates the value pf good communication above technological advances as instrument for physicians:

> *"De gebruikelijke omschrijving van geneeskunde als een combinatie van kunst en kude wordt hiermee uitgebreid met een derde factor: communicatie. Het is terecht dat communicatie op deze manier expliciet onder de aandacht wordt gebracht. Immers, communicatie - het uitwisselen van informatie en emoties - is het belangrijkste instrument van de arts. Belangrijker dan diagnostische hulpmiddelen, en belangrijker dan technologische interventies, al doet de coalitie van media, medische wetenschap, en industrie ons graag anders geloven."*

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12 *op cit* p 630.

13 he is of the opinion that this was not the case in England and South Africa - see *infra* for a different viewpoint.

14 "In medicine, one can detect a move away from the prior, tacit or general consent described by classical liberalism to a more specific consent for each procedure, as well as a duty of information, which is in part due to the increasing complexity of medical procedures." - *ibid.*

15 1993. **Informed Consent: Patient Autonomy and Physician Beneficence within Clinical Medicine**. Kluwer Academic Publishers, vol 4.

16 *op cit* p 5.

17 Dokter, H.J. and de Graaf, W.J. 1994. Arts - Patiënt Interactie: **Boerhaave Commissie voor Postacademisch Onderwijs in de Geneeskunde-Rijksuniversiteit, Leiden** - Arts-Patient Communicatie: De rol van Affectief Gedrag, 1.

18 *ibid.*

McLean,[19] on the other hand, focusses on the clear connection between technology and the duty to inform. She believes that the technical revolution has had a significant consequences for doctors and patients - "as the gap in technical skills widens, so the difficulties of communication inevitably increase". The development of medical science has therefore increased the importance of proper communication of information.

2. A comprehensive disclosure of information

Beer[20] reports on liability based on a lack of informed consent as a separate ground of medical negligence law:

> *"Een aparte vorm van aansprakelijkheid is die welke saamhangt met het ontbreken van 'informed consent' in het kader van een medische behandeling. Onder het begrip 'informed consent' wordt verstaan de door de patiënt voor medische behandeling gegeven toestemming die is gebaseerd op voldoende en zorgvuldige informatie die van de arts is verkrygen."*[21]

Non-compliance of the duty to inform could have far-reaching implications for a medical practitioner,[22] as a patient is then unable to give his permission for the proposed medical intervention.[23] Legemaate[24] declares that it is of vital importance that a patient should be informed of the following relevant aspects[25] concerning his/ her specific condition or request[26]

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19 1989. **A Patient's right to know - Information Disclosure, the Doctor and the Law** Dartmouth - Medico Legal Series, 4.

20 1991. **Aansprakelijkheid voor Medische Fouten: Vanuit Juridisch oogpunt bezien** Koninklike Vermande BV. Lelystad, 12.

21 A paraphrased summary of this quotation is: Liability for the failure to obtain an informed consent is a separate class of liability found in medical negligence law. Informed consent is the patient's consent prior to medical treatment, based on sufficient and meticulous information supplied by the physician.

22 see fn 7 and also the discussion of the value of proper information *infra*.

23 Strauss *op cit* p 4.

24 1996. **Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg**, W.E.J. Tjeenk Willink, 99.

25 the Dutch statutory regulation found in art. 7:448 lid 2 BW provides that the following aspects should be covered: (compare with the discussion on the proposed comprehensive disclosure discussed on p 5 *infra)*.

- *de aard en het doel van het onderzoek of de behandeling en van de uit te voeren verrichtingen;*

and/ or the particular medical procedure or treatment proposed by the physician:[27] Legemaate[28] identifies a number of variables that could be used as guidelines to ascertain how the duty to inform should be applied in each particular instance:

- does the procedure entail an essential or non-essential intervention?;[29]
- is the treatment experimental or a non-standard approach?;[30]
- consideration must be given to the gravity of the risks and its consequences in relation to the frequency of its occurrence;[31]
- was the consequence of the risk a common incident?;[32]

- *de te verwacgten gevolgen en risico's daarvan voor de gezondheid van de patiënt;*
- *andere methoden van onderzoek of behandeling die in aanmerking komen;*
- *de staat van en de vooruitzichten met betrekking tot de gezondheid van de patiënt voor wat betreft het terrein van het onderzoek of de behandeling.*

26 There are a variety of reasons why a person could decide to consult with a physician. The most obvious reason would be that the patient is ill and seeks medical solace. It also frequently happens that a physician is required to give his expert opinion on a particular health matter, eg to interpret blood test results or maybe give advice to prevent possible future illnesses. Many prospective parents also discuss their future family plans with their general practitioner or a genetic specialist. This is especially true if prospective parents have a tendency/ history of genetic anomalies in their families or are themselves carriers of genetic disease.

The physician's duty to inform his patients will greatly depend on the nature of the consultation. Where it would accordingly be sufficient for a physician to superficially discuss with a flu-patient his condition and the treatment in a few sentences, he would have to be much more thorough and specific if asked to give his opinion to a couple with a high risk of genetic anomaly planning to have a baby. It is lastly essential for a physician to use common layman's language. The patient must be able to understand what will happen, why and when.

27 Van Oosten *op cit* p 171.

28 *op cit* p 100.

29 Legemaate, *ibid* states that although the duty to inform is required in both instances, a more stringent duty is expected in non-essential matters - (Rb Dordrecht 21 juni 1995, *re* a sterilization procedure).

30 *ibid* - it is submitted that a higher level of disclosure is required for procedures of experimental nature.

31 *ibid* - all consequences and risks should be disclosed, taking into consideration recurrence and prevalence/seriousness of the danger *ie* a rare occurrence with severe consequences should rather be disclosed than a non-frequent occurrence with moderate effects.

32 *op cit* p 101 - Legemaate reports that some courts have found in the past that certain well-known risks do not fall under the duty to disclose because they are common knowledge (Rb's Gravenhage 21september 1994, failed sterilization operation).

- are there specific circumstances surrounding the patient to be taken into consideration?;[33]
- the nature of the intervention in relation to relevant litigious interests;[34]
- questions by the patient.[35]

Van Oosten[36] similarly reports on the nature and scope of the duty to disclose which is generally expected from a medical professional.[37] He distinguishes between disclosure as regards the nature of self-determination information and as regards disclosure of risks and dangers. Concerning the scope of the physician's duty to inform, the following aspects must at least be discussed, although *all* relevant surrounding circumstances should be added:

- the nature of the patient's disease/ condition;
- the nature of the procedure,[38] as well as its;
- extent/ scope;[39]
- administration;[40]

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33 *op cit* p 102 - certain specific circumstances of a particular patient could create a duty to inform of relevant aspects that would not normally fall under a duty to disclose eg in a case where a patient has lost a child due to a serious hereditary disease, the duty to inform such patient of the risk of failure of a sterilization is stronger than normal (Rb Dordrecht 21 juni 1995).

34 Legemaate *ibid*, conveys that in cases where medical interventions take place without the direct goal of healing a patient or improving the service related to the treatment of patients *eg* organ donation *etc*, the duty to disclose of possible risks is higher than normal.

35 *op cit* p 103 - the usual disclosure to patients is initiated by the physician and therefore, if a patient pertinently asks for more information, it should be be given thoroughly and in detail.

36 1995 *op cit* p 171.

37 see *infra* - who could fulfill the task of being informers.

38 the nature of the relevant procedure must be explained to the person who will receive the particular treatment, eg whether a patient will be thoroughly examined or merely superficially and specifically whether blood/ cell samples will be taken or whether medicine will be administered *etc.*

39 closely related to the nature of a medical procedure is the scope or extent of the intervention - a patient must be informed of the magnitude of the intervention and specifically with regard to the extent in which the patient's right to privacy and self determination will be infringed, thus, wether it will it be a trivial or a serious/ dangerous procedure.

40 with regards to the administration of treatment or an examination, what needs to be conveyed is the method of application, *eg* an injection or a tissue sampling, medication applied orally *etc.*

- importance;[41]
- consequences;[42]
- risks;[43]
- dangers;[44]
- advantages/ disadvantages;[45]
- alternative procedures;[46]
- prognosis;[47]
- expertise and experience of the physician;[48]

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41 a physician must be sure to explain to the patient the reasons why, according to his expert opinion, a certain intervention will be necessary - if there is reason to believe that a procedure must be performed without delay, this should also be mentioned.

42 not only must the reasons and nature of a procedure be explained, but also the effect that the treatment is expected to have on the patient's body and mind.

43 Although the reasonable physician would not disclose very unusual or extremely uncommon risks, **Richter v Estate Hamman** 1976 (3) SA 226 (C), **Lymbery v Jefferies** 1925 AD 236, *dangerous* unusual or remote risks and also dangers *about which the patient makes enquiries*, should however be disclosed.

In terms of genetic research and testing probable risks are often minute, but because the resultant health conditions or consequences are sometimes serious such improbable possibilities should be disclosed. When patients consult with a genetic counsellor for specific genetic advice eg on their particular risk of conceiving an impaired child, it is obvious that all relevant information should be given to those parents and to withhold such information would be breach of contract (positive malperformance) - see ch 2 on contractual liability.

If there are any risks involved with the administration of a procedure it is vital that the possibility of the realisation of such risks be disclosed. An example in the scope of genetics would be that there is an approximate risk of 5% in the administration of an amniocentesis that the foetus could be injured.

44 Inherent dangers to a medical procedure (see fn *supra*) must obviously also be mentioned. In this regard a physician would inform a patient considering an amniocentesis that if the foetus were to be injured during the procedure, a spontaneous abortion could take place or that the foetus could be born handicapped as a result. Here it is equally essential that the procedure be placed in perspective in that the dangers that exist if no action would be taken must also be disclosed.

45 in order to achieve a fully comprehensive disclosure, it is necessary that the pro's and con's of all possible options available to the patient be mentioned.

46 Although the physician's first choice of action must be propagated, it might also be beneficial to the patient if alternative (and maybe less drastic) procedures are given as an option. The final choice is, after all, that of the patient. The patient must be guided in this decision and the reasons why the alternatives would be the physician's second choice must be given.

47 Van Oosten *op cit* p 170 - which may include the possibility of subsequent interventions.

48 a higher level of proficiency is expected from a specialist - see ch 4 *infra* regarding medical negligence.

- professional personnel, technical resources, degree of specialisation of hospital;
- cost;[49] as well as
- any other relevant aspect.[50]

3. Who should inform?

With regard to the correct person to inform an individual concerning genetic diagnosis and in the field of clinical genetics generally, the prevailing view is that *treatment* and *genetic counselling* should be provided by different individuals.[51]

> "The committee would like to emphasise the importance of simple and well-balanced information about the disorder to be detected and about the real significance of carrier status. This is important with regard to obtaining informed consent from the person to be tested."[52]

Hondius[53]debates whether it would be sufficient if a patient is informed by nursing staff and declares that, although such inputs could be of invaluable assistance, it is not acceptable as the only source of information. The physician in question should as a minimum requirement at least act as a co-informer.

> "The information to be provided should be the best possible, and it should be conveyed by the health professionals involved. Midwives, gynaecologists, general practitioners and other primary health care workers should possess adequate

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49 This is an important aspect of *concensus* which is often overlooked or ignored in the scope of medical procedures. The law of contract requires that contracting parties must reach agreement on all the essential aspects of the contract before a legal tie or obligation between the parties is created and a legal, binding contract is concluded. The cost of the proposed medical procedure is very much an essential aspect of their agreement.

50 This includes information given to inform the patient of all the relevant aspects of the patient's medical condition and also the medical procedure intended. Based on these facts, the patient then has to make a decision on whether he wants to proceed with the treatment and, if so, with which of the possible treatments available. When the patient gives his consent (based on the information given to him by the medical expert) the physician has legal authority to perform the chosen procedure, in the manner and to the extent the patient consented thereto.

51 Anon. 1994. Genetic screening. **Report: Health Council of the Netherlands: Committee Genetic Screening** (Publication no. 1994/22E), 51.

52 *ibid.*

53 1995. De privaatrechtelijke positie van de patiënt. In Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1679.

knowledge of the field of genetics. They must subscribe to the purpose and the use of a given test, since the hazards posed by incomplete or incorrect information would otherwise be too great."[54]

Gevers[55] writes that the provision of genetic advice is not the sole responsibility or monopoly of geneticists. He believes that general practitioners and other specialists also play an important part, especially with regard to the awareness and availability of genetic testing under patients as well as providing information to possibly affected family members.

Eriksson *et al*[56] gives an illustration of the various parties that could be involved in genetic counselling, indication the usual course that is followed by an individual seeking genetic advice. He suggests that such an individual could, in the Netherlands, probably find the best assistance at any one of the seven centres for hereditary studies affiliated with the particular universities. These centra are equipped with the best facilities, the most advanced examination techniques and methods and also have computerised information systems. He is of the opinion, however, that all the medical professionals involved with providing genetic information work well together.

"Het samenspel tussen artsen, specialisten en hulpverleners enerzijds en de ouder- en patiëntenorganisaties anderzijds blijkt goed te werken."[57]

He[58] emphasises the important role of the general practitioner in the whole process of genetic counselling,[59] especially with regard to the initial awareness to possible genetic risk, the availability of genetic tests and also the referral to specialists. Because the general practitioner often has a close relationship with the patient (probably also with the family), and has a detailed medical history and access to other relevant information, he is generally the person in the best position to provide initial assistance.

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54 Anon. 1994. *op cit* p 65.

55 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 8.

56 1985. **Over erfelijkheid - aangeboren afwijkingen erfelijkheids voor lichting begeleiding.** Bosch & Kenning, 24.

57 *ibid.*

58 *op cit* p 25.

59 see *infra* regarding the various facets of genetic counselling.

4. A duty to inform

The main purpose of the duty to inform is basically to protect the patient's freedom of choice and his right to self-determination by placing the patient (as a layperson) in a position to make a rational decision based on knowledge and appreciation of his medical situation.[60] In absence of such information, real consent will be lacking.[61]

Legemaate[62] conveys that the patient's right to information is also a fundamental right in Dutch law and is not only well established in professional codes, rules of conduct, criminal judgements and civil court decisions, but is since 1995 also affirmed in legislation.[63] He directs that the duty to inform should be approached with regard to the specific patient, taking into consideration the patient's ability to understand, development, education and experience.[64]

Closely related to the nature and scope of the duty to disclose are the surrounding circumstances and facts of each case that has to be taken into account to determine to what extent the patient must be informed.[65]

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60 Van Oosten, F.F.W. 1996. Patient Rights: A status report on the Republic of South Africa. **Law in Motion - International Encyclopaedia of Laws** - World Law Conference, 997: "In the medical context this has been taken to mean that there will usually be a duty incumbent upon a doctor, as an expert, to furnish the patient, as a layperson, with the necessary and sufficient information to establish the requisite knowledge and appreciation and, hence, effective consent to the proposed medical intervention." He refers to the following authorities: **Esterhuizen v Administrator Transvaal** 1957 (3) SA 710 (T); **Stoffberg v Elliott** 1923 CPD 148; **Lampert v Hefer** 1955 (2) SA 507 (A); **Lymbery v Jefferies** 1925 A 236; **Richter v Estate Hamman** 1976 (3) SA 226 (C); **Castell v De Greef** 1994 (4) SA 408 (C); **S v Edouard v Administrator, Natal** 1989 (2) SA 368 (D); **Verhoef v Meyer** (Transvaal Provincial Division, 12 September 1975); **Mtetwa v Administrator Natal** 1989 (3) SA 600 (D); **Binta** 1993 (2) SACR 553 (C), **S v Kiti** 1994 (1) SACR 14 (E); **Administrator, Natal v Edouard** 1990 (3) SA 581 (A).

61 Van Oosten, 1995 *op cit* p 167, also **Pringle v Administrator Transvaal** 1990 (2) SA 379 (W), **Castell v De Greef** 1994 (4) SA 408 (C).

62 *op cit* p 202.

63 art 7:448 BW - see fn *supra.*

64 see *supra.*

65 Van Oosten *op cit* p 171, appropriately lists various relevant considerations:
- the nature of the patient's disease or medical request;
- the nature of the proposed intervention;
- the available alternatives to the proposed intervention;
- the urgency and gravity of the proposed intervention;
- the potential adverse consequences of the proposed intervention;
- the degree of risk or danger that the proposed intervention entails;
- the frequency of complications;
- the expertise and experience of the doctor concerned;
- the professional personnel, technical resources, standard of hygiene and

An important aspect that should be remembered when a patient is informed is the fact that he is a layperson that could easily be intimidated by the use of medical jargon or a highly technical discussion or an un-sympathetical approach by the doctor. For this reason, physician must assess each particular patient to determine the correct scope and detail of disclosure. Beer states:[66]

> *"Een gevoel van machtelossheid ten opzichte van de ziekte en van intimidatie door de medische terminologie en technologie plaatsen de patiënt meestal in een afhankelijkheidspositie van de arts."*

Although the duty to inform is a general duty with a broad application, it would appear[67] that no duty to disclose exists where the patient is already in possession of the required information;[68] the patient expressly or impliedly waives his right to information;[69] the so-called defence of 'therapeutic privilege' is applicable; or where disclosure in the circumstances is impossible.[70]

5. Therapeutic privilege

This excuse to not informing a patient is found where the harm caused by the disclosure would be greater than the harm caused by non-disclosure. Here a physician makes a decision based on his own subjective opinion that the revelation of certain shocking/ disturbing information relating to the patient's health would cause the patient more harm than keeping this information from him, for example were an elderly patient without any prognosis of recovery would suffer great trauma when learning that he suffers from a dangerous disease, whilst he will in any event live for but a few months.

Leenen[71] discusses a possible problematic situation that could arise from genetic diagnosis that could lead to the application of the so-called therapeutic privilege. This would occur where the

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degree of specialisation of the hospital or clinic; and
- the patient's personal and professional circumstances.

66 *op cit* p 54.

67 Van Oosten, F.F.W. 1991. The Legal Liability of Doctors and Hospitals for Medical Malpractice. **SAMJ** (80), 25.

68 *eg* where a patient has received the required information at an earlier consultation.

69 see ch 2 and *infra* for a discussion on the waiver of rights.

70 *eg* where the patient is unconscious.

71 *op cit* p 73, 164.

physician or genetic counsellor learns that the client suffers from of a serious, untreatable and previously undetected hereditary disease. A similarly difficult situation could arise where traces of genetic anomaly is detected which could possibly have affected already born children or probably will affect future children. Leenen writes that where knowledge of such devastating and unexpected news would cause the client serious damage, the genetic counsellor would be in a position to apply his therapeutic privilege.

Hondius[72] agrees that the duty to inform could be suspended in cases where the individual entitled to the information would suffer serious harm as a result.

> *"Informatie hoeft niet worden verstrekt indien de patiënt hier ernstig nadeel van zou ondervinden. Deze zgn. therapeutische exceptie moet met terughoudenheid worden gehanteerd."*

Grubb[73] writes that with regard to contraceptive advice, there should generally be no reason for withholding any information based on therapeutic privilege. This could, however, be possible where an operation is carried out on a woman with a diseased womb or if there were other pregnancy related-dangers the particular patient. He writes:

> "It would seem that withholding information can only be justified by the doctor on the ground that he fears that knowledge of the small risk of reversal would deter the patient from having the operation. This ought not be a good reason for non-disclosure: it is paternalism at its highest..."[74]

Strauss[75] also discusses the extent to which a patient should be informed of uncertain potential hazards. He believes that there is no duty to inform a patient of remote possible consequences and that a particular risk should be assessed based on empirical, statistical knowledge. It is submitted[76] that South African courts[77] would most likely leave the duty to inform to sound medical judgement and restrict disclosure of possible risks to those made by reasonable

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72 *op cit* p 1697.

73 1988. Contraceptive advice and doctors - A law unto themselves? **The Cambridge Law Journal**, 12.

74 *op cit* p 14.

75 *op cit* p 9.

76 *ibid.*

77 **Richter v Estate Hamman** 1976 (3) SA 226 (C) at 232 H.

medical practitioners in similar circumstances.[78] There would therefore be no duty to inform if a physician is convinced that full awareness of the severity of a patient's condition would be therapeutically detrimental. A "common-sense" view is taken by the South African courts in this regard.[79]

6. Right to information

Leenen[80] confirms the patient's right to proper information and concomitant principle that no valid consent[81] can be given without sufficient information.[82] He reports that the development of patients' right to information has influenced the patient-physician relationship in that some physicians consider this to be a breach of the traditional trust patients had in the physician's knowledge and discretion. Leenen[83] disagrees with this contention and believes that better communication between physician and patient will rather enhance the trust between the parties. He further states that proper communication will necessarily lead to more accurate diagnosis[84] and has the additional advantage of resulting in fewer complaints and negligence claims instituted by unhappy patients against their physicians.[85]

Grubb[86] agrees that the quality of medical service would increase with improved disclosure and communication:

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78 see ch 4 on medical negligence for the "reasonable doctor test".

79 **South Africa Medical and Dental Council v McLoughlin** 1948 (2) South Africa 355 (A).

80 *op cit* p 170 - *"Niet informeren is niet nakomen van de overeenkomst. Indien daaruit schade is onstaan, zal de patiënt daarvoor vergoeding kunnen claimen." ie* failure to inform constitutes breach of contract on ground of which the patient can claim for any resultant damages.

81 it is mentioned that a patient can also at any time revoke his consent, upon which event the physician must discontinue the medical treatment, but only after informing the patient of the consequences of his revocation.

82 *ie* "informed consent".

83 *op cit* p 164.

84 it is reported that incorrect diagnosis leads to a considerable percentage of medical negligence claims.

85 he refers to a study done in the U.S.A. where it was shown that well informed patients are less likely to blame their physicians for thwarted expectations.

86 1988. *op cit* p 14.

> "If the medical profession were to volunteer more information, a franker dialogue between doctor and patient would result. This should also be the aim of legal rule-making in this context. Indeed, this would have the desired effect anyway, because there would be nothing for a patient to litigate about if he had been put in a position to make an 'informed' choice."

With regard to nature and scope of the physician's duty to inform, Leenen[87] states that a reasonableness criteria should be used. Under such a paradigm should be understood the release of information concerning facts and possibilities that a reasonable person would regard as necessary, under the circumstances, in order to reach a decision on a specific medical intervention, treatment and also its consequences. He writes that the importance or severity of a proposed medical intervention does not influence the scope of required information and rejects the notion that a lighter duty to inform is expected for trivial medical procedures.

Beer[88] writes that if *every* possible risk were to be disclosed, consultations would take an unacceptable period of time and patients will probably be unnecessarily unsettled as most complications occur very rarely. As illustration he questions whether it could reasonably be expected from an internist to disclose a 1 in 20 000 chance of complication in a particular treatment:

> *"Een ieder zal zeggen dat een juiste balans in de informatie moet worden nagestreefd, doch waar licht deze balans? Is de balans zoals hierboven[89] reeds kort aangeduid, althans in de optiek van de patiënt niet in belangrijke mate afhankelijk van de uitkomst van de behandeling?"*[90]

Earle[91] believes that there is a difference between consenting to treatment and refusing it and that "it is doubtful whether the degree of disclosure of information required would be as high in cases where the patient refuses treatment on the basis of insufficient information and a risk associated with non-treatment eventuates; or that causation (in terms of remoteness of

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87 *op cit* p 165.

88 *op cit* p 55.

89 referring to the particular aspects that have to be discussed with the patient, as discussed *supra*.

90 A paraphrased summary of this quotation is:
Although it is clear that a balance must be found in the extent of disclosure necessary, it is not that simple to determine where that balance should lie. The entire discussion surrounding informed consent only becomes relevant once a patient is prejudiced and therefore the result of a medical intervention is maybe the most important factor to be considered.

91 *op cit* p 633.

damage) in such a case would be as easily proved." He is further of the opinion that a patient should be nevertheless informed of the consequences of leaving the ailment untreated as well as any alternatives.[92]

Schoonenberg[93] asks to what extent a physician could be expected to volunteer genetic information. He states in this regard that only vitally important information should be given out.[94]

Leenen[95]reports on instances where the right to information is influenced by factors beyond the reach of the patient:

> *"Ook kan niet-informeren voortvloeien uit een conflict van plichten van de arts. Een voorbeeld is dat de arts over voor de patiënt belangrijke informatie beschickt, verkregen van familieleden die geen toestemming gegeven de patiënt in te lichten. Dat kan zich bijvoorbeeld bij genetische gegevens voordoen."*[96]

A physician is as a general rule not entitled to inform the family of the patient concerning medical information of the patient because of his basic duty to secrecy.[97] He may only release information with the consent of the patient. There could nevertheless arise circumstances of necessity where a physician would have no choice but to inform others of important information relevant to them, which would necessarily result in a conflict of duties for the physician. As this would only happen in exceptional cases, Leenen reports,[98] there are barely any established rules governing such situations.

Strauss[99] reports with regard to a physician's therapeutic duty to inform the patient where

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92 and their respective risks.

93 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 62.

94 *"..uit eigen beweging die informatie te verschaffen die voor de patiënt van vitaal belang is." ibid.*

95 *op cit* p 168.

96 (168) *ibid* - a paraphrased summary of this quotation is: A physician's restraint to inform a patient could occur in the event of a conflict of interests, eg where he has received information relevant to the patient in question from a source who has not consented to the release of the information, possible in the event of genetic data.

97 see *infra.*

98 *op cit* p 170.

99 *op cit* p 8.

failure to do so may cause him physical or mental harm[100] that the standard in America is rather that of the reasonable/ prudent patient, than that of the reasonable physician.[101]

Barrett[102] has the following to say about the physician's duty to inform:

> "The adequacy of disclosure is determined using the "prudent patient" standard: the physician must disclose all information which would be material to a prudent patient regarding the choices of proposed treatments and their inherent or potential risks."

In the South African case of **Richter v Estate Hamman**[103] it was found that a physician is negligent in failing to provide information to a patient if the reasonable physician would have done so under the same circumstances.[104] *In casu* it was testified by neuro-surgeon with regard to the reasonableness of a physician to withhold information, that different approaches are taken in respect of different complaints: If a patient's compliant is serious, the doctor should tend to emphasise the possible relief and minimise the risks, whereas a trivial compliant would call for the opposite approach.[105] Although this is an apparent view of some practising physicians, it is submitted that the subjective views of the physician[106] should not influence his approach towards the patient in respect of information. The court summarised the position in this way:

> "If he fails to disclose the risks he may render himself liable to an action for assault, whereas if he discloses them he might well frighten the patient into not having the operation when the doctor knows full well that it would be in the patient's interest to have it. It may well be that in certain circumstances a doctor is negligent if he fails to warn a patient, and, if that is so, it seems to me in principle that his conduct should be tested by the standard of the reasonable doctor faced with the particular problem. In reaching a conclusion a Court should be guided by medical opinion as to what a reasonable doctor, having regard to all the circumstances of the particular case, should or should not do. The Court must, of course, make up its own mind, but it will

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100 therapeutic privilege.

101 **Canterbury v Spence** 464 F. 2d 772 (1972).

102 1994. *Hummel v. Reiss:* The New Jersey Supreme Court Takes a Step Backward in its Recognition of Wrongful Life. **Rutgers Law Review** (46:465), 558.

103 1976 (3) SA 226 (C).

104 see ch 4 on medical negligence.

105 *ie* "the doctor should be perfectly frank and possibly even over- emphasise the risks" - Strauss *op cit* p 267.

106 whether a specific ailment/ condition is serious or not.

be assisted in doing so by medical evidence."[107]

6.1 A right to information or a duty to receive it?

Kamm[108] writes that the right to give an informed consent is really the right to have full information about the procedure on the basis of that information, which right can be waived, unless it is also a duty to be fully informed before one acts. She asks:

> "Perhaps in medical context we have come to the point where we will not allow people to act without being informed and so will not allow them to waive their right to give informed consent. Thoughtful and informed decision making would then be not just a right but a duty."[109]

An interesting viewpoint on the right to information is touched by Shepherd.[110] He argues that although parents essentially have a right to receive information, societal attitudes will increasingly pressure parents into obtaining genetic information before childbirth, which will eventually place a duty on them to undergo genetic tests:

> "Even absent legal recognition of such a claim against the mother, prospective parents face growing medical, economic and moral pressure to avoid the births of such children, primarily because of the extent of suffering that birth will entail. Prospective parents may feel an ethical or moral duty not to continue such pregnancies, to follow the medically indicated and prescribed solution rather than rely upon their own autonomous ethical and moral capacities. The emerging notion that a child has a right to be born healthy - a right essentially based in suffering - requires parents to adopt a medical response to predicted suffering which excludes other equally caring responses."[111]

6.2 Standards of disclosure

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107 *op cit* 232 H.

108 1992. **Creation and Abortion - A study in Moral and Legal Philosophy** (Oxford University Press), 14.

109 *op cit* p 187.

110 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Dame Law Review** (72:1), 103.

111 *op cit* p 108.

Earle[112] distinguishes between three possible standards from which the duty to disclose can be perceived, depending on whose interests are represented. The first is the medical-professional standard,[113] the subjective-patient standard[114] and the objective test standard.[115] Earle is in favour of the objective standard in terms of which a physician would be expected to know that the seriousness of inherent consequences is directly proportional to the patient's desire for information. If a physician therefore knows that a particular patient has a special interest in possible risks or consequences of treatment, even very remote possibilities should be disclosed.[116]

Gevers[117] conveys with regard to the standard of genetic examination and advice that:

> *"Erfelijkheidsonderzoek en -advies dienen, zoals alle medisch handelen, te beantwoorden aan de professionele standaard. Dit begrip kan worden gebruikt als aanduiding van het geheel van beroepsplichten waaraan het medisch handelen onderworpen is...drie bronnen worden onderscheiden waaruit dergelijke normen voortvloeien: de aard van het medisch handelen, de rechten van de patient en de maatschappelijke functie van de gezondheidszorg."*[118]

In conclusion as to whether a subjective or an objective standard of disclosure should be followed, one could say that the basic question is between the test of the reasonable physician or the prudent patient.

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112 *op cit* p 637.

113 as accepted by the English courts - see *infra.*

114 "According to which each specific patient would have to attest to whether he or she would have made a certain decision given the disclosure of risks, has been criticized for being prone to hindsight and to the whims of the unreasonable patient, and because it would not be practically possible to handle all patients identically and with a view to fairness under a subjective test." *op cit* p 637.

115 "The objective test is more practically operable. It disposes of the problem of hindsight by asking how the average prudent person in the plaintiff's situation would have decided, given the circumstances. It also dispenses with the problem of holding a practitioner liable for the whimsical courses of action of his or her patients under the subjective test." *op cit* p 637.

116 that would otherwise not be necessary.

117 *op cit* p 9.

118 A paraphrased summary of this quotation is:
Genetic testing, as well as the provision of genetic advice and counselling should adhere to the professional standard set for all medical practice. ie an indication of professional duties that regulate all medical conduct. Three sources can be identified from which these norms flow: the nature of the medical intervention, the rights of the patient as well as the social function of medical care.

7. Effective consent

It is important to note that while consent could usually be implied[119] by a patient's conduct,[120] many difficulties can be avoided by granting express consent either orally[121] or in writing. Van Oosten[122] summarises the basic requirements of effective consent in a medical context:

- it must be recognized by law;[123]
- consent must be given by someone who is legally capable of consenting;[124]
- it must be informed consent;[125]

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119 Hondius *op cit* p 1699 states that the Dutch Civil Code (*Burgerlijk Wetboek*) pertinently recognizes implied consent to medical intervention in sec 7:466, on condition that the procedure is not serious or significant.

120 After the physician's task is laid down (*ie* the medical problem has been discussed with the doctor), the patient generally gives his tacit consent to the doctor's inspection and treatment by allowing the doctor access to and assistance with the inspection of his/ her body. If the required medical intervention involves a more serious/ intensive procedure or an operation, a patient would most likely as a matter of general practice be expected to expressly consent to the intervention in writing. Physicians often feel safer to have "conclusive evidence" that a patients has in fact consented to a procedure - Van Oosten *op cit* p 24.

121 it is always difficult to prove the existence and precise terms of an oral agreement/ consent - see ch 2.

122 *ibid.*

123 In accordance with public policy, as one may not under all circumstances consent to the infringement of rights. It would namely be legally impossible to consent to a definite, serious infliction of injury as this would be regarded as *contra bonos mores* (see *infra*). One will therefore have to determine in each particular instance whether the waiver of the right to information has in fact resulted in such an injury. If intended "consent" is given for a definite and serious injury, no legal permission for the infringement of a subjective right has been given and no waiver to institute action has in fact taken place. It is for this reason obvious that waiver of this right must not be taken lightly - see *infra* for a further discussions on the waiver of rights and the *pactum de non petendo in anticipando.* Neethling, J. Potgieter, J.M. and Visser, P.J. 1999. **Law of Delict.** Butterworths (3rd edition) 102: "The consent must be permitted by the legal order, in other words, the consent must not be *contra bonos mores*."
S v Collett 1978 (3) SA 206.

124 As a general rule any sane and sober adult has the capacity to validly consent to medical interventions - note, however, that a married patient has to give consent to his/ her own diagnosis and treatment, also Neethling *et al, op cit* p 100: "A person is capable of volition when he has the mental capacity to distinguish between right and wrong and to act accordingly."

125 legally adequate information is essential to enable sufficient knowledge and appreciation in order to give lawful consent - also Neetling *et al, op cit* p 100: "The consenting person must have *full knowledge* of the extent of the (possible) prejudice." **Castell v De Greef** and **Santam Insurance Co Ltd v Voster** 1973 (4) SA 764 (A) 781.

- it must be comprehensive;[126]
- it must be clear and unequivocal; and
- it must be free and voluntary.[127]

Further established principles regarding the legal requirements of lawful consent and voluntary assumption of the risk of injury in general are:

- the consenting party must fully realise/ appreciate the nature and extent of the harm;[128]
- the person consenting must in fact subjectively consent to the infringement of his

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126 see p 2 *supra* - Berry *op cit* p 30 states that:
"In order to make the detail of the high technology tests available to those who usually have little technical knowledge it is important to communicate in a way that is appropriate so that the people concerned feel neither patronized by being talked down to nor overwhelmed by technical jargon."

127 Neethling *et al*, *op cit* p 99, also **R v McCoy** 1953 (2) SA 4 (SR). Although one could perceive that the matter of individual consent to medical assistance would generally be without external pressure and interference, it could well be a different story in wrongful conception and wrongful birth cases as a child now enters the equation and therefore additional parties have interests in the diagnosis and all other medical interventions of the mother and (future) foetus. It could be that the father or prospective father may not agree with the mother's wishes to undergo/ not undergo an amniocentesis or other genetic testing procedure or even an abortion. In these instances the unfettered consent from the mother is of great importance, as her right to bodily integrity supercedes the father's interests in the unborn child - see § 12 *infra*, (for further reference to constitutional matters, see the discussion of the Constitution of South Africa, ch 9).

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.

Note also§ 5 of the current abortion act on ch 3:

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.

128 Neethling *et al, op cit* p 101: "Mere knowledge of the risk or harm concerned is therefore not sufficient; the plaintiff must also *comprehend* and *understand* the nature and extent of the harm or risk." - **Castell v De Greef, Waring and Gillow Ltd v Sherborne** 1904 TS 340.

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rights;[129]

- consent is a unilateral act which can be unilaterally revoked at any time before the actual infringement of rights takes place;[130]
- consent is a legal act and should therefore be apparent and manifest;[131]
- consent may be given either expressly or tacitly;[132]
- consent must be given *before* the prejudicial occurrence[133] and
- the infringement consented to must fall within the limit of the consent given.[134]

Neethling *et al*[135] conveys that as consent is a ground of justification,[136][137] the person inflicting

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129 **Castell v De Greef, Santam Insurance Co Ltd v Voster**, 780. Van Oosten *op cit* p 173 writes that the focus must be on the patient who is capable of understanding the information and reaching a decision, while disclosure should otherwise only be to someone acting on the patient's behalf.

130 Neethling *et al*, *op cit* p 98, **Jooste v National Media Ltd** 1994 (2) SA 634 (C), 649.

131 **R v Taylor** 1927 CPD 16.

132 express consent can be given either orally or in writing - see *infra* on written consent.

133 as opposed to the *pactum de non petendo in anticipando*, where waiver of the right to claim can take place even after the infringement - the person consenting to harm intends to preclude the harmful act from being unlawful.

134 **Burger v Administrateur, Kaap** 1990 (1) SA 483 (C), also the unreported case of **Verhoef v Meyer** (Transvaal Provincial Division, 12 September 1975), where a patient initially consented to treatment, but later was no longer willing to undergo an operation. It is vitally important that a physician obtains consent to a specific medical intervention and not only to treatment in general. Another important principle of consent is that it may be revoked at any time before the actual infringement takes place. Strauss *op cit* p 36 states that especially in cases of drastic or unusual surgery, a physician should set in writing the essential nature and risks involved and obtain written consent for such procedure.

135 *op cit* p 104.

136 *op cit* p 97, they mention that this justification is derived from the maxim *volenti non fit iniuria* (he who consents cannot be injured) found in the Roman and Roman-Dutch law *D* 47 10 1 5; De Groot 3 35 8 and Voet 47 10 4 and distinguish between two forms of consent: "Consent takes two forms: *consent to injury,* and *consent to* (or acceptance of) *the risk of injury.*"

137 Necessity and undue administration are other grounds of justification that can be raised by a physician against a complaint of physical infringement without consent: "Like unauthorised administration, necessity as a defence in the medical context also connotes lawful medical interventions in emergency situations, but unlike unauthorised administration it does not require that the patient was incapable of consenting or that the intervention must be against his will or that the intervention must be in his best interest." - van Oosten, 1991 *op cit* p 25. Van Oosten, F.F.W. 1996. Patient Rights: A status report on the Republic of South Africa. **Law in Motion - International Encyclopaedia of Laws** - World Law Conference, 992: "Moreover, in terms of a policy ruling of the South African

the injury or affecting the infringement of the consenting person's rights,[138] acts lawfully.[139] In this respect one should distinguish between prior consent and the so-called *pactum de non petendo in anticipando*.[140] Such an agreement is a contractual undertaking not to sue a wrongdoer[141] who has in fact committed a delict.[142] The agreement therefore identifies the individual in question against liability.

Earle[143] also conveys that legal consent has attached to it various facets of contract and quotes: "every human being of adult years and sound mind has a right to determine what shall be done with his own body".[144]

Strauss[145], in summary, gives four "golden rules" relevant to obtaining consent:

- obtain consent from the person legally *competent* to give consent;
- obtain an *informed* consent;
- obtain a clear and *unequivocal* consent; and
- obtain a *comprehensive* consent.

8. Refusal to receive information

Medical and Dental Council (SAMDC) a medical practitioner is obliged, in cases of emergency, to render assistance at all times..".

138 in medical terms a patient consents to the infringement of his personality rights and especially his rights concerning bodily integrity, as a physician is permitted to either examine, do tests, analyse, apply medication and on a more significant level, execute a medical procedure (*eg* give an injection/ x-rays) and even operate or amputate.

139 Van Oosten, 1996. *op cit* p 999, reports on the landmark South African decision of **Castell v De Greef** in this regard: "The court prefers to place the doctor's duty of disclosure and its concomitant, the patient's informed consent, within the framework of the wrongfulness element rather than the fault element of delict."

140 **Payne v Minister of Transport** 1995 (4) SA 153 (C) 160 and **Jameson's Minors v CSAR** 1908 TS 575.

141 *ie* a waiver of the right to institute legal proceedings.

142 and therefore has necessarily acted wrongfully - see ch 2 for a discussion on delictual liability.

143 *op cit* p 630.

144 **Schloendorff v Society of New York Hospitals** 211 N.Y. 125 N.E. 92 (1914), 97.

145 *op cit* p 4.

Leenen[146] believes that an individual's right to refuse information has special relevance in the field of genetic counselling and declares:

> *"Bij erflijkheidsadvisering heeft het recht om geen informatie te willen ontvangen, speciaal gewicht. Informatierecht is geen plicht om informatie te ontvangen. In het WGBO (art. 1653c) is het recht neergelegd om niet geïnformeerd te willen worden 'behoudens voor zover het belang dat de patiënt daarbij heeft niet opweegt tegen het nadeel dat daaruit voor hemzelf of anderen kan voortvloeien'. Bij erfelijk onderzoek met voorspellende mogelijkheden of waarbij ontdekking van een latente onbehandelbare ziekte tot de mogelijkheid behoort, behoren over het al dan niet informeren en de wijze waarop zal worden gehandeld, vóór het onderzoek afspraken te worden gemaakt. Dergelijke afspraken doen recht aan de zelfbeschikking van de patiënt. Ook na het onderzoek doch voordat de uitslag is medegedeeld, kan de adviesvrager nog besluiten niet te willen worden geïnformeerd."*[147]

9. Written consent

Although a patient can give his express consent to the fact that he has been properly informed by his physician either orally or in writing,[148] Legemaate[149] reports that a new trend is emerging to require written consent. This is probably an attempt by physicians to escape possible negligence liability based on failure to comprehensively inform their patients.[150]

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146 *op cit* p 74.

147 A paraphrased summary of this quotation is:
To have a right to information does not constitute a duty to receive information. The only instance where information could be "forced" on an individual is where the damage that he (or others) would suffer as a result of not knowing, is out of proportion to the forced receipt of information. Leenen suggests that client and counsellor should agree before genetic testing (with a inherently predictive nature) commences on the procedure that will be followed if a latent and incurable disease were to be detected. Such an agreement will supercede the patient's right to self-determination. A client/ patient could nevertheless still decide after the examination, but before the diagnosis has been made known, not to be informed about the results.

148 **Stoffberg v Elliott** 1923 CPD 148.

149 1997. Het recht van de patiënt op informatie, mede in relatie tot de dossierplicht van de arts. **Advocatenblad** (77:5), 202.

150 it is submitted that, although written consent should not be seen as a quick-fix solution to all problems related to the duty to inform and should certainly not be seen as a shortcut to a proper informative discussion, a written acknowledgement remains a valuable documentary evidence which will doubtlessly assist a physician in proving that the duty to inform was in fact adhered to.

Strauss[151] explains:

> "There are two different schools of though on the best way to take consent. The one school holds that a detailed written consent should be taken; the other holds that there should be no written consent at all and that the doctor can rely on the patient's tacit consent. There is obviously no necessity to insist on a formal written consent in respect of minor procedures...The more drastic the procedure is, the more advisable it is in my opinion, from a legal point of view, for the doctor to take a fairly detailed written consent, in which the essential character of the operation is described in simple terms understandable by the layman."

Hondius[152] reports that while both written and oral consent is statutorily recognized, oral consent is disadvantageous for the medical practitioner because of difficulties of proof. A drawback of written consent is that it would reduce the prevalence of oral consent. He suggests that a combination of both oral and written consent would be ideal.

Legemaate[153] warns of possible disadvantages that could result from the exclusive use of written consent. Firstly, he cautions against the replacement of the personal conversation-discussion between physician and patient with a standard type consent form. He mentions that it would be possible that patients are prejudiced hereby, in that they read through highly-technical jargon without understanding the meaning thereof and then consent to it without having the knowledge or appreciation. Secondly, he forewarns of a possible misconception that written consent by a patient will ensure foolproof protection against medical negligence liability.

He[154] reports on the official viewpoint of the KNMG[155] that there are more negative than positive attributes associated with written consent forms. Legemaate also reports on a further development in the Netherlands by the *Vereniging voor Obstetrie en Gynaecologie*[156] concerning policy regarding patient consent to sterilization. Although specific guidelines have been issued to physician assigned to perform sterilization procedures in the form of a checklist they have to refer to, no recommendation has been made to use consent-forms.

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151 *op cit* p 289.

152 *op cit* p 1698.

153 *op cit* p 207.

154 Legemaate *op cit* p 206.

155 *"Koninklijke Nederladsche Medischce Gemeenschap"*, set out in 1995.

156 the Dutch Obstetrics and Gynaecology Society.

Olsthoorn-Heim[157] explains that the Dutch "medical treatment agreement: expressly states that [158]orally obtained informed consent is sufficient and written consent would only be necessary in cases of drastic medical interventions or where the patient requests that all agreements be reduced to writing.

9.1 Written reports

Broekhuizen[159] reports on Leenen's opinion with regard to the practice of comprehensively reporting every aspect of a patient's condition and treatment in writing and states that it is unnecessary and impractical. He warns that a culture of defensive medicine might develop if written reports were to be required to provide an informed consent, which practice is concurrently detrimental to the physician-patient relationship:

> *"Daar ben ik op tegen, dat artsen alles gaan opschrijven en doemt zelfs het gevaar op van het Amerikaanse schriftelijke informed consent. Dit zijn onleesbare stukken. We hebben dit in Nederland nog niet. Gelukkig maar, want het is slecht voor de relatie tussen arts en patiënt en het leidt tot defensieve geneeskunde. Het recht zal daar iets aan moeten doen."*[160]

10. Escaping liability

Fain[161] reports that some doctors are attempting to protect themselves by telling every mother-to-be that she has at least a 2% risk of giving birth to a impaired child, as "standard procedure". By doing this, the mother will be prevented from arguing afterwards that she wasn't warned of the possibility of her bearing a defective child.

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157 1994. Toestemming: de inhoud telt. **Tijdschrift voor Gezondheidsrecht** (3), 123.

158 *"Op 22 Februarie 1994 aanvaardde de Tweede Kamer het voorstel van Wet geneeskundige behandelingsovereenkomst. De teneur is dat mondelinge toestemming volstaat. Volgens artikel 1653e is schriftelijke vastlegging - door de hulpverlener - alleen nodig voor ingrijpende verrichtingen en voor zover de patiënt om die vastlegging vraagt. Schriftelijke informatie kan ondersteunend zijn, maar niet vervangend."*

159 1995. Rode draad: 'Beroepsaansprakelijkheid': Interview met prof. dr. H.J.J. Leenen. **Ars Aequi** (44:11), 851.

160 *op cit* p 856.

161 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

There is not implicit guarantee of success for medical interventions[162]and the vast majority of physicians would not consent to or casually give such guarantee, as liability could then follow much easier. Gevers[163] writes that the correct transfer of information has become so important that it has become practice in some Dutch clinical genetic centra that those requesting genetic counselling receive a written report on the most important aspects concerning their condition/ the prospects discussed with them, which reports are, with the consent of the patient, sent through to the specialist/ general practitioner in question.

> *"Naarmate de over te dragen informatie complexer is, zal de noodzaak toenemen om te waarborgen, dat geen misverstanden ontstaan."*[164]

Lodeizen-Schoonenberg and Stein[165] writes on the validity of disclaimer clauses[166] and states that it could be *contra bonos mores* under certain circumstances.[167] They list various aspects that should be taken into consideration when establishing if it would be allowable, such as the level of fault in reference to the nature and seriousness of the consequences, the nature and content of the disclaimer agreement, the social situation of the patient as well as the nature of the relationship between physician and patient. Other relevant issues are the manner in which the parties reach consensus and the extent of appreciation the patient showed with regard to the gist of the waiver.

They[168] are of the opinion that exclusion of liability for sterilization procedures for failure to inform, would in general not be enforceable. Suggested reasons for this viewpoint are that the patient's decision to undergo a sterilization and the specific consequences thereof necessitate complete information regarding alternatives, unexpected repercussions and complications. It is the responsibility of the physician to instruct and advise a patient on the intervention and that

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162 see ch 4.

163 *op cit* p 11.

164 *ibid* - as the information to be communicated becomes increasingly complex, the necessity to *guarantee the transfer of information*, to ensure that no misunderstandings result becomes more compelling.

165 1983. Uitsluiting van medische beroepsaansprakelijkheid. **Tijdschrift voor Gezondheidsrecht** (4:7), 167.

166 *"exoneratieclausules"* - see *supra.*

167 in terms of the Dutch Civil Code sec 2 (2), any general clause that is unreasonably prejudicial for a party to a contract, when taking into consideration the nature and content of the whole agreement as well as the reciprocal interests of both parties, is in principle voidable - *ibid.*

168 *op cit* p 179.

it would be performed according to certain prescribed regulations, and attempts to bypass these duties by excluding liability would be unacceptable. However, it is argued[169] that a disclaimer would be perfectly in order where a patient has been properly informed.

> *"O.i. is er weinig bezwaar tegen aansprakelijkheid voor het feit, dat sterilisatie heeft plaatsgevonden alsmede voor de specifieke consequenties, die aan de ingreep verbonden zijn, tegenover de ter zake voldoende geïnformeerde patiënt uit te sluiten."*

Regarding waiver agreements, Leenen[170] conveys that is no supporter of this concept and states that these waivers are in any event not possible in terms of the Dutch "WGBO"[171] or the Act on medical agreements. If a physician accepts the instruction to treat a patient, he must be prepared to accept the consequences.

> *"Ik ben daar geen voorstaander van. Volgens de WGBO is het ook niet mogelijk. De patiënt kan nooit overzien wat een dergelijke beperking of uitsluiting inhoudt. Als de arts zegt: ik doe deze ingreep alleen onder deze voorwaarden, dan heb je een onvrije situatie. Als de arts een medische behandeling uitvoert, dan moet hij voor de consequenties instaan."*

Strauss[172] warns that, although written attested consent has "considerable evidential importance", caution should be applied with regard to *pro forma* consent forms as these forms by themselves would be no defence to an action based upon assault if no explanation had in fact been given.[173]

It is reported[174] that also hospital authorities[175] endeavour to exclude possible vicarious liability[176] by expecting patients to consent to imperious conditions of admission. Although it

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169 *op cit* p 180.

170 as quoted in Broekhuizen 1995. **Ars Aequi** (44:11) *op cit* p 856.

171 *Wet op de Geneeskundige Behandelingsovereenkomst.*

172 *op cit* p 13.

173 under these circumstances consent is only given in form, not in reality as decided in the English case of **Chatterton v Gerson** (1981) QB 432 at 443 D.

174 Strauss *op cit* p 305.

175 especially private hospitals.

176 the fundamental principle concerning vicarious liability is that a person (or institution/ legal person) is not liable for the wrongful act of an independent contractor engaged by him, although circumstances may dictate that a legal duty is placed on an employer to take steps to prevent such harm to members of the

is mentioned[177] that several American jurisdictions have declared such waiver conditions invalid, it is submitted that South African courts will recognize unequivocal and properly defined exemptions, although intentional misconduct or grossly negligent conduct could not be legally endorsed by such agreement.

11. Diagnostic disclosure

Physicians are from time to time consulted for the specific and exclusive reason to give a professional opinion or diagnosis.[178] This would be the case in most wrongful life instances where an expert is asked to give his view on a specific matter, for example, the patient's chances of bearing a disabled child or transferring a hereditary disease. It is important that physicians appreciate the fact that these expert opinions are given on a professional-contractual basis and carry the same risk of possible liability should the physician be negligent in providing them. Because of the general duty on physicians to serve the best interest of their patients, it seems obvious that diagnosis disclosure would be imperative where it may affect the patient's decision whether or not to submit to the proposed intervention; it is an express or implied term of a so-called "diagnosis contract" between the doctor and patient; or where it is essential for therapy and a failure to do so may cause the patient physical and/ or mental harm.[179]

Strauss[180] explains that the diagnosis concerns the question "Why?": in wrongful life terms, why should a specific patient undergo genetic testing or why is it potentially dangerous for a particular patient to have children (with his/ her spouse)? Strauss believes that a proper diagnosis is formed based on a complexity of symptoms, involving scientific assessment of each case on the basis of the physician's knowledge, skill and experience. He is not of the opinion that a general duty exists, to under all circumstances *fully* inform every patient of the diagnosis and submits that "full diagnosis must generally be given only where the patient

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public.

177 *ibid.*

178 *ie* where a patient does not suffer from any ailment or expects the physician in question to provide medication.

179 *eg* where a physician actually tries to convince a patient to undergo a specific test or medical procedure by emphasizing the medical importance/ benefits thereof, as would be the case where an elderly woman would be encouraged to undergo prenatal testing if she was found to be pregnant.

180 *op cit* p 8.

stipulates this as a condition to giving his consent to an operation or treatment."[181] He states that full diagnostic disclosure should also be given where the information is material to the patient's decision to undergo or refuse treatment.[182]

12. Genetic counselling

Closely related to and often overlapping with the diagnostic disclosure of a physician is the informative task of the genetic counsellor. Clarke[183] describes genetic counselling as what follows when a person asks questions of a health professional (the genetic counsellor) about a medical condition or disease that is or may be genetic in origin. She indicates what proper genetic counselling should consist of by suggesting the following characteristics of a consultation with a client.[184]

Firstly, a genetic counsellor should listen attentively to find out what the client's questions and concerns are. It is secondly important that the diagnosis of the individual should be confirmed or clarified and here it might be possible that calculations be made to ascertain the risk of possible recurrence of a disorder from knowledge of a family history and other genetic tests. The information requested by the clients should then be communicated to them in an understandable and appropriate manner. A further element of a geneticist's service should be scenario-based decision counselling, whereby clients are guided in thinking through and considering their individual responses to the various possible options. A final component of proper counselling is the provision of ongoing support to clients and their families.[185]

Berry[186] submits that part of a geneticist's role is to work through the various decisions and reproductive options available to potential parents and try to sort out with them the best way forward.

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181 *ibid.*

182 it is submitted that this would often be the case in wrongful life matters.

183 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge.

184 she believes that the person seeking information should be referred to as a 'client' rather than a 'patient', as the former implies that the person is suffering from a disease and which is often not the case.

185 especially relevant here is the instances where individuals are at risk of developing adult onset disorders - see *infra* where post-counselling support is discussed in more detail.

186 *op cit* p 29.

Leenen[187] declares that the same principles regulating the general duty to inform is applicable in respect of genetic diagnosis/ counselling. According to Leenen, it has been established in Dutch law that a genetic counsellor should not only inform a client of all relevant aspects, but should also see to it that the client understands the gist of the disclosure.

Fain[188] believes that genetic counselling has increased in both scope and use, as this specialised science has developed over the years. She therefore suggests a new, more complete definition of genetic counselling, as:

> "A multi-step process in which the genetic counsellor attempts to help the couple to:
>
> - comprehend the medical facts, including the diagnosis, probable course of the disorder and the available management;
> - appreciate the way heredity contributes to the disorder and the risk of recurrence in specified relatives;
> - understand the alternatives for dealing with the risk of recurrence;
> - choose the course of action which seems to them appropriate in view of their risk, their family goals and their ethical and religious standards and to act in accordance with that decision;
> - to make the best possible adjustment to the disorder in an affected family member and/ or risk of recurrence of that disorder."[189]

This holistic approach to genetic advice is to be recommend and it is suggested that these five steps be closely followed by physicians to ensure sufficient and thorough genetic counselling. This multi-step process of genetic counselling, as described by Fain, will in most instances make an educated decision possible for parents confronted with such a situation.

The criteria of the Council of Europe[190] set for the term "genetic tests for health care purposes" refers to a test which reserves:

- to diagnose and classify a genetic disease;

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187 *op cit* p 73.

188 *op cit* p 616.

189 *ibid.*

190 Anon. 1994, - **Recommendation No. R (92) 3 of the Committee of Ministers to Member States on Genetic Testing and Screening for Health Care Purposes** (Adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of the Ministers' Deputies).

- to identify unaffected carriers of a defective gene in order to counsel them about the risk of affected children;
- to detect a serious genetic disease before the clinical onset of symptoms in order to increase the quality of life using secondary preventive measures and/ or to avoid giving birth to affected offspring
- to identify persons at risk of contracting a disease where both a defective gene and a correct lifestyle are important as causes of the disease.

With regard to general rules for good practice in genetic testing and screening, various principles were laid down by the Council.[191] Concerning the quality of genetic services, the following were laid down:

- proper education should be provided regarding human genetics and genetic disorders, particularly for health professionals and the paramedical professions, but also for any other profession concerned;
- genetic tests may only be carried out under the responsibility of a duly qualified physician;
- it is desirable for centres where laboratory tests are performed to be approved by the state competent authority in the state, and to participate in an external quality assurance.[192]

Gevers[193] agrees that quality genetic counselling should be provided and states that high levels of proficiency should be expected from counsellors, especially with regard to the communication of information.

Frets[194] has made a study of the problems experienced by patients who have to make reproductive decisions after receiving genetic counselling. The report on her findings reveal the following important aspects regarding their informed decisions:

In a follow-up study of 164 couples, an evaluation was made concerning reproductive decision-making 2-3 years after genetic counselling. The study revealed that 43% had problems making the reproductive decision and had experienced the decision-making process as difficult; had doubts about the decision they had made; or had been unable to make a decision.[195]

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191 Anon. 199, *op cit* p 113.

192 *ibid.*

193 *op cit* p 10.

194 1990. The Reproductive Decision after Genetic Counselling. **Proefschrift - Erasmus Universiteit, Rotterdam**, 75.

195 it is submitted that if nearly half of all patients find it difficult or impossible to make an informed decision after receiving proper genetic counselling, it would be an even more impossible task if no or insufficient counselling is given.

She[196] conveys that a logistic regression analysis revealed the following factors as independently and significantly associated with problems in the decision-making process: no post-counselling relief; anticipation of a high risk level; relatives' disapproval of decision; the decision not to have a(nother) child; and the presence of an affected child. An interesting finding revealed that 45% of the couples eligible for prenatal diagnosis who decided to have children experienced the decision-making process as difficult, against 23% of couples deciding to have children while prenatal diagnosis was not available. She suggests that a possible explanation for this result is that problems in the decision-making process might only become apparent *after* genetic counselling rather than in the course of it. To remedy this challenge, it is submitted that structured follow-up sessions[197] should occur 3-6 months after genetic counselling to identify couples that would benefit from additional supportive counselling.[198]

12.1 Psychological impact of genetic diagnosis

It is possible that genetic counselling could place future parents in a state of emotional confusion.[199] Just being confronted with the possibility gives rise to anxiety and stress. The first spontaneous expectation on the part of the parents is to be reassured that their child is normal.[200]

There is a distinct difference between diagnostic tests and tests to evaluate the degree of risk involved, which should be made quite clear to the patients.[201] Psychological test on risk perception have shown that most people find it difficult to correctly understand chances and to deal with the associated level of uncertainty. The level of anxiety engendered by screening[202] can be further reinforced by lack of information or clarity in the interpretation of test results. A heightened risk does not necessarily imply that the unborn child actually has the disorder. It is therefore necessary to explore the consequences of informing people that they have a heightened risk.

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196 *ibid.*

197 see duty to re-contact *infra*.

198 indicating that a physician's duty to support and continually advise a patient should not stop after the initial consultation.

199 see fn (3 below) *infra*.

200 Anon. 1994, *op cit* p 52.

201 *ibid.*

202 Anon. 1994, *op cit* p 53.

Frets[203] reports that feelings of guilt[204] played an important role in half of the couples confronted with a reproductive decision after receiving genetic counselling. She suggests that genetic counsellors should focus on understanding counselees' feelings, especially concerning: acceptance of apparently irrational considerations[205] and support with/ understanding the role played by guilt towards parents or an affected sibling.

Gevers[206] reports that the prevention of the birth of handicapped children, made possible by genetic testing, is a social issue. He suggests that there could be a conflict between the clients' right to self-determination and the interests of future children and asks whether the counsellor does not have a responsibility towards future children with a high risk of being born with serious birth defects, to convince the clients/ parents not to have any children. He answers that although such a view could have honourable motivations, the genetic counsellor may never allow his professional opinion to be superceded by personal norms and values.[207]

12.2 Time of diagnosis/ genetic counselling

12.2.1 Diagnosis prior to conception[208]

If people are aware of the risk at this stage, all possible courses of action regarding their offspring are still open. Genetic diagnosis also creates opportunities to discover, at an early stage, a susceptibility to disorders which occur later in life.[209] That risk may perhaps be reduced by adapting their environmental factors and/ or lifestyle.

12.2.2 Prenatal diagnosis

Prenatal diagnosis could be not only in the interests of the parent(s), but also in the interest of

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203 *op cit* p 90.

204 "Guilt feelings were more predominant in couples with an affected sibling than in those with an affected spouse." *ibid.*

205 as these feelings indicate the influence of unconscious motives.

206 *op cit* p 13.

207 see discussion *infra* on the influence of geneticists' subjective views on the procreative decision of patients.

208 Anon. 1994, *op cit* p 63.

209 there are some diseases (cystic fibrosis) where it is not yet possible to detect all carriers of the trait in question - in this context in particular, the importance of providing good information cannot be understated.

the unborn child.[210] Based on prior notice, the expectant parents can opt for any course of action, based on their personal views.

12.3 Excessive information

To further complicate the matter of correct information disclosure, a physician should be wary not to "over-inform" his patient, as excessive information hampers a rational decision, which is tantamount to no information at all.[211] The question as to what sufficient information would be must be answered on a case-by-case analysis and it is suggested that the "reasonable medical practitioner" test should be applied.[212] If a patient should ask to be fully informed concerning his medical condition, the physician's duty to disclose is extended and *full* information should be communicated.[213] The reason for this is the prevalence of patient autonomy in South African medical law.[214]

12.4 Value of proper information - consequences

The legal consequences[215] of a medical intervention performed without the patient's lawful consent are that the doctor or hospital may incur liability for breach of contract;[216] civil or

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210 "With prenatal diagnosis, results which indicate the presence of a predisposition to a disorder usually involve severe disorders for which no treatment is available. In such cases, the available courses of action are rather limited when compared to diagnosis carried out prior to conception. The only choice available to the parents of the unborn child are to terminate the pregnancy or to accept the birth of a child with the disorder."

211 **SA Medical & Dental Council v McLoughlin** 1948 (2) SAH 355 (A) and **Castell v De Greef** *supra.*

212 Physicians often have a close relationship with their patients and therefore would in the vast majority of cases know how to best approach and inform each particular patient. If a relatively unknown or new patient must be informed, a common sense approach should be applied: To bombard an average layperson with detailed aspects of a highly technical nature would probably only confuse a patient and do more harm than a superficial explanation would. Each patient's individual intellect, education and development should guide a physician in determining the correct level of information needed.

213 even if this disclosure would be harmful or shocking to the patient.

214 **Richter v Estate Hamman, Castell v De Greef** *supra.*

215 in South African law.

216 **Behrmann v Klugman** 1988 (W) - unreported.

criminal assault (a violation of physical integrity);[217] civil or criminal *injuria* (a violation of *dignitas*/ privacy);[218] negligence;[219] and/ or the doctor or hospital may be unable to recover a professional fee;[220] medical regulations and ethical codes will in addition magnifying the extent and seriousness of such misconduct. Van Oosten[221] aptly sums-up the basis of the principle of proper disclosure:

> "This[222] applies irrespective of whether or not the intervention was administered with due care and skill and eventually proves to have been beneficial to the patient, the reason being that the violation perpetrated by the doctor wh performs the wrongful or unlawful intervention is one against the patient's physical integrity or *dignitas*/ privacy rather than one against his health."

Hondius[223] debates on what sanction would be best used against a physician who failed to give any or insufficient information to his patient in the Netherlands. He raises the question if a physician under such circumstances could not possibly argue that the prejudicial consequence would have materialised whether he has forewarned the patient of its possible occurrence or not. It is reported[224] that this question has been answered in the French law in the following way: If the failure to inform has deprived the patient of an opportunity to exercise a choice in the matter, such prejudiced patient should have a claim for financial compensation.

Earle[225] reports that an action for trespass[226] against the physician who performs a medical intervention on a patient without informed consent is often instituted in America, whilst an action for battery is also possible.

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217 **Stoffberg v Elliott**; **Lampert v Hefer** 1955 (2) SA 507 (A); **Esterhuizen v Administrator Transvaal**; **Richter v Estate Hamman**, **S v Binta** 1993 (2) SACR 553 (C), **S v Kiti** 1994 (1) SACR 14 (E).

218 **Stoffberg v Elliott**.

219 **Lymbery v Jefferies**, **Dube v Administrator Transvaal** 1963 (4) SA 260 (W), **Richter v Estate Hamman**, **Castell v De Greef** *supra.*

220 **McCallum v Hallen** 1916 ODPA 74.

221 *op cit* p 167.

222 *ie* principle of proper disclosure.

223 *op cit* p 1696.

224 *ibid.*

225 *op cit* p 632.

226 "..an action in trespass, thereby conflating the torts of medical negligence and medical trespass." *ibid.*

> "In America, a doctor's duty required by courts in disputes is that of reasonable disclosure regarding the probable consequences and dangers falling within his knowledge. Consent based on such disclosure can be said to have been informed, and the degree of disclosure required is a question for the court."[227]

In England, it is reported,[228] that medical intervention without any consent amounts to battery,[229] while imperfect or insufficient consent could constitute negligence, which is the dominant cause of action in England. Earle writes that negligence would be found were the physician in question's conduct "departs from general and approved medical practice and is based on things said and not said".[230] He explains that the standard of the legal duty of care concerning the provision of information is a physician-based one.[231]

12.5 Case law developments in South Africa

Although the duty of disclosure has been generally adhered to by South African physicians through the years, the pertinent judicial acceptance and far-reaching importance[232] thereof only recently came under the spotlight in the judgment of **Castell v De Greef**.[233] Legal principles concerning forensic medicine in general, but also wrongful life litigation specifically, were established in this landmark decision. Some have even suggested that a new category of personality rights, *ie* the right to self-determination or freedom of choice has been created by this judgement.[234]

With regard to direct wrongful life application, the following rules were entrenched:
It was established beyond doubt that the doctrine of informed consent applies to South African

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227 *op cit* p 631.

228 *ibid.*

229 **T v T** (1988) 1 All ER 613.

230 **Clark v MacLennan** (1983) 1 All ER 416.

231 see *infra* where the "Bolam principle" is discussed.

232 Van Oosten *op cit* p 993.

233 *supra.*

234 "...the court appears to have introduced, in so many words, the patient's right to self-determination or freedom of choice as a separate and distinct category of personality rights in South African medical law." Van Oosten *op cit* p 178.

law.[235] No consent can therefore legally be given by a person for the infringement of any right (*in casu* personality rights)[236] without the necessary knowledge- basis from which appreciation of all relevant aspects and consequences related to the future infringement[237] transpires.

Secondly, the court stated that patient autonomy is of greater importance than medical paternalism.[238] The court shifted the emphasis from a professional medical standard of disclosure to a patient autonomy standard of disclosure, as the decision to undergo or refuse a medical procedure has now been solely reserved as that of the patient.

In the third instance the court found that the duty to inform a patient is based on contract.[239] It is submitted that a physicians are nevertheless concurrently bound by a delictual duty to disclose, as the *boni mores* would still expect from a physician to act in accordance with the general level of proficiency found in the medical fraternity.[240]

Another vital foundation laid down by the court is that if a reasonable patient would have though certain information relevant/ important and if the physician could be expected to reasonably have foreseen that the patient would have though it important, then the physician

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235 Ackermann J, 420 G-H: "I am constrained to disagree, inasmuch as I am of the view that *there is not only a justification, but indeed a necessity, for introducing a patient-orientated approach in this connection.* It is important, in my view, to bear in mind that in South African law (which would seem to differ in this regard from English law) *consent by a patient* to medical treatment is regarded as falling under the defence of *volenti non fit injuria*, which would *justify an otherwise wrongful delictual act*."

236 Barnard, Cronjé and Olivier 1994. **The South African Law of Persons and Family Law**, Butterworths, (3rd edition) 6: "The right to personality property is a personality right. A person's right to his good name, his honour *and his corporeal integrity* are examples of personality rights as the object of the person's right in these instances is an aspect of his personality."

237 as consent can only be given based on information, it is obvious that proper disclosure must precede consent - see, however, the *pactum de non petendo* discussed *supra,* where prior agreement is reached that no claim would arise from a future injury.

238 Ackermann J on 421 C-D: "It is, in principle, wholly irrelevant that her (the patient's) attitude is, in the eyes of the entire medical profession, grossly unreasonable, because *her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment.* It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under the circumstances, it was the duty of the surgeon to refrain from bringing the risk to the patient's attention."

239 a doctor is therefore under a separate contractual obligation to furnish a patient with the necessary information - Ackermann J on 425 E-F: "In the South African context the doctor's duty to disclose a material risk must be seen in the contractual setting of an unimpeachable consent to the operation and its *sequelae*."

240 see ch 4 for a more detailed discussion on professional negligence.

does not fulfill his duty if this specific information is not given through to the patient.[241]

> "Instead, the question is now whether or not the *reasonable patient* would have regarded the risk or danger as significant, or whether or not the doctor was or could have been aware that the *individual patient* would regard the risk or danger as significant." [242]

A final important principle that was laid down was that it is for the court to make the final decision whether a physician acted negligently under the particular circumstances and not the physician's peers or other colleagues in the medical field.[243] In the same way a physician has a duty to inform his patient on any medical procedure, a genetic advisor is under an obligation to fully inform his patient concerning genetic and procreative matters.

Nijs[244] indicates that a physician's failure to properly inform a patient concerning possible fertility, alternative contraceptive measures could have been used and the unwanted pregnancy avoided.[245]

12.6 Position overseas

The **Castell** court referred to various overseas jurisdictions and indicated that the most have principally the same contention regarding specific patient disclosure.[246] Grubb,[247] however,

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241 it is therefore not important whether the *physician* assesses a risk to be serious or unusual or remote, but rather what the patient would consider as significant or not - special reference is made in **Castell** to the position overseas, as discussed from fn 140 *ao.*

242 Van Oosten *op cit* p 998.

243 Van Oosten *op cit* p 996: "Expert evidence might also have a bearing on the material nature of risks, provided it is borne in mind that the matter will not be concluded on the basis of expert evidence alone, but will ultimately be decided by the court."

244 1989. Het kind en de rekening fout, schade en schadevergoeding naar aanleiding van een mislukte sterilisatie. **Rechtskundig Weekblad** (52:22), 1156.

245 *"Als de gynaecoloog de informatiefout niet had gemaakt, dan had het echtpaar de kans gehad aanvullende anticonceptiva te gebruiken: zo had een zwnagerschap kunnen worden vermeden" op cit* p 1162.

246 The North Carolina Supreme Court decision of **McPherson v Ellis** 287 SE 892 N.C. (1982) is quoted as indicating the American position: "In determining liability by whether a reasonable person would have submitted to treatment had he known of the risk that the defendant failed to relate, no consideration is given to the particular quirks and idiosyncrasies of the individual. His supposedly inviolable right to decide for himself what is to be done with his body is made subject to a standard set by others. The right to base one's consent on proper information is

reports on English law which has applied[248] the so-called "Bolam tests"[249] whereby the medical profession itself determines whether specific conduct is in accordance with accepted medical practice or not:

> "Medical men are therefore put in a very favourable position. While the law imposes a duty of care, uniquely, the medical profession sets its own standard of care."

He[250] further informs in this regard that the majority view[251] of English courts is that the "Bolam test" should also be applied as benchmark for cases involving contraceptive advice.[252] Grubb writes that:

> "The fact that the courts rely very heavily on expert evidence in cases of medical

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effectively vitiated for those with fears, apprehensions, religious beliefs. Or superstitions outside the mainstream of society."

The **Castell** court also referred to the South Australian case of **F v R** (1983) 33 SASR 189 and the recent Australian High Court case, **Rogers v Whitaker** (1993) 67 ALJR 47 and stated: "In both cases the matter was approached on the basis of the doctor's duty of care to the patient, breach of which would constitute negligence on the doctor's part. As already indicated, the matter is approached somewhat differently in South African law, the enquiry being whether the defence of *volenti non fit injuria* has been established and in particular whether the patient's consent has been a properly informed consent."

Van Oosten *op cit* p 176 sums up the **Castell's** view in this regard: "The court prefers to place the doctor's duty of disclosure and it's concomitant, the patient's informed consent, within the framework of the wrongfulness element (with *volenti non fit injuria* or voluntary assumption of the risk of harm as a justification) rather than the fault element (intention - which the court, incidentally, does not refer to in this context - or negligence) of delict."

247 1988. *op cit* p 12.

248 in **Sidaway v Bethlem Royal Hospital** (1985) A.C. 871(see wrongful conception ch p6) the failure to disclose a risk on injury arising from a therapeutic procedure was at hand.

249 **Bolam v Friern H.M.C.** (1957) 1 W.L.R. 582 - a doctor's failure to disclose is not negligent if he has acted "in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art."

250 *op cit* p 13.

251 this "right of the doctor to decide everything" has been criticised by Lord Templeman and Lord Bridge in **Sidaway** 904, who believe that it should be up to the courts to decide whether a patient has received "sufficient information to make a 'balanced judgement".

252 in **Gold v Haringey Health Authority** (1987) 3 W.L.R. 649 it was found that a physician who failed to inform a patient of the small risk that nature may reverse the surgery and also neglected to advise the patient of a surgical alternative with a smaller risk of failure, was not negligent because of the application of the "Bolam test".

advice is explicable, because judges are very anxious not to trespass on a doctor's clinical judgement of what should be disclosed in the patient's best interests where the patient's health is at stake."[253]

Earle[254] also refers to the influence of the "Bolam principle"[255] on various jurisdictions and shows that this standard is constantly being eroded by courts in the context of advice and information[256] given to patients in judgements where "courts assert their own primacy over medical practice."

He believes that, although the **Sidaway** decision adopted a paternalistic and physician-orientated approach which aligned informed consent with professional duty, it did not leave the issue in medical hands alone. The gravity of this rule is also tempered by the fact that it was a decision of first instance and "what has become the *Bolam* test was part of a summing-up to a lay jury."

13. Emphasis on information

The nature of disclosure could have varying focus-points.[257] Information could be imparted for the single purpose of obtaining the patient's consent as an exercise of his right to self-determination,[258] or it could be imparted for the protection of the patient's health and other

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253 *ibid.*

254 *op cit* p 631.

255 "A rule that a doctor is not negligent if he acts in accordance with a practice adopted at the time as proper by a reasonable body of respectable medical opinion." - *op cit* p 633.

256 "What has become apparent is that, in respect of the *Bolam* test, there is a difference between treatment and information. Because as a general rule the judiciary lacks medical expertise, *Bolam* is only able to be eroded in the courts in respect of the standards of disclosure of inherent risks that are to be required of physicians by the law." - *op cit* p 638.

257 Van Oosten *op cit* p 169 distinguishes between two main categories of disclosure, *ie self-determination disclosure* (which serves the purpose of procuring the patient's effective consent as an exercise of his right to self-determination), classified as either diagnosis disclosure, disclosure of the course of events and disclosure of complications on the one hand; and *therapeutic disclosure* (with the purpose of procuring the patient's informed consent) on the other hand.

258 *eg* where a general practitioner informs a patient of a simple procedure or injection that will be administered during a consultation.

health related matters.[259] It is suggested that the information needed[260] to make an informed wrongful life/ birth/ conception decision, would fall under the last mentioned category.[261]

A subtle distinction, therefore, exists between general informed consent on the one hand and informed decision-making in wrongful life type situations, on the other. When consent is given in the general sense, a patient gives his "permission" to a physician to apply his medical expertise on a specific ailment or condition (usually) in his own body. It is my submission that informed decision-making in cases of wrongful life is much more complex and often has far-reaching implications in religious, social and financial spheres.

In these cases parents place all their trust in the accurate genetic analysis of a medical professional in order to decide whether a foetus in a high risk group of genetic anomaly must be given the opportunity of life or not. It is submitted that this great responsibility magnifies the importance of quality information, as these parents have to weigh all the information given to them by the doctor[262] and make a decision based on these facts.

Clarke[263] emphasizes the fact that genetic counsellors are in principle there to inform clients about a specific genetic condition or risk and not to make procreative decisions on their behalf. She writes, however, that many confuse this task and assign different duties to them:

> "Some clinicians in other branches of medicine still expect genetic counsellors to give their patients instructions as to whether they should have children or be sterilized or undergo prenatal diagnosis and possibly have a termination of pregnancy (genetic counsellors do not do this); they make inappropriate referrals of families who do not wish to be seen."[264]

She[265] identifies two distinct instances where informed consent can cause difficulties in

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259 the so-called "therapeutic disclosure" - **Dube v Administrator Transvaal**.

260 a patient should be familiarized with and prepared for the proposed medical procedure, *eg* sterilization/ genetic test and should be informed of the nature of his condition and instructed on how to behave before, during and after the procedure.

261 *eg* the case of **Behrmann v Klugman**, where the defendant-doctor failed to inform the plaintiff-patient to have a sperm count before resuming intercourse with his wife without contraception after having undergone a vasectomy - see ch 6.

262 as the expert.

263 *op cit* p 5.

264 *ibid.*

265 *op cit* p 8.

providing genetic counselling. The first is the issue of complexity: where clients are confronted with technically complex choices they can not effectively give an informed consent without adequate understanding.[266] Ethical problems arise when counsellors fail to adequately explain the possible choices to the clients. The second concern relates to genetic screening programmes which often offer "minimal information and cursory discussion." These screening programmes have also in past generated social problems such as racial discrimination against black Americans found to carry sickle cell disease and have similarly caused problems of stigmatization of thalassaemia carriers.[267]

14. Application to wrongful life litigation

The physician's duty to inform is extremely relevant to most instances of wrongful life. Teff [268] appropriately declares:

> "...the true rationale of 'wrongful life' ability is the parents' right to make a properly informed decision."

Foutz[269] states that proper medical information is similarly relevant to wrongful conception/ birth actions. In these cases the doctor, for instance, has a duty to inform his patients after a sterilization operation of the remote possibility that they could once again become fertile as reported cases exist where the effect of sterilization has been naturally reversed.[270] If a physician neglects to fulfill this duty he could be held accountable for the resulting damages. He further states that in a typical wrongful life action a disabled or genetically impaired child does not assert that the physician-defendant's medical negligence caused his detrimental condition. The plaintiff rather alleges that the defendant breached his duty to properly inform his/ her parents, in due time of the existing genetic defect in their child, or of a greater than normal risk of abnormality in their pregnancy.

Since it can be accepted that parents would act in their child's best interests, the plaintiff suggests that upon receiving this legally required information from the defendant, his/ her

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266 which can be attained through proper guidance and explanation.

267 *op cit* p 9.

268 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.

269 1980. **Tulane Law Review** (54), 488.

270 see ch 11.

parents would have prevented the pregnancy or would have ended the pregnancy by obtaining an abortion. Thus, had the defendant not breached his duty to inform, the physically challenged child would not have been born and would not have to suffer from impairments until the end of its often short and painful life. It is therefore of vital importance that physicians fully inform patients of the medical procedures intended by them, the results of tests done and also any other relevant facts concerning the health or reproductive plans[271] of patients in order to escape liability.

Legemaate[272] reports on liability for wrongful conception actions in failed sterilization procedures. He explains that the physician can be held liable either because of negligent performance of the sterilization itself or based on a failure to properly inform the patient or on account of both.

> *"Een bekend voorbeeld van een ingreep waarbij zowel aspecten inzake gebrekkige informatie aan de orde kunnen zijn als een onjuiste uitvoering van de ingreep is de sterilisatie van vrouwen. Binnen het geheel van civielrechtelijke procedures op het terrein van de gezondheidszorg, vormen die over mislukte sterilisatie een belangrijk deel. In een aantal van deze procedures wordt de arts verweten dat hij de ingreep technisch niet correct heeft uitgevoerd, ten gevolge waarvan de vrouw in kwestie zwanger is geworden. In andere gevallen houdt het verwijt aan de arts in dat hij de vrouw niet had geïnformeerd over het geringe mislukkingsrisico van de sterilisatie. In sommige procedures gaan deze beide verwijten samen."*

15. Disclosure for abortion

In **Lifchez v Hartigan**[273] it was decided that the right to privacy included the right to obtain information in order to decide whether to terminate a pregnancy.

When discussing the issue of informed decision-making, it is apt to specifically consider the life or death decision that wrongful life/ birth parents has to make when confronted with the possibility of an abortion.[274] Proper information is vital in these cases as the plaintiff-child will

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271 such as dangerous genetic genes detected in the patient or known hereditary diseases in the patient's family history.

272 1996. *op cit* p 105.

273 735 F. Supp 1361, 914 F. 2d 260 (1990), 111 S. Ct. 787 (1991).

274 Berry *op cit* p 34 submits that: "Although in the future clinical genetics is likely to involve treatment of genetic disease and prevention of disease in those at risk, at present prevention is very dependant on prenatal diagnosis and selective abortion

pertinently argue that his parents would have aborted him while a foetus, if they only had the necessary medical findings[275] of his disabled/ impaired future at the time when an abortion could still be requested.

The defendant-physician should accordingly realize the magnitude of the parent's choice and keep this in mind when considering the duty to inform. It would seem only human that the opinion of the physician[276] will have great influence on the final outcome of the matter.[277] It is therefore of utmost importance that all the relevant information is given correctly, timely and accurately. Instances where an interpretation of results must be made to advise prospective parents must also be handled with extreme caution. It would be wise under these circumstances to consult with a colleague in order to obtain a second opinion.[278]

As plaintiff-parents in wrongful life cases could be influenced by various factors when considering the abortion option, one writer[279] mentions 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.*"[280]

Grobe[281] reports on further infringements of the right to be informed and gives as an example the governmental intrusion of physicians' duty to inform brought about by a recent judgment, **Rust v Sullivan.**[282] In this case the Supreme Court of the United States of America upheld

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of affected fetuses."

275 and thorough genetic testing/ proper inquiries would have made these findings known.

276 as the specialist and professional.

277 van Oosten *op cit* p 168 comments: "While it may be true that the doctor is medically in the best position to judge the necessity or desirability of an intervention, considerations other than medical ones are often also relevant to the patient's decision to undergo or refuse an intervention. Such considerations normally fall outside the doctor's sphere of competence."

278 Sheperd, L. 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Dame Law Review** (72:1),115.

279 Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. **Harvard Law Review** (100), 2026.

280 my emphasis.

281 1992. The future of the "wrongful birth" cause of action. **Pace Law Review** (12:3), 717.

282 111 S. Ct. 1759 (1991).

rules governing state benefits pursuant to the Public Health Services Act, not to promote abortion as method of family planning. The court's decision has 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. It is suggested that such restrictions will severely hamper physicians in practising their profession. Grobe[283] rightly fears that women's abortion rights may be adversely affected[284] if physicians are relieved by the state from their duty to inform patients properly. It is important to recognize that the public health patients affected by the abovementioned judgment are entitled, like all other patients, to have "a liberty interest in being free from unwarranted governmental intrusion in the informed consent dialogue necessary to medical self-determination."[285] Grobe[286] hereby pleas for acknowledgement of the common law duty to disclose material information.[287] It is submitted that this viewpoint should be supported.[288]

15.1 Subjective influences

Another pressing aspect relevant to the doctrine of informed consent that is often overlooked, is the effect that personal believes and opinions of the person on whom the duty to inform lies have on the accuracy and acceptability of the disclosure in question. Shepherd[289] reports on a study which showed that various genetic counsellors interpret the same information in different ways, as a result of being influenced by external factors such as personal experience of suffering, understanding of disabled people, religious believes, training, moral upbringing,

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283 *ibid.*

284 and that recognition of wrongful birth actions might accordingly be reversed as a result.

285 *op cit* p 719.

286 *ibid.*

287 and states that this commonly recognized duty between physician and patient has in the past regularly founded liability in medical negligence cases.

288 Anon. 1994, *op cit* p 55 - Termination of pregnancy for genetic reasons: if, after a test result has indicated the existence of heightened risk, prenatal diagnosis reveals the presence of a severe disorder, most parents decide to terminate the pregnancy.

The individual has to set things straight regarding conflicting emotions and the clash between the image of a much-wanted child and that of a handicapped child. Nevertheless, in subsequent pregnancies, most women again opted for prenatal diagnosis.
In addition, some had feelings of guilt, *eg* for having passed on the disease or for having decided to terminate the pregnancy.

289 *op cit* p 103

personality,[290] general sense of compassion *et cetera*.

It is my submission that parents/ patients are not only entitled to comprehensive information but also have the right to *objective* clinical information. This directive would ensure that patients would not subtly be influenced in their decision-making by obtaining information tainted by the physician's own personal believes and attitudes. This is especially true since medical practitioners' own opinions are not constant. Sheperd[291]makes reference to a study in which it was shown that interpretations of medical statistics vary as time goes on and more accurate tests are developed.

Clarke[292]agrees that the supplier of information has a profound influence on the decision made by an individual seeking genetic counselling:

> "The decision as to whether or not to terminate a pregnancy affected by a sex chromosome anomaly (of minor importance in comparison to a diagnosis of Down syndrome) is influenced by the background of the person who gives the information: more terminations are performed if an obstetrician gives the information than if it is given by a genetic counsellor."

An important consideration in this regard is to assess what tests are accurate enough to be recommended to and performed on patients. Andrews[293] explains that while chromosome analyses or karyotyping[294] were done in earlier years, more modern tests have since been introduced which are generally much safer for the foetus, but not in every instance necessarily more accurate.

> "...the ultimate decision to undergo or forego a medical intervention, should rest with the patient as master of his own body and life and not with the doctor."[295]

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290 whether the medical practitioner is a natural optimist/ pessimist.

291 *op cit* p 113: "Since the introduction of prenatal testing, genetic counsellors have undergone a substantial change of heart what odds are high risks and what odds are low risks."

292 *op cit* p 18.

293 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 165.

294 whereby a small sample of amniotic fluid is subtracted from te womb and then tested - see ch 11.

295 Van Oosten *op cit* p 169: "The doctor's ethical duty to heal does not create a legal right to heal."

To ensure that this is possible, information-suppliers should be aware of the fact that their opinion is highly regarded by patients and that their appraisal could dramatically influence the final decision of the patient. It is accordingly contended that counsellors should try to "screen" their information before communicating it through to their patients, to ensure that only[296] the necessary scientific facts reach their patients. It is important a patient has the opportunity to make a subjective and discrete decision concerning his/ her own body, as the main purpose and function of informed consent is to protect the patient's right to self-determination, freedom of choice and also to encourage rational decision-making.[297]

Berry[298] has similar views on the genetic counsellor's duty to truthfully inform a patient. She feels strongly that accurate information has to be given at all times, whether good news or bad. Five relating aspects are discussed by her in this regard: Firstly, the geneticist's personal concerns must not influence the information.[299] Secondly one must consider the particular impact on the affected individual.[300] A third consideration for a counsellor is the impact of results on the parents of the affected child. In this respect it is important that geneticists be kept fully informed about the effectiveness of new treatments and evaluation procedures. Fourthly a geneticist should consider necessary and unnecessary truths, as many clients could be made unnecessarily anxious about possible or potential harm that is substantially remote. A final aspect to take into account is the reality that affected individuals might suppress the true facts.[301]

Berry,[302] in conclusion, debates whether it is not the duty of the genetic counsellor to guide the

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296 It would obviously be impossible to fully negate the human factor in this respect as every human is subconsciously influenced by his personal ideas and believes. If genetic counsellors would nevertheless make a concerted effort to be absolutely objective, it is likely that a much better and more acceptable result will be obtained.

297 **Castell v De Greef**, 409.

298 *op cit* p 31.

299 "The geneticist must endeavour to give the couple as accurate an outlook as possible, remembering that it is as serious an error to give a couple an incorrectly high recurrence risk which may deter them from further pregnancies as to give them too low a risk, resulting in their having a further affected child." *ibid.*

300 "An individual who is only mildly affected with, for example, *neurofibromatosis* needs to know the full range of the gene's potential manifestations so that he or she can decide whether or not to take the 50 per cent risk of transmitting the gene to the child, or whether to request prenatal diagnosis if it is available." *ibid.*

301 it is advised that great sensitivity should be applied in cultures and traditions where women have a low status in society as it is possible for a woman found to be a 'bad gene carrier' to lose a potential husband, security and status.

302 *op cit* p 42.

patient into making a morally responsible decision. Is it not irresponsible of a medical professional to allow the continued pregnancy of a woman carrying a foetus with a high risk of a severe disorder? Should the counsellor not exert some pressure on such a woman to undergo prenatal test in order to obtain a definite diagnosis? The obvious answer to this question should be a resounding "no".[303]

Eriksson *et al*[304] ask whether the true duty of a physician is to merely inform or to advise the patient. They come to the conclusion that through giving proper information, the physician makes it possible for the patient to make up his own mind. Only if a physician is specifically asked for his personal opinion, should it be offered.

> *"Met behulp van de informatie maakt de arts - dat is de bedoeling - de aanstaande ouders zo wijs, dat ze zelf de beslissing kunnen nemen over wat er verder gebeuren moet. Het ishun gezin dat er al dan niet komt, en het zijn hun kinderen."*[305]

Although a medical advisor must give his professional opinion on the relevant risks attached to a particular pregnancy and also has to inform the client on the expected malignant nature and characteristics of a possible hereditary disease, it still remains the sole decision and prerogative of the patient to decide on the matter.[306]

Bensing[307] suggests that the detection of medical conditions are perceived differently by patients than by physicians, as medical professionals generally seem to focus more on the importance of the bio-medical diagnosis itself, than on the effect of the knowledge thereof on the patient.[308]

Gevers[309] writes that all communication is tainted with subjective values. He reports that even

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303 Berry concedes *ibid* that: "The medical adviser may feel that the loss of the pregnancy is less of a disaster than having an affected child but it is the parents themselves who have to live for the rest of their lives with the result of their decision."

304 *op cit* p 32.

305 *ibid.*

306 see *supra* and particularly the decision of **Castell v de Greef**.

307 *op cit* p 1.

308 the detection of a rare hereditary disease in a patient could be a scientific achievement for a physician, whilst the knowledge thereof could drastically alter the affected individual's (and his family's) future plans to have children *etc.*

309 *op cit* p 14.

when a physician is not asked for his personal opinion, the physician would inadvertently structure his advice in a specific manner that could convey a positive or negative message. He summarises:

> *"Als elk ander communicatieproces, zal erfelijkheidsadvisering nooit geheel non-directief en waardenvrij kunnen zijn."*[310]

Bensing[311] distinguishes two basic patient-needs that physicians should be aware of. The first is appreciation of what precisely the patient expects from the physician[312] and secondly the patient wants to perceive that the physician understands his position and subsequently expects support, respect and acceptance from the physician. Bensing explains that the first is a cognitive need,[313] the second is an affective need[314] and both are equally important.

15.2 Perception of risks change

Shepherd[315] declares that physicians do unwittingly influence patients in providing calculated risk assessments during informative sessions. He[316] explains that there is a fluctuating point of view held by genetic counsellors on what high risks are and what odds are seen to be low (or acceptable). The professional viewing/ consideration of these odds differ as years go by and as medical technology advances. In addition to this uncertain state of affairs, counsellors characterize a potential disability to be a high or a low risk, depending on their personal assessment of the severity of the disability. This has the effect that even a minute chance to inherit a serious genetic disorder, is seen as a "high risk":

> "Thus, the assessment prospective parents receive from genetic counsellors and physicians regarding the *extent* of risk for a condition reflects not only statistical

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310 *ibid.*

311 *op cit* p 3.

312 *ie* the reason for the consultation.

313 the so-called "problem-solving related coping with a patient" or the need to know and understand.

314 the "emotional orientated coping with a patient" or the need to feel known and understood.

315 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Dame Law Review** (72:1), 103.

316 *op cit* p 114.

probabilities but also the professional counsellor's feelings[317] about certain conditions."

16. Boundaries of disclosure/ Who may know?

Andrews[318] debates what classes of persons should be entitled to receive information obtained through genetic testing.[319] He does this to establish where the limits/ boundaries of their liability should lie. He reports on an American case, **Munro v Regents of the University of California**,[320] where the court required that a patient should fall within a "reasonably high-risk group"[321] of genetic disease,[322] before it would expect from a physician to specifically test the

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317 Here we find an extremely important aspect of the *duty to inform* a patient. A medical professional or genetic counsellor has a legal duty to properly inform a patient of all *relevant* information. This information is required for the patient to make an informed decision. In cases where a patient seeks genetic information, it is of great importance that the counsellor's professional opinion, based on scientific results, are given to the patient objectively. Here there is no place for any personal views and/or beliefs (ethical or religious) to influence the given advise. Care must be taken that scientific results are not indirectly influenced or adapted through the subjective interpretation of results or in the communicating of the final advise to the patient.

In extreme circumstances, irrelevant and/or additional subjective opinions of physicians or genetic advisors may totally change the initial decision of the patient or at least, the decision that would have been made, had the proper objective results been given. In such circumstances it could be said that the duty to inform was not properly adhered to (and as a result such advisor could be held accountable for consequential damage).

318 *op cit* p 163.

319 Clarke *op cit* p 6, also verifies that uncertainty exists in practice to whom a diagnosis has to be established or confirmed, especially where the client or family does not readily accept the finding or in instances where others have a real interest in the results: "There is then the difficulty of deciding whether one's primary duty is to the referring professional (who want's a diagnosis made, if possible), or to the immediate family (who want time to accept their child's set of abilities and problems), or to the extended family (if another branch of the family might want the diagnosis established because of implications for them), or to the child in question (whether the child is best served by being diagnosed and thereby categorized, or by remaining undiagnosed and therefore a unique individual."

320 263 Cal. Rptr. 878, 882 Ct. App. (1989).

321 Clarke *op cit* p 6 writes: "How do we distinguish between degrees of risk? Between low or 'acceptable' risks, and high or 'unacceptable' risks?" It is therefore a very difficult and certainly a subjective matter whether a risk is acceptable or not. It is submitted that physicians/ counsellors should be guided by existing (objective) practice guidelines when considering each case.

322 it is theoretically-mathematically possible to establish whether a patient falls in a high-risk group of a specific disease by taking into account several factors such as ethnicity, gender, cultural background, living conditions (often dictated by economic circumstances) and many other considerations, *eg* Tay-Sachs disease is a quite rare condition, but is found in much greater frequency in the Jewish communities of

patient for such a disease and before a higher level of adherence to the duty of disclosure would be expected. *In casu* the court found that there is no general legal duty on a physician to *sua sponte* suggest testing for and treatment of possible genetic diseases. It is argued that recognition of such a duty would not create a new duty on physicians, since similar conduct has already been expected from physicians in successful wrongful birth actions.[323] It would be correct to say that if a patient is fully informed of all risks and possible consequences of genetic disease, the physician has properly fulfilled his duty to inform and has thereby placed the patient in the position to make his own decision on whether to be actually tested or not. Clarke[324] concludes that:

> "Information about a person's genetic make-up may be of interest not only to the individual but also to other members of their family, to their employers, their life-insurance company and possibly other agencies, including the state. When does this interest in a person's genetic constitution give the interested party a *right of access* to that information?"

The following measures are suggested[325] to prevent inadvertent breaches of confidentiality: Obtaining consent before examining medical records, obtaining consent before obtaining samples or doing tests on family members, taking care that sensitive information is not passed on to other branches of a family, taking care not to reveal "raw" laboratory results and finally clearly distinguishing between samples taken for research purposes and those taken to provide information for the family, while obtaining separate consent for these separate purposes.

16.1 Information to family members

With regard to the transfer of genetic information to family members, the following aspects are discussed by Leenen.[326] As point of departure one must realise that the general rules concerning secrecy and privacy is certainly applicable to genetic information.[327] This is obvious, as genetic data is often of a sensitive nature, while it usually has direct relevance to family members as well.

Eastern Europe as well as in a specific French community in Canada.

323 such as in **Turpin** where actual testing and treatment were never really considered.

324 *op cit* p 12.

325 *ibid.*

326 *op cit* p 75.

327 in principle, therefore, genetic information about a patient (without his consent, that is) may not be disclosed to any third parties, even if they are family members.

An interesting challenge arises where a patient gives consent to disclosure of his carrier status of a dangerous hereditary disease. Can un-volunteered information concerning such a hereditary disease[328] be disclosed to unsuspecting family members? The dilemma lies in the fact that while these family members have a real interest in the information, they do not have the luxury of choice in the matter of receiving this life changing information. Not only is there no possibility of prior agreement on the matter,[329] but the mere fact that information is available is already an indication that all is not well.[330] Leenen believes that a therapeutic privilege could rescue a physician from this dilemma, where serious harm would result as consequence of disclosure.

This brings us to another difficult complication, namely the question whether there is a legal *duty on the physician-counsellor to actually inform family members.*[331] Such a duty would muster much criticism, as the physician has no relationship with this group of people. It would also be ludicrous to expect a medical professional to look up family members that might be scattered around the globe. Leenen[332] is of the opinion that a duty to inform relatives would only be thinkable if they are easily reachable and affected by a relative serious condition.[333]

Further interesting intricacies relating to the physician's duty "to let the truth be known" that could arise between spouses will now be considered. One such possibility is where it is established during genetic testing that the apparent father of the child is in fact not the father.[334] The situation is further complicated if the child in question is born with a genetic defect, whereupon the couple decides not to have any further children.[335] It is submitted that a

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328 which will inevitably influence his/ her life in a drastic manner.

329 see fn (3 above) *supra*.

330 if a family member was not at risk of being affected, the knowledge of a hereditary disease in the genealogy would never have come under discussion.

331 *op cit* p 75: *"Vraag is of de arts, indien de patiënt toestemming heeft gegeven de familieleden in te lichten, dan ook de juridische plicht heeft dat te doen."* - see discussion *supra.*

332 *ibid.*

333 the Committee of Ministers of the Council of Europe has the following viewpoint on the matter. - Anon. 1994. *op cit* p 51. "In conclusion, the committee would also like to address the importance which the results obtained by genetic screening have for the family. If a person is shown to be a carrier of a mutation, this information is also important to brothers, sisters and, possibly, for other members of the family."

334 Leenen reports *ibid* that between 5 -20% of all Dutch children born from married parents are conceived by someone other than the husband.

335 *ie* on the mistaken belief that *they* have conceived the diseased child, while the hereditary aberration was in fact transmitted by the illegitimate third party.

physician will under these circumstances be expected to enlighten the faithful spouse of the fact that the congenital abnormality was caused by a third party.

Leenen,[336] in conclusion to the troublesome situations created by the relevance of genetic information to multiple parties, summarises the requirements that must be proved in order to succeed with a defence of conflict of interests as follows:

- the genetic counsellor will have to prove that all has bee done to actually obtain consent from the patient in question;[337]
- that the information in question will in all probability prevent serious harm to the relatives;
- that the examination or treatment cannot proceed without the relevant information;
- that the breach of secrecy is the only possible solution;
- that not more information that what is absolutely necessary will be compromised;
- that the information will only be released to the consulting physician of the patient or the family member; and
- that in all aspects, the patient's personal life will be infringed as little as possible.

16.2 A duty to re-contact?

Clarke[338] suggests that a genetic counsellor should give a client post-counselling. Individuals could be supported by providing care and counselling in the management of the disorder through: regular management clinics for patients with specific conditions; long-term co-ordination of care for those who need regular surveillance; occasional clinic appointments, as well as follow-up support in the family home by specialist genetic co-workers. She writes that if home visits are not possible, telephone contact is an acceptable alternative.

Andrews[339] debates the question whether there exists a general duty on physicians to re-contact patients. If test results which have been obtained from earlier analysis are given new meaning through more advanced technology and broadened knowledge, the question arises whether the patients in question should be re-contacted or not.

With the development of new technology and advanced genetic science, physicians are

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336 *op cit* p 78.

337 (but in vain).

338 *op cit* p 4.

339 *op cit* p 169.

progressively able to derive new relevance from existing genetic data.[340] Geneticists could possibly show concern for a previously unknown genetic condition or disease through application of the newly acquired knowledge to existing test results. Should they be expected to share this breaking news with the relevant patient and/ or his family? In some instances the newly discovered information could have life or death implications for a patient.[341] Andrews[342] emphasises the necessity of developing a workable system by which these "informative updating sessions" could be made a practical reality. He suggests the use of computers linked to a networking system to solve this problem.[343]

Berry[344] states that:

> "For the geneticist to fulfil this role satisfactorily first and most obviously there is a need for an accurate diagnosis, accurate test results and accurate interpretation of these findings. As genetic diseases are often rare, there may be a need for detailed library searches and access to appropriate computerized databases. This is particularly important in view of the very rapid progress being made in the field of gene mapping and identification. A disease for which no molecular test was available last year may well be established as readily detectable this year."

Although there does not exist any substantive local authority on this specific issue, it seems[345] correct to presume that there should be a legal duty on physicians to make known any new dangers that patients might be unknowingly suffering from.

In the American case of **Schwartz v United States**,[346] the explicit duty to re-contact patients

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340 Berry *op cit* p 37: "As ultrasound becomes more widely used and its definition improves, a large number of structural defects may be detected."

341 *eg* where such a patient could be timeously warned of a dangerous condition that can be effectively treated or even avoided through proper care or medication.

342 *ibid*.

343 It is submitted that a web-site, specifically dedicated to inform patients that have previously been earmarked as possible genetic disease- carriers, could also be considered as an effective alternative. Physicians can hereby list the names of patients that could not be re-contacted by more conventional means on a web-site, indicating that new information on their specific genetic aberration/ condition is available. The patient will now be aware of the fact that he/ she could possibly be at risk and will be in the position to decide whether to inquire further about the new developments or not.

344 *op cit* p 29.

345 legally-theoretically.

346 230 F. Supp. 536 E.D. Pa. (1964).

with new information was first acknowledged. *In casu* the facts were the following: The navy used "umbrathor ink"[347] on personnel, which later was found to cause severe irritation in the area of application, having the potential to even cause tumour growth in the sinuses. The court recognized a duty on the state to search through all records in order to find out who were the patients treated with this substance lived and to contact these people and warn them of possible danger. In a later analogous case, **Tresemer v Barke**,[348] it was similarly stated that: "Defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to *all* risks which make the conduct unreasonably dangerous".

Andrews[349] states:

> The court held that, "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide the AFP test and plaintiffs' injuries. A less that 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause."[350]

In the case of **Taber v Riordan**[351] the court found that the post-treatment duty to disclose can also be seen as part of the physician's duty not to abandon the patient and that a physician who unilaterally ends the relationship while the patient still needs treatment, abandons the patient.

16.3 Who's duty is it?

It could be argued that the duty to re-contact and/ or re-diagnose is placed specifically on the physician[352] because he is probably the person in the best position to locate and inform patients of their particular medical condition. A general post-treatment duty to disclose relevant information could certainly be seen as part and parcel of the physician's duty not to abandon

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347 applied in the nose for the use of x-rays in the nasal area.

348 150 Cal. Rptr. 384 Ct. App. (1978).

349 1992.Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 168.

350 existing information about a patient will subsequently take on new meaning.

351 403 N.E. 2d 1349 Ill. App. Ct. (1980).

352 as opposed to a state duty or local government obligation.

his patient.[353] Once this duty to re-contact has been established,[354] it is relevant to ascertain whether the particular relationship between physician and patient is of a superficial nature or not.[355] It could be expected that the duty to re-inform would be clearer defined in cases where a close and long lasting physician-patient relationship exist, than would be the case where a patient only once consulted with the specific physician. Where a genetic advisor,[356] however, has only once been consulted to ascertain specific information, the duty to re-contact should still be adhered to.

16.4 Others re-contacted?

Many related questions arise in this regard: Does there exist a corresponding general duty to inform third parties and/ or relatives about genetic risks and dangers? Should the wife of a patient, for example, be warned of genetic anomalies in her husband that might affect his health in the later stages of his life, or would that only be so if the aberration would affect the health of their (future) children? Will a close relative have the right to insist on this information? How will sufficient proximity of relations be established? What classes of third parties have sufficient interest in the matter to also be entitled to such information? Is this information not essential to prospective parents in order to make an informed decision on future children and reproductive decisions in general?

Andrews[357] is of the opinion that there are certain circumstances where the physician will have a duty, to inform the spouse of a patient affected by genetic anomaly, disease or other serious condition. This will be the case where, for example, test results confirm that the patient/ spouse suffers from a contagious or transmittable disease or condition, such as AIDS.

In spite of the duty to inform patients and to be generally involved with the well-being of the patient, the final decision concerning reproduction still lies with the individual/ mother.[358] This

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353 Andrews *op cit* p 170.

354 *eg* through an existing doctor-patient relationship or based on contractual principles.

355 or whether there has lapsed a long period since the patient has initially been examined.

356 it is submitted that the role of a general practitioner and the type of relationship with the patient is totally different from that of a genetic specialist, as last-mentioned professional regularly deals with particular individual cases on a short-term basis.

357 *op cit* p 177.

358 protected by a right to privacy.

was again emphasised in the cases of **Planned Parenthood v Danforth**,[359] judging that a woman may have an abortion without her husband's consent and **Planned Parenthood of Southeastern Pennsylvania v Casey v Casey**,[360] where the judge stated that the mother does not even have to inform the father about her decision to abort.[361] It would therefore seem correct to assume that not even the father of an child would be able to prove sufficient grounds to obtain genetic information of his wife/ girlfriend, if this would infringe on the mother's right to privacy concerning their child.[362]

In some instances relatives of a patient suffering from a genetic disease would have a clear interest in the results of tests done for genetic anomalies, since they also could be possible carriers due to their family relations.[363] Legal policy seems to dictate that there is less need for a duty to inform spouses concerning genetic anomalies of their partner, than for instance informing partners of contagious diseases and violent tendencies.[364] A reason for this approach could be the (near) practical impossibility of contacting relatives when considering time and cost implications. A physician's duty to inform is therefore limited only to those groups of people directly at risk of harm.

16.5 Methods of disclosure

Practical alternatives to the traditional manner[365] of informing patients of medical conditions or warning/ advising relatives are: Physicians could supply patients in the waiting room with

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359 428 U.S. 52, 69 (1976).

360 112 S.Ct. 2791 (1992).

361 this position is in accordance with the current South African abortion laws - see ch 3.

362 if the mother would suffer from an infectious disease, it is clear that all parties in danger of infection would have a right to be informed of this risk.

363 *eg* the condition of "*porphyria*" - this genetic defect is only triggered when carrier comes into contact with barbiturates and could therefore be avoided if prior knowledge about the condition is obtained.

364 because these conditions pose a direct risk to the partner or relative, whereas genetic anomalies merely pose a risk to possible future children.

365 Andrews *op cit* p 182 states that the vast majority of physicians exclusively use consultation or examination time to discuss relevant information concerning the disease or possible risks with patients. Often this short and regularly interrupted conversation is not sufficient and doesn't serve it's purpose. If relatives needs to be contacted, or if patients are re-contacted, many physicians delegate this important task to their subordinates who merely phone to the last known address and do not pursue the matter further of the contact information is incorrect/ outdated. The question remains: to what lengths should a physician go in finding numbers and contact persons?

informative pamphlets on the reality and the prevalence of genetic diseases, as well as the compilation of genetic risk groups; patients sitting in the waiting room could be asked to fill in questionnaires on family backgrounds and other relevant genetic information helpful to the physician in detecting genetic anomaly, instead of expecting patients to read outdated magazines; the use of computers (possibly linked to police information networks) could also be implemented in tracing previous patients and unknown relatives.[366]

Until the time when more sufficient ways[367] are found to inform and identify people suffering from hereditary diseases, we must conclude that this mammoth task should remain on the shoulders of physicians and that of health care providers.[368]

Legemaate,[369] although he acknowledges that auxiliary methods of informing patients such as pamphlets, cassette and video tapes, posters, checklists and so forth are helpful, warns that these methods must never take the place of the traditional oral information session.

Hondius[370] has also raised the question whether information should be given orally or in writing. He is of the opinion that a combination of the two is the most effective, as information via brochures only is not always appropriate for every individual instance, while there is a real possibility that a patient who has been emotionally affected by a medical intervention could fail to grasp everything discussed by the physician.

16.6 A contractual relationship

In most cases of medical treatment the patient and doctor enter into a contract of letting and hiring of work or *locatio conductio operis*.[371] As a general contractual requirement both parties

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366 see *supra*.

367 On the long run the solution to place an information-burden on physicians is not the most efficient method to spread the necessary information effectively. The fact is that people need information on genetic diseases before they are tested. Only a small percentage of people believe or realise that they might suffer from a genetic anomaly and accordingly undergo genetic tests. To solve this problem of ignorance, Andrews *op cit* p 184 suggests that basic education on genetic abnormalities is given at school level.

368 and that these professionals should be held accountable if they do not comply with their duty to inform.

369 *op cit* p 206.

370 *op cit* p 1695.

371 Strauss *op cit* p 69, also **S v Progress Dental Laboratory (Pty) Ltd and Another** 1965 (3) SA 192 (T).

have to reach agreement or consensus on the important terms and conditions of the contract in question.[372] It is submitted that there exists a distinct correlation between the pre-contractual negotiations before an ordinary contractual agreement and the informative session by a physician before the patient actually consents to the perceived medical intervention or treatment suggested by the physician.

16.7 Liability for failure to inform

Grubb[373] mentions that from an English viewpoint, liability resulting from medical procedures is mostly based on negligence. He mentions, however, the exemplary case of **Thake v Maurice**[374] where the court found that a physician can similarly be held liable on breach of contract and therefore also in the absence of negligence.[375] *In casu* the court judged that the physician gave an implied guarantee of success regarding the performance of the sterilization procedure, based on the fact that he *neglected to inform* his patient of the possible failure of the operation and also neglected to warn his patient of the risks involved, if he resumed sexual relations before first undergoing a fertility test.

Legemaate[376] explains that the mere fact that a physician has failed to provide proper information to a patient,[377] will not by itself be sufficient to result in liability for the physician. The plaintiff-patient will firstly have to prove that he in fact suffered damage as a result of the failure to inform.[378]

A plaintiff will further have to prove that there exists a causal link between the wrongful conduct and the resultant damage. The patient asserts that he would not have given consent to the particular medical intervention in question, had he been properly informed. The question then

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372 see ch 2 for a more detailed discussion on the contractual principles regulating the physician-patient relationship.

373 1985. **The Cambridge Law Journal**, 30.

374 (1984) 2 All ER 513, discusse *supra*.

375 see also ch 2 regarding the physician's contractual guarantee and ch 6 in respect of wrongful conception actions.

376 *op cit* p 204.

377 *ie* in breach of his duty to inform - (wrongful conduct).

378 *eg* damage resulting from a pregnancy after a failed sterilization - see wrongful conception ch 6.

arises on who the burden of proof is.[379] Legemaate reports on a wrongful conception action based on a failed sterilization procedure, where the Utrecht court[380] found that no causal link was proved, because the patient failed to indicate that she would have chosen an alternative procedure had she been properly informed. He is nevertheless convinced that such an action should in principle succeed and does not see the proof of causation as a major stumbling block.

The following aspect to consider is the conduct of the medical professional under the circumstances. Legemaate states that the point of departure should be the level of proficiency that could reasonably be expected from the physician at the particular time. He once again refers to the issue of failed sterilizations to address the point. He writes that although a number of physician are held liable for a failure to properly execute the sterilization procedure itself, many physicians are sued for their failure to inform the patients of the small failure rate associated with the particular procedure in question.[381]

16.8 Dutch guidelines for disclosure of information

Beer[382] reports on the special statutory regulations concerning the disclosure of information as found in the seventh title of the Dutch Civil Code:[383] It is submitted that these statutory provisions could be used as helpful guidelines in determining where emphasis should be placed for patient protection and could indicate what conduct is legally expected from medical professionals.

> ***Artikel 1653c***
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> *Indien de patiënt te kennen heeft gegeven geen inlichtingen te willen ontvangen, blijft het verstrekken daarvan achterwege, behoudens voor zover het belang dat de patiënt daarbij heeft niet opweegt tegen het nadeel dat daaruit voor hemzelf of anderen kan voortvloeien.*[384]

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379 Legemaate conveys that there is Dutch support for the opinion that the burden of proof lies on the medical practitioner to repute a causal *nexus*.

380 *Rechtbank* Utrecht 26 juli 1995.

381 both grounds of negligence could fall together as well.

382 1991. **Aansprakelijkheid voor Medische Fouten: Vanuit Juridisch oogpunt bezien** Koninklike Vermande BV. Lelystad, 12.

383 *Zevende Titel A van het Vierde Boek van het Burgerlijke Wetboek wordt een nieuwe titel ingevoegd, luidende Zevende Titel B, de overeenkomst inzake geneeskundige behandeling:*

384 a paraphrased summary of this quotation is: where a patient has made it clear that he does not want to be informed, such whish should be respected, unless the consequences thereof is disproportionately prejudicial to the patient or others.

Artikel 16531

Onverminderd het in artikel 1653b, tweede lid, tweede volzin, bepaalde verstrekt de hulpverlener aan anderen dan de patiënt geen inlichtingen over de patiënt dan wel inzage in of afschrift van de bescheiden, bedoeld in artikel 1653i, dan met toestemming van de patiënt. Indien verstrekking plaatsvindt, geschiedt deze slechts voor zover daaroor de persoonlijke levenssfeer van een ander niet wordt geschaad. De verstrekking kan geschieden zonder inachtneming van de beperkingen, bedoeld in de voorgaande volzinnen, indien het bij of krachtens de wet bepaalde daartoe verplicht.[385]

Onder anderen dan de patiënt zijn niet begrepen degenen van wie beroepshalve de medewerking bij de uitvoering van de behandelingsovereenkomst noodzakelijk is en degene die optreedt als vervanger van de hulpverlener.[386]

Artikel 1653m

In afwijking van het bepaalde in artikel 16531, eerste lid, kan de hulpverlener zonder toestemming van de patiënt ten behoeve van statistisch of ander wetenschappelijk onderzoek op het gebied van de volksgezondheid aan een derde desgevraagd inlichtingen over de patiënt of inzage in de bescheiden, bedoeld in artikel 1653i, verstrekken indien aan de volgende voorwaarden is voldaan:
Het vragen van de toestemming is in redelijkheid niet mogelijk;
Het onderzoek dient een algemeen belang;
Het onderzoek kan niet zonder de desbetreffende gegevens worden uitgevoerd; en
De persoonlijke levenssfeer van de patiënt wordt daaroor niet onevenredig geschaad.[387]

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385 A paraphrased summary of this quotation is: A medical professional may not disclose any information of a patient to third parties without the explicit consent of the patient. Disclosure of information under these circumstances may only take place if there are no infringement of a personal nature. Disclosure outside of the mentioned scope of consent may, however, take place where it is so provided in an act.

386 a paraphrased summary of this quotation is: Assistant medical staff and all additional service providers who are necessary for the medical treatment agreement and their replacements are to be considered in the same privileged position as the physician.

387 a medical professional may also disclose patient information without consent for statistical and scientific purposes in the context of public health, under the following circumstances:

- where it is reasonably not possible to obtain consent;
- where the examination serves a general purpose;
- the examination in question cannot be performed without the relevant data;
- the patient's personal sphere is not disproportionately prejudiced by the disclosure of information.

CHAPTER 6

Wrongful Conception Actions

1. Introduction

In this chapter wrongful conception actions are discussed in detail. All the relevant aspects relating to this unique type of action are placed under scrutiny. Note that various difficulties concerning this action are identified for which solutions are then suggested, while references are made to court judgments[1] concerning specific aspects. The varying legal positions currently existing in the United States, England, Germany, the Netherlands and South Africa with regards to this cause of action are considered.

1.1 Facts giving rise to action

In this type of action a normal and healthy, but *unplanned* baby is usually born due to the negligent performance of a sterilization operation or abortion procedure. Potential defendants range from medical practitioners to genetic counsellors,[2] hospital authorities and manufacturers of contraceptives,[3] pharmacists[4] and even the parents themselves.[5]

Hampton[6] discusses the facts of the influential case of **Sherlock v Stillwater Clinic**[7] as a classic example of factual circumstances on which wrongful conception actions could be based. *In casu* the plaintiff already had five children which caused severe financial strain on the family. To ensure that no further children would be born the Sherlocks agreed that Mr. Sherlock should undergo a vasectomy procedure.[8] In spite of this seemingly foolproof solution another healthy

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1 primarily American decisions.

2 **Park v Chessin**, 400 N. Y. S. 2d 724 (1979).

3 **Rieck v Medical Protective Co**, 64 Wis. 2d 514 (1974).

4 **Troppi v Scarf**, 31 Mich. App. 240 (1971).

5 **Zepeda v Zepeda**, 41 Ill. App. 2d 240 (1963).

6 1986. The Continuing Debate over Recoverability of the Costs of Child-rearing in 'Wrongful Conception' Cases: Searching for Appropriate Judicial Guidelines. **Family Law Quarterly** (20), 45.

7 260 N.W. 2d 169 Minn. (1977).

8 this procedure is discussed in ch 11.

child was unexpectedly born a few months later. The ensuing wrongful conception action was successful.[9]

1.2 Increasing importance of family planning

It is submitted that the growing emphasis on the importance of family planning worldwide has had an important impact on the origin and continued prevalence of wrongful conception actions. Over the past few years birth control measures have shown a rapid increase,[10] taking into account that up to 79% of all married white females in the United States of America already took birth control measures in 1982.[11]

Cheslink[12] is of the opinion that changes in society and behavioural patterns with a tendency towards an urban lifestyle have contributed to the fact that family planning's importance is constantly emphasized in modern society. Because many women have independent careers in modern society, they have become more career orientated and accordingly unwanted children could create many difficulties.[13] For this very reason many wrongful conception plaintiffs feel that they ought to be compensated.

It is submitted that women have become increasingly aware of their rights and especially their constitutionally protected rights regarding privacy[14] and procreative decisions are held to be almost sacred. Modern medicine has made great contributions towards effective fammily planning and the average person generally feels confident about the successful implementation of procreative decisions. It is when individuals' informed decisions and responsible planning regarding procreation are indeed not realised (in this modern and technologically advanced age) that disillusioned plaintiffs turn to the legal system to seek justice.

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9 see case discussed in more detail *infra*.

10 A.N.M. 1982. Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant. **Virginia Law Review** (68), 1311.

11 *ibid.*

12 1985. Wrongful Conception **F. I. C. Quarterly**, 289.

13 *op cit* p 290.

14 see the discussion on constitutional rights in ch 9.

2. Position in United States of America

2.1 Traditional tort elements

Strict adherence to and application of traditional tort principles is the obvious and evident route to take in establishing a legal base for wrongful conception actions. Great challenges to this traditional system, however, are experienced when totally new concepts of liability are introduced to an established legal system that originated in ancient times when jurists had no concept of genetic science. In this study alternative approaches to the existing framework of liability are discussed. These new strategies are developed by courts in order to contend with novel concepts and the acknowledgement of previously unprecedented rights.[15]

2.2 Founding theories

According to Keplinger and Cramer[16] there are basically three theories on which an action for wrongful conception could be based, namely: negligence; breach of contract/ warranty; or fraudulent misrepresentation and deceit. Cheslik[17] agrees with this premise, but adds an additional basis of liability to support a wrongful conception cause of action, namely the theory of strict liability. She[18] explains that "these claims are by no means mutually exclusive and most plaintiffs will use at least two of the theories".[19] Hampton[20] explains that wrongful conception actions usually originate in a specific social and legal setting[21] and mentions certain events which may create bases for such claims:

2.2.1 Negligence in medical malpractice

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15 *eg* the right to be born a whole, functional human being - *infra*.

16 1988. vol 12 (no 2) **Tort and Insurance Law Journal**, 497.

17 *op cit* p 291.

18 *ibid.*

19 it is reported that in **Custodio v Bauer** 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), the plaintiffs proceeded under 7 different theories: negligent performance of the sterilization; negligent failure to warn of the fallibility of the sterilization procedure; negligent misrepresentation; lack of informed consent; the plaintiff-husband's right to compensation for damages resulting from the above acts; fraud and deceit and lastly, breach of contract.

20 *op cit* p 47.

21 it is submitted that fammily planning concerns receive more attention in developed countries, where better medical services exist and people are more rights orientated.

Cleaver[22] lists the traditional elements of the tort negligence that have to be proven to constitute liability.[23] A plaintiff must establish: that a legal duty rested on the defendant[24] towards the plaintiff;[25] that a breach of this duty occurred;[26] a causal link;[27] and real damage/ injury.[28]

A plaintiff suing on the basis of negligence must prove the essential elements of this particular tort. Cheslik[29] states that there is usually no difficulty in establishing the relevant duty of care. Breach of this duty can be established by expert testimony that the defendant- physician did not exercise his profession in the degree of skill and care expected from him.[3031] It is mentioned that the element of causation is generally not difficult to prove in wrongful conception cases, as the patients' resumption or continuation of sexual intercourse after sterilization[32] is usually not seen to be an intervening act[33] sufficient to break the chain of causation.[34] A possible defence defeating causality is, however, a failure to adhere to post-operative testing instructions.[35]

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22 1991. Wrongful Birth - The Dawning of a New Action. **South African Law Journal**, 50.

23 compare the establishing elements of this tort with South Africa's prerequisites for delict in
ch 2.

24 typically a medical practitioner or health care worker.

25 typically the patients of the physician in question or individuals seeking fammily planning advice.

26 see the variety of negligent conduct discussed *supra*.

27 between the above-mentioned breach of duty and the resultant damage.

28 typically child-rearing expenses and other costs incurred due to the unplanned birth.

29 *op cit* p 292.

30 as exercised by general practitioners of good standing in the locality.

31 remember that specialists have a higher level of care required from them - see ch 4 for a discussion on professional negligence.

32 or alternative contraceptive measure.

33 or *novus actus interveniens*.

34 the general rule being that the occurrence of a *foreseeable* intervening act does not break the chain of causation - see ch 4.

35 as was the case in **Bowman v Davis** 48 Ohio 2d 41, 356 N.E. 2d 496 (1976).

It is reported that negligent conduct can be established in a variety of ways:[36]

2.2.1.1 Lack of informed consent

To ascertain whether the defendant failed to fulfil his duty to inform an objective test should be applied.[37] The relevant question would be whether a reasonable person in the patient's position would have withheld consent had all material risks been disclosed.[38] It is submitted that it is nevertheless difficult to prevail with this theory given the fact that so few sterilizations are unsuccessful.[39] Failure to properly inform[40] could manifest in a failure to diagnose a pregnancy, failure to suggest the alternative of an abortion[41] or even insufficient post-sterilization instructions. It is generally accepted that breach of the duty of care is the main cause of action under these circumstances.[42]

2.2.1.2 Negligent misrepresentation

It is possible that post-operative misinformation concerning the perceived success of the operation could be supplied[43] to the patient. In such an instance the patient will have to prove that the physician should have known the information in question to be untrue/ unreliable and that the reasonable plaintiff would under similar circumstances have justifiably relied on this misrepresentation.[44] Patients who are under the impression that they are in fact sterile, could naturally be expected to resume sexual intercourse without additional contraceptive measures. There is no need to prove intent on the part of the physician to misinform his patients.[45]

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36 *ibid.*

37 **Hartke v McKelway.**

38 see ch 5 on the duty to inform.

39 sterilization is the most effective way of contraception, with only 5 out of every 1000 performed without success (see ch 11) - it is doubtful whether patients would choose any less effective (alternative) measure of contraception, even without being properly informed of these facts.

40 misdiagnosis and/ or faulty advice - see ch 5.

41 as was the case in **Rieck v Medical Protective Company** - some statues prohibit physician's to even suggest an abortion or give any assistance in directing patients to abortion clinics, see ch 7 and 10.

42 Hampton *op cit* p 48.

43 either through positive misleading conduct or by failing to remove an incorrect impression in the mind of the patient about actual sterility directly after the sterilization operation.

44 **Hackworth v Hart** 474 S.W. 2d 377, 380 Ky. (1971) - where a patient relied on post operative assurances that the procedure was "100% and fool-proof".

45 and is therefore easier to prove than a claim based on deceit.

2.2.1.3 Negligent performance of sterilization or other post-operative testing procedure

This cause of action calls for the application of the *res ipsa loquitur*[46] doctrine. It is possible, although highly improbable, that a sterilization may be unsuccessful even without negligent conduct by the physician.[47] This freak occurrence takes place in the event of so called "re-canalisation", where the patient's fallopian tubes naturally grow back after being severed by the sterilization procedure.[48]

Hampton[49] mentions forms of sterilization[50] are laparoscopic tubal cauterization,[51] tubal ligation,[52] or alternatively the actual removal of the woman's fallopian's tubes. Male sterilization is achieved by means of a vasectomy. He[53] reports on other birth control measure failures. Example here are unsuccessful abortions,[54] or non-surgical medical application such as the incorrect prescription of contraceptive medication.[55]

2.2.2 Breach of contract/ warranty

Cheslik[56] believes that it is generally more difficult to proceed under a claim for breach of contract than would be the case under negligence.[57] Because a physician is not considered to be a warrantor or guarantor off his services,[58] courts require either a specific pre-operative or post-operative contract expressly guaranteeing the success of the medical procedure,

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46 "the facts speak for themselves".

47 Cheslik *op cit* p 294 - see also ch 11 in this regard.

48 evidence to this effect can be obtained by means of a "2nd look" operation or a pathology report - spontaneous re-canalisation happens in 1 to 3 out of every 1000 sterilizations performed.

49 *op cit* p 47.

50 **Hartke v McKelway** 707 F.2d 1544, 1549 D.C. Cir. (1983).

51 where the woman's fallopian tubes are blocked by burning.

52 where the fallopian tubes are cut.

53 *ibid.*

54 as in **Stills v Gratton** 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 Cal. Ct. App. (1976), where a Californian court allowed a wrongful conception action.

55 as was the case in **Troppi v Scarf**.

56 *op cit* p 294.

57 in spite of the fact that these claims have the advantage of longer prescription periods allotted by the relevant statutes of limitations.

58 see ch 4 on the relationship between physician and patient.

complete with a separate consideration[59] to show that the physician did in fact agree to guarantee a certain result.[60]

2.2.3 Strict liability

One point of criticism that could be raised against this approach as a legitimate basis for a cause of action in wrongful conception, is that strict liability usually applies only to products and not to services.[61] In cases where service provision was included under this theory, the service was closely related to the product and the relevant service was of a commercial nature and did not have a professional character and it could therefore be agreed that strict liability has a doubtful application to wrongful conception matters. It is submitted that manufacturers of contraceptives, for example, could be held liable for wrongful conception[62] under the theory of strict liability.[63]

2.2.4 Misrepresentation or deceit

Cheslik[64] explains that this base of action is rarely used in modern claims because it requires proof that the physician intentionally made a false misrepresentation as to the success of the sterilization procedure to the plaintiff. This is a difficult, if not impossible, fact to prove.[65] It is reported[66] that the first wrongful conception action was that of **Christensen v Thornby**,[67] instituted in Minnesota in 1934. Here the plaintiff unsuccessfully tried to prove his case[68] employing the theory of deceit. Since the plaintiff was unable to show fraudulent intent, the claim was dismissed. According to Cheslik[69] modern claims are rarely based on deceit. A

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59 see ch 2.

60 in **Rogala v Silva** 16 Ill. App. 3d 63, 305 N.E. 2d 571 (1973) it was decided that a physician who called a procedure "a foolproof thing" was merely expressing an opinion and that such pronouncements are mere statements of reassurance and no formal warranties.

61 *ie* service providers are not liable in the absence of fault - **Restatement 2nd of Tort**, 5 402 A (1979).

62 if it would be possible to prove that a defect in the manufacturer's product has indeed caused the plaintiff damage.

63 were a plaintiff need not prove negligence on the side of the defendant.

64 *op cit* p 295.

65 see **Christensen v Thornby** 192 Minn. 123, 255 N.W. 620 (1934) discussed *infra.*

66 Cheslik *op cit* p 292.

67 192 Minn. 123, 255 N.W. 620 (1934).

68 which involved a negligent vasectomy.

69 *op cit* p 293.

suggested reason for this is the difficulty in proving wrongful and intentional conduct on the part of the physician. Plaintiffs generally proceed under one[70] of the remaining and more common theories.[71]

2.2.5 Avoidable consequence doctrine

Block[72] discusses the merits of this doctrine that has been applied by courts in wrongful conception cases. According to this precept a plaintiff cannot recover damages that could have been avoided by the use of reasonable effort after commission of the tort. The foundation of this doctrine in American law is section 918 of the **Restatement (2nd) of Torts.** This section reads:

§ 918 comment a (1979):

> "In the cases covered in this Section, it is not true that the injured person has a duty to act,...*but recovery for the harm is denied because it is in part the result of the injured person's lack of care,* and public policy requires that persons should be discouraged from wasting their resources, both physical or [sic] economical."

And also **comment b (1979)**:

> "If harm results because of his careless failure to make substantial efforts or incur expense [to avert the consequences of the tort], the damages for the harm suffered are reduced to the value of the efforts he should have made or the amount of expense he should have incurred, in addition to the harm previously caused."

Although a plaintiff is accordingly not required to take any positive action to mitigate damages, a plaintiff is nevertheless precluded from recovering for any additional damages that results from his failure to make a reasonable effort to avoid it.[73] The burden of proof rests on the defendant[74] to show by a preponderance of evidence that a reasonable person in the same circumstances would have taken steps to avoid or limit the adverse consequences of the damage causing event. Plaintiff must prove that such steps as suggested by the defendant would not have been reasonable under the circumstances and he could also be required to

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70 of course the above-mentioned grounds for instituting a claim are not mutually exclusive.

71 usually the negligence of the physician.

72 *op cit* p 1112.

73 note that these basic principles of the duty to mitigate is fundamentally similar in South African law as a plaintiff is entitled to recover all expenses incurred in mitigation - see ch 2.

74 give authority.

substantiate rebutting evidence if the reasonableness of his actual steps taken in mitigation are questioned.

Block[75] explains that specific application of this doctrine to wrongful conception actions would limit the damages awarded to the point at wich the reasonable plaintiff could have acted to avoid greater injury and loss. He suggests two possible periods from which this determination could be applied; either from the stage when the foetus could have been safely aborted or altematively, from the time the child could have been given up for adoption.[76] Therefore, the plaintiff's recovery will be limited to the point at which one of these actions could have taken place. Concerning the first instance[77] mentioned above, Block applies this principle to wrongful conception cases and consider its consequences:

> "If the line is drawn at the point at which the fetus could have been aborted, the maximum recovery would include medical costs incident to the abortion, pain and suffering, emotional distress, loss of consortium, loss of wages during the recovery period, and the cost of a second sterilisation when failure of the first is the basis of the action."[78]

With regard to the second time frame:[79]

> "Using the point at which the child could be placed for adoption - in other words, immediately after birth -maximum damages would include the medical expenses associated with the pregnancy, loss of wages during the pregnancy and recovery period, pain and suffering, emotional distress associated both with the pregnancy and the adoption, loss of consortium, and the costs of a second sterilisation."[80]

It is clear that a wrongful conception plaintiff would proportionally be entitled to more extensive compensation in the event of giving the child up for adoption than would be the case in the event of an abortion as medical expenses, loss of wages and consortium will be incurred over a longer period. Although the levels of emotional distress will vary in each separate instance, it is submitted that both instances would invariably cause severe emotional anguish. For this

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75 *op cit* p 1114.

76 it could be asked whether either of these actions would be taken by a reasonable and prudent person in the same circumstances - see ch 2.

77 *ie* abortion.

78 *op cit* p 1114.

79 *ie* adoption.

80 *ibid.*

very reason one should carefully consider whether either of the options suggested by Block as possible steps to mitigate damages could seriously be expected from the reasonable parent.

2.3 Compensation for wrongful conception

It is submitted that if an action is principally recognized, the logical ensuing questions would be what the extent of the compensable damage is and how it should be calculated.

Smith-Groff[81] conveys with regard to damage awards in wrongful conception actions that the majority of jurisdictions have adopted the limited damages rule, which permits recovery for ordinary medical expenses directly associated with pregnancy and childbirth. It is reported that a minority of states follow the benefit rule, which allows recovery for child-rearing costs minus the beneficial value of the child. Jurisdictions such as New Mexico[82] and Wisconsin[83] have allowed full recovery of expenses for rearing a child, whereas Nevada[84] has refused to even recognize wrongful conception as a cause of action.

Block[85] reports that since the eventual recognition of wrongful conception actions in the United States the courts have awarded a broad range of damages, including:

- all medical expenses incident to the unplanned pregnancy;[86]
- the mother's loss of earnings during the pregnancy;[87]
- pain and suffering as a result of the pregnancy and birth;[88]
- loss of consortium;[89]

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81 1996. Wrongful Conception: When an unplanned child has a birth defect, who should pay the cost? **Missouri Law Review** (61), 139.

82 **Lovelace Medical Centre v Mendez** 805 P.2d 603, 612 N.M. (1991).

83 **Marciniak v Lundborg** 450 N.W. 2d 243, 248 Wis. (1990).

84 **Szekeres v Robinson** 715 P.2d 1076, 1077 Nev. (1986) (although action referred to as wrongful birth, case involved a failed sterilization procedure).

85 *op cit* p 1109.

86 **Kingsbury v Smith** 122 N.H. 237, 442 A. 2d 1003 (1982).

87 **Beardsley v Wierdsma** 650 P.2d 288 Wyo. (1982).

88 **Boone v Mullendore** 416 So. 2d 718, 723 Ala. (1982).

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

- mental anguish and emotional distress for the parents[90] and
- costs of rasing the child until the age of majority.[91]

He agrees[92] with most commentators that the last-mentioned head of damage has been the most controversial of these awards and the majority of courts have refused such damages.[93]

Welbom[94] mentions three basic views that are held by courts concerning the determination of damages: *limited recovery*, where only actual medical costs together with compensation for pain and suffering directly caused by the pregnancy and birth are allowed;[95] *application of the benefit rule* where, although, child-raising expenses and/or other costs involved with the pregnancy and birth are allowed, such award is set off by the benefits derived from the child;[96] *full recovery*, where in exceptionable cases the costs involved in child-rearing are included in the composition of the amount of damages, without subtracting the benefits[97] the parents have acquired in consequence of the unplanned child.[98]

Cheslik[99] has a similar view on the courts' approach to compensation, although he identifies four distinct approaches and concludes that there is obviously no consensus between courts on the question of damages.

2.3.1 Refusal to recognize damages

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90 **Troppi v Scarf** 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

91 **Custodio v Bauer** 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

92 Block *op cit* p 1110.

93 it is interesting to see that the South African courts have been quite liberal in their views on compensation, as child-rearing expenses are principally recognized - see *infra*.

94 1989. **Tulane Law Review** (63) 1216.

95 **Smith v Gore** 728 SW 2d 738 Tenn. (1987).

96 **Troppi v Scarf** - see benefit rule discussion *infra*.

97 these benefits usually include the love and affection felt towards the child, the joy he/ she brings, together with all the emotional gain, comfort and companionship - note, however that if the child should bring his parents any material or patrimonial advantage, this amount or other benefit should also be taken into consideration when compiling the damages award.

98 **Custodio v Bauer** 251 Cal. App. 2d 303, 59 Cal. Reptr. 463 (1967).

99 1985, *op cit* p 297.

This was the original approach followed by the courts.[100] The so-called "blessed event" theory was then regularly applied, holding that the birth of a healthy baby could never be seen as an injury but should rather be counted a blessing. The widespread use of contraceptive measures to prevent this "blessed event" from occurring, however, marked the abandonment of this approach. Childbirth as it is now recognized is not always a joyous occasion.[101]

In this respect it should be stated that courts traditionally supported the "overriding benefit theory". This theory has a faulty basis, as the courts perceived the birth of the child from a normal parent's point of view.[102] What these courts failed to take into account is the fact that wrongful conception plaintiff/ parents specifically sought to avoid pregnancies[103] altogether. Even where surprised parents do accept their unplanned child into their family the fact of the matter is that:

> "Their affection would not provide the money to feed the child or the time for the working mother to resume her career."[104]

In this statement we can see that the unplanned child itself is not an item of damage but that it is merely the "instrument" through which the physician's negligence is transformed into an injury to the parent-plaintiff. The effective implementation of family planning methods is of important public interest. The increased legal protection given to family planning[105] supports this concept and undermines the public policy argument used by followers of the so-called "windfall theory".[106]

Another matter that complicates the acceptance of wrongful conception actions is the fact that

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100 **Christensen v Thornby** 192 Minn. 123, 255 N.W. 620 (1934) and also **Shaheen v Knight** 11 Pa. 2d 41 (1957).

101 **Troppi v Scarf**, 31 Mich. App. 240 187 N. W. 2d 511 (1971).

102 there is little doubt that parents who have planned and properly prepared for the birth of a child are genuinely overjoyed when the newcomer arrives - wrongful conception parents, however, do not fall into this category, as for them the unexpected pregnancy, (for whichever reason), is a catastrophe.

103 even parenthood.

104 **Troppi v Scarf**.

105 the right to family planning was first accepted in **Griswold v Connecticut** 381 US 479 (1965), with the recognition of the right to use contraceptives - the following step as **Roe v Wade** 410 US 113 (1973) where a woman's right to seek non-therapeutic abortion was established.

106 the windfall theory (sometimes referred to as the "overriding benefit theory") states that wrongful conception plaintiffs should not be allowed recovery, since they have suffered no loss at all - in fact they have actually benefited from the experience.

the injury complained of in these actions is of a peculiar nature as the source of the injury can be removed whenever the plaintiff chooses.[107] It is, however, suggested that this conclusion is based on a superficial investigation of the problem. It is namely obvious that to require such drastic steps from parents would be totally out of proportion to what can be expected from a plaintiff, in terms of containing or minimizing his/ her damage.[108]

It is reported[109] that a great number of states have reported decisions which disallowed child rearing expenses as damages.[110]

Some courts that have denied child-rearing expenses have argued that the birth of a normal, healthy child simply is not a compensable injury.[111]

2.3.2 Award of all damages

The school that allows recovery of wrongful conception actions, argues that recovery protects

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107 *ie* by means of an abortion or adoption.

108 in adherence to a general duty on all plaintiffs to mitigate or restrict their damage - see ch 2.

109 Keplinger, B. and Cramer, J.J. 1988. Wrongful Pregnancy: A house divided. **Tort and Insurance Law Journal** (23), 502.

110 Alabama - **Boone v Mullendore** 416 So.2d 718 Ala. (1982);
Arkansas - **Wilbur v Kerr** 275 Ark. 239, 628 S.W.2d 568 (1982);
Delaware - **Coleman v Garrison** 349 A.2d 8 Del. (1975);
District of Columbia -**Flowes v District of Columbia** 478 A.2d 1073 D.C. (1984);
Florida -**Fassoulas v Ramey** 450 So.2d 822 Fla. (1984);
Georgia - **Fulton-DeKalb Hospital Authority v Graves** 252 Ga. 441, 314 S.E.2d 653 (1984); Illinois - **Cockrum v Baumgartner** 96 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E.2d 385, *cert. denied sub nom.,* **Raja v Michael Reese Hospital and Medical Center** 464 U.S. 846 (1983); Indiana - **Garrison v Foy** 486 N.E.2d 5 Ind. App. (1985);
Iowa - Kansas - **Johnston v Elkins** 241 Kan. 407, 736 P.2d 935 (1987);
Kentucky -**Schork v Huber** 648 S.W. 2d 861 Ky. (1983);
Maine - **Macomber v Dillman** 505 A.2d 810 Me. (1986);
New Hampshire - **Kingsbury v Smith** 122 N.H. 237, 442 A.2d 1003 (1982);
New Jersey - **P v Portadin** 179 N.J. Super. 465, 432 A.2d 556 (1981);
New York -**O'Toole v Greenberg** 64 N.Y.2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1985); Pennsylvania - **Mason v Western Pennsylvania Hospital** 499 Pa. 484, 453 A.2d 974 (1982);
Tennessee - **Smith v Gore** 728 S.W. 2d 738 Tenn. (1987);
Texas - **Hickman v Myers** 632 S.W.2d 869 Tex. Ct. App. (1982);
Virginia - **Miller v Johnson** 231 Va. 177, 343 S.E. 2d 301 (1986);
Washington - **Mckernan v Aasheim** 102 Wash. 2d 411, 687 P.2d 850 (1984);
West Virginia - **James G. v Caserta** 332 S.E. 2d 872 W.Va. (1985);
Wyoming - **Beardsley v Wierdsman** 650 P.2d 288 Wyo. (1982).

111 **Boone v Mullendore** 416 So. 2d 718 Ala. (1982); **Fassoulas v Ramey** 450 So. 2d 822 Fla. (1984).

the parents' right to freedom of choice.[112] They believe that the parents seek damages not because they do not love their child, but because a fault of another has forced on them burdens they sought to and had a right to avoid. By assisting plaintiff parents financially and providing the means to care for their unplanned child, the child will encounter less resentment and anger than would otherwise be the case.

it is apt that the first court to recognize the shift in public policy regarding the legitimate use of contraceptives and the recognition of an individual's procreative autonomy, also took the most liberal approach in awarding damages for wrongful conception. In **Custodio v Bauer**[113] the Californian Supreme Court used the following powerful argument for allowing child-rearing expenses:

> "where a mother survives without casualty there is still some loss, she must spread her society, comfort, care, protection, and support over a larger group. If this change in the family status can be measured economically, it should be compensable..."[114]

In casu the plaintiff sought to be sterilised in order to maintain a certain standard of living. The negligent physician was held liable for all "reasonably foreseeable harm".[115] This decision, however, was not widely accepted with great enthusiasm as many courts did not want to burden physicians with possible liability to such an extent.

Cheslik[116] argues that it would be unjustified to allow child-rearing expenses in every case as this would fail to take into account the true reasons for each plaintiff's decision for sterilization. If, for example, a couple sought sterilization only to prevent the birth of a handicapped child and a healthy baby is in fact born, the birth could still be seen as beneficial or a windfall.[117] In such an instance wrongful conception claim should be rejected. This reasoning seems to be correct.[118]

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112 **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984).

113 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

114 *ibid.*

115 incl child-rearing expenses.

116 *op cit* p 298.

117 since the feared result did not materialise.

118 To allow full damages under all circumstances would have the same unfair results as the "blessed event" theory which does not take into account the various intricacies of each case, particularly the reason for sterilization. It is submitted that courts should attempt to reach an intermediate position and balance basic tort principles (allowing child- rearing costs) with sound public policy (taking into

2.3.3 Benefits of birth subtracted from full damage award

According to this rule a plaintiff can in principle recover all damages and expenses,[119] however, the amount of damages is subject to offset by the value of the benefits conferred upon the parents by the child's birth.[120]

Troppi v Scarf[121] was the first judgment in which this theory was implemented. All benefits derived from the childbirth is calculated and then subtracted from the total amount of damages, regardless of whether the awards were compensation for economic, emotional or physical injuries.[122]

The court rejected the notion that benefits will always outweigh the burdens in wrongful conception cases. By applying the benefit rule in this broad manner, the **Troppi** court ignored the "same interest" limitation of the restatement rule, which requires that the particular items of damage awarded, *be offset only by benefits conferred to that particular damaged interest*. Thus, damages for the financial injury caused by the birth of an unplanned child (such as additional medical and education costs), may not be diminished by emotional benefits. The **Troppi** court found that economic and emotional injuries are "inextricably related" and accordingly reduced all classes of benefits from all types of liabilities, regardless of any particular benefit or damaged interest. This incorrect assumption was followed by **Arizona Health Sciences Centre v Superior Court**.[123] This court was similarly of the opinion that policy concerns merit a lumping together of interests to reduce the plaintiff's damages.

The court in **Sherlock v Stillwater Clinic**[124] allowed the rule to be properly applied as it was intended. The court also did well in taking into account the offset of financial benefits conferred by the children to their parents *for the duration of the parents' lives*, rather than merely until the

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account the reason for sterilization).

119 including child-rearing expenses.

120 see discussion *infra* on the principles governing the benefit theory and note the criticism expressed because of the mis implementation of this rule.

121 31 Mich. App. 240 187 N. W. 2d 511 (1971).

122 In this respect, the court went astray from the true application of **Restatement 2nd of Torts** 920, and the initial intention of the legislator. (see discussion (*circa)* fn. 53). The true intention was that each interest be scrutinized individually and that only benefits pertaining to a specific interest be taken into consideration with regards to the injurious effect of that same interest (and not that all benefits be "subtracted" from the injury of *all* interests together).

123 136 Ariz. 579, 667 P. 2d 1294 (1983).

124 260 N.W. 2d 169 Minn. (1977).

time the children reach majority.[125]

2.3.4 Recovery of all damages, excluding child-rearing expenses

According to Keplinger and Cramer,[126] the majority of courts grant damages for expenses directly linked to pregnancy and birth, but do not readily recognize maintenance costs of a healthy and normal child. Cheslik[127] agrees that this view has been adopted by the clear majority of American courts. Although courts are reluctant to compensate parents for maintenance costs, they seem willing to allow medical and hospital costs, loss of wages, loss of consortium, pain and suffering and in exceptional cases even the mental anguish suffered by the plaintiff.

In the case of **Johnston v Elkins**[128] the court stated the heads of damage that could be considered by a court when allocating an award:

- costs of the unsuccessful (initial) sterilization operation;
- pain and suffering endured during the sterilization operation;
- costs related to pre-birth care, hospitalisation costs, and post-birth care expenses;
- pain and suffering experienced by the mother before, during and after the birth and also for the trauma experienced in the following sterilization operation; and
- loss of consortium during the initial sterilization, the birth period itself and for a reasonable period after the birth.

Some courts extent the scope of compensation even further and in addition to the above mentioned items/ heads also allow the following damages:

- loss of income by the mother during the last stages of pregnancy, birth and a reasonable time after the birth;[129]

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125 In this way the true financial benefit of the children are taken into account and a fair adjustment can be made to the plaintiff-parents' award. In modern western society young children rarely make a significant contribution to the family income. More often elderly parents enjoy financial support from their children, which support has to be considered in order to make a just estimation for purposes of the benefit rule in wrongful conception actions.

126 *op cit* p 504.

127 *op cit* p 303.

128 241 Kan 407, 736 P.2d 935 (1987).

129 **Beardsley v Wierdsman** 650 P.2d 288 Wyo (1982).

- emotional stress[130] caused by the sterilization operations, the unexpected pregnancy and the eventual birth of the unwanted child;[131] and
- any further costs resulting from medical complications following the sterilization operations and birth.[132]

Hampton[133] conveys that courts have generally responded in one of three ways when confronted with the question of child-rearing expenses.[134] According to him the majority of jurisdictions allow all damages except child-rearing costs because many are of the opinion that this would violate public policy.

In conclusion, it should be stated that in the **Sherlock** case the court established the principle that, as a point of departure, all reasonable and foreseeable expenses connected with the maintenance of the child should be recognized.

2.3.5 Another possibility

Although the four basic approaches are acknowledged it is possible to add another to the list namely a combination of two of the common approaches.[135] One can therefore identify in total five basic approaches utilised by courts in dealing with wrongful conception actions can be distinguished.[136]

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130 Over the years many courts have excluded compensation for emotional distress. An argument used was that satisfaction for distress experienced by the parents is unacceptable and unreasonable as childbirth is not an universally recognized injury. It was also difficult to convince a judge or a jury that they suffered a substantial emotional injury. In spite of these doubts one must concede that possible situations could exist where emotional stress under wrongful conception circumstances could cause a plaintiff actual harm, *eg* it can be accepted that the news of an unplanned pregnancy in a period of possible promotion and increased responsibility could be devastating for a young professional person. Note that a claim for emotional distress is only actionable in South African law if the plaintiff has actually suffered harm on account thereof. Each case should therefore be considered on its own merits.

131 **Miller v Johnson** 231 Va 177, 343 SE.2d 301 (1986).

132 **Beardsley v Wierdsman**.

133 *op cit* p 48.

134 they have either denied the child-rearing costs altogether; allowed child-rearing costs but set it off against the benefits of having a child; or allowed full recovery regardless of benefits.

135 that is, to implement a combination of the scheme that reduces recovery by the value of benefits obtained from damage causing event and the scheme that limits certain items of damage recoverable.

136 they are: total refusal of all damages; award of all damages; damages with application of the benefit rule; all damages excluding child-rearing expenses and a combination of restricting damages by application of the benefit rule together with

2.3.6 Actual cost

Heida[137] reports on the varying cost of additional children. It has been found that although the average first child absorbs an astounding 17% of the family income, this percentage decreases as further children are born. Two children take up 25% and three children a comparatively meagre 32% of total familial income. It is suggested[138] that this consideration be taken into account when compensation for wrongful conception is calculated.[139]

2.4 Arguments for and against child-rearing expenses

Recovery for child-rearing expenses seems to be the pivotal consideration in wrongful conception litigation in the United States of America.

2.4.1 Arguments against

A possible rationale for the widespread denial of child-rearing costs may be traced back to one of the first wrongful conception actions, **Christensen v Thornby.**[140] *In casu* the plaintiff had undergone a failed vasectomy operation. Because plaintiff neglected to allege fraudulent intent[141] on the defendant's part, his action was accordingly denied. In the *obiter dicta* of the decision the court stated that to allow child-rearing expenses would be contrary to public policy. After this decision a 30-year *status quo* on this matter was maintained.[142] Courts that do not grant child-rearing costs provide various reasons to substantiate their viewpoint:

- the birth of a normal and healthy child is not a compensable loss/ damage;[143]

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the exclusion of certain items of damage recoverable.

137 1997. Foutje...Bedankt?! **Nederlands Juristenblad** (26), 1176.

138 *op cit* p 1177.

139 it might be found that a sixth child does not cost the parents that much after all.

140 192 Minn. 123, 255 N.W. 620 (1934).

141 as plaintiff based his claim on fraudulent misrepresentation he had to prove that he was intentionally deceived by the physician.

142 the view expressed *in casu* remained unchallenged until 1967 in the case of **Custodio v Bauer** *supra*.

143 **Boone v Mullendore** 416 So. 2d 718, 723 Ala. (1982).

- the benefits of rearing a child always outweigh the burdens as a matter of law;[144][145]
- child-rearing costs place an unreasonable burden on defendant which is wholly out of proportion to the culpability involved;[146][147]
- to allow recovery in wrongful conception would render the child an "emotional bastard";[148][149]
- damage awards in wrongful conception are too speculative;[150][151]
- there exists a need for legislative guidance without which courts are not prepared to

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144 **Mason v Western Pennsylvania Hospital** 499 Pa. 484, 453 A.2d 974 (1982); **Fassoulas v Ramey** 450 So.2d 822 Fla. (1984).

145 It is submitted that this presumption goes directly against the decision of **Griswold v Connecticut** 381 US 479 (1965), where a fundamental right to procreative autonomy was established. While it might still be possible to assume that emotional benefits of parenthood outweigh the emotional burdens in every case, the courts lump both the economic and emotional interests together - this approach denies case-by-case determination of the facts. The rejection of compensation on this public policy-basis amounts to the use of the benefit rule and the end result thereof is that the benefits exceed the costs involved with the child and in effect cancel the awarded damages, **Raja v Michael Reese Hospital and Medical Centre** 464 US 846 (1983).

146 **Kingsbury v Smith** 122 N.H. 237, 442 A. 2d 1003 (1982); **Rieck v Medical Protective Company** 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

147 Policy considerations therefore necessitate the restriction of recovery on maintenance costs because of the unreasonable burden it would put on medical practitioners. This argument is unconvincing as tort principles dictate that a victim must receive full compensation for the damage suffered (in other tort actions courts do not weigh damages against culpability).

148 **McKernan v Aasheim** 102 Wash. 2d 411, 687 P. 2d 850 (1984); **Boone v Mullendore** and **Flowers v District of Columbia** 478 A.2d 1073 D.C. (1984).

149 Supporters of this rationale believe that the emotional and physiological well-being of the child will be damaged if it would learn later on in its life that her parents were unwilling to maintain it. This line of reasoning is illogical: A child will be less damaged by such a "prejudice", than if it would grow up in a family with insufficient funds for its education, general maintenance *etc.* Approx 40% of all pregnancies in the U.S.A are unplanned. This would mean that close to half of American society are "emotional bastards" or rather, psychologically prejudiced individuals. If a court is truly concerned with the well-being of a child, it could guarantee anonymity for the plaintiffs.

150 **James G v Casceto** 332 SE 2d 872 W Va. (1985); **Sorkin v Lee** 78 A.D. 2d 180, 184, 434 N.Y.S. 2d 300, 303 (1980).

151 it is submitted that this is an unfounded concern as "American courts regularly expect juries to award damages where a dollar value is difficult to assess" - the court in **McKernan v Aasheim** 102 Wash. 2d 411, 687 P. 2d 850 (1984) suggested that rearing and educational costs of the child should be calculated by means of actuarial tables and other relevant information.

tackle wrongful conception cases;[152]

- courts are concerned about the looming possibility of opening court doors to fraudulent claims;[153][154]
- some courts believe that wrongful conception plaintiffs fail to mitigate their damages by refusing to give the unwanted child up for adoption or by declining abortion of the foetus[155] and for this reason forfeit the right to claim child-rearing expenses;
- certain judgments maintain that policy considerations prohibit the recovery of maintenance costs for fear that it would transfer the maintenance duty of the parents to the doctor, while the parents enjoy all the benefits of the child.[156]

Cleaver[157] mentions additional arguments against acceptance of wrongful conception actions in the United States of America.[158] The first, that no one can place a monetary value on child and the second, the dated contention that adults should not be allowed to contract out of the consequences of sexual intercourse.[159]

Cobben[160] argues that the woman in a wrongful conception action cannot maintain two conflicting positions. He explains that once the woman has chosen to personally care for her child (a personal characteristic), she should not be allowed to at the same time maintain a businesslike attitude towards the child and claim maintenance costs for it:

> *"Duidelijk lijkt mij dat de vrouw zich niet tegelijk op twee posities kan stellen. Als ze er eenmaal voor gekozen heeft haar kind zelf op te voeden (de "niet-zakelijke"*

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152 it is submitted that legislative recognition and guidance of wrongful conception would contribute much to legal certainty - see ch 8 where the need for comprehensive wrongful life legislation is explained, with concurrent relevance in wrongful conception.

153 **Beardsley v Wierdsma** 650 P 2d 288 Wyo. (1982).

154 these courts feel that comprehensive damages will lead to the institution of fraudulent actions.

155 this argument fails to take into account the moral differentiation many couples make between attempting to prevent pregnancy and dealing with potential life after conception - it is also suggested that it is not reasonable to expect parents to take either of these steps: "tortfeasors should take their victims as they find them."

156 **Kingsbury v Smith** 122 NH 237, 442 A 2d 1003 (1982).

157 *op cit* p 65.

158 and also in South Africa.

159 this reasoning was obviously considered before the constitutional acceptance of the right to family planning.

160 *op cit* p 481.

verhouding), dan kan ze niet tegelijkertijd een "zakelijke" verhouding tot haar kind innemen door integrale vergoeding van de opvoedingskosten te claimen."[161]

2.4.2 Arguments in favour

The following rationales could assist in answering some of the criticisms expressed by courts regarding child-rearing expenses:

- a physician who negligently performs an ineffective sterilization or who fails to properly inform a patient of contraceptive-related information should be held to the same level of professional standards that any other physician is expected to adhere to;[162] [163]
- the defendant-physician's negligent conduct should be the focus of a wrongful conception claim and not the birth of a child or the child's worth;[164]
- there is a need to consistently apply uniform tort rules concerning the award of damages irrespective of the cause of action;[165]
- damages in wrongful conception actions are no more speculative than damages commonly awarded in analogous cases;[166]
- the birth of a child is not necessarily more of a benefit than a burden;[167]
- there could be no doubt that the birth of a child and the ensuing child-rearing costs

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161 *ibid.*

162 **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984) - it remains true that medical negligent conduct should not be differently treated from any other instance of professional negligence.

163 when judging whether certain conduct was negligent, it should already be established that the conduct was also wrongful - see ch 2.

164 Hampton *op cit* p 54.

165 **University of Arizona Health Services Centre v Superior Court** 136 Ariz. 579, 667 P. 2d 1294 (1983) - the court could find no persuasive reason why they should not apply the basic damage rules to wrongful conception actions and allowed recovery to that extent.

166 **Jones v Malinowski** - an economist demographer scientifically calculates the cost of child-rearing with reference to general economic projections and criteria: similar computations are routinely made to measure damages in wrongful death cases without courts being too concerned about the accuracy or acceptability thereof.

167 **Sherlock v Stillwater Clinic** - the court found no reason to assume that the benefits of having a child will necessarily be greater than having no children in every instance: a jury should weigh the facts and circumstances of each particular case in order to determine whether a specific child could be seen as a blessing or a burden, also (in dissent) **Fassoulas v Ramey**.

cause a direct financial loss to the parents;[168]

- parents should be permitted to weigh the risks of possible adverse effects on the child's psychological development against the certain financial support and peace of mind created by a wrongful conception award;[169]
- the fear of possible fraudulent claims is an insufficient basis on which to deny recovery.[170][171]

Hampton[172] summarises the rationales which answer the majority of critics:

- a physician who performs an ineffective sterilization should be held to the same malpractice standards that any other physician must meet;[173]
- the birth of a child is not necessarily more a benefit than a burden;[174]
- parents should be permitted to weigh the risks of possible adverse effects on the child;[175]
- possible fraudulent claims: an insufficient basis upon which to deny recovery;[176] and

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168 **Sherlock v Stillwater Clinic** - there is principally no real difference between these expenses having an immediate financial effect and the more distant costs such as future medical expenses (wich most courts readily compensate.

169 **Beardsley v Wierdsma** - Hampton *op cit* p 56 holds that it has not yet been proven that wrongful conception litigation has any adverse psychological effect on children and neither has it been established that it would be significantly detrimental to the child should this be so - he also mentions that wrongful conception litigation would probably have no greater effect than any other instance where a child learns that its birth was not planned.

170 in **McKerran v Aasheim** the court emphasized its faith in the ability of the judicial process to distinguish fraudulent actions form legitimate claims.

171 I am likewise convinced that there are sufficient safety procedures in place to ensure that fraudulent claims do not succeed - justice will certainly not be done if the plaintiffs are prohibited from claiming compensation on account of possible counterfeit claims.

172 *op cit* p 54.

173 **University of Arizona Health Sciences Centre v Superior Court** 136 Ariz. 579, 667 P.2d 1294 (1983); **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984).

174 **Sherlock v Stillwater Clinic** 260 N.W.2d 169 Minn. (1977); **Beardsley v Wierdsma** 650 P.2d 288 (Wyo. 1982); **Sorkin v Lee** 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980); **Fassoulas v Ramey** 450 So.2d 822 (Fla. 1984); **Troppi v Scarf** 31 Mich. App. 240, 187 N.W.2d 511 (1971).

175 **Sherlock v Stillwater Clinic** 260 N.W.2d 169 (Minn. 1977).

176 **McKernan v Aashiem** 102 Wash. 2d 411, 687 P.2d 850 (1984): "Undoubtedly, the system will not decide each case correctly in this field, just as it does not in any field, but here, as in other areas of tort law, we think it better to adopt a rule which will enable courts to strive for justice in all cases rather than to rely upon one which will ensure injustice in many."

- child-rearing costs are not more speculative than analogous damages commonly awarded in other areas of law.[177]

2.5 Benefit theory

An important implication of the court's decision in **Troppi v Scarf**[178] was the employment of the so-called "benefit rule" or "benefit theory". Application of the benefit rule has the effect that all benefits in respect of the damage causing event are attributed towards the plaintiff. When the benefit rule is applied the courts appraise the beneficial consequences of a particular damage causing event and the damage award is then accordingly moderated by that amount.

Block[179] explains that in cases such as **Custodio**[180] and **Sherlock**[181] the benefit rule was applied and all advantages resulting or emanating from the child, were subtracted from the total amount of damages. I do allow child-rearing costs but reduce the awards by the anticipated benefits[182] the child will provide to the parents to such an extent that no award is in fact given. He describes it as "a form of mitigation used to prevent unjust enrichment to the parents[183] in wrongful conception claims." In calculating the relevant offset-amount, courts examine the specific circumstances of the plaintiffs-parents and base their awards on a case-by-case approach taking into consideration factors such as: the number of children already in the family; the financial resources available to the parents; and the reasons why the parents sought to limit the size of their family.[184]

The **Troppi** court evaluated the same factors when it applied the benefit theory, but added

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177 **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984): "They point out that similar computations are routinely made in wrongful death cases, where juries are required to measure recovery by considering, for example, the value of the child's services and companionship."

178 *supra.*

179 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. **Fordham Law Review** (53:4), 1107.

180 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

181 260 NW 2d 169 Minn. (1977).

182 both monetary and emotional benefits.

183 who have the benefit of having the child while collecting damages from the defendant.

184 the plaintiff's motivation for not wanting to increase their family is of vital importance in the South Africans plaintiff's case - only economic motivation for sterilization would warrant compensation (see **Edouard** *infra*).

thereto the age and marital status of the plaintiff-parents as additional relevant considerations. The court conceded that it is extremely difficult to place a monetary value or estimate on how much the unexpected extension of a family could adversely influence the typical wrongful conception household. It was suggested that the larger the existing family, the greater the detrimental effect of an additional child would be.[185]

It is similarly difficult to appraise how factors such as the varying ages and marital status of parents could affect dealing with unexpected pregnancies. Young married couples would probably be in a better position to deal with such an event than an elderly married couple without any wish for a latecomer child. Unmarried couples are also generally[186] less enthusiastic about unplanned pregnancies than spouses who have considered the possibility of children, but who have decided against it or who have postponed such plans to a more convenient time.

The household income can be accurately calculated and is certainly an important consideration in wrongful conception awards since it directly influences the daily circumstances and living standard of the family. Here one would take into account that the practical impact of an additional child would have less of an adverse effect on a wealthy family than on a family already living on the breadline.

Keplinger[187] reports that the rule allowing the costs of child rearing to be offset by the benefits of the child is usually referred to as the "benefit" rule. To date, jurisdictions recognizing the

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185 If, for example, a family with only one child should be increased by another sibling due to a negligent act of a physician, one could appreciate the fact that the family is still within reasonable and manageable bounds - as apposed to a family of six children who is enlarged even further. Each family's circumstances, however, are different and what might be acceptable and manageable for one could be devastating to another. One must concede that a totally new paradigm is entered into when a couple without children unexpectedly is blessed with a child - for such a couple who did not want children, a single child would certainly have a monumental effect on their everyday circumstances and way of life.

186 as communal living without marriage becomes more popular and socially acceptable, one could expect an increase in such couples having planned children of their own.

187 *op cit* p 502.

benefit rule include Arizona,[188] Connecticut,[189] the District of Columbia,[190] Maryland[191] and Michigan.[192]

Block[193] writes that the use of the "benefits offset"[194] has been criticised on several grounds. He mentions firstly that any tort victim should be entitled to recover full damages as a result of the wrongdoing.[195] If a plaintiff's claim is restricted by the implementation of the benefit rule[196] full recovery does not take place and the plaintiff is thereby unjustly prejudiced. Many courts have held that no cause of action exists stating that the intangible and incalculable benefits of a healthy child are always greater than the rearing costs of such a child.

Another unfortunate consequence emanating from the benefit offset approach is that if child-rearing expenses were awarded parents will in order to maximise their recovery, put in the unsavoury position of having to declare that they do not love or want the child, or that the child is of little or no value to them.[197]

Cleaver[198] is of the opinion that the implementation of the benefit rule in circumstances like these has the theoretically unacceptable effect that a price tag is put on the love and pleasure of the unplanned child. He warns that when the benefit theory is misapplied in that an overestimation of benefits[199] are made, it could have the effect that the award would be cancelled *in toto*. If so, no damages could be allowed for the reason that the maintenance

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188 **University of Arizona Health Science Centre v Superior Court** 136 Ariz. 579, 667 P.2d 1294 (1983).

189 **Ochs v Borrelli** 187 Conn. 253, 445 A. 2d 883 (1982).

190 **Hartke v McKelway** 707 F.2d 1544 *cert. denied,* 464 U.S. 983 (1983).

191 **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984).

192 **Green v Sudakin** 81 Mich. App. 545, 548, 265 N.W.2d 411, 412 (1978).

193 *op cit* p 1111.

194 another term frequently used for the benefit theory.

195 **Custodio v Bauer** 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), **Cockrum v Baumgartner** 96 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E. 2d 385 (1983) - which philosophy is in line with general principles of natural justice.

196 synonymous with benefit theory.

197 it is true in application of the benefit theory that the more the parents acknowledge their love for the unplanned child, the less recovery they would be entitled to.

198 *op cit* p 52.

199 both the child's love and similarly the pleasure the parents derive from parenthood.

costs and other expenses associated with parenthood are exceeded by the benefits of having the child.[200]

It is argued[201] that children do not contribute much to the family income in modern society.

> "To deny these costs is to rob the plaintiffs of compensation even for the most direct consequences of the defendant's negligence. In an urban society, the economic contribution that a child can be expected to make to his family is a small one; the primary benefit that he will bring his parents is the emotional benefit of mutual affection. The unhappy effect of this particular offset is to punish the loving parent: the more pleasure he takes in his child, the less his economic recovery will be. It is difficult to imagine a more inequitable result than this."

To limit an amount of damages by taking into account positive spin-offs from the damage-causing event in order to make a fair assessment is not a new concept. In American law this legal principle is founded by section 920 of the **Restatement 2nd of Torts** (1979):

> "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit *to the interest of the plaintiff that was harmed,* the value of the special benefit conferred is considered in mitigation of damages, to the extent that it is equitable."

According to this section a court may reduce a plaintiff's recovery in the fashion explained above. Many courts[202] have ignored or misconstrued the two significant limitations the **Restatement** have placed, namely:

- the circumstances considered in mitigation must benefit the *same interest* that was harmed by the tortious act;[203] and

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200 here the use of the benefit theory is severely criticized on grounds of an incorrect and unacceptable error in reasoning - if the child's future *financial benefits* are expected to be greater than its rearing costs, then a damage award would effectively be cancelled out by the accrual of this benefit to the parents, and this would hardly ever be the case.

201 A.N.M. 1982. Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant. **Virginia Law Review** (68), 1325.

202 **Flowers v District of Columbia**; **University of Arizona Health Services Centre v Superior Court** 136 Ariz. 579, 667 P. 2d 1294 (1983).

203 Block, *op cit.* writes on p 1111: " ...the courts have failed to observe the 'same interest' limitation specified in section 920 of the **Restatement 2nd of Torts,** which provides that the benefits used to offset should be of the same type as the damages being awarded. Using this principle, costs of child rearing would be offset by the expected financial benefits of having the child, and emotional distress

- the benefit can be offset against the damage only to the extent that this is *equitable*.

2.5.1 Misapplication of the benefit rule

It is submitted that a superficial probe into many "wrongful conception" judgements reveal that there is a general misapplication and judicial misrepresentation of the benefit theory with regard to the two key aspects mentioned above.[204]

2.5.1.1 Judicial misrepresentations of "same interest" limitation

Although the **Troppi** court[205] regarded the physical, emotional and economic aspects of parenthood as a single interest, comment (b) to section 920 clearly demonstrates that the limitation contemplates a much narrower definition of the word "interest":

> "Damage resulting from an invasion of one interest is not diminished by showing that another interest has been benefited. Thus damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act."

It is reported[206] that against this background it can clearly be seen that the drafters of the **2nd Restatement** argued that physical, emotional and economic injuries harm separate interests.[207] Wrongful conception claims usually involve the injury of all the above-mentioned interests. The true distinction between the various interests are illustrated whenever courts deny recovery for one type of injury, while allowing another. The **Restatement** explains:[208]

> "The benefit rule provides that a benefit of any of these separate interests offsets the damages only to that interest, not to other interests that are harmed by the same act of negligence."

2.5.1.2 Judicial misrepresentation of limitation to" an equitable extent"

The benefit rule applies only *"to the extent that it is equitable"*. Because a broad reasoning is incorrectly used, many courts weigh the emotional benefits of a wrongful conception child

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damages would be offset by the emotional joys of child rearing."

204 A.N.M. *op cit* p 1326.

205 31 Mich. App. 240 187 N. W. 2d 511 (1971).

206 A.N.M. *op cit* p 1325.

207 classes of interest.

208 *ibid.*

against *all* the items of damage associated with childbirth. This could have the unfair result that a wrongful conception plaintiff loses his total recovery because of the restricting effect of the benefit theory. It is suggested[209] that this incorrect use of the theory amounts to inequitable results and therefore the benefit theory should find no application in such cases.[210] To deny a legitimate wrongful conception plaintiff compensation because of this incorrect application of the benefit theory especially in an urban society where the economic contribution of a child to his family is small, is unacceptable and inequitable. It is obvious that the primary benefits of children in a modern and developed urban society are emotional benefits[211] and emotional support. Since benefits are to be considered in mitigation of damages only to the extent that it is equitable, inequitable application of the benefit rule should therefore be stopped.

It is suggested that there would be no unfairness or inequitable results if the benefit rule were to be applied in the correct way. Proper application would only consider same interests, for example where any financial benefits derived from the birth of a child would be taken into account and subtracted from any financial loss suffered in consequence of the birth of the child. In this way there would be no conflict with either of the restatement's limitations.

2.6 Public policy in favour of wrongful conception

It has been suggested that certain policy considerations could be taken into account when expanding the ambit of wrongful conception compensation.[212] They are the following:

- In all tort cases the primary purpose of the award of damages is to compensate the plaintiff for injuries caused by the defendant's negligence. Many courts[213] disallow wrongful conception actions for fear of possible psychological damage to the child. These courts suggest that emotional damage would be caused if the child learns of the litigation concerning it's birth. It has however been suggested[214] that, even so, the risk of possibly causing a certain amount of psychological trauma in this manner is still

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209 A.N.M. *op cit* p 1324.

210 note that the end effect of strict application of the benefit theory is the same as if the claim were to be dismissed on grounds of policy - costs relating to the unexpected pregnancy are obviously not part of the "windfall" of parenthood (*ie* windfall theory overriding-benefit theory is applied).

211 *eg* mutual affection and love.

212 A.N.M. *op cit* p 1328.

213 see *supra* reasons given for rejection of claim.

214 A.N.M. *ibid.*

much less harmful to the child than growing up in financial hardship[215] and in an environment where financial constraint has been caused because of it's very existence.[216]

- Although the pro-wrongful conception argument has been raised that liability would ensure a high level of medical professional care, it has been suggested[217] that not all are not convinced that liability would reduce the number of negligently performed sterilization operations. It is nevertheless probable that wrongful conception liability might improve the standard of counselling and post-operative testing.

- The plaintiff's recovery in a wrongful conception suit is circumscribed by the same principles that effectively limit other tort actions. It is suggested that the difficulty in proving the required elements and establishing a cause of action sufficiently protects the defendant from liability where he has not clearly been at fault.

- The items of damage in wrongful conception actions are not more speculative than in other claims. To disallow a legitimate wrongful conception claim on this basis is unnecessary and inequitable[218].

- It seems obvious that as the popularity and importance of responsible family planning increases, the number of wrongful conception cases will inevitably grow. Until proper guidelines for assessing damages are provided for by statute, courts must rely on standard principles of negligence law.[219]

2.7 Constitutional protection[220]

The issue of constitutional protection with regard to wrongful conception was considered in **Kingsbury v Smith**.[221] Primarily the fundamental rights to privacy[222] and human dignity are

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215 caused by the unexpected additional expenses derived from the family budget.

216 this view was supported in **Custodio v Bauer**.

217 A.N.M. *op cit* p 1329.

218 and it could be seen to effectively condone medical negligence.

219 *op cit* p 1330.

220 see ch 9.

221 122 N. H. 237, 42 A 2d 1003 (1982).

222 which includes decision making concerning family planning, abortions *etc.*

important in this regard and the application of these rights to family planing and procreative choice are obvious. These rights were respectively acknowledged and protected in landmark decisions such as **Griswold v Conneticut**[223] and **Roe v Wade.**[224] In **Sherlock v Stillwater Clinic**[225] it was pertinently stated that these constitutional rights support and protect wrongful conception actions.[226]

Hampton[227] is in favour of a rationale based constitutional dimension to the recognition of wrongful conception. He believes that denial of recovery in these cases is totally unacceptable, as the actions originate from an infringement of the plaintiffs' constitutionally protected right to choose not to procreate. It is argued[228] that this right closely corresponds with the ensuing right of an individual to choose sterilization as a birth control method which should also enjoy legal protection. It is accordingly suggested that certain judicial guidelines should be taken into account when the wrongful conception action is considered.[229]

2.7.1 No anti-wrongful conception legislation

It would appear that the same public policy considerations once used to prohibit the action for wrongful conception altogether are now implemented to limit wrongful conception damages in many states in America.[230]

2.8 Conclusion

Wrongful conception actions have been recognized in virtually every American jurisdiction presented with this issue. In spite of the claim's general acceptance by the courts, the question of damages is still in disarray. The application of the benefit rule as originally intended would present an equitable solution in many instances. It must be emphasized however, that each case should be examined on its own merits.

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223 381 US 479 (1965).

224 410 US 113 (1973).

225 260 N.W. 2d 169 Minn. (1977).

226 see the detailed discussion on these important cases, together with the relevance of these decisions on wrongful conception litigation in ch 2 where abortion rights, amongst other relevant topics, are investigated.

227 *op cit* p 59.

228 *ibid.*

229 see suggestions mentioned in final reflections ch 12.

230 for a full discussion on legislation prohibiting wrongful conception, wrongful birth and wrongful life actions, see ch 10.

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3. Legal position in England

3.1 Introduction

Jackson[231] points out that although there is a vast difference in the legal systems and the legal cultures of the United States and England, "the courses of action available to people who consider themselves injured as a result of the birth of an unanticipated child, caused by the negligence of another"[232] are virtually identical in both countries,[233] as both countries recognize the parents' claims, while rejecting wrongful life actions

3.2 Historical background

The first wrongful conception action was reported in England much later than its American counterpart.[234] Cleaver[235] gives possible explanations why the action for wrongful conception only surfaced in England when it did:

- changing public policy considerations concerning family planning and the increased use of contraception as a method of achieving this goal;
- sterilization as an accepted method of preventing unwanted future children became general practice;
- the influence of new abortion legislation in 1967.

3.3 Case law history

3.3.1 Udale

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231 1995. Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England. **Loyola of Los Angeles International and Comparative Law Journal** (17:2), 535.

232 *op cit* p 610.

233 except for a few American states who recognize wrongful life.

234 the first English case was reported in 1982 - **McKay v Essex Area Health Authority** (1982) QB 1166 (CA), (1982) 2 All ER 771, whilst the first American case was decided in **Christensen v Thornby** in 1934.

235 *op cit* p 53.

Udale v Bloomsbury Area Health Authority[236] was the first successful wrongful conception claim that came before the English courts. *In casu* the plaintiff-parents made a decision based on financial considerations not to have any more children. A negligent sterilization operation was performed on Mrs. Udale and she became pregnant once again. She gave birth to her fifth healthy baby nine months later. The hospital in question acknowledged liability for the following damages: Costs of both the sterilization operations,[237] compensation for shock caused by the unexpected pregnancy and loss of income for eleven months.[238] Damages in dispute were: expenses of expanding the family home and child-rearing expenses until the age of sixteen years. Judge Jupp expressed concern over these disputed damages, based on the following grounds:

- the child would feel unwelcome if he should ever discover that his birth has lead to litigation;
- the application of the benefit rule[239] disallows these damages;
- wrongful conception accountability would put unacceptable pressure on medical practitioners which may eventually prompt physicians to recommend unnecessary abortions in order to escape possible liability; and
- the effect of the windfall theory,[240] by which the birth of a child is always seen as a blessed event.[241]

In spite of these considerations the court "found it legitimate to have some regard to the disturbance to the family finances which the unexpected pregnancy caused"[242] and allowed damages to the amount of £8000 for the improvements of the family home[243] and recognized the disruption of the family finances as a compensable injury.

Cleaver[244] criticises the court's decision. He finds it illogical that the court recognized loss of

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236 (1983) 2 All ER 522 QB.

237 *ie* the initially performed procedure as well as the follow-up operation.

238 a reasonable period before and after birth.

239 see *supra*, where the benefit rule is discussed.

240 it is submitted that much criticism could be expressed over the acceptability of this theory - see *supra* where a similar viewpoint is held by American critics.

241 compensation would attribute to the parents a "double blessing".

242 Cleaver *op cit* p 55.

243 necessitated by the further extension of the family.

244 *ibid.*

income, medical expenses *et cetera* on the one hand, while not allowing child- rearing expenses as damages. He points out that all the above-mentioned types of damage originate from a single cause of action, namely, the negligent performance of a sterilization operation.

3.3.2 Emeh

The next important wrongful conception case was **Emeh v Kensington and Chelsea and Westminster Area Health Authority.**[245] In this case the negligent performance of a sterilization operation caused the birth of a deformed and handicapped child.[246] The court *a quo* found that all damage resulting from the period *after* twenty weeks of pregnancy is not compensable, since the plaintiff-mother had the opportunity to obtain an abortion. The court therefore found that the mother did not comply with her duty to limit her damages by not taking such drastic steps![247]

On appeal the court reached a different conclusion: The choice of the plaintiff-mother not to abort her unexpected child did not constitute a *novus actus interveniens*[248]. The court of appeal further stated that the mother's duty to mitigate[249] could not reasonably have included a duty to obtain an abortion. The decision further declared that the following damages should be compensated by defendant, whether the child in question is born normal or disabled:[250] pain and suffering and future loss of amenities of life.[251]

The final order of damages therefore included all demands of the plaintiff except the child-

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245 (1984) 3 All ER 1044 (CA); (1985) 1 All ER 346 QB.

246 which could easily cause one to be misled into earmarking it as a wrongful birth action, which it is not - see discussion of the **Bowman v Davis** case *supra*.

247 this viewpoint implies that wrongful conception or wrongful birth mothers with unwanted pregnancies have a duty to obtain an abortion (especially in the case of a handicapped foetus), since abortion may then be legally obtained - I submit that such requirement is unreasonable.

248 see ch 2 where causation as element of delict is further discussed.

249 Visser & Potgieter in their book on the **Law of Damages** (1993) *op cit* 231 declare that as the defendant is usually the blameworthy party, there cannot be expected from a plaintiff too high a degree of care in mitigating his damages. Any conduct that would, for example, be considered below his dignity or would be unreasonable for him under the circumstances, would not be expected from him. The test is that of the reasonable person.

250 it is important that courts, as the court in case, keep wrongful conception and wrongful birth actions apart and the differences in the cause of action be considered when an award is made.

251 the court merged this head of damage with "pain and suffering which would occur in the life of the handicapped child" - it is submitted that this anomaly could contribute to the already existing confusion between wrongful conception and wrongful birth actions.

rearing expenses.[252]

3.3.3 Thake

In **Thake & another v Maurice**[253] the parents of five healthy children decided, due to financial considerations, not to have any more children. Acting on this decision, Mr. Thake underwent a vasectomy[254] procedure in 1975. This procedure would have the effect that he would be made permanently and irreversibly infertile. Against all expectations of the Thake family another healthy child was born in 1978. The court *a quo* found that the medical practitioner committed a breach of contract. In reaching a different conclusion, the Appeal Court stated that no guarantee as to the success of the procedure was given.[255] The tort action based on the negligence of the doctor, however, was successful. The court found that there rested a legal duty on every medical practitioner to take utmost care when attending to patients. *In casu* the defendant neglected to inform his patient of the slight possibility that he once again could become fertile.[256] This omission was in breach of his duty to take utmost care and the doctor, therefore, did not fulfill his obligations[257] towards his patient. Damages were awarded for prenatal stress, pain and suffering as well as reasonable child-rearing costs.

Grubb[258] is of the opinion that these decisions in the **Emeh** and **Thake** cases established the cause of action based on wrongful conception in English law. He conveys that the action is usually based on tort, but where suitable, an action can also be based on breach of contract. Both the cases of **Thake v Maurice**[259] and **Emeh v Kensington and Chelsea and Westminister AHA**,[260] arose out of unsuccessful sterilization operations, which he believes, gave rise to three concurrent issues:

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252 the Appeal Court's awards were, £3000 for pain and suffering, plus £1000 for future loss of amenities and o specific award for child-rearing costs was allowed.

253 (1986) 1 All ER 497.

254 see ch 11.

255 see ch 4 on medical aspects, concerning medical guarantees.

256 *ie* where so-called re-canalisation takes place - see ch 11.

257 a person who is under contractual obligation to act in a certain manner could still be held delictually liable for damage caused to the person for who's benefit he was obliged to act - the contractual relationship could be an indication of the fact that a legal duty existed between the parties.

258 1985. Medical Law - Failure of Sterilisation - Damages for "Wrongful Conception" **The Cambridge Law Journal**, 30.

259 *supra.*

260 *supra.*

3.3.3.1 Concurrent issues

The first is that the wrongful conception cause of action can be based on contract and/ or tort. The **Thake** court shows that in the absence of negligence, a physician may still be held liable for breach of contract. *In casu*, the physician failed to disclose a small risk that fertility might return and had by implication not only agreed to perform a vasectomy, but also guaranteed permanent sterility. Alternatively the judge found a collateral warranty to the same effect.[261]

It is secondly suggested[262] that because the actual birth of the child in question is rather remote from the physician's negligence conduct, could possibly lead to a duty on parents to abort unwanted foetuses in certain instances. In **Emeh** the unexpected pregnancy was only discovered after 20 weeks gestation and the parents accordingly decided against an abortion. The court found their behaviour reasonable under the specific circumstances, but the possibility remains that discovery of the pregnancy at an earlier stage could change the picture to such an extent that it becomes unreasonable not to abort.[263]

Finally, it is believed[264] that public policy prevented recovery of certain damages in both **Thake** where a healthy child was born and **Emeh** where a deformed child was born.[265] In **Udale v Bloomsburry AHA**,[266] a number of well-known arguments were mentioned, the most important ones beint that of the viewpoint that the acceptance of a child-rearing expenses award would the "double blessing" and "constitute the rejection of parenthood". Although **Thake** found these arguments persuasive, the court judged it doubtful whether a child is always a blessing.

3.3.4 Eyre

In another case, **Eyre v Measday**[267] an unsuccessful sterilization operation was performed on Mrs. Eyre. In spite of the court's decision in the **Take** judgement given in the same year, the claim was rejected on the grounds that plaintiff did not prove that operation was negligently performed and also that plaintiff did not plea that the defendant breached a duty to inform her of the possibility that the procedure could be unsuccessful.

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261 Grubb. 1985, *op cit* p 31.

262 *ibid.*

263 I do not agree with this supposition - see ch 2 regarding reasonable mitigation.

264 Grubb. 1985, *op cit* p 32.

265 public policy barred any head of damage that could not be classified as additional expenses attributable to the child's condition of abnormality.

266 *supra.*

267 (1986) 1 All ER 488 (CA).

Grubb,[268] in a follow-up commentary on the evolvement of wrongful conception actions in England makes a comparison between correlative cases. He reports that although the defendant-physicians in **Thake** and **Eyre v Measday**[269] competently performed sterilization operations, they failed to disclose a risk that the operations could naturally reverse themselves.[270] In both these cases nature indeed took its course and the patients became fertile again. Both plaintiffs claimed for physical injury and financial loss and argued that the physicians expressly guaranteed sterility.

3.3.5 Negligence

The courts applied an objective test to determine the true contents of each medical procedure agreement. It was found that the reasonable patient would only expect reasonable care and skill, with the understanding that "irreversible" means "surgically irreversible" in the context of the finality of sterility achieved by sterilization procedures. At the core of the court's rejection of strict contractual obligation was the recognition that medicine is an inexact science and the outcome of medical procedures are usually uncertain. It is nevertheless possible for a physician to guarantee the success of treatment, but in such instances the guarantee must be given in unequivocal terms. In **Thake** the physician did not disclose any risk of possible regained fertility and even admitted that it was essential to do so.[271]

Instances where non-disclosure of risk might be considered negligent are:

- Upon acquisition of new knowledge, some physicians might decide to disclose that a certain risk exists when a patient undergoes a certain procedure or suffers from a specific condition. The accumulate effect of these disclosures could be that it becomes professional custom to do so as more physicians uniformly agree with these disclosures. Eventually disclosure in that specific instance becomes standard practice and failure to inform a patient would then constitute malpractice.[272]

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268 Grubb, A. 1986. Failed Sterilisation: Is a claim in contract or negligence a guarantee of success? **The Cambridge Law Journal** 197.

269 both in the same year, 1986.

270 see occurrence of re-canalisation ch 11.

271 and thereby acknowledged that he acted inappropriately not to reveal this risk.

272 Grubb. 1986, *op cit* p 199.

- In the **Sidaway** case[273] the court considered the fact that the physician's failure to disclose certain information, could constitute negligent conduct. There appears to be no counterbalancing health based reason to weigh against the need of disclosure. It is suggested[274] that "therapeutic discretion"[275] would not be suitable in sterilization cases as procreative decisions are of an elective and highly personal nature and usually not a matter of great urgency.[276]

- Even if a physician is not under a general duty to *volunteer* information about the risks of failure or reversal of a particular medical intervention,[277] he is still under a duty to give truthful information if specifically asked about such risks.[278] The courts decided that a physician's legal obligations should not depend on whether a patient is treated privately[279] or under National Health Service,[280] except where there is a clear agreement increasing the legal accountability of the physician. In both instances liability would depend upon p[281]roof of negligence. To prove negligence where a sterilization operation has been *prima facie* competently performed, however, still may not be easy.

3.3.6 Gold

The final English case to be discussed, is **Gold v Haringey Health Authority**.[282] *In casu* it was found that a physician who failed to inform a patient of the small risk that nature may reverse the surgery and also neglected to advise the patient of a surgical alternative with a smaller risk

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

274 *ibid.*

275 see ch 5.

276 a "therapeutic discretion" to inform or not, could possibly with exception be acceptable in cases of emergency.

277 that would be the case where in the medical fraternity it is not commonly accepted that physicians specifically inform their patients about certain aspects of the relevant condition - therefore, the courts will find that a physician who failed to disclose these facts did not act differently from the expected standard procedure.

278 see ch 11 on medical aspects.

279 where a plaintiff may bring action based on contract.

280 since contractual liability is excluded by statute an action can only be instituted when based on tort.

281 as negligence is a prerequisite for post malpractice, based on contract - see ch 2.

282 (1988) QB 481 (CA), (1987) 2 All ER 888 (1987) 3 W.L.R. 649.

of failure,[283] was not negligent. In reaching its decision, the court applied the so-called "Bolam test"[284] in terms of which the proper standard of medical care is established by the medical profession itself.[285]

Grubb[286] reports on yet another place that the Court of Appeal was anxious to restrict medical negligence actions for failed sterilization in cases where the procedure itself has been properly performed.[287] Grubb criticises that fact that he court did not want to award damages for the birth of a healthy child based on the premise that this would make the physician the 'financial father' of the child, as it was clearly established in **Emeh** that it is not against public policy to award damages for the cost of maintaining a child to majority.

He writes[288] in summary of the English position regarding wrongful conception:

> "In conclusion, it is submitted that the courts should allow these claims, but perhaps they should limit the damages that can be recovered. Until *Gold* is reversed, the best that can be hoped for id that the medical profession, out of an abundance of caution and fearing that a failure that a future court might take a different view of the law, will adapt its practices to ensure a greater disclosure. Ironically, this may be an example of beneficial defensive medicine!"

4. Legal position in Germany

4.1 Historical background

The first wrongful conception action in Germany was instituted in the year 1967.[289] *In casu* a

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283 a vasectomy performed on the patient's husband would have been a more secure option.

284 see ch 5 on informed consent.

285 as opposed to an aspect of negligence determined by the courts, as is the case in South Africa - see **Castell** *infra*.

286 1988. Contraceptive advice and doctors - A law unto themselves? **The Cambridge Law Journal**, 12.

287 *ie* to cases where negligence lie in respect of a failure to inform.

288 *op cit* p 14.

289 Landsgericht Itzehoe 21 Nov. 1968, 1969 **Zeitschrift für das gesamte Familierecht** 90 ff.

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288 *op cit* p 14.

289 Landsgericht Itzehoe 21 Nov. 1968, 1969 **Zeitschrift für das gesamte Familierecht** 90 ff.

pharmacist gave the plaintiff stomach tablets,[290] where in fact the contraceptive pill "Eugynon" was prescribed. The result of this negligent disposal of medication, was the birth of plaintiff's sixth healthy child. Stoll[291] also reports on this German wrongful conception case. The court[292] in *Landgericht Ithehoe* gave judgement against the chemist and awarded damages for breach of contract in the form of periodical maintenance payments. The court awarded an amount of DM 100 per month as child-rearing expenses until such time as the child in question has reached majority.

In the judgments of two important wrongful conception cases[293] the Supreme Court of Germany, the *Bundesgerichtshof,* established several principles relevant to the awarding of damages in wrongful conception actions:[294]

- the birth of a normal child may in certain instances be seen as a damage causing event;
- the object of damage resulting from breach of contract in a wrongful conception action, is not the child itself but rather the rearing costs of that child;
- child-rearing expenses may only be awarded if the parent's family planning measurers were necessitated by economic pressure and frustrated because of negligence;
- the courts should burden the award of damages by imposing the regulation that the moment the parents accept the child in the family home and no longer see it as unwelcome, the amount of damage should become refundable *ex tunc*.[295]

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290 "Enzynorm" tablets.

291 1989. A Doctor's liability for the unwanted birth of a child. **Comparative and International Law Journal of South Africa**, 206.

292 LG Itzehoe 21, 11, 1968: (FamRZ 1969 90 = VersR 1969 256).

293 both decided in 1980.

294 Bundesgerichtshof 18 Mrt. 198, **Entscheidungen des Bundesgerichtshof in Zivilaschen** 76, 249/ 76,259.

295 Mayor criticism can be expressed against this inhuman structure which defeats the bonds of family unity and would probably result in the child feeling unloved. The child could even develop personality defects because of this feeling of being unwanted. This regulation contradicts the court's first finding that the child himself is not the object of damage, but rather the expenses. Why should the parents and the child be punished if the negligence of the defendant caused this difficult position?

When subsequent changes in the fammily planning should occur, (and benefit the child), the damage lapses. This is an illogical premise and contrary to normal principles of damage calculation: *eg* at one stage the child is seen as damage, where at another stage, the child is not seen as damage. Such a premise, offends the "once and for all" rule (assessment of damages is made only once), as well as the collateral-benefit rule.

- the courts have striven to confine awards of damages to those injuries which the sterilization procedure was designated to avoid, therefore, an award would be denied if the actual reason for sterilization was fear of bearing a handicapped child (and a healthy baby is eventually born, or where a mother did not want children because of fear that she might die during childbirth and she lives to see her healthy child).
- when child-rearing expenses are awarded, only basic expenses are covered, as calculated from the standard child-rearing expenses scale.[296]

It is reported[297] that since the regular German Supreme Court decisions,[298]have been published on this problem:[299]

4.2 Extent of Wrongful Conception liability in Germany

Harrer[300] reports that in both American and German jurisdictions it is necessary to distinguish between the birth of healthy and impaired children when addressing *the extent of liability* in wrongful conception actions, as courts have treated both instances differently. An interesting comparison is drawn between the varying approaches followed in these two countries.[301]

German Courts have found that the lack of statutory remuneration provisions does not justify the refusal of wrongful conception compensation altogether.[302] These courts consistently hold that the birth of a child[303] entitles parents to compensable damages to address their burden of maintenance. It is reported[304] that the remuneration is based on and limited to a global sum corresponding to the amount provided for by the maintenance-ordinance for illegitimate

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296 this system is discussed in detail in ch 8, where its concurrent application to wrongful life actions in Germany is explained.

297 Stoll *op cit* p 207.

298 *"Bundesgerichtshof"*

299 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.

300 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 89.

301 see *supra* for American position.

302 Harrer *op cit* p 94.

303 even a healthy child.

304 *ibid.*

children under German law (sec 1615(f) BGB. This ordinance prescribes the amount of maintenance a natural father of an illegitimate child is legally obligated to contribute as "ordinary maintenance" until majority of the illegitimate child. The amount in question is fixed by the legislator from time to time, being the amount of maintenance required to maintain a modest/ average standard of living. The relevant contributions have to be payed monthly by the parent and depends on the age of the child while the amount increases as the child becomes older.[305] In 1994 the schedule prescribed the following monthly contributions:

- DM 291-under 6 years of age
- DM 353- under 12 years of age
- DM 418-under 18 years of age

The German legal system therefore solves the various challenges associated with the extent of damages in wrongful conception cases by ordering the defendant to pay in a global amount and taking into consideration all other relevant factors, a similar contribution to maintenance than expected from the natural father of an illegitimate child.

The courts consider it necessary to incorporate a reasonable surcharge to balance the value of rearing services rendered and obviously consider all underlying circumstances when calculating a suitable damage award. For this reason the amount is generally reduced by the child rearing subsidy received by parents from the government.[306] These state subsidised child-grants[307] were last amended on 30 January 1990. The state contribution increase with each child and amount to a monthly payment of:

- DM 50 - for the 1st child
- DM 130 - for the 2nd child
- DM 220 - for the 3rd child
- DM 240 - for the 4th child and up to 4 children DM 240

4.3 Varying comments

The German solution to wrongful conception is quite unique to approaches followed in other

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305 reflecting the increased financial needs for everyday expenses as the child becomes increasingly active in various spheres of life.

306 the German government contributes to each child's maintenance a certain amount per month, in order to assist with the financing of such an expensive (and therefore ever decreasing) venture.

307 enacted in section 10(1) BKGG.

countries as damage are generally restricted to child-rearing expenses[308] until the age of majority. It is reported[309] that the German Supreme Court consistently curtails the total damage award as the award is intended to compensate only the economic burden created by the wrongful act of the wrongdoer.[310] The courts accordingly argue that damages should be limited to an amount consistent with the average necessities needed in raising a child as the wrongdoer cannot be expected to meet liabilities beyond this boundary. A further limitation placed on the award is the fact that liability is confined to a global sum.[311]

Claasen[312] also refers to the West German Federal Supreme Court that found wrongful conception damages cannot be claimed in full and that only the amount a biological father would have had to pay if the child had been born illegitimately, *in addition to* the lump sum for such services which are necessary for the caring and raising of a child.[313]

Harrer[314] believes that mere compensation for child-rearing expenses is an insufficient recompense as a sense of justice must also be satisfied.[315] He suggests[316] that this will be achieved through a "compromise solution" whereby not only compensation for maintenance should be allowed, but also further injuries such as increased medical expenses, loss of earnings, pain and suffering and so forth be recompensed. As a counter balance for such a comprehensive award certain subtractions should be made for benefits stemming from the cause of action, while further limitations could be introduced to contain the damages to a fair and reasonable amount.

The current German method of calculating damages could be criticised for obvious reasons.[317]

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308 where many other jurisdictions are weary of compensating these expenses.

309 Harrer *op cit* p 95.

310 BGH, 1980 VersR 561, also OLG Saarbrücken, 1986 VersR 1550.

311 corresponding to the abovementioned maintenance ordinance for illegitimate children.

312 Claassen, N.J.B. and Verschoor, T. 1992. **Medical Negligence in South Africa** (ch 5) Digma.

313 *op cit* p 82.

314 *ibid.*

315 see Visser's viewpoint on the nature of compensation, ch 2.

316 *op cit* p 96.

317 The fact that all plaintiffs' claims are calculated in the same way and based on the same given data could raise concerns that individual circumstances are not taken into consideration. Only objective/ hypothetical factors such as a standard rate

As an alternative, critics[318] supports a concrete and individually based computation of damages. In following this method no persuasive arguments are necessity to deviate from the general principle of individual determination in assessing damages. "The wrongdoer should take his victim as he finds him."[319] When applying the individual computation method the extent of loss varies greatly from plaintiff to plaintiff, as the specific circumstances of each plaintiff-family are taken into account.

4.4 Conclusion

It appears, in conclusion, that the wrongful conception action is in principle allowed in Germany.[320] Criticism may, however, be expressed against the intimidating condition set by the courts, that damages should be paid back, if the parents admit that they accept the child into their own family, and that the unexpected child is no longer unwanted. The purpose of true compensation is defeated by such an inhuman qualification.

5. Legal position in the Netherlands

5.1 General background

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maintenance payable per month and a standard state contributions determine the outcome and basis of the award. This method is therefore contrary to the traditional damages assessment formula whereby each plaintiff's unique circumstances are taken into account and each plaintiff's *actual* damage is compensated.

A glaring shortfall pertinent to this approach is the fact that no award would be ideally fair or justifiable, as specific circumstance of plaintiffs are ignored. (When all plaintiffs receive the same amount damages, based on the average child's maintenance, it would unjustly prejudice wealthy plaintiffs and would certainly benefit poor plaintiffs without obvious reason.) The actual damage is therefore never computed and in stead a general average is used in order to simplify claims and produce a workable solution for wrongful conception actions. The achievement of this goal, however, is of great value and it is submitted that serious consideration should be given to this type of regulated and uniform approach in solving wrongful conception challenges - see recommendations *infra.*

318 OLG Karlsruhe, 1979 NJW 599.

319 meaning that if the wrongdoer physician is unfortunate enough to chose a well-off plaintiff as his "victim", his claim will be of greater proportion because of the higher maintenance required to maintain the plaintiff's high standard of living.

320 Harrer *op cit* p 97 draws attention to the fact that, in direct contrast to the German approach, the majority of courts in the United States of America limit damages to those losses occurred directly as result of pregnancy, but usually excluding the child-rearing expenses of a normal child.

Stolker[321] mentions in his summary of the wrongful conception action in the Netherlands that the majority of cases are settled out of court.[322] According to him the first case of this kind was heard[323] in the 1970's and it has become increasingly prevalent ever since. In accordance with and in direct correlation to this development, the importance of fammily planning has also increased. An example illustrating this phenomenon is the Dutch Organisation for Obstetrics and Gynaecology who gave out a note in 1992, in which they gave their support to the sterilization of women. This note was circulated on advise of a large *aansprakelijkheidsverzekeraar* or liability insurance company, foreseeing future problems in respect of wrongful conception.

Gevers[324] reports with regard to wrongful conception in the Netherlands that courts have generally rejected damages for child-rearing and education costs.[325] He reflects on divergent academic views on this point and mentions that although Stolker is in favour of judicial restraint concerning educational costs, Sluyters finds it difficult to understand why these claims cannot be awarded.

5.2 Recent judgement

Stolker[326] discusses the most recent decision of the *Hoge Raad* of the Netherlands[327] with regard to wrongful conception actions.[328] The facts of this important case[329] were as follows:

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321 1997. Who's afraid of wrongful birth? **Weekblad voor Privaatrecht, Notariaat en Registratie** (6262:128), 191.

322 it is interesting to note that the same phenomenon is found in South Africa - see ch 4.

323 (in the Netherlands).

324 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 25.

325 1978 (10 juli) Hof Arnhem (NJ 1979, 247) en 1979 (2 november) Hoge Raad (NJ 1980, 77).

326 *ibid.*

327 the *Hoge Raad* is the country's highest legal authority, similar to the Highest Court of Appeal in South Africa, or the Supreme Court in the United States of America.

328 Note that the Dutch academics and courts incorrectly refer to wrongful conception actions as "wrongful birth actions". This interesting discovery concerning the Dutch approach in wrongful life actions was their different and sometimes confusing use of internationally recognized terminology. This unclear position should not be followed, as it is of vital academic importance that the correct terminology be used to describe specific legal phenomena. Because of the superficial resemblance between the varying wrongful life actions (in the broad sense) it is necessary that specific reference is made to specific actions. The actions under discussion differ with regard to a number of fundamental issues - see research proposal and ch 2

In 1986 a gynaecologist took out a *spiraaltje* or contraceptive device that was positioned in Mrs. O's uterus during 1984 in order to prevent future pregnancies. He did not replace the device after this routine inspection and also failed to inform Mrs. O of this important detail. As a result Mrs. O continued sexual relations with her husband without taking alternative contraceptive precautions, became pregnant and delivered their third healthy baby in 1987. Their reason for obtaining the particular contraceptive device was the fact that it was financially impossible for them to support a further child. In fact, the family lived on a monthly social support handout,[330] awarded by the state to Mrs. O's husband.

Mrs. O instituted an action for wrongful conception against the gynaecologist. The following heads of damage were in dispute:

- damages for child-rearing expenses[331] until the age of 18 years;
- damages for the plaintiff mother's loss of income; and
- satisfaction for the immaterial rather non-patrimonial damages suffered by the plaintiff.

The following heads of damage were not argued and were accordingly paid by the defendant:

- costs of a baby attendant/ babysitter;
- costs involved with the arranging and modifying of a baby room; and
- all additional costs in respect of the pregnancy and birth.

The defendant admitted that he, by failing to inform his patient of the fact that she no longer had a contraceptive device in place, had committed a *beroepsfout* or professional misconduct. Stolker[332] mentions that professional negligence in the medical sphere can roughly be divided into cases of negligence with regard to treatment and negligence with regards to the duty to properly inform. *In casu*, both these classes of negligence were present. The plaintiff primarily based her case on the negligent treatment of the physician and subsidiarily on ground of lack of information. Stolker[333] reports that there is still much uncertainty in Dutch academic circles and in the judgement of the courts concerning the precise meaning and sphere of the failure

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where definitions are given and varying terminology are discussed.

329 HR 21 februari 1997.

330 *RWW-uitkering.*

331 including care and education of the child.

332 1995. Aansprakelijkheid voor beroepsfouten - van droom-carrière naar nachtmerrie. **Ars Aequi** (44:1), 13.

333 *op cit* p 15.

of a physician to properly inform his patient about the treatment and its (possible) effects.[334]

5.2.1 Varying views

In the *Hoge Raad's* judgment, the statement was made that in so far as the parents are obliged to maintain and to provide the basic needs[335] of their children, these costs would not be seen as damage in the sense of patrimonial loss.[336] This would be possible in only two extraordinary circumstances:

- if the parents were to live in serious financial difficulty because of the additional child; or
- if the circumstances would force the parents into a substantially lower standard of living.

Criticising this viewpoint, the Advocate General Vranken,[337] in his opinion to the *Hoge Raad* on this matter, refused that educational costs be awarded. According to him the central problem in allowing educational costs as a head of damage is that the child himself is then seen to be the object of damage and this would be an unacceptable state of affairs.[338] Vranken's final view of wrongful conception actions is that it should generally not be permitted. He paraphrases the German author Picker[339] in the following words:

> "... *schadevergoeding is gericht op het herstellen van de oorspronkelijke waarde van iets. Dat kan een object zijn dat beschadigd is, dat kunnen ook de gezondheidstoestand of de levenskansen van een mens zijn die letsel heeft opgelopen. Het object, de gezondheid of de levenskansen van de mens worden hierbij als intrinsiek waardevol en als juridisch beschermenswaardig vooropgesteld. Juist daarin is de rechtvaardiging gelegen voor het toekennen van een vergoeding voor hun herstel: de schadevergoeding komt ten goede aan iets dat waardevol is en probeert die waarde zoveel mogelijk weer op het nivo van voor de schadetoebrengende*

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334 *eg* it is uncertain who must prove that the duty to inform has not been fulfilled.

335 incl education costs.

336 and the plaintiff would therefore not be able to claim these costs from the defendant.

337 in the Netherlands each province has an Advocate General - these judicially appointed legal officials give advise to the *Hoge Raad*.

338 see ch 8 *infra* where this very concern is discussed in reference to wrongful life actions.

339 Picker. 1995, *op cit* p 492.

handeling of gebeurtenis te brengen. Bij 'wrongful birth' [340]*-vorderingen ontbreekt dit alles. De oorspronkelijke waarde is een leven zonder het niet geplande kind. Op zichzelf is dit een intrinsiek waardevol en juridisch beschermenswaardig iets, maar niet meer als het kind er eenmaal is. Dan immers is de oorspronkelijke toestand alleen voor herstel vatbaar, zij het in natura, zij het in geld, indien men het kind wegdenkt, althans indien men het kind uitsluitend beschouwt in termen van kosten c.q. van een kosten-baat analyse. (...) Het civiele aansprakelijkheidsrecht heeft op dit terrein dan ook niets te zoeken..."*[341] [342]

Not withstanding this viewpoint, Vraken is of the opinion that *never* allowing educational costs for an unwanted child would be too rigid an approach. He finds the forced distinction between the child and its worth as a human being on the one hand set against the harsh reality of the child's educational and other expenses on the other hand an impossible situation to bear. An acceptable middle road must be found between the two extremes of no damage award [343] and a full damage award.[344] He believes that neither of these viewpoints is totally defendable under all circumstances. The undiluted application of pragmatism as found in the basic principles of the law of damage does not satisfy fundamental questions. Similarly, the usage of the principle perspective only could lead to the unacceptable position of earlier times where no criterion or yardsticks of equity and humanity were tolerated.

In his own words, Vranken expresses the seeming impossibility of reaching the final solution to the expected "magic formula" of the *via media* approach:[345]

"Ik slaag er niet in een scherpe grens te trekken tussen enerzijds de erkenning van de waarde van het kind en anderzijds het onloochenbare feit dat de arts inbreuk heeft gemaakt op het recht van de vrouw haar leven naar eigen inzicht in te richten. (...)

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340 actually a wrongful conception action - take note of the incorrect use of terminology by Dutch legal writers in this respect - see research proposal in this regard.

341 conclusion of Advocate-General Vranken, sub 19.

342 A paraphrased summary of this quotation is: Damages is awarded in order to replace, to the previous level of worth, an object which is legally protected and intrinsically valuable. In a wrongful conception action this legally protected object is a life without the unplanned child. After the arrival of the child this object loses it's worth. The only way in which the original level of worth can be replaced, is by eliminating the child from the equation. The law of civil liability has no business venturing into this field of controversy.

343 as propagated by Picker *ibid.*

344 including educational costs as dictated by the basic principles of the law of damages.

345 Stolker. 1997, *op cit* p 193.

Misschien... behoort de 'wrongful birth'[346] -problematiek tot de soort waarin altijd tot op zekere hoogte geschipperd moet worden tussen principe en werkelijkheid."[347]

He foresees that countries with a high level of social support[348] would be better able to confront the daunting problems associated with these actions.[349] It is reported[350] that Vranken poses many questions with regards to the seemingly illogical and divergent decisions made in courtrooms around the world, in respect of wrongful conception awards:

- why are educational expenses often limited to average expenses[351] rather than the actual costs spent by the plaintiff on his child's education?[352]
- why can it not be expected from a woman who does not want the additional child to limit/ mitigate her damage by obtaining an abortion or adoption?[353]
- why is the damage in wrongful conception seen to remain/ persist until the age of 18 years[354] even if the initially unwanted child is later as accepted and loved as any other

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346 a wrongful conception action.

347 This can be paraphrased as follows: Vranken cannot succeed in drawing a definite line between the recognition of the child's worth on the one hand and the insurmountable fact the a physician has infringed upon the right to self determination of the mother. Maybe the wrongful conception phenomenon belongs to that group of problems that can only be approached by floating between considerations of principle and fact.

348 the Netherlands has an exceptionally high level of social support and many programs are in place to help underprivileged communities and other struggling groups, such as handicapped people - in contrast to this state of affairs, the South African government experiences great difficulty in providing for the most basic needs of the majority of the masses.

349 it is submitted that if a state is in the position to look well after its disabled and indigent peoples, plaintiffs from these groups would not need to institute big claims against the physician-defendant to care for their unexpected or disabled children.

350 Stolker. 1997, *op cit* p 195.

351 as seen in the German legal system.

352 it is submitted that a family's usual standard of living should be taken into account when a wrongful conception award is made - *eg* if the plaintiff's themselves received private college education, they should be entitled to be fully compensated by defendant for their child's education at a private institution and other additional expenses.

353 for criticism on this viewpoint, see ch 2.

354 in other instances awards are given to accommodate for the unplanned child up to 21 years of age.

planned child?[355]

- why are no immaterial damages awarded in cases where the mother of a unwanted child has to attend to the child, instead of fulfilling her own personal goals in business, study or travelling?[356]
- why are immaterial damages deemed to be in conflict with the value and dignity of the child as a human being, whereas patrimonial damages with regard to educational expenses are acceptable?

5.3 Damages

In contrast to the cautious approach of the Advocate General Vranken, the *Hoge Raad* in its decision on the wrongful conception action of February 21, 1997, boldly committed themselves in awarding damages:

> *"Het gaat immers uitsluitend om vergoeding voor de extra last die as gevolg van de fout van de arts op het gezinsinkomen wordt gelegd en die juist door de aanvaarding van het kind ontstaat. Voormelde gedachtegang kan evemin worden gezegd in strijd te komen met de waardigheid van het kind als mens of zijn bestaansrecht te ontkennen. Integedeel mag, mede in het belang van het kind, aan de ouders niet de mogelijkheid worden onthouden om ten behoeve van het gehele gezin, met inbegrip van het nieuwe kind, aanspraak op vergoeding van de onderhavige kosten te maken."* (r.o.3.8)[357]

The *Hoge Raad* declared that the child itself was not the object of the damage, but instead found that the financial consequences of its birth should be seen as the main object of damage. Stolker[358] is of the same opinion.[359] According to him it is not immoral to "think away" the

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355 it is submitted that this point of view is based on an incorrect understanding of the true nature of wrongful conception damages - it is namely not the child itself, but rather the unavoidable expenses occasioned by the child that is complained of.

356 these unrealised dreams surely show an infringement of personality rights or expectations.

357 This can be paraphrased as follows: Reparation for the additional burden placed on a family's income by the negligent conduct of a physician is the only relevant consideration before us. This approach cannot be seen to reduce the worth of the child as such. Rather, it enhances the child's value and the parents may not be barred from demanding damages for the child's costs which may benefit the entire family.

358 1997, *op cit* p 193.

359 I agree with this reasoning.

damage-causing object[360], it is merely a way in which to assess the damage. In much the same way, adopting parents will surely make a calculation as to how much their new addition to the family will cost them!

Dutch law is codified and Stolker[361] mentions in this respect that the *Hoge Raad* did not base its decision to allow an award for wrongful conception solely on the principles of the law of damages. He shows that *in casu* we have to do with a claim found in Book Six, and not a Book One claim. It is further reported that in Advocate-General Vranken's descending conclusion to the recognition of damages in wrongful conception actions, he did not base his decision on conservative restrictive reasons, but was rather moved by considerations of fear of fraudulent application by greedy parents.

Vranken is apparently further perplexed by the solution of the German courts with regard to educational expenses in wrongful conception actions:[362] They restrict awards to the average educational costs of the average German child and do not allow the genuinely expected cost of the plaintiff's child to be claimed. Vranken argues that if a decision is made to compensate the parents for this specific head of damage, then the basic damages principle should be followed, which states that a full redress must take place.[363]

In Dutch law section 6:98[364] provides that, with regard to the calculation of damages, the final amount may be reduced in the discretion of the judge on grounds of the *nature* of the damage.

5.3.1 Specific family circumstances

Cobben[365] discusses a novel possibility that could be used to limit wrongful conception claims to acceptable bounds.[366] He explains that the plaintiffs' family circumstances should be taken into account when an award is made, for example where the plaintiffs have three children, it should be considered that the eldest might leave the family home within six years of the unplanned sibling's birth. If this reasoning is applied, plaintiffs' wrongful conception claim

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360 the unwanted child.

361 *ibid.*

362 see German discussion *supra.*

363 a plaintiff is entitled to be placed in the same position he would have been in had the damage causing event not taken place.

364 *ie* Book 6, sec 98.

365 1997. Autonomie versus zorgplicht. **Nederlands Juristenblad** (11:72), 479.

366 especially as the concern for excessive compensation has in the past been used to prohibit wrongful conception altogether.

would be limited to such an occurrence.

> *"Uit de feiten waarvan in cassatie kon worden uitgegaan, valt af te leiden dat het oudste van de drie kinderen binnen zes jaar na de geboorte van zijn ongeplande broer of zuster meerderjarig is geworden. Vanaf dat moment kwamen in beginsel wederom slechts twee kinderen ten laste van het gezinsbudget. Moet de periode waarover schadevergoeding is verschuldigd niet worden beperkt tot dat moment?"*

Stolker,[367] accordingly, suggests how the problem concerning the just allocation of educational expenses[368] and limitation of awards in so-called "windfall claims"[369] could be solved. By simply taking into account the actual needs necessitated by the unplanned child *versus* the means of support for that child[370] in each instance, a just and fair damages award could be assigned every time. The result would be that poor families[371] would be financially assisted, while better-off families[372] would be precluded from receiving a so-called "double blessing".[373] Stolker also mentions the probability that richer plaintiffs may sue for higher damages than average plaintiffs in order to maintain their higher standard of living.[374] By assessing each claim on its own merits, the much-feared possibility of excessive claims for damages would be prevented. The basis of this limitation of damages would be the special nature[375] of the damage. The *Hoge Raad* specifically referred to the criterion of section 6:98:

> *"Zoals hiervoor in 3.7 reeds aangegeven, komt uitsluitend voor vergoeding in aanmerking schade die aan de arts naar de maatstaf van art. 6:98 als een gevolg van zijn fout kan worden toegerekend. Deze maatstaf sluit de mogelijkheid niet uit kosten die de gemiddelde kosten van verzorging en opvoeding van een kind te boven gaan, niet toe te rekenen aan de arts, maar aan de ouders zelf, die in de hen persoonlijk betreffende omstandigheden aanduiding hebben gezien tot het besluit tot het maken*

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367 1997, *op cit* p 194.

368 to deserving parents.

369 of undeserving parents.

370 each plaintiff's family has to their disposal.

371 who would be harder hit by an additional mouth to feed and child to care for.

372 who generally already maintain a high living standard.

373 by receiving the benefits and joys associated with parenthood and claiming damages for all the child's expenses.

374 even so, it is submitted that the maxim: "wrongdoers should take their victims as they find them" should apply.

375 as required by sec 6:98.

van deze kosten." .[376] [377]

From this statement we may draw the conclusion that all Dutch wrongful conception plaintiffs, regardless of their financial circumstances, are entitled to at least a minimum of the average child-rearing expenses and educational costs. The court stated that the NIBUD, could provide the courts with helpful information regarding the true costs of an average child's development.

Stolker[378] shows that if his suggested reasoning is followed,[379] it would be possible under certain circumstances that no award of damages will be allowed. In such an instance he would have reached the same result as proposed by Advocate-General Vranken but by following a totally different route. Stolker, however, declares that the *Hoge Raad* did not go *that* far in restricting awards, as they did allow damages for the average child-rearing expenses to all plaintiffs, irrespective of their wealth. He concludes to say that the actual figure of this average amount would expeditiously be established, and would then become a rule of application.

The *Hoge Raad* added to their conclusion that the presiding judge could still further limit the award in so far as the physician's insurance does not cover his professional negligence liabilities. If the liability insurance[380] is sufficient to cover the total amount further limitation of the claim is accordingly not possible.

5.3.2 Various arguments

Another important aspect regarding the subjective positions[381] of plaintiffs in wrongful conception actions is discussed.[382] He argues that the motive for the parents' decision to implement birth control measures in order to achieve family planning is extremely relevant to

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376 A paraphrased summary of this quotation is: Only the damages awarded on the criterion of sec 6:98, should be allowed for the damage caused by the error of the physician. This criterion does not exclude the possibility that above average maintenance and educational costs could be for the account of the parents and not the defendant-physician.

377 the reason suggested for this approach is that since it is the parents who chose to incur the higher than average costs they should also have to pay for it.

378 1997, *op cit* p 195.

379 keeping sec 6:98 in mind.

380 see final reflections (ch 12) on the important role of professional insurance in solving wrongful life challenges.

381 *ie* financial position, religious believes governing *eg* the position on abortion *etc.*

382 Stolker. 1997, *op cit* p 196.

the court's award of damages.[383] He gives the example of a couple, who because of their fear for the possibility of a handicapped child, decided to use contraception to prevent the birth of such a child. The contraceptive measures do not work and a healthy baby is eventually born. Stolker feels, it would be incorrect to award these parents child-rearing expenses and educational costs in an ensuing wrongful conception action.[384]

A certain amount of criticism has been raised against this viewpoint. It has been said for example, that it would be impossible to establish the true intentions and motives of the plaintiff-parents at the time of conception.[385] Nothing but integrity and honesty stands in the way of plaintiff-parents to declare that their motive to implement birth control measures was indeed for financial reasons.[386] Stolker, however, is not convinced that this opportunity for fraud is an insurmountable obstacle. He is in this respect encouraged by the decision of the *Hoge Raad* to take into account the true financial capabilities of the parents when considering wrongful conception claims.

Another argument raised against the awarding of wrongful conception damages *in casu* was that the child will suffer psychologically if he one day learns of the litigation surrounding his birth, especially the fact that his parents refused to pay for his upbringing.[387] The *Hoge Raad* was, however, not persuaded by this concern:

> *"Die kosten hebben derhalve met het gewenst zijn van het ind als mens niet van doen. In de derde plaats mag ervan worden uitgegaan dat ouders in het algemeen in staat zijn om aan het kind duidelijk te maken dat een indruk als voormeld onjuist is, nog daargelaten dat zij zelf die idruk kunnen logenstraffen door het kind met liefde en zorg*

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383 the exact same reasoning is followed in South African law (see *infra*) and I submit that it is the correct viewpoint to follow.

384 For the same reason I think it would be wrong to award child-rearing expenses in wrongful birth actions. These parents wanted to have a child and were prepared to pay for the expenses associated with the upbringing of a child. Their only complaint with the birth is the fact that the child is disabled/ genetically impaired. I believe therefore that the true motivation, attitude and circumstances of plaintiffs should be carefully considered, so as to ensure that justice prevails and equitable decisions are made.

385 Note that the appropriate point in time for the plaintiffs' feelings to be tested is at time of conception, as it is at this point that the parents' lives will start to change because of the unplanned pregnancy. It is possible that plaintiff-parents might have a change of heart concerning the pregnancy, in which case no action will be instituted.

386 whereas the true motivation for their decision was based on some other reason *eg* a fear of bearing a handicapped child, personal health considerations, *etc.*

387 see also *supra* where the same concerns were raised by English and American courts.

groot te brengen." (r.o.3.9)[388]

Stolker[389] makes an interesting comparison between the specific position of "wrongful conception children" and unplanned children in general,[390] for example late-comer children.[391] According to the viewpoint mentioned above all unplanned children should suffer from psychological trauma.[392] The only difference between unplanned children in general and "wrongful conception children" is the fact that their parents did not take the necessary precautionary measures and would not be entitled to claim for child-rearing expenses. It could be therefore argued that these children would be even worse off[393] than "wrongful conception children" because of the additional financial implications of an unplanned child.[394] This argument should be rejected when used to reject wrongful conception actions.

The viewpoint that the benefits of a healthy child should influence the amount of damages[395] was also dismissed by the *Hoge Raad*:

> *" Met name dient het standpunt te worden verworpen, dat het enkele feit dat het gezin met een gezond kind wordt uigebreid, reeds een immaterieel voordeel oplevert dat tegen elke vermogensschade van de onderhavige aard opweegt. In de eerste plaats strookt het niet met de ontwikkelde gedachtengang om reeds op grond van dit enkele feit aansprakelijheid te dezer zake van de arts te laten vervallen. In de tweede plaats zou het, gegeven het uitgangspunt dat de schade is ontstaan door het doorkruisen van een mede door financiële verwachtingen ingegeven gezinsplanning, ook niet redelijk zijn in de zin van art. 6:100. Veeleer moet ervan worden uitgegaan dat immateriële*

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388 This can be paraphrased as follows: An award for child-rearing costs have nothing to do with the desirability of the child as a human being. The parents would generally speaking be able to make it clear to the child that the suggested impression (that the child itself is unwanted and the parents do not want to pay for its maintenance) is incorrect and will be able to prove it by raising the child with love and care.

389 *ibid.*

390 a study was done in the United States of America where it was found that 1/3 of all Americans are born from unplanned pregnancies - see *supra*, where another study reported this figure to be 40%.

391 *"laatlammers".*

392 because of the great number of "unplanned" children actually born, it is doubtful whether serious psychological harm is done.

393 and would accordingly suffer worse psychological trauma.

394 the parents without a claim would certainly be in a worse financial position and this could easily lead to the parents transpiring their negative feelings to the child.

395 *ie* the application of the benefit theory - see *supra.*

voordelen slechts in rekening behoren te worden gebracht bij de vaststelling van eventuele immateriële schade." [396]

One other well known argument used to disallow wrongful conception is that the parents could have limited their damages by obtaining an abortion or alternatively by giving away the child for adoption. This supposition was dismissed by the *Hoge Raad*.[397]

The current discussion of the recent Dutch wrongful conception decision only dealt with child-rearing expenses and educational costs. Other important head of damage, to be considered is: the plaintiff mother's loss of future income. The *Hoge Raad* rejected this claim. They held that it was the own choice of the mother not to work[398] the first years after the birth as the fact that a woman bears a child generally does not stop her from choosing and following a career. Stolker[399] believes that the *Hoge Raad* in this respect the was too restrictive. The *Hoge Raad* namely stated that it would in principle be possible for a wrongful conception plaintiff to acquire such damages, but only in cases where the given circumstances would make it reasonable.[400]

"Daarbij zal enerzijds gewicht moeten worden toegekend aan de vrijheid van de vrouw om haar leven met het oog op het belang van het kind zodanig in te richten als haar met het oog daarop goeddunkt, terwijl anderzijds in het oog moet worden gehouden dat de vrouw haar schade voor zover haar dit mogelijk is en redelijkerwijs van haar kan worden gevergd, dient te beperken... Voort zullen bij de beoordeling van de redelijkheid van voormelde keuze onder meer een rol kunnen spelen de specifieke gezinsomstandigheden, zoals het aantal en de leeftijd van de andere kinderen, het al dan niet ingeschakeld zijn van de echtgenoot in het arbeidsproces en de financiële middelen van het gezin." [401]

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396 (r.o.3.10) A paraphrased summary of this quotation is: The viewpoint that a family at the birth of a healthy child necessarily receives an immaterial advantage of such proportion that it bars all future relevant patrimonial loss should be rejected. According to sec 6:100 it would not be reasonable to state that the damages caused by the frustration of family planning could not be claimed. Importantly, it should also be remembered that only immaterial benefits could be taken into account when calculating future immaterial loss.

397 Stolker. 1997, *op cit* p 196 similarly rejects this line of reasoning and declares that neither the supporters nor the adversaries of the wrongful conception actions should further pursue this easily contradict able argument.

398 in order to attend to her child.

399 *ibid.*

400 *in casu* the circumstances, therefore were not sufficiently compelling.

401 (r.o.3.13.2) This can be paraphrased as follows: The following important aspects have to be balanced: Firstly, the right of a woman to freedom of choice and to self determination. To make decisions in the best interest of her child on the one hand

Stolker[402] shows that also in this respect the *Hoge Raad* opted for a compromising middle road. The woman's right to self-determination enjoys preference, the question whether she will actually receive an award for damages compensating her loss of income, would only be answered by the criteria of whether it would be reasonable in her circumstances or not. Stolker has a logical solution for establishing reasonable conduct in these cases: If the woman continued working after the birth of previous children, then she has no grounds for an award for loss of income in this instance and *visa versa*.[403]

5.3.3 Non-patrimonial damage

Over and above all these heads of suffered loss the plaintiff *in casu* also sued for immaterial damage under the head of loss of amenities to the liberal amount of fl.25 000.[404] Both the court *a quo* and the *Hoge Raad* disallowed this specific claim. They admitted that the unexpected birth of a child due to the negligent conduct of another could in principle lead to psychological shock and a feeling of helplessness, but they doubted whether it could lead to any permanent psychological scar.[405]

In this respect the court mentioned that an award for satisfaction should also be influenced and limited by the joy experienced by the parents, because of the birth.[406] The possibility of a plaintiff actually suffering from a psychological scar under these circumstances should, however, not be completely negated and in such an instance a reasonable satisfaction award should be ordered.

Van der Wiel,[407] in discussing the same judgement,[408] informs us that the amount of

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while on the other hand having a corresponding duty to within reasonable bounds limit damages to others. In judging whether an award for loss of income should be approved in a particular instance or not, the following aspects and criteria of the plaintiff's circumstances must be considered: The specific family circumstances including the number of children and their ages, as well as the economic contributions of the spouse and the financial position of the family as a whole.

402 *ibid.*

403 if she stopped working for a period after the birth of previous children or if the family's standard of living dictates, the court may give the plaintiff an award for loss of income.

404 approx R 85 000, 00.

405 this viewpoint is also in accordance with South African law - see *infra*.

406 once again the so-called benefit rule applied - see *supra*.

407 1997. Wrongful birth. **Trias** (25:6), 21.

408 HR 21 Februari 1997, RvdW 1997, 54C.

damages[409] was never in question but that only the merits of paying such damages was under dispute.

Due to the highly controversial character of damage in wrongful conception, all three levels of judiciary considering the matter differed in opinion. The *rechtbank*[410] was of the opinion that maintenance costs should be allowed, while the loss of earnings should not. The Court of appeal thought differently on the award for maintenance and argued that the expenses incurred by the mother for general maintenance and education were made because of the legal duty on parents to care for their offspring. The Court believed that in cases were this legal duty is shifted to someone else[411] it must only be allowed under special conditions.[412]

Koopmann[413] believes that professional liability and professional insurance influence each other. She reports[414] that although there is no general statutory-compulsory duty on professionals to take out professional insurance, they have generally done so independently. She supports this trend and indicates a beneficial consideration for a prejudiced party - such a person has a direct action against the insurer for any damages suffered.[415]

Van der Wiel[416] remarks that the birth of the child is a *conditio sine qua non* for the need to incur expenses for its maintenance. He believes that compensation for educational costs is more of an ethical consideration than a legal question.[417]

5.3.4 The German model

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409 the parties agreed on fl 250 000 (Dutch Guilders) this amounts to approximately R 850 000 or $ 116 000, which is not an inconsiderable amount of money - it is submitted for this reason that comprehensive insurance against professional liability should be of paramount importance to physicians.

410 (court *a quo*).

411 defendant or his insurer.

412 such as when serious financial difficulty or a notable decline in standard of living is brought about by the maintenance burden.

413 1995. Beroepsaansprakelijkheid en verzekering. **Ars Aequi** (44:10), 755.

414 *op cit* p 758.

415 sec 6 of the **Liability Act.**

416 *ibid.*

417 see discussion on the ethical problems of wrongful life actions in general, ch 8.

Van der Wiel[418]comments on a statement by Advocate-General Vranken that the German courts have allowed the compensation of child-rearing expenses and educational costs[419] to wrongful conception parents since the early 1980's.[420] The German *Bundesverfassungsgericht* (constitutional court) however, made a decision in 1993 that did not correspond with the German courts' approach up to then. The constitutional court stated that a child may not be seen as the origin/ object of damage. In their response the German courts did not change their position on the matter but maintained that the child itself is not the object of damage but rather the expenses resulting from its birth.

Van der Wiel[421] reports on the German writer, Picker, who is of the opinion that the main object of the (German) law of damages is to accomplish *naturalherstellung.*[422] Picker expands this theory and comes to the conclusion that the child has to be "thought away" in order to achieve the same position as before the birth of the child. [423] Van der Wiel does not agree with this contention.[424] According to him it is the duty of maintenance[425] and not the child itself that is the origin of the expenses and should therefore be "thought away". He remarks on the contention of Advocate-General Vranken that damages as a general rule[426] should not be allowed, but should only be considered under exceptional circumstances. Vranken bases this opinion on the reject-able concept that the child itself is seen as the origin of damage.

In its decision, the *Hoge Raad* shows that the very same argument used by the court *a qua* to reject an award because of the legal duty to maintenance can be used to prove the contrary. The reasoning behind this conclusion is that the type of damage is pure unavoidable patrimonial damage caused by the negligent conduct of a physician. It is this negligent conduct that in fact created the obligation of maintenance and care.[427]

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418 *op cit* p 22.

419 of the average German child.

420 see *supra.*

421 *ibid.*

422 to place an injured party in the closest possible position to that which existed prior to the damage causing event - see theories of compensation in ch 2.

423 see ch 2 on the *conditio sine qua non* theory.

424 I concur Van der Wiel in this respect.

425 for the child.

426 in cases like these.

427 incl costs such as child-rearing expenses and educational costs.

Concerning the amount of damages, Van der Wiel[428] maintains that the *Hoge Raad's* solution is closely related to that followed by the German courts, that is, the average cost of an average child's maintenance and education. The *Hoge Raad* is approached nevertheless keeps open the possibility of a higher than average award.[429] It is on the other hand also possible that a judge could still further limit the award of average costs to the amount of the physician's insurance coverage.[430]

Van der Wiel[431] declares that this "limitation to average costs"-concept employed by the Dutch Courts in wrongful conception actions is based on the closely related legal duty placed on parents to care for their children. The boundaries of this legal duty are also stipulated by the average cost of an average child's education and other expenses. If parents wish to spend more on their children than this legally required amount,[432] it is indeed for their own account. Van der Wiel[433] warns that the mechanism used to calculate the quantum of maintenance claims in general family law matters, should not be used unchanged in wrongful conception cases. The main reason for this concern is that the ability of the defendant to actually pay the damages is usually a central consideration which should not be the case in wrongful conception litigation.[434] Two problems that could result from similar application can be identified:

Firstly, the financial resources of a person under a legal obligation to pay maintenance[435] are relevant and directly linked to the need for higher than average costs.[436] The defendant or

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428 *op cit* p 23.

429 in the second *alinea* of r.o.3.11 of its decision.

430 and thereby restrict the amount of damages.

431 *ibid.*

432 Van der Wiel *op cit* p 22 mentions that the premise layed down by the Dutch family law, is the actual needs of the child. Regarding the needs of the child, "normally expected" needs are the guideline. He further pronounces that if the parents' financial position and living standard would require it, a higher award could even be considered.

433 *op cit* p 22.

434 note that the *Hoge Raad* introduced this very principle (founded in sec 6:109 of the Civil Code), stating that awards could be further limited to the extent of the physician's liability coverage.

435 *eg* unmarried fathers are obliged to pay maintenance for their children.

436 the amount of maintenance payable is calculated by weighing the need for maintenance against the ability to provide maintenance.

physician's financial state in such an event, however, is a totally unrelated matter.[437]

Secondly, the nature of the two duties are totally different: The one is a common law to maintain a child, whilst the other is an award laid down by a court to compensate damages resulting from negligent conduct.

5.4 Conclusion

The much quoted maxim: "a tortfeasor should take his victims as he finds them", is relevant in this respect. The application of this maxim will have the effect that if the damages in a certain factual situation are much higher than could reasonably be expected under similar circumstances, the wrongdoer is still obliged to pay the full damages. In the same way, therefore, a physician[438] should be liable for *all* the damage inflicted to the "victim". If, by chance, the negligent physician chooses a wealthy patient[439] then he should still be liable for these high(er) expenses.

Van der Wiel[440] remarks that it seems form the decision of the *Hoge Raad* that this well-know principle of the law of delict does not apply in cases of wrongful conception.[441] He supports this viewpoint and states that if parents incur additional costs on their own free will[442], they should not be allowed to claim it from the defendant, but should be expected to finance it themselves.[443] He concludes that wrongful conception damages should be linked to and limited to the level of average child-rearing expenses.

Hijma[444] states that in terms of sections 6:74 and 6:98 a physician could be held liable in a wrongful conception action[445] for all patrimonial damages brought about by his conduct that

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437 "you should take your victims as you find them" - see the relevant discussion in ch 2.

438 or the insurer of the tortfeasor.

439 who spends much more on his children than the average parent.

440 *op cit* p 23.

441 as discussed in the paragraph above.

442 higher than the average child-rearing expenses.

443 he contends that in other factual circumstances (where personal factors such as living standard of plaintiff are taken into account), patrimonial damage is suffered, but not out of the plaintiffs own free will.

444 1997. Wrongful birth. **Ars Aequi** (46:6), 431.

445 incorrectly referred to as "wrongful birth".

can be legally attributed to him according to the standard set by section 6:98 of the Dutch Civil Code.[446]

6. Legal position in South Africa

6.1 Background

The South African law recognizes the wrongful conception actions of plaintiffs who sought to implement family planning for economical reasons. Although the first case was heard by the courts much later than in other jurisdictions, recent cases have established the acceptance of this particular cause of action beyond any doubt.

6.2 Initial view

The first wrongful conception action instituted in South Africa was the unreported case of **Behrmann and another v Klugman.**[447] *In casu* a normal but unwanted child was born in spite of the fact that Mr. Behrmann underwent a vasectomy operation a few months prior to the unexpected pregnancy. Damages to the amount of R 300 000 was sued for. The claim was based on breach of contract.[448] The plaintiff argued the following points:

- that either an explicit or an implied guarantee was given to Mr. Behrmann that he would be sterile after undergoing this operation and that the necessary degree of skill and competence will be adhered to in the performance of this procedure;[449] and
- that defendant neglected to advise the plaintiff to first undergo a sperm count before resuming sexual intercourse without alternative contraceptive measures.

The relevant legal question before the court was whether the plaintiff was sufficiently

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446 *"In verband met de art. 6:74, 6:96 en 6:98 BW, in onderligende samenhang gelezen; brengt dit mee dat de arts aansprakelijk is voor alle vermogensschade die in zodanig verband met die fout staat dat zij hem naar de maatstaf van art. 6:98 als een gevolg van die fout kan worden toegerekend." op cit* p 432.

447 1988 WLD - (unreported, judgment delivered on 18 May 1988).

448 and alternatively on delict.

449 1986. Grubb. A. **Cambridge Law Journal**, *op cit* p 197 mentions that the effect of a vasectomy operation can be naturally reversed through the spontaneous re-canalisation of the tubes severed in the procedure.

informed[450] on the advised practice of obtaining a sperm count.[451] The plaintiff stated that the defendant brought him to believe that the operation would be final and that he would be completely sterile within ten weeks after the operation. The defendant replied hereto that it was his practice to allow at least nine months after the operation, before a final conclusion on sterility could be made.

The plaintiff 's claim did not succeed, as the court found that he was unable to prove on a preponderance of probabilities that a guarantee of sterility, either implied or explicit was given.[452] The court left open the question whether this type of action is *contra bonos mores*[453] considering the facts that the child was born healthy and legitimate.

Pearson[454] reports the that the plaintiffs' action was unsuccessful, since they had failed to prove that the doctor had guaranteed[455] the success of the operation.[456] Strauss[457] rightly predicted that "Behrmann's case is not the last word that we shall hear in South Africa on wrongful conception."

6.3 Recognition of claim

Administrator, Natal v Edouard[458] is the *locus classicus* of the legal position set out by the Appeal Court on wrongful conception actions in South African law. In the initial case[459] the wrongful conception action was in principle recognized and an award for damages was allowed.

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450 *ie* whether the duty to inform was properly fulfilled.

451 which would have clarified the question of sterility.

452 there are basically two types of guarantees that are generally given for medical procedures - see discussion in ch 4.

453 "against the good morals of society" or whether certain conduct is legally reprehensible/ unacceptable according to the legal norm of society - see a detail discussion in ch 2 and arguments *supra* based on this viewpoint, denying wrongful conception action in various jurisdictions.

454 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 93.

455 expressly or impliedly.

456 following English case of **Eyre**, which held that the court should be slow to imply an unqualified warranty by the doctor in the absence of an express warranty.

457 1988. First South African claim against doctor for Wrongful Conception Fails. **South African Practice Management** (9), 6.

458 1990 (3) SA 581 (A).

459 **Edouard v Administrator, Natal** 1989 (2) SA 368 (D).

Mrs. Edouard[460] contracted with the Natal provincial hospital that she would be sterilised by means of a hysterectomy operation during the same procedure by which her third child would be delivered by a Caesarian section. The decision for this sterilization operation was based on economic considerations. What indeed happened was that the hospital carried out the Cesarean section, but neglected to perform the planned hysterectomy.[461] Mr. and Mrs. Edouard were not informed of this crucial omission and as a result Mrs. Edouard became pregnant with their fourth child four months later. Mr. Edouard sued on behalf of his wife for damages based on breach of contract. The defendant (the provincial administration of Natal) was prepared to pay the costs of the original hysterectomy operation. The plaintiff sued for the following additional heads of damage:

- child-rearing costs until the age of eighteen years; and
- a non-patrimonial award for discomfort, loss of amenities, as well as pain and suffering.

The defendant admitted that the contract in question was valid and enforceable, but contended that an legal action to enforce it is *contra bonos mores* since the child was born healthy and normal.[462] The defendant alternatively submitted that the plaintiff's failure to give the child away for adoption constituted a *novus actus interveniens*[463] which omission defeats the basis of claim. Strauss[464] reports that in **Edouard** the court regarded the argument that it is morally wrong that a normal healthy life should be the basis of a compensable wrong as "squeamish and pedantic".[465]

6.3.1 Basic principles

It its judgement the court formulated the following basic principles concerning the position of

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460 Mr. Edouard.

461 in the vast majority of cases the facts in wrongful conception actions reveal that the defendant neglected to inform the plaintiff sufficiently of the risks or other relevant information concerning sterilization - the facts in Edouard are quite exceptional in that the negligent conduct was the failure to operate itself.

462 and that it would therefore be against the legal conviction of the community if action is taken over the birth of a child.

463 a new fact changing the relevant circumstances and thereby breaking the legal causal link between defendant's action and the resultant damage.

464 1990. Voluntary sterilisation for convenience: The Case of the unwanted child. **Consultus** (3), 93.

465 *op cit* p 95.

wrongful conception actions in South Africa:[466]

- Sterilization became a recognized form of contraception for married couples in modern society. It is in the best interest of society that families do not become larger than planned for by parents.[467] A reasonable standard of living should be maintained by means of responsible family planning.

- The court made the declaration that this type of action should only be instituted on economic grounds, to reimburse plaintiffs for economic losses incurred by child-rearing expenses. It further stated that it is not necessary to establish the value of the child him/ herself in order to allow the action, since the child is not the object of damage.

- The emotional benefits[468] the parents derive from their child are not to influence the quantum decided on by the courts.[469]

- A plaintiff-doctor, who is found liable should pay full damages, including child-rearing costs since his negligence caused the birth of the child. In this regard the court reminded us that the natural fathers of illegitimate children are regularly obliged by court orders to pay maintenance for their offspring.[470] In these cases an argument that the illegitimate child causes the mother much happiness and joy does not reduce the amount of maintenance.[471]

- The court rejected the argument that it would be morally unacceptable to base an action on the birth of a healthy and normal child. Compensation is not awarded because the child was born, but is allowed for the expenses incurred by the parents because of this unexpected child. This reasoning seems sound as in most of the cases these parents cannot afford another child and have for this reason taken steps to limit their families.

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466 also summarised by Strauss in **Doctor, patient and the law** (1991), *op cit* p 178.

467 taking into account the financial resources of each household.

468 such as love and affection.

469 *ie* rejection of the benefit rule.

470 Note that courts who order unmarried fathers to pay a certain amount of maintenance do not consider the child as the object of damages - the only relevant question is how much the illegitimate child's natural father should pay for child-rearing expenses. It is submitted that the wrongful conception defendant should similarly pay for the unwanted expenses occasioned by the child's birth.

471 the same should be true of wrongful conception actions.

- No court would force parents to give their child away for adoption in order to alleviate them from the financial burdens of another sibling. There is a duty to mitigate damages on every blameless party,[472] but only in so far as the damage can be limited by *reasonable steps*. Forced adoption[473] is not reasonable.[474]

- The court was of the opinion that all the challenges associated with wrongful conception actions could be solved. For example, the fear that doctors will be forced to pay more than what they morally should be held accountable for was found to be over exaggerated. Further arguments namely that doctors will be put under unnecessary pressure to perform illegal abortions,[475] or would refuse to perform sterilization operations out of fear for malpractice litigation were similarly not convincing to the court.

- Judge Thirion added that sterilization operations are relatively simple medical procedures and further stated that any medical practitioner could effectively protect himself from unwanted litigation[476] by simply informing his patient of the possibility that the operation could still be unsuccessful and that there always exists a chance of fertility, even after a sterilization. An obvious way to ensure protection from malpractice suits is to contract with each patient on the basis that no action would be instituted against the physician.[477]

In casu the plaintiff then succeeded with a claim of R 22 500, an amount settled on by the parties which included child-rearing costs. The second claim for satisfaction due to pain and suffering was, however, rejected.

6.3.2 Non-patrimonial loss based on breach of contract

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472 to a breach of contract or delict.

473 not even to mention forced abortion.

474 remember that although the parents have decided not to have any additional children, generally because they simply can't afford it, they are still only human and will naturally get attached to this unexpected addition to the family.

475 remember that abortions on request or eugenic abortions were not legalised in South Africa until 1997 with the introduction of the new **Termination of Pregnancies Act** - see the discussion in ch 3 of this new legislation.

476 and liability.

477 or a "*pactum de non petendo in anticipando*" as a contractual undertaking not to hold the actor liable - see ch 5 for a further discussion.

A pressing legal policy question, that had to be answered, was whether accountability for non patrimonial loss should be extended to the sphere of breach of contract in South African law.[478] The court did not see any compelling reason why it should broaden liability in this manner[479] as such a claim could easily be joined to a delictual claim.[480]

Taitz[481] conveys that plaintiff's claim for non-patrimonial damages resulting from discomfort, pain and suffering and loss of amenities caused by the pregnancy and subsequent birth of the child was dismissed. "The authorities, both at common law and the authorities cited *in casu* and earlier judicial decisions and learned authorities are of the view that non-patrimonial loss based on breach of contract is not recoverable in our law".

De Waal[482] comments on this particular aspect of the case of **Edouard v Adiminstrator, Natal**[483] and agrees that the main reason for the courts not awarding damages for non patrimonial loss[484] is because the claim was based on breach of contract. The fact that no common-law authority could be found in matters where non patrimonial loss was compensated due to breach of contract naturally played an important roll in the decision. According to the court there were not sufficient practical and policy need for such an extension.

The facts of this case differ from most other wrongful conception cases in that the usual cause of action, a negligently performed sterilization operation, was *in casu* not performed at all! Although the facts show a highly improbable and gross form of medical negligence, the principle of liability stays exactly the same. There is no fundamental difference for example,

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478 1989. **Current Law** (Review Five) K 669: "If there is a need to extend the rules of our law relating to the recover ability of non-pecuniary loss flowing from breach of contract, such need best be accommodated in the law of delict where the concepts of wrongfulness and fault (in the form of *culpa* and *dolus*) and the defences germane to delict can be used to define the limits of the relief." - refer to **Edouard v Administration, Natal** 1989 (2) SA 368 (D).

479 to an action based on breach of contract.

480 through which satisfaction can easily and without uncertainty be recovered.

481 1991. Maintenance Damages against an erring medical authority for the birth of an unwanted child confirmed by the Appellate Division. **THRHR** (54), 138.

482 1990. Remedies by Kontrakbreuk - of skadevergoeding verhaal kan word vir onderhoud van kind gebore na onsuksesvolle sterilisasie. **De Rebus**, 711.

483 *ibid.*

484 *ie* discomfort, pain and suffering and loss of amenities caused by the pregnancy and eventual birth of their fourth child.

with a case of 1% negligence, although it is possible in some jurisdictions[485] that a higher amount of damages may be awarded for acts of gross negligence.

6.3.3 Edouard on Appeal

The Court of Appeal unanimously concurred with the decision of the court *a quo*:

- The Appeal judges rejected the argument advanced by plaintiff that liability would be against public policy. According to appellant, an award for maintenance would transfer the duty which usually rests on parents, to the defendant in the matter, the hospital authority. The court concluded that the duty to maintain is not really transferred by holding the negligent hospital authority liable. Although the parents might receive an amount of money from the defendant for child-rearing expenses, the responsibility to care for the child still rests with the parents. The rationale behind this fact can clearly be seen in the example that, should the parents lose the entire amount of damages in a crooked investment they would still be obliged to pay their sibling's maintenance bills.

- The Appeal Court also rejected the defendant's contention that a normal and healthy child's birth can not constitute a cause of action. Although the parents are probably overjoyed about their newborn child, the reality of the additional expenses is still a source of great uncertainty and remains a real burden. It is after all not the child itself that is unwelcome, but rather the financial burden that follows as a consequence.

- Another reality of modern society recognized by the court is that a normal and healthy child is not necessarily a blessing. The court explained that a loving child could still become a drug addict or a violent psychopath[486] In later years.

- An important prerequisite[487] for the success of this action in South African courts is that the decision not to have further children must have been made based on socio-

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485 in the United States of America, courts award so-called "punitive damages" - see ch 2 where the South African position regarding damages is discussed.

486 *op cit* p 591 C-D.

487 see *supra,* where the same requirement has been set in American courts.

economic reasons.[488] [489] [490]

- A further principle was laid down namely that liability for wrongful conception could follow whether a healthy child is born or whether the child is handicapped and suffers form a serious hereditary disease.

- The pertinent question whether a wrongful life action could be instituted in South Africa was left unanswered by the court.

6.3.4 Opinions on the decision

Keyser[491] supports the decision in **Edouard**[492] that damages should be allowed for wrongful conception actions, rejecting the various public policy objections to the claim.

> "The court's forthright approach is to be welcomed, especially in view of the reluctance of courts in the United States to award damages for the maintenance and education of a healthy but unwanted child"

Norrie[493] conveys that the **Edourd** court has followed the English approach, as it was held that there is no policy requirement that the courts finds as a matter of law that the benefits of parenthood outweigh the losses.

6.4 Recent developments

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488 Welborn, in **Tulane Law Review** (1989), 1221 reports on a similar requirement set in American courts: "Many courts have inquired into the reasons behind the sterilisation procedure in determining whether child-rearing costs should be awarded...Thus, recovery of child-rearing costs is allowed only when the parents' purpose in having the sterilisation was economic in nature."

489 1990 **Annual Survey of South African Law**, 148: "These considerations, however, applied only when, as in Edouard, a sterilization procedure was performed for socio-economic reasons; different considerations might apply when sterilization was ought for some other reason."

490 see the discussion of Milsteen's views dealing with the motivation for sterilization in ch 9.

491 Keyser, B. 1989. Wrongful birth. **Annual Survey of South African Law**, 8.

492 special reference is made to p 383 G-H of the judgement.

493 1991. Wrongful Birth and the Supreme Court of South Africa. **International and Comparative Law Quarterly** (40), 439.

In a recent South African wrongful conception action, **Chalk v Fassler**,[494] the surprised mother of a totally unexpected but healthy child sued for a whopping R 800 000 in child-rearing expenses from a gynecologist-defendant who failed to successfully perform a legal abortion.[495]

This case represents the first South African case based on failed abortion. The plaintiff's claim for damages was in respect of the birth of her child following the allegedly negligent performance of a lawful abortion by the defendant. The claim was rejected, as the court held that the expert evidence indicated that even with the exercise of due skill and care, it was possible for abortions to fail. It was further judged that there was no evidence to suggest that the defendant had been negligent in performing the procedure. A final basis for disallowing the claim was the fact that the plaintiff took no further steps to effect termination of her pregnancy once she realised that the initial procedure was unsuccessful.

It is submitted that the failure of the **Fassler** case should not be interpreted as a return to non-recognition of wrongful conception in South Africa. The principle of recovery has been firmly founded in the Highest Court of Appeal,[496] and the **Fassler** case was simply lost because of poor merits.

6.5 Evaluation

When we look at the various findings on wrongful conception actions of courts around the world, it appears that the majority holds an optimistic view. An important prerequisite that a prospective South African plaintiff will have to comply with is that the reasons for making use of the failed contraception in question was economically based.[497] Prospective plaintiffs should sue for realistic amounts of damages that could be properly motivated and proved.

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494 1995. WLD - unreported (judgement delivered in first week of May 1995) - this case received much publicity in the media, see references in "Beeld" (1995-03-21) 1.

495 note that this recent litigation still took place under the previous abortion act - for a detailed discussion of this act and the dramatic changes that came about under the new act, see ch 3.

496 **Edouard** *supra*.

497 therefore stating that the parents can not afford the unexpected child.

7. Various related aspects

7.1 Pure economic loss

Cleaver[498] argues that there should be no reason why a wrongful conception action based on delict could not be allowed in South Africa as such a claim is one for pure economic loss. Although the South African law does allow such claims, it is approached with much circumspection. In **Administrateur Natal v Trust Bank van Afrika, Bpk**[499] the court extended the ambit of the Aquillian action to negligent misstatements[500] giving rise to pure economic loss. This broadening of delictual liability was done cautiously in order to contain such liability within reasonable bounds. In **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty)Ltd.**[501] the appeal court confirmed that pure economic loss may be wrongful, but warned that it must not be regarded as *prima facie* wrongful.

Cleaver[502] investigates whether liability under pure economic loss should be extended towards physicians in professional negligence cases.[503] He believes that wrongfulness would be the most difficult issue to prove. The question would be: did the physician owe a legal duty of care to plaintiff ? Cleaver is of the contention that the physician does and particularly because of the existence of a physician-patient contract and a relationship of trust between the parties. This much is implicit in terms of the **Lillicrap** decision. A final assessment of wrongfulness and the concurrent existence of a legal duty could be determined by the public-policy consideration of "reasonableness".[504]

There are many factors used to determine whether wrongfulness is present or not, such as the fact that the physician has expert knowledge, the patient had reasonable reliance on his skill and judgement, the direct contractual relationship between parties, a limited loss and a limited number of claimants. Based on these factors, it is submitted that legal duty on physicians does exists.

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498 *op cit* p 62.

499 1979 (3) SA 825 (A).

500 it must be established that the defendant was under a legal duty not to make a negligent misrepresentation.

501 1985 (1) SA 448 (A).

502 *ibid.*

503 and more specifically, in wrongful conception actions.

504 see ch 2 - a discussion of delictual principles in the South African law.

7.2 No automatic medical guarantee

In **Jackson v Anderson**[505] damages were allowed on grounds of breach of guarantee and the negligent performance of a sterilization operation. De Vries and Rifkin[506] are of the opinion that breach of guarantee is only present in the event where a medical practitioner has guaranteed a successful medical intervention or procedure without delivering the promised result. They emphasize, however, that an action based on breach of warranty will fail if it cannot be proved that the medical practitioner expressly gave an enforceable promise or guarantee of success.[507] It is also trite law in South Africa that no automatic or implicit guarantee of success arises when a medical procedure is performed.[508]

7.3 Sterilization for economic reasons

Einheuser[509] writes that it is imperative for the success of an ensuing wrongful conception action in the United States of America, that the motivation for a sterilization operation[510] was for reasons of financial restraint.[511]

Bodgan[512] also reports on the interesting similarity between American and South African law with regard to wrongful conception actions, specifically concerning the requirement set out in **Edouard** that the purpose of plaintiff's contraception must have been for economic considerations. He refers to the case of **Hartke**[513] were the court denied the parents damages for the economic expenses of raising a healthy child because the mother sought sterilization solely for health reasons. In **Hartke** the mother's interest was the health of herself and her

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505 230 So. 2d 503 Fla. App. (1970).

506 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. **The Forum** 207.

507 *op cit* p 215.

508 **Behrmann v Klugman** 1988 WLD (unreported), **Bulls v Tsatsarolakis** 1976 (2) SA 891 (T) - see ch 4

509 1984. Wrongful Conception - Recovery of child-rearing expenses is denied when the purpose of sterilization was therapeutic, not economic. Hartke v Mc Kelway. **Journal of Urban Law** (61), 651.

510 only if a sterilization or any other attempt in contraception was obtained because of economic constraints will an award for child-rearing expenses be considered - see a similar requirement in South African law, **Edouard** case.

511 *op cit* p 654.

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

513 707 F.2d 1544, 1549 D.C. Cir. (1983).

child, not the pecuniary expense of raising a child. Since the mother's interest suffered no harm, the court did not allow the plaintiff to recover the economic costs of raising the child.

7.4 Injury vs Harm

In the case of **Hartke v Mc Kelway**[514] the plaintiff was Sandra Hartke. She had a legitimate medical fear that a future pregnancy would endanger her life,[515] and accordingly she underwent a sterilization operation.[516] Her physician, Dr. McKelway, omitted to inform her that an average failure rate for the procedure performed on her was approximately three out of every 1000. Mrs. Hartke indeed became pregnant, gave a normal birth[517] to a healthy child and then instituted a wrongful conception action. The action was based on:

- the negligent performance of a sterilization operation;
- the failure of the physician to properly inform his patient and thereby not obtaining an informed consent;[518] and
- breach of warranty.

In the court *a quo* the jury awarded damages for medical expenses, pain and suffering, mental anguish, as well as the anticipated rearing costs.[519]

The Appeal Court[520] upheld the decision on two separate bases, namely the failure to inform the patient of a material risk and also on grounds of a negligent sterilization procedure. The court upheld al of the heads of damage, except the compensation for child rearing expenses. Both parties further appealed against this judgment. The Court of Appeal asked the following important questions: Was there a duty to inform the patient of a remote risk? Did the plaintiff

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514 **Hartke v McKelway** 526 F. Supp. 97 D.D.C. (1981).

515 her medical condition was such that it was dangerous for her to bear a child and at the time of the sterilization she had already had a number of miscarriages.

516 note that the motivation for sterilization was based on personal medical reasons.

517 her feared expectations did not materialize.

518 the failure rate of the procedure was argued to be a material aspect of Mrs. Hartke's decision.

519 with application of the benefit rule, restricting the total amount of damages by subtracting the estimated benefits that would be derived from the child.

520 **Hartke v McKelway** 707 F.2d 1544, 1549 D.C. Cir. (1983).

establish a proximate cause[521]? Was the court correct in disallowing rearing costs? All three questions were answered affirmatively.

Einheuser[522] explains with reference to the **Hartke** case that during the past few years the judiciary in the United States has become actively involved in the decision making process of several moral issues. He believes that the active involvement of society in this fashion could be seen as judicial activism and may be an attempt from the judiciary to close the gap between what is referred to as moral order and the law.[523]

In casu, no consensus could be reached on the question of damages. The circuit court held that where the purpose of sterilization was therapeutic,[524] there is a rebuttable presumption against allowing an award for child rearing expenses[525]in this respect. Einheuser[526] believes the court's logic is internally inconsistent as it allowed recovery for other damages resulting from the same negligent act.[527] This illogical approach could be the result of a confusion between the terms injury[528] and harm.[529]

Although Mrs. Harthe's health was not *harmed* by the unexpected birth an *injury* had nevertheless occurred.[530] All her injuries were direct consequences of the unexpected

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521 would she have gone through with the sterilization, if she knew about the risks involved.

522 *op cit* p 655.

523 As was previously seen in landmark decisions such as **Griswold** 381 US 479 (1965) (contraceptives fall in zone of privacy), and **Roe** 410 US 113 (1973) (unwanted pregnancies are injurious). As society progresses and moral values change, so the moral order of the community is inevitably influenced and constantly altered. In order to ensure the legitimacy of the courts it is vital that the legal system should adapt to these societal changes.

524 and not on account of medically necessity.

525 the court based this presumption on the premise that when basic tort law principles are followed, the plaintiff suffers no cognizable injury.

526 *op cit* p 658.

527 If a defendant's conduct is found to have been negligent, a plaintiff should generally be allowed to recover *all* damages suffered as a result, *ie* to put her once again in her pre-injury condition being that prior to conception. Should a plaintiff be unable to prove negligence, then the plaintiff failed to prove its case and should not be allowed to recover any damage.

528 the invasion of any *legally protected interest* of another.

529 the loss or detriment *of any kind* to a person resulting from any cause.

530 by the actual materialisation of the undisclosed risk.

conception. From this single injury various manifestations flowed: pain, suffering, mental anguish, monetary expenses *et cetera*. One must therefore acknowledge that the element of injury was present and under strict application of tort law principles, all compensable damage[531] should be recoverable. It is believed[532] that the court also confused the concept *injury* with the actual *harm* that Mrs. Hartke sought to prevent. She namely sought to prevent pregnancy. Therefore, the court need not look into the subjective motives underlying her decision. The defendant argued in this regard that no interest of the plaintiff was invaded, as is required by **Restatement 2nd of Torts:** "The actor is liable for an invasion of an *interest* of another".

It is submitted[533] that "interest" is defined as the object of human desire. The wrongful conception defendant may accordingly argue that the plaintiff's wish not to become pregnant was the *subject* of the plaintiff's desire and not its *object.* The object of desire must be distinguished from the thing in respect to wich the desire is entertained. For example, everyone desires that his/ her body shall be free from material harm. The object of this desire is the security of the body and not the body itself. The body's for which security is desired is therefore the subject of the desire and not its object.

In casu the defendant could have argued that the object of his desire was to preserve the plaintiff- mother's health were as successful sterilization was merely "the thing in respect to which the desire is entertained". Therefore, if the plaintiff's health was in fact not prejudiced by the birth of a child, [534] no injury was suffered. Einheuser[535] is of the opinion that even if the defendant had pursued and the court had accepted this argument, it still would not be sufficient to explain the court's contradiction in awarding certain heads of damages while denying others. Had the court based its decision on a public policy rationale rather than judging that no injury was established, the decision would have been sound. However, a public policy rationale would have been inconsistent with the court's prior discussion that the plaintiff had suffered no injury.[536] By discussing the social effects that recovery of certain damages will have, the public policy rationale by this very recognition concedes that the plaintiff indeed suffered injury![537]

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531 incl child-rearing expenses.

532 *op cit* p 659.

533 *ibid.*

534 caused by the unsuccessful sterilization.

535 *ibid.*

536 Einheuser *op cit* p 660.

537 the court merely does not all the heads of damage.

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The court set forth a rebuttable presumption which places a burden of proof on a plaintiff to prove that economic harm was in fact caused by the negligence of the defendant. This burden of proof is more difficult than what a plaintiff ordinarily would have to prove: Actual injury in this case pertains to the materialisation of an undisclosed risk and not the proof of economic injury.[538]

The plaintiff sought sterilization for therapeutic reasons.[539] The court ominously held that the logical nexus to this fact was that the parents would otherwise[540] have wanted the child. Einheuser[541] believes that here are two fundamental problems with such a postulate: The first is that this presumption appears to be lacking strong probative force between the basic given fact and the presumed fact. It is possible that Mrs. Hartke sought sterilization mainly for therapeutic reasons, but even so did not want any children. Secondly, the precedential value of this rebuttable presumption may serve as nothing more than a warning to plaintiff's attorneys[542] to have some proof of economic harm accessible in order to rebut the required presumption.

The approach introduced by the Hartke court gives us a new perspective on the issue of child-rearing expenses : The court's analysis is internally inconsistent, allowing recovery for certain damages while denying recovery for others[543] caused by the same act of negligence.

In conclusion Einheuser[544] writes that the Hartke court reaffirms the judicial acceptance of wrongful conception as legal cause of action. A new approach in defining the recover ability of child-rearing expenses is however introduced as sterilization for therapeutic purposes now raises a rebuttable presumption against recovery of child-rearing expenses. She ascribes this seemingly inconsistent viewpoint to a clear misinterpretation of the distinction between injury and harm.

7.5 In summary

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538 as a result of the materialisation of the undisclosed risk *ie* percentage of failed sterilization.

539 *ie* based on medical advice for her own protection.

540 had there been no substantial risk related to childbirth.

541 *op cit* p 661.

542 and all future plaintiffs.

543 based on the premise that no injury was sustained.

544 *op cit* p 662.

Basically three schools of thought exist concerning wrongful conception actions: They are those who deny the action, those who allow the action and lastly the intermediate group, who allows full recovery, but subtracts any benefit derived from the damage causing event.

Some of the reasons given by those Courts who deny child-rearing expenses:

- public policy reasoning that a child is a precious gift and always outweighs the economic loss suffered by parents;[545]
- the benefits that a child bring cannot be equated with loss or injury;[546]
- the value of a human life can not be compared to its cost;[547]
- respect for human life is at the heart of any legal system and recognition of the action would jeopardise this respect;[548]
- liability for wrongful conception actions is wholly out of proportion to the wrongful conduct (of the negligent physician);[549]
- recovery of an award would be a windfall to the plaintiff parents;[550]
- liability would be an unreasonable burden on a negligent physician;[551]
- recognition of the action would cause emotional and psychological harm to the child;[552]
- damages in wrongful conception actions is not measurable;[553]
- damages in wrongful conception actions is too remote and speculative;[554] and
- possibilities of fraudulent claims.[555]

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545 **Cockrum v Baumgartner** 96 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E. 2d 385 (1983); **Garrison v Foy** 486 N.E.2d 5 Ind. App. (1985); **Hickman v Myers** 632 S.W.2d 869 Tex. Ct. App. (1982).

546 **Christensen v Thornby** 192 Minn. 123, 255 N.W. 620 (1934).

547 **Coleman v Garrison** 349 A.2d 8 Del. (1975).

548 **Cockrum v Baumgartner**.

549 **Rieck v Medical Protective Company** 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

550 **White v United States** 510 F. Supp. 146, 149 D.Kan. (1981).

551 **Beardsley v Wierdsma** 650 P. 2d 288 Wyo. (1982).

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

553 **McKernan v Aasheim** 102 Wash. 2d 411, 687 P. 2d 850 (1984).

554 **Coleman v Garrison**.

555 **Rieck v Medical Protective Company**; **Beardsley v Wierdsma**.

Block[556] lists additional rationales given by courts in dismissing child-rearing costs:

- they are too remote and not within the foreseeable risk undertaken by the defendant;[557]
- the damages would be excessive;[558]
- the defendant should not have to bear the costs of rearing the child wile someone else enjoys the benefits associated with child rearing;[559] and
- the child would feel like a "emotional bastard" when it learns that its financial needs and general maintenance are not being provided for by its parents.[560]

7.6 Conclusion

Garfinkle[561] is of the opinion that the full recovery approach to wrongful conception must be followed, in order to best protect society from the negligence of its physicians. She warns that by limiting or eradicating liability in negligent sterilization actions, physician are immunised from their negligent acts, which discourages conformity to a high standard of care when performing these procedures.

> "We must also ensure that the traditional tort principles of damages continue to be applied. To create instances where some causes of action are not bound by ordinary principles of law is to create uncertainty within our system of compensation for injury."[562]

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556 *op cit* p 1110.

557 **Schork v Huber** 648 S.W. 2d 861, 862 Ky. (1983).

558 **White v United States**.

559 **Boone v Mullendore** 416 So. 2d 718, 723 Ala. (1982).

560 **McKernan v Aasheim**.

561 1991. Burke v Rivo: Towards a more rational approach to Wrongful Pregnancy. **Villanova Law Review** (36:4), 830.

562 *ibid.*

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CHAPTER 7

Wrongful Birth Actions

1. Summary

Wrongful birth actions are basically instituted by parents who claim that they would have aborted their impaired foetuses if they had prior knowledge of expected or diagnosed developmental abnormality. Berenson[1] emphasizes the fact that in wrongful birth actions the right to recovery is based solely on the mother[2] testifying that she would have chosen to abort if the physician, hospital or laboratory[3] had but told her of the unfortunate results of an amniocentesis test[4] or alternatively of a scientifically based expectation of increased risk in the pregnancy because of other determining factors.[5] The plaintiff's injury therefore results from a denial of her right to an informed choice[6] or no choice at all.[7] These plaintiffs fundamentally differ from wrongful conception parents in that they planned the birth of a child, but indeed only

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1 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". **Tulane Law Review** (64), 895.

2 in South African law the mother has the sole right to decide on an abortion in terms of the **Choice on Termination of Pregnancy Act** No. 9 of 1996 (there is not even a duty on a pregnant woman to inform the father of the child of her decision) - sec 5(2) reads: "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".

also in the case of **Friedman v Glicksman** 1996 (1) SA 1134 (W) the court made it clear that even prior to the new abortion act the final decision to abort a foetus rested exclusively with the mother of the child: "However, it must be stressed that the election to proceed with or terminate the pregnancy in these circumstances rests solely with the mother, who bears the moral and emotional burden of making such election".

3 **Robak v United States** 658 F. 2d 471 (1981).

4 Berenson *ibid* writes that the percentage of woman who refuse to consider abortion because of religious or other believes is astoundingly high - courts should therefore be cautious when adjudicating these actions as plaintiffs may institute action and *ex post facto* argue that they would have aborted an impaired foetus, while they genuinely would not even have considered such prospect.

5 as many factors may have an influence on foetal development (*eg* pollution, drug use by the mother and other damaging elements in the surroundings) - see ch 11, physicians should also take into consideration the family health history and look at possible increased risk areas in a specific community or family - see ch 5 for a suggested thorough genetic analysis.

6 see ch 5 dealing with informed consent and the right to an informed choice.

7 in cases of failed abortion and/ or sterilization procedures - see *infra*.

a healthy offspring.[8]

The child itself is therefore not unwanted, but rather the defective state of the child. The plaintiff-parents do not institute action for their child's impediments, since the defendant did not actually cause the disease or handicap and because it is the parents who are the victims of the defendant's negligence.[9] Plaintiffs rather seek compensation for the deprivation of their right to choose whether or not to be parents of a healthy child.[10]

De Vries[11] conveys: "It is generally advanced that to consider a birth an injury would offend fundamental values attached to human life."[12]

Symmonds[13] comments with regard to wrongful birth and states that the policy factors that govern these actions are "virtually unique when compared with policy factors in negligence generally." He believes that the wrongful birth cause of action is so different that "treatment of this as an area where the mainstream principles of negligence can easily be applied is palpably wrong".[14]

Grobe[15] agrees with this premise and expands this theory of liability by stating that the physician's negligence in wrongful birth precludes the parents from making an informed decision about whether to bear a genetically diseased child. He[16] emphasizes that this action is based on a woman's constitutional right[17] to choose termination of pregnancy.

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8 as opposed to the unplanned pregnancy (failed contraception) and/or birth (failed abortion) in wrongful conception actions.

9 not the child - the child's action is that of wrongful life.

10 see Faircloth's opinion on this matter *infra*.

11 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. **The Forum**, 218.

12 **Cockrum v Baumgartner** 95 Ill. 2d 193, 447 N.E. 2d 385 (1983), cert denied, 104 S. Ct. 149 (1983).

13 1987. Policy factors in actions for Wrongful Birth. **The Modern Law Review** (50), 269.

14 *op cit* p 305.

15 1992. The future of the "wrongful birth" cause of action. **Pace Law Review** (12:3), 717.

16 *op cit* p 719.

17 abortion on demand is a constitutional right in America (also in South Africa) - see ch 3 where abortion is discussed in more detail.

Bodgan[18] reports that the defendant could be negligent either in providing inaccurate genetic counselling,[19] in performing an unsuccessful abortion[20] or in performing an unavailing sterilization operation that failed to prevent conception.[21]

Damages relating to the additional medical and special care expenses necessitated by handicapped children are often sued for in wrongful birth actions and in addition many disgruntled parents also seek satisfaction for emotional shock.[22] Most writers[23] agree with this proposition of damage and in support of their opinion that such expenses may be claimed cases such as **Phillips v United States**[24] and **Robak v United States**[25] are quoted as authority. In these cases the principle was laid down that damage awards may embody all general as well as extraordinary expenses associated with child-rearing.[26]

2. General Aspects

2.1 Factual causes of action

Three typical factual situations can be identified in giving rise to this cause of action, namely where a medical practitioner or authority fails to properly advise prospective parents of the fact that they have a higher than average chance of conceiving a child afflicted with birth defects or suffering from a genetic disease,[27] secondly where an unsuccessful abortion was performed

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18 1983. Wrongful Birth: Who Owes What to Whom and Why? **Washington and Lee Law Review** (40), 125.

19 **Phillips v United States**.575 F Supp. 1309 D.S.C. (1983).

20 **Speck v Finegold** 497 Pa. 77, 439 A.2d 110 (1981).

21 see previous fn.

22 some courts do allow compensation for the mental anguish and pain and suffering experienced by the parents in wrongful birth, *eg* **Schroeder v Perkel** 432 A. 2d 834 N.J. (1981) and **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983).

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

24 *supra.*

25 658 F. 2d 471 (1981).

26 discussed in more detail *infra.*

27 **Naccash v Burger** 223 Va. 406, 290 S.E.2d 825 (1982).

on a woman with such high risks[28] and thirdly where a negligent sterilization procedure was carried out on such a plaintiff-mother.[29]

Schoonenberg[30] similarly recognizes three basic types of medical negligence from which wrongful birth actions originate, but reports that an incorrect diagnosis could also be marked as possible cause of action.[31] He refers to the American case of **Turpin v Sortini**[32] where the failure to diagnose deafness in older children has precluded the parents from deciding against further children and where another child afflicted by a hereditary hearing deficiency was subsequently born.

2.2 Tort basis[33]

When a wrongful birth action is based on tort,[34] it is obvious that all the elements required by law for liability because of a particular wrongful conduct must be present. Although the South African and American legal systems have different approaches in formulating these requirements,[35] both is basically founded on the believe that a person prejudiced by another's breach of a legal duty is entitled to compensation. Since wrongful birth actions have been throughly examined and tried by American courts over the past few decades, their analysis of

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28 **Speck v Finegold** *supra*.

29 **Hartke v McKelway** 526 F. Supp. 97 D.D.C. (1981).

30 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 62.

31 the other two instances mentioned are the insufficient provision of information (**Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983), and the inaccurate performance of laboratory tests (**Curlender v Bio-Science Laboratories** 106 Cal. App. 3d 811 (1980) which could also entail the incorrect calculation of percentages based on test results - see ch 4 regarding laboratory negligence.

32 182 Cal. Rptr. 337 (1982).

33 see ch 2 dealing with the bases of claims.

34 more commonly referred to as delict in South African law.

35 in South African a wrongdoer commits a delict if the requirements of conduct; unlawfulness; fault; causality; and damage are proven - in terms of American law various torts exist, although the tort of negligence comprises of the following requirements: duty; breach; proximate cause; and loss/ damage must be established.

wrongful birth based on tort is discussed here.[36] Schoonenberg[37] suggests that both the wrongful life action of a handicapped child and the wrongful birth action of the parents of a disabled infant base their actions on delict.[38]

2.2.1 Duty of care

Grobe[39] believes that the physician's professional relationship with his patient[40] clearly establishes the required duty of due care.[41] Physicians are therefore required to impart all material information to their patients regarding all relevant information, such as the likelihood of future children to be born with congenital impairments.

2.2.2 Breach

In wrongful birth, breach of duty is most commonly found in the failure of the physician to inform prospective parents of the risks of foetal disorders and genetic diseases. A physician's conduct is measured by the failure to conform to the appropriate standard of skill, care and learning.[42]

2.2.3 Proximate Cause

According to Grobe[43] the parents' assertion that they would have avoided the birth of a defective child if they had been properly informed, is sufficient to establish the causal connection between defendant's failure to inform and plaintiff's damages.[44]

2.2.4 Damage

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36 the South African application of law of delict to local wrongful birth actions will be discussed later, see *infra*.

37 *op cit* p 63.

38 he observes that in terms of Dutch law these causes of action would fall within the scope of the *"hulpverleningscontract"* or medical treatment agreement and would accordingly be better founded on breach of contract - see the discussion on the legal position in the Netherlands *infra*.

39 *ibid.*

40 usually a pregnant woman or a woman considering the prospect of pregnancy, although (prospective) fathers could also be the relevant patient.

41 as opposed to wrongful life actions, where the plaintiff often has difficulty to establish that the physician in question also owed him a duty of care (although no agreement exists between them) - see ch 8.

42 of the reasonable physician - see ch 4.

43 *ibid.*

44 the damage issue in wrongful birth is discussed separately and in more detail *infra*.

Bodgan[45] conveys that damages for both economic and emotional loss are recognized.[46]. It is stated[47] that the plaintiff typically characterize economic loss as: pecuniary expenses associated with pregnancy and birth;[48] medical expenses related to the raising of a handicapped child;[49] and pecuniary expenses in excess of the special medical/ training costs for the child in question.[50] With regard to emotional or non-patrimonial damages, the following heads of damage are reported[51] to be claimed: mental pain and suffering associated with pregnancy and birth;[52] difficulty associated with raising a handicapped child;[53] suffering loss of consortium;[54] and also compensation for the interference with established family relationships.[55]

2.3 Medical Technological advances

Pearson[56] states that because technological progress in the field of obstetrics and gynaecology facilitates detection of foetal defects or chromosomal abnormalities prior to birth and even prior to conception,[57] an increased standard of care is placed upon medical practitioners in this field. He states:

> "An obligation thus results to apprise parents of the availability of such procedures, as well as to provide accurate information regarding test results and potential physiological aberrations. Thus, liability ensues where the attendant physician fails to inform parents properly of the risk of producing a defective child, thereby depriving

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45 *op cit* p 128.

46 **Gildiner v Thomas Jefferson University Hospital** 451 F. Supp. 692 Pa. (1978), **Berman v Allan** 80 N.J. 421, 404, A. 2d 8 (1979).

47 *op cit* p 129.

48 **Stribling v de Quevdeo** 288 Pa. Sup. 436, 439 A.2d 240 (1981).

49 **Jacobs v Theimer** 519 S.W. 2d 846 Tex. (1975).

50 **Robak v United States** 658 F. 2d 471 (1981).

51 *ibid.*

52 **Stribling v de Quevdeo.**

53 **Naccash v Burger** 290 S.E. 2d 825 Va. (1982).

54 **White v United States** 510 F. Supp. 146, 149 D.Kan. (1981).

55 **White v United States.**

56 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 91.

57 see ch 11 where new genetic tests are discussed.

them of the right to make an informed decision regarding conception or abortion (that is, negligent genetic counselling). Moreover, the general allowing of abortion of an irreparably seriously handicapped child is indicative of society's response to defective foetuses. Such a response may be generated by the reality that neither the state nor parents can afford the burden of a handicapped child."[58]

Harrer[59] feels that because the birth of child no longer is considered an inevitable act of nature but rather a perfectly planable enterprise, family planning fails in the first instance if an unplanned child is born despite the parents' wish not to have a child,[60] secondly when parents' wishes to have a normal child is defeated[61] and lastly if the birth of a desired child is prevented or unattainable.[62]

Others[63] agree with this premise and write that since the **Roe**[64]era medical science's ability to predict and detect defects in the unborn has expanded significantly.[65] Prenatal screening and diagnosis have changed society's viewpoint on genetic possibilities and birth expectations in such a way that wrongful birth litigation is a logical and necessary development in tort law in reaction to these medical advances and societal viewpoint changes.[66] This new[67] type of litigation could be explained as a reaction to developments in medical science and is designed to protect the constitutional rights of parents and protect societal interests in promoting quality prenatal health care.[68]

It is submitted that recognition and availability of wrongful birth actions will ensure that

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58 *ibid* p 95.

59 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 89.

60 *ie* wrongful conception.

61 typical wrongful birth cause of action.

62 wich set of facts traditionally does not fall in the wrongful birth scope of actions.

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

64 **Roe v Wade** 410 U.S. 113 (1973) see next fn.

65 see ch 11 where modern genetic tests are discussed.

66 *op cit* p 2021.

67 the first true wrongful birth action was instituted in **Gleitman v Cosgrove** (1967) *infra*.

68 *op cit* p 2022.

physicians exercise due care in prenatal counselling and provide accurate information necessary to make informed procreative decisions.[69]

Not all authors, however, support the premise that medical advances have had positive results. Faircloth[70] is of the opinion that the extraordinary advancements in medical technology have been accompanied by a corresponding rise in efforts to "lay blame for life's vicissitudes at the feet of others". As an example of this statement he names the new birth-related causes of action[71] and quotes:[72]

> "But one little thing has been overlooked in their preoccupation with our wonderful new ability to take the forces of nature and harness them. Our scientific and intellectual advances were not accompanied by similar moral strides...Technology, instead of making us morally better, has been accompanied by a time of moral disintegration."[73]

Bodgan[74] is of the opinion that wrongful birth actions originated from a variety of contributing factors. Not only does he agree with the vital influence that legal abortions have had on wrongful birth litigation,[75] but he also reminds us of the importance of factors such as the dramatic increases in the number of sterilization operations[76] and more effective prenatal diagnostic techniques[77] which in combination result in ever growing numbers of wrongful birth actions.

3. Position in the United States of America

3.1 American legal principles

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69 *ibid.*

70 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 545.

71 such as wrongful conception, wrongful birth and wrongful life actions.

72 *ibid.*

73 *ibid* - quoted from A.W. Tozer, **Faith Beyond Reason** (1989), 122.

74 *op cit*, p 124.

75 possible after the decision of **Roe v Wade**.

76 Bodgan *ibid* reports that there was an increase of 500 000 sterilization procedures performed between 1971 and 1978 - this is indicative of the change in societal attitudes in the time of genetic science's introduction to the broad public.

77 see ch 11.

It seems as if the majority of American courts have recognized the wrongful birth cause of action in negligence, thereby basing recovery on medical malpractice/ negligence claims. To succeed with a negligence claim the traditional elements have to be proven[78] and a plaintiffs must accordingly show that the defendant owed them a duty to use reasonable care in giving genetic counselling; or in performing an abortion; or sterilization procedure.[79] The plaintiffs must further prove that defendant's conduct constituted a breach of a duty of care owed to the plaintiffs and that the defendant's negligent conduct proximately caused injury to the plaintiffs.[80] Some plaintiffs have founded their claims on breach of contract or breach of warranty.[81]

It is reported[82] that "virtually every court since *Roe* that has considered the validity of a wrongful birth cause of action has upheld it".

Bey-Berkson[83] agrees that the majority of American courts have recognized the wrongful birth cause of action, but comments that the damages recoverable vary tremendously among jurisdictions. She reports that the negligent act or omission by the physician precluded an informed parental decision either to prevent conception or to terminate the pregnancy. It is further reported that the bulk of the courts find that the failure to provide adequate genetic counselling, falls within the existing frameworks of a traditional negligence action or the doctrine of informed consent.

Bey-Berkson[84] makes a fundamental distinction between those courts that treat wrongful birth litigation as a cause of action for negligence; and those courts that explicitly view this type of litigation as a separate cause of action for wrongful birth or wrongful life.[85]

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78 see Faircloth's criticism of the incorrect application of the traditional tort framework in wrongful birth actions *infra*.

79 see ch 4 where medical negligence is discussed in more detail.

80 see ch 2 where the South African elements of delict are discussed.

81 **Hartke v McKelway** *supra* - see ch 2 where breach of contract and warranty is discussed further.

82 Anon. 1987, *op cit* p 2018.

83 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 63.

84 *ibid.*

85 *ie* there are basically two schools of thought: one believes that novel actions could be founded in the traditional tort framework, the other argues that unique causes of action should be introduced to cater for new types of litigation.

3.2 Historic development of cases

The first wrongful birth action was instituted in New Jersey in 1967. In **Gleitman v Cosgrove**[86] the court denied the action of the plaintiff on grounds of public policy, as anti-abortion legislation was still in place at that time.[87] The court reasoned that because public sentiment concerning abortions was so negative, no cause of action was proven by the plaintiff.[88] An additional obstacle was another public policy viewpoint, namely that of "the impossibility to measure damages in being the mother and father of a defective child".[89]

In casu the basis of the claim was the birth of a seriously handicapped infant[90] brought about by the defendant-physician who negligently failed to inform the plaintiff of the high probability of such impairments occurring as a result of the plaintiff's contraction of German measles[91] during her pregnancy.[92]

Grobe[93] explains that there are basically two reasons why wrongful birth actions could not succeed prior to **Roe**. Firstly because the plaintiffs could not claim that the physician's failure to inform them *caused* the birth defect and secondly the parents could not prove that such information would have prevented the impaired child since eugenic abortions were illegal in most states at that time.

A definite shift in public policy concerning the issue of abortion was established in 1973 by the landmark case of **Roe v Wade**.[94] As the right to prevent the birth of a potentially handicapped

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86 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

87 see fn 3 *supra*.

88 therefore, even if the physician had fulfilled his duty to inform and had warned them in time, it would make no difference - the court stated that "the right of the child to live is greater than and precludes the parents' right not to endure emotional and financial injury".

89 *ibid* at 29-30, 227 A. 2d 693, the court was unable "to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."

90 the infant was born deaf, blind and mentally retarded.

91 see ch 11 where the detrimental effects of *Rubella syndrome* is further discussed.

92 see ch 5 where a physician's duty to inform is discussed in detail.

93 *op cit* p 718.

94 410 U.S. 113 (1973) - refer to ch 3 for a more detailed historical record on the acknowledgement of woman's right to self determination and abortion.

child was now recognized by law, the basis of wrongful birth actions was in effect endorsed and divergent judgments decided on similar *pre* **Roe** facts, soon followed. By 1990, 17 states in America have recognized a cause of action for wrongful birth.[95]

In **Jacobs v Theimer**,[96] for example, the Texas Supreme Court allowed damages for the medical expenses in a successful wrongful birth action. In the case of **Becker v Schwartz**[97] a wrongful birth action also succeeded and pecuniary damages were recovered for the institutional care of a child born with *Down's syndrome*, following the negligent failure of the defendant-physician to inform of and advise an amniocentesis in such a case of advanced age for pregnancy.[98] Satisfaction for emotional pain and suffering was, however, denied. The court stated that such recovery could only be allowed if it were specifically authorized by legislation.[99] In contrast to this refusal of non-patrimonial damages, the New York Supreme Court in

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95 (According to Berenson *op cit* p 899.) These states are:
Alabama - **Robak v United States** 658 F.2d 471 7th Cir. (1981);
California - **Andalon v Superior Court** 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984);
District of Columbia - **Haymon v Wilkerson** 535 A.2d 880 D.C. (1987);
Florida - **Moores v Lukas** 405 So. 2d 1022 Fla. Dist. Ct. App. (1981);
Illinois - **Siemieniec v Lutheran Gen. Hosp.** 117 Ill. 2d 230, 512 N.E.2d 691 (1987);
Louisiana - **Pitre** 530 So.2d 1151;
Maine - **Me. Rev. Stat. Ann.** Tit. 24, § 2931 Supp. (1988);
Michigan - **Profitt v Bartolo** 162 Mich. App. 35, 412 N.W.2d 232 (1987);
New Hampshire - **Smith v Cote** 128 N.H. 231, 513 A.2d 341 (1986);
New Jersey - **Procanic v Cillo** 97 N.J. 339, 478 A.2d 755 (1984);
New York - **Becker v Schwartz** 46, N.Y. 2d 401, 386 N.E.2d 807, 413 N.Y.S. 2d 895 (1978);
North Carolina - **Gallagher v Duke Univ.** 638 F.Supp. 979, 852 F.2d 773 4th Cir. (1988);
Pennsylvania - **Speck v Finegold** 497 Pa. 77, 439 A.2d 110 (1981);
South Carolina - **Phillips v United States** 508 F. Supp. 544 D.S.C. (1981);
Texas - **Jacobs v Theimer** 519 S.W.2d 846 Tex. (1975);
Virginia - **Naccash v Burger** 223 Va. 406, 290 S.E.2d 825 (1982);
Washington - **Harbeson v Parke-Davis, Inc.** 98 Wash. 2d 460, 656 P.2d 483 (1983);
West Virginia - **James G. v Caserta** 332, S.E.2d 872 W.Va. (1985); and
Wisconsin - **Dumer v St. Michael's Hosp.** 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

96 519 SW 2d 846 (1975).

97 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

98 plaintiff was 37 years old at time of her pregnancy (studies have shown that there is a direct link between the age of a mother and the risk of her baby being affected by *Down's syndrome*) - it is common medical practice to refer a pregnant patient above the age of 30 years for an amniocentesis, see ch 11.

99 see ch 10 dealing with wrongful birth statutes and also ch 12 for a proposed legislative solution to the wrongful birth debate.

Karlsons v Guerinot[100] found that claims for pain, suffering as well as mental anguish, were maintainable.[101]

In the judgment of **Berman v Allen**[102] the supreme court of New Jersey partly reversed their previously held 1967-viewpoint[103] by allowing satisfaction for the emotional anguish suffered by the plaintiff in a wrongful birth action. An interesting aspect of this case was that the court[104] refused to award damages for the maintenance of the impaired child.[105] In motivating its decision the court stated that such compensation would be disproportionate to the defendant's culpability and was also too speculative.[106]

It would seem as if a shift in focus from satisfaction for non-patrimonial damages to special damages, awarded for child-rearing expenses and increased medical costs, occurred in the early 1980's. In **Phillips v United States**[107] a South Carolina court awarded recovery for wrongful birth plaintiffs in such a manner. *In casu* a physician once again failed to warn[108] his pregnant patient of an increased risk of *Down's syndrome* indicated by a history of this disorder in her family and thereby deprived the plaintiff of an opportunity to abort the impaired foetus.

Speck v Finegold[109] is another remarkable example of exceptional medical negligence in spite

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100 57 App. Div. 2d 73, 394 N.Y.S. 2d 933 (1977).

101 this court, however, did not award child-rearing expenses.

102 80 NJ 421, 404 A 2d 8 (1979).

103 as expressed in **Gleitman v Cosgrove**, *supra*.

104 similar to the **Karlsons** decision.

105 I believe that this reasoning is sound and its result a fair one - since the parents indeed planned to have a child and accordingly were prepared to maintain such a child it is only fair that disgruntled parents be compensated for their emotional suffering - they should, however, also be reimbursed for additional (future) expenses caused by the unplanned condition of handicap or genetic disease - see Gevers, J.M.K. and Leenen, H.J.J. 1986, *op cit* p 64 (*infra)* who similarly supports this line of reasoning.

106 I respectfully disagree with this argument - accurate financial estimations can readably be made as to the approximate future expenses related to the general maintenance, education and other costs reasonably to be expected for a specific child: such calculations are routinely made and accepted in judgments worldwide.

107 508 F Supp. 544 (1981)575 F Supp. 1309 D.S.C. (1983).

108 ...and advise of existing genetic test that could be implemented to ascertain possible indications of the disorder.

109 *supra.*

of modern technology and advanced medical science.[110] In this case the wrongful birth plaintiffs not only underwent a negligently performed and subsequently failed sterilization procedure,[111] but also had to deal with the trauma of a failed abortion attempt[112] which resulted in the birth of a seriously impaired child.[113] The Supreme Court of Pennsylvania followed the overwhelming majority of judgments given by that time and recognized the plaintiffs claim.[114]

In **Naccash v Burger**[115] the Virginia Supreme Court compensated the parents of a child suffering from *Tay-Sachs disease*.[116] In spite of undergoing genetic tests the plaintiffs conceived an affected child because of the negligence of a laboratory. Another successful wrongful birth action was instituted in **Harbeson v Parke-Davis Inc.**[117] Here a physician acted negligently by failing to warn his patient of an increased risk of birth defects due to her use of the drug *Dilatin* during pregnancy. A handicapped child was born and Mrs. Harbeson was compensated for all extraordinary expenses caused by the impairment as well as her mental anguish and emotional stress suffered as a result of the handicapped child.

3.3 A new look at wrongful birth

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110 see the case discussed in ch 8 for its concomitant wrongful life relevance.

111 a vasectomy was unsuccessfully performed on Mr. Speck, known to be afflicted with the inheritable disease from which their other children also suffered.

112 although Mrs. Speck informed her physician that she believed that she was still pregnant after the abortion procedure, he assured her that the pregnancy was terminated.

113 the infant suffered from *neorofibromatosis* - see ch 11 for a discussion of this condition.

114 A.H.S. 1983. Torts. **Journal of Family Law** (21:1) reports on p 169 that in the **Finegold** judgment, four varying opinions were expressed: the lead opinion, which permitted a tort clause of action for both the parents and the child (wrongful life action); a concurring opinion which supported the lead opinion's conclusions; a partially concurring opinion which permitted the parents a tort cause of action, but not the child; and a one-man dissent which denied both the parents and the child a tort cause of action. For a detailed discussion on the reaction from the Pennsylvania State Legislator to this judgment, see ch 10 dealing with wrongful birth statutes.

115 290 SE 2d 825 (1982).

116 since both parents have to be carriers of Tay-Sachs for the children to be afflicted, the laboratory only tested the husband (and would test the wife only once they found the husband to be a carrier): his results were unfortunately confused with that of another - see ch 11 for a further review on *Tay-Sachs disease*.

117 98 Wash. 2d 460, 656 P. 2d 483 (1983).

In the recent Alabama case of **Keel v Banach**[118] a wrongful birth action was allowed.[119] In spite of the fact that Dr. Banach performed two sonograms during the pregnancy, Justine Keel was born with multiple birth defects.[120] The plaintiff-parents instituted action based on medical negligence against Dr. Banach and asserted that he was negligent on at least two accounts, namely that he failed to meet the standard of prenatal care by firstly failing to further investigate questionable sonogram findings[121] and secondly by failing to warn his patients of increased genetic risk after their disclosure that Mr. Keel had previously fathered an *anencephalic*[122] stillborn. Under such circumstances an amniocentesis should[123] have been performed. The plaintiffs alleged that they would have aborted the pregnancy, had the defects been discovered in time.

The court followed the "extraordinary expense" view and allowed all costs pertaining to the child's abnormal condition, including hospital and medical cost, costs of medication and costs of education and therapy for the child. The court additionally awarded any medical and hospital expenses already incurred as a result of the physician's negligence, damages for the physical pain suffered by the mother, loss of consortium and satisfaction for the mental and emotional anguish the parents have suffered.[124]

In reaching its decision the court considered various public policy arguments previously advanced in favour of wrongful birth. These arguments include:

- wrongful birth is a necessary extension of tort principles;
- social interest in reducing and preventing birth defects; and

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118 624 So. 2d 1022 Ala. (1993).

119 the trial court granted summary judgment for Dr. Banach, whereas the Alabama Supreme Court allowed the action on appeal.

120 *ibid* at 1023 - the child had one to few vessel umbilical cords, a short cord, *ventriculomegaly*, absent right leg, imperforate anus, one testicle, one kidney, a vertebrate anomaly in the lumbar sacral region, *hydrocephaly*, a large fluid-filled sac extending off the right aspect of the sacrum consistent with *meningocele (spina bifida)* and died at age 6.

121 the plaintiffs alleged that the reasonable physician would have noticed the "lemon sign", which is a condition recognisable in foetuses with an oblong head and with open frontal bones.

122 see ch 11 where this condition is discussed in more detail.

123 according to the prevalent medical practice.

124 note that no damages were awarded for costs associated with raising a normal, healthy child.

- the notion that refusal to recognize wrongful birth frustrates the principles of compensation, deterrence of negligence and encouragement of due care.[125]

Faircloth[126] criticises the judgment from his viewpoint that wrongful birth actions should not be allowed. He believes that the problems presented by causation, harm and damages illustrate that wrongful birth is not an extension of existing tort principles but rather "a tort without precedent and at variance with existing precedents both old and new."[127] Not only does he find that wrongful birth is a matter of "more policy than law",[128] but he concludes that:

> "Finally, because courts must contradict themselves to find a cause related to a compensable harm in order to allow recovery in wrongful birth actions, rejection of the cause of action makes the law more consistent and equitable."[129]

3.4 Damage viewpoints

An important legal principle that should be remembered in consideration of awarding damages, is the fact that parents[130] have a common law legal responsibility towards their children to provide maintenance and medical expenses. It is therefore submitted that where parents in wrongful birth cases had to incur extraordinary costs in providing and caring for the child, these additional coasts should in principle be compensable.

Horowitz[131] reports that the current trend in wrongful birth cases, unlike cases involving healthy children,[132] appears to be that courts treat the parent's claim as a traditional malpractice action. She explains that if the child's impairment is serious or fatal, courts generally award complete

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125 *op cit* p 1030-31.

126 *op cit* p 555.

127 quoted from **Wilson v Kuenzi** 751 S.W. 2d 741 Mo. (1988) at p 745.

128 it is my submission that because wrongful birth encompasses several important social issues, it is obvious and plausible that public policy should assist in protecting individuals' interests in this regard - specialised legislation could also be considered as a solution to the many 'wrongful life challenges', see ch 12.

129 *ibid.*

130 in their role as guardians of the child.

131 1983. The Wrongful birth cause of action. **Annual Survey of American Law** (Torts II), 687.

132 wrongful conception actions.

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damages,[133] whereas if the child's defect is mild, courts usually apply the benefit rule to offset the damages recoverable. She[134] concludes:

> "The apparent victory achieved by the wrongful life plaintiff as result of the Turpin and Harbeson decision may be largely symbolic. Since most courts accept the parents' right to recover the medical expenses incurred in raising an impaired child, the child's separate claim will apply only to expenses incurred after reaching the age of majority. In many cases, however, the child's defective condition is so severe that does not live to majority. The Turpin and Harbeson decisions, therefore, may have little practical effect."

3.4.1 Different approaches

Harrer[135]attempts to classify the various damage awards-viewpoints pertaining to wrongful birth actions in the United States. There seems to be a variety of different perspectives reflected in the different decisions.

3.4.1.1 Additional expenses

The first notable viewpoint only allows additional expenses to the normal maintenance need of the child. The majority of authorities in the United States permit parents of children born with substantial mental or physical defects to recover damages for the special medical, educational and other necessary expenses associated with the rearing of such children to the age of majority. Here only extraordinary rearing costs are awarded.[136] Harrer states that these courts are usually also the same jurisdictions that prohibit all compensation for child-rearing expenses incurred by parents of healthy children in wrongful conception actions.[137]

3.4.1.2 Full compensation

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133 damages for emotional injury are similarly be balanced against emotional benefits.

134 *op cit* p 692.

135 *op cit* p 99.

136 **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983) and **Jacobs v Theimer** 519 S.W. 2d 846 Tex. (1975); **Gallagher v Duke Univ.** 638 F. Supp. 979 N.C. (1986); **Lininger v Eisenbaum** 764 P. 2d 1202, 1210 n.10 Colo. (1988) and **Viccaro v Milunsky** 406 Mass. 777, 551 N.E. 2d 8 (1990), to name but a few.

137 Schoonenberg *op cit* p 64 reports that damages are usually limited to: medical expenses during minority of the child; pregnancy and birth related costs of the mother and also compensation for any immaterial damages suffered.

The second group of courts allow full compensation[138] of which Harrer notes that most have also authorised compensation for the reasonable child-rearing costs of normal children.[139] This liberal view is often taken by courts who believe that a full award is necessary since the support obligation of parents for a severely impaired child is likely to last well beyond the age of the child's majority. The parent's award usually takes into consideration the increased possibility of extensive and long term support expenses.

3.4.1.3 Benefit theory application

A third perspective is noted to allow full recovery while at the same time reducing all accruing benefits associated with the child's birth.[140] The offset of benefits of parenthood is done in terms of the **Restatement of Torts**.[141] Among jurisdictions that support this concept some courts apply the so-called tort benefit rule[142] and reduce the award for the value of any benefits derived from such child-rearing.

The reality of most wrongful birth children is that their particular impairment will remain with them for the rest of their lives. It is reported[143] that some courts[144] therefore take into consideration the fact that expenses would be incurred beyond the age of majority and accordingly include the increased potential for these support expenses.

Grobe[145] observes that courts have in application of the "incidental benefit rule"[146] followed a

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138 *ie* allow the parents of an impaired child total recovery for child-rearing expenses, incl ordinary as well as extraordinary costs - **Robak v United States** 658 F. 2d 471 (1981).

139 in wrongful conception actions.

140 **Ochs v Borrelli** 187 Conn. 253, 445 A. 2d 833 (1982); **Burke v Rivo** 406 Mass. 764, 551 N.E. 2d 1 (1990).

141 (2nd) § 920 (1977): "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that it is equitable." *ibid.*

142 see ch 2 on the working of the benefit rule.

143 Harrer *op cit* p 100.

144 **Procanic v Cillo** 97 N.J. 339, 478 A. 2d 755 (1984); **Rivera v State of New York** 94 Misc. 2d 157, 163 N.Y.S. 2d 950, 954 (1978).

145 *op cit* p 735.

146 or the common "benefit rule".

"markedly different trend" in wrongful birth than in wrongful conception actions.[147] Here, it is submitted, one should keep in mind the fundamental difference in these actions, namely that wrongful birth parents were aware of and were prepared to face the burden of maintenance for a healthy child. A valid point of criticism against the general application of the benefit rule is accordingly that many courts fail to correctly the rule as was intended by the legislator.[148]

Andrews[149] writes with regard to the statement that the benefits of having a child should offset any damage award:

> "More importantly we would not even consider the theory that the joy of parenthood should offset the damages. Would anyone in their right mind suggest that where a healthy fetus is injured during delivery the joy of parenthood should offset the damages? There is no more joy in an abnormal fetus come to full term than a normal fetus permanently injured at delivery. Both are heartbreaking conditions that demand far more psychological and financial resources than those blessed with normal children can imagine."

3.4.1.4 No compensation

A final group of judgments deny recovery altogether.[150] Some judges completely prohibit recovery of child-rearing expenses, even in the event where a seriously impaired child is born. Many of these rulings are defended by advancing public policy considerations and by emphasizing the difficulty to ascertain damages.[151] It is further reported that recent legislation[152] in some states now expressly prohibits actions for wrongful birth.

3.4.2 General discussion

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147 wrongful birth parents have been allowed to recover only additional cost over and above the normal rearing costs of children, instead of being entitled to seek all damages flowing from the defendant's negligence - in both instances the benefits of childbirth is set-off against the damages.

148 as stated in the **Restatement of Torts (2nd)** § 920 (1977).

149 1992.Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 158.

150 **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; **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

151 see discussion of cases *supra.*

152 see ch 10 on wrongful birth statutes.

Bodgan[153] is of the opinion that the major controversy over damage awards in wrongful birth suits concerns the consequences of an afflicted child's birth. He has identified two competing themes in courts' damage policies concerning wrongful birth cases: the first approach stating that public policy requires courts not to award any damages;[154] and the second asserting that the courts are to apply traditional tort doctrine, holding the defendant liable for all harm that directly and foreseeably results from his negligence.[155]

Even though abortion in America has been made lawful by the **Roe** decision,[156] the concern has been raised that recognition of wrongful birth would encourage unnecessary abortions. Faircloth[157] explains that there is no real danger, as foreseen by anti-abortion critics of wrongful birth that recognition of these actions will cause an increase in abortions:

> "In purely logical terms, if wrongful birth claims increase, the actual abortions should be decreasing, because the wrongful birth plaintiff is seeking recovery for an abortion that never happened. Allowing wrongful birth causes of action might more appropriately be said to validate or sanction the concept of abortion."[158]

Bodgan[159] reports that some courts[160] have attempted to reconcile the differing approaches to the allocation of damage awards by permitting plaintiffs to recover damages due to economic and emotional suffering , but reducing the damage award by the amount of benefit plaintiff's receive from being parents.[161] This observation coincides with the assessment of Harrer *supra*.

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153 *op cit* p 135.

154 in **Gleitman v Cosgrove** public policy was directed against abortion - after **Roe**, courts rejecting wrongful birth on public policy grounds have used arguments such as "windfall to parents" and undue burden on defendant, as in **Berman v Allan** 80 N.J. 421, 404, A. 2d 8 (1979) and **Naccash v Burger** 290 S.E. 2d 825 Va. (1982).

155 **Speck v Finegold**.

156 see ch 3.

157 *op cit* p 545.

158 *op cit* p 556.

159 *op cit* p 136.

160 **Ochs v Borrelli**, **Eisbrenner v Stanley** 106 Mich. App. 351, 308 N.W. 2d 209 Mich Ct. App. (1981).

161 see ch 2 where the benefit theory is discussed in more detail.

Grobe[162] agrees with the observation that different courts approach the awarding of damages with regards to "recovery for the cost of raising the child beyond those occasioned by the birth defect", in various different manners. He confirms that expenses occasioned by the birth impairments are generally allowed without too many problems. He further maintains[163] that effect should be given to the primary purpose of tort law, in that an injured party should be compensated for all injuries sustained due to the wrongful conduct of another.[164]

Grobe[165] refers to section 901 of the 2nd **Restatement of Torts** wherein it is stated that the measure of damages is established at the hand of "the purposes of tort actions, which are to give compensation, indemnity or restitution of harms; to determine rights; to punish wrongdoers[166] and deter wrongful conduct and to vindicate parties and deter retaliation or violent and lawful self-help."

Robertson[167] submits that wrongful birth plaintiffs should be compensated for the ordinary costs of raising a healthy child plus any extra cost, such as for medical treatment, involved in raising a severely handicapped child.[168]

3.4.3 Patrimonial and non-patrimonial damages

A distinction is made between the courts' approaches towards patrimonial and non-patrimonial damages:[169]

3.4.3.1 Patrimonial damages

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162 *op cit* p 732.

163 *ibid.*

164 therefore all damages proximately caused by a wrongdoers negligence.

165 *op cit* p 733.

166 note that although the South African compensation theory does have a certain secondary element of retribution or reprisal associated to it, no direct punishment for the wrongdoer is intended by it and such a apprehension of punishment is mostly found in the injured party's subjective response to the damage award - see Visser's discussion on the theories behind compensation in ch 2.

167 1982. Wrongful Life. **Modern Law Review** (45), 697.

168 *ie* full compensation.

169 Grobe *op cit* p 734.

Many American courts[170] allow compensation for the patrimonial damages occasioned by the handicapped condition of children in wrongful birth litigation. An argument that has been raised against compensation in this fashion is that plaintiffs have the opportunity to mitigate their losses by giving the source of the damage, namely the child itself, away for adoption.[171] Since it can only be expected from a plaintiff to take reasonable steps in limiting damages,[172] it has now been pertinently established that it is unreasonable to expect from a parent to place a child up for adoption under these circumstances.[173]

Block[174] reports that the few courts, such as **Ziemba v Sternberg**[175] and **Sorkin v Lee**,[176] that have actually applied the avoidance of consequence doctrine have found as a matter of law that reasonable mitigation includes abortion in cases where the pregnancy is discovered early on[177] and the mother's health is such that an abortion is not too risky.[178] It is submitted that South African courts will not expect a plaintiff to go to such lengths to mitigate damages, as only reasonable steps could be required from such a plaintiff.

Block[179] states, however, that the vast majority of courts have rejected the avoidance of consequences doctrine, holding as a matter of law that no plaintiff should be required to abort the foetus or place the child for adoption in order to mitigate damages.

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170 **Dumer v St Michael's Hospital** 69 Wis. 2d 766, 233 NW 2d 372 (1976); **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983); **Jacobs v Theimer** 519 S.W. 2d 846 Tex. (1975): **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978); **Turpin v Sortini** 182 Cal. Rptr. 337 (1982); and **Gildiner v Thomas Jefferson University Hospital** 451 F. Supp. 692 Pa. (1978).

171 the adoption issue is considered in ch 3.

172 in South African law it is clear that only reasonable steps are expected in mitigation of loss: **Hazis v Transvaal & Delagoa Bay Investment Co Ltd** 1939 AD 372; **Swart v Provincial Insurance Co Ltd** 1963 (2) SA 630 (A); **Modimogale v Zweni & another** 1990 (4) SA 122 (B).

173 **Schork v Huber** 648 S.W. 2d 861, Ky. (1983) and **Troppi v Scarf** 31 Mich. App. 240, 187 N.W. 2d 511 (1971) - a wrongdoer must "take his victim as he finds him", indicating that a defendant cannot complain if the plaintiff does not have the mental and/ or emotional strength to place a child for adoption.

174 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. **Fordham Law Review** (53:4), 1107.

175 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

176 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980).

177 (in the first trimester).

178 *op cit* p 115.

179 *op cit* p 116.

A suggested[180] solution to tackle the mitigation question in American law[181] is:

> "A better approach, and the one intended in the Restatement (Second) of Torts, is to leave the issue of mitigation to the jury. The test is whether a reasonable person in the plaintiff's circumstances would have either had an abortion upon discovery of the pregnancy or placed the child for adoption upon its birth. The jury would consider several circumstances: the religious, moral and ethical beliefs of the parents, the point at which the pregnancy was discovered, the health of the mother, the parents' prior history of abortion or adoption placement, the reasons the parents sought to prevent the pregnancy in the first place, and the parents' reason for not wanting to place the child for adoption."

3.4.3.2 Non-patrimonial damages

Grobe[182] reports on certain courts[183] that have recognized damages for emotional pain and suffering while at the same time applying the benefit rule. In so-doing these courts have decreased the plaintiffs' compensation with the emotional benefits derived from parenthood.[184]

Other courts[185] have rejected this notion, doubting whether wrongful birth parents have any pleasure in watching their children suffer each day.[186]

> "We cannot offset the well recognized, foreseeable expenses of child rearing with the joy we can only hope for. We cannot disregard the parents' claim that they expect distress from the disruption of their careful family planning, but allow the tortfeasor an

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180 Block *op cit* p 1119.

181 South Africa no longer has a jury system - it is submitted, however, that the presiding judge could similarly apply the principles suggested by Block with a jury in mind.

182 *op cit* p 736.

183 **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

184 I submit that the correct application of the benefit rule as set out in § 920 of the **Restatement of Torts (2nd)** of 1977 is more frequently maintained under these circumstances, when emotional benefits are taken into consideration when calculating damages for emotional losses, than in claims for patrimonial loss - in this way the correct result will suffice, as similar categories of damage are set-off against similar benefits.

185 **Schroeder v Perkel** 432 A. 2d 834 N.J. (1981), also **Schork v Huber** 648 S.W. 2d 861, Ky. (1983).

186 depending on the nature and manifestations of the various types of genetic diseases and congenital birth defects.

offset for the bundle of joy he hopes to have contributed to their lives."[187]

Some courts[188] apply the so-called "bystander rule"[189] when considering a claim for non-patrimonial damages. In terms of this rule recovery for emotional distress is only possible if the emotional injury was brought about by a shock sustained at childbirth, while other jurisdictions[190] maintain that witnessing the birth of an impaired child is sufficient grounds for emotional trauma.

> "The wrongful birth claim involves injuries to physical, emotional, and economic interests, not just to a single interest in avoiding parenthood. The benefit rule provides that a benefit to any of these separate interests offsets the damages only to that interest, no to other interests that are harmed by the same act of negligence."[191]

4. Concerns for recognition

4.1 Arguments against wrongful birth

Various points of criticism have in the past been raised against wrongful birth litigation. In considering some of these arguments, special reference will be given to problems pertaining to causation, damages and public policy. A recent American case, **Keel v Banach**,[192] will be scrutinised for this purpose as an exemplary judgment.

4.1.1 Causative challenge

Courts[193] and writers[194] alike have by occasion questioned whether the defendant-physician in wrongful birth is the proximate cause of the defective birth of the child and have accordingly rejected the notion that the failure to warn the parents of an increased risk in the pregnancy is

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187 **Schork v Huber**, p 866.

188 **Andalon v Superior Court** 208, Cal. Rptr. 899, 901 (1984).

189 see ch 2 for a discussion on this rule in South African law.

190 **Blake v Cruz** 698 P. 2d 315, 319 Idaho (1984).

191 A.N.M. 1982. Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant. **Virginia Law Review** (68), 1326.

192 624 So. 2d 1022 Ala. (1993).

193 **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

194 Andrews.1992, *op cit* p 149.

actionable.[195] The necessary causal link for liability based on tort is therefore disputed.[196]

The **Banach** court[197] explained that "...a negligent act need not be the sole cause of the injury complained of in order to be the proximate cause of that injury". Faircloth[198] reports that the court further stated that since the cause of action in wrongful birth is fundamentally based on the defendant's failure to diagnose and inform his patients, the injuries to the foetus and who caused them are really irrelevant in a causation perspective:

> "The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant's negligence was the proximate cause of the parents' being deprived of the opinion of avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child."[199]

4.1.2 A damage concern

A fundamental misapprehension can arise in wrongful birth damage assessment when the faulty approach is taken that the actual harm complained of is the infant's injury itself. The true grievance lies in the fat that parent's wishes for normal childbirth were shattered. Closely connected hereto are the far reaching consequences of life with disability or congenital anomalies and disease, such as exorbitant medical and educational expenses. Faircloth[200] suggests that due to this problem in pinpointing the harm for which the courts would allow recovery, many judgments have been inconsistent. He believes that for this very reason varying and arbitrary damage awards have been given by the courts.[201]

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195 note the point made by Andrews *supra*: "liability for a missed diagnosis in other areas of medicine was, and still is, common even though, in such cases, the physician did not cause the illness." - in my view this is a sound argument.

196 related questions that arise are: how is it determined which patients are sufficiently at risk?; which tests are sufficiently predictive?; how long is the duration of the duty to warn of genetic risk?; do third parties have a right to know about a patient's genetic risk?

197 *op cit* p 1022.

198 *op cit* p 550.

199 *ibid* p 1029.

200 *op cit* p 552.

201 three mainstream approaches are identified, namely full recovery of all costs associated with the raising of the impaired child, the award of only special expenses associated with the child's defect and lastly additional recovery for the parents' emotional distress.

One of the most fierce points of criticism raised by Faircloth[202] against the **Banach's** judgment concerning damages, is that the court did not apply the general tort compensation principle that "the plaintiff should be put in the position that he would have been in, absent the defendant's negligence." He argues that by allowing recovery only for extraordinary expenses[203] the court did not restore the plaintiffs to their original position, as this would only be the case if complete child-rearing expenses were also compensated.[204]

4.1.3 Policy concerns

Many of the policy concerns generally expressed by critics of wrongful life actions are also regularly asserted by wrongful birth critics.[205] In the **Banach** case the defendant protested that if the cause of action was accepted, further litigation would follow which could possibly be subject to the risk of fraudulent claims. He argued that wrongful birth liability would furthermore place a heavy burden on obstetricians and gynaecologists which could lead to the increase of abortions.[206] The defendant also feared that the plaintiffs' children would be adversely affected by recognition of the action.

An important concern raised, was that wrongful birth would have a negative impact on the disabled community. It is submitted that this might be a real concern, as I am personally also apprehensive that the true basis of wrongful birth might be misunderstood in such a way that the disabled community might feel prejudiced[207]by the recognition of wrongful birth.[208]

After consideration of all the relevant aspects and questions pertaining to wrongful birth, Faircloth[209] is not convinced of its virtue:

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202 *op cit* p 553.

203 relating to the child's impairments.

204 this is the only way in which the same result as an abortion, the plaintiffs' alternative, could be obtained. "The crux of the complaint is that the plaintiffs would have aborted absent the doctor's breach of duty. Absent Dr. Banach's negligence, the Keels would never have had Justine. Therefore, the original position is the one without the deformed child." *ibid.*

205 see ch 8 for various grounds of disapproval.

206 unnecessarily performed as preventive medicine.

207 see ch 9 where this plight is further discussed.

208 the court in **Banach** was, however, not impressed by these public policy arguments and rather followed the majority trend of authorities by allowing the action.

209 *op cit* p 558.

> "Wrongful birth is a legal misnomer and creates more problems with causation, harm, and damages than could ever be solved. The only thing certain about Alabama's acceptance of wrongful birth is that much litigation is sure to follow."

He is further of the opinion that wrongful birth "forces doctors to facilitate the mother's abortion and forces society to conclude that non-existence is preferable to life with impairment. At the very least, courts should not allow recovery of damages that are connected with an infant's genetic injury."[210]

4.1.4 Conclusion

Critics of wrongful birth actions contend that the relevant medical practitioner or medical institution is not liable, because the foetus[211] suffered from a hereditary disease or other impediment before the defendant's negligence occurred. Physicians should therefore not be held responsible for the child's defects. It is my submission that, this argument, however, misconstrues the true nature of the wrongful birth claim in that the plaintiff does not blame the defendant for causing the handicapped childbirth, but rather seeks justice for the fact that plaintiff was deprived of the right to accept or reject a specific parental relationship.

4.2 A legislative solution?

Bodgan[212] has an interesting viewpoint on legislative guidance for wrongful birth.[213] He is of the opinion that since courts recognize wrongful birth actions as a type of negligence claim, they do not require any explicit legislative sanction.[214] As reasoning behind this premise he refers to the judgment of **Naccash v Burger**,[215] where it was stated that no distinction should be made between a wrongful birth action and any other malpractice suit. Another reinforcing judgement is that of **Gildiner v Thomas Jefferson University Hospital**,[216] where the court pronounced that wrongful birth actions are actions in negligence and that the judiciary is competent to determine the boundaries of common law negligence doctrine.[217] He reports that numerous courts have in accordance with this view allowed wrongful birth claims and have

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210 *ibid.*

211 which is ultimately the reason for the litigation.

212 *op cit* p 132.

213 see ch 10 where wrongful birth statutes are further discussed.

214 *ie* wrongful birth statutes.

215 290 SE 2d 825 (1982).

216 451 F. Supp. 692 Pa. (1978).

217 without legislative assistance.

allowed recovery in one way or another.[218] Be this as it may, it should be noted that many state legislators have consequently introduced wrongful birth statutes of which some restrict wrongful birth litigation, while many prohibit these actions altogether.[219]

5. Position in Germany

5.1 Background

Harrer[220] writes that while the first pregnancy related action was instituted in the United States of America as early as 1934[221] Germany, by contrast, only heard its first wrongful birth case as late as 1968.[222] In spite of their "late start" German courts have over the years independently developed very practical solutions to solve most wrongful life related problems, which approaches differ significantly form the solutions formulated in the United States and much of the rest of the world.

Much uncertainty encompassed the German legal system in recent times with regards to the question of legality of abortions.[223] In spite of this confusion with regards to one of the most important basis of wrongful birth litigation,[224] it could be concluded that this country principally acknowledges actions for wrongful birth.[225] In a Supreme Court case decided on 22 November 1983[226] the court awarded full maintenance costs[227] to the parents of a child suffering from

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218 *op cit* p 133.

219 see ch 10 where wrongful birth statutes are discussed in more detail.

220 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 89.

221 in the matter of **Christensen v Thornby** *supra*.

222 many reasons may be offered to explain this "containment" of new actions in Germany up to this late period.

223 see ch 3 where the chronological development of the right to an abortion in Germany is discussed.

224 many writers believe that if parents would not have been prepared to abort a genetically impaired foetus had they known of its condition, they should therefore not be able to institute a wrongful birth action.

225 see the following judgments.

226 BGHZ 89, 95.

227 courts usually award only additional expenses related to the impairment in wrongful birth actions and not full child-rearing costs.

mongolism.[228]

Stoll[229] agrees with such comprehensive award for patrimonial damages and believes that it accomplishes a just result, in that the distressed parents are thereby also *de facto* compensated for their emotional suffering and distress. It should be noted that even though this might be the actual effect or perceived result flowing from a comprehensive award for patrimonial damages, the German Supreme Court[230] emphatically rejected any non-patrimonial damages in these cases.

Giesen,[231] however, states that the wrongful birth plaintiff should in principle be able to receive an award for satisfaction in cases where the pregnancy and birth is more painful or uncomfortable than a normal childbirth because of the child's impaired condition. Although the parents sought pregnancy and appeased themselves with the pain and risks inherent with normal childbirth they were still not anticipating such additional suffering.[232]

5.2 Basic principles

Harrer[233]considers the valuable solutions found in the German legal system and compares them to American approaches. He writes that under German law, birth or human existence as such can never be found to be a legally cognizable injury[234] for the reason that children are highly valued in German society. This notion is supported by their fundamental Christian-humanistic culture and the fact that many protective laws exist to safeguard German

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228 see ch 11 where this condition is discussed.

229 1989. A Doctor's liability for the unwanted birth of a child. **Comparative and International Law Journal of South Africa**, 206.

230 BGH 18 1 1983; BGH 22 11 1983.

231 1988. **International Medical Malpractice Law** (11-33), 242.

232 Pearson, F.L. 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 97.

233 *op cit* p 91.

234 it should be remembered that damages and compensation are awarded when there is a destruction or reduction in legal value or worth of any legally protected subjective right.

children.[235] In seeming contrast[236] to these views, expenses related to the birth of a child in wrongful conception[237] and wrongful birth actions are regularly compensated in German courts.

Two contradictory points of view exist under German legal scholars regarding the question of compensation for child-rearing expenses.[238] The first school underwrites the *"principle of unity"* which denies that any damages or even the possibility of compensation arising from childbirth is acceptable.[239] The second school supports a *"principle of separation"* which claims that it is principally possible to distinguish between the benefits of childbirth on the one and detriments associated with the same birth on the other hand. According to these scholars, childbirth under certain circumstances, could be seen as a legally acceptable cause of action.[240]

5.3 Arguments for and against

It is reported[241] that opponents of birth related actions argue that litigation arising from childbirth have a detrimental effect on the psyche of the children involved. The German Supreme Court[242] rejected this argument and judged that it is highly improbable that any psychological defects would result in a child upon gaining knowledge of such a lawsuit.[243] On the contrary, the courts believe that because an award reduces the financial burdens associated with unwanted childbirth,[244] damage awards will improve the parent-child relationship and will necessarily cause the parents to feel more positive towards their child. The reimbursed parents will at the same time be in a better financial position to cope with the inevitable high costs associated with raising a handicapped child.[245]

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235 *op cit* p 93.

236 if one considers the true basis of wrongful birth, there is no prejudicial sentiment with regards to children as a whole or handicapped children in particular - it is submitted that recognition of these actions advance, rather than diminish the value of children in society.

237 see ch 6.

238 Harrer *op cit* p 91.

239 therefore obviously against wrongful birth actions.

240 this viewpoint allows the concept that wrongful birth actions could in principle be allowed.

241 Harrer *op cit* p 91.

242 BGHZ, 86, 240 1984 JUS 436.

243 BGH, 1980 JR 368.

244 remember that the parents in wrongful birth actions wanted a healthy, normal child.

245 the compensation of additional costs incurred because of the child's handicapped condition is in line with the suggested approach to wrongful birth.

Another argument raised by critics of wrongful birth actions is that the complex parent-child relationship involves a unity that prohibits diminution of the child's value as a human being by perceiving the child as a cause of action.[246] This argument also failed to impress the German Supreme Court[247] and they rejected this reasoning as a legally useless argument and an oversimplification of matters. The truth is that the relationship between parents and child is not destroyed by such litigation and the parents remain liable and responsible to support the child afterwards.[248]

Critics continue to assert that even if damage is measurable, it is still unacceptable to transfer the burden of child-rearing from the parents to the wrongdoer-defendant.[249] This concern was also not persuasive to the German courts[250] since an award for damages does not destroy the primary duty of parents to support their children, it merely changes the final allocation of the burden.[251]

5.4 Compensable damages: United States of America v Germany

The majority of courts in the United States of America take into account the state of health of children in birth related actions and distinguish between normal and impaired children[252] when considering whether compensable damages for child-rearing expenses should be allowed.[253] According to Harrer[254] many believe that there is a philosophical difference between the two actions[255] and the majority allows remuneration only if the child is physically or psychologically

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246 Harrer *ibid.*

247 BGH, 1980 NJW 1451.

248 a similar view was expressed by the South African Appeal Court in the important wrongful conception case of **Administrator, Natal v Edouard** 1990 (3) SA 581 (A) - see ch 6.

249 Harrer *op cit* p 92.

250 Karlsruhe, 1979 NJW 600.

251 see previous fn.

252 it should be remembered that the singular fact whether a child is normal or handicapped is not the only consideration that distinguishes wrongful birth and wrongful conception actions - see ch 2 and 6.

253 in contrast to the legal position in Germany.

254 *op cit* p 93.

255 *ie* wrongful conception and wrongful birth actions.

impaired.[256] He signifies this distinction based on the physical condition of the child in question as a remarkable difference when compared to the German legal system.

Under the German system courts do not differentiate between healthy and impaired newborns when consideration whether child-rearing expenses should be allowed or not.[257] In *both* instances basic child-rearing costs are awarded in successful cases. Additional[258] damages such as lost earnings and medical expenses caused by the wrongful birth cause of action will generally be allowed, although these damages are often limited. The majority of German courts, however, denies recovery for the mental anguish of having an impaired child, thereby refusing to extend traditional tort concepts beyond reasonable bounds.[259] Harrer lists other costs that have been allowed by courts in the past, being hospital costs, costs of housekeeping, expenses incurred for additional help or caring for already existing children, loss of earnings, the possible loss that could occur if the changed situation necessitated a transfer to part-time work, as well as an award for pain and suffering.[260]

Harrer[261] concludes that under Germany law, therefore, parents[262] of both mentally and physically handicapped children are in principle entitled to full compensation for the total burden of maintenance, as well as other costs. Ordinary maintenance or child-rearing expenses are compensated and liability may be even further expanded in the event of any special circumstances.[263] There is generally no age limit[264] placed on the expected contribution to maintenance, since the handicapped child's parents will probably be obliged to care for child for its entire life.

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256 therefore in a wrongful birth action.

257 it is my respectful submission that this viewpoint is not sound: one must always remember that wrongful birth parents planned to conceive a child and were prepared to carry the cost of child rearing - the only point of concern for them should be that their child has been born disabled and therefore additional expenses (which they did not account for) will be incurred, for which they wish to be compensated.

258 child-rearing costs beside.

259 the court states that calculation hereof is too speculative.

260 *ibid.*

261 *op cit* p 99.

262 in a successful wrongful birth action.

263 where all additional costs are compensated.

264 in wrongful conception actions the award is usually limited to maintenance up to the age of majority of the child, as they are expected to provide for their own maintenance from that time.

5.5 A philosophical reality

It is submitted that comprehensive damage awards bring about true restitution by financially placing the plaintiff in the same position had there been no damage causing event.[265] Harrer[266] reasons from a philosophical perspective that since wrongful birth parents essentially could not have had another child conceived at exactly the same time without a handicap[267] and because wrongful birth parents were willing to conceive a healthy child,[268] they should not be entitled to normal child-rearing expenses in terms of a wrongful birth action.

Only the additional expenses necessitated by the handicapped condition of the child could be justifiably compensated. The reasoning behind this argument is that the disgruntled parents in wrongful birth actions are compensated for their defeated expectations[269] as well as additional rearing expenses necessitated by a handicapped child. They are, however, not entitled to be unfairly benefited through a comprehensive award (including maintenance costs that would be spent on a normal child), since they were well prepared to incur these costs when conceiving the child.[270]

To summarise, one can argue that because wrongful birth parents knew about and accepted the costs of a normal child, these child-rearing expenses should not be awarded them in a wrongful birth action. Although their wishes did not come true exactly as they anticipated, by bearing a handicapped child with additional expenses,[271] they still should face the financial and emotional consequences of their actions and follow through with their initial commitment to care for the child.

5.6 Relevance of Abortion to wrongful birth actions

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265 *eg* if a successful abortion had been performed.

266 *op cit* p 99.

267 this is a complex philosophical question without any simple and final answer, discussed in greater detail in ch 9.

In this case one could argue that the parents would not be entitled to child-rearing expenses needed for a healthy child, because a healthy child was never an option for them on that specific time.

268 and therefore knowingly accepted the costs of child-rearing and the other expenses associated with extending the family.

269 of having a healthy child.

270 which was eventually born handicapped.

271 such as special medicines, additional medical treatment, special schools and daycare and so forth.

Harrer[272] writes that critics of abortion[273] find it unacceptable that plaintiff-parents in these actions seek medical advise to identify severe prenatal aberration in their unborn children with the intention to consequently end the pregnancy. These critics argue that by cringing back from maintenance costs and other child-raising expenses these plaintiffs are trying to avoid their responsibilities as parents.[274] This raises another important issue, namely whether eugenic abortions are legally obtainable in Germany.[275] It would seem as if abortions are currently legal.

5.7 Legal basis of claim

There are at least two separate independent legal bases for establishing liability for wrongful birth actions under German law, namely on basis of breach of contract and tort. Harrer[276] explains that the same principles of compensation basically applies to both claims, but that the contractual basis is more sound.

Contracts to obtain abortions and sterilizations procedures constitute contracts of service.[277] Contracting parties usually do not bargain for the successful outcome of the services rendered because physicians do not as a general rule guarantee a successful result.[278] Logically, a claim for damages based on contract can only arise if a valid contract exists[279] between the parties. With reference to wrongful birth actions, it is argued by some that both sterilization and abortion contracts are void in Germany[280] either because these contracts contravene relevant statutory prohibitions or because they are unconscionable. The dominant view, however, is that voluntary sterilization is not punishable under the German Penal Code (St GB)[281] and that

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272 *op cit* p 102.

273 and therefore inevitably critics of wrongful birth actions.

274 similar arguments have been raised in wrongful conception actions - see ch 6.

275 see ch 3 on abortions in Germany.

276 *op cit* p 101.

277 § 611 BGB.

278 in most cases the patient and doctor enter into a contract of letting and hiring of work, or *locatio conductio operis*.

279 see ch 2 on the basic principles of the law of contract and the requirements for a valid contract.

280 *ie* the former West Germany up and until reunification on October 3, 1990.

281 unless it violates public policy.

abortion are principally legal.[282]

6. Position in England

6.1 Brief discussion

It would seem as if the wrongful birth action was met with initial success in England. In **Mc Kay v Essex Area Health Authority**[283] an action was instituted by a plaintiff -child born with severe impairments, which condition resulted from the failure of the Essex Health Authority to detect *rubella*[284] following blood tests done for this purpose on the child's pregnant mother.[285] Although this action for wrongful life was dismissed by the court because no statutory support for such a novel action existed, the court in principle acknowledged that the parents in a correlative wrongful birth action would have succeeded on the facts before them.[286] However, the court made no adjudication on such action.

Two years after the **Mc Kay** case the English courts were once again prepared to recognize an action for wrongful birth, although it was actually a wrongful pregnancy action that was instituted in **Emeh v Kensington and Chelsea and Westminster Area Health Authority & others.**[287] The court was prepared to award not only special damages, but also general damages for the loss caused by the birth of an unwanted and disabled child resulting from the defendant's failure to advise his patient of the availability of an abortion.[288]

A final wrongful birth action was recognized in **Scuriaga v Powell.**[289] This type of action was, however, never again instituted because of the implementation of the **Congenital Disabilities**

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282 Harrer *ibid.*

283 (1982) QB 1166 (CA), (1982) 2 All ER 771.

284 see ch 11 where this disease and its consequences on foetal development is discussed.

285 see ch 8 where the wrongful life action in **Mc Kay** is discussed.

286 but no wrongful birth action was instituted.

287 (1984) 3 All ER 1044 (CA); (1985) 1 All ER 346 QB.- see further the discussion of the **Emeh** case in ch 6 on its wrongful conception relevance.

288 whilst carrying an impaired foetus.

289

(Civil Liability) Act of 1976,[290] specifically prohibiting these actions.

7. Position in the Netherlands

7.1 Brief discussion

Schoonenberg[291] reports that the basis of wrongful birth is the infringement of the plaintiff's right to self-determination brought about by medical malpractice. This right concerns the individual's prerogative to choose to whether to have children or not, which also entails the decision on abortion. It is noted that although a delictual action is therefore possible on this ground under normal circumstances, specific mention is made in the Dutch Civil Code, section 6.1.9.11 (NBW) that "an injury to a person" entitles such a person to restitution.[292] The question is therefore if an infringement of an individual's right to self-determination could be seen as an injury.

It is reported,[293] however, that the wrongful birth cause of action falls within the scope of the *"hulpverleningscontract"* or medical treatment agreement and would generally be founded on breach of contract.[294] Whether liability follows because of improper/ inaccurate conduct[295] or because of liability based on the provision of a professional service, it is reported that the foreseeability[296] of damage is vital in both instances.

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290 sec 1(2)(b).

291 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 62.

292 *"Het verzuim van de behandelend arts om zijn patiënt(e) voldoende informatie te verschaffen om een weloverwogen keuze omtrent het verwekken van nageslacht te kunnen maken kan worden beschouwd als het maken van een inbreuk op het zelfbeschikkingsrecht van de patiënt omtrent procreatie, hetgeen ik zou willen kwalificeren als aantasting van zijn of haar persoon. In artikel 6.1.9.11 NBW wordt 'aantasting van de persoon' uitdrukkelijk als grond voor aansprakelijkheid genoemd, maar ook het huidige recht kan op de grondslag van aansprakelijkheid uit onrechtmatige daad worden aangenomen." op cit* p 62.

293 Schoonenberg *op cit* p 63.

294 a claim based on *"onrechtmatige daad"* or delict would also be possible in cases where the plaintiff could prove that the defendant's negligence infringed upon his right to self-determination.

295 *"onzorgvuldig karakter van de gedraging"*.

296 in South African law the foreseeability factor is relevant when determining the element of fault: whether a person has acted negligently - see ch 2 and 4.

Schoonenberg[297] conveys that in the general wrongful birth cases, the patient(s) specifically consulted with the physician to inquire about genetic risks, in which case there is a clear foreseeability of damage, should incorrect information be given.[298] The question is now asked whether this "clear foreseeability" would similarly be the case where a patient was totally ignorant regarding his genetic make-up and was volunteered the important information by a physician. Schoonenberg points out that a physician under these circumstances could not know how a patient would react once a foetal aberration has been detected. It is submitted[299] that this uncertainty with regards to the reaction of the parents[300] will not alter the position and liability could still follow.[301]

Habets[302] gives an interesting comment on the influence of modern media in educating people about genetic risks and informing them of medical procedures. He is of the opinion that future wrongful birth parents might find it difficult to prove that they in fact did not know the basics of common genetic anomalies and statistics, for example that pregnancies after 35 is risky and that sterilization procedure have an immanent chance of failure.[303]

It is submitted that there is a common point of interest in Dutch law between wrongful conception and wrongful birth actions concerning failed sterilization.[304] In both actions the basic issue revolves around the unwanted birth of a child, for which a civil claim for damages is instituted. Failed sterilization has lead to various court cases in the Netherlands with causes of action ranging from failed information[305] to unsuccessful sterilization procedures.[306]

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297 *op cit* p 64.

298 as it clear that these patients do not even consider bearing a handicapped child.

299 *ibid.*

300 whether an abortion would possibly be obtained or not.

301 *"Het is dan voor de arts niet meer met enige zekerheid te voorzien welke weg de patiënt zou hebben ingeslagen, indien hij/ zij voldoende zou zijn ingelicht omtrent waarschijnlijke genetische afwijkengen. Naar mij mening is dit laaste echter geen beletsel om aansprakelijkheid van de arts aan te nemen."*

302 1995. Schadeclaims naar aanleiding van mislukte sterilisaties: een dossieronderzoek. **Tijdschrift voor Gezondheidsrecht** (5), 270.

303 "Dat patiënte niet zou hebben geweten van de mislukkingskans onwaarschijnlijk is nu in allerhande damesbladen op dat risico werd en wordt gewezen." *op cit* p 269.

304 *op cit* p 66.

305 1979 (22 november) Rb. Maastricht - where a patient was not properly informed of the fact that the full effect of a sterilization procedure will take some time.

306 1983 (17 mei) Hertogenbosch - where it was found that a failed sterilization procedure was a legally cognisable injury to the patient.

Focus is drawn on the societal viewpoint in favour of fammily planning and support for the individual's right to self-determination.[307] An infringement of these interests should be compensated and the benefits derived from the unwanted birth do not override or cancel this fact:[308]

> *"Het Hof is van oordeel dat de persoonlijke afweging van de vrouw om zich te laten steriliseren in het huidige cultuurpatroon niet onredelijk is te achten en dat de schade van de moeder ten gevolge van de mislukte sterilisatie niet gecompenseerd wordt door de voordelen van het moederschap."*[309]

With regard to immaterial damages in wrongful birth , it is said, there is currently no recognition for such compensation in Dutch law. This stance is often criticised, as there seems to be no logical reason why certain heads of damage are[310] allowed while others are not, although all stem from the same cause of action.[311] This anomalous position may well be changed on account of new statutory guidance given by section 6.1.9.11 NBW[312] whereby *"smartegeld"* or compensation for non-patrimonial loss may also be claimed under circumstances of failed sterilization.[313]

According to Schoonenberg[314] writes that with regard to wrongful birth actions specifically, non-patrimonial damages would probably be restricted to psychological tension, pain and suffering associated with the pregnancy and birth, as well as redress for the infringement of the plaintiffs' right to self-determination. It is important to note that the said NBW-section expressly excludes compensation for the sorrow the parents experience(d) because of the birth of the seriously handicapped child.

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307 this valid observation has also been used in favour of wrongful conception actions - in terms of South African law a successful wrongful conception plaintiff must prove economic reasons for sterilization, which indicates the importance of societal interests.

308 see the discussion on the so-called "benefit rule" *supra.*

309 *ibid.*

310 *eg* loss of income; pregnancy and birth related costs.

311 it is reported that in terms of Dutch law, the main focus of recovery is on medical expenses incurred because of the hereditary impairment - it is, however, unclear whether the parents have standing to institute action to claim for these losses (see Schoonenberg's viewpoint regarding the child-plaintiff's exclusive legal standing ch 2, 8).

312 see *supra.*

313 *ie* encompassing both wrongful conception and wrongful birth actions.

314 *op cit* p 67.

8. The South African Position

8.1 Background

Up to date there have been few wrongful birth actions instituted in South African courts. Since South Africa was traditionally seen to be a relatively conservative community and not as litigious as most other countries, it is not strange that the first authoritative court decision on this matter was made as late as 1990. The judgments that have been made, however, are quite liberal in inclination and it would seem as if our courts principally acknowledge and accept these claims.

8.2 Case law

The legal position regarding wrongful birth actions in South Africa has been made clear through two prominent and recent decisions. In the landmark wrongful conception case of **Edouard**[315] the Court of Appeal made it clear that these type of actions[316] would not be *contra bonos mores*, as the South African community deems it important that family planning be successfully executed and that parents' procreative rights be respected.

In **Friedman v Glicksman**[317] a 'double barrel' wrongful birth-wrongful life action was instituted. The parent-plaintiff claimed firstly in her personal capacity for child-rearing and medical expenses and secondly on behalf of the child, in her capacity as mother and guardian. The court indeed acknowledged the claim for wrongful birth and allowed child-rearing expenses for the disabled child as well as all future medical and hospital treatments and related costs.[318] *In casu* the facts were that Mrs. Friedman entered into an agreement with Dr. Glicksman to advise her whether she was at greater risk than normal of having an abnormal or disabled child. This information was necessary for her to make an informed decision whether or not to terminate the pregnancy. The defendant wrongly advised his patient and as a result of this

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315 **Administrator, Natal v Edouard** 1990 (3) SA 581 (A) - see the ch 6 on wrongful conception actions for a full discussion of this important case.

316 wrongful conception actions and wrongful birth actions generally.

317 *supra.*

318 the court rejected the wrongful life claim for general damages and loss of earnings based either in contract or delict - see ch 8.

negligent conduct a disabled child was born. The court held that such a contract[319] is not only acceptable, but that wrongful birth claims[320] for damage arising from either breach of contract or *ex legis Aquiliae* were not *contra bonos mores.*[321]

Blackbeard[322] places emphasis on the fact that the plaintiff *in casu* consulted with a specialist gynaecologist[323] and that the parties specifically agreed that the pregnancy in question would be terminated should there be any risk greater than normal that the unborn child would be abnormal and/ or disabled.

In consideration of possible liability the court effectively dealt with probably the most troublesome aspect pertaining to wrongful birth actions, namely by proving the element of *wrongfulness*. The court stated:

> "In my view the contract entered into between the plaintiff and the defendant was sensible, moral and in accordance with modern medical practice. The plaintiff was seeking to enforce a right, which she had, to terminate her pregnancy if there was a serious risk that her child might be seriously disabled."[324]

and also at another place,

> "Thus the Legislature has recognised, as do most reasonable people, that cases exist where it is in the interests of the parents, family and possibly society that it is better not to allow a foetus to develop into a seriously defective person causing serious financial and emotional problems to those who are responsible for such person's

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319 whereby a patient seeks a medical opinion on a specific matter such as in the present case.

320 see ch 8 where the court's reasons for rejecting the wrongful life action are discussed.

321 Although defendant argued that to enforce a contract of this nature would be against public policy since it would encourage abortion and thus be inimical to the right to life enshrined in the constitution, the court noted that: "this argument flies directly in the face of the **Abortion and Sterilisation Act** 2 of 1975" - in terms of which a legal abortion could be procured "were 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." (Note that this judgment was given even before the enactment of the new and much more liberal **Choice on Termination of Pregnancy Act** No. 9 of 1996) - see ch 3.

322 1996. Actions for wrongful birth and wrongful life. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg** 711.

323 from whom a higher degree of proficiency is expected in his particular field of expertise - see ch 4.

324 *op cit* p 1138 H.

maintenance and well being."[325]

It was held, therefore, that the mother had a right to decide whether to go through with an abnormal pregnancy or to terminate it - the defendant was specifically employed to prevent the birth of a handicapped child and because of his negligence a disabled child was born.

It is remarkable how accurate the court expressed itself in the use of specialised wrongful life jargon and in analysing the various similar, yet conceptually different issues found in this type of generally confusing litigation. The court found that the cause of action *in casu* is a logical extension of the principle earlier enunciated in the wrongful conception decision of **Edouard**. The court explained the *harm* complained of in wrongful birth.

> "(T)he 'wrong' consists not of the unwanted birth as such, but of the prior breach of contract (or delict) which led to the birth of the child and the consequent financial loss. Put somewhat differently,...although an unwanted birth as such cannot constitute a 'legal loss' (ie. a loss recognised by law), the burden of a parents' obligation to maintain the child is indeed a legal loss for which damages may be recovered."[326]

In quoting American decisions as support for acceptance of wrongful birth, the court stated that the reasoning followed by these foreign courts is sound and fits comfortably within the Aquilian action instituted in South Africa:

> "The requirements for such an action are a wrongful act committed with the fault either negligent or intentional) of the defendant which causes the plaintiff to suffer some harm. A doctor acts wrongly if he either fails to inform his patient or incorrectly informs his patient of such information she should reasonably have in order to make an informed choice of whether or not to proceed with the pregnancy or to legally terminate such pregnancy. The fault element of the delict is to be found in the foreseeability of harm which the doctor-patient relationship gives to the doctor. Once proper disclosure is not made and the patient is deprived of her option, it seems to me that the damages she has suffered by giving birth to a disabled child are clearly caused by the fault of the doctor, provided she would have terminated the pregnancy if the information had been made available to her."[327]

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325 *op cit* p 1138 G.

326 *per* Van Heerden J.A. in **Edouard's** case *supra* at 590 E-F.

327 *op cit* p 1139-40 G-B.

Blackbeard[328] states that the fault element of the delict was to be found in the foreseeability of harm, which the physician-patient relationship gave the physician.

9. Final conclusion

Although the majority of jurisdictions have recognized the action for wrongful birth once the right of women to abortion has been acknowledged, legislators in many American states and also the English legislator, have barred the cause of action.

In support of legislative guidance, Faircloth[329] reports that the North Carolina Supreme Court in **Azzolino v Dingefelder**,[330] in rejecting wrongful birth, stated that such issues were better left to the legislature, which "can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mould of conventional tort concepts which clearly do not fit".

Bodgan,[331] however, believes that because American courts recognize wrongful birth actions as a type of negligence claim,[332] wrongful birth actions arguably do not require explicit legislative sanction. He refers t the case of **Naccash v Burger**[333] where it was stated that no distinction between a wrongful birth action and any other malpractice action exists. In **Procanic v Cillo**,[334] for example it was held that recovery of medical expenses by either the child or the parents is consistent with the principle that the negligent act affects the whole family and the family should be compensated:[335]

> "Law is more than an exercise in logic, and logical analysis, ... should not become an instrument of injustice."[336]

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328 *op cit* p 172.

329 *op cit* p 558.

330 337 S.E. 2d 528, 537 N.C. (1985).

331 *op cit* p 133.

332 and therefore, it is submitted, any jurisdiction where a similar basis of liability is used.

333 Va. 406, 290 S.E. 2d 825 (1982).

334 97 N.J. 339, 478 A. 2d 755 (1984).

335 in this case, the parents' wrongful birth action was time barred.

336 at 762.

Irrespective of the wisdom of these prohibitions by means of statutory curtailment, it is suggested that any uncertainty that might still cloud the legal position of wrongful birth could[337] yet be solved by effective and proper legislation.[338] Because of the novel character of these actions and the fact that various levels of human existence are influenced by it, it is often difficult for courts to ascertain what the public sentiment concerning the provision of genetic services in these cases is and also to what extent the government/ legislator is prepared to intervene. The fact that medical science and genetical engineering are rapidly evolving does certainly not simplify matters for the courts. Clear legislative guidance could instantly solve these problems for the judicial bench by clarifying what the actual legal status of these actions is, which would concomitantly ensure that consistent judgments are made.[339]

The legislator must first of all decide whether such actions should in principle be allowed or not. Careful consideration should be taken concerning all the relevant aspects and interests pertaining to this complex social conundrum. Abortion on demand[340] is the first issue that should be scrutinised, as the wrongful birth claim is principally founded on the premise that plaintiff parents would have preferred to abort their abnormal foetuses.

Another aspect that should be contemplated is the position of the disabled community with regards to actions instituted because of the birth of handicapped children. The rights of physically and mentally challenged people have recently enjoyed much attention and are commonly protected by law.[341] What legislators should further consider is the interests of

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337 resulting in inconsequent judgments.

338 see ch 10 on wrongful birth statutes and also ch 12 where the value of legislative solutions are considered - it should be noted, however, that the legal position of wrongful birth actions are much clearer than its wrongful life counterpart.

339 legal certainty *per se* is greatly beneficial for the public at whole and especially for those unfortunate individuals who are confronted with a wrongful birth matter.

340 in certain jurisdictions abortion on demand are not allowed, although an abortion could be legally performed when there is reason to believe that the child will be born with serious abnormalities, *eg* in terms of South Africa's pervious **Abortion and Sterilization Act** No.2 of 1975 - see ch 3.

341 South Africa's constitution expressly protects the disabled community from any form of discrimination when such discrimination is based on the disability of the individual itself - a positive duty is placed on the national legislator to enact legislation to ensure that this community is sufficiently protected:

Equality

9. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against

plaintiffs in such circumstances. To what extent should liability for medical negligence be allowed and enforced? The community in general surely has vested interests in a high level of medical care.

A final consideration could be that one should be weary of over-extending the arm of the law by holding physicians liable for very remote consequences flowing from their unpredictable science.

anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

CHAPTER 8

Wrongful Life Actions

1. Introduction

In this chapter wrongful life actions are discussed in detail.[1] All the relevant aspects relating to this specific type of action are placed under scrutiny. Note that various difficulties concerning this action are identified, solutions are suggested and references are made to court judgments concerning specific aspects. The varying legal positions obtaining in the United States of America, England, Israel, the Netherlands and South Africa regarding this cause of action are considered.

De Vries and Rifkin[2] mention that although parents' claims[3] have been recognised, the action of children[4] have been almost unanimously rejected in the past. According to them, a unique challenge often found when dealing with wrongful life claims, is the general inability of judges and legal commentators to differentiate between pre-conception and post-conception negligence.

Although four states[5] in the United States of America, Israel and France have already recognised wrongful life actions, the vast majority of courts, scholars and legal critics condemn this action on various different grounds.[6]

2. Background

2.1 Typical wrongful life events

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1 see research proposal for a definition of wrongful life.

2 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. **The Forum**, 211.

3 *ie* wrongful birth actions and wrongful conception actions.

4 *ie* wrongful life actions.

5 California, Washington, New Jersey and Colorado (North Carolina) - see *infra*.

6 in **Gildiner v Thomas Jefferson University Hospital**, 451 F. Supp. 692 (1978), the court renounced the basis of the claim as a: "Fascist-Orwellian Societal attitude of genetic purity", whilst another strongly worded rejection was formulated in **Dumer v St. Michael'sHospital**, 69 Wis. 2d 766 (1975): "Hitlerian elimination of the unfit".

Stolker[7] mentions various types of factual circumstances that in recent years have induced wrongful life litigation in the United States of America:

- a negligent medical procedure or treatment performed on the mother *before* conception;[8]
- negligent genetic/ reproductive advise by a physician or genetic counsellor *before* conception;[9]
- negligent genetic or reproductive advise by a physician or genetic counsellor *during* pregnancy;[10]
- an unsuccessful sterilization operation on a patient desiring to avert the birth of a handicapped child;[11]
- careless prescription of incorrect medication during pregnancy;[12]
- other careless and/ or negligent conduct during or before pregnancy.[13]

It is clear that Collins[14] agrees only in part with the exposition of Stolker and classifies the different types of wrongful life causes of action in the following way:

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7 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 521.

8 **Renslow v Mennonite Hospital** 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977), where a faulty blood transfusion was given the mother nine years before conception and **Albala v City of New York** 54 N.Y. 2d 269, 445 N.Y.S. 2d 108, 429 N.E. 2d 786 (1981), where a woman's uterus was negligently perforated four years before conception.

9 **Park v Chessin** 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977) where the patient suffered from a kidney disease and **Moores v Lucas** Fla. App. 405 So. 2d 1022 (1981) where a child suffering from *Larsen's syndrome* was born - for a discussion on this disease see ch 11.

10 **Procanic v Cillo** 97 N.J. 339, 478 A. 2d 755 (1984) where the plaintiff suffered from *rubella syndrome* and **Berman v Allan** 80 N.J. 421, 404 A. 2d 8 (1979) where the child suffered from *Down's syndrome* - see ch 11 for medical conditions.

11 in **Speck v Finegold** 497 Pa. 77, 439 A. 2d 110 (1981), the plaintiff was eventually born after a failed abortion and suffered from *neorofibromatosis* - see ch 11 for a discussion of this condition.

12 **Grodin v Grodin** 102 Mich. App. 396, 301 N.W. 2d 869 (1980) where a child was born with brown teeth due to its mother's intake of a specific medicine during pregnancy.

13 **Bergstreser v Mitchell** 577 F. 2d 22 (1978) where a carelessly performed Caesarean section was performed.

14 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

- so-called "dissatisfied life" cases;[15]
- improper sterilization procedures;[16]
- unsuccessful abortions;[17]
- alternative forms of pre-conception negligence, such as where parents are denied the opportunity to obtain information on the possibilities of bearing a deformed child;[18]
- post-conception negligence whereby parents are denied the prerogative of avoiding their child's birth.[19]

Berenson[20] agrees that the negligent conduct of a physician in these instances may have

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15 **Zepeda v Zepeda** 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963); **Slawek v Stroh** 62, Wis. 2d 295, 215 N.W. 2d 9 (1974); **Pinkney v Pinkney** 198 So. 2d 52 Fla. Dist. Ct. App. (1967); **Williams v State** 18 NY 2d 481,276 NYS 2d 885, 223 NE 2d 343 (1966) - see further discussion on dissatisfied life cases *infra*.

16 **White v United States** 510 F. Supp. 146, 149 D.Kan. (1981); **Speck v Finegold**; **LaPoint v Shirley** 409 F. Supp. 118 Tex. (1976); **Elliott v Brown** 361 So. 2d 546 Ala. (1978); **Bowman v Davis** 48 Ohio 2d 41, 356 N.E. 2d 496 (1976); **Beardsley v Wierdsma** 650 P. 2d 288 Wyo. (1982); **Clegg v Chase** 89 Misc. 2d 510, 391 N.Y.S. 2d 966 (1977).

17 **Speck v Finegold**; **Stills v Gratton** 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 Cal. Ct. App. (1976).

18 **Turpin v Sortini** 182 Cal. Rptr. 337 (1982); **Park v Chessin** 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977); **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978); **Curlender v Bio-Science Laboratories** 106 Cal. App. 3d 811 (1980); **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983).

19 **Eisbrenner v Stanley** 106 Mich. App. 351, 308 N.W. 2d 209 Mich Ct. App. (1981); **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967); **Berman v Allan**; **Becker v Schwartz**; **Greenberg v Kliot** 47 A.D. 2d 765, 367 N.Y.S. 2d 966 (1975). 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978); **Johnson v Yeshiva Univ.** 396 N.Y. 2d 818, 364 N.E. 2d 1340, N.Y.S. 2d 647 (1977); **Karlsons v Guerinot** 57 App. Div. 2d 73, 394 N.Y.S. 2d 933 (1977); **Greenberg v Kliot** 47 A.D. 2d 765, 367 N.Y.S. 2d 966 (1975); **Gildiner v Thomas Jefferson University Hospital** 451 F. Supp. 692 Pa. (1978); **Smith v United States** 392 F. Supp. 654 N.D. Ohio (1975); **Phillips v United States** 508 F. Supp. 544 D.S.C. (1981); **Nelson v Krusen** 678 S.W. 2d 918 Tex. (1984); **Dumer v St Michael's Hospital** 69 Wis. 2d 766, 233 NW 2d 372 (1975), because of a lack of information.

20 1990. The Wrongful Life Claim - The legal dilemma of existence versus non-existence: "To be or not to be" **Tulane Law Review** (64), 895.

occurred either before[21] or after[22] conception.[23] He believes that wrongful life actions can be further divided into two general categories, namely:

- where a physician was actually aware of a reasonable prospect of a congenital disorder because of specific prior knowledge of the patient or the family's medical history of the patient,[24] but failed to warn or inform[25] his patient;
- where elements of a potential congenital disorder are present but not diagnosed, either because the physician did not appropriately use diagnostic techniques or failed to properly interpret the tests.[26]

According to Berenson[27] cases of impaired births *following sterilization operations* basically fall into two categories. This classification deals with the main reason or motivation for parents' decision to refrain from having children:

- cases where a sterilization procedure is performed merely as a convenience to parents for reasons such as to limit the size of their family, personal, religious, financial or health reasons, *et cetera* (these parents generally have no reason to suspect any prospect of a defective child);[28]
- sterilization because of actual knowledge or a suspicion of a possible defective or

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21 a failed sterilization operation in concurrency with other factors can also be part of a wrongful life action - *eg* where genetically high risk parents decide not to have any children in order to cancel out the possibility of bearing affected offspring.

22 *eg* where parents, aware of the fact that their unborn child inherited a dangerous family disease decides to abort the affected foetus and the subsequent abortion is unsuccessful due to negligent conduct of a physician.

23 a general form of negligence often found in these cases is where a physician, before or after conception, fails to properly inform his patients of the possible risks of hereditary disease or of available genetic tests and/ or the options of sterilization and abortion.

24 reasonable foresee-ability of the birth defect.

25 of possible genetic tests.

26 it is reported ibid: geneticists estimate that even with proper prenatal diagnosis, 2-4% of all children will still be born with serious birth defects.

27 *op cit* p 897.

28 there are two types of abortion procedures: an "therapeutic" abortion is to prevent the birth of a deformed or handicapped child, thus to prevent harm to the child and in the child's best interests; a "eugenic" abortion is performed to prevent the birth of a child, healthy or not, in preventing harm to the mother and therefore in the interest of the mother's health or her freedom of choice.

impaired birth.[29]

Berenson[30] shows some points of similarity between litigation based on wrongful conception and wrongful life with regard to sterilization. One similarity is that statutory provisions regulate both these actions. Many states have statutes that limit or prohibit either or both of these actions[31]. Berenson believes that inconsequent application of legal premises and unsound regulations in many of these statutes cause a great deal of uncertainty and often have unjust consequences. Idaho state,[32] for example, prohibits any claims based on the negligent prevention of an abortion but does not bar claims based on negligence that results in an unwanted conception. Therefore an action based on a negligently performed sterilization procedure is permitted,[33] but a claim for the negligent interpretation of an amniocentesis is not.[34]

Fain[35]states that wrongful life is basically founded on the same factual circumstances leading to wrongful birth litigation, with the difference that the unwanted child itself is the plaintiff. The injury complained of is being born to parents who did not want impaired children and accordingly lack the necessary commitment and love, usually expected from parents.

Another author[36] argues convincingly that wrongful life and birth actions are a logical and necessary development in tort law designed to protect the constitutional rights of parents.[37] It is reported that these claims also protect the individual's interests in quality health care, since possible liability ensures that physicians exercise due care in prenatal counselling and provide parents with the information necessary to make informed procreative decisions.[38]

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29 *ie* a therapeutic abortion.

30 *op cit* p 900.

31 see ch 10 dealing with these so-called "wrongful birth statutes".

32 **Idaho Code** § 5-334 (Supp. 1989).

33 *ie* a typical wrongful conception action.

34 *ie* a typical wrongful life action.

35 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 588.

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

37 *ie* the right to make procreative decisions - see ch 3 and 9.

38 *op cit* p 2022.

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2.2 Medical advances

Fain[39] agrees with many others[40] that advances in medical science lie at the heart of wrongful life litigation. Advanced knowledge improves the physician's ability to detect problems with foetal development and the application of various techniques[41] accordingly lead to ever broadening fields of speciality in genetic counselling.[42] De Vries and Rifkin[43] also believe that the well known **Roe**[44] decision, together with advances in medical science have led to a flood of new litigants. Faircloth[45] writes that most commentators[46] would only credit technology with giving rise to the wrongful life and wrongful birth causes of action because they both predicate liability on the failure to diagnose genetic defects using genetic testing and prognostication devices, while wrongful pregnancy or wrongful conception actions involve somewhat more basic medical knowledge.

2.3 Duty to Inform

There lies a legal duty on all physicians and medical officers to fully inform their patients about the nature and extent of any medical procedure planned for the specific patient, in order for the

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39 *op cit* p 585.

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- Teff, H. 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.
- Collins, E. F. 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.
- **Park v Chessin**, 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (A.D. 1977).
- Blackbeard, M. 1991. Die Aksie vir Wrongful Life: To be or not to be. **THRHR** (54), 57.
- Brownlie, S.1985. Wrongful Life: Is it a viable cause of action in South Africa? **Responsa Meridiana** 18.
- Strauss, S. A. 1991. **Doctor, patient and the law** JL van Schaik (3rd edition).
- Andrews, L.B. 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

41 such as amniocentesis and ultrasonography - see ch 11 for a detailed discussion on these procedures.

42 the more medical scientists know about genetic diseases, the more comprehensive patients should be informed.

43 *op cit* p 207.

44 **Roe v Wade** 410 U.S. 113 (1973) - see discussed *infra* and ch 3.

45 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 545.

46 see *supra.*

patient to make a rational choice on the matter and give the required informed consent.[47] The duty to inform is extremely relevant to most wrongful life actions and has significance for other forms of related actions as well.[48]
Teff [49] declares:

> "...the true rationale of 'wrongful life' ability is the parents' right to make a properly informed decision."

It should be remembered that in a typical wrongful life action a disabled or genetically impaired child does not assert that the physician-defendant's medical negligence *caused* his detrimental condition. The plaintiff rather alleges that the defendant breached a duty to properly inform its parents (in due time)[50] of the existing genetic defect in their child, or of a greater than normal risk of abnormality in their pregnancy. Since it can be generally assumed that parents would act in their child's best interests,[51] the plaintiff suggests that upon receiving this legally required information from the defendant its parents would have prevented[52] the pregnancy or would have ended the pregnancy by obtaining an abortion. Thus, had the defendant not breached his duty to inform, the handicapped child would not have been born and would not have to suffer from impairments until the end of its often short and painful life.

Collins[53] argues that a presumption that parents generally act in the best interests of their child should allow courts to view the informed consent of the parents[54] as the consent of the child.[55]

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47 see ch 5.

48 Informed consent is also relevant to wrongful conception and wrongful birth actions - see ch 6 and 7.

49 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.

50 *ie* while a legal abortion may still be procured - see ch 3 for abortion regulations in the various jurisdictions.

51 Collins *op cit* p 685: "The presumption that parents act in the best interests of their child would allow courts to view the consent of the parents as the consent of the child".

52 by implementing contraceptive measures *eg* sterilization.

53 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 685.

54 for medical intervention in a foetus, such as in-uterine treatment or genetic engineering.

55 in obtaining an abortion.

It is therefore of vital importance that physicians fully inform their patients of the medical procedures intended by them, the results of tests that have been done and also any other relevant facts concerning the health or reproductive plans[56] of patients, in order to escape liability.

2.4 Support for liability

Teff[57] mentions that there is growing support from the public for physician accountability and compensation in cases of medical malpractice. A possible reason for this phenomenon is the ever increasing awareness under the public of the advances in genetic technology and the subsequent realistic possibilities of performing timely and successful medical procedures:

> "We are no longer content to view as fate abnormalities preventable by modern screening techniques."[58]

De Vries and Rifkin[59] suggest that wrongful life actions should be based on the theory that an unborn foetus has legally recognized rights. According to them the acceptance of such a revolutionary right is still not widely acknowledged[60] in legal circles, since similar rights did not exist[61] in common law.[62] The first court in the United States of America that was prepared to acknowledge the existence of foetal rights was **Bonbrest v Kotz**.[63]

3. Nature of plaintiff's right

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56 such as dangerous genetic genes detected in the patient or known hereditary diseases in the patient's family history.

57 *op cit* p 424.

58 *ibid.*

59 *op cit* p 212.

60 **Turpin v Sortini; Gleitman v Cosgrove.**

61 it is submitted that such progressive rights did not exist in common law because medical science and genetic science were still in its infancy - it is my submission that legal development should keep pace with scientific growth.

62 according to common law legal personality started at birth - see ch 3.

63 65 F. Supp. 138 (D.D.C. 1946): "The law is presumed to keep pace with the sciences...".

3.1 Plaintiff's legal standing[64]

Bodgan[65] reports that in wrongful life actions the plaintiff is a child who, through a guardian or a curator *ad litem* sues either a physician, hospital or laboratory for negligently causing the plaintiff child to be born with defects.

In South African law an unborn child does not have any legal rights on which to base an action for a delict committed against it while still in its mother's womb.[66] The application of the nasciturus fiction,[67] however, does propose a solution, as discussed by Davel and Jordaan:[68]

> "...in certain circumstances, interests or potential interests are kept open, dependant on the live birth of the child involved. This fiction thus takes cognizance of the fact that the nasciturus will be a legal subject after birth. By using the fiction, the interests of the potential legal subject are kept in abeyance. As soon as the nasciturus is born alive, the benefit concerned is then allocated to him or her."[69]

In spite of the initial application of the nasciturus fiction in the law of succession only, the application has been broadened by the South African courts to also include delictual matters.[70]

3.1.1 Alternative to fictions

Joubert[71] argues that the normal principles of the law of delict should be applied to each set of facts. When applied to wrongful life circumstances, one can argue that because the wrongful and culpable conduct of a tortfeasor is separated from the resultant harmful consequence by time and space, one could further reason that once a plaintiff is born and

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64 see ch 3 concerning the beginning of legal subjectivity.

65 1983. Wrongful Birth: Who Owes What to Whom and Why? **Washington and Lee Law Review** (40), 123.

66 Lind, C. 1992 **The South African Law Journal**, 440.

67 *"nasciturus pro iam nato habetur quotiens de commodo eius agitur"*.

68 1995. **Law of Persons**, 12.

69 the "benefit" spoken off in this quotation in reference to the wrongful life debate, will be the right to litigate based on wrongful conduct that occurred before its birth.

70 **Chisholm v East Rand Proprietary Mines Ltd** 1909 TH 297 (2), 301; **Pinchin v Santam Insurance Co Ltd** 1963 (2) SA 254 (W) (3); and **Christian League of Southern Africa v Rall** 1981 (2) SA 821 (O), 4.

71 1963. THRHR, 295.

receives legal personality he only then is actually injured. Although the infliction of the damage causing event took place while still a foetus, the plaintiff only as a person with legal subjectivity, is in the position to suffer injury and accordingly institute an action to rectify the situation.

It is submitted that this solution of Joubert for the problems relating to the lack of legal subjectivity of a foetus injured before birth, makes perfect sense. It has the benefit of not requiring support from a fiction. An additional advantage of this reasoning is that *any* unlawful conduct can be accommodated,[72] whereas the application of the nasciturus rule or fiction is restricted to wrongful conduct that occurred only *after* conception.[73]

3.2 Development of prenatal torts[74]

Collins[75] writes on the interesting development of the history of prenatal torts in the United States of America. As early as 1884 the prenatal injury case of **Dietrich v Inhabitants of Northampton**[76] came before the courts in which a claim for *wrongful death*[77] was denied because a foetus was found not to be a "separate legal entity" when the injury occurred. Much legal development concerning prenatal rights took place in the years following this decision.

Collins[78] reports that **Bonbrest v Kotz**[79] is generally considered to be a pivotal American case

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72 incl conduct that took place *before* conception (when viewing prenatal torts in this light it does not matter when the injury was inflicted, as the moment all elements of delict are present an action arises).

73 see ch 3.

74 in the United States of America (where the bulk of wrongful life litigation occurs) - indicative of a global trend towards recognition of foetal rights.

75 *op cit* p 678.

76 138 Mass. 14 (1884).

77 wrongful life and wrongful death cases (such as **Verkennes v Corniea** 229 Minn. 365, 38 N.W. 2d 838 (1949), which was the first court to allow a wrongful death action of a viable, but stillborn foetus) have an interesting touching-point in this regard - in both discussions it is of vital importance whether foetal rights are recognized and to what extent the interests of unborn children are protected.

78 *op cit* p 679.

79 65 F. Supp. 138 D.D.C. (1946).

in prenatal tort law. Here the court introduced *viability* of the foetus as a decisive factor in determining whether an injury was in fact incurred when dealing with prenatal tort claims. It is conveyed[80] that many later courts, however, in reaction to this criterion found that viability was not only difficult to determine, but also an irrelevant fact to prove in terms of the establishment of causation. The first court to reject this premise was **Kelly v Gregory**,[81] where it was judged that a child is a biological entity separate from it's mother from the moment of conception.

Collins discloses[82] that by 1984, of the 36 jurisdictions that actually allowed a cause of action for prenatal torts, 17 did not any longer require a plaintiff to be viable at the time of injury.[83] She notes that it seems as if the recent trend is to, at least in principle, grant an action to prenatally injured plaintiffs.[84]

Further development in prenatal torts took place when courts allowed even *pre-conception* actions.[85] The first court that entertained this radical concept was **Renslow v Mennonite Hospital**,[86] where a mother received blood from an improper blood type during a transfusion years before conception which resulted in the eventual birth of a handicapped child some time later.

It is submitted that challenges associated with pre-conception actions[87] are very similar to obstacles that are often experienced with wrongful life litigation in general.[88] It would seem as

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80 *ibid.*

81 282 A.D. 542, 125 N.Y.S. 2d 696 N.Y. App. Div. (1953).

82 *op cit* p 680.

83 if a court demands that a foetus be viable at the time of injury, a foetus therefore has to be developed up to the stage of viability in order to be eligible for recovery.

84 that is 'traditional prenatal injuries' - according to Collins *ibid* nearly all jurisdictions disallow wrongful life actions.

85 where it is acknowledged that a damage causing event could happen even before the plaintiff's conception - other courts support a "right to be born as a whole functional human being", such as the court in **Turpin v Sortini**, also discussed in **Speck v Finegold**; **Park v Chessin**; **Becker v Schwartz**; **Curlender v Bio-Science Laboratories**; **Smith v Brennan** 31 N.J. 353, 364 (1960); **Sylvia v Gobeille** 220 A. 2d 222, 224 (1966).

86 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977).

87 some of the most prominent fears are concerns of fraudulent actions, seemingly unlimited liability, ever increasing litigation *etc.*

88 see *infra* typical obstacles encountered in wrongful life actions.

if one could derive from the abovementioned judgments that there is principally a right to sue for any wrongful negligent act committed before or after conception.

It should be remembered that no all consider the wrongful life plaintiff to have suffered an injury. Bey-Berkson[89] writes that judicial recognition that a disabled life is an injury would harm the interests of the handicapped and it is suggested that a determination of injury in such cases hinges upon personal views of the intangible value of life.[90]

3.2.1 Injury free formation

Collins[91] believes that courts in their quest to find an acceptable legal foundation for wrongful life actions, have overlooked the option of granting a child the right to an injury free formation.[92] Based on this supposition all requirements of prenatal and pre-conception injury are dealt with, but without the need of support from a somewhat unfounded right "to be born free from reasonably foreseeable defects."[93] This right as proposed by Collins should vest only at birth[94] and any recovery by the child-plaintiff claimed for injury resulting from a breach of this right should depend on the child's ability to prove whether its formation was wrongfully altered by another's conduct or not.[95] A foreseeable problem with this approach, is that there apparently is no action for a child with a naturally occurring defect.[96]

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89 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 69.

90 see points of criticism raised against wrongful life *infra.*

91 *op cit* p 690.

92 this entails that all human life should have a right to develop unfettered from the stage of plantation/ conception until birth.

93 see discussion *infra.*

94 at the stage, when according to traditional law of persons-principles, an individual receives legal subjectivity.

95 by changing the natural course of the child's formation.

96 It is submitted that, although a person could suffer from a naturally occurring defect, wrongful life or birth liability could still follow. This would be the case where parents knew of a possible genetic disorder that might affect their future offspring and specifically did tests to learn whether this was the case or not. If a physician negligently performs such tests and the parents continue with their family with the result that a handicapped child is born, the physician should be held accountable for wrongful birth and/ or wrongful life, even though the disorder occurred "naturally".

Collins[97] therefore propagates the "right to injury free formation"[98] to serve as an alternative basis for wrongful life and even wrongful death cases, as opposed to current inconsistent and often indefensible solutions used to explain liability in these specific prenatal injury cases. In all these claims[99] courts grant relief on the basis that parents have a right to make their own reproductive decisions and accordingly also the right to determine the form of the child to whom they give birth.[100]

According to Collins[101] all *wrongful formation* causes of action are principally based on the following factual situations: improper sterilization procedures; unsuccessful contraceptive precautions; unsuccessful abortions; or situations where physicians negligently fail to provide parents with information which would allow them the option to avoid conception or terminate pregnancy.[102]

3.2.2 Recovery for wrongful formation

With regard to damage awards in wrongful formation cases, Collins writes[103] that recovery can be limited by legal doctrines such as contributory negligence; comparative negligence; and public policy considerations. She believes that the following public policy factors should be taken into account before finally determining the scope of recovery to parents-plaintiffs:

- encouraging an attitude of reverence for human life;
- holding parents responsible for the care of their children;
- improving quality of human existence;
- protecting procreative rights of individuals;
- holding tortfeasors liable for proximately caused damage; and
- encouraging competent medical care for all.

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97 *op cit* p 691.

98 in a general sense the term "wrongful formation" covers cases in which an individual seeks to assert his or her right to prevent the formation of a child, to terminate the formation of a child, or to alter the formation of a child - an action in wrongful formation, therefore, will lie for a violation of an individual's procreative rights (see ch 2).

99 basically all prenatal claims.

100 with regard to wrongful life actions where the plaintiff is the injured child itself, however, it is submitted that this premise will only be true if one believes that the plaintiff-child derives its rights from the parents' rights to reproduction.

101 *op cit* p 693.

102 identical to that of wrongful life actions.

103 *op cit* p 695.

Three possible approaches that could be used when awarding damages in *wrongful formation* actions are identified:[104]

- application of traditional tort principles in conjunction with the benefit rule;[105]
- the traditional viewpoint of awarding all suffered damage;[106]
- damages limited to certain heads of damage.

3.3 Rights of the newborn

She reports that although most courts agree on the fact that a child can not state its wrongful life cause of action based on its status at birth, they disagree on whether a child can sue because of its rights in existence and form. Basically four types of rights are identified[107] that can be granted to a newborn in order to provide it with an interest in its existence and form. A prenatal life can be given the:

- right to unfettered development;[108]
- right to an injury free formation;[109]
- right to be born as a whole functional human being;[110]
- possible future right to be born free from defects which, with reasonable care, could have been treated and rectified before the child's conception or birth.[111]

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104 Collins *op cit* p 696.

105 whereby any benefits derived from the damage causing event is taken into account when calculating damages - according to Collins the "benefit rule" is fundamentally rather a public policy doctrine than a rule of damages, she writes that courts have devised a case-by-case system of assessing damages: "Under benefit-offset rule the courts acknowledge an individual's procreative rights, but they limit an individual's recovery." *op cit* p 697 - see *infra* a detailed discussion on the benefit rule.

106 followers of this viewpoint often consider the benefit rule as an improper application of the **2nd Restatement of Torts** § 920 (1979).

107 *op cit* p 704.

108 subject to ruling of **Roe v Wade** - allowing abortion up to the second trimester of development, therefore from the 3rd trimester onwards.

109 as supported by Collins *ibid* - see *supra.*

110 as proposed by the **Turpin v Sortini**, see also the cases of **Speck v Finegold** and **Park v Chessin**.

111 these prenatal operations and treatments will be made possible by (not so distant) future advances in foetal medicine - see ch 11.

In addition to the right to an injury free formation, Collins[112] supports the viewpoint that courts should recognize a cause of action for *wrongful impairment*.[113] In order to succeed with such a claim, a plaintiff will have to prove that:

- an impairment now exists because of an alteration in the natural course of a child's prenatal development; or
- an impairment now exists because specific conduct denied a child's parents the opportunity to treat the child for curable defects before its birth;
- a physically or psychologically impaired child exists because a certain wrongful conduct denied the parents an opportunity either not to conceive or to terminate the foetal development of their handicapped child through abortion.[114]

She[115] believes that the courts are likely to recognize a child's rights because the quality of the child's form is at issue and not the sanctity of life, and because damages can be measured in terms of treatment versus non-treatment rather than in terms of existence versus non-existence.

> "Once the courts grant a child the right to be born free from reasonably treatable, prenatal defects, the actions for wrongful form and for wrongful alteration can be dealt with under the single cause of action of wrongful impairment."

In conclusion, Collins[116] suggests that courts should consider the following suggestions:

- they should recognize a cause of action for wrongful impairment;
- courts should recognize a child's right to develop from implantation until birth;
- finally, courts should recognize a wrongful formation cause of action which would cover in-uterine treatment cases as well as cases presently heard under wrongful conception, wrongful pregnancy and wrongful birth.

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112 *op cit* p 707.

113 he prefers to use this collective term which is broad enough to include pre-conception torts, pre-natal torts, wrongful life cases and even futuristic in-uterine treatment cases.

114 the child's action would be based on it's right to be born free from negligently inflicted injuries (of reasonably treatable defects), or to be born whole and functional.

115 Collins *ibid.*

116 *op cit* p 708.

3.4 A right to be born healthy?

Although the recognition of legal rights of unborn children is a step in the right direction for wrongful life success, Teff[117] argues that courts still have to go further and recognize a right "to be born without the handicap of a readily preventable defect".[118] He believes this to be true since the basic premise of wrongful life actions is to prefer a condition of non-existence to a life as a handicapped or genetically crippled person. It should be remembered that the plaintiff in a wrongful life action does not ask for the remedy of specific performance in the failed genetic analysis contract and subsequent abortion procedure.[119] The plaintiff rather seeks compensation for the damages resulting from the relevant breach of contract or delict.[120] Teff[121] believes that at least three courts[122] in the United States of America that have already recognized this right.

3.5 A right not to be born?

Steinbock and Ron McClamrock[123] remarks that "wrongful life suits do not claim merely that the infant plaintiff was harmed before birth. They claim that the child was harmed by being born, implying an interest in not having been brought into existence. Someone can be said to have an interest in not being born if his or her existence is inexorably and irreparably such that life is not worth living."[124]

Steinbock and Ron McClamrock[125] believes that the right not to be born is "a compendious way of referring to the plausible moral requirement that no child be brought into the world unless

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117 *op cit* p 424.

118 note the similarity with Collin's proposed right to an injury free formation.

119 *ie* death.

120 *ie* handicapped life.

121 *ibid.*

122 **Park v Chessin** "the fundamental right of a child to be born as a whole, functional human being."; **Curlender v Bio-Science Laboratories**; **Turpin v Sortini**.

123 1994. When is birth unfair to the child? **Hastings Center Report** (24:6), 15.

124 *ibid.*

125 1994. When is birth unfair to the child? **Hastings Center Report** (24:6), 15.

certain very minimal conditions of well-being are assured."[126]

3.5.1 In a tort framework

Foutz[127] believes that a successful claim for wrongful life could fall within the ambit of the traditional tort framework.[128] With special reference to the case of **Park v Chessin**[129] and the subsequent case of **Becker v Schwartz**,[130] the author specifically looks at the most troublesome elements of *duty* and *causation*. He explores various theories that could be implemented for holding a physician liable under wrongful life[131] and illustrates the basis of wrongful life as "the right not to be born."[132] Only the two most challenging elements of are tort considered:

3.5.1.1 Duty

The proof of the existence of a legal duty of care towards the wrongful life plaintiff is a prerequisite for the success of the ensuing action and should, according to Foutz, be derived from plaintiff's right to an informed decision.[133] Foutz,[134] in adapting the doctrine of informed consent to found the child's claim for wrongful life, proposes two different approaches in which this application is possible:

Firstly, that there is an individual and separate duty owed to the plaintiff-child itself.[135] A

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126 *ibid.*

127 1980. Wrongful Life: The Right not to be born. **Tulane Law Review** (54), 480.

128 the American traditional tort framework is briefly discussed with reference to wrongful conception actions in ch 6 - contrary to the opinion of the **Gleitman** court, Foutz feels that a wrongful life action can be allowed within the traditional tort framework and without subverting public policy in favour of human life.

129 which was the first court of appeal to recognize a wrongful life action.

130 where the court found that the plaintiff failed to state a cause of action.

131 in addition to the discussion of these tort elements, he also mentions other questions that often arise: did the child actually suffer a legally cognizable injury, can damages be legitimately measured and what public policy concerns are mentioned when these actions are allowed.

132 *op cit* p 488.

133 if a defendant does not act in accordance with a legal duty his conduct could be marked as wrongful.

134 *op cit* p 489.

135 it is submitted that the occurrence of a wrongful act against an unconceived plaintiff is no barrier, as the right to sue for the breach of a duty to the unborn foetus was established in **Bonbrest v Kotz**.

physician therefore owes a duty to the child similar to but separate from the duty that is owed to its parents.[136] Secondly, that a derivative duty towards the plaintiff-child exists which is construed from the physician's primary duty of care towards his patients, which are the parents of the plaintiff. The duty of care primarily owed to the parents is thus adapted and subsequently projected to the child.[137]

3.5.1.2 Causation

Although the element of causation sometimes causes concern with courts dealing with wrongful life actions, Foutz[138] believes that if one could accept the premise that the injury complained of is not the condition of deformity *per se*, but rather an unwanted birth and life, then the question of a proximate cause would present little or no obstacle to recovery.[139]

A valid question raised by Foutz[140] concerning causality is whether an objective or a subjective standard should be applied in determining whether parents would indeed have avoided conception or terminated pregnancy had they been timely and properly informed by their physician of complications. Generally speaking informed consent circumstances require a physician to only disclose information that a reasonable person would have deemed relevant in considering a proposed treatment or medical condition, thus an objective standard.[141]

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136 A real difficulty experienced with this "separate duty" approach is defining the nature of the duty owed to the child in an acceptable manner. It could namely be argued that a duty to inform a foetus is not really achievable and indeed factually impossible. Foutz *ibid* reasons that the only way to bridge this obstacle and to prevent breach of this duty would be with the assistance of a third person such as a mother who acts in the best interests of her child. A physician would in this way fulfill his duty of informing and possibly warning prospective parents. Foutz believes that although the fetus cannot determine its own future or even influence the decisions directing its existence, the law should not preclude a duty to the child merely because of its fetal state and inability to act upon information disclosure.

137 this approach is based on the second **Restatement of Torts** § 920 (1979), which prescribes that if a person negligently gives false information to another and this person should, because of reliance thereon act with the result of harm to such a person/ other persons, the negligent informer could expect to be held accountable for the action taken - such a "derivative duty" approach was adopted in **Park v Chessin**.

138 *op cit* p 491.

139 it is suggested that in this way courts would not have to feel that they are stretching too far the bounds of liability for holding a physician liable for the handicapped condition of a child - their task should rather be to find legal causality between a wrongful act and its reasonably foreseeable consequence namely a deprived and unwanted life.

140 *ibid.*

141 see ch 5.

Foutz[142] fears that the application of this viewpoint might give the physician too much room for use of his own discretion in determining whether a patient would consider information to be important or not. For example, if a physician does not inform a Catholic patient[143] of the availability of an amniocentesis (using an objective standard) it might objectively be seen as reasonable conduct.[144] The possibilities for abuse and improper application of the objective standard in these cases have led Foutz to believe that a subjective test is to be preferred.[145] When a subjective standard is applied, parents must be able to prove that *they* specifically would have prevented the birth of a handicapped child. It would therefore not be sufficient to establish that the reasonable parent would have obtained an abortion under similar circumstances.[146]

3.6 An alternative approach

Lind[147] gives an interesting alternative to the wrongful life plaintiff's difficult task of proving a right to be born healthy and comparing life to non-existence:

> "This does not give the child a right to be born healthy, but merely an alternative right for our refusal to give him the right, through his parents, to make a choice favouring death at a stage when that choice can be made. This remedy would not call for a comparative valuation of non-life and life in a defective condition. It would merely ask the judge to hypothesize the extent of damages needed to make the child comfortable enough not to want to seek death as a means of escaping his misery. And to that end, there will always be experts to advise a judge."[148]

3.7 Wrongful death

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142 *op cit* p 492.

143 if the physician had knowledge of the fact that his patient is a Catholic and was aware that Catholics generally refuse abortions on religious grounds.

144 Foutz *ibid* illustrates the reality of his concern by recording that, in spite of this seemingly logic and acceptable supposition, one survey showed that a large percentage of Catholic people would rather abort than carry a deformed child to term in spite of strict religious prohibition of eugenic abortions.

145 according to the subjective standard a physician would be required to disclose comprehensive information about any genetic risk that is required by each specific patient without any regard for his own personal assessment of the patient's needs and ultimate decision.

146 as would be sufficient under an objective assessment.

147 1992. Wrongful Birth and Wrongful Life Actions. **South African Law Journal**, 428.

148 *op cit* p 445.

Concerning the relevance of wrongful death cases in this discussion, Collins[149] writes the following: Because of the **Bonbrest** decision, seemingly every court is prepared to grant a wrongful death cause of action if a live birth was eventually recorded. In the case of a stillborn foetus, however, there is much disagreement. The **Verkennes v Corniea** case[150] was the first to allow recovery for a once viable - but eventually stillborn foetus. To decide whether or not to allow recovery in these cases, courts have created several methods of assessing liability.

One criteria used by courts, is to ascertain a victim's stage of development at the time the injury was inflicted and allow recovery only if he/ she has reached an acceptably advanced stage of development or in the alternative, on the occurrence of a live birth.

Collins believes that the general division between victims under these circumstances, who have an action and those who do not, will widen as more courts adopt *conception* as the guidepost for prenatal causes of action, while they retain *viability* or *live birth* as the standard in wrongful death cases. Collins is convinced that the general, standardised application of a right to injury free formation, would have more equitable and fair results.

Clark[151] draws an interesting correlation between wrongful life and wrongful death cases. She is of the opinion that in both instances plaintiffs suffers real injuries without having a legal remedy:

> "When a plaintiff concludes a suit on personal injuries that later cause death, surviving wrongful death beneficiaries generally meet with a complete denial of recovery despite the very real injuries that they have suffered through the loss of a relative. This inequity may become more commonplace as life support techniques increasingly prolong life well beyond final judgements in personal injury suits. Fearing excessive recovery by wrongful death beneficiaries, courts may continue to respond with wholesale exclusion of damages, thus undermining the principles that produced wrongful death acts."

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149 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

150 229 Minn. 365, 38 N.W. 2d 838 (1949).

151 1993. Impacts of modern life support techniques on Wrongful Death Actions brought after final personal injury judgements. **University of Puget Sound Law Review** (16:2), 711.

It is suggested[152] that collateral estoppel[153] can minimize risks of excessive recovery without violating principles of res judicata and the principles that underlie wrongful death actions, which could possibly also be applied to wrongful life.

4. To be, or not to be?

4.1 Arguments against wrongful life

Lehr and Hirsh[154] list some of the concerns expressed by courts regarding recognition of wrongful life actions. It would seem as if the elements of causation, damage and wrongfulness are the main causes of difficulties.

- it is reported[155] that a legal causal *nexus*[156] between the negligent conduct of the physician and the consequential damage or loss is not easily proven;[157]
- damage is extremely difficult to ascertain;
- there are precious little previous decisions which can be used as guidelines in calculating quantum;
- the judiciary has a moral duty to prevent and restrict possible fraudulent actions from reaching the courts of justice, as well as an obligation to the health sector to minimize malpractice litigation;
- public policy is not in favour of abortion as an alternative to contraception;
- many courts judge that any form of life, no matter how physically or psychologically

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152 Clark *op cit* p 738.

153 "The interests in properly construing wrongful death statutes and in serving their compensatory objectives justifies the burdens that might follow from reliance on collateral estoppel, special verdicts, periodic payments, and other procedural and legislative devices." *ibid.*

154 1983. Wrongful Conception, Birth and Life: A question of viability. **Medicine $ Law** (2), 199.

155 Lehr and Hirsh *op cit* p 200.

156 for a further discussion on causality, see ch 2.

157 it is suggested that a possible reason for this is the fact that the physician did not physically cause the handicap or genetic disease - courts, such as in **Kosberg v Washington Hospital Center** 394 F 2d 947, 949 D.C. Cir. (1978), often find that the eventual damage is too far removed from the initial negligent conduct and that liability could therefore not be imputed to the defendant.

restrictive or genetically impaired, is preferable to a condition of non-existence.

Blackbeard[158] is of the opinion that the main objection to the recognition of the action is the legal system's unwillingness to accept life as "damage". Public opinion is the most important factor in deciding whether handicapped life is more acceptable or favourable than no-existence. Although it is very difficult[159] to make a rational judgement in this respect, it remains vital for wrongful life litigation that an assessment is made of the quality of a plaintiff's life. She mentions common difficulties experienced by courts in this regard:

- it is reported[160] that the main objection raised many courts when considering wrongful life actions is finding that life as such is an injury;[161]
- difficulties are experienced in the assessment of damages;[162]
- uncertainty and divergent ideas concerning the precise nature and content of the duty owed by the physician towards the plaintiff-child;[163]
- fears are expressed by courts concerning physicians possibly placing pressure on parents to abort handicapped foetuses, even in cases where the possibility of deformity is extremely remote, in order to escape wrongful life liability;[164]
- to declare that a physician has a duty to prevent a handicapped child from being born necessitates a corresponding right[165] of a child to be born as "a whole and functional

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158 *op cit* p 66.

159 if not impossible: as all of us are living beings, none can therefore make a true judgement on non-existence.

160 *ibid.*

161 according to this perspective public policy dictates that human life is too valuable and precious to be noted as a cause of action.

162 according to Blackbeard *op cit* p 67 most courts find it impossible to calculate damages altogether - while some courts allow only special damages, other jurisdictions try to solve the problem by weighing the benefits and detriments caused by the defendant's conduct (thereby first determining the seriousness of the disability and then weighing any benefits derived from the life against that estimate), see *infra.*

163 *op cit* p 68 it is reported that in America there seems to be a duty on physicians to take care towards foetuses from their third trimester of development and onwards - Blackbeard suggests that this duty of care does not exist before the third trimester, as legal abortions can still be performed until such time.

164 the opinion is raised *ibid* that if parents knowingly advance with a pregnancy, against the advise of their physician, their conduct could be noted a *novus actus interveniens* - I do not agree with this supposition, as I have serious reservations whether courts will objectively require parents to obtain an abortion under these circumstances.

165 for every duty there is a corresponding right and *visa versa*.

human being".[166]

4.1.1 Additional grounds of rejection

In summarising the American legal literature and decisions Stolker[167] finds that the overwhelming majority of courts disallow wrongful life actions. In addition to the abovementioned grounds of objection the following concerns are also listed:

- the acceptance of wrongful life actions could be seen as a disqualification of handicapped people in a so-called "normal" society.[168]
- a comparison between handicapped life and life as a normal person is impossible.[169]
- courts are concerned about the possible emergence of ethical problems related to the expedient conclusion of court decisions.[170]
- in Becker v Schwartz the judge proclaimed that the entire wrongful life debate is: "...a mystery more properly to be left to the philosophers and the theologians."[171]
- an expected danger in the increase of abortions that would result if wrongful life actions were allowed.[172]
- fears that successful wrongful life actions against physicians will evolve to actions against parents as well, which would be morally unacceptable.[173]

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166 Blackbeard *ibid* explains that such an assessment is based on empirical observations which relate to the highly personal nature of the individual's experience of life - because each person would experience life in a different way and because there could be many interpretations as to what exactly is "whole and functional", Blackbeard suggests that it would be impossible to guarantee such a right.

167 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 532.

168 it is feared that the disabled community might be offended by these actions and that acceptance might damage their cause.

169 it is, however, contended by Stolker that such a comparison is not relevant to wrongful life actions, **Gleitman v Cosgrove** - I agree: the relevant comparison, according to the traditional damage formula, would be a allegory of non-existence with handicapped life.

170 there are concerns that wrongful life actions would take courts longer to decide than other cases because of the inherent difficulties associated with these actions - Stolker *op cit* p 533 suggests therefore that the matter be referred to the legislator: "Such a fear, it is said, would cause a court of law to choose a simpler route, since the court normally has to reach an opinion in a brief space of time as compared to the years available to State commissions and politicians."

171 it is thus suggested that wrongful life is not exclusively a legal matter.

172 according to the Pearson Commission.

173 as was the case in **Zepeda v Zepeda**.

4.1.2 Policy reasons against physician liability

Stolker[174] lists considerations relevant to the limitation of physician-accountability against medical malpractice litigation in general, but also very important in wrongful life litigation:

- the fact that a physician's work, duties and moral obligations are specifically directed towards the healing of patients;[175]
- parties involved in litigation based on medical malpractice are often well known to each other;[176]
- it is mentioned[177] that another factor that should be taken into account is the very real fact that the physician makes his mistake and suffers the consequences of his misjudgement in direct fulfilment of his professional duties;[178]
- a general fear exists that if physicians are excessively exposed to malpractice litigation, medical insurance premiums and general medical costs would rise;
- another possible result could be the implementation of so-called "defensive medicine"[179] by doctors.

4.1.3 Floodgate

Schoonenberg[180] conveys: concerns that have been raised against wrongful life litigation include the fear that children might sue their parents. She writes that under Dutch law, although a child can be represented by a special *curator* in terms of sec 1:250 (BW) of the Civil Code to institute action on behalf of such a child, inter-familial immunity would be raised in

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174 *op cit* p 524.

175 medical mistakes are therefore not made by doctors acting entirely in their own interest, but rather with the main goal of curing or assisting patients.

176 the physician-patient relationship requires a certain amount of trust between the parties - it is submitted that this relationship of trust and confidence is necessarily broken if the physician does not properly fulfill his mandate, such as the duty to inform *etc.*

177 *ibid.*

178 a claim for malpractice is often seen as a direct attack on his personal professional capabilities as well as his integrity and honour.

179 If defensive medicine is practised, physician's solely direct their professional conduct to an the goal of escaping any possible malpractice litigation. The results of this phenomena are that totally unnecessary or excessively pre-cautioning) tests are performed on patients. Nonessential precautions are take redundant additional opinions are gathered and super medication is prescribed. Risks are inflated and exaggerated.

180 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 73.

defence of an action against parents.[181] It is also suggested that in cases where parents are insured against civil liability, this argument should not prohibit the recognition of wrongful life actions. Schoonenberg[182] reports that no such actions of children against parents have been successful in the Netherlands, although there is no absolute restriction for such actions. It is further reported[183] that parents have a moral and also a social duty towards the health and well-being of their unborn children:

> *"Leenen gaat er van uit dat op de ouders een morele en maatschappelijke verplichting rust om voor de gezondheidstoestand van het ongeboren kind te waken."*

Hol[184] considers a possible action of a wrongful life plaintiff against parents. He reports that a legal base for such an action could be found in section 6:162, as one could argue that there has been conduct contrary to social acceptance. A further connection-point with unlawful conduct by parents in wrongful life cases, is to be found in section 1:245, where a statutory duty is placed on parents to care for and educate their children.[185]

Hol[186] concludes that the law, as a general rule keeps its distance from family life and parents' care and education of their children. There could, however, be instances where the judiciary will intervene and hold parents liable towards their children.[187]

It is concluded[188] that wrongful life actions of children against their parents, although it should

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181 individuals in a family relationship are expected to endure more from family members than from others ans should be more excepting and forgiving towards them.

182 *op cit* p 74.

183 *ibid.*

184 *ibid.*

185 *"Voorzover men hier zoekt naar een rechtgrond zou men zich kunnen baseren op de regeling van de onrechtmatige daad (artikel 6:162). Men zou kunnen stellen dat er sprake is van een handelen in strijd met de maatschappelijke betamelijkheid. Aanknopingspunt voor de onrechtmatigheid zou ook kunnen zijn het handelen in strijd met de verplichting die wettelijk is neergelegd in artikel 1:245 lid 2 BW. Hier wordt gesproken over de verplichting van ouders om hun kinderen op te voeden en te verzorgen."*

186 *op cit* p 277.

187 *"Om privacy-redenen en om ruimte te scheppen voor de eigen opvoedkundige inzichten van de ouders houdt het recht afstand ten opzichte van de gezinssituatie. Niettemin zijn er gevallen waarin de rechter aansprakelijkheid van ouders jegens de kinderen aanneemt." ibid.*

188 *ibid.*

not be a regular occurrence,[189] should not be totally excluded.[190]

4.2 Arguments in favour of wrongful life

Berenson[191] believes that damages awarded in wrongful life actions will be an incentive for physicians to exercise more care in future. He thereby supports the premise that an underlying purpose of damage awards[192] is to deter future injurious conduct and to assist in preventing negligent medical practice. He argues that a humane and legally progressive viewpoint would be that the impaired child should not have to bear the burden of proving damages based on an obviously impossible comparison between its actual condition and that of non-existence. The plaintiff should rather only have to prove that its impaired condition exists and that its existence is the result of the defendant's negligence. In a harsh reaction to courts disallowing wrongful life, Berenson proclaims:[193]

> "Apparently, the psychological frailty of judges occasionally outweighs their judicial objectivity. In cases that demand extraordinary metaphysical insight, the intellectual inability to deal with the unknown prevents the application of the most rudimentary rule of tort law: when the necessary elements of negligence are proved, the injury of the victim should be compensated."

In spite of all the difficulties encountered in determining the true extent of injury suffered the courts continue to use the traditional tort analyses to determine liability. According to Berenson three basic factors inhibit the judiciary's acceptance of such claims and restrain their approval of general damage awards in wrongful life actions:

- the inability of courts to quantify damages;[194]

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189 Schoonenberg submits that this should be allowed only in extreme cases of parental neglect.

190 this concept of parental responsibility is also supported by others - see ch 9 and opinion of van Wamelen.

191 1990. The Wrongful Life Claim - The legal dilemma of existence versus non-existence: "To be or not to be" **Tulane Law Review** (64), 895.

192 see discussion on the theories behind compensation in ch 2.

193 *op cit* p 916.

194 even though Berenson believes that this problem arises from the court's self-imposed theory of calculation

- a collective reluctance of courts to award general damages;[195]
- the abortion debate.[196]

Schoonenberg[197] explains that legal recognition of wrongful life actions[198] necessitates a certain broadening of medical professional liability. She believes, however, that this new legal developments are necessary to keep up with rapidly advancing (bio)medical science. She discusses especially two public policy aspects that should be considered in view of such broadening liability: the implication on insurance and a possible floodgate of actions.

LaCroix[199] gives a powerful address in favour of recognition of wrongful life actions and in defence of special damages in these cases:

> "To deter medical malpractice in this area, the judicial system should require negligent physicians to compensate injured plaintiffs. The courts need not play God in an attempt to determine whether non-existence is better than an impaired life. As the *Procanik* court correctly stated, recovery of extraordinary medical expenses is "predicated on the needs of the living. Damages for extraordinary medical expenses are narrowly tailored to the wrong and, therefore, are the proper form of recovery. An award of special damages does not reject the preciousness of human life but rather affirms the concept that a handicapped life is as valuable as a non-handicapped life. Helping a deformed child bear the burden of her affliction demonstrates that life in general is important - not the life that may or may not have been, but the life that is."[200]

4.2.1 *Right to die* influence

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195 Berenson *ibid* states that this reflects the sensitivity of tort reform in this regard and is accentuated by the limitations of medical liability - he believes that this reflects the public policy sentiment held by the courts on this issue.

196 By leaving the administration and protection of abortion rights to the states the Supreme Court increased the difficulty of the wrongful life plaintiff. Because of this, not only does the plaintiff's action depend on the forum state's statutes and jurisprudence permitting or denying such claims in the first place, but his claim is also subject to a possible anti-abortion statute, which could effectively bar all post-conception negligence claims altogether.

197 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 73.

198 and also wrongful birth actions.

199 1993. Wrongful life - a birth defective child born prior to Roe v Wade does not have a valid cause of action in Wrongful life against the physician who failed to inform it's mother of the option of an abortion. **Seton Hall Law Review** (23:3), 1876.

200 LaCroix *op cit* p 1909.

Foutz[201] reaches the conclusion that in light of recent right to die cases, courts have set a precedent for acknowledgement that life under certain circumstances is not always preferred. He believes that courts should allow wrongful life actions and thereby advance objectives of tort recovery. He mentions that this would also invariably result in the raising of medical standards and ensure adequate genetic counselling.

Kelly[202] has a similar view and believes that neither policy nor doctrine need interfere with the child's recovery, as courts have overcome their concern for the sanctity of life in the context of right-to-die cases.

Fain

In spite of all these arguments against the recognition of wrongful life actions, the author feels that (conditional) recognition would be a step in the right direction. He feels that a comparison between non-existence and handicapped life can be made, and is in fact often made in cases where patients would expire unless they receive medical life support and in cases which a vegetative patient's life might be prolonged, but life support treatment is withheld or discontinued. In these cases, the individual's life is presumed more harmful and disadvantageous than allowing the person to die. This decision is made in the patient's best interests, so there does seem to be a comparison between the harm of existence in an impaired state and the harm of non-existence! Joys of life are emotional in nature- but joy, however great, can't speak to the plaintiff child's financial condition.

Butler[203] summarises the need for wrongful life liability from her perspective:

> "There are public policy considerations that compel recognition of a separate cause of action for wrongful life. First, under general tort principles, the party that causes a harm should bear the cost. Requiring the innocent child to bear the cost of his infliction would be unjust and inconsistent with general tort principles, because he had done nothing to cause the injury. Second, the medical profession is in a better position than the individual to bear the burden of some of the cost through medical malpractice insurance. Finally, the recognition of a separate tort for wrongful life would deter physicians and others in the medical profession from negligent conduct."

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201 *op cit* p 499.

202 1991. The Rightful Position in "Wrongful Life" Actions. **The Hastings Law Journal** (42:1), 589.

203 1992. Cowe by Cowe v Forum Group Inc.: Wrongful life and the Dilemma of Comparing Impaired Existence with Nonexistence. **Memphis State University Law Review** (22:4), 886.

5. Various relevant aspects

5.1 Guidelines for public policy in wrongful life actions

Brownlie,[204] when considering the element of wrongfulness, rightly declares that there exist precious little guidelines that can be taken from South African court decisions whereby public policy principles concerning the wrongful life issue can be laid down. He expresses doubt whether traditional factors[205] will be effective in clarifying guidelines to wrongfulness in these cases. He mentions six additional and relevant factors that he subtracted from foreign court decisions in this respect:

5.1.1 The immeasurable value and sanctity of human life

Brownlie[206] submits that there is a trend in American law suggesting that life is not under all circumstances preferable to non-existence.[207] Brownlie assumes that the South African position on this matter will, however, be similar to that of the English law laid down in McKay v Essex Health Authority,[208] since the previous South African abortion legislation and its English counterpart was substantially the same.[209]

The birth of a physically challenged child seen as "damage".[210]

"The crisp question is, is birth with injury (not being born being the relevant *status quo ante*) damage in law, capable of pecuniary assessment? Put another way, can any form of life be loss, or on the more metaphysical level, does your cause of action *per se* undercut the basis of your claim (by averring a preference of death, is your *locus*

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204 *op cit* p 21.

205 as introduced in the judgment of **Coronation Brick v Strachan** 1982 (4) 371 (D), namely: the extent of the loss involved; the relationship between the parties; the social consequences of the imputation of liability; the means available to avert the loss *etc.*

206 *op cit* p 22.

207 **Turpin v Sortini**; **Harbeson v Parke-Davis, Inc.** and **Superintendent of Belchertown v Saibewicz** 370 N.E. 2d 417 (1977).

208 (1982) 2 WLR 890, CA.

209 it is submitted that this viewpoint will be altered because of the new South African **Choice on Termination of Pregnancy Act**, No. 9 of 1996.

210 although damage is a separate element of delict and should be constantly discussed separate from wrongfulness, it seems as if public policy has been the decisive factor in wrongful life actions in deciding whether defective birth may be termed as legal damage.

standi thereby removed?)[211]

He reports[212] on the position in England and concludes that damage might indeed be legally recognized in wrongful life litigation. As authority for this premise he quotes the viewpoint expressed by the Pearson Commission:[213]

> "Nor would it be easy to assess damages on any logical basis, for it would be difficult to establish a norm with which the plaintiff in his disabled state could be compared. He never had a chance of being born other than disabled... We have not, we think, been unduly influenced by those considerations of logic. Law is an artefact, and, if social justice requires that there should be a remedy given for a wrong, then logic should not stand in the way. A measure of damages could be artificially constructed."[214]

Brownlie comments:[215]

> "What the above extract purports to illustrate is that 'impossibility' of fixing a damages *quantum* does not *per se* exclude the possibility that the defective birth may be regarded as damage. On the contrary, the report would appear to assume that damage is in fact present, for which social justice may require damages to be artificially constructed."

With regards to the American position Brownlie writes that many courts[216] have in the past found that damage in these cases is not recognisable at law. In **Turpin v Sortini**,[217] however, the court criticised the inconsistency of previous judgments in dismissing an impaired birth as a legal injury on one hand, while allowing special damages on the same cause of action on the

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211 Brownlie *op cit* p 25.

212 *ibid.*

213 **Royal Commission on Civil Liability and Compensation for Personal Injury**, Report vol 1 (1978)(7054-1) - this Commission had to inquire whether wrongful life actions were to be allowed in England or not.

214 it remains uncertain what is exactly meant by "artificially constructed damages" - a court should either find that damage was suffered or that no damage was suffered.

215 *op cit* p 26.

216 **Gleitman v Cosgrove**, **Dumer v St. Michaels Hospital**.

217 182 Cal. Rptr. 337 (1982).

other hand. Also in **Harbeson v Parke-Davis**[218] damage was proved. Brownlie[219] therefore concludes that although damage was initially rejected *in toto*, recent cases recognize by implication that there has been legally cognizable injuries suffered. He personally believes that a defective birth may be regarded as *damnum* and bases his argument on the following challenging assumption of the Gleitman court:

> "But for the doctor's negligence, the conditions of impaired life would not have come to fruition, and having now matured, such condition necessitates pecuniary expense, which in the event of non-existence would not have had to be incurred... Moreover, it would surely follow logically from the proposition that death may be preferable to defective life that in cases in which this holds true, and in which the preference for the plaintiff's non-existence did not mature, the resulting defective life would be an injury?"

5.1.2 Conceptual social and legal policy factors

Here Brownlie[220] mentions that reluctance to recognize that a physician owed any duty to a child[221] has also prevented allowance of wrongful life actions. In answer to this question, the Turpin court stated:[222]

> "Of course... the unborn child cannot personally make any choice as to the relative value of life or death. At that stage, however, just as in the case of an infant after birth, the law generally accords the parents the right to protect the child's interests...parents also presumptively consider the interests of their future child. Thus...(he) harms the potential child as well as the parents."

5.1.3 Social implications and consequences

In this regard, the first concern is the expected intolerable burden[223] that liability in these cases would place on the medical profession. Brownlie[224] answers this concern with the arguments that it is ultimately for parents to decide whether or not to have an abortion and secondly that physicians making use of advanced medical technology should be able to make accurate inquiries into possible deformity of a foetus.

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218 98 Wash, 656 P. 2d 483 (1983).

219 *op cit* p 27.

220 *op cit* p 28.

221 reasons for this reluctance are the facts that the foetus/ child cannot make its own decisions and is unable to act on the physician's advice.

222 *op cit* p 345.

223 this burden includes subconscious pressures to advise abortions in instances where it objectively is not necessary or not usually recommended.

224 *op cit* p 29.

The second social reservation mentioned here is the uncertainty of determining which plaintiffs would be allowed to claim. It is namely a difficult task to lay down a minimum level of deformity which must be proven before a plaintiff is allowed to institute an action. Brownlie believes that this question should be answered in relation to the mother's assertion that, but for the physician's negligence, she would have aborted the foetus.[225]

5.1.4 The protection of the integrity of the courts

Both in American[226] and English[227] cases courts have objected against judicial intervention and responsibility in this emotive and morally complex issue. It is suggested[228] that a legislative solution should rather be found. Brownlie contends that although legislative direction could be helpful in these cases, the integrity of the courts will be further undermined if all difficult questions were to be handed over to the legislative sphere to be solved.

5.1.5 Ideals of compensatory justice

It has been said that there should be a remedy for every wrong committed.[229] Brownlie argues[230] therefore that every time a wrongful life action is rejected, this honourable principle is violated.

Spier[231] submits that the principle of "full compensation" is often regarded as one of the fundamentals of modern tort law".

In conclusion to the issue of wrongfulness, Brownlie[232] submits that it is both feasible and desirable that the conduct of a physician in these cases should be labelled as wrongful. He further suggests that traditional judicial caution should be applied less stringently because of the novel character of wrongful life actions and taking into account the American precedent

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225 reference is made to the previous South African **Abortion and Sterilisation Act** No 2 (1975) and it is suggested that the same grounds for abortion set in the act should guide one in determining which cases are serious enough for wrongful life litigation.

226 **Zepeda v Zepeda**.

227 **McKay v Essex Health Authority**.

228 *op cit* p 30.

229 **Turpin v Sortini**.

230 *ibid.*

231 1995. **The Limits of Liability. Keeping the Floodgate Shut.** Kluwer Law International, 2.

232 *op cit* p 21.

which has considerable persuasive value.

6. Legal basis

6.1 Basic tort principles

It is obvious that all legal requirements must be proved before a claim[233] will be successful. Hughes[234] refers to American law and names the four required elements for a claim based on negligence: a legal duty; breach of this duty; proximate cause and damage.[235]

A *legal duty* based on typical wrongful life facts could be is established in the following manner: The parents act as agents or representatives of the unborn child.[236] Through this relationship with the physician, a legal duty of care between the physician and the unborn child is constructed.[237] It is submitted[238] that a duty can also be directly related and owed to the unborn child.[239]

Breach of duty is established by comparing the conduct of the defendant-physician with the general level of professional proficiency administered by the reasonable physician with the same level of knowledge and experience. An unreasonable deviation from this level of

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233 on whichever basis (delict, contract, misrepresentation *ect.*) - see *infra* and ch 2.

234 1987. Recognition of Wrongful Life Actions: Trend or aberration? **Tort & Insurance Law Journal** (22), 583.

235 South African law knows five elements of delict that has to be proved: conduct, wrongfulness, fault, causation and damage - 1992 **Deliktereg** Butterworths (2de uitgawe).

236 Hughes *op cit* p 583.

237 as previously established in the right-to-life decisions of **In re Quinlan** 70 N.J. 10, 355 A2d 647 (1978); **Superintendant of Belchertown v Saibewicz** 370 N.E. 2d 417 (1977).

238 Hughes *ibid:* "A finding of such a direct duty to the unborn child follows the same reasoning which allows an infant to sue for injuries, *in utero*, caused by the physician's negligence."

239 Fain *op cit* p 589 is of the opinion that a duty can be proved when a wrongful life plaintiff argues that the existence of their physician-patient relationship (between the physician and the parents of the plaintiff) created a duty on the physician towards the parents and the child.

professional competence will result in a breach of duty.[240] Fain[241] believes that the physician's deviation from the applicable standard of care[242] only constitutes breach of his duty in the wrongful life field of application when genetic counselling and prenatal testing were specifically and clearly indicated by a patient's particular[243] circumstances.[244]

It is suggested that *proximate cause* is proven by the fact that the plaintiff would not have been born was it not for the negligent conduct of the defendant.[245] A detailed informative discussion and informed medical treatment consent is relevant in this regard, since the parents of the plaintiff would not have conceived or (in the alternative) would have aborted the handicapped foetus, if they were given timely warnings.[246] According to Fain[247] the plaintiff needs to prove that the physician's failure to test; failure to warn; or mis-diagnosis caused its parents either to forego an abortion or to conceive, resulting in his impaired existence.

Hughes[248] states that the proof of *damage* is the most difficult task of all.[249] The comparison between handicapped life and a condition of non-existence is virtually impossible. Courts have tried to solve this problem by only awarding damages for those heads of damage that are possible to calculate, for example special damages for hospital and medical costs. General damages such as pain and suffering have not yet been awarded because of the abovementioned problem of comparison. Hughes[250] believes that in exceptional cases of

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240 Strauss. 1991, *op cit* p 3 - see also ch 4.

241 *ibid.*

242 *eg* failure to test for abnormalities in foetal development.

243 evidence of increased risk would be *eg* the mother's advanced age; family history; exposure to certain drugs *etc* - **Turpin v Sortini** involving a mis-diagnosis of deafness in the plaintiff's older siblings.

244 *op cit* p 590.

245 *ibid.*

246 see ch 5 a detailed discussion of informed consent.

247 *ibid.*

248 *op cit* p 584.

249 Fain *op cit* p 590 agrees that the damage issue is the most controversial. He writes that in compensating a plaintiff we must attempt to return the plaintiff to his position before the occurrence of the tort. Because this is obviously not possible, public policy should guide courts in giving just compensatory awards. He shows that courts who have allowed damages have restricted their awards to special compensatory damages - see discussion *infra*.

250 *op cit* p 584.

severe disablement or genetic disease it should be contemplated that non-existence could be preferable to handicapped life - under these circumstances, it is submitted, a calculation of general damage must be made by means of estimation.[251]

6.2 Liability based on breach of contract[252]

According to Berenson,[253] the **Pitre v Opelousas General Hospital**[254] court correctly applied the analogous rules of liability for damages in *breach of contract*. In cases where the plaintiff can prove that his parents have reached consensus with the physician for a particular result[255] they should have a valid claim against the obligor-physician who has breached the terms of their agreement by failing to perform the desired result, as specified in the contract.[256] It is submitted that in the absence of an actual agreement, but where the physician was indeed aware of the patient's intentions and volition to conclude such a specific term, the physician's failure to deliver the desired result[257] should also be seen as a breach of contract.

A significant question with regards to the limit of a physician's contractual liability[258] in these cases, is whether an adequate causal link existed between the negligent surgery or test on one hand and the defective birth on the other hand.

> "An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made."[259]

He writes[260] that a plea of detrimental reliance upon the conduct or impression made by the physician could also be applicable in this context, as the Louisiana Civil Code (contextually

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251 *op cit* p 585.

252 see ch 2.

253 *op cit* p 913.

254 530 So. 2d 1151 La. (1988) - discussed further *infra.*

255 such as a successful sterilization or a guarantee for the birth of a healthy child.

256 see ch 4 on the contractual relationship between physician and patient (take note of the distinction made in French law, between the *obligation de resultat* and the *obligations des monyens*).

257 Berenson believes *op cit* p 914.

258 as opposed to the theory of *delictual* causation used in the **Pitre** court.

259 **LA. Civ. Code ANN.** art. 1996.

260 *ibid.*

modified) declares:[261]

> "a physician may be obligated by a promise when he knew... that the promise would induce the patient to rely on it to his detriment and the patient was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the patient's reliance on the promise."

An obligation to act in a certain way could therefore also arise when a patient reasonably relies on the doctor's expressed or implied promise that the procedure will have a certain effect.[262] Note, however, that claims of liability arising from an implied contractual obligation for medical services have been made impossible in Louisiana by means of a statutory prohibition.[263]

Hol[264] believes that the wrongful life plaintiff can be included in the contractual relationship between mother and physician. The duty of care towards the mother as patient could also encompass a duty of care towards the unborn child and is directed by the question whether this protection falls under specific legal norms.[265] He writes that one should take a third party's interests into account, once one is aware of such a person - this seems to be the case in wrongful life, although the damage issue remains an illusive challenge:[266]

Berenson[267] is of the opinion that these *ex contractu* claims accrue only to the parents[268] and not to the children.[269] The reason for this is that the child has no reasonable argument that a

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261 *op cit* art 1967.

262 such as prevent future pregnancies in the case of a sterilization.

263 LA. Rev. Stat. Ann. § 40:1299.41 (C) (West 1977) The same statute limits all professional malpractice claims to an amount of $500 000.

264 *op cit* p 276.

265 *"Men zou ook kunnen aanhaken bij de contractuele relatie die tussen moeder en de arts bestond. Omvat die relatie - naast de zorg voor het welzijn van de moeder - niet tevens een zorgplicht van de arts ten aanzien van het welzijn van het kind? We stuiten hier op het probleem van relativiteit. Daarbij draait het om de vraag welke belangen onder de bescherming van een bepaalde rechtnorm vallen." ibid.*

266 *"Of men dus rekening moet houden met het welzijn van derden hangt af van de vraag of men op de aanwezigheid van "een derde" bedacht diende te zijn...Kortom: in het geval van Marleen is er wel een rechtgrond te bedenken voor een vordering tegenover de arts, er is alleen geen sprake van schade die op het conto van de tekortkoming van de arts kan worden geschreven."*

267 *op cit* p 915.

268 a possible wrongful birth action.

269 therefore excluding wrongful life actions.

contractual relationship existed between himself and his parent's physician prior to his own conception or birth.

6.3 Damage issues

Gevers[270] discusses the question of damages in wrongful life actions. He states that the function of damages in wrongful life is not based on the premise that the plaintiff wants to hypothetically correct his circumstances,[271] but rather to alleviate his current suffering and acquire adequate medical treatment and assistance.[272]

An alternative proposed[273] to the award of damages is a sustenance award which would aid the plaintiff in becoming self-supporting. Additionally, the proponent of this alternative would allow recovery of damages which could be specially proved.[274]

Berenson[275] reports that many courts have disallowed wrongful life claims for a variety of reasons,[276] the majority of which state that damages are impossible to ascertain.[277]

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270 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 25.

271 that he did not wish to be born.

272 he believes that a wrongful life plaintiff would in any event be principally entitled to a claim for satisfaction.

273 Kohnen, D.A. and Zoellner, R.M. 1986. Wrongful Life: Existance v. Nonexistance - Is Life Always Preferable? **Federation of Insurance & Corporate Councel Quarterly** (63), 243.

274 it is suggested that a reasonable person test would be applied.

275 *op cit* p 901.

276 The states whose courts have denied wrongful life claims include:
Alabama: **Elliott v Brown** 361 So. 2d 546 Alabama (1978);
Florida: **Moores v Lucas** 405 So. 2d 1022 Fla. Dist. Ct. App. (1981);
Idaho: **Blake v Cruz** 108 Idaho 253, 698 P.2d 315 (1984);
Illinois: **Siemieniec v Lutheran Gen. Hosp.** 117 Ill. 2d 230, 512 N.E.2d 691 (1987);
Kansas: **Bruggeman v Schimke** 239 Kan. 245, 718 P.2d 635 (1986);
Louisiana: **Pitre v Opelousas Gen. Hosp.** 517 So. 2d 1019 La. Ct. App. 3d Cir (1987), *aff'd in part, rev'd in part on other grounds*, 530 So.2d 1151 La. (1988);
Michigan: **Strohmaier v Associates in Obstetrics & Gynecology** 122 Mich. App. 116, 332 N.W.2d 432 (1982);
New Hampshire: **Smith v Cote** 128 N.H. 231, 513 A.2d 341 (1986);
New York: **Becker v Schwartz** 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); North Carolina: **Azzolino v Dingfelder** 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986);
Pennsylvania: **Ellis v Sherman** 512 Pa. 14, 515 A.2d 1327 (1986);
Texas: **Nelson v Krusen** 678 S.W.2d 918 Tex. (1984); and
Wisconsin: **Dumer v St. Michael's Hosp.** 69 Wis. 2d 766, 233 N.W.2d 372

In **Pitre v Opelousas General Hospital**[278] it was stated:

> "When a physician knows or should know of the existence of an unreasonable risk that a child will be born with a birth defect, he owes a duty to the unconceived child as well as to its parents to exercise reasonable care in warning the potential parents and in assisting them to avoid the conception of the deformed child."[279]

Berenson[280] believes that by "limiting liability for injuries in wrongful life cases to the parents' interest "not only places a manageable boundary on the defendant's exposure but also provides the plaintiff with some remedy for a clearly actionable tort that cannot be distinguished from any other recognized tort."
He writes:[281]

> "The more difficult argument, and the humane and legally progressive position, insists that the impaired child should not bear the burden of proving damages based on an obviously impossible comparison between its actual condition and nonexistence. Rather, the plaintiff should have to prove only that his impaired condition exists, and that his existence is the result of the defendant's negligence. No more should be required. In *Turpin*, the California Supreme Court understood the human, if not legal, need to respond to an obvious wrong and chose to extend the law to provide for the extraordinary costs of a defective child."

Berenson[282]identifies three identifiable factors, however, apparently interact to inhibit the judiciary's acceptance of such claims and their approval of general damage awards in claims for wrongful life.[283]

(1975).

277 **Lininger v Eisenbaum** 764 P. 2d 1202, 1210 n.10 Colo. (1988).

278 517 So. 2d 1019 La. Ct. App. 3d Cir (1987), 530 So.2d 1151 La. (1988).

279 at 1157.

280 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". **Tulane Law Review** (64), 914.

281 *op cit* p 915.

282 1990.The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be".**Tulane Law Review** (64), 916.

283 first (an probably most significant) is the courts' inability to quantify the child's damages; secondly, the courts' sensitivity to the issue of tort reform and the limitations of medical liability; and finally, the abortion question.

Berenson[284] writes:

> "The unfortunate reality is that many courts refuse to recognize wrongful life claims for artificial reasons, reasons the most certainly would not suffice in cases of more measurable injury."

Foutz[285] also documents that most courts disallow wrongful life actions based on the failure to prove damage. Two questions are often asked: has the plaintiff-child suffered any legally cognizable injury? - and if so; is it possible to measure harm? He mentions that at the heart of these two questions lie two pressing and imminent concerns:[286]

6.3.1 Loss of legal standing

Firstly, that the plaintiff loses his legal standing when he claims that his life should not have been.[287] Foutz[288] finds this *lack of standing* argument unsound, "as a single act may at once confer both a benefit and a detriment."

He gives the following examples to illustrate his point: What if a physician performs a lifesaving amputation on an infected leg of a patient. The patient subsequently learns of less extreme treatment that would have been equally successful without the need for an amputation. In such a case a patient would principally[289] be able to institute an action even though this very [290] lifesaving operation gave him the opportunity to litigate! Therefore one must admit that courts principally recognize that an act may at once confer a benefit and a detriment to a person. This fact is also true and very relevant in wrongful life actions.[291]

One must, however, be consequent in the use of examples, as the same principles should be

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284 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". **Tulane Law Review** (64), 916.

285 *op cit* p 493.

286 namely: legal standing of the plaintiff and establishment of damage.

287 this viewpoint argues that a plaintiff cuts under himself by "wishing away" his life on one hand, while litigating for financial benefits for that very same unwanted life on the other hand.

288 *op cit* p 494.

289 if we agree for argument sake that all elements of tort are present and no ground of justification (such as necessity) exist.

290 on which the action for medical malpractice is based.

291 where the plaintiff is conferred the blessing of an opportunity to live, while having to bear the agony and hardships of a debilitating genetic disease.

applied in every case. There seems to be a fundamental difference between the lifesaving amputation example and the basic wrongful life cause of action:

If, in the amputation-example, the physician *improperly*[292] performs the procedure within the same set of facts given by the example, the result is an impaired life or life without a limb.[293] In a wrongful life case, where a physician acts improperly, the result is the preservation of life of which the consequence is believed to be *per se* something of value and benefit.[294]

It is reported[295] that in other cases where public policy concerning the comparison of existence versus non-existence have been considered, no uniform decision was adopted that life is always preferred over non-existence.[296]

6.3.2 Establishing damage

Secondly, Foutz[297] suggests that in order to evaluate a child's position, relative values must be assigned to each possible condition of every wrongful life plaintiff.[298] In this way, the more severe a defect or hereditary disease, the less defendable the argument becomes that deformed or impaired life has a greater value than non-existence. If a plaintiff suffers only from mild physical or psychological affliction the scale is once again tilted in favour of life and it becomes difficult to prove that non-existence would be preferred.

To give structure to an evaluation of life, Foutz[299] suggests that a value assignment system be introduced whereby one would be able to calculate whether a specific plaintiff's life is in fact worth living or not. It is suggested that a normal life be allotted a plus value (+1); that non-

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292 by unjustifiably implementing too drastic a measure.

293 *ie* a reprehensible consequence.

294 although, it should be noted, this argument ignores the fact that the physician's conduct did not produce the *preferred* result, namely non-existence.

295 *op cit* p 495.

296 *Eg* in **Superintendent of Belchertown State School v Saikewitcz**, it was found that treatment for a severely retarded adult suffering from leukemia without prospects of recovery, would only produce temporary remission with serious adverse side effects. The court found that in this case treatment would not be in the best interest of the patient and that to prolong life would be cruel and inhumane. It is submitted that such acknowledgements by courts that life is not always to be preferred, creates a precedent for wrongful life actions.

297 *op cit* p 496.

298 *ie* handicapped life on one hand and a state of non-existence on the other.

299 *op cit* p 497.

existence be allotted a zero or unknown value (0); and that life with serious defects or sickness be allocated a minus value (-1). By applying this formula one can through a very simple and uncomplicated calculation reach a verdict as to the value of a particular plaintiff's life. In summary: to live a normal life is beneficial;[300] to live life with a serious handicap or congenital disease is prejudicial and therefore a wrongful life litigant can quite easily prove harm, since non-existence[301] has an unknown or zero value.

It is submitted that this value assignment system, however, is ignorant of basic wrongful life litigation facts. Since the deformed child never had the opportunity to be born normal, it seems illogical to discuss this option in the given formula. A more appropriate test might be one where the various *relevant* aspects are balanced in reference to each other. It was stated earlier that a single conduct can cause both advantageous and detrimental consequences. The **second Restatement**[302] states that the value of any benefit conferred on the plaintiff by the damage causing event should be considered as limitation of damages, when equitable.[303]

When applying the abovementioned alternative test, non-existence should be assigned a neutral or unknown value (0). Life with defects could be calculated with reference to a value reflecting the benefits of life, minus the gravity and seriousness of the deformity or sickness.[304] For this purpose a court or jury would have to consider the severity of each defect.[305] It is suggested that in this way a court can grant fair recovery while still recognising that life with defects does have benefits.

6.4 Damage through case law

Silverman[306] reports that no state in America has ever allowed general damages for wrongful

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300 but unfortunately not an option for wrongful life litigants.

301 the plaintiff's preferred choice.

302 § 920 (1979) - see discussion of benefit rule *infra*.

303 the wrongful life defendant-physician could therefore demand that balancing of the positive and negative results from his negligent conduct should take place, based on this provision.

304 of the life in question.

305 the more severe a handicap is found to be, the less beneficial the child's existence is and the greater the damage award and *visa versa*.

306 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: state action and undue burden - Edmonds v Western Pennsylvania Hospital Radiology

life actions in the past.

> "To date, no states permit *general damages* for this controversial cause of action. This is due in part to the philosophical difficulties involved in determining whether the plaintiff would have been better off had he never been born, as well as the conceptual problems involved in calculating damages in order to return the plaintiff to the position he would have occupied absent the misfeasance."[307]

6.4.1 Approaches of five jurisdictions

Berenson[308] looks at judgments of five American states regarding damage awards to see whether it is possible to establish a pattern of thought implemented by courts in solving common wrongful life obstacles related to the question of damage.

6.4.1.1 California

Curlender v Bio-Science Laboratories and **Turpin v Sortini** - In these two cases only special damages were allowed, as the courts found that the absence of "any legally cognizable injury" was fatal to the claim for general damages, although not fatal to the claim for special damages.[309]

6.4.1.2 Washington

In **Harbeson v Parke-Davis Inc.** the court structured its analysis according to conventional damage principles and found that compensation for special damages were appropriate, although general damages were impossible to ascertain.

6.4.1.3 North Carolina

In **Azzolino v Dingfelder**,[310] the plaintiff's claim was based on the fact that her physician acted in a negligent manner by failing to inform her of the availability of an amniocentesis. The judge disallowed the action and found that the injury complained of was not "cognizable at law" in North Carolina, without clear legislative guidance to the contrary.[311]

Assocs. **Temple Law Quarterly** (66:4), 1087.

307 *op cit* p 1089 ft. 27.

308 *op cit* p 901.

309 this viewpoint is difficult to understand - if no cognizable injury could be found then no claim *should* be allowed and therefore no damages *whatsoever* should principally be awarded.

310 315 N.C. 103, 337 S.E. 2d 528 (1985).

311 see suggestions in ch 12.

6.4.1.4 Colorado

The court in **Lininger v Eisenbaum**[312] concluded that the value of non-existence is impossible to perceive and accordingly found that plaintiff's claim did not establish a legally cognizable injury. The court came to this judgment after reviewing the decisions of **Turpin**, **Procanik** and **Harbeson** who all disallowed general damages, while nonetheless awarding special damages. The **Lininger** court found that the life of the plaintiff , even in an impaired state, cannot be seen as a detriment.[313]

6.4.1.5 Louisiana

In the case of **Pitre v Opelousas General Hospital**[314] a surgeon was aware of the fact that he acted negligently because he had not ligated the fallopian tubes of his patient as he was supposed to do. He did not inform her of this surgical omission and the patient later gave birth to an albino child. In addressing the claim, the court pointed out two common law theories of causation; that of foreseeable risk[315] and direct consequences[316]should be used to limit liability. The court concluded that foreseeable risk is the determining factor in medical negligence claims in Louisiana state. The court emphasized the fact that although wrongful *birth* actions have previously been allowed in that state, wrongful *life* actions have not. Therefore a physician has a *duty of care* towards the child before conception and birth, but no duty to the unconceived child to protect it from the risk of being born with albinism.

The court did not become involved in discussions over non-existence but rather focussed on whether the physician was reasonably responsible for the child's defective condition. Only once the court was satisfied that the physician could reasonably have foreseen the defective birth could the question of injury be addressed. The court exclaimed that the civilian tradition in law requires a codal basis for the development of legal analysis in cases of first impression. It is suggested that this decision implied that professional malpractice is not a new basis of litigation and that it could still be further extended to accommodate wrongful life actions.

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312 764 P. 2d 1202 Colo. (1988).

313 Berenson *op cit* p 909 comments that this viewpoint is self serving for someone who can see and hear. It is suggested that though it might be understandable to deny compensation on grounds of legal or public policy grounds, it is unacceptably presumptuous for a court to base a decision on its own subjective conclusion that a severely handicapped person would choose impaired life rather than non-existence.

314 530 So. 2d 1151 La. (1988).

315 the theory of foreseeable risk supposes that the scope of liability should ordinarily extend to, but not go beyond, risks that are reasonably foreseeable - see ch 2.

316 the theory of direct consequences provides that the scope of liability should ordinarily extend to, but not venture beyond, all direct consequence or those indirect consequences that are foreseeable.

Welborne[317] reports on the **Pitre** case and comments:[318]

> "The Pitre court erred when it failed to consider the circumstances surrounding the sterilisation procedure. Many courts have inquired into the reasons behind the sterilisation procedure in determining whether child-rearing costs should be awarded. Under this analysis, the interest harmed by the negligence must be the same as the interest the parents sought to protect in order for the plaintiff to be entitled to damages."

6.4.2 Conclusion

Reporting on a more recent case, Butler[319] makes reference to the case of **Cowe by Cowe v Forum Group Inc.**[320] reports that damages for wrongful life are not cognizable under Indiana law. She[321] conveys that courts rejecting wrongful life have realized the difficulty in defining a standard of "a perfect birth and thus the line of demarcation from the resulting breach of duty."

Andrews[322] summarises that the current[323] trend in American courts decisions is to allow both wrongful life and wrongful birth actions, but to only allocate additional costs, medical expenses and a special resource fund for the plaintiff or impaired child in question. General damages, such as basic child-rearing expenses until majority, are usually not allowed.

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317 1989. Wrongful Life and Wrongful Conception Actions in Louisiana. **Tulane Law Review** (63), 1216.

318 *op cit* p 1221.

319 1992. Cowe by Cowe v Forum Group Inc.: Wrongful life and the Dilemma of Comparing Impaired Existence with Nonexistence. **Memphis State University Law Review** (22:4), 881.

320 575 N.E. 2d 630 Ind. (1991).

321 Butler *op cit* p 883.

322 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

323 commentary was written in 1992.

7. Legal position in the United States of America

7.1 Historical analysis of cases

7.1.1 Initial "status" actions

Zepeda v Zepeda[324] was the first case in which the term "wrongful life" was used. This case, however, was no wrongful life action in the true legal technical sense of the word but rather a "wrongful status claim".[325] The facts were that the plaintiff's unmarried natural father promised his mother that he would marry her if she would engage in a sexual relation with him. He subsequently failed to marry her and instead left her pregnant.[326] The plaintiff instituted a "wrongful life action" on the ground that he was born an illegitimate child and had to live his life with all the social prejudices and discrimination associated therewith. The court refused the action on the grounds that illegitimacy can not be regarded as damage in law and also expressed concerns about the momentous proportions such a claim could have resulting in a possible floodgate of claims.

7.1.1.1 A distinction

Topham[327] makes a clear distinction between true wrongful life actions and illegitimacy cases. He shows that they are different in several ways: First, the defect suffered in physical/ mental impairment cases is more sever than the "stigma of illegitimacy". Second, in impairment actions the plaintiff claims that the physician's negligence caused life but not the defect. In contrast, defendant-fathers in illegitimacy cases are responsible for both the child's status (defect) and for its life. Wrongful birth, however, is based on the child's condition rather than his birth. Finally, a defective child's action comply with the requisite elements of traditional medical malpractice tort claims: "A physician has breached his duty to fully inform his patient and his negligence has resulted in the birth of a [defective child]".[328]

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324 41 Ill. App. 2d 240, 190 N.E. 2d 849 Ill. App. Ct. (1963).

325 The "dissatisfied life" claim generally. In a "wrongful status action" specifically the plaintiff complains that he must live under unacceptable stigmatisation or prejudice because of specific adverse circumstances or set of facts relevant to his situation - see discussion in ch 2 and also thoughts of Haavi Morreim in ch 9 concerning "minimum standard of living", arguing that these plaintiffs should have an action for status harms (these actions are presently not allowed because of a fear for multiplicity of actions and the so-called "floodgate theory").

326 with the plaintiff.

327 1984. Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater. **Utah Law Review** (1), 833.

328 *op cit* p 837.

A similar case came before the courts in **Williams v State**[329] where a mentally retarded woman was raped whilst under protective custody of a state clinic. The child born from this wrongful conduct sued the institution for their negligent care of his mother. The injury complained of was the unfavourable circumstances of his existence,[330] including his status as an illegitimate child. The court dismissed the claim instituted by the plaintiff on the basis that there existed no right that entitled a child to be born free from adversity. The plaintiff therefore had to accept the circumstances under which he was born.

7.1.2 Course of events

The first true wrongful life action[331] was instituted in New Jersey in the case of **Gleitman v Cosgrove**[332] Here a child was born with serious sensual disability caused by the fact that its mother suffered from German measles during pregnancy.[333] The court refused to grant the plaintiff a claim for damages. The court rejected the contention of the plaintiff that the physician failed to give his patient[334] sufficient warning as to the dangers involved with this disease during pregnancy. The court summarised its judgement in the following statements: legally there were no damage suffered; comparison for purposes of calculating damages is impossible; public policy is against the granting of the action.

The next wrongful life case was **Stewart v Long Island College Hospital.**[335] Once again a child suffered from the devastating effects of *rubella syndrome* because of a physician's failure to inform his pregnant patient about the dangers of German measles during the first trimester of pregnancy. The seriously handicapped plaintiff in the **Stewart** case sued the responsible hospital authority on grounds of the fact that he was not aborted.[336] In its decision the court relied heavily on the findings of the **Gleitman**-court and accordingly refused the action, but on the following grounds: the hospital did not cause the condition of disability; the plaintiff-child's abnormalities could not have been prevented by the hospital; *in casu* no legally recognisable

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329 46 Misc. 2d 824, 223 N.E. 2d 343 N.Y. (1966).

330 "dissatisfied life" claim.

331 see also wrongful birth ch 7, as this case is authority for both wrongful life and wrongful birth actions.

332 49 N.J. 22, 227 A. 2d 689 (1967).

333 "*rubella syndrome*" - see the discussion on the medical implications and risks of this disease during pregnancy in ch 11.

334 the plaintiff's mother.

335 58 Misc.2d 452, 296 N.Y.S. 2d 41 (1970).

336 or rather that his mother was deprived the right to informed medical treatment and accordingly also the opportunity to make a decision regarding an abortion.

damage was suffered;
abortion on demand was still illegal at the time of this case and accordingly a wrongful life action was not desirable; and that the final decision in this matter was to be made by the legislator.[337]

In **Park v Chessin**[338] an action for wrongful life was allowed for the first time. The facts were that a mother gave birth to a child suffering from a debilitating genetic anomaly namely *polycystic kidney disease*.[339] In order to prevent a tragic recurrence of this disease, Mrs. Park consulted a physician to inquire about the chances of a second child also being affected. Dr. Chessin assured her that there were no indications that suggested a higher than normal risk of future children having the same hereditary disease. Acting on this assurance of the doctor, Mrs. Park once again became pregnant and to her shock and trauma learned that her second sibling also suffered from the same hereditary disease.

The court carefully looked at previous judgments of similar cases of which have all denied the action. In reaching a different conclusion the court declared that it is the nature of the law to adjust to changing circumstances and developments in areas of scientific, economical and social norms. The court further stated that public policy allows for and encourages couples to make responsible decisions regarding family planning. This is especially true of resent cases where medical science is able to predict genetic anomalies in advance.

The court found that the physician *in casu* breached his duty to properly inform and advise his patients, which constituted an action for the plaintiff-child based on delict. The physician was directly held responsible to the child for the pain and suffering caused by the physician's negligent conduct. As foundation for this novel claim the court established a new right namely a right of each child to be born as "a complete and functional human being." As main reason for its decision the court advanced the argument that changes in public policy were necessitated by a changing society. Two important principles are derived from this judgment:

- the court handled the calculation of damages for this wrongful life case in the same manner as any other delictual claim for pain and suffering;
- the court recognized the legal basis of the claim.

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337 see thoughts propagating legislative guidance in ch 12.

338 60 A.D. 2d 80, 400 N.Y.S. 2d 110 A.D. (1977).

339 a disease that primarily affects the kidneys, covering it with growths - see ch 11.

On appeal, the case of **Park v Chessin** was combined with the case of **Becker v Schwartz**[340] and both the claims were rejected. The Appeal Court of New York gave the following reasons:

- no legally recognized damaged was suffered by the plaintiff since no child has the right to be born as a whole and functional human being;
- damage is not calculable;
- no causal link necessary for accountability was established in either case.

In **Becker v Schwartz**, therefore, the court reverted back to the traditional point of view that no action for wrongful life exists.[341] *In casu* an action was instituted against a physician who allegedly failed to warn a 37 year old woman of the increased risks involved with a pregnancy at such an advanced age. The general practice at that time in cases where an elderly woman continued with a pregnancy was to make use of an amniocentesis test[342] to ensure normal development of the foetus. Such a test was neither performed on Mrs. Becker, nor was she informed of the existence of such a test and as a result she only became aware of the fact that her child suffered from *Down's syndrome*[343] at its birth. An action for wrongful life was instituted on behalf of the child. In refusing the claim the court stated emphatically that calculating damages was impossible since a condition of non-life was unknown to man and therefore could not be used as a comparison to an impaired life.[344]

In a similar case a year later, **Berman v Allen**,[345] basically the same facts resulted in another wrongful life action. Once again the action was dismissed, this time on grounds of policy considerations. The court stated that life, as protected in the American constitution,[346] is always more precious than non-existence even when affected by serious shortcomings and disability.

The first case since the **Park** ruling in which a wrongful life action was recognized, was

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340 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

341 the court stated that this action could only succeed if the Legislator would create a right to be born whole and functional.

342 a test where a sample of the amniotic fluid of a pregnant woman is collected and tested for possible abnormalities in the foetus - see discussion in ch 11.

343 discussed in ch 11.

344 the court did in fact recognize an action for wrongful birth, which was simultaneously instituted in this instance the court allowed damages for the expenses related to the caring and treatment of the afflicted child.

345 80 N.J. 421, 404 A. 2d 8 (1979).

346 U.S. Constitution, Amendment V, XIV.

Curlender v Bio-Science Laboratories.[347] The facts were that the plaintiff's parents made use of the services of a genetic laboratory to run tests in order to be sure that they would be genetically compatible and suitable parents. In spite of these pro-active precautionary measures and subsequent approval of the genetic laboratory, a child was conceived who suffered from the genetically transmitted disease of *Tay-Sachs*.[348] The plaintiff alleged that the defendant's conduct was negligent because the laboratory knew that their test results *in casu* were inaccurate, but failed to inform their clients of this fact.

The court found that the laboratory had a duty of care in cases of genetic testing which entailed a duty to correctly communicate the relevant information and test results. This duty is necessary to ensure that parents will be able to make certain informed decisions regarding family planning matters. The damage suffered was the birth of a abnormal child due to the furnishing of incorrect genetic advice. The court based its decision on the factual breach of duty that took place and the reality of the pain and expenses suffered due to this breach: "The reality of the wrongful life claim is that such a plaintiff exists and suffers due to the negligence of others."[349]

The court limited the award of damages to the pain and suffering experienced by the plaintiff during its short lifespan[350] and in addition allowed all special expenses incurred due to the hereditary disease.[351]

The ruling in **Eisbrenner v Stanley**[352] reverted back to previous decisions and rejected the wrongful life action instituted by a plaintiff suffering from various birth defects due to the fact that a physician failed to diagnose its pregnant mother with German measles. The physician accordingly failed to warn Mrs. Eisbrenner of the dangers associated with this disease during pregnancy. The court's decision was founded on the fact that the resultant genetic aberrations could not be prevented once it had occurred, except for the possibility of an abortion. The court

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347 106 Cal. App. 3d 811, 165 Cal. Rptr 477 Cal. Dist. Ct. App. (1980).

348 a form of familial spastic paralysis associated with mental retardation, due to genetic damage, commencing in childhood and affecting first the lower limbs, partial blindness occurs during the course of the disease and finally becomes total - see ch 11 for a further discussion.

349 *op cit* p 479.

350 the court decided that the plaintiff's right to damages must be based on her mental and physical condition at birth and her anticipated condition during the predicted life span of four years.

351 punitive damages were also justified.

352 106 Mich. App. 351, 308 N.W. 2d 209 Mich. Ct. App. (1981).

rejected the finding of the Curlender court and declared that the assessment of damages was impossible.

In **Turpin v Sortini**[353] a wrongful life action succeeded once again. In this case a child was born deaf due to the negligent advise given by a physician.[354] The plaintiff's older sister also was born deaf but this fact was only established after the birth of the plaintiff who suffered from the same hereditary impairment[355] In its finding the court relied on common law principles and declared that these type of actions should be approached like any other malpractice suit. The damage award was limited to extraordinary expenses and medical costs during the plaintiff's lifespan. General damages were rejected on two grounds: plaintiff did not suffer an injury by being born deaf as opposed to not being born at all; even if an injury was perceived, it would be impossible to assess general damages in a fair, unspeculative manner.

Saltz[356] writes that **Turpin** decision agreed with the damages formula used in **Harbeson**,[357] rejecting the argument that the recognition of the tort disavows the sanctity of human life.

> "The child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority. Rather than saddling the parents or the state with these expenses, the court placed the burden 'on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training".[358]

In **Harbeson v Parke-Davis Inc.**[359] Mrs. Harbeson was under medication for epilepsy and therefore used the drug *Dilatin*. In order to make a responsible procreative decision she consulted with three different doctors for advise on the possible effects the drug might have on her planned pregnancy. She was assured that the continuation of her medication would not

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353 31 Cal. 3d 220, 643 P. 2d 954, 182 Cal. Rptr. 337 (1982).

354 the physician of the plaintiff's parents failed to diagnose deafness in her older sister and accordingly misadvised plaintiff's parents not to have any concerns for possible deafness in future children.

355 various test were previously done on the older sister, but the physician could not establish with certainty that the child was indeed deaf and gave incorrect advise that the child wasn't deaf, he gave the go ahead for the second child to be conceived without higher risk of deafness.

356 1986. Better off never born? **American Bar Association Journal** (72), 46.

357 *ie* medical and educational expenses, but no general damages.

358 *op cit* p 47.

359 98 Wash. 2d 460, 656 P. 2d 483 (1983).

lead to any serious additional risks in the pregnancy. She was however informed of a small possibility of temporary, insignificant anomalies in the children due to the use of the drug during pregnancy. Mrs. Harbeson, acting on the reassuring expert advise given her by the physicians, continued with the pregnancy. *Ex post facto* she learned that both her children suffered from *fetal hydantoin syndrome*[360] caused by the use of *Dilatin* during pregnancy.[361] The court made use of the traditional elements of delict and allowed the action. Damages were limited to extraordinary expenses such as medical bills *et cetera* and no award was made for general damages because of the impossibility of comparing no-existence with handicapped life.

Van der Hoef[362] writes on the **Harbeson** case and comments:

> "The court approached the question from a concept of duty: that is, the court found the injury to be a product of a breach of duty. In essence, the court found that the parents had the right to avoid the birth of a deformed child, and a breach of the duty to protect that right led to the injury, which was the birth of a deformed child. But this reasoning puts the cart before the horse. 'Duty' is shorthand for the conclusion that the defendant has a legal obligation to protect the plaintiff from any of the defendant's actions that risk injury to the plaintiff. Thus, crucial to the concept of duty is the prior determination that the defendant's actions risk injury to the plaintiff."[363]

Van der Hoef[364] offers two reasons why he is of the opinion that damages in wrongful birth claims lack the certainty of damages in claims for the death or injury of an existing child: impossibility of establishing damages by means of comparison; and the uncertainty in the measure of damages in wrongful birth claims.

Again in **Procanik v Cillo**[365] the wrongful life action succeeded. The facts, very similar to those in the **Gleitman** case, were that a physician acted negligently in respect of a pregnant patient with German measles. The court approached the facts with a perspective that was most

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360 at 486: "This resulted in their experiencing mild to moderate growth deficiencies, developmental retardation, wide-set eyes, later ptosis (drooping eyelids), *hypoplasia* of the fingers, small nails, low-set hairline, broad nasal ridge and other physical and developmental defects." - see ch 11.

361 a substantially more serious condition than ever expected by Mrs. Harbeson, based on prior medical advise.

362 1983. Washington Recognizes Wrongful Birth and Wrongful Life - A Critical Analysis - Harbeson v. Parke-Davis. **Washington Law Review** (58), 649.

363 *op cit* p 660.

364 *op cit* p 661.

365 97 N.J. 339, 478 A. 2d 755 (1984).

beneficial to the interests of the child and found negligent conduct on the side of the physician by solely looking at the birth of the physically impaired plaintiff.[366] The court assumed that the parents would have obtained an abortion if they were timely notified of the expected complications. Special damages were awarded to both the child in its wrongful life action and the parents in their wrongful birth action.[367]

Fain[368] reports that the **Procanik** court explained that its decision to allow recovery for extraordinary medical expenses was based on the needs of the living in bearing the burden of their condition, not on a belief that non-existence is preferable to an impaired life. The court rejected the minor's claim for general damages for pain and suffering because the minor plaintiff "never had a chance of being born as a normal, healthy child."[369]

The final American wrongful life case that will be discussed in this study is that of **Azzolino v Dingfelder**.[370] In this case a woman of 36 years became pregnant without any advise from her physician as to the increased risks associated with foetal development at such an advanced age. No suggestions were made to her for an amniocentesis tests to be carried out. The parents learned with shock of their child being born with *Down's syndrome.* They persisted that hey would have obtained an abortion if they knew about the abnormality. Taking into account the judgments of **Turpin**, **Harbeson** and **Procanik**, the court awarded special damages for extraordinary costs related to the genetic impairment.

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366 *res ipsa loquitur.*

367 in the wrongful birth action all additional medical expenses until the child's age of majority were compensated - the child's damage award was extended beyond its age of majority.

368 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

369 the court at 764 indicated that: "the award of extraordinary medical costs to the child or the parents when combined with the right of the parents to assert a claim for their own emotional distress, comes closer to filling the dual objectives of the tort system; the compensation of injured persons and the deterrence of future wrongful conduct."

370 322 S.E. 2d 567 N.C. App. (1984).

8. Legal position in England

8.1 Legislative background

In England the wrongful life debate was slow to catch on compared to its rapid development in the United States of America. In order to clarify the English legal position regarding wrongful life actions, the British Legal Commission was given the task in 1974 to investigate the matter. The Commission produced a report "Injuries to unborn children" wherein they criticised the claim and suggested that it be disallowed.[371] They found that although there should principally be an action in cases where a disability or an abnormality was directly caused by a tortfeasor,[372] this was not the basis of a wrongful life action.[373] The opinion of the Legal Commission was accepted and made law through enactment of the **Congenital Disabilities (Civil Liability) Act** of 1976.[374]

Another inquiry into the merits of wrongful life actions was done by the Pearson Commission[375] two years after the act has been introduced. This commission similarly rejected wrongful life actions.

8.2 A case study

In the case of **Mc Kay v Essex Health Authority**[376] the plaintiff's mother contracted German measles during her pregnancy. Assured by the (incorrect) advice of her physician who failed to diagnose the disease, she did not consider the possibility of investigating the matter any further. At its birth it was established that the plaintiff was in fact seriously affected by its

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371 "Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advice abortions in doubtful cases through fear of an action for damages is, we think, a real one. It must not be forgotten that in certain circumstances, the parents themselves might have a claim in negligence."

372 Blackbeard *op cit* p 64 declares that in England, torts committed against the unborn are recognized and the plaintiff need not even be conceived for a defendant to be in a position to act negligently towards the plaintiff.

373 *ie* a straightforward action for physical injury, based on tort - the difference between these actions and wrongful life actions is that, in the first instance a normal healthy baby would be born was it not for the injurious conduct, while in wrongful life a normal existence was never an option.

374 sec 1(2)(b).

375 Royal Commission on Civil Liability and Compensation for Personal Injury (1978).

376 (1982) Q.B. 1166 (1982) 2 All. E.R. 771.

mother's infirmity and was subsequently born with various debilitating abnormalities, including partial blindness and a hearing deficiency. A claim for wrongful life was accordingly based on the negligent conduct of the physician which prevented the option of an abortion and caused the plaintiff to be born as a seriously handicapped person. The court *a quo* rejected the claim.

On appeal, the court unanimously agreed that this claim does not have a reasonable legal cause of action. Robertson[377] writes that this verdict was to be expected because of the legislative prohibition of wrongful life actions in section (1)(b) of the Congenital Disabilities (Civil Liability) Act. The reasons given by the Court of Appeal for its decision are summarised in the following points:

- there existed no legal duty on the physician towards the unborn child to insure that it be aborted;
- such a cause of action would undermine the sanctity of human life and is accordingly against public policy;
- insurmountable problems regarding calculation of damages.

Robertson[378] mentions that the value of the judgement does not lie in the rejection of the wrongful life action,[379] but rather in the implied support the court gave towards recognition of the wrongful birth action.[380]

Finch[381] reflects that the general importance of the Appeal Court's ruling in **McKay v Essex Area Health Authority** is in fact considerably restricted for practical purposes by the Congenital Disabilities (Civil Liability) Act 1976 which, by s 4(5) has the effect of depriving any child born after July 22, 1976 of a cause of action (if ever there had been one) for wrongful life.

To summarise, it seems as if the position concerning wrongful life actions in the English legal system is clear: the cause of action is rejected because of legislative prohibition.[382]

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377 1982. Wrongful Life. **Modern Law Review** (45), 697.

378 *op cit* p 700.

379 since this could be predicted.

380 which is discussed in ch 7.

381 1982. No Wrongful Life. **New Law Journal** (132:6043), 235.

382 it is submitted that the clear statutory regulation of the entire wrongful life issue is plausible, as much harm is done in terms of legal uncertainty and unnecessary litigation in countries where the exact position concerning these actions is unknown - see ch 12 where it is suggested that legislative guidance is therefore a certain solution to the entire wrongful life dilemma.

9. Legal position in Israel

9.1 Brief discussion

It seems as if the Israeli courts are especially liberal in comparison to most other Western countries with regards to wrongful life actions. Blackbeard[383] reports on the case of **Saul, Shmuel & Nvadra Katz v Dr R Zeitzev, Beilinson Hospital**,[384] where an action was boldly allowed by the Israeli courts. The facts of the case were that the plaintiff's mother sought genetic advise before her marriage on the possibility of her being a carrier of the hereditary *disease of Hunter*.[385] The reason she specifically inquired about the risk was the fact that this disease has been prominent in her family history. She decided beforehand that if she was found to be a carrier, she would never give birth to a son. She was negligently examined and accordingly the wrong diagnosis was made. Dr. Zeitzoff ensured her that there existed no chance of her passing on this genetic disease to her unborn son. The plaintiff was indeed born with Hunter's disease and he accordingly instituted a wrongful life action. In the court *a quo* the claim was dismissed on the following two grounds:

- the wrongful life debate falls outside the courts' jurisdiction and therefore the legislator should solve the problem by statutory means;
- as the true tortfeasors are the parents,[386] who will escape liability when the action is only instituted against a third party namely the physician.

9.1.1 On appeal

On appeal the plaintiff's action succeeded. According to section 2 of the Israel Tort Ordinance the plaintiff indeed suffered damage.[387] The court found that the well known comparison between a condition of non- existence and handicapped life is the correct formula by which damage must be calculated. Although the holiness and value of a human life could establish the presumption that any form of life is more valuable than the alternative, the court stated that

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383 *op cit* p 65.

384 Civil Appeal 518/ 82, 540/ 82; 40 PD (2) 85.

385 a genetic disease which only affects male offspring - see ch 11.

386 the court argued that because the parents conceived the child, they should be directly responsible for the plaintiff's physical anomalies.

387 the damage include: "loss of life; loss of property; comfort, physical welfare or reputation; or a lessening thereof; and any loss or diminution derived from the above."

in Israeli law the question of damages for the reduction in lifespan is approached in a quantitative manner.[388] This implies that in Israeli law there exists a presumption that life always has a positive value.

The court further declared that the comparison between life and non-existence has already been made earlier in the "Babylonian Talmud",[389] where it is stated that life under certain circumstances is not preferred to non-existence.[390]
Carmi[391] reports on the Court of Appeal's judgment in **Saul, Shmeulen Nvadra Katz v Benlin Hospital**[392] and writes that the court eventually allowed a wrongful life action by awarding not only special, but also general damages. He deliberates that this claim seems to have been based on "the foetal right to life without defects", since judge Barak held the view that human beings do not have the right not to live, but that they are entitled to life without defects. Therefore the damage does not lie in the creation of life but in the causing of a defective life.

The assessment of the damage should therefore be made by comparing a defective life to a life without defects.[393] Judge Barak founded his view on the believe that non-existence is not a human state and that other courts accordingly have made an incorrect comparison by weighing disabled life with non-existence in order to establish damage in wrongful life actions.[394]

Chief Justice Ben-Porat found that in certain cases it is possible that it would be better not to have lived at all. He suggested that one should approach the handicapped life debate by

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388 in contrast to the English law where this calculation is made with reference to qualitative values where the degree of happiness and expected quality of life is an important consideration.

389 Aruvin tract 13(b).

390 it should therefore be recognized that it is sometimes better not to have been created.

391 1990. Wrongful Life: An Israeli Case. **Medicine & Law** (9) **Medicine and Law**, 777.

392 C.A. 518, 540 (82); PD (2) 85.

393 according to Carmi *op cit* p 778, this premise is based on a misunderstanding of the basis of wrongful life litigation - the plaintiff never had the option of normal existence and judge Barak, therefore, applied a wrong method.

394 Blackbeard *ibid*.

implementing an objective "reasonable man test".[395] Would the reasonable man find a specific handicapped condition (identical to that of the plaintiff) bearable or not? If the answer is no, then one could declare that the plaintiff's specific life is not more advantageous than non-existence.

According to the Chief Justice the most important issue was not whether it is possible to cause life and an impaired condition through a single wrongful conduct, but rather if actual, legally cognisable damage was caused. He believes that this question should be answered before the issue of a duty of care is discussed, since it serves as a basis for the existence of such a duty.[396]

In casu there was no doubt that the physician owed a duty of care to the parents[397] and he would surely have had to compensate the parents under a claim for wrongful birth. Judge Ben-Porat was convinced that damage has indeed been proven and accordingly felt that physicians should owe a similar duty towards the unborn and allowed the wrongful life action.

The debate on the right of a child to sue his parents for being born disabled was also considered by the court. Here, Carmi[398] declares that one must find an equitable balance between the interests of the parties involved. Nevertheless, relevant guidelines should be laid down by either the legislator or the courts. He reports that the court *in casu* was convinced that this should definitely be a matter for legal policy makers to consider.

In conclusion Judge Carmi[399] states that there are three vital questions must be answered in order to establish a basis for wrongful life actions, namely:

- does a foetus have rights?
- does there exist a duty of care on the physician *and* parents towards the foetus?
- in what manner should damages be calculated in wrongful life actions?

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395 this reference to the "reasonable man test" should not be confused with the commonly recognized reasonable man test applied in establishing negligence.

396 Blackbeard *op cit* p 66.

397 not only was there a contractual relationship between the physician and his patients, but also as a result of his negligent advice, a seriously ill child was born - *res ipsa loquitur.*

398 *op cit* p 779.

399 *op cit* p 780.

Tedeschi[400] writes that "even as for predictable causes, it is only possible to contemplate those which should have compelled the parents to refrain from procreating, having regard to circumstances and on the basis of moral responsibility."[401]

10. Legal position in the Netherlands

10.1 Introduction

Stolker[402] declares that wrongful life actions are seen as the "frontier of medical malpractice litigation". He believes that these actions are becoming ever more relevant worldwide as genetic counselling becomes more popular by the day. He notes that the majority of wrongful life cases are based on insufficient genetic advise. Stolker proclaims that the position held by courts in maintaining that the actions should not be allowed has basically stayed the same over the past years. Only in exceptional instances have courts allowed this action.[403] In reaction to this general unwillingness to accept the claim, it is reported[404] that erudite authors are still searching for arguments to convince courts to change the *status quo* and accept the actions.

He[405] explains that wrongful life actions are generally more difficult to decide than "normal delictual actions". If the facts show that a physician injured a healthy foetus to such an extent that it is born handicapped, it would be presumable that a cause of action in delict exists.[406]

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400 1966. On tort liability for "Wrongful Life". **Israel Law Review** (1:4) 513.

401 "On what grounds could this position be inferior to that of others? Since he belongs to a class which is determined by reference to the time when damage will be caused and not when the act is committed, one is not to take account of a "class of those-to-be-born" as such, but of a class to which a person unborn or not conceived at the time of the wrongful act will be found to belong at the time of the damage." *op cit* p 522.

402 1997. Een onrechtmatig bestaan in Nederland - een stand van zaken. **Aansprakelijkheid en Verzekering** (5:2), 39.

403 it is reported *ibid* that the wrongful life action has only been successful in three American states: that of **Procanic v Cillo**; **Curlender v Bio-Science Lab.** and **Harbeson v Parke-Davis** (*supra*).

404 *ibid.*

405 Stolker, *op cit* p 40.

406 that is if all the other required delictual elements are proven: (as stated in my preview, only "true" wrongful life actions will be discussed in this study and cases were healthy foetuses are injured before birth fall within the recognized ambit of delictual claims and cause little difficulty in legal theory) - the defendant will then be in the same position as a negligent driver of a motor vehicle who injures an unborn child).

Much more difficult to judge, however, are cases were the defendant did not directly cause the impaired condition itself, but through negligent conduct caused a handicapped child to be born.[407]

Stolker comments that although he dismissed the wrongful life claim on dogmatic grounds in an earlier comment,[408] he now has come to realise that behind the reasoning of wrongful life claims there lies deep human suffering and pain. It is accordingly submitted that this basic truth might make these plaintiffs more worthy of damage awards than in wrongful conception plaintiffs.[409]

Schoonenberg[410] writes that even though the basis of wrongful life liability lies in the improper provision of genetic information and failure to warn of foreseeable genetic anomalies, the practical implication of a failed sterilization could similarly constitute liability.

> *"Aan de behandelend arts van de ouder(s) wordt verweten onvoldoende informatie te hebben verschaft omtrent voorzienbare genetische afwijkingen bij de patiënt. De aansprakelijkheid kan echter ook gebasseerd zijn op een mislukte sterilisatie of abortus."*

10.2 Recent case law

Stolker and Levine[411] reports on a vey recent and yet undecided wrongful life action that was instituted in the Netherlands. *In casu* the plaintiff, Kelly, was born with serious physical and psychological impairments that were caused by a very uncommon genetic aberration. In the ensuing action it was argued for the plaintiff that this unfortunate birth could have been prevented if an *amniocentesis test* was performed on her mother by the Academic Hospital in Leiden. It was alleged that, had the rare genetic digression been detected, an abortion would have been obtained which would have prevented her current suffering.

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407 *ie* wrongful life: the defendant is basically reproached for unlawfully depriving the option of an abortion from concerned parents - alternatively the defendant is held accountable for insufficient or incorrect genetic advise given before conception; or for depriving the parents of the possibility and right to choose not to have children at all.

408 1986. **Aansprakelijkheid van de arts voor mislukte sterilisaties** Kluwer-Deventer (Serie Gezondheidsrecht no. 17).

409 where the birth of a healthy baby is the cause of action, which claims are commonly recognized - see ch 6 for a discussion on wrongful conception.

410 1986. *op cit* p 61.

411 *op cit* p 38.

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Volker[412] summarises the vital aspects of the case.[413] To ascertain whether the physician in question has acted below the level of proficiency expected from him, the court applied the test of the reasonable colleague.[414] The court recognized that there does exist a contractual relationship between the mother-patient and the physician in terms of section 7:446 Civil Code.[415]

This agreement was partially concluded with the interests of the child in mind and the child should therefore be included in the scope of protection afforded by the contract.[416] It is suggested that not only other Dutch writers,[417] but also the courts[418] support such an extension of liability.

The question whether one should therefore take into account the interests of a third party depends on the fact if one was expected to have knowledge of the existence of such a third party.[419] Although the case which was used as authority was founded in delict, it is submitted that direct application should be made to the current issue, which was based on contract.[420]

It is suggested[421] that a physician acts wrongfully in terms of section 6:162 Civil Code, if he acts in contravention of unwritten law (socially unacceptable conduct). The physician could consequently be imputed to have committed a delict in terms of section 6:162 (3), inasmuch as the blame for the detrimental result could be cast on him, according to the view of the community.[422] It is submitted[423] that the mere fact that discussions are held concerning a

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412 1997. De wrongful life vordering - Toewijzing mogelijk of niet? **Skripsie**, Erasmus Universiteit, Rotterdam.

413 September 1997.

414 as reiterated in the *Hoge Raad* decision of 9 November 1990, NJ 1991, 26.

415 the specific medical treatment agreement - see *supra*.

416 *"De overeenkomst die de vrouw sloot met de arts werd ook gesloten in het belang van het kind. De beschermingsomvang van de norm strekt zich uit tot het ongeboren kind." op cit 6.*

417 *eg* Stolker and Levine, Hol *etc* - see *supra*.

418 the well known "*verstekeling-arres*" of HR 27 Januari 1984, NJ 1984, 536.

419 which is clearly the case in wrongful life.

420 *op cit* p 7.

421 *ibid.*

422 *"Onrechtmatige daat vloeit voort uit een buitencontractuele relatie. De arts handelt onrechtmatig, indien hij handelt in strijd met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt (artikel 6:162 lid 2 BW). Een onrechtmatige*

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delictual or contractual basis of liability, indicates that a wrong has been committed, for which compensation should be given.

Volker[424] refers to German[425] and American[426] authority were the wrongful birth action of the mother was recognized, but the child's action refused. In a recent French[427] case, however, a wrongful life action was allowed. The Dutch court followed the German and American example.

Appeal Judge Vranken, as quoted in a recent wrongful conception action,[428] is generally less enthusiastic about the use of dogmatic reasoning in these type of cases:

> *"Het minst bevredigend, m.i. zelfs ronduit onjuist, is het wanneer men de oplossing zou willen zoeken op het niveau van de dogmatiek, bijvoorbeeld in het begrip schade of in de gezinsbeplanning als persoonlijkheidsrecht. Dogmatiek is niet meer dan de inkadering van de initiële keuze in het bestaande systeem. De rechtvaardiging van de initiële keuze ligt elders. Op dat niveau moet zich dan ook de argumentatie bewegen."*[429]

Schoonenberg[430] argues that wrongful life actions should be legally recognized in the Netherlands. She addresses the question whether a duty of care could exist between a physician and their posterity:

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daad kan aan de arts worden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt (artikel 6:162 lid 3 BW)." op cit p 8.

423 *op cit* p 9.

424 *op cit* p 15.

425 Bundesgerichtshof: BGH 18 Januarie 1983, Juristenzeitung 1983.

426 **Sundi A. Greco v United States of America** 893 P.2d 345 Nev. (1996): "We decline to recognize any action by a child for defects claimed to have been caused to the child by negligent diagnosis or treatment of the child's mother".

427 Cour de Cassation 26 March 1996 (2 arrets), Receuil Dalloz 1997.

428 HR 21 februari 1997, **RvdW** 1997, 54c.

429 Conclusion of Vranken sub 23 - a paraphrased summary of this quotation is: It is highly unsatisfactory and even unjust to find the solution (to this problem) in dogmatic reasoning for example in reference to the damage issue or the right to procreative decisions as a personality right. Dogmatics is nothing more than support for an initial decision/ choice in a current (legal) system. The justification of the initial decision lies on another level. It is on this level that the argument must be founded.

430 1986. *op cit* p 62.

> *"Mag men aannemen dat er in de Nederlandse samenleving in dit verband sprake is van een zodanige norm van maatschappelijk behoren, dat er aanleiding is voor bescherming door het recht? Schut stelt dat het bij toetsin aan de zorgvuldigheidsnorm gaat om toetsing aan maatschappelijke normen van een zodanig gewicht en zo algemeen aanvaard dat zij tevens het karakter van rechtsnormen hebben aangenomen. Scherpe grenzen zijn hier niet te trekken. De rechter heeft een grote mate van vrijheid bij het tot rechtsregel verheffen van normen van maatschappelijk behoren."*[431]

It is mentioned [432] that another valid point concerning the basis of wrongful life litigation[433] is that these actions are derived from social questions that have developed from recent bio-medical advancements. Scientific development has therefore extended the duty of physicians.

> *"Bij WL acties gaat het evenals bij WB acties om maatschappelijke vragen welke door de ontwikkeling in de biomedische wetenschap juridische relevantie krijgen. Wetenskappelijke ontwikkelingen brengen een uitbreiding van de taak van de arts met zich mee."*[434]

She[435] is of the opinion that a clear duty of care on a physician to consider the interests of unborn children has not yet been established in the Netherlands. The legal recognition of such a duty would depend on societal attitudes, which would on its part be determined through a process of societal development and change in correlation with scientific advances and moral-ethical standards in the particular community.

10.3 Based on contract or delict?

Schoonenberg[436] declares that as the unborn child of the patients have no contractual link with the family physician, an action that is instituted by the child would have to be based on delict.[437]

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431 *op cit* p 67.

432 Schoonenberg *op cit* p 66.

433 and similarly wrongful birth.

434 key issues in both wrongful life and wrongful birth actions are the relevance in the legal sphere of societal questions regarding the development of medical science.

435 Schoonenberg *ibid*.

436 *op cit* p 68.

437 refer to ch 2.

An interesting issue that is considered in this regard[438] is the possible delictual liability of a physician under these circumstances, based on the legal concept of professional liability towards third parties. It is namely an established principle in Dutch law[439] that an individual can be held accountable for reasonably foreseeable injury caused to third parties because of his negligence.[440]

Although professional liability based on malpractice towards third parties is therefore easily established,[441]it is unclear whether such responsibility will also extends to unborn plaintiffs or even plaintiffs that have not yet been conceived at the time of misconduct.

It is reported that Dutch academics differ in opinion:[442] although Sluyters is not convinced that a duty of care can be imputed to the physician, Leenen is of the opinion that a breach of the duty to act with proficiency could infringe the interests of the unborn. Schoonenberg seems to agree with him.[443]

Stolker[444]explains that an important principle in Dutch law of contract is that agreements exclusively exist between the particular contracting parties. Third parties do not derive any rights or duties in terms of such an agreement. Section 6: 253 of the Civil Code, however, is an exception.[445]

> *"Een hoofdregel van ons contractenrecht is dat overenkomsten slechts van kracht zijn tussen de handelende partijen (in dit geval de KNMG en het LP/CP). Derden (de patiënt) ontlenen aan een overeenkomst geen rechten of verplichtingen. Een uitzondering daarop is het derdenbeding (art.6:253 e.v. BW)."*

10.4 Is wrongful life attainable in the Netherlands?

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438 and to the question of a duty of care in wrongful life actions.

439 1971 (30 december) Rb. Den Haag; 1973 (15 januari) Curaçao.

440 *ibid.*

441 as soon as plaintiff can prove that the damage to third parties was reasonably foreseeable.

442 *ibid.*

443 *op cit* p 68.

444 1994. De nieuwe Wetgeneeskundige behandelingsovereenkomst en het juridische belang van de Modelregeling arts-patiënt. **Nederlands Tijdschrift voor Burerlijk Recht** (11:1), 118.

445 see further discussion of sec 6: 253 in ch 6.

Kruithof[446] expresses his personal view on wrongful life and states that it should not be allowed on the following reasons: a comparison between life and non-existence is not impossible and the plaintiff-child is thereby placed in the absurd position of denying his very existence:[447]

> *"Persoonlijk kan ik deze redenering niet onderschrijven. Niet alleen omdat een vergelijking tussen leven en niet-leven onmogelijk is, maar omdat het kind hier in de absurde positie geplaatst wordt zijn eigen bestaansrecht te ontkennen."*

Major challenges to the acceptance of wrongful life in other jurisdictions are now considered from a Dutch perspective and applied to current law in the Netherlands.

10.4.1 Familial litigation

Leenen[448] conveys that a wrongful life action of a child against its parents is conceivable, although somewhat more complex than an average wrongful life action.

> *"Bij een wrongful life action van het kind tegen de ouders ligt de situatie ingewikkelder. Zij zou eventueel denkbaar zijn bij het bewust schade toebrengen aan de vrucht tijdens de zwangerschap. Doch de vraagstukken, waarin men bij acties van kinderen tegen ouders terecht komt, zijn groot. Nog weer een stap verder is een actie van het kind tegen de ouders op grond van het verwijt, dat zij, op de hoogte van genetische risico's, het genetisch beschadigde kind desondanks hebben voortgebracht. Zonder te denken aan een recht van het kind om gezond geboren te worden, zou het een vordering hebben omdat de ouders vermijdbare risico's vóór en na de conceptie niet hebben vermeden? Zou het de ouders ervoor aansprakelijk kunnen stellen, dat geen amniocentesis en op grond daarvan geen abortus is verricht of dat zij chromosomale schade vóór de conceptie niet hebben voorkomen?"*[449]

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446 1987. Schadevergoeding wegens de geboorte van een ongewenst kind? **Rechtskundig Weekblad** (50:41), 2737.

447 *op cit* p 2754.

448 1984. Nieuwe wetenschappelijke ontwikkelingen rond het begin van het leven; problemen voor het gezondheidsrecht. **Tijdschrift voor Gezondheidsrecht**, 116.

449 *Op cit* p 120 - a paraphrased summary of this quotation is: The instance where a child sues its parents for wrongful life is complicated, but certainly conceivable, especially where the harm was inflicted knowingly during the pregnancy. A further step beyond this troublesome prospect is the case where the action is based on the reproach of the child that its parents continued with the pregnancy in spite of a high risk of abnormality. Would the parents be accountable for their failure to minimise the risks of genetic aberration or their failure to obtain an amniocentesis or a subsequent abortion?

Gevers writes:[450]

> *"Ten aanzien van een actie van het kind tegen de ouders wegens het niet voorkomen van zijn geboorte is mijns inziens even grote terughoudenheid gewettigd. Wat er zij van een eventuele morele of maatschappelijke plicht om bij zware genetische risico's van progenituur af te zien, juridisering van zo 'n verplichting is in strijd met de individuele vrijheid over voortplanting te beslissen."*[451]

10.4.2 Elements of unlawful conduct

A brief discussion of the traditional elements of unlawful conduct in Dutch law with regard to wrongful life follows:

10.4.2.1 Damage

The recognition and calculation of damages has probably posed the most stringent opposition to wrongful life. Schoonenberg[452] comments that the award of damages aims to place the plaintiff in the position he was before the damage causing event. Because the hypothetical condition of 'non-existence' cannot be calculated[453] much uncertainty remains as to the awarding of damages in wrongful life. It is submitted that although the traditional method of damage calculation does not produce a faultless solution in these circumstances,[454] one should keep in mind that an award of money will doubtlessly soften the suffering and ease the financial burden of wrongful life plaintiffs:[455]

> *"De schadevergoeding de situatie, waarin het zonder die onrechtmatige daad zou zijn geweest, zo dicht mogelijk benader, doch heeft de functie het lijden van het kind zoveel mogelijk te verminderen of te verzachten."*[456]

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450 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. **Verslag: Vereniging voor Gezondheidsrecht** (10 April), 27.

451 a paraphrased summary of this quotation is: Regarding a child's action against his parents for the fact that they allowed him to be born impaired, it is suggested that restraint be applied. The moral and social pressure that would mount on parents to abort an impaired foetus would be an infringement of the individual's right to freedom of choice and procreation.

452 *op cit* p 69.

453 as no person can evaluate the condition of non-existence.

454 as the plaintiff logically cannot be placed in the position he was before.

455 see compensation theories in ch 2.

456 *op cit* p 69.

In answer to the question how a plaintiff's diseased or impaired condition can be related to the subsequent claim for damages, Schoonenberg[457] writes that these injuries should be marked as physical injuries[458] in terms of section 1407 of the Dutch Civil Code. She argues that although the physical injury was not directly inflicted by the physician, his negligence nevertheless caused the impaired condition and should therefore be accounted to the physician as each time the 'potential injury' materialises.

Frenk,[459] reflecting on the recent Dutch decision, explains that although no non-patrimonial damages were awarded *in casu*, it would be in fact possible where plaintiff can prove an actual injury, which is more than mere intense psychological discontent.

10.4.2.2 Causation

It is reported[460] that Leenen acknowledges that damage can in a legally-technical sense be suffered long after the damage causing event has taken place. In wrongful life this would be the instance when the plaintiff actually experiences his injury, namely at birth.[461]

> *"De onrechtmatigheid van de gedraging van de arts tegenover het kind schuilt dan in het feit dat de behandelend arts van de ouders de redelijkerwijs voorzienbare belangen van het ongeboren of ongeconcipieerde kind bij zin beroepsuitoefening onvoldoende in aanmerking heeft genomen."*[462]

In conclusion it is submitted that in the Netherlands, a statutory basis for wrongful life liability exists:[463]

> *"Wanneer men met mij aanneemt dat het kind in bovergenoemde situasies letselschade in de zin van artikel 6.1.9.11a Ontw. Inv. Wet lijdt, kan alleen het kind zelf vergoeding van de kosten van voor hem of haar benodigde medische voorzienningen vorderen. De ouders hebben dan - uit eigen hoofde - slechts een vordering voor zover*

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457 61.

458 *"letselschade".*

459 1997. Schadevergoeding na ongewenste zwangerschap door medische fout: HR 21 februari 1997, RvdW 1997, 54C **Nieuwsbrief BW** (7:5), 52.

460 Schoonenberg *op cit* p 70.

461 although the physician's negligence caused the injury even before the plaintiff was conceived.

462 *ibid.*

463 Schoonenberg *op cit* p 70.

zij die kosten hebben betaald (37). Daarnaats kan het kind op grond van artikel 1407 BW en artikel 6.1.9.11a Ontw. Inv. Wet jo. Artikel 6.1.9.11, lid 1 sub b, NBW smartegeld vorderen."[464]

10.4.3 Importance of social services

Schoonenberg[465] is convinced that the recognition of wrongful life and wrongful birth actions in the Netherlands will not have the feared detrimental result expected by some.[466] She explains that the main head of damage in wrongful life is that of medical expenses for the handicapped/ diseased child, which would to a large extent be covered by societal support systems such as the AWBZ.[467] Children[468] with maintenance needs will similarly be entitled to a AAW allowance. Because these institutions do not have a right of recourse against the wrongdoer and since a judge in a wrongful life action will doubtlessly take the plaintiff's social benefits into account, no dramatic effect on professional insurers are expected. Schoonenberg is also confident that other heads of damage, such as claims for satisfaction will not unnecessarily burden insurers, as Dutch courts award modest immaterial damages.[469]

10.5 Conclusion

Gevers and Leenen[470] views the wrongful life action as the equivalent of the wrongful birth

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464 A paraphrased summary of this quotation is: If one agrees that a wrongful life plaintiff has in fact suffered damage ito sec 61911a, only the child itself would be entitled to claim for these expenses. Its parents would merely have a claim of their own for expenses already incurred. The plaintiff-child should additionally be able to receive satisfaction for pain and suffering ito sec 6.1.9.11b of the New Ducth Civil Code.

465 *op cit* p 75.

466 concerns have been expressed that too wide and superfluous liability will have the end result that certain risks will not be insurable.

467 a social support handout given to needy citizens.

468 up the age of 18 years.

469 reference is made to the unacceptable American position where, *eg* an award of $ 900000 was given in the **Curlender** case (*infra)* - it is reported that awards of more than fl.100000 is seldom given, and usually much smaller awards are allowed for immaterial damages.

470 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 11.

action,[471] with the only difference that the action is instituted by the impaired child itself.[472]

Leenen[473] is therefore of the opinion that wrongful life actions could succeed in the Netherlands:

> "Een wrongful birth action van de ouders en een wrongful life action van het kind tegen een schadeveroorzakende derde lijken mij ook naar Nederlands recht mogelijk. Bij een wrongful life action van het kind tegen de ouders ligt de situatie ingewikkelder."[474]

11. Legal position in South Africa

11.1 Background

The majority of medical malpractice cases in South Africa are settled out of court.[475] Claasen[476] communicates in support, that although several wrongful life actions have been instituted in South Africa the vast majority have been settled. The effect of this phenomenon is amplified by a general scarcity of wrongful life litigation up to recent times.[477] Although precious little research and publications on the subject have been done locally when compared to other countries, the existing viewpoints of various legal writers are now considered:

11.2 Local opinions

11.2.1 Blackbeard's opinion

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471 it is submitted that this viewpoint is basically sound, although one should be weary of an over-simplification of matters: see ch 2 for a detail discussion on the inherent differences between the actions.

472 see their consideration of whether these actions would be successful under Dutch law or not, taking into account the limited success of the action in America, as discussed in ch 7.

473 1984. Nieuwe wetenschappelijke ontwikkelingen rond het begin van het leven; problemen voor het gezondheidsrecht. **Tijdschrift voor Gezondheidsrecht**, 116.

474 *Op cit* p 119 - a paraphrased summary of this quotation is: According to me it seems possible to acknowledge both the wrongful birth action of the parents and the wrongful life action of the child against a third party as wrongdoer under Dutch law. The situation becomes more troublesome in the event where a child institutes an wrongful life action against its parents.

475 Strauss. 1991, *op cit* p 245.

476 Claassen, N.J.B. and Verschoor, T. 1992. **Medical Negligence in South Africa** (ch 5) Digma. 94.

477 in a traditionally conservative society.

Blackbeard,[478] in an article published before the first wrongful life action came to the South Africa,[479] foresees two possible problems that local courts might encounter when faced with wrongful life actions. She is of the opinion that firstly it would be difficult to prove causality, since one must depart from the premise that the parents would have opted for an abortion if they were to be confronted with the reality of a handicapped foetus.[480] Secondly, as in most jurisdictions around the world, it would be difficult (if not impossible) to establish and calculate damage.

In spite of her reservations concerning the two mentioned hindrances, she feels that an action should be allowed in cases of extreme retardation or handicapped life. She believes that under such circumstances life could actually be regarded as more disadvantageous than non-existence.[481]

Blackbeard[482] writes that it seems as if advances in medical technology have created a new right for foetuses namely, to be born without the debilitating effect of a reasonably detectable genetic disorder. This deduction finds support in American cases such as **Park v Chessin**, where a fundamental right has been awarded to the unborn "to be born as a normal and functional human being".[483]

The obstacles perceived by Blackbeard[484] might have the effect that wrongful life actions could not be theoretically founded using the traditional negligence tort structure without first making the necessary adjustments. She[485] is of the opinion that the South African legislator has previously foreseen certain circumstances where life would be less preferred than non-existence and she therefore maintains that courts should not have any fundamental problems with accepting this premise in the wrongful life debate. An example of legislation supporting this

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478 1991. *op cit* p 57.

479 see her comment on a recent wrongful life action *infra.*

480 a further obstacle in this regard was the fact that abortions on demand were at that stage still illegal - refer to previous abortion act, ch 3.

481 *op cit* p 74.

482 *op cit* p 59.

483 it is my submission that in the quest for solutions to the plight of the wrongful life plaintiff, one should at least consider the merits of such a novel right and broaden one's paradigm accordingly.

484 concerning the difficulty in calculating damage and problems with establishing a causal link.

485 *op cit* p 69.

statement is the **Abortion and Sterilisation Act** No. 2 of 1975, section 3(1)(c).[486]

In order to establish damage, Blackbeard[487] suggests that a comparative approach be used. This should be done by comparing the financial position of the plaintiff before the damage casing event with the state of affairs directly thereafter. Although no condition of comparison exists for the plaintiff in a wrongful life action before the damage casing event,[488] actual expenses associated with the birth can readily be identified. Regarding the *extent* of damage, Blackbeard[489] perceives that a qualitative difference between the financial position before and after the delict would be similarly difficult to establish. Although the condition of non-existence can not be calculated in a quantitative manner, the medical costs and other patrimonial liabilities can accurately be worked out.[490]

With regards to the question whether the plaintiff's personality interests have been infringed, Blackbeard suggests[491] that the answer is quite obviously "yes". Possible damage posts are: pain and suffering:[492] stress associated with a general feeling of unhappiness:[493] loss of amenities and sometimes even a shortened lifespan. It is reported that in South Africa it seems as if the extent of the psycho-physical loss is generally expressed as a product of the intensity of the physical or affectionate infringement of the plaintiff's personality, in relation to the nature and duration thereof. In application to wrongful life actions, therefore, the plaintiff's loss[494] in this regard will be determined with reference to the degree and nature of the physical or psychological handicap of the plaintiff, which will necessarily differ from case to case.

11.2.2 Boberg's opinion

In expressing his opinion on the possible success of wrongful life litigation in South Africa,

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486 in terms of this act a mother was entitled to obtain an abortion if her child would be born with serious handicaps - see the discussion where this act is compared to the new **Choice on Terminations of Pregnancies Act**, ch 3.

487 *op cit* p 72.

488 because of its unknown condition of non-existence.

489 *op cit* p 73.

490 and should therefore be awarded.

491 *ibid.*

492 because of the inherited impairment.

493 because of a deformed body.

494 the extent of the infringement of the plaintiff's personality rights.

A fundamental issue that should be correctly approached, Boberg[503] states, is the nature of the interest sought to be protected, namely mental suffering and distress. The Aquilian action should therefore not be instituted,[504] but rather the *actio iniuriarum*. Taking this into account, one should agree that it might be too far fetched to say that a physician had *animus iniuriandi*[505] to injure the plaintiff.

Although there would seem to be no other fundamental legal impediments prohibiting the action, Boberg[506] feels that it would at least amount to a very original adaption of existing legal principles to an entirely novel situation. He nevertheless has serious reservations concerning the success of these actions in South Africa.

11.2.3 Brownlie's opinion

Brownlie[507] discusses the question whether South African courts will allow wrongful life actions from a hypothetical[508] perspective. He believes that in order for a wrongful life claim to be successful in South Africa, it is essential that the plaintiff should be able to prove with absolute certainty that the mother would have aborted[509] had she known of any real risk of her future child being born seriously handicapped. If such a claim were to be instituted in South Africa it should be based on the *actio legis Aquilia* because it would be impossible to prove that the physician had *animus iniuriandi.*[510]

> "Unfortunately, our case law provides few guidelines by means of which public policy is determinable, since the truth must be that policy is largely determined at the whim of the presiding judge...Fortunately, a perusal of overseas case law allows us to identify clearly factors which would be involved in a discussion of public policy with respect to a wrongful life claim."[511]

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503 *ibid.*

504 *actio legis Aquiliae* - see ch 2.

505 or *intent* to injure the plaintiff - a prerequisite for the *actio iniuriarum.*

506 *op cit* p 502.

507 *op cit* p 18.

508 at the time of his article, no such case has yet been brought before the South African courts.

509 under the previous **Abortion and Sterilisation Act**, sec 3(1)(c).

510 see, however, Boberg's view on this point *supra.*

511 *op cit* p 21.

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All the elements of delict should subsequently be established. Brownlie[512] recommends that the traditional delictual principles be used in a local approach to wrongful life. These principles are sufficiently elastic to accommodate the wrongful life action in South African law,[513] with little or no distortion of principle.[514] The truth is that South African law compensates on a fault basis and it is thus within this system that the answer is to be found.

11.3 Traditional tort elements

It is important to scrutinize the traditional tort elements in reference to the wrongful life cause of action and then consider legal writers' viewpoints on these principles, in order to see whether these actions could be founded in South African law. According to Blackbeard[515] an action for wrongful life in the South African law should be based on delict.[516] She agrees with Brownlie[517] that the common law *actio legis Aquiliae* should be instituted in order to claim patrimonial damages, whereas she submits, the action for pain and suffering would cover the compensation for the non-patrimonial sphere of loss. In order to establish whether an action for wrongful life would suffice in South African law each element of delict will be examined separately, using a typical wrongful life factual situation:

11.3.1 Conduct

Would consist of a the physician's failure to make a correct diagnosis or a failure to advise[518] his patient of the availability of genetic tests and the option of an abortion.[519]

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512 *op cit* p 33.

513 Brownlie *ibid* believes that the previous **Abortion and Sterilisation Act** limited the application of Aquilian liability by leaving the success of the wrongful life claim essentially at the whim of the mother of an injured child - it was namely quite difficult for the mother of a child to satisfy the prerequisites of the act, in order to obtain a legal abortion: as these restrictions have fallen away with the enactment of the new and significantly more liberal **Choice on Termination of Pregnancy Act**, a greater chance of wrongful life success can be expected.

514 under the previous abortion act it was possible to obtain a legal abortion if the foetus would suffer from any serious handicap or psychological anomaly - in theory, therefore, it was even possible to base a wrongful life action under those circumstances if the supporting facts established a cause of action.

515 1991. *op cit* p 69.

516 see the viewpoint that these actions should primarily be based on contractual principles, relating to breach of contract.

517 *supra.*

518 *ie* to properly inform his patient - see ch 5.

519 Brownlie *op cit* p 19.

The defendant-physician's conduct could also consist of a neglect to diligently perform[520] the specifically required or necessary medical procedure.[521]

11.3.2 Wrongfulness

According to Brownlie [522] the element of wrongfulness may be termed as "that quality of a damage causing event that makes a claim actionable in delict". Since it has been a tool of judicial control over new frontiers of liability with regards to novel litigation in the past,[523] it could in the same way be implemented to address the question of wrongful life. He[524] mentions two possible approaches to determine wrongfulness:

- did A[525] owe B[526] a legal duty? or
- has A infringed a right/ interest of B which the law deems worthy of protection?

Our case law provides few guidelines whereby public policy is determinable in specific, novel circumstances since the truth must be that policy is largely determined at the notion of the presiding judge.[527] Brownlie[528] takes a look at foreign case law concerning public policy considerations relevant to wrongful life actions and then identifies six areas important to any court's decision regarding the question of wrongfulness in these claims:

- sanctity of human life;[529]

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520 or total failure to perform - see the **Edouard** case in ch 6, where the physician forgot to even perform a sterilization.

521 *ie* proper performance of genetic tests; a success sterilization prior to conception of a high-risk foetus; or an effective abortion of such a foetus.

522 *op cit* p 21.

523 such as liability for omissions and pure economic loss.

524 *ibid.*

525 the physician.

526 the plaintiff.

527 who has to perceive what the *boni mores* concerning the matter in question would be.

528 *op cit* p 22.

529 he believes that South African courts would have the same opinion on this matter as expressed in the English case of **McKay** and he doubts whether the United States decisions will be followed - *op cit* p 23.

- defective birth as "damage" in law;[530]
- conceptual socio-legal issues;[531]
- social consequences;[532]
- preservation of the integrity of the courts;[533]
- ideal of compensatory justice.[534]

In conclusion to this issue, Brownlie[535] feels it is both feasible and desirable to label the conduct of physicians under typical wrongful life circumstances as wrongful. There appears to be no public or legal policy considerations contradicting or prohibiting this conclusion.

Blackbeard[536] agrees that the element of unlawfulness is established by asking whether a legal duty on the physician to act in a positive manner in order to avert a damage causing event to another existed and whether this duty was breached by the defendant. If in the legal opinion of society (*boni mores*) there did exist such a duty and the physician neglected to act is this

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530 in the **Gleitman** case the court judged that the conduct complained of did not give rise to any damages recognizable at law - Brownlie, however, thinks that a defective birth may be regarded as *damnum* and argues that if it was not for the physician's negligence, the conditions of impaired life would not have come to fruition and having now matured such condition necessitates pecuniary expenses be indemnified - *op cit* p 25.

531 parents are given the responsibility of making decisions concerning (and to the benefit of) their children - since the statutes regulating abortions and sterilizations do not impose any *duty* on mothers or medical practitioners to abort defective foetuses, there should be no fear that children will sue their parents (because there is no duty on them to abort - *op cit* p 28.

532 Many feel that recognition of wrongful life would place an intolerable burden on physicians - this, however, does not change the fact that it is for the parents to decide whether or not to abort (because advances in medical technology make it possible for physicians to be certain about future birth complications and foetal impairments, parents are placed in a position to make these decisions). Although it can be difficult (in some jurisdictions) to determine when an abortion can legally be performed (for the reasons that only seriously impaired foetuses may be aborted), this issue will not cause any significant problems in South Africa with its new abortion act - see ch 3.

533 This is an emotive and morally complex issue: courts would generally rather have the legislator handle the problem, although Brownlie is of the opinion that the action can be allowed without legislative intervention. He submits *ibid* that the courts' integrity would be further undermined if every difficult task which confronts them was "palmed off" into the legislative sphere.

534 that for every wrong that is committed, there ought to be a remedy - as reiterated in the **Turpin** case.

535 *op cit* p 31.

536 *op cit* p 70.

manner, he then acted in an unlawful manner. She[537] believes that the existence of a doctor-patient relationship is also a factor that could indicates such a legal duty.

11.3.3 Fault

Negligence or *culpa* is established by the objective "test of the reasonable man".[538] A person acts negligently[539] if he acts differently from a reasonable person, who under the same circumstances, would have foreseen the possibility that his conduct could injure another[540] and accordingly would have taken reasonable steps to guard against such occurrence. In wrongful life, therefore, a physician should conduct himself with a reasonable degree of skill and care as would "the reasonable physician in the same situation" in order not to act negligently.[541] The negligent physician's conduct is therefore found to have been ill-judged and inconsiderate under the circumstances.[542]

11.3.4 Causation

Brownlie[543] believes that the relevant test to establish factual causation is the *sine qua non* test or the "but for" test.[544] Legal causation can be determined by applying the test of reasonable foreseeability.[545] He mentions that in the United States the action was allowed without even discussing the matter of causation in some cases, which implies that certain jurisdictions do not have too much trouble in finding a legal nexus between conduct and damage. South African courts could easily follow suit.

Blackbeard[546] writes that unlawful and negligent conduct which resulted in damage to another

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537 *ibid.*

538 see ch 2 and 4.

539 before the element of fault can be considered, a wrongful conduct should already have been established.

540 in his person or property.

541 the level of professionalism by which a doctor's negligence is compared, is the test of the reasonable doctor - South African authority for this principle is the decision of **R v Van der Merwe** 1953 (2) PHH 124 (W), see ch 4.

542 Blackbeard *op cit* p 71.

543 *op cit* p 20.

544 see ch 2.

545 **Masiba v Constantia Insurance Co.** 1982 (4) SA 333 (C).

546 *op cit* p 71.

must legally be seen to have caused the detrimental state of affairs.[547] The neglect of the physician must not only factually have caused the birth of a handicapped or genetically impaired child, but also legally have done so. The consequence of the unlawful conduct should therefore be imputed to a specific person.[548]

11.3.5 Damage

The question on what basis damage should be considered, is often asked. Special damages comprise of actual expenditure incurred and other patrimonial losses suffered to date and can in general be precisely calculated. General damages, on the other hand, comprise of those future expenses and prospective losses which are likely to occur, as well as awards for disfigurement, pain and suffering and (ironically in this context) loss of amenities.[549]

Brownlie[550] believes that the calculation of neither special, nor general damages in wrongful life should be done by the impossible comparison of existence and non-existence.[551] He proposes an alternative solution whereby the measure of damages should be artificially constructed:[552] It is namely suggested that the pragmatism of the **Curlender** court should be followed when awarding damages, where the court artificially constructed a measure of damages by construing the wrongful life cause of action:

> "as the right...to recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."[553]

In order to prove damage in a wrongful life action, Blackbeard maintains,[554] a plaintiff must show that handicapped life is more detrimental than non-existence. She suggests that this is a difficult moral dilemma that has to be answered with reference to public policy considerations.

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547 in **Minister van Polisie v Skosana** 1977 (1) S A 31 (A), the court made use of the *condictio sine qua non* test.

548 *ie* the negligent physician.

549 the plaintiff's claim is based on the fact that his life is not worth living and that non-existence would be preferred.

550 *op cit* p 32.

551 although this fact *per se* should not preclude an award if it were to be applied.

552 whether the collateral benefit rule should apply, is matter of speculation - see the discussion of the benefit rule in ch 2 and 6.

553 at 489.

554 *op cit* p 73.

The question of damage is evidently the most difficult element of the delict to prove in these cases[555] and she believes that this might prove to be the ultimate stumbling block preventing acceptance of wrongful life actions in South African courts.

11.4 Recent developments

Friedman v Glicksman[556] is a recent wrongful life action that came to the South African courts. *In casu* the plaintiff's mother alleged that she consulted with a gynecologist in order to assess whether her unborn child had an above average chance of being born abnormal or physically challenged. If the risks for such an occurrence were to be greater than normal, she was adamant to have the foetus aborted. After conducting various tests the specialist came to the conclusion that Mrs. Friedman had a perfectly normal pregnancy. A few months later a disabled child was born. The mother instituted a wrongful birth action in her own name and a wrongful life claim on behalf of her handicapped child Alexandra. It was stated that the physician acted negligently by breaching his duty to take care, as well as his contractual obligations towards them.

In the ensuing wrongful life action, general damages were demanded together with a claim for the loss of future earnings. After consulting various overseas judgements in this regard, the court made its decision known:

> " Thus the legislature has recognised, as do most reasonable people, that cases exist where it is in the interest of the parents, family and possibly society that it is better not to allow a foetus to develop into a seriously defective person, causing serious financial and emotional problems to those who are responsible for such person's maintenance and well being... In my view the contract entered into between the plaintiff and the defendant was sensible, moral and in accordance with modern medical practice. The plaintiff was seeking to enforce a right, which she had, to terminate her pregnancy if there was a serious risk that her child might be seriously disabled."[557]

Although Mrs Friedman's wrongful birth claim was awarded,[558] the court rejected the wrongful life action on the following grounds:

- the physician-defendant owed no duty of care to the unborn child by giving the child's

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555 see history of cases *supra*.

556 1996 (1) SA 1134 (W).

557 *ibid.*

558 see ch 7.

mother the opportunity to terminate the pregnancy;

- it is against public policy for the *courts* to make the decision whether non-existence is preferred to disabled life.[559] Blackbeard puts the court's view in her own words: "...it would be contrary to public policy for a court to decide that it would be better for a person not to have the unquantifiable blessing of life rather than to have such life albeit marred by disability.";[560]
- it is possible that the acceptance and success of wrongful life litigation against third party physicians might lead to similar actions being instituted against *parents* of handicapped children and such a situation would be intolerable.
- the method used to calculate damages in these actions is inconsistent with the usual method used in delictual claims,[561] as the defendant did not cause the child to be handicapped or afflicted with a hereditary disease.[562]

Pearson[563] comments on litigation flowing from failed abortion:

> "Moreover, the general allowing of abortion of an irreparably seriously handicapped child is indicative of society's response of defective foetuses. Such a response may be generated by the reality that neither the state nor parents can afford the burden of a handicapped child. An extreme illustration is evidenced by Beijing's proposed eugenics law designed to prevent "inferior" births by means of sterilization of the mentally handicapped and abortion of abnormal foetuses."[564]

Pearson[565] believes that, like the wrongful birth action," the action for wrongful life may be accommodated within the increasingly pervasive scope of the *Aquilian* action. It would appear

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559 such a decision should rather be made by the legislator.

560 *op cit* p 713.

561 no person nor court could place a value judgment on the condition of non-existence based on actual knowledge of such a situation.

562 the only possible manner in which damage can be assessed, is to compare non-existence with disabled life - for such a comparison certain criteria of *both* possible situations must be known to mankind, which *in casu* is not.

563 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 94.

564 he quotes the Public Health Ministry in **Time** 2 May 1995, 54 stating: "The law will serve to prevent or reduce the number of births of seriously sick and disabled children".

565 *ibid.*

that the aforementioned delictual elements are satisfied in wrongful life actions."[566]

He writes[567] that although the future remains indeterminable, it is necessary to keep abreast of the constantly evolving *boni mores* or sense of justice in the community and accordingly suggests that wrongful life should be recognized by South African courts in the future.[568]

It is suggested[569] that, in accordance with the plaintiff's contention in the Glicksman case, the proper measure of damages should be "the determination of an amount necessary to compensate the child for having to live in a disabled state and should not be the difference between non-existence and a disabled existence".

Furthermore, it is argued that "the **Choice on Termination of Pregnancy Act** has clearly made an inroad into the sanctity-of-human-life principle by in effect recognising, even at an advanced stage of pregnancy, that non-existence is preferable to an irreparably seriously handicapped life."[570] Because both the claims for wrongful life and wrongful birth, rest on the premise that the child's mother would have procured an abortion had te information regarding the child's defective condition been available to her, it is concluded:[571]

> "Thus, the wrongful life claim appears to rest on the whim of the mother. Whilst anomalous, this situation ....does not preclude the possibility of the action arising".

Blackbeard[572] conveys that the court considered American decisions such as **Becker v Schwartz** and **Park v Chessin**[573] where the impossibility of comparing no life with impaired life was acknowledged but the actions nevertheless allowed, as it was considered unnecessary for the plaintiff child to prove this comparison.

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566 *op cit* p 105.

567 Pearson, *ibid.*

568 "If courts have gone so far in some cases as to no longer view birth as a "blessed event", how far behind is another court decision that favours a cause of action on the grounds of "wrongful life"?

569 *op cit* p 106.

570 *op cit* p 107.

571 *ibid.*

572 1996. Actions for wrongful birth and wrongful life. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg**, 713.

573 *supra.*

She[574] reports that with regard to the wrongful life action, there could be no claim in contract, as the child's legal personality only commences at birth and because an agent cannot claim on behalf of a non-existing principal. The agreement between the plaintiff and physician can neither be moulded in a contract for the benefit of a third party, as the third party could only accept the alleged benefit[575] when it was no longer possible.[576]

11.5 Evaluation

It can reasonably be expected that a broadening of liability with regards to wrongful life actions will occur as medical technology and genetic studies advance. The more thorough and accurate genetic tests become, the more implicit will the resultant duty be on a physician to properly inform parents on the risks associated with their potential future or yet unborn children. If a genetic disorder or serious hereditary disease could accurately be predicted and the results thereof be totally relied upon, it is obvious that a legal duty will firmly rest on the physician or genetic counsellor to communicate these facts to the parties involved. Liability should then follow where the damage is obvious[577] and the defendant's conduct was grossly negligent.[578] Divergent viewpoints remain:

De Vries and Rifkin[579] are of the opinion that in cases were damages for wrongful life claims have been awarded in the past, it was done because of philanthropic reasons and considerations of equity. They do not believe that the action will ever be entirely accepted on pure legal considerations.[580]

Teff [581] declares that allowing wrongful life actions does not deny the value and worth of a human life. In fact, he argues, it is the acknowledgement of handicapped people and their

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574 Blackbeard, *ibid.*

575 *ie* non-existence, as the pregnancy would have been terminated.

576 see ch 2, where the merits of this very possibility is discussed.

577 because of serious physical or psychological impairments or a genetic disease with considerable consequences.

578 Hughes. 1987. **Tort and Insurance Law Journal** 585.

579 *op cit* p 221.

580 they report, however, that "several recent cases" allow recovery of special damages.

581 *op cit* p 440.

value in society that results in the need to protect the rights of disadvantaged people.[582]

Brownlie[583] reaches the conclusion that because compensation is awarded on the basis of fault in South Africa, a wrongful life claim should succeed. He suggests that the *actio legis Aquiliae* be used.

Bey-Berkson[584] reports on different views[585] concerning wrongful life:

> "Troublesome damage issues in wrongful life cases could be ignored for policy reasons so that a court can deal with the reality of a defective child who needs care and attention."

In purporting his view on wrongful life, Hughes[586] writes:

> "Liability seems appropriate only where the damages are apparent and extreme, and the physician was obviously negligent. A wrongful life cause of action should not be an insurance policy. It is a method of compensation for the damages arising out of wrongful conduct. Taking these limitations into account, it seems logical that wrongful life actions should be available where the traditional tort elements exist."

Cheslik[587] states:

> "While computing a dollar amount for the value of a child's aid, comfort, and society is a difficult task, courts have routinely asked juries to make such determinations in loss of consortium and wrongful death cases."

Personally, although I feel that a seriously impaired wrongful life plaintiff should be

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582 courts are commonly called upon to enforce these rights - much litigation therefore follows in instances where these rights are breached, incl wrongful life actions.

583 *op cit* p 33.

584 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 69.

585 Annas, *Righting the Wrong of "Wrongful Life"*, 11(1) Hastings Center Report 8 (1981).

586 1987. Recognition of Wrongful Life Actions: Trend or aberration? **Tort & Insurance Law Journal** (22), 585.

587 1985. Wrongful Conception. **F.I.C. Quarterly**, 302.

accommodated,[588] have serious reservations as to the chances of wrongful life success locally within the next few years. Not only have the local courts denied the action recently,[589] but alarmingly few judgments in all of the wrongful life history have thought differently.

Vital challenges[590] remain to bar the acceptance of the action when traditional tort elements are applied. On the other hand, it must be said that the overwhelming majority of the "traditional arguments" raised against the action are superficial or originated from a misconceived understanding of the true basis of wrongful life.

The mayor influence of the enactment of the **Choice on Termination of Pregnancy Bill** on the wrongful life issue should also not be underestimated. The liberal viewpoint concerning abortion taken by this statute and the emphasis placed on a women's freedom and right to choose,[591] definitely advances the cause of future wrongful life plaintiffs. It is further true that the wrongful life issue has not yet advanced to the highest court in South Africa,[592] nor has the matter been considered by Constitutional Court. The final word has therefore not yet been spoken.

I believe that as medical technology advances and as society's opinions on relevant issues evolve over the years,[593] increasing pressure will be placed on courts and the legislator to come up with a solution to this very real problem of the wrongful life plaintiff.[594]

12. Summary

It is commonplace that much confusion and uncertainty remains to exist in the minds of legal

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588 these plaintiffs are real people, who often genuinely suffer a great deal because of another's negligence.

589 **Friedman v Glicksman.**

590 such as the impossibility to establish damage and public policy considerations prohibiting limitless liability - see *supra.*

591 which rights are protected in the constitution - see ch 9.

592 the High Court of Appeal situated in Bloemfontein.

593 the South African public sentiment with regards to abortion, for example, seems to have changed quite dramatically over the past few years (with the general acceptance of one of the world's most liberal abortion laws).

594 ever since the enactment of the new constitution, it seems as if South Africans have generally become more aware of their rights - a direct result of the dawning of a new human rights culture touching every aspect of life.

writers and judges alike, with regard to the entire wrongful life issue. The incorrect application of wrongful conception and wrongful birth actions principles used in solving wrongful life actions, contributes to this problematic state of affairs. A possible explanation for this phenomenon is the fact that all these actions are based on principally the same public policy considerations, namely the value of human life and the worth of a handicapped life.

Maybe Snyderman[595] is correct as she expresses her view on wrongful life:

> "Every question involves serious legal, ethical and moral considerations that may never be satisfactorily resolved by the courts or the legislature. Undoubtedly, however, courts will continue to recognize these torts in varying degrees - a mixed blessing of increased individual rights coupled with skyrocketing medical costs."[596]

Because of the changes in public opinion over the years and specifically the recent trend in recognising euthanasia[597] and other taboos of the past,[598] courts are progressively inclined to make more liberal decisions. There now seems to be more reason than ever to allow the wrongful life cause of action, based on the fact that public opinion no longer questions the vital basis of the claim.[599]

Weiss[600] concludes:

> "Because the tort system should recognize all injured parties and compensate them fully for all their injuries, both wrongful birth and wrongful life claims should be recognized and full compensation awarded. However, a legislative program similar to workman's compensation or no-fault car insurance is an alternative - and perhaps better - solution."[601]

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595 1982. Wrongful Life and Wrongful Birth Claims: Judicial Recognition and Acceptance. **Medical Trial Technique Quarterly**, 15.

596 *op cit* p 30.

597 the "right to die" has recently been acknowledged in various countries, wich implies that there do exist certain circumstances where life is no longer worth living, nor preferable.

598 *ie* pre-conception injury, abortion on demand *etc.*

599 *ie* that life itself could be an "injury".

600 1987. Wrongful Birth and Wrongful Life: In search of a logical consistency. **Annual Survey of American Law**, 507.

601 *op cit* p 522.

CHAPTER 9

Philosophical Aspects

1. Introduction

Although the primary focus of this study is placed on the legal implications of wrongful life litigation, these actions also entail many complicated philosophical, moral and religious questions. Some of these issues raised in previous chapters will now be addressed on an *ad hoc* basis and from a philosophical viewpoint.

Cobben[1] philosophises on legal development by asking: Is that which is technically possible also ethically-socially acceptable? Does that which is technically possible and ethically-socially acceptable deserve juridical recognition and protection?

> *"Is wat technisch kan, ook ethisch-sociaal toelaatbaar? Verdient wat technisch kan en ethisch-sociaal toelaatbaar is, ook juridische normering en sanctionering?"*

Einhenser[2]suggests that within the past several decades the judiciary has increasingly become involved in the decision-making process of several "moral" issues. Einhenser believes that this "judicial activism may be an attempt to close the gap between what is referred to as 'moral order' and the law."

2. Diverse philosophical questions

2.1 Medical assessment of the value of human life

Sheperd[3] is of the opinion that society today relies too much on medical technology and the medical fraternity's ethical norms and perceptions in response to human suffering. He criticises their unacceptable viewpoint that futility of a patient's circumstances entitle them (as medical

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1 1997. Autonomie versus zorgplicht. **Nederlands Juristenblad** (11:72), 479.

2 1984.Wrongful Conception - Recovery of child-rearing expenses is denied when the purpose of sterilization was therapeutic, not economic. Hartke v Mc Kelway. **Journal of Urban Law** (61), 655.

3 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Damme Law Review** (72:1), 103.

experts) to withhold medical attention in extreme cases:

He[4] feels that society has essentially adopted a medical model in it's response to suffering, involving medical definitions and perceptions of suffering, medical perceptions and tolerances of risk, and medical solutions to suffering through technology. He believes that science has created some of the expectations about how life should be, thus causing us to turn to science to realize those expectations for us. He is concerned about suffering (or perceived suffering) caused by natural circumstances and especially how we look to medical science to provide the means by which to judge what we have been dealt (by nature) and determine *if it falls below a certain level of acceptability.*[5]

> "...we look to medical science to provide the means by which to judge what we have been dealt *(by nature/ circumstances)*[6] and determine if it falls below a certain level of acceptability."[7]

Shepherd[8] pronounces that in addition to providing it's own definitions of suffering, medicine also prescribes tolerances for medical risk.[9] He mentions that these prescriptions are quite conservative and then illustrates his statement with the fact that genetic counsellors and physicians often see a certain genetic risk as intolerably high, were parents may be more willing to accept them. The medical response to suffering is to alleviate it, and if alleviation is not possible, to avoid it:[10]

> "The risk/ benefit analysis medical professionals conduct to determine whether a therapy or treatment should be undertaken necessarily and understandably opens the discussions for quality of life assessments."[11]

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4 *op cit* p 126.

5 for a detailed discussion on "the minimum level of quality of life", and the relevance of this measure for wrongful life actions, see *infra.*

6 my emphasis - note that circumstances could be perceived as harmful.

7 *op cit* p 127.

8 *ibid.*

9 even the use of the term "risk" implies value judgements, when compared to a more neutral term such as "chance".

10 in wrongful life terms, to avoid the suffering that will result form a seriously disabled life, by aborting the affected foetus in time.

11 *op cit* p 129.

In this regard, he explains that the medical profession initially were driven only by the duty to preserve life at all cost, while doctors of today first take into account the quality of the life that will be preserved. Shepherd[12] warns that this could be a dangerous practice because the assessment of statistics, probabilities, and risk does not take into account any personal criteria for quality of life, such as relationships, religious beliefs, ethical norms, the personal tolerance for pain, strength or the desire to live. Where a life or death decision must be made, the justification depends on an assessment of quality of life and the decision must be based on the values of the individual patient, and not the physician's values.

> "Futility is the justification physicians rely on to refuse to perform or advise patients against certain treatments, generally life-prolonging treatments...Futility, as applied, means that the doctors do not think the treatment will enable you to have a *good enough life*.[13] If the medical profession cannot give you a better life, then perhaps you should have no life at all."[14]

This last thought is also discussed[15]by another author.[16]

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12 *ibid.*

13 My emphasis - the question as to what a "good enough life" is, is extremely complex and simply does not have a straightforward answer: the main reason for this complexity is that to each person different matters are important and each individual experiences life from an unique perspective (and accordingly, many subjective factors must be taken into account). In this respect we can criticise courts who in the past have found that "life is always preferred", as oversimplifying a immensely complicated philosophical debate, see ch 8.

14 *op cit* p 131.

15 In both instances it is suggested that life, under certain detrimental circumstances, could possibly not be worth living. Shepherd explains that society no longer makes such value judgments on grounds of morality, but has rather acceded to the perspective of medical science. Morreim, on the other hand, explains that the mere fact that an individual suffers, could under certain circumstances constitute harm by itself. In order to establish such harm, one must be able to draw a minimum line of acceptable human living standard. Establishing this minimum standard involves a variety of different value judgments.

16 See Haavi Morreim *infra*. He criticises the current method of assessing damages and proposes a totally new theory for establishing harm. One of his solutions is to attribute to each circumstance of life a certain minimum level of acceptability. If a person should fall below this socially acceptable level, a status harm results and this person is in principle entitled to restitution.

A difficult problem to solve in this respect, is to find a scientifically defendable theory with wich "levels of acceptability" can be formulated and assigned - according to Sheperd, it would not be wise or acceptable to use the norms dictated by medical science.

Clarke[17] comments on society's view on reproduction and genetic disorders, as influenced by expectations created by medical science:[18]

> "The notion of social responsibility in reproduction, coupled to the mistaken but increasingly popular belief that almost all genetic disorders and other causes of 'handicap' can be prevented by terminating affected pregnancies, is leading to the expectation that all babies will be biologically perfect. Where a baby is 'flawed' there must be someone to blame; if the medical profession has not been negligent, then it must be the parents' fault for not having had 'the tests', or for not having terminated the pregnancy. Such attitudes could have serious repercussions for the provision of care by society for those with congenital malformations and genetic disease."[19]

Wertz[20] comments on the thoughts of Brock[21] who claims that there are other cases - compatible with a worthwhile life - where the parents have "a moral obligation to prevent the genetically transmitted disability". He calls these cases "wrongful disability" or "wrongful handicap" and argues that parents have a moral obligation to prevent such disabilities before conception, by conceiving with a different person.[22]

Werts[23] submits that:

> "The weakness in Brock's argument is that he assumes that it is possible to draw a line between 'lives not worth living' (wrongful life) and 'wrongful handicaps'. If it is a moral duty to abort a life not worth living, this duty may inevitably spill over into cases of wrongful handicap. Also, who will decide which disorders belong in which categories and how will this affect genetic counseling?"

2.1.1 An alternative estimation of life's value

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17 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge.

18 which Shepherd *supra* warns against.

19 *op cit* p 19.

20 1997. Is there ever a moral duty to use prenatal diagnosis and selective abortion? **The Gene Letter** (2:1), 1 (Found on Internet at: http://.geneletter.org/0897/prenatal.htm).

21 Brock expressed these ideas at a May 26-29 conference on Eugenic Thought and Practice at Tel Aviv University, Israel.

22 different mate, donor sperm or donor egg.

23 *ibid.*

Morin[24] discussed the relevant question: what is the correct means of calculating the value of a human life? In his report, he refers to the formula of an economist, Feldman,[25] who believes that calculation begins by asking individuals how much they would be willing to pay to extend their life for a finite period of time. Feldman's theory is in the minority, however, as most economists calculate the value of a human life by examining how much an individual is willing to pay to reduce the risk of death. It is reported that the courts similarly use this "human capital model" to determine damages in cases of wrongful death. It is submitted that "this [theory] views people as a machine - a stream of income."

Scheid[26] conveys an interesting perspective regarding this assessment of the value of life in wrongful death cases, as opposed to wrongful birth cases:

> "Consequently, it would be inconsistent for a court to simultaneously assert in child wrongful death cases that parents have bee deprived of something essentially worthwhile (the love, companionship, affection and joy that a normal and healthy child brings to the family) but then, in a wrongful birth case, to award parents damages for the cost of raising the child to majority."[27]

It is suggested in criticism of that the "human capital mode"l does not correctly assess what people are willing to pay to avoid death as the model does not count and figure how people enjoy their lives.[28]

2.2 Background to the right of the child not to be born

Veerman[29] comments on philosophical ideas expressed by the Swedish writer, Ellen Key, who wrote early in the century about the rights of children. Ellen Key were, amongst others, influenced by Herbert Spencer (1820-1903), who's philosophy entails that the individual's

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24 1998. Economist Feldman takes different route toward assessing value of a life. **George Street Journal** (Found on Internet).

25 as the report was obtained from the Internet, no further references could be found, although it is submitted that this would not in any way minimise the application value of the theory on wrongful life actions.

26 1985. Benefits vs. Burdens: The Limitation of Damages in Wrongful Birth. **Journal of Family Law** (23), 57.

27 *op cit* p 96.

28 it is my submission that, taking into account the subjective nature of valuing life, these are valid points of criticism.

29 1992. The Rights of the Child and the Changing Image of Childhood. **International Studies in Human Rights** (18), 75.

aspirations must be judged after taking into consideration the effects they will have on the lives of future generations.[30]

In 1900 Key published her book "The Century of the Child", in which she describes the child's first right, namely: "The right to choose your parents wisely". In this work, she argues for the prohibition of those with inherited physical or psychical diseases, to transmit these impairments to their offspring. Although it is impossible for a child to actually make a decision on who his parents should be, the abovementioned right basically means that a man and woman, about to conclude a union that could result in the birth of a child, must ask themselves seriously whether their own physical and spiritual constitution gives them the right to suppose that such a child would be physically and spiritually healthy.[31]

The basic idea of children having a right to be born "of a sound body and mind", is, as most things in life, not a new concept. Even before Key's work in this regard, Frances S. Hallowes wrote in 1896 on prospective children's rights to be born into the world in a healthy condition.

In support of her children rights theories, Ellen Key believed that the right to family planning fundamentally belongs to the child. Accordingly, when dealing with the question of a right "not to exist", the right of the child "to choose it's parents" can be re-formulated as the right of the child "not to be born",[32] should prejudicial circumstances prevail.

2.3 Life free from suffering

Shepherd[33] explains that American society has created a new type of right, namely the right to be free from suffering. He warns us about the dangers of such developments (in an unrestricted form) and suggests reasons for it's emergence, as well as guidelines by which to approach it.

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30 the relevance and reality of this philosophy is seen in the efforts of many parents when making responsible and informed decisions concerning future children - irresponsible decisions to conceive children cause much suffering and heartache.

31 *ie* instead of emphasising the right of the parents to have children, consideration should be given to the necessary duties and responsibilities that parenthood entails - which would include responsible choices concerning hereditary traits and genetic diseases.

32 this right is generally acknowledged to be the basis of wrongful life actions - see ch 8.

33 *op cit* p 126.

He states[34] that the medical science has developed to such an extent that one can, in a great number of cases, accurately predict future suffering by means of proper diagnosis.[35] By applying medical technology, a physician can choose to escape suffering by either avoiding[36] or eliminating[37] the life of the one who suffers or will suffer. This is often the best solution physicians, compelled by their seemingly expanded role as "participant" in the process of dying, can offer their unfortunate patients. Shepherd[38] criticises society's apparent willingness to concede to this (purely) medical approach, without considering other perspectives and interests.[39]

2.4 Euthanasia

Also at the end of life, people are (under certain circumstances and in certain countries)[40], given the right to die:

> "In such instances the basis of the rights espoused is the principle that people should not be required to suffer when the means are available to end or altogether avoid such suffering, even if such means are ending the life or avoiding the life of the one who will suffer."[41]

Shepherd[42] has the following opinion on how society's acceptance of medical values and

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34 *op cit* p 127.

35 *eg* by means of an amniocentesis test, a foetus with a fatal or exceptionally vicious genetic disease can be detected, or a patient with a terminal disease can be identified - see ch 11.

36 in wrongful life actions it is stated that a plaintiff's life should have been avoided (by abortion or by not being conceived), because of the great suffering his life would entail.

37 the right to be free from suffering (sometimes utilized to support wrongful life actions), is similar to the line of though used to advocate euthanasia or the right to die - see the discussion on similarities between the right to die and the right to be free from suffering in ch 8.

38 *op cit* p 129.

39 *eg* that a handicapped person might enjoy life, despite his physical condition.

40 see the discussion on euthanasia in ch 8.

41 Shepherd, *op cit* p 116.

42 *op cit* p 116.

standpoints against suffering, can support and ultimately lead to the recognition of a right to die:

> "Despite longstanding assumptions in favour of life, however, the culture of medicine is undergoing a change in its understanding of the relationship between life prolongation and suffering. Where medicine *cannot* provide a means of prolonging life and *cannot* significantly improve the quality of life of the very ill, medicine is increasingly open to the idea of *relief from suffering through death*, which is a shift from the mere acceptance of an increased risk of death occasioned by the use of painkillers (the doctrine of "double effect")."

Hubben[43] is of the opinion that Dutch supporters of euthanasia incorrectly believes that the *Hoge Raad* decision of 28 April 1989[44] favours their point of view. He reports that the decision has merely set the circumstances under which treatment to a handicapped newborn may be suspended, these are: if a real chance exists that treatment will cause the child excruciating pain and where treatment is futile and merely postpones inevitable death.

Brahams[45] draws an interesting parallel between the phenomenon of euthanasia and that of wrongful life. He reports that although euthanasia remains a criminal offence in the Netherlands, physicians who conform to certain narrow guidelines are unlikely to be prosecuted or disciplined.

Foutz[46] conveys:

> "In light of recent right-to-die cases, courts now have precedent for acknowledging that life, in some circumstances, is not always preferred. By allowing a "wrongful life" action, courts can further the objectives of tort recovery. Not only will injured children be compensated, but more importantly, adequate genetic counselling will be encouraged."

Brahams[47] writes:

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43 1989. Levensbeëindiging bij ernstig gehandicapte pasgeborenen. **Nederlands Juristenblad** (25), 914.

44 where a physician was not held accountable for his patient's (a handicapped newborn) death.

45 1990. The reluctant survivor. **New Law Journal** (140:6453), 586.

46 1980. Wrongful Life: The Right not to be born. **Tulane Law Review** (54), 499.

47 1990. The reluctant survivor. **New Law Journal** (140:6453), 586.

> "Analogies with claims for expenses incurred for bringing up loved but unplanned and unwanted babies, healthy or otherwise, which may on occasion include private school fees suggest that a negligence claim for damages for failure to deliver euthanasia would be logically sustainable."

2.4.1 Better of dead?

Steinbock and Ron McClamrock[48] conveys that to establish damage in wrongful life is more complex than the case is when a terminal patient requests euthanasia, as a competent adult could rationally judge that he is better off dead.[49]

It is rightly submitted that this test, cannot be applied in the case of infants, because infants cannot express their preference and do not have the intellectual capacity for having the relevant preferences.[50] For this reason an objective decision should be made on behalf of the infant to determine whether life would be worth living or not.[51]

Labuschagne[52] refers to Heifetz and Mangel and argues that a right to euthanasia should be recognized, as we have reached a new level of civilisation wherein one need not endure unnecessary pain and suffering.

> "We must weigh the validity of that future subhuman existence, the right to maintain that life, against the sadness and cruelty imposed on parents and siblings living with a subhuman organism."[53]

2.4.2 Suffering as an injury

Shepherd[54] further states that unprecedented claims to rights, based on the avoidance of suffering, are being made and recognized by both courts and legislators. He remarks that suffering has thus become a sufficient condition for a right. He concludes that therefore, there

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48 *op cit* p 16.

49 and consider life not worth living.

50 *ibid.*

51 and to promote his or her general welfare.

52 1988. Dekriminalisasie van eutanasie. **Tydskrif vir Suid-Afrikaanse Reg**, 167.

53 *op cit* p 193.

54 *op cit* p 104.

need no longer be a tortfeasor,[55] neither any harm[56] caused by society, nor any inequity, for a suffering individual to claim relief.

This right "not to suffer" has far reaching consequences, as articulated by Shepherd:[57]

> "...the right to avoid suffering is not merely a right to be let alone and instead entails duties of affirmative action on the part of others; the stronger the right becomes, the more the corresponding duties will require affirmative action. Thus, the right not to be born, requires that physicians predict and evaluate the risk and degree of suffering of children yet to be born and requires that prospective parents act on that information to avoid the suffering of children. The right to die, requires that physicians assess the degree of suffering that a patient is experiencing or will experience and prescribe the relief sought *if that suffering is adequately severe.*[58]"

At another place, Shepherd[59] suggests a combination of two developments to explain the emergence of claims based on the so-called "right no to suffer". They are:

- society's increasing acceptance and *expectation* of technology-based[60] solutions to human problems; and
- the development of a collective conscience- a community empathy for other individuals in matters of personal well-being.[61]

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55 it is my submission that although this is true of euthanasia cases, this contention does not apply to wrongful life actions, where the harm is caused by a wrongdoer (if the action is based on delict), or the guilty party (in breach of contract) - see ch 2.

56 see *infra* where an alternative definition for harm is discussed and "new" classes of harm are introduced.

57 *op cit* p 105.

58 my emphasis - refer to ch 8 where it is proposed that only plaintiffs who "suffer severely enough" be allowed to claim in a wrongful life action.

59 *op cit* p 126.

60 in his own words: "Science is in effect an attempt to know the world; technology is the tool through wich scientific principles are applied. While science is based on the idea that the world is knowable,...technology is based on the idea that we can bring about purposeful change; it is knowledge that is applied." *op cit* p 126

61 "In the collective conscience, we share not only a growing awareness of the suffering, and especially the visible suffering, of others, but a growing sense of responsibility to help others avoid avoidable suffering. We find conceptual support for this heightened social responsibility in such theories as the feminist ethic of care. The ethic of care requires attending to responsibilities and relationships, rather than attending to rights and fairness (the ethic of justice)." *ibid.*

Shepherd's view on the right not to be born[62] is now discussed in more detail.

2.5 Pro-wrongful life and anti-wrongful birth

The viewpoint of Anthony Jackson[63] concerning the value of wrongful life actions on the one hand, contrasted against the damaging effects of wrongful birth actions on the other hand is a concept that is shared by other commentators[64] as well:

> "..Wrongful birth actions are highly denigrating to the child and to the handicapped population in general, whereas wrongful life actions allow compensation to the child whose suffering outweighs the benefits of life."

While the wrongful birth suit provides recovery for the parent's injury, it does not address the suffering of the child.[65]

Courts have in the past granted children the right to be born with a sound mind and body,[66] [67] in order to allow torts suffered prenatally. Shepherd[68] observes that what the courts were trying to do, was to protect the child's right to be free from harmful bodily interference from third parties while *in utero*. The courts, however, had to refrain from saying that *foetuses* had rights,

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62 the very basis of wrongful life actions.

63 Jackson, A. 1995. "Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England." **Loyola of Los Angeles International and Comparative Law Journal** (17:2), 535.

64 *eg* Schoonenberg, (see ch 8) who is of the opinion that wrongful life actions should have a greater chance of success in the Netherlands than wrongful birth actions (although wrongful birth has generally received much wider acceptance in other jurisdictions) - see ch 7.

65 He states that damages in a wrongful birth action will generally only cover the life of the child to majority. At that time the parents are (under state law) no longer responsible for providing care for the child. Disability may extend the parent's responsibility for their children's needs beyond minority, but the prediction of such continued disability and it's degree of severity must be made years earlier at the time of the parent's wrongful birth suit. The test laid down by the Supreme Court of California, is whether it can be proven at the trial if the disabled child would be able to maintain himself by work on reaching adulthood.

66 **Smith v Brennan**, 157 A.2d 497, 503 N.J. (1960) - holding that "...justice requires ...that an infant has a legal right to begin life with a sound mind and body" and **Womack v Buckhorn**, 187 N.W.2d 218 Mich. (1971), also ***In re* Baby X**, 293 N.W.2d 736, 739 Mich. Ct. App. (1980).

67 it appears as if this right is based upon a right to be free from reasonably avoidable suffering.

68 *ibid.*

since the injury complained of may have occurred at a time and under conditions when the mother may have legally terminated the pregnancy.[69]

2.6 Foetal rights?

Jecker[70]states that the duty owed by hospital and physician to this infant presumably arises in virtue of the fact that the conduct in question caused foreseeable harm to the child in question, despite the fact that at the time misconduct took place, the infant had not yet been conceived.[71] She believes that a different approach to the duty issue in wrongful life claims is that the duty owed to parents extends derivatively to child.[72]

It is conveyed[73] he ascription of a right not to be born to plaintiffs in these cases implicitly assumes the position that possible persons have rights.

According to Jecker,[74] recognition of plaintiff's right not to be born with certain opportunities foreclosed logically entails recognition of the rights of persons who never exist. She argues:

- if a person, *p,* is the bearer of a right, *r,* then *p* is the bearer of *r* regardless of whether *r* is or is not successfully exercised;
- suppose that some person, *p1,* who exists at the present time has a right, *r1,* not to have been conceived or born with important opportunities foreclosed; and suppose further that *p1* has some deformity (*eg* spina bifida) that would inevitably foreclose important opportunities for *p1*;
- given (2), it follows that if *p1's* parents knew about her spina bifida beforehand, and if it were also the case that *p1's* right not to be conceived or born with certain opportunities foreclosed had been successfully exercised, the *p1* would never have come into existence - *ie p1* would be a possible person who never exists rather than a possible person who exists;
- then, given (1), if the actual person, *p1,* has a right not to have been born with certain

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69 through abortion - legalised since **Roe v Wade** 410 U.S. 113 (1973).

70 1987. The Ascription of Rights in Wrongful Life Suits. **Law and Philosophy** (6), 149.

71 *op cit* p 150.

72 the reasoning in **Schroeder v Perkel** 432 A. 2d 839 (1981).

73 Jecker *op cit* p 153.

74 *op cit* p 154.

opportunitie foreclosed, so does the possible person that *p1* "would have been" (so to speak) if *r1* had been successfully exercised.

She[75] gives an example:

> "If members of a nation A agree that starving persons living in nation B have a moral right to receive food from them, then if such aid is provided, we would still want to say that the latter individuals are receiving what they are morally entitled to receive. It is hardly plausible to maintain that in cases such as these, where rights are successfully exercised, rights lose their force. We do not suppose, in other words, that an individual's rights come and go, so to speak, depending upon whether the rights in question are or are not successfully exercised in that particular context in which they arise."

Jecker's conclusion[76] is that because possible persons fail to satisfy the family of requirements that are typically put forward as a basis for rights.[77] She remarks that it is absurd to ascribe rights to persons who never exist just because these persons possibly possess interests, sentience, free will, and so on.

2.7 Philosophy behind wrongful birth

Harrer[78] reasons on a philosophical level that wrongful birth parents essentially could not have had another child, conceived at exactly the same time, without a handicap. It would be possible for them at precisely the same time not to have had a child at all,[79] but they could not have had a healthy child on *that* date and time, even if they had the opportunity to go back in the past to have another opportunity to conceive.[80]

2.7.1 Only non-patrimonial damages

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75 *op cit* p 155.

76 *op cit* p 156.

77 *eg* they do not actually or potentially possess interests or the capacity to reason or free will or the capacity to suffer or same combination of the above.

78 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 89.

79 the parents could have used contraceptives.

80 Haavi-Morreim has a different opinion - see *infra*.

Harrer[81] argues therefore, that because wrongful birth parents were willing to conceive a healthy child and also knowingly accepted the costs of child-rearing and the other expenses associated with extending the family, they should not be entitled to normal child-rearing expenses in terms of a wrongful birth action. Only the additional expenses necessitated by the handicapped condition of the child should be justifiably compensated.

The reasoning behind this sound argument is that the disgruntled parents in wrongful birth actions are compensated for their defeated expectations[82] as well as additional rearing expenses necessitated by a handicapped child. They are, however, not entitled to be unfairly benefited through a comprehensive award including maintenance for a normal child, since they were prepared to incur these costs when conceiving the child.

2.8 Alternative to foetal rights

To avoid admitting that foetuses have rights to be free from bodily interference, Shepherd explains,[83] the courts rather used more positive language to solve this problem and referred to a right "to begin life with a sound mind and body". Such a right vests in the child later born alive, and not in the foetus at all.[84]

Shepherd[85] gives an alternative solution by which the courts might have negotiated their way around this problem: By finding that the tort was committed against the mother (as in wrongful birth actions),[86] the necessary damages can be awarded to cover the child's additional life expenses stemming from the injury.[87] This solution is especially applicable in cases of negligent prenatal screening, because of the direct contractual link between the mother and the genetic counsellor. He continues with his discussion on the so-called "right to a sound mind and body" and reaches the following conclusion:

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81 *op cit* p 113.

82 of having a healthy child.

83 *op cit* p 111.

84 similar to the South Africa position, where legal subjectivity only begins at birth - the foetus does not enjoy any rights prior to live birth, see the discussion on the beginning of legal personality in this regard in ch 3.

85 *Ibid.*

86 see, however, *infra* where critics argue in favour of wrongful life, whilst rejecting wrongful birth.

87 a challenge to this viewpoint is that the plaintiff in a wrongful life action is the disabled child himself (and not his parents) - if the parents institute an action against a physician or genetic advisor, it is classified under wrongful birth actions.

> "Because the suffering of many of these children could have been avoided by avoiding their births, the "right to a sound mind and body" becomes a "right not to be born," and we begin to look to parents to avoid the children's suffering through prenatal testing and abortion." [88]

Here one can see a positive duty[89] placed on the parents of impaired *foetuses* to avoid the birth of impaired children. Influenced by various circumstances, these unfortunate parents are forced to make a life or death decision on behalf of their unborn children. It is submitted that society strongly encourages these parents to choose abortion, rather than to allow these disabled and/or genetically diseased children to be born. According to this viewpoint, abortion seems to be the better choice, since unnecessary suffering is avoided in this way.[90]

2.9 Motivations for sterilization

Milsteen[91] states that the motivation behind a sterilization is helpful in identifying the specific interests that have been impaired. He reports[92] that in the case of **Speck v Finegold**[93], the court identified principal purposes for limiting the size of a family: the eugenic purpose; to prevent the birth of a defective child; the therapeutic purpose, to prevent harm to the mother's health; and the socioeconomic purpose.

It is reported[94] that a *therapeutic sterilization* procedure is designed to protect the physical or mental health of the patient or, in the case of a vasectomy, the wife of the patient. If the health

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88 *op cit* p 112.

89 Concerning duties placed on parents, Shepherd refers to the views of Barbara Katz Rothman regarding the difficult decision parents have to make against an abortion, once the amniocentesis has revealed a serious genetic anomaly in the foetus. Concerns are expressed that parents may even be forced to obtain information on whether or not their offspring carries a congenital defect. Once a woman chooses to conceive and carry the child to term, certain obligations might ensue under this view, including a duty to undergo prenatal testing "where there is a reason to believe that this screening may identify congenital defects correctable with available therapies".

90 society seems to be convinced that if a person's quality of life is too low or suffering is unbearable, it becomes more advantageous to end that life or prevent it's existence.

91 1983. Recovery of childrearing expenses in wrongful birth cases: A motivational analysis. **Emory Law Journal** (32:1), 1167.

92 *op cit* p 1189.

93 497 Pa. 77, 439 A. 2d 110 (1981).

94 Milsteen *op cit* p 1190.

of the putative mother is the only interest to be protected by the operation, then the only injury within the contemplation of the parties at the time of the sterilization was the impairment of the mother's health as a result of the pregnancy and subsequent delivery.

With an *eugenic motivation*, it is explained,[95] a couple attempts sterilization in order to prevent the known possibility of conceiving a genetically defective child, the interests sought to be protected are easily identifiable. Although parents seeking sterilization for eugenic reasons may have wanted a child, they have chosen sterilization , instead, to avoid the anxiety of wondering whether the child would be born defective, and to forego the financial and emotional strain of rearing a child with an impairment they specifically sought to avoid. It is suggested[96] that if a eugenically motivated sterilization fails and a defective child is born, parents should be permitted to recover for the mental anguish and emotional distress suffered during the pregnancy and after the birth, and for extraordinary child-rearing expenses.
With regard to the influence of *adoption*, Milsteen writes:[97]

> "Most courts dealing with the avoidable consequences rule in the wrongful birth context have tended to lump the abortion and adoption alternatives together, treating both as equally unreasonable. Can it be said with legal certainty, however, that placing a child for adoption is unreasonable *per se*? Admittedly, a genetically effective child may be difficult to place for adoption. Thus, in seeking to promote the best interests of the defective child, adoption may not be a viable alternative. The reasonableness of this alternative, like abortion, should be left to the jury."

Milsteen[98] conveys that the socio-economic motivation could be divided into a "pure economic" motivation[99] and a socio-economic motivation that is not entirely economically motivated, bit rather a more "social" motivation. He explains that; "here, the parent or parents simply choose not to have a child that places a burden on their lifestyles or affects their career choices. It is in these cases that the appropriate interests are the most difficult to identify."

It is finally concluded[100] that one should not focus on the child as an injury per se:

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95 *op cit* p 1192.

96 *op cit* p 1193.

97 *op cit* p 1194.

98 *ibid.*

99 where the child is truly "unwanted".

100 *op cit* p 1197.

> "The courts should no longer engage in philosophical pontifications as to the worth of a child. Rather, legal analysis should focus on the specific interests the plaintiff sought to protect by undergoing a sterilization operation. The best way to determine these interests is through a motivational analysis that would disclose the plaintiff's underlying reasons for engaging the physician's services."

It is suggested[101] that the benefit rule should be applied to offset against those recoverable damages any benefits conferred upon the plaintiff's protected interests as a result of the child's presence. "Finally, the avoidable consequences rule should be applied in the wrongful birth context, and the reasonableness of the plaintiff's failure to mitigate should be left to the trier of fact."

2.10 Influence of partial counselling on reproductive decisions

The very purpose of prenatal testing is to permit pregnant women to abort foetuses with genetic anomalies. Studies done[102] under a group of genetic counsellors revealed distinct bias attitudes in favour of abortion, in cases of severe genetic anomalies. It is submitted that the "perceived seriousness" of any genetic anomaly is largely determined by the judgements of medical professionals.[103]

Berry[104] agrees that individuals and couples who seek genetic counselling are not only affected by scientific factors on a logical-rational level, but that their entire being could be influenced by it:

> "Decisions about reproduction are not made solely on the basis of logical, scientific factors so it is important to discover what aspects are paramount for the couple concerned: have they already decided that whatever the risk they are going to start another pregnancy (or have already done so) as the only way they can see of restoring self-esteem? Or is their confidence so devastated by a recent tragedy that they feel unable ever again to face the uncertainties of another pregnancy? What are their views on abortion? "[105]

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101 *ibid.*

102 in the study done by Barbara Katz Rothman, Shepherd *op cit* p 113.

103 see ch 5, where the influence of a genetic counsellor's subjective opinions on the patient's decision is discussed.

104 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge.

105 *op cit* p 30.

Shepherd[106] believes that because these professionals constantly see people with disabilities and medical problems, their perceptions about the quality of life are often excessively negative. He conveys that the medical profession also appears to have a more conservative perceptive of what an acceptable degree of risk is, than the laymen community.

2.11 A feminist view

Ryan[107] gives a feminist viewpoint on wrongful birth and reports that:

> "Much of the trouble plaguing the wrongful birth claim stems from reliance by courts and legislatures on male norms under particularly inappropriate circumstances. Courts have judged pregnancy, motherhood, and abortion by male standards, even though each of these experiences is an uniquely female one. The result has been confusion, distortion, and misrepresentation of women's experiences."[108]

Ryan[109] gives a feminist analysis of theories courts have used to deny damages for emotional harm in wrongful birth cases. She believes that there is a disparity between woman's actual experiences and the law's description of experiences such as pregnancy, birth and also a mother's reaction to the knowledge that her child will be born disabled or abnormal.

Ryan[110] criticises the courts' use of the Impact doctrine[111] in establishing emotional harm damages. She believes that even if this doctrine was applied to wrongful birth actions, the plaintiff mother could easily prove the required "physical contact", as mothers always experience some physical effects flowing from the defendant's negligence.[112] She further argues that the courts' use of the bystander doctrine is unacceptable from a feminine perspective, as "one simply cannot speak of a pregnant woman only as a 'bystander' to

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106 *ibid.*

107 1994. Wrongful Birth: False Representations of Women's Reproductive Lives. **Minnesota Law Review** (78), 857.

108 *op cit* p 858.

109 *op cit* p 879.

110 *ibid.*

111 the requirement that a plaintiff should have suffered "physical impact" before emotional damages may be sought.

112 *ie* she carries her pregnancy to term.

anything that happens to her unborn child."[113]

She writes that "it is untenable for the law to split the mother and her unborn child into two entities. By applying the bystander rules to wrongful birth cases, however, this is precisely what courts have done."[114]

> "Courts should examine these concerns directly when deciding whether to award mental harm damages in wrongful birth cases, instead of hiding behind rules that were conceived for a world in which pregnant women do not exist."[115]

It is further reported[116] that the courts' application of the "benefit/ burden" rule has a prejudicial effect on predominantly woman-plaintiffs in wrongful birth.

> "In the case of a severely impaired child, the stereotype plays on the romanticized notion of parenthood while it trivializes the emotional pain of parents who must witness the early death of a young child or care for a severely impaired child for the rest of their own lives. By invoking the stereotypical view of woman as fulfilled mother, courts play a cruel joke on parents who may have been emotionally devastated by their child's impairment and who may have found little inf any emotional satisfaction in the burden they have taken on as a result of the defendant's negligence."

It is argued that patriarchal interests are served by the misrepresentation of woman's actual reproductive experiences.[117]

> "By speaking only of the technical rules regarding emotional harm damages and ignoring the details of the actual harm that results from wrongful birth, courts deny the importance and severity of the emotional harm suffered by parents who must watch their children suffer and sometimes die, while at the same time knowing they may have been able to do something to prevent it."

Ryan[118] conveys her opinion on the influence of societal attitudes in wrongful birth:

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113 *op cit* p 881.

114 *ibid.*

115 Ryan *op cit* p 884.

116 Ryan *op cit* p 885.

117 Ryan *op cit* p 886.

118 1994. Wrongful Birth: False Representations of Women's Reproductive Lives. **Minnesota Law Review** (78), 857.

> "Of course, much of the mental anguish suffered by parents in wrongful birth cases would not exist if our world were less hostile toward the physically and mentally impaired. A significant portion of the emotional pain these parents suffer is caused by the fact that society will discriminate against their children."[119]

2.12 Actions against parents

Successful actions instituted by children against their parents are no longer a ridiculous impossibility of the distant future.[120] It is conveyed that current legal recognition of a child's claim against his parents is neither fanciful nor without support and suitably articulates the opinion of John Robertson on this point:[121]

> "Even absent legal recognition of such a claim against the mother, prospective parents face growing medical, economic, and moral pressure to avoid the births of such children, primarily because of the extent of suffering that the birth will entail. Prospective parents may feel an ethical or moral duty not to continue such pregnancies, to follow the medically indicated and prescribed solution rather than rely upon their own autonomous ethical and moral capacities. The emerging notion that a child has the right to be born healthy- a right essentially based in suffering- requires parents to adopt a medical response to predicted suffering which excludes other equally caring responses."

Legal precedent that opened the way for such actions exist. In **Curlender v Bioscience Laboratories**,[122] for example, the court found no reason why parents (who proceeded with a pregnancy of a foetus they knew to be carrying a genetic defect) could not be sued by that disabled child. As quoted from the case:

> "Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have

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119 *op cit* p 889.

120 Shepherd *op cit* p 114.

121 J. A. Robertson 1983. "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth." **VA. Law Review**, (69:405), 43. - supporting the recognition of a legal duty on parents " not to conceive under certain circumstances," and arguing on behalf of a child's right to "allege that his or her parents had the duty not to conceive at all," and must therefore be held legally responsible to the child " for causing misery, pain, suffering, and death, if it could have been avoided" - on this viewpoint, please also refer to the ideas of P.E. Veerman mentioned *supra*.

122 106 Cal. App. 3d 811 (1980).

wrought upon their offspring."[123]

This principle recognition of actions against parents, Silverman[124] comments, is in line with an increasing willingness to exert pressure on women to abort foetuses with detectable genetic anomalies.[125] He fears that the pregnant woman herself could even be held liable under criminal or tort law as the guilty party engaging in the wrongful conduct[126] (where such wrongful conduct traditionally came from third parties).
Schedler[127] has an interesting opinion on this viewpoint:

> "It seems logically odd, if not inconsistent, to claim that the physician's failure to inform the mother causes the defective fetus's defective birth and thereby wrongs the fetus, when the mother would have done no legal wrong to the fetus had she brought it to term knowing it was defective."[128]

Regarding the possibility of children suing their parents in cases like these, the views of Shaw[129] is also of interest:

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123 once again, one can see the importance that is placed on the suffering of others - a consideration the court did not take into account, is the fact that by relieving the child from his pain and suffering, he also loses his opportunity to experience life itself.

124 Silverman, A.M. 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: state action and undue burden- Edmonds v Western Pennsylvania Hospital Radiology Assocs. **Temple Law Quarterly** (66:4), 1087.

125 Consequential to the existence of a feeling described as "collective care" in society of today, and togther with the general notion that "people shouldn't suffer", is the possibility that parents could be obliged in future to have genetic tests done before birth and to abort foetuses with serious genetic anomalies. This raises an important question- whether this affirmative obligation on parents would be morally and ethically acceptable/ sustainable.

126 *Eg,* if the mother damaged the foetus through the intake of drugs during pregnancy, or if the mother knowing the risks, infected her foetus with HIV. It should be noted that these forms of unlawful conduct is not under detailed discussion in this thesis. These "traditional/ normal torts" (where disability is caused by a tortfeasor) are irrelevant for our current discussion, because the prejudiced plaintiffs in these cases, are potentially healthy children. See research proposal.

127 1986. "Women's Reproductive Rights: Is There a Conflict with a Child's Right to Be Born free From Defect's? **Journal of Legal Medicine** (7), 357.

128 this statement is shocking, but fundamentally true - this reasoning might be used to ultimately reach a decision that wrongful life actions and wrongful birth actions should not be allowed at all (it is submitted that under South African law, actions instituted against parents in these cases, would be *contra bonos mores* or against public legal policy).

129 1984. "Conditional Prospective Rights of the Fetus." **Journal of Legal Medicine**, (5:63), 110.

"Instead of designating a third party medical provider as the tortfeasor, however, the mother's failure to obtain an abortion when one was legally available to her is the proximate cause of the child's life of suffering."

A possible (future) duty placed on parents to undergo medical check-ups and genetic tests before bringing a child in the world, is maybe not so far-fetched. This will almost certainly become a reality if a child's right "to be born with a sound mind and body", is generally excepted. In **Grodin v Grodin**[130] the court warned of the proportions this legal duty, if indeed placed on parents, could have:

"..a child could maintain an action against his mother on grounds that his mother negligently failed to seek proper prenatal care, failed to ask her doctor to test her for pregnancy, and failed to tell her doctors she was taking the drug tetracycline which caused the child's teeth to be discolored."

2.13 Right to happy childhood?

This discussion is relevant to the question whether a general, separate duty on parents exists to ensure that they provide an acceptable environment for their children.[131] It is thus contended that these parents should themselves be physically and psychologically fit and must be able to offer their offspring healthy and happy circumstances to grow in.

According to Ellen Key,[132] there should be a duty on parents to ensure they do all they can to make a suitable environment for their children and be adequately prepared and willing to support the child in all aspects of parenthood. Two questions arise:

- does the child have a reasonable chance to be born healthy or without serious defects?[133]
- did the parents take sufficient action in order to adhere to this duty?

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130 301, N.W. 2d 869, 870 Mich. Ct. App. (1980).

131 this duty is discussed by Veerman, P.E. 1992. The Rights of the Child and the Changing Image of Childhood. **International Studies in Human Rights** (18), 75 (Martinus Nijhoff Publishers).

132 as discussed by Veerman *supra.*

133 are there any genetic anomalies in the family *etc* - it is suggested *ibid* that to ensure the duty is adhered to and in order to minimise risks, genetic tests should be undertaken by the parents and genetic advise should be obtained from a professional counsellor.

It is my submission that such a stringent selection and examination of parents to determine whether they are "approved for parenthood", would mean that parents with HIV-Aids, for example, will not be allowed by social pressure and prejudices to have children.[134] If this reasoning is taken to its very limits, such conduct could even constitute an action by the child against such parents.

Roberts[135] similarly recognizes that there is social pressure that influences parents to abort impaired foetuses: "According to the prevailing wisdom, it is morally problematic to produce children whose existence is bound to be flawed in some material respect."

> "A principle of parental responsibility should require of individuals that they attempt to refrain from having children unless certain minimal conditions can be satisfied. This principle maintains that in deciding whether to have children, people should not be concerned only with their own interests in reproducing."[136]

The same concept of responsible parenthood, as discussed by Veerman,[137] is supported by Steinbock and Ron McClamrock[138] "failing to have a child, even when you could have had a happy one, is neither right nor wrong."

> "Having a child under conditions which should enable one to predict that it will be very unhappy is morally objectionable, not because it violates the rights of a presently existing potential person, but because it results in the frustration of the interests of an actual person in the future."[139]

4.14 One chance to live?

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134 because of the great risks of infecting the child and since they will not be able to ensure a healthy and suitable environment.

135 1995. Present duties and future persons: When are existence - inducing acts wrong? **Law and Philosophy** (14), 297.

136 *op cit* p 17.

137 *supra.*

138 *ibid.*

139 *op cit* p 18.

Harrer[140] discusses this philosophical question[141] about how and in what state of health humans are born into this world. Is every person's birth (with each unique attribute of an individual) predestined or is it a matter of chance whether you or another of your possible brothers or sisters are conceived and later born? Is it possible for parents who conceive a child at a specific time to have conceived a normal healthy child one time around and a seriously debilitated child suffering from various serious hereditary diseases the next time?

Hypothetically speaking, it is my submission that, if one argues that no matter what the parents could do, they would always conceive the same handicapped child at a specific period in time, then their only option to not have a (that) handicapped child would be to conceive another at an earlier or later stage in time. The only alternative to prevent the unwanted birth of such a handicapped child would then be by detection (through proper pre natal testing) and abortion.

If the birth of a child (handicapped or healthy and with one or the other personality and different unique attributes) is decided by chance, then it is possible for parents to conceive either a healthy or handicapped child, when conceived at exactly the same time in history, in different attempts (off course). If this was the case, some of the responsibility to prevent seriously debilitated children from being born would be shifted from physicians and genetic counsellors to "lady luck", since either a healthy or disabled child could be born!

2.15 Forced genetic testing?

Gevers[142] is adamant that no person could be obliged to undergo genetic testing in terms of Dutch law, as such action would constitute an infringement of the untouchable right to physical integrity as entrenched in section 11 of the Dutch constitution. He is of the opinion that this issue could become increasingly relevant as growing societal and moral pressure is expected to force prospective parents to only bear healthy and normal children, as medical and genetic knowledge increases.[143] He writes:

> *"Daarbijwordt dan genoemd de mogelijkheid van schadeplichtigheid van onzorgvuldige ouders jegens later geboren kinderen met defecten (wederom de 'wrongful life' problematiek), wettelijk verplichtingen bepaald onderzoek te ondergaan (prenuptiaal of prenataal) en zelfs als extreme maatregel procreatieverboden. Zoals gezegd is dit*

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140 *op cit* p 99.

141 (which is without any simple and final answer).

142 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19.

143 *op cit* p 57.

een heilloze weg, die zich niet verdraagt met de huidige rechtsorde."

2.16 Genetic manipulation acceptable?

Strauss[144] writes on the ideological considerations inherent in difficult questions raised by developments in genetic science, such as genetic manipulation and foetal medical treatment. He believes that each procedure should be judged on its own merits to ascertain whether it is socially acceptable and in line with the *boni mores* of a particular community. One difficulty in assessment could be the fact that the lawyer is a layman in the field of natural science and might not fully be able "to envisage the exact nature, scope and effects of a particular scientific procedure". Factors that should be taken into account are: is there a therapeutic objective; would other benefit from it; is it purely of scientific relevance; has the individual who is the subject of the procedure been fully informed of potential harmful consequences?

It is submitted[145] that one should, in answering these questions, take note of the views of recognized religious denominations and theologians and also be guided by general ethical considerations,[146] including medical professional ethics.

In discussing various possible applications, Strauss[147] conveys that where medical procedures contribute to the needs of mankind and are guided by therapeutic objectives, such conduct would probably be lawful.[148] He gives an example, however, of where a normal developing foetus is removed from its mother's womb as an experiment to test a artificial womb. He is of the opinion that such a scientific venture would be unlawful and "that the prevailing *boni mores* prevailing in this country would thoroughly disapprove of such a procedure",[149] even though the mother has consented to it after having been informed of the risks to the foetus and warned of possible birth defects.

2.17 When do we begin?

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144 1991. **Doctor, patient and the law** JL van Schaik (3rd edition), 194.

145 Struass, *ibid.*

146 here it would also be helpful to take into account the values protected by other laws.

147 *op cit* p 195.

148 the legal meaning of lawfulness is discussed in ch 2.

149 it is reported by that successful experiments on artificial wombs have in fact been done in Japan.

Ford[150] writes that the question when human existence legally begins causes many moral problems, such as in the instance where contraceptive measures are used by adults (the prevention of life) and also where experimentation is done on human embryos (severe infringement of rights if one views that human individuality starts at conception).[151] She criticises the inadequate legal position in this regard:

> "Morality and the law dictate what ought to be done or omitted in relation to a human individual, but they do not determine what constitutes a human individual."[152]

She argues[153] that we presuppose what the concept "human" is and explains that our attitudes determines this fact, as we can easily distinguish between a child and an animal based on the perception that a human is superior in nature and dignity. However, she argues, it is not our attitudes that *make* the child a human, but rather the fact that "we respond to the recognition of the child's human nature and personal dignity by our attitudes of respect and love". She believes that the same attitudes could be applied towards unborn children as well.

2.18 Collective Conscience phenomena

Shepherd[154] discusses the so-called "collective conscience" phenomena and summarises it as follows:

> "As we continue to move along the path of a collective conscience in matters of health, the responsibility we feel for the care of others becomes duty, and in the language of advocacy for recognition and adherence to that duty, we see constant recourse to the familiar language of rights. To give proper weight to a concern within our rights-based constitutional framework, there is pressure to discover or proclaim (depending on your natural law or positivist proclivities) a right. *Thus, to ensure that we properly adhere to the collective duty we feel to alleviate individual's suffering, there is pressure to recognise an individual's right to claim the resources needed for the alleviation of that*

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150 1988. **When did I begin? Conception of the human individual in history, philosophy and science.** Cambridge University Press, 2.

151 see ch 3.

152 *op cit* p 3.

153 *ibid.*

154 *op cit* p 135.

suffering.[155"156]

Shepherd[157] is concerned that these rights, (based on suffering) do not merely define and require minimum levels of behaviour, but create new and unprecedented expectations of rescue-like behaviour. He is sceptical about the consistency of the implementation of these rights, which appears to originate from caring concerns for the suffering of others.

If we consider the ethic of care in cases of prenatal diagnosis of disability, we can expect a compassionate response to the parents faced with this difficult and sad situation. Their initial suffering, together with the difficult choices they have to make concerning a possible abortion, is obvious. Also if the child is born, a similar caring and accepting response would be expected. Shepherd[158] contends that a right not to be born does not constitute any such care. He states that the right not to be born, as well as the right to die, although both originated from concerns of individual suffering, are "by their universal nature, absent of individualized care."

The implications that are expected if these rights based in suffering, are generally accepted, are well summarised in Shepherd's own words:

> "If we let medical definitions of and responses to suffering prevail, and give these the weight of law, we risk two grave results. First, we crowd out other definitions and responses to suffering. Our law combined with medicine will create the norms for behaviour at the edges of life. Individuals acting singly, in families, or as communities will have less influence than doctors in setting such norms. Second, we face a potential erosion of rights we have traditionally held dear. We have now, through medicine, the tools to evaluate the worth of an individual's life, and, through law, the language of rights to support action taken on the basis of that evaluation. But as we recognize an individual's rights to liberty and equality, and provide the language and the justification for taking a suffering individual's life for another's good."[159]

2.19 Measuring quality of life

"Quality of life assessments abound in determinations of the presence of suffering and

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155 my emphasis - here it is clearly stated how a collective conscience could lead to the thought of rights protecting people against unnecessary suffering.

156 *op cit* p 137.

157 *ibid.*

158 *op cit* p 138.

159 *op cit* p 138.

it's degree of severity."[160]

In society it often happens that assessments are made of another's quality of life. Courts and physicians daily have to make decisions concerning other people's quality of life (and even deciding whether it is worth living).[161]

Blackbeard[162] argues that no right to be born normal exists as "normality" is a subjective determination and each person measures the quality of life differently:

> "Should a doctor, however, have a duty towards an unborn child to prevent that he or she be born disabled, the child may have the right to be born 'as a while and functional human being'. No such right can, however, be recognised, as no objective standard exists to determine what is understood by 'whole and functional'."

Kruithof[163] recognizes that underlying and differing values in society contributes to the complexity of wrongful life studies:

> *"Gevallen tonen niet alleen aan dat het aan de orde zijnde probleem in zeer uiteenlopende situaties voorkomt, maar ook dat hier vaak onderliggende waardenconflicten aan bod komen die in onze samenleving op zeer verschillende wijze beoordeeld worden."*[164]

2.19.1 Discrimination on base of disability

Shepherd[165] fears that these assessments of other's lives will result in characterization and classification of these lives into: "normal" and "disabled" or "genetically impaired" groups, which might lead to discrimination against individuals suffering from hereditary disadvantages.[166]

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160 Shepherd *op cit* p 140.

161 in a successful wrongful life action, the court has to find that plaintiff's life is not worth living.

162 1996. Actions for wrongful birth and wrongful life. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg**, 714.

163 1987. Schadevergoeding wegens de geboorte van een ongewenst kind? **Rechtskundig Weekblad** (50:41), 2737.

164 *op cit* p 2740.

165 *Ibid.*

166 it is suggested *ibid* that not only diminished abilities, but even cosmetic differences are seen as sources of suffering.

One can therefore argue that the mere fact that society classifies people as "disabled" or "handicapped", is in itself a form of discrimination. Although some might say that disabled people are in a "separate, but equal group", history shows that separate is not always equal.

2.19.2 Value of disabled life

Shepherd[167] contends that society should have equal respect for all persons, whether disabled or not. This would mean that we should not use individuals as mere means, but recognize them as ends in themselves, implicating that we can not decide that one person's life is worth more than another person's life.

In this regard it could be argued that wrongful life actions will be detriment to the status of disabled or seriously handicapped people in society. The lives of genetically handicapped people are already worth so little in the eyes of a large proportion of society, that additional recognition to the disadvantageous realities concerning disabled people's lives (emphasized by allowing wrongful life actions), could be devastating to the plight of the handicapped community for equal treatment and general recognition.

> "The enjoyment of a right to relief from suffering (as in a right to physician-assisted suicide or a right not to be born) demands a direct, corresponding duty on the part of others: one cannot exercise a right to physician-assisted suicide unless someone in society makes a quality of life judgment that "weighs" one type of suffering against that of another, to determine if the suffering is severe enough to warrant granting the request. If, as I have argued, the issue is not autonomy, but suffering, then the issue is not how the suffering individual feels, but how we feel; whether we feel the suffering merits relief through death, and we decide who can or cannot die. Some courts have already recognized the inevitability of this sort of assessment in wrongful life cases; that is, that judicial fact finders are faced with determining whether a life with disabilities is worse than no life at all.
>
> These are decisions I say are not ours to make. Recognizing rights based in suffering requires that we (meaning those unconnected to the decision: physicians, courts, society) make decisions about other people's suffering, their quality of life and therefore their value in living. If we decide that the suffering is severe and the quality of life substantially diminished, then we are justified in treating this unequal life differently. We are justified in making decisions that erode autonomy and equality in the name of providing relief from suffering.
>
> The potential (though improbable) application of wrongful life suits against parents, and the more likely and already apparent economic, professional, and social pressure

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167 *op cit* p 144.

> on parents to abort "defective" fetuses, acknowledge the right of children to avoid suffering. But they do so at the cost of individual instances of parental autonomy and, as I have argued elsewhere, as a general matter, they threaten the highly important relationship of attachment between parent and child."[168]

Other commentators[169] have similarly argued that recognition of such injury to the handicapped child will diminish the progress which has been made in the physical and attitudinal aspects of public policy toward the handicapped.

Teff[170] believes that it is no longer commonly maintained that we devalue the handicapped, by providing them with social benefits.[171] "On the contrary, such provision is properly seen as one of the hallmarks of a compassionate society."[172]

> "Permitting a remedy does not imply a cynical disregard for the preciousness of human existence. It is precisely the recognition of the value of life and the laudable reluctance to stigmatise it when impaired that should enable "wrongful life" litigation to be kept within socially acceptable limits".[173]

Hubben[174] summarises the viewpoint of physician who believe that, although seriously handicapped children could sometimes be kept alive for many years, they would prefer to terminate their impaired lives at birth, based of the reason that these children would experience no real quality life.[175]

2.20 Conclusion

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168 *op cit* p 146 -7.

169 Kohnen, D.A. and Zoellner, R.M. 1986. Wrongful Life: Existance v. Nonexistance - Is Life Always Preferable? **Federation of Insurance & Corporate Councel Quarterly** (63), 239.

170 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.

171 or that such expenditure encourages societal intolerance of them.

172 *op cit* p 438.

173 *op cit* p 440.

174 1993. Levensbeëindiging van ernstig gehandicapte pasgeborenen en ernstig demente bejaarden: waar ligt de grens? **Tijdschrift voor Gezondheidsrecht** (17), 207.

175 *"De consequentie van dit standpunt van de kinderartsen is, dat bijvoorbeeld in het geval van een pasgeborene met een ernstige geestelijke handicap, die bij normale verzorging lange tijd kan overleven, op grond van de prognose van de kwaliteit van het leven opzettelijke levensbeëindiging tot de mogelijkheden gaat behoren." op cit* p211.

Shepherd[176] asks whether we should recognize individual's rights to relief from or avoidance of suffering, being the underlying principle to the right not to be born. He pleas for the principles of equality and liberty to protect individuals' rights, although he is sceptical whether these would render sufficient protection against the new rights based in suffering.

> "The developing medical model of suffering that I have described is powerful. Adding rights to that medical-technology formula threatens to overwhelm other rights that do not have the same psychological and social force that medicalized suffering does. What is needed is a new alternative model of responses to suffering that includes, as a component of that model, medical solutions, but also includes other responses to suffering and that elevates above medical perceptions other, broader perspectives."[177]

These broader perspectives that Shepherd speaks of, I agree, should include religious, social-cultural, legal and other relevant perspectives.

3. Damage perspectives

3.1 A new definition for harm required

Haavi Morreim[178] believes that a key issue in correctly understanding wrongful life actions, is by properly understanding the legal term "harm". In order to describe harm, we must compare the condition in which the individual now exists with that condition in which he would otherwise have been, but for the allegedly harmful event.[179] He shows this definition to be conceptually and morally flawed[180] and he accordingly proposes an alternative general definition which, when applied to wrongful life cases, prove that we can easily define harm in these cases.

Often the pivotal point of dispute in wrongful life actions is whether the plaintiff has suffered

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176 *op cit* p 155.

177 *op cit* p 156.

178 1988. The Concept of Harm Reconceived: A different look at Wrongful Life. **Law and Philosophy** (7), 3.

179 see ch 2.

180 see critical discussion *infra*.

any legally recognized injury.[181] Injury is established by comparing the child's damaged existence with his only alternative, namely non-existence. An argument often used by courts in dismissing the cause of action is plaintiff's failure to prove that an injury was suffered.[182] Other courts, however, assert that even though damages cannot be measured in a fair, non-arbitrary way,[183] this fact should not prohibit a cause of action.[184] Haavi Morreim[185] tries to explain the reasoning behind these viewpoints and illustrates the deficiency in the traditional legal definition of harm in taking hold of these new actions:

> "Where we may (justifiably) identify a harm in some pre-legal sense (like telling a little white lie) which we do not choose to recognise as a legal harm suitable for litigation or compensation, rather these courts (without any merited reason) deny altogether that we can predicate the concept of harm in wrongful life cases."

3.2 The traditional definition

The "otherwise-condition"[186] of harm (used in the traditional definition to establish harm by comparing the actual prejudiced situation plaintiff finds himself in, with the hypothetical situation where no damage-causing event took place) is summarised by Haavi Morreim.[187] Harm according to this "otherwise-condition" occurs when the ongoing course of events is deflected for the worse by some particular event E[188], which can be:

- some natural event;[189]

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181 see ch 8.

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

183 *ie* general damages, but nevertheless allow special damages: **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967); **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983); **Procanic v Cillo** 97 N.J. 339, 478 A. 2d 755 (1984).

184 **Turpin v Sortini** 182 Cal. Rptr. 337 (1982); **Goldberg v Ruskin** 113, Ill. 2d 482, 499 N.E. 2d 406 (1986); **Azzolino v Dingfelder** 71 N.C. App. 289, 322 S.E. 2d 567 N.C. App (1984) - see ch 8.

185 *op cit* p 7.

186 this term is used by Haavi Morreim to describe the alternate position/ condition implemented when comparing a plaintiff's current (prejudiced) situation to *that in which he would have been*, was it not for the damage-causing event.

187 *op cit* p 10.

188 or in traditional legal terminology, the "damage-causing event".

189 *eg* where a pregnant woman contracts German measles or any other disease potentially dangerous to the foetus.

- an act performed by a person or group;[190] or
- a specific omission.[191]

There are several important aspects to be recognized in the traditional definition[192] of harm, that would make it possible to fully understand why this conventional method is not sufficient to deal with unique problems associated with wrongful life actions.

Overall, the otherwise-condition definition[193] asks us to conceive harm in terms of a "change-change" event or situation in someone's ongoing course of affairs. This is seen in the assumption that to simply be in an unfortunate condition, cannot by itself constitute a harm.[194] We must describe quite precisely some alternative (better) condition in which that person would have been, but for event E (which sent him instead to his current inferior/ prejudiced condition).[195] One must be careful not to compare the child's life with a normal[196] life, because this child could never have been normal.[197]

One problem associated with the otherwise-condition definition used to assign harm, is that many commentators assume that the only way to identify event E, is "causing the child to be born", therefor *he* can only exist as this impaired person and he is only harmed by this act if his life is not worth living. According to Haavi Morreim[198] this assumption can be criticised on at least two bases:

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190 when dealing with wrongful life litigation, many instances of culpable conduct by health care workers could be mentioned - see ch 7 and 8.

191 not simply any possible omission, but a particular event which was specifically due to befall the plaintiff, and which would certainly have happened in the normal course of events, (but did not, due to some reason or another).

192 a description of injury given in the South African judgement of **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 (A) at 840: "..based upon *damnum* suffered by the plaintiff which is to be measured by the difference between the *universitas* of his rights and duties as it is after the wrongful act and what it would have been if the act had not been committed."

193 or the so-called "traditional" definition of harm.

194 *ie* to be born with a birth defect is not a harm, but rather "an unfortunate fact of life".

195 in wrongful life actions, the harmful event is the culpable conduct of defendant which causes the plaintiff-child to be born - a comparison is made between the total result of the physician's actions, namely the child's impaired existence and the child's otherwise-condition, which is non-existence.

196 without hereditary physical or psychological impairment.

197 see the philosophical discussion on this topic *infra*.

198 *op cit* p 14.

- In denying that this individual (the plaintiff) could exist as himself without the disabling condition or hereditary disease[199] this view appears to rely on some debatable ontological assumptions about the nature of personal identity.[200]

- There is no good reason why we should restrict ourselves so narrowly in selecting the appropriate causal event E, for example, the belief that a mother's *rubella* caused a birth defect in her child. Alternatively, we might suppose that the event E is instead the physician's failure to suggest *rubella* immunization a year ago. If everything else would have gone on *ceteris paribus*, the woman would still have conceived this child at this time, but without *rubella*. On this selection of event E, the child is clearly harmed, even on an otherwise-condition account!

3.3 Fundamental flaws in the traditional "otherwise-condition" definition

Haavi Morreim[201] exposes certain fundamental flaws that he finds in the otherwise-condition definition. He mentions that the otherwise-condition definition cannot account for certain clear instances of harm and that the definition has morally untenable implications. Here a number of these flaws are mentioned:

3.3.1 Missed harms

The otherwise-condition definition of harm is unable to account for two large and important classes of harm. By assuming that harm arises only as events cause changes in ongoing affairs *(event-harms)*, the definition omits those cases in which harm resides in the ongoing affairs themselves *(status-harms)* and instances in which harm arises through a dereliction of duty *(default-harms)*.[202]

3.3.2 Morally untenable results

Haavi Morreim[203] supports his critical viewpoint concerning the morally indefensible results derived from using the otherwise-condition definition, through illustrations of possible factual situations.

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199 see ch 11 for more detail on hereditary diseases.

200 can a specific person exist only at a specific given time in history, or is it possible that same person could have lived at another time under the same circumstances - *eg* as a healthy person.

201 *op cit* p 15.

202 *op cit* p 16.

203 *op cit* p 19.

Example 1: Carla, pregnant, learns that unless she takes some treatment, there is a risk that her child may have a handicap. She decides not to have the treatment. Carl, the child born from the pregnancy, is indeed born handicapped.

Example 2: Paula, trying to become pregnant, learns that if she conceives now, there is a risk of bearing a handicapped child. If she waits for two months, there would be no such risk. She decides not to wait and her child, Paul, is born handicapped.

According to the otherwise-condition based analysis, Carla has clearly harmed Carl, since he could have had a normal existence. Paula, on the other hand, did not harm Paul in the least, because if Paula waited, Paul would not have been born at all. *His* existence is as this handicapped child or not at all, and thus he is only harmed if his life is not worth living!

Another example illustrates this point: What would be the position if a malicious scientist employs genetic screening and in vitro fertilization to produce the most diseased, handicapped individual he possibly can, just to watch his "experiment" suffer. If the child's life is just barely worth living,[204] then, on the otherwise-condition approach, the scientist has not harmed him in the least!

The problem pervading all these examples is that once we are denied the opportunity to assign a harm, we are at a loss to account for the moral seriousness of a individual's actions. It is suggested[205] that "promote the good" approaches[206] are inadequate, "because they do not account for moral seriousness." These approaches try, by adopting a "right not to be born"[207] to defend a compendious way of referring to the plausible moral requirement that no child should be brought into the world unless certain very minimal conditions of well-being are assured. Parents who knowingly bear seriously affected children, wrong them in many ways[208]

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204 the argument that "life is always more preferable and precious" than no life (irrespective of living standard or quality of life), is often quoted by courts disallowing wrongful life actions - this example illustrates the superficial foundations of this maxim.

205 *op cit* p 20.

206 as seen in judgments where a right to be born as a whole and functional human being, is given to plaintiff-children in some wrongful life actions - see *supra.*

207 Haavi Morreim *op cit* p 21 feels that these "birth rights" stretch beyond reason and our usual notion of a right as a fairly specific, legitimate claim against moral agents for specific types of conduct.

208 seriously handicapped people often have a low self-esteem and generally find it difficult to adapt to life in general; job opportunities for handicapped people are also scarce and usually these individuals remain dependant for the rest of their lives - some hereditary diseases cause a lifetime of suffering and pain.

that would affect them for the rest of their lives, even though they have not legally harmed them in the least.

The entire "future generations" theory[209] is unable to give a moral account for the abovementioned examples. The answers proposed by these "future generations" writers are morally anaemic: by focussing on positive duties to promote good, they miss what seems to be the central point, namely that moral agents have acted in ways which directly produced avoidable suffering.

It is submitted that the following dilemmas arise from the given examples:[210]

- we see an intuitively obvious harm which is also evidently connected to moral wrong;
- we are precluded by the otherwise-condition definition from ascribing harm in the most obvious locus/focus (the infant's disease itself), because we cannot assign to each person an otherwise-condition in which he personally would have been; and
- we must then retreat from strong statements about avoiding harm into weaker arguments about promoting good or about avoiding other side-harms.

3.4 New definition

A new definition of harm that would have more equitable results is proposed by Haavi Morreim.[211] Although not all harm arises from an adverse change in ongoing affairs, all assignments of harm do involve comparisons. We do not assign harm simply on the ground that something or a certain situation is unfortunate. We use the crucial expression "worse than" which presupposes that there is some appropriate comparative state that, when compared to one's current condition, is more favourable because of the absence of a damage-causing event. Haavi Morreim[212] suggests that instead of looking to what would have been the case, we must look to what should have been the case, more precisely:

> "We will say that a person P is harmed at time T in respect R if his condition regarding R is worse than it *should have been* at time T."

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209 wich propagates the premise that future generations already have certain rights currently.

210 *op cit* p 23.

211 *op cit* p 23.

212 *Ibid.*

In order to explain the functioning of the new definition of harm, it is important to distinguish between three classes of harm: *status-harms* (which is the most basic of the three); *event-harms* and *default-harms.*

3.4.1 Status-harm

In ascribing a status-harm we identify a condition or state of affairs as being a harm, independent of locating any cause or ascribing any moral judgment. The concept is nevertheless normative and comparative, for we judge that the harmed state is worse than some comparative condition. The question how precisely to identify this comparative state of affairs, remains. It is suggested[213] that a baseline comparison state is introduced (which is a minimal, socially acceptable, decent human welfare standard of living) and any significant deviation below this baseline standard of living, will accordingly constitute harm.

This concept of minimal welfare is, however, not original and has already been described by many philosophers.[214] Through status-harm ascription we say that someone is in a harmed condition wherever his welfare is significantly below some minimal standard of normality. The *condition* is a harm, without concomitantly having to say that something or some event harmed a person.

When establishing a status-harm, we are interested in serious impairments in human living, not in someone merely existing below the average quality of living shared by his community. Also important to note is that one does not necessarily have to consider a person's life as a whole and in totality in order to assign a harm condition. A person needs only to be "sub-par" or "restricted" in a particular aspect of his/her life in order to say that he/she is harmed in that respect. To say that a condition is worse than it should be, is not only normative, but can be relative to personal or societal values. The notion of a decent minimum of well-being is vague, therefore the aim of the new definition is not to provide a precise criterion for ascribing harm, but only to characterise harm rather generally and at the same time to offer a plausible, (if somewhat sketchy) alternative to the otherwise-condition approach.

Status-harms necessitate a minimum state or level of well-being. Here, two types of normative judgments are made: The first is the very act of defining "human normality", such as deducting that all humans have one nose, two ears *et cetera*. Such defining requires not only the empirical observation that such attributes are typical, but also the normative and

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213 *op cit* p 25.

214 Griffin, *eg* suggests that a certain minimum level of standard of living be introduced, against which one can establish whether a certain individual's circumstances are by themselves harmful to the individual or not. Feinberg, on the other hand, made a list of certain minimum welfare interests.

conceptual judgment that we will not stretch our attributions of normality beyond a certain point. Secondly, as we speak on a minimal level of well-being, we are suggesting (normatively) that some states of affairs are sufficient/ good enough and some are not (maybe in part arising from human fellow-sympathy).

3.4.2 Event-harm

Here the baseline of comparison is not some general minimum of well-being, but a particular individual's own baseline condition, as determined by his previously ongoing affairs. For example, a rich man who loses R1000 will still be financially better off than the average person (or above the general minimum standard), in spite of the fact that he was harmed by the damage-causing event. This type of harm is traditionally associated with the so-called "otherwise-condition definition" of harm. Event-harms involves, in part, an empirical judgment about what in fact will happen if things progress normally. We do not routinely look up every single event (positive or negative) in our lives. We generally only label as event-harms those events which we say in some sense, should not have happened. These event-harms are accordingly established either through the moral judgment that someone did something wrong, or through the sympathetic-ideal judgment that "such things should not happen to a person".[215]

3.4.3 Default-harm

Here the baseline condition of comparison is that condition in which the individual should have been, and would have been, had duty-bearing agents fulfilled their obligations. The baseline is determined, not by previously ongoing events, but by moral entitlement. Default-harms are quite plainly a moral determination. These harms are commonly defined in terms of the nature and scope of the relevant duty, for example: Each parent has a duty to feed his child, not to entertain the child. The child's starving would therefor count as a default-harm, but not his boredom, as the harm is defined in terms of the duty itself and not according to our final judgment about the agent who defaulted.[216]

It is therefore clear that in each of the three classes of harm discussed above, the should in "worse off than", functions somewhat differently. The differences found in studying various bases of harm not only broaden our viewpoints on harm, but also open up new ways of thinking about one of the stumbling blocks to wrongful life actions, namely the question of injury.

3.4.4 Conclusion

Although Haavi Morreim does not offer precise criteria for identifying harms, as assigning

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215 *op cit* p 25-26.

216 *op cit* p 26.

moral and legal duties, imputing liability or awarding damages, he at least shows that it is possible and plausible to do so.

3.5 Insufficient tort based compensation

Peters[217] believes that compensation based on tort is insufficient to address wrongful life plaintiffs, who are in need of comprehensive support,[218] which can only be provided by family law principles. It is submitted that this be rectified by means of legislative measures. He writes:[219]

> "Because tort law is designed to insure compensation for harm, not adequate child support, tort law leaves children born as a result of tortious conduct inadequately protected. The problems and complexities associated with proof of harm in wrongful life and wrongful birth actions cause courts to significantly limit the recovery of compensatory damages. These limitations threaten to leave many families without the resources necessary to adequately provide for their children. To protect these children, lawmakers need to abandon their exclusive reliance on tort doctrine as it is traditionally construed."

3.5.1 A new approach needed

Peters explains[220] that family law is based on a "care-based orientation",[221] which is consistent with a secondary child support obligation in wrongful life cases. He admits that his suggested application of family law principles to create a new cause of action for wrongful life has not been previously recognized, but remains convinced that the following materials for constructing could be validly implemented:

- it imposes child support responsibility on non-parents who contribute to the birth of a child without requiring proof of harm to the child;

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217 1993. Rethinking Wrongful life: Bridging the boundary between Tort and Family Law. **Tulane Law Review** (67:1), 397.

218 "Unlike tort damages, child support awards are not intended to compensate for harm. Rather, they are intended to protect the child's welfare by fairly apportioning support responsibility among the responsible adults" *op cit* p 399.

219 *op cit* p 398.

220 *op cit* p 429.

221 while tort law is designed to compensate losses.

- it sometimes imposes a child support remedy for tort-like misconduct;[222]
- this new claim would base child support on tortious conduct that causes the life of a child *whether or not it harms the child.*[223]

It is suggested[224] that the following policy considerations should be considered in recognizing a tort-based claim for child support, as it is a question of values and policy, not a matter of logic: faimess; compensation; social consequences; impact on the family; unbundling parental rights and responsibilities; deterrence; the choice between tortfeasor assistance and charity.

Peters[225]is convinced that his suggested use of Family law support principles could be superimposed on wrongful life and states that the strongest cases for such imposition are the following elements:

- tortious interference with the procreative rights of the parents;
- the foreseeable birth of a child who would not otherwise have been born; and
- the inability of the legal parents to provide adequately for the child's ordinary or extraordinary support needs without requiring inequitable sacrifices by other family members.

He suggests[226] that where these factors exist, backup support liability is appropriate unless other policy objections outweigh the normative claim.

3.6 Associated causes of action

Harrer[227] reports on another mutation of wrongful life litigation,[228] namely suits between parents as to misrepresentation regarding use of birth control or sterility prior to sexual intercourse. He explains that in the standard case, the natural mother would falsely represent to her partner

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222 admittedly, no family law doctrine combines the two lines of cases the way an action for backup child support would.

223 as a result, it would require an extension of tort and family law beyond existing precedent.

224 Peters *op cit* p 441.

225 *op cit* p 454.

226 *ibid.*

227 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 119.

228 as fammily planning will gain further importance.

that she is taking birth control pills to induce the father (of the eventually born child) to engage in sexual relations with her.[229] He reports[230] that courts in both America and Germany have held that the deceived father cannot recover damages because of the highly intimate nature of the relationship.

229 in reliance upon such representation.

230 *ibid.*

CHAPTER 10

Legislative Relevance

A. Wrongful birth statutes

1. What are wrongful birth statutes?

Wrongful birth statutes are legislative measures taken by either state or central government to prohibit, restrict or regulate litigation deriving from a variety of birth related medical negligence cases. Both actions[1] instituted by parents for the birth of either an unexpected healthy child[2] or the birth of a handicapped offspring[3] are commonly regulated by these statutes and especially the action of the impaired child itself[4] is frequently moderated by the legislator. It is uncertain why the exclusive term "wrongful birth" statutes is commonly used to refer to these restrictions,[5] but for the sake of clarity and uniformity this term will also be used in this study. It is submitted that this specific term is used to refer to "actions arising from the birth of a child", which would encompass all three classes of actions.

1.1 Relevance to thesis

Wrongful birth statutes could be seen as a reaction from the legislator to intervene and assist in the difficult issues raised by novel medical negligence actions that have evolved because of advances in the modern science of genetics. These actions are recurrently surrounded by a cloud of uncertainty[6] and burdened by complex moral, social, religious and legal questions.

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1 *ie* wrongful life and wrongful birth actions.

2 wrongful conception actions: *eg* **Maine Statute - Title 24§ 2931 (2)** - discussed *infra*.

3 wrongful birth actions: *eg* **Pennsylvania Consolidated Statutes §8305 (a)** - discussed *infra*.

4 wrongful life actions: *eg* **North Dakota Central Code §32-03-43** - discussed *infra*.

5 A possible reason could be that much statutory guidance is needed for wrongful birth, as wrongful conception actions are usually less complicated in terms of moral and ethical issues and generally so commonly recognized that special legislative curtailment might seem unnecessary - see ch 6. In contrast, wrongful life actions are so progressive that the vast majority of courts have rejected its cause of action and therefore restrictions by means of statute could also be perceived to be superfluous - see ch 8.

6 as conflicting court decisions are given with regular interval.

Often there are no instant or obvious solutions to the questions arising from such new litigation. Courts regularly decline to make judgments because of ever changing public policy considerations and frequently refer the issue to the legislator for guidance.[7] Jackson[8] emphasizes the importance of clear guidelines to address the wrongful life phenomenon: "Actions for wrongful life, wrongful pregnancy and wrongful birth have been settled on a piecemeal basis, leading to inconsistent and unjust results."[9]

1.2 Method and objectives of discussion

In order to discuss the phenomenon of wrongful birth statutes an exemplary statute enacted in Pennsylvania will be studied. A most important facet of this study is the reaction from the judicial sphere to this enactment. In this regard two court cases instituted in Pennsylvania questioning the constitutionality of this state's wrongful birth statute will be analysed. In conclusion arguments of wrongful birth statutes supporters will be listed and other exemplary wrongful birth statutes[10] will be considered as a possible basis for a comprehensive legislative solution to common wrongful life litigation challenges.[11]

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7 as was the case in **Gleitman v Cosgrove** 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967): "...To recognize a right not to be born is to enter an area in which no one can find his way..." and also in **Elliot v Brown** 361 So. 2d 546 Ala. (1978): "...We decline to pronounce judgment in the imponderable area of nonexistence..." and then in **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978): "...Whether it is better to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians..."

8 1995. Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England. **Loyola of Los Angeles International and Comparative Law Journal** (17:2), 535.

9 *op cit* p 610.

10 namely that of Maine; Utah; California; Idaho; Minnesota and South Dakota.

11 student will consider the application of statutory guidance as solution to the South African wrongful life debate in the final reflection, ch 12.

2. Introductory discussion

2.1 History of wrongful birth statutes

Since the **Roe v Wade**[12] decision partially legalised[13] abortions in America, anti-abortion groups have fought to restrict this right to abortion by various legislative means.[14] Many state legislators have now in accordance with this move enacted statutes prohibiting wrongful birth actions.[15] Such action was deemed necessary, as virtually every court[16] after **Roe** that

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12 410 U.S. 113 (1973) - There is only one reported wrongful birth action *prior* to **Roe** (which was unsuccessful), namely that of **Gleitman v Cosgrove**. The New Jersey court judged that the plaintiff failed to state a claim mainly because of countervailing public policy supporting the preciousness of human life. **Roe** shifted the balance so that now policy supports and not militates a woman's right to abortion.

13 see discussion on abortion in the United States of America in ch 3.

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

15 by 1995, because of pressure from anti-abortion groups, 21 states have introduced and 9 have enacted legislation prohibiting wrongful birth and/ or wrongful life actions:
wrongful birth and wrongful life actions barred:
Idaho Code § 5-334 (1986), **Minn. Stat. § 145. 424 (1)(2)** (1993), **Mo. Rev. Stat. § 188, 130** (1992), **N.C. Gen. Stat. § 14.45.1(e)** (1993), **42 Pa. Constitutional. Stat. § 8305** (1993) and **Utah Code Ann. § 78-11-24** (1993)
wrongful life action barred:
Ind. Code Ann. § 34-1-1-11 (1993), **N.D. Cent. Code § 32-03-43** (1993)
wrongful conception, wrongful birth and wrongful life action barred:
S.D. Codified Laws Ann. §§ 21-55-1 & 21-55-2 (1987)

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), writes that in only 4 of the 9 states that bar wrongful life and wrongful birth claims the statutes have ever been constitutionally challenged.

16 Faircloth. R.C. 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 557 reports that in addition to statutory bans, 4 states have rejected wrongful birth by judicial decree:
Obstetrics and Gynaecology Group v Abelson 398 S.E. 2d 557, 563 Ga. (1990); **Wilson v Kuenzi** 751 S.W. 2d 741, 746 Mo, *cert denied*, 488 U.S. 893 (1988);
Azzolino v Dingfelder 337 S.E. 2d 528, 537 N.C. (1985), *cert denied*, 475 U.S. 835 (1986); and **Spence v Seikel** 742 P. 2d 1126, 1127 Okla. (1987).

considered the validity of the wrongful birth cause of action, has upheld it.[17][18]

Silverman[19] supports this observation and conveys that these efforts include the enactment of statutes containing regulations to control access to abortions through state requirements[20] such as: mandatory waiting periods; spousal notification requirements; and fiscal control forbidding the use of state funds for abortion services or counselling.[21]

Kowitz[22] is similarly concerned about this trend to enact wrongful birth statutes. She agrees with the viewpoint that judicial recognition of wrongful birth and wrongful life suits prompted pro-life organizations to lobby for legislation barring these claims. She seriously questions state legislators'[23] true motives for enacting these restrictions, as he believes they are not enacted to achieve mere tort reform, but rather designed to substantially obstruct women from seeking abortions.

Berenson[24] also reports on the increasing prevalence of statutory limitations of abortions and mentions that the Idaho wrongful birth statute,[25] for example, distinguishes between claims based on the negligent prevention of an abortion and claims based on negligence that results in an unwanted conception. Thus, an action for a negligently performed sterilization procedure

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17 courts interpreting laws of at least 17 states have recognized wrongful birth actions - see list of states and judgments allowing wrongful birth actions in ch 7 (only **Azzolino v Dingfelder** found the action invalid *post* **Roe**).

18 wrongful life actions have not been that successful as only 4 states in the United States of America and two other countries have recognized this cause of action - see list of states and judgments allowing wrongful life actions in ch 8.

19 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: State action and undue burden - Edmonds v Western Pennsylvania Hospital Radiology Assocs. **Temple Law Quarterly** (66:4), 1087.

20 the South African state legislators do not have legislative sovereignty in similar matters of public health policy and it is therefore suggested that central government will continue to dictate these policies - see ch 3 where the new South African abortion act is discussed (note that this act does not require any conditions such as mandatory waiting periods, spousal notification or obligatory counselling).

21 for more detail on these restrictions, see ch 3.

22 *op cit* p 235.

23 such as Pennsylvania.

24 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". **Tulane Law Review** (64), 895.

25 see *infra*.

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is permitted, while a claim based on the negligent interpretation of an amniocentesis[26] is not.

Finally, the same convention is reported by Topham:[27]

> "In an apparent effort to stem any future flow of wrongful birth/ life actions into its state courts, the Utah legislator recently enacted a statute that will influence the maintenance of actions claiming life as an injury."[28]

2.2 Statute under discussion

A real concern arising from such restrictive measures is the fact that even state laws that do not directly regulate access to abortion could still influence a woman in her decision to choose an abortion or could ultimately prohibit her form actually obtaining an abortion. An example of this type of legislation is title 42, section 8305(a) of the **Pennsylvania Consolidated Statutes Annotated** originally enacted in 1988, which denies a previously recognized common law cause of action for wrongful birth.[29]

> **Pa. Const. Stat. § 8305 (1992)**
>
> **(a) Wrongful birth.** - There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages of wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defence against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practices Act of 1985, or any other act regulating the professional practices of health care practitioners.

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26 which situation can only be rectified through obtaining an abortion.

27 1984. Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater. **Utah Law Review** (1), 833.

28 *op cit* p 834 - an interesting attribute to the Utah wrongful life act is that wrongful conception actions are in effect recognized by a provision of the act which precludes defendants from raising the failure to obtain an abortion or to use contraceptives as a defence in any action.

29 in **Speck v Finegold** 439 A.2d 110, 114 Pa. (1981) a wrongful birth action was allowed - see ch 7.

(b) Wrongful life. - There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

(c) Conception. - A person shall be deemed to be conceived at the moment of fertilization.

Silverman[30] criticises the effects of this statute:

> "By eliminating wrongful birth claims, section 8305(a) allows medical care providers negligently or intentionally to misrepresent information to a pregnant woman regarding the health and status of her fetus without fear of tort liability. Such misinformation may, in some circumstances, effectively prevent a pregnant woman from being able to make an informed decision regarding abortion. Thus, while Pennsylvania's wrongful birth statute does not directly limit access to abortion, it may indirectly impact on a woman's ability to make an informed choice regarding her pregnancy."[31]

3. Criticism

3.1 Cases against wrongful birth statutes

Concerning the historical background of wrongful birth legislation in Pennsylvania, the following: In 1981 the Pennsylvania Supreme Court recognized the wrongful birth and wrongful conception cause of action in the case of **Speck v Finegold**.[32] Subsequent judgements from both Pennsylvania's Supreme Court and Superior Court upheld the pronounced principles

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30 *op cit* p 1087.

31 the argument that non-recognition of wrongful conception, wrongful birth and wrongful life actions would inevitably result in the lowering of medical standards, have been raised consistently.

32 Silverman, *op cit* p 1090 believes that the court was concerned that to deny recovery in cases of wrongful conception and wrongful birth would undermine the fundamental rights articulated in **Roe**. It is my submission that this judgment is fundamentally correct - see ch 7 where this case is discussed in more detail. If a right to full medical information (including reproductive issues) exists and also a right to abortion, it would be legally unacceptable not to enforce these rights by allowing wrongful birth and wrongful conception actions.

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established in **Speck**.[33]

In reaction to these decisions, section 8305 was enacted to prohibit all causes of action for wrongful life[34] (regardless of whether the misconduct occurred before or after conception). In **Edmonds v Western Pennsylvania Hospital Radiology Assocs.**[35] the Superior Court of Pennsylvania had to decide whether this statute represented an impermissible state regulation of abortion.[36] The facts were the following:

Plaintiff was a teenager who fell pregnant and subsequently received medical care and a sonogram from Dr. Cooper, a physician at the hospital in question. Plaintiff alleged that although the sonogram clearly indicated that her foetus suffered from *quadrigeminal arachnoid cysts* and *hydrocephalus*,[37] defendant neglected to inform her of the abnormality in time to obtain an abortion. Because of section 8305, plaintiff's wrongful birth and her child's wrongful life action was barred.

Kowitz[38] discusses another case instituted in Pennsylvania a few months later, based on a virtually identical cause of action. In **Sejpal v Carson**[39] the facts show of extreme medical negligence that occurred in spite of advanced genetic science and so-called "reliable modern health services". Ms. Julie Sejpal at age 36 gave birth to a daughter suffering from *Down's*

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33 A.H.S. 1983. Torts. **Journal of Family Law** (21:1) reports on p 169 that in the **Finegold** judgment, four varying opinions followed a Superior Court order: "In extending the duty of care owed by the physicians to the parents, the lead opinion rejected the physicians' contention that a wrongful birth cause of action contravenes legislatively declared policy favouring birth over abortion. The opinion stated three reasons for its rejection. First, a wrongful birth cause of action neither advances nor impedes the ability to have an abortion. Instead, it provides equal protection to persons injured by negligently performed medical procedures, including vasectomies and abortions. Second, a remedy for negligently performed abortions must be provided to give substance to the constitutional right articulated in Roe v. Wade. Finally a duty must be imposed upon the physicians in order to compensate the victim, deter negligence and encourage due care. Usual common law principles of damages should be applied. Furthermore, mental distress damages should be recoverable since the distress was foreseeable.

34 in the broad sense of the word, therefore including wrongful conception and wrongful birth actions.

35 607 A.2d 1083 Pa. Super. Ct. (1992).

36 and whether it accordingly would be unconstitutional and void.

37 see ch 11 where these conditions are discussed.

38 *op cit* p 235.

39 no. 1991-2288-A Pa. Ct. Comm. Plaintiff. Mar. 4, (1992) *aff'd* 627 A.2d 210 Pa. Super. Ct. (1993).

syndrome.[40] Having some knowledge of disabled children, she expressed concern throughout her pregnancy of her advanced age and increased risk of foetal anomalies. Her obstetrician discouraged her to undergo an amniocentesis and assured her that this would only be necessary if other prenatal tests suggested a problem. Ironically, a routine prenatal blood test indeed showed that she faced a greater than normal risk of giving birth to a child with *Down's syndrome* and the laboratory result specifically warned that the patient should be advised about amniocentesis and genetic counselling. Defendant did neither.

In addition to this negligent conduct, one of the obstetricians, when a sonogram indicated that the pregnancy was not progressing normally, misinformed the plaintiff that the unusually small size of the foetus suggested that her pregnancy was less advanced than they had thought and assured her that it was unnecessary that the blood test should be repeated.

The baby was eventually delivered by Cesarean section and immediately taken to an oxygen tent, without plaintiff properly seeing her newborn. The personnel told plaintiff and her husband that the baby was fine and never alerted them of its condition before proceeding with a sterilization procedure on the plaintiff which she consented to a week before. Plaintiff instituted a wrongful birth action[41] as well as a wrongful life action on behalf of her impaired child.[42] Because of the Pennsylvania wrongful birth statute, both claims were dismissed. The Sejpals asserted that the statutes violated their Fourteenth Amendment right to privacy, which encompassed the right to choose abortion as established in **Roe**.

3.2 Is it constitutional?

Kowitz[43] reports that whether and to what degree the Fourteenth Amendment prevents a state from restricting the right to choose abortion became an issue of American national debate soon after the **Sejpal** case, as the landmark case of **Planned Parenthood of Southeastern**

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40 see ch 11.

41 Plaintiff asserted that she would have obtained the necessary information which would have entitled her to make an informed decision was it not for the defendant's conduct. It was further stated that if she had known of the abnormality, she would have obtain an abortion and would not have consented to a sterilization.

42 One cannot but feel aggrieved when misconduct of this proportion is committed without any intervention from the law. It is submitted that in cases similar to these (which occur every day in hospitals around the world), justice is not served without full and proper compensation awarded to the victims of such serious negligence and misconduct - see ch 2 where compensation theories are discussed. In cases like these, it is submitted, compensation is secondarily required to fulfill society's sense of justice.

43 *op cit* p 237.

Pennsylvania v Casey[44] was heard two months later. The court affirmed "the essential holding of Roe" while upholding considerable restrictions[45] on a woman's right to terminate her pregnancy. Most significantly, Kowitz writes,[46] the Casey plurality altered abortion jurisprudence radically with its ruling that restrictions on a woman's right to choose abortion were no longer subject to "strict scrutiny", but instead to a newly-minded and less stringent "undue burden" standard of review.[47] It is reported that while relaxing the standard of state legislation review,[48] the Casey court at the same time expanded the scope of legislation that would be subject to that review. He explains:

> "The joint opinion defined an undue burden as 'a state regulation [that] has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. This disjunctive language -'purpose *or* effect'- provides two alternative and independent bases for review of legislation affecting reproductive choice. Prior to *Casey*, purpose was not an independent inquiry. After *Casey*, legislation affecting abortion rights is unconstitutional if it is passed with either the purpose of substantially obstructing women seeking abortions or when the legislation has that effect."[49]

This expanded scope of legislative review is extremely important to critics of wrongful birth statutes, since a statute that has the effect[50] of limiting a legal right can also be struck down as unconstitutional. It is important to appreciate in what respects the new "purpose test" introduced by the **Casey** judgment effects legislation that influences abortion rights. When applying the effect analysis, one has to prove that a specific piece of legislation causes a *substantial* obstacle which constitutes an undue burden.
Courts, therefore, have to firstly ascertain if an obstacle exists and then estimate the "size" of the obstacle. Then the effect of a restriction has to be considered and be found an undue

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44 112 S.Ct. 2791 (1992).

45 to note - 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.

46 *op cit* p 238.

47 see the discussion of this issue *infra* and also in ch 3.

48 and thereby making it more difficult to find wrongful birth statutes unconstitutional.

49 *op cit* p 238 - Kowitz believes that Pennsylvania has passed their wrongful birth statutes with the exact purpose disallowed in **Casey**.

50 irrespective of the legislator's purpose with the statute.

burden,[51] in order to find it unconstitutional. Kowitz[52] declares that this calculation becomes increasingly difficult if the challenged law is not an abortion regulation, but still affects the right to choose abortion indirectly. He also warns that the effect analysis relies on highly case specific factors,[53] which may vary the outcome of the analysis from state to state.

It is submitted[54] that another difficulty in using the "effect argument" against restrictive legislation is that actual harm has to be proven or specific future harm predicted. Purpose based challenges do not require a litigant to prove or predict harm and legislation can be challenged immediately. Furthermore, an analysis of the legislative purpose of a statute could resolve the state action problem that can arise under an effect analysis. Since state laws may only regulate the interaction between private individuals, a legislative measure with the purpose to, for example impact abortion rights will no longer regulate individual conduct alone and would therefore be seen as state action.

When a purpose analysis is used to question the constitutionality of restrictive legislation and it is found that a states' purpose with the legislation surpasses mere encouragement of a specific issue[55] and reaches the intent to substantially obstruct individuals from exercising their rights, the legislation becomes unconstitutional. For example, a statute barring wrongful birth and wrongful life actions could have the permissible purpose[56] of prohibiting a cause of action against physicians, while having an underlying purpose of placing a substantial obstacle in the path of a woman seeking an abortion. Kowitz[57] is of the opinion that with regards to **Pa. Const. Stat. § 8305 (1992)**, Pennsylvania's legislative history exposes and exemplifies such an impermissible legislative intent.

3.3 Bases of constitutionality

Courts that have judged that wrongful birth statutes do withstand constitutional scrutiny have

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51 to find a certain restriction a "particular burden" would not be sufficient.

52 *op cit* p 260.

53 possible factors include the number of abortion facilities in a state, the accessibility of public transport and the cost of the procedure.

54 Kowitz *op cit* p 238.

55 such an attempt of a state to discourage abortions to further its interest in potential life.

56 standard tort reform.

57 *op cit* p 248.

justified upholding them on two bases:

- because the statute's bar does not affect the right to terminate pregnancy; or
- because the statute's effect does not constitute state action.[59]

Kowitz[60] is of the opinion that the issue in all these cases is whether the wrongful birth statute infringes the guarantees of the Fourteenth Amendment. He reminds us, however, that a plaintiff cannot seek this protection unless the claim involves state action. Individuals are therefore only protected against action taken by the states, not against action taken by private parties. Concerning private conduct that causes injury,[61] the Due Process and Equal Protection clauses provide redress, but only in limited circumstances. Under these circumstances the state normally has no responsibility unless it has encouraged the behaviour or exercised coercive power sufficient to render the act essentially an act of the state.[62]

3.3.1 State infringement

In turning to the issue of state involvement the **Edmonds** court used two criteria for finding the necessary state action:[63]

- whether the statute regulates or directly affects rights protected by the Fourteenth Amendment; or
- whether the statute sufficiently encourages action by private individuals so as to make the individual's action effectively that of the state.[64]

The court concluded that because section 8305(a) permits administrative sanctions to remain intact, Pennsylvania's wrongful birth statute did not encourage medical practitioners

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58 Kowitz *op cit* p 257.

59 as in the **Edmonds case** *supra*.

60 *ibid*.

61 Silverman, p 1091: commenting on the *Civil Rights Cases* 109 U.S. 3, 11 (1883) referring to the Due Process and Equal Protection clauses: "The Court concluded that actions by private parties are not subject to Fourteenth Amendment restrictions, and persons injured by such private actors must resort to state law for redress of their complaints."

62 the question could be asked whether the Pennsylvania Legislator did not encourage physicians to act negligently with regards to genetic counselling by removing the possibility of possible malpractice claims.

63 in order to establish a 14th Amendment violation.

64 *in casu* this was the contention of the plaintiff.

intentionally to misrepresent information to their patients.[65]

Silverman[66] is of the opinion that the Superior Court of Pennsylvania erred in its conclusion that the facts of the **Edmonds** case did not fulfill the state action requirement of the Fourteenth Amendment. He explains that the question presented by a state action analysis of section 8305(a), is whether state legislation eliminating a formerly recognized common law cause of action qualifies as state action under the Fourteenth Amendment. It is, after all, commonly accepted that statutory provisions enacted by a state's legislator are one of the most fundamental forms of state action. It is further similarly well established that a state court administering state common law is also state action.

It is reported[67] that the court found the facts of the case did not constitute "state conduct"[68] because the actions of the doctors could not directly be attributed to the state. Accordingly the court found the fourteenth amendment of the United States constitution inapplicable and upheld the constitutionality of section 8305(a).

Silverman[69] criticises the court's approach and states that they never engaged in a substantive constitutional analysis of the statute. He furthermore criticises the **Edmonds** judgment because of the fact that the United States Supreme Court firmly established the state action doctrine in the so-called "Civil Rights Cases".[70] In **New York Times v Sullivan**,[71] the Supreme Court made a landmark pronouncement concerning state involvement. The test for state action, the court said, is not the form in which a state applies its power but rather whether such power has in fact been exercised. Once a given factual scenario has met the state action requirement, a court should proceed to confront the underlying substantive constitutional

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65 see, however, various critics' views *infra* and also ch 4 and 9 where the effectiveness of administrative sanctions (of professional bodies) to keep medical professionals in line and accountable for their actions is seriously questioned.

66 *op cit* p 1095.

67 *op cit* p 1098.

68 as would be necessary to find an unacceptable infringement of her right to an abortion.

69 *ibid.*

70 109 U.S. 3, 11 (1883) (Due Process and Equal Protection Clauses of Fourteenth Amendment applicable solely to action undertaken by states); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). The Court concluded that actions by private parties are not subject to Fourteenth Amendment restrictions and persons injured by such private actors must resort to state law for redress of their complaints.

71 376 U.S. 254 (1964).

issues.[72]

3.3.2 Wrongful birth statutes infringe constitutional principles

The constitutional inquiry into wrongful birth statutes does not end with a finding that state action was involved. Once state action is established, it must be determined whether the relevant statute infringes a constitutional right.[73]

Roe established a trimester framework for the examination of abortion rights.[74] As the foetus approaches independent viability the state's interest in the potential new life becomes more compelling and if any state infringement of this right should take place, it has to withstand "strict scrutiny" in order to be classified as constitutional. It is suggested that section 8305 was not placed under strict scrutiny in terms of infringing state action in the **Edmonds** case, as should have been the case.[75] Silverman[76] thus believes that by enacting section 8305, the state of Pennsylvania has infringed the fundamental right to abortion.

The **Roe** trimester system has proved controversial as many questions continue to arise when and how states may regulate abortions. In an effort to resolve the controversy the Supreme Court gave important guidance in the judgment of **Casey**.[77] Here the Supreme Court examined the constitutionality of a Pennsylvania statute requiring certain measures[78] be taken before a woman could obtain an abortion. The Court upheld all of the statute's provisions except the spousal notification requirement.[79] The Court reaffirmed what it determined to be the three essential holdings of **Roe**:

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72 Silverman *op cit* p 1099.

73 *in casu*, the right to abortion set out in **Roe** and clarified in **Casey**.

74 see the discussion on abortion in America in ch 3.

75 remember that the **Casey** judgment, wherein the new "undue burden" standard was introduced, was only given after the **Edmonds** decision, therefore the "strict scrutiny" was the correct standard of application.

76 *op cit* p 1094.

77 112 S.Ct. 2791 (1992).

78 they were the following: the woman had to ...
- give her informed consent prior to the procedure and obtain parental consent if still a minor;
- be provided with certain information about the procedure and the status of the foetus;
- observe a twenty-four hour waiting period between first consultation and the performance of the abortion;
- if married, notify their husbands of their decision to obtain an abortion.

79 see previous fn..

- a woman has the right to choose abortion prior to foetal viability and to obtain such an abortion *without undue interference from state*;[80]
- the state has the authority to restrict abortions *after foetal viability*,[81] provided the state makes exceptions for the health and life of the pregnant woman;
- the state has a legitimate interest in protecting the health of the pregnant woman and the unborn child.

It is reported[82] that the majority of the court expressly overruled the "strict" trimester analysis and effectively replaced it with a new constitutional standard of "undue burden".[83] In its judgement the court found the first three requirements[84] of the statute enhanced the woman's ability to an informed decision and accordingly these withstood the test of constitutionality. Concerning the spousal notification requirement, however, the court decided that while the husband's interests concerning pregnancy is considerable they are outweighed by the woman's rights to be free from possible risk of domestic violence and coercion. Therefore it was held that this requirement unduly burdened a woman's right to choose abortion and as such was unconstitutional.

3.4 Casey's new approach

Kowitz[85] explains that most courts having already dealt with the state action issue and in considering the merits of challenges to the statutes, have held that they do not affect abortion rights. He believes that the reason for this is that the courts have used the analysis developed in **Roe** whereby only legislation that *directly* impacts on abortion rights are for this reason unconstitutional.[86] He shows that analysis of these statutes under the undue burden test developed in **Casey** yields a significant different result.

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80 this was the *crux* of the matter in the **Edmonds** case: plaintiff argued that by withholding vital information on the health of her unborn foetus the defendant-physician infringed her right to abortion and the state assisted in this infringement by barring her route to legal redress, and therefore the state of Pennsylvania unduly interfered with her decision to obtain an abortion.

81 in the **Edmonds** case the plaintiff could have enforced her right to abortion *before* foetal viability, if she timely received the necessary information.

82 Silverman *op cit* p 1095.

83 replacing the more severe "strict scrutiny"requirement established in **Roe**.

84 see *supra*.

85 *op cit* p 259.

86 statutes therefore barring wrongful birth and wrongful life actions are upheld because such statutes do not regulate or affect abortion *directly*.

In the **Edmonds** and **Sejpal** cases it was alleged that Pennsylvania's wrongful birth statute interferes with a woman's constitutionally protected right to choose an abortion by allowing a physician to withhold information that *directly* impacts on a woman's ability to make an informed decision. This contention involved both the due process and equal protection clauses of the fourteenth amendment of the United States constitution.[87] Important principles in this regard are:

- legislative enactments enjoy a strong presumption of constitutionality;
- those who challenge such statutes on constitutional grounds bear the burden of rebutting that presumption.

Basically two main constitutionally arguments could be raised against the legality of wrongful birth statutes, namely that they violate the due process clause and that they deny equal protection of the law.[88]

3.4.1 Effect on constitutional rights

3.4.1.1 Wrongful birth statutes violate the due process clause

State legislators may not impermissibly interfere with rights protected in the United States constitution.[89] In addition to this fact, thirty six state constitutions contain a remedy clause that guarantees every person a remedy for any *legally recognized wrong*. Remedies clauses may bar the state from withdrawing a cause of action once the underlying right has been recognized by the courts, thus in states were wrongful birth actions have already been successful,[90] state constitutions as well as the federal constitution may bar legislative elimination of the cause of action. It is argued:[91]

> "Wrongful birth statutes violate the due process clause of the 14th amendment because they burden a constitutionally protected privacy right and are not justified by a compelling state interest."

It could thus be argued that wrongful birth statutes allow physicians to withhold legally required information to their patients, which intrudes into the physician-patient relationship regarding

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87 discussed *infra*.

88 Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. **Harvard Law Review** (100), 2023.

89 **Munn v Illinois** 94 U.S. 113, 134 (1877).

90 as in Pennsylvania, recognizing a wrongful birth action in **Speck v Finegold**.

91 Anon. *op cit* p 2025.

consultation and undermines the essential relationship of trust and reliance. In **City of Akron v Akron Centre for Reproductive Health Inc.**[92] it is reported[93] that the Supreme Court invalidated an Ohio abortion ordinance that specified certain information that the physician had to recite to each woman seeking an abortion as an obstacle placed in the path of the physician. In the same way wrongful birth statutes interfere with the normal functioning between physician and patient and should thus also be invalidated.

Wrongful birth statutes significantly limit the physician's legal duty to inform a woman regarding pregnancy as in accordance to accepted standards of medical practice. Supporters of wrongful birth statutes argue along the same line as supporters of legislation restricting abortion, whom say that such regulation merely embodies the state's decision not to facilitate and fund abortion although a woman could still freely obtain it.[94]

Because wrongful birth statutes infringe upon fundamental rights they must be justified by a *compelling state interest*.[95] Courts have found only two state interests sufficiently compelling to justify interference with choice of abortion, namely: protecting the health of the mother; protecting potential life.[96]

It is suggested[97] that wrongful birth statutes can also not be justified by concerns for material health, since by lowering the enforceable standard of care wrongful birth statutes actually increase health risks to pregnant woman.

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92 462 U.S. 416 (1983)

93 Anon. *op cit* p 2024.

94 Wrongful birth statutes supporters rely on **Maher v Roe** 432 U.S. 464 (1977) and **Harris v McRae** 448 U.S. 297 (1980), two Supreme Court cases holding that a state's refusal to fund abortions does not infringe the exercise of a fundamental right, since such a government did not place any obstacles in the way of a woman and it need not remove (financial) obstacles not of it's own creation. It is, however, my belief that these judgments have no real relevance *in casu*, as the lack of relevant and reliable medical information precludes an informed choice altogether and therefore *do* place a significant obstacle to an abortion.

95 **Roe v Wade**, **Shapiro v Thompson** 394 U.S. 618, 634 (1969).

96 Under **Roe** each of these interests becomes compelling at a specific time during the pregnancy - see ch 3. The state's interest in protecting maternal health becomes compelling at the end of the 1st trimester and its interest in safeguarding potential life becomes compelling only at viability. An obvious result of this fact is that because no compelling state interest arises until end of 1st trimester, wrongful birth statutes that affect 1st trimester abortions should be invalid (on the same account it should be admitted that wrongful birth statutes that affect post-viability abortions might be justified as protecting potential life).

97 Anon. *op cit* p 2027.

3.4.1.2 Wrongful birth statutes deny equal protection of the law

This statement can be made because wrongful birth statutes firstly rely on classifications that burden a "fundamental interest" and secondly are not justified by a "compelling state interest".

It is reported[98] that the classification employed by wrongful birth statutes burden a fundamental interest: Wrongful birth statutes generally apply to groups that are selected upon unfair bases as only parents who would have chosen abortion after conception has taken place are usually precluded from suing. For example, if a physician is negligent in performing a sterilization procedure and this interferes with the parent's choice not to conceive,[99] such negligence is still actionable under most wrongful birth statutes. But if a physician's negligent or intentional conduct in the provision of information or testing *after* conception interferes with the patient's decision to abort, wrongful birth statutes usually prohibit these actions. Therefore one can conclude that some wrongful birth statutes allow recovery for the infringement of a right to prevent a child from being conceived, but prohibit recovery where parents want to prevent the birth after conception. Thus by creating such a classification, wrongful birth laws burden fundamental interests in procreative decision making.

Also with regards to the relevance of classification in wrongful birth statutes, the following:[100] Although it is uncertain how many woman will actually be prejudicially affected by these statutes[101] there is little doubt that to the women who will in fact be prevented from choosing abortion as a result of statutes such as section 8305(a), it clearly stands as an absolute bar to their ability to choose abortion.[102]

Silverman[103] argues that even if one argues that only a very small percentage of women will actually be exposed to and influenced by improper information, **Casey** shows it is nevertheless relevant:

> "[t]he proper focus of constitutional inquiry is the group for whom the law is a

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98 *op cit* p 2028.

99 wrongful conception actions.

100 Anon. *op cit* p 2029.

101 wrongful birth statutes could have the indirect effect of causing health care providers to increasingly misrepresent information to their patients, thereby preventing the patients from making an informed decision.

102 and accordingly infringes on their constitutional right to an abortion.

103 *op cit* p 1103.

restriction, not the group for whom the law is irrelevant."[104]

In explaining this concept, Silverman[105] refers to the example given by the court concerning the spousal notification requirement. While ninety-nine percent of married women were likely to notify their spouses regardless of the statute, proper analysis must focus on the one percent of woman forced to notify their husbands against their will. The relevant group[106] is those for whom the statute is an "actual rather than an irrelevant restriction." Women fearing spousal violence and coercion would be presented with a substantial obstacle to choosing abortion. The court stated that: "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to choosing abortion" and therefore the spousal notification requirement was deemed to be unconstitutional. Similarly, Silverman argues the consequential effect of barring wrongful birth would detriment women who have not received proper genetic information:[107]

> "As the frequency of misinformation increases, the likelihood that women will be prevented from exercising their abortion rights also increases."

Classification employed are not rationally related to a legitimate governmental interest: Even if courts find that the classifications mentioned above do not burden fundamental interests, the statutes still could not survive equal protection analysis as wrongful birth statutes do not encourage the making of a decision in favour of childbirth, but they rather prevent the making of an informed decision altogether.

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104 *ibid* - quoted from the case of **Planned Parenthood of Southeastern Pennsylvania v Casey**.

105 *op cit* p 1104.

106 Silverman discusses the **Casey** court's viewpoint on obstacles prohibiting people from enjoying their rights and states that: " [a] particular burden is not of necessity a substantial obstacle." This will only be the case if a "large fraction" of the relevant group is detrimentally affected, eg the staggering consequences that a 24-hour waiting period required by law before an abortion may be legally performed could have. For most this restriction is irrelevant, but for others this could be an absolute obstacle, especially for poor women living in rural parts where the nearest medical services may be many hours away. In such instances a woman who could not afford an overnight stay in a hotel room or who could not take the required time off from work would effectively be prevented from acquiring an abortion. In the United States only a small percentage of women is affected to such an extent and accordingly the Court in **Casey** wasn't persuaded to strike down this requirement as unconstitutional.
In South Africa, however, this scenario is much more likely and would probably affect a large enough percentage of women to establish that if similar restrictions would be placed on the availability of medical services, it would probably be unconstitutional on the basis that a substantial obstacle is placed between women and their right to abort.

107 *ibid.*

3.4.2 Direct or indirect infringement

In the Supreme Court judgment of **Casey** the court made it very clear that a law that has the purpose or effect of preventing a woman from making a decision on abortion is an undue burden and therefore unconstitutional. The **Edmonds** court, however, judged that section 8305(a) does not *directly* regulate a woman's access to abortion.[108]

An important question then remains: Does the statute have the *indirect* effect of causing health care providers to misrepresent information to their patients and thereby prevent the patients from making an informed decision? The court answered this question in the negative.[109]

3.4.3 Effectiveness of administrative sanctions

Topham[110] believes in the value of wrongful birth and wrongful life actions in that they further the fundamental tort goals of deterrence and compensation:

> "The threat of liability provides a strong incentive to avoid tortious acts, and potential liability in the wrongful birth context would similarly influence health practitioners to exercise proper care when performing sterilizations or abortions and when advising and counselling patients."

Silverman[111] agrees that tort damages are awarded against a tortfeasor, in part, to dissuade other potential tortfeasors from engaging in the same wrongful behaviour.[112] He also mentions the possible application of punitive damages[113] to punish particularly egregious wrongs. Section 8305(a) has the effect that these detergents are taken away,[114] which may result in the

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108 remember that one of the consequences of the **Casey** decision was that even indirect conduct could still cause a statute to be unconstitutional (be that as it may, the **Edmonds** decision was given prior to this development).

109 Silverman *op cit* p 1105 feels that although this might possibly be the correct conclusion, their inquiry was incomplete as to the indirect consequences of the statute.

110 *op cit* p 853.

111 *op cit* p 1101.

112 see in this regard the various compensation theories in ch 2.

113 in the United States of America - punitive damages are not recognized in South Africa: see, however, next fn.

114 although administrative sanctions might present some degree of deterrence against misrepresentation, this form of regulation and peer review have often been criticized as ineffective.

lowering of informative standards and eventually in the burdening of abortion patients. In his own words:

> "Section 8305(a) extinguishes a previously recognized common law cause of action, thereby terminating a system of state-sanctioned disincentives formerly applied against a particular kind of negligent and intentional misconduct. The logical conclusion, therefore, is that section 8305(a) will, at least to some degree, increase the occurrence of negligent or intentional misrepresentation."

Kowitz[115] writes:

> "Wrongful life and wrongful birth claims are tort claims. A basic tenet of tort law is that liability deters behaviour society wants to discourage. Both compensatory and punitive damages aim, to varying degrees, to dissuade the tortfeasor from repeating undesirable behaviour, and to deter others from similar action. The risk of medical malpractice actions, therefore, functions as a deterrent to poor medical practices."

Others[116] have similar concerns of the negative effects wrongful birth statutes may have on the standard of medical services, however one should concede that the vast majority of physician will continue to practice medicine on a high level of proficiency even without the prospect of possible malpractice claims:

> "In the presence of such statutes, many doctors will of course continue to exercise proper medical judgment in accordance with accepted standards of care; but others, relieved of the threat of malpractice suits, will not. Granting a physician immunity for failure to impart information that is medically indicated interferes even more with the abortion right than does a requirement that he impart information that is not medically indicated. The latter may be confusing and detrimental to a woman's well-being; the former directly prevents a woman from making an informed choice."[117]

Courts upholding wrongful birth statutes usually insist that although the fear for possible malpractice liability is done away with, administrative sanctions[118] are still intact to discipline medical practitioners who make themselves guilty of negligent conduct. Although these sanctions do present some degree of deterrence, administrative regulation and peer review

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115 *op cit* p 262.

116 Anon. 1987, *op cit* p 2024.

117 *op cit* p 2025.

118 incl license suspension or revocation, disciplinary warnings, fines and/or other penalties.

have often been criticised as ineffective.[119] Problems facing administrative sanctions are:

- the perception that state and hospital review boards and disciplinary committees have a "captured agency" drawback, since they are composed primarily of physicians who are reluctant to discipline members of their own profession; and
- the inability of administrative boards to award damages to injured patients resulting in a reluctancy to pursue administrative sanction.

3.4.4 Conclusion

One can argue in conclusion that wrongful birth actions are necessary to protect societal interests in procreative autonomy, meaningful physician-patient relationships and quality prenatal care. Statutory attempts to prohibit these action are very dangerous as they license physicians to disregard patients' rights and values and to inject their own moral convictions into patient decision making. In so doing wrongful birth statutes violate the Due Process and Equal Protection clauses of the Fourteenth Amendment.

4. Support

4.1 Arguments for wrongful birth statutes

Topham[120] reports that proponents of wrongful birth statutes assert that such legislation is vital to prevent unnecessary eugenic screening tests. He writes that many believe that if wrongful birth and wrongful life actions would be recognized, a legal duty would be created for doctors to recommend or perform and for mothers to undergo prenatal tests and abortions. It is reported[121] that wrongful birth statute supporters argue that these statutes are further beneficial to/ assist in:

- preserving the value of life;[122]

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119 Wecht, C.H. 1992. The Impact of Peer Review on the Practice of Medicine and the Relationship Between Patients, Hospital and Third Parties. **Trauma** (5:6), 34.

120 *op cit* p 857.

121 *op cit* p 858.

122 in answer to this supposition one can state that wrongful birth actions do not demean the value of life, as the injury results from the denial of the right to choose and it enhances the dignity and comfort of the handicapped child.

- protecting the conscience of the physician;[123]
- discouraging the practice of unnecessary defensive medicine;[124]
- restricting a cause of action that threatens to expand unacceptably.[125]

4.2 Wrongful birth statutes are constitutional

Faircloth[126] questions the premise that statutory prohibition of wrongful birth is unconstitutional as he doubts whether the interest protected by **Roe** is the same as that claimed in wrongful birth actions.[127]

It is further reported[128] that wrongful birth litigants do not challenge government action, but rather inaction of private citizens.[129] "The required state action is missing in judicial prohibition, and the United States Supreme Court has indicated that states may prefer live births over abortions."[130]

The same viewpoint has been held in a number of judgments. In **Hickman v Group Health Plan**,[131] for example, the Minnesota Supreme Court held that a statutory ban on wrongful birth actions does not violate **Roe**.

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123 (especially those physicians who are morally or religiously opposed to encouraging or performing non therapeutic abortions) - however, it is contended that wrongful birth actions do not affect in any way the right of a physician to refuse performance of an abortion, although he still has as a duty to inform his patient-mother of any increased risk of bearing an abnormal child.

124 wrongful birth actions do not more encourage physicians to practice defensive medicine than any other malpractice claim.

125 wrongful birth actions, as all malpractice claims, are limited to instances where there was a violation of a duty by a physician to provide medical care on an accepted standard - if a violation does occur, liability should logically follow.

126 *op cit* p 545.

127 Arguing that neither court rejection nor legislative prohibition of wrongful birth therefore violates the interests protected by **Roe**, since different interests are involved. It is mentioned that **Roe** does not compel a state to remove obstacles to abortion that were not created by the state, thus wrongful birth statutes: 1) do not involve state action 2) which affirmatively creates an obstacle to abortion that did not already exist 3) while the state may freely exercise a value judgment in favour of live births.

128 *op cit* p 557.

129 medical practitioners *etc.*

130 *ibid* - see **Harris v McRae** 448 U.S. 297, 316 (1980) and **Maher v Roe** 432 U.S. 464, 479 (1977) further discussed in ch 3.

131 396 N.W. 2d 10 Minn. (1986).

4.3 Regulatory advantages of wrongful birth statutes

Researcher in principle supports legislative instruction of wrongful life litigation since much uncertainty as to specific matters still remains in many areas, which invariably leads to unjust results and unnecessary litigation. It should, however, be noted that obtrusive denial of these actions by means of statutory ban is not the answer. It is my belief that a just resolve could be found and workable legislation implemented that would clarify the whole wrongful life debate and in the process insure sound medical practice, while protecting the individual's fundamental human rights.

In the past, various voices have gone up in favour of legislative recognition of wrongful life actions. One such example is found in **Azzolino v Dinfelder**[132] it was held that wrongful birth claims will not be recognized absent a clear legislative mandate.

Student agrees with the viewpoint that most "wrongful birth statutes" infringe on fundamental rights in that the basic right of all people to detailed and accurate information concerning medical decisions will be compromised if physicians were not sufficiently deterred from giving misinformation by threat of malpractice litigation. As a consequence insurmountable obstacles could be created for women regarding their right to abortion.

In spite of the all the possible negative consequences associated with the so-called "wrongful birth statutes" in the United States of America and England, researcher remains convinced that there are many advantages[133] to legislatively regulate the phenomena of wrongful life actions that causes so much legal uncertainty and unnecessary litigation.

Stolker[134] submits that the purpose of legislative guidance is to protect and strengthen the legal position of the patient through a general guideline wherein the rights and duties of both the patient and medical professional is established:

> *"Het doel is de rechtspositie van de patiënt te versterken door het scheppen van een algemene civielrechtelijke regeling waarin de rechten en plichten van hulpverlener."*[135]

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132 315 N.C. 103, 337 S.E.2d 528 (1985).

133 see discussion in final reflections, ch 12.

134 1994. De nieuwe Wetgeneeskundige behandelingsovereenkomst en het juridische belang van de Modelregeling arts-patiënt. **Nederlands Tijdschrift voor Burerlijk Recht** (11:1), 115.

135 *ibid.*

5. Exemplary legislation

5.1 Maine statute

A good example of legislative guidance in wrongful life matters is the Maine Statute, which legislatively recognizes the wrongful birth cause of action.

Maine Statute - Title 24§ 2931:

1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child. [1985, c. 804, §§ 16, 22 (new)]

2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilisation procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilisation procedure and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy. [1985, c. 804, §§ 16, 22 (new)]

3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child. [1985, c. 804, §§ 16, 22 (new)][136]

4. Other causes of action. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual. [1985, c. 804, §§ 16, 22 (new)] [137]

From subsection one and two it is obvious that the wrongful conception action is statutorily limited in Maine. Although plaintiffs are barred from suing for general child-rearing expenses, parents whom have been prejudiced by the negligent performance of a sterilization procedure

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[136] *ie* recognition of wrongful birth, allowing limited damages.

[137] *eg* if physician prescribes harmful drug to pregnant patient *etc.*

do have some relief, as they may receive awards of damages for the hospital and medical expenses incurred for the sterilization procedure and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

Although author personally believes that wrongful conception plaintiffs should be able to receive full compensation,[138] at least the parents do have an action and the courts have clear guidelines as to the extent of awards they are allowed to give.

In subsection three the Maine statute legislatively awards recognition to the wrongful birth cause of action, although the heads of damages are restricted to expenses relating to the handicap, defect or genetic disease suffered by the child. As there is no limit placed on the extent of such expenses an award might well be considerable.

Student believes that this is the most reasonable and just solution to wrongful birth. The Maine legislator has correctly understood the basis of the claim, in that these parents were expecting a child and were prepared to foot the bill of ordinary child-rearing costs. The additional expenses resulting from a disability or disease, however, was not expected and therefore these expenses should be compensated.

Subsection four deals with so-called "traditional medical negligence torts", whereby an injury is inflicted upon either a mother or child because of negligent conduct by a physician-defendant. It also includes instances where a handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, but for the negligent conduct of a physician. These cause of actions are left unrestricted.

A conceivable point of criticism against this statute is the fact that the position of wrongful life actions are not addressed. Wrongful life actions are undoubtedly the most troublesome of the actions mentioned and it is of vital importance that legislative recognition, albeit with limitations or alternatively obtrusive dismissal should be prevalent from such legislation. By ignoring the troublesome question of wrongful life, courts are still left in the dark as to how they should solve these novel, but al too real dilemma.

5.2 Utah statute

Another example of state legislation directed at establishing sound and certain principles

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138 full compensation would include all child-rearing costs - it is submitted that damage awards might be limited in this instance due to a misperception of the true basis of a wrongful conception claim (it is namely not the child itself that is complained of, but rather the real additional expenses necessitated by an unplanned child).

regulating wrongful life litigation, is the Utah Wrongful Life Act.

Utah Code Ann. §§ 78-11-23 to -25 (Supp. 1983)

78-11-23	The legislator finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, condition or dependancy, including all handicapped persons and all unborn persons.
78-11-24	A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.
78-11-25	The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.

It is interesting to compare the content and effect of various states' wrongful birth statutes. Note, for example, that the legislator in Utah has chosen to bar the recovery of both wrongful life and wrongful birth actions, while in effect recognising the action for wrongful conception.[139] The analogous statute of Maine, however, dictates that wrongful conception actions have been restricted to instances of failed sterilization and also with regard to specific heads of damages. The Maine statute also differs in the sense that legislative recognition of wrongful birth actions is given. Each states' unique policies and goals become clear as different actions are either barred, restricted or recognized.

Topham[140] comments on the **Utah Code Ann. §§ 78-11-23 to -25 (Supp. 1983)**. He is not convinced that the state's purpose with the statute, namely to encourage respect for the value of life of impaired persons, will be achieved. He fears that it will rather isolate health practitioners from liability for negligence that will result in unwanted births and in the process infringe on abortion rights.

He suggests[141] various approaches whereby wrongful life/ wrongful birth plaintiffs in Utah could

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139 **Subsec 78-11-25** effectively does away with the main defence of a wrongful conception defendant. In researcher's opinion this is an example of the least liberal type of wrongful birth statutes, in that wrongful conception actions are so commonly recognized that it almost seems superfluous to give it legislative acknowledgment as well.

140 *op cit* p 856.

141 Topham *op cit* p 585.

"functionally eviscerate" the abovementioned statute, while remaining within the contours of the statutory language. He writes that wrongful birth/ wrongful life actions may arise in at least five contexts, including:

- negligent prenatal counselling;[142]
- negligent genetic testing;[143]
- unsuccessful abortions;[144]
- negligent dispensing contraceptives;[145] and
- unsuccessful sterilizations.[146]

Of the five, only the first three appear to contain the requisite nexus with abortion. Therefore, a narrow construction of the Utah Act would allow wrongful birth actions alleging the last two causes of action. Unfortunately, the Act would still deny a cause of action to the vast majority of impaired plaintiffs.

Secondly, Topham suggests[147] that plaintiffs could ground their actions on alternative bases.[148] Actions based on breach of contract or warranty could bypass the application of the Act. An advantage of claiming on breach of contract is a usually longer statute of limitation period. Disadvantages, however, are a lack of insurance coverage, problems of proof and the common use of preoperative consent forms invalidating prior oral guarantees of success. Another disadvantage is that while it is generally held that a postoperative warranty must be supported by separate consideration, some courts have extended that rule to hold that preoperative warranties must also be based on new consideration. This requirement will usually bar contract or warranty actions for unwanted births because patients rarely make additional payments to physicians in return for guarantees of success. Additionally, in Utah, a warrantee must also be "a written, express contract, signed by the provider or his agent". He then continues:

> "Finally, the scope of the Act may be circumvented by plaintiff's claiming injuries other

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142 **Gleitman v Cosgrove** 49 N.J. 22,227 A.2d 689 (1967).

143 **Curlender v Bio-Science Labs.** 106, Cal. App.3d 811, 175 Cal. Rptr. (1980).

144 **Speck v Finegold** 497 Pa. 77, 439 A. 2d 110 (1981).

145 **Troppi v Scarf** 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

146 **Herrera v Roessing** 533 P.2d 60 Colo. Ct. App. (1975).

147 *op cit* p 859.

148 in case of intentional misstatement of a physician, a plaintiff could base a claim on fraud, deceit or misrepresentation.

than those resulting from the inability to undergo an abortion. An example of such an injury is the deprivation of the mother's right to make an informed procreative choice. A claim of damage by loss of choice would appear to be valid under the Act because such deprivation is an injury distinct from and unrelated to whether abortion would have been actually undergone had the true facts been known."[149]

5.3 North Carolina statute

The North Carolina Supreme Court also supports legislative guidance and stated in **Azzolino v Dingfelder** that wrongful birth issues were better left to the legislator which "can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit."[150]

5.4 California statute

Bey-Berkson[151] summarises some further existing legislation governing wrongful life matters.[152] These existing examples of wrongful life and wrongful birth statutes can be used as a starting-point when attempting to draft a comprehensive act whereby the entire wrongful life phenomenon as well as associated intricacies would be covered. By examining existing statutes that regulate wrongful life litigation, one can establish the various interests that are sought to be protected and regulated. The **California Civil Code**[153] provides that:

- "No cause of action arises against a parent on the claim that the child should not have been conceived or born alive. The refusal of a parent to prevent the live birth of his child shall not be a defense in an action against a third party or be conceived in awarding damages."[154]

It is obvious from the Californian wrongful life statute that the main thrust of the legislator was to protect the parent's position as party to wrongful life litigation. In the first instance it is very interesting that the legislator ensures that actions may not be instituted by children against their

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149 *op cit* p 862.

150 Faircloth *op cit* p 558.

151 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 63.

152 of various American states.

153 § 43.6 (enacted in 1982).

154 *op cit* p 90.

parents. It is suggested that such type of litigation would be seen as *contra bonos mores* under South African law, however, no harm can be done by explicitly prohibiting such litigation.

The second aspect that is dealt with in the Californian statute is the implied *de facto* approval of the wrongful life cause of action. A wrongful life or wrongful birth action can therefore be instituted against a third party physician without any legislative bar or hindrance. In this regard, however, the parents' position is once again protected. Their procreative decisions may not in any way be drawn into the litigation. It is suggested that this line of reasoning is correct and in accordance with current constitutional protection of procreative choices and the right to individual family panning. This protection afforded to parents should surely be included in a comprehensive model statute.

5.5 Idaho statute

The **Idaho Code**[155] prohibits a cause of action on behalf of any person based on a claim that, but for the conduct of another, a person would have been aborted. The statute does not preclude causes of action based on claims that, but for a wrongful conduct fertilisation would not have occurred, maternal death would not have occurred or handicap or disease of an individual prior to birth would have been prevented or cured in a manner that preserved life of the affected individual. The **Idaho Code 5-334 (1990)**, provides:

> "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."[156]

The first important consequence of this statute is that wrongful life and wrongful birth actions are effectively barred, as the general view of commentators dictates that both these actions rely heavily on the parents' right to have the disabled or diseased child aborted.[157] On the other hand the statute gives specific recognition to the wrongful conception cause of action. Also recognized by this statute are the so-called "traditional" pre-natal tort based actions in the sphere of physician negligence and professional liability.[158]

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155 § 5-334.

156 at 5-334 (1).

157 see ch 7 and 8 where alternative opinions are raised, stating that the right to abortion is not essential for a successful wrongful life action.

158 where the unlawful conduct of a third party causes a pre-natal injury, see ch 4.

It would seem as if the Idaho legislator intended to place limits on the scope of litigation involving the birth of children with regards to the more troublesome actions,[159] while still allowing the more traditional and generally accepted causes of action.[160] It would be difficult to predict the exact reasons for this viewpoint, but it is suggested that official state policy and public sentiments in a particular state on issues such as family planning, abortion, adoption and physician liability are important in this respect.

Careful consideration should therefore be taken as to a country's specific viewpoints on important social and political issues before a legal solution can be sought through the enactment of a regulatory and prescriptive statute with the purpose of creating legal certainty in a particular sphere of law.[161]

5.6 Minnesota statute

Minnesota[162] has taken a similar stance as Idaho and has also barred wrongful life and wrongful birth, while upholding wrongful conception actions.[163] The wording of the clause making provision for wrongful conception states that a cause of action does exist for malpractice for failure of a contraceptive method or sterilization. The **Minn. Stat. Ann 145.424 (West 1989)**, provides:

> "Wrongful birth actions are prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, (a child) would have been aborted."[164]

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159 *ie* wrongful life and wrongful birth actions. It would be fair to assess these actions as more troublesome (than wrongful conception) , as they involve a wider scope of philosophical, ethical and religious challenges and question such as possible discrimination against the handicapped society and also abortion issues.

160 *eg* cases where the foetus is injured by a physician in a medical examination or negatively affected by incorrect medication.

161 *eg* if abortion on demand is not acceptable on either religious or moral or even legal grounds in a specific community, it would be inappropriate for a legislator to give legal recognition to the wrongful life cause of action.

162 § 145.424.

163 note *supra*, where it is recorded that Minnesota's wrongful birth statute has been found to be constitutional in the case of **Hickman**.

164 at 145.424 (2).

5.7 South Dakota statute

One must carefully read the words of the South Dakota statute[165] in order to establish what may and what may not.[166] This statute prohibits a cause of action on behalf of any person based on te claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been born alive. It also prohibits a cause of action based on the claim that, but for the conduct of another, a person would not have been permitted to be born. The **S.D. Codified Laws Ann 21-55-2 (Rev. 1987)**, provides:

> "There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive."

The first portion of the statute is directed to prohibit wrongful life actions, as the words "based on the claim of that person" are used. The second prohibition is more generally directed and it is vague precisely what is meant by the legislator in this instance. It is submitted that both wrongful birth and wrongful conception actions are encompassed herein as both these actions are aimed at the prevention of the birth of a child and both are instituted by the parents, while no distinction or exception is made as to the possible recognition of wrongful conception actions.

5.8 Further statutes

Grobe[167] also comments on a variety of state statutes and quotes relevant portions:

> **Ind. Code 34-1-1-11 (Burns 1986 & Supp. 1991)**, provides: "No person shall maintain a cause of action or receive an award of damages on (his behalf) based on the claim that but for the negligent conduct of another (he) would have been aborted."

> **Mo. Ann. Stat. 188.130 (Vernon 1988 & Supp. 1992)**, provides: "No person shall maintain a cause of action or receive an award of damages based on the claim that

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165 § 21-55-1 to 21-55-4.

166 it is suggested that special attention should be given to the choice of words when a statute is compiled - it is advisable that generally understandable wording be used in simply constructed sentences to improve the comprehension and effectiveness of the act.

167 1992. The future of the "wrongful birth" cause of action. **Pace Law Review** (12:3), 738.

but for the negligent conduct of another, a child would have been aborted."

42 Pa. Stat. Constitutional. Ann. 8305 (1989 & Supp. 1991), provides: "Wrongful birth - there shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born."

Me. Rev. Stat. Ann. Tit. 24, 2931 (West 1990), provides: "Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as a result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child."[168]

6. Conclusion

Student believes that a clear legislative guidance based on a true understanding of the difficult issues involved in each specialised action, could solve the wrongful life puzzle once and for all. Every central or state legislator will have to consider its own public policy considerations and decide on its own values concerning the religious, moral and ethical spheres when enacting these statutes.

Hondius[169] is similarly a sturdy proponent of the value and effectiveness of legislative regulation of patients' rights through medical treatment agreements:

> *"De rechtspositie van de patiënt heeft zich de afgelopen jaren flink gewijzigh. Nederland is een van de weinige landen waar deze wijzigingen wettelijk zijn vasgelegd. Hoewel de keuze voor een bijzondere overeenkomst als wettelijk raam voor een regeling van patiëntenrechten enige nadelen heeft, is zij, gelet op de betekenis die hiermee aan de autonomie van de patiënt wordt gegeven, verantwoord. Sterker: het is een goede keuze geweest, die gerust aan andere landen tot voorbeeld mag strekken."*[170]

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168 at 2931(3).

169 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1709.

170 a paraphrased summary of this quotation is: "The legal position of the patient has dramatically changed in the Netherlands over the past few years, being one of the few countries which have adopted legislative measures to stipulate patient rights. Although this choice in favour of legislative modification of patient rights has presented certain challenges, the vast improvement of patient autonomy that has been achieved by it is overwhelming. It was therefore a good decision that could similarly be followed in other countries" - it is suggested that this very advise be

The benefit of such statutory guidance would be legal certainty for both the plaintiff and defendant alike and would ultimately save much unnecessary litigation.

followed in solving the wrongful life debate, see final reflections.

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B. Constitutional relevance in South African Law

1. Background to the constitution

In 1994 South Africa received its first human right based constitution.[171] This interim constitution formed the basis of the final draft that would follow. A few years later the final constitution[172] was accepted by the first democratically elected government of the Republic. This constitution differs quite drastically from its predecessors in that it is given supremacy over all levels of government. As supreme law of the country any other law or conduct inconsistent with it, is invalid.[173]

2. Discussion

2.1 Relevance to wrongful life actions

The constitution has various important point of relevance with the wrongful life debate and direct application of some these rights could certainly have an effect on future wrongful life litigation. Only a few selected sections will be considered. In some instances only portions of a section is relevant and accordingly mentioned. The order of deliberation is determined numerically.

2.1.1 Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

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

Section eight establishes the fact that all organs and levels of State are bound by the provision and principles of the constitution. The legislator and courts alike will have to apply the concepts and principles set forth by the constitution and all must adhere to, respect and protect

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171 a Bill of Rights is encompassed in ch 2 of the document.

172 **The Constitution of the Republic of South Africa** Act No. 108, 1996.

173 sec 1(c) as well as sec 2.

the rights guaranteed therein.[174] Not only the state, however, is bound to the principles of the constitution, also natural and juristic persons must abide thereby.[175] De Waal *et al*[176] agrees that:

> "The Bill of Rights binds private persons in certain circumstances...only to the extent that the provisions is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[177]

2.1.2 Equality

9. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

It is interesting to note that various specific[178] grounds of discrimination are addressed in

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174 If a statute is found to be unconstitutional, it is accordingly declared invalid by the Constitutional Court. It is *eg* possible that future wrongful life or wrongful birth statutes prohibiting these actions may be declared invalid in this way - see the discussion *supra*, where it is argued that similar American statutes are also unconstitutional in terms of the U.S. constitution.

175 this horizontal application is important to involve or implicate all the parties to wrongful life litigation.

176 1999. **The Bill of Rights Handbook** Juta & Co. Ltd. (2nd edition).

177 *op cit* p 43.

178 and relevant to wrongful life in general.

section nine. Especially grounds such as pregnancy,[179] marital status,[180] disability,[181] religion and birth[182] are important. De Waal writes:[183]

> "Equality is a difficult and deeply controversial social ideal. At its most basic and abstract the idea of equality is a moral idea that people who are similarly situated in relevant ways should be treated similarly." and
>
> "This comprises a guarantee that the law will protect and benefit people equally and

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179 It is suggested that this equal treatment provision is directed to discrimination against pregnant women *eg* in terms of employment equality *etc.* Specifically in *wrongful conception actions* this could be relevant, since a young professional career woman could in principle be severely prejudiced by an unexpected pregnancy.

If the true application of sec 9 were to be followed, this would provide some form of relieve and protection to the distressed wrongful conception plaintiff. Her injury will be limited at least with reference to her employer's employment and promotional prejudices. Sec 9, however does not eliminate the injury *in toto*, since the infringement of a plaintiff's time management caused by the unwanted pregnancy remains a very real one.

180 In the very first wrongful life case, **Zepeda v Zepeda**, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (Ill. App. Ct. 1963), a plaintiff based his action on the fact that he was born an illegitimate child and had to live with the stigma and prejudices associated with illegitimacy - see ch 8. In terms of the sec 9 of the South African constitution he would today receive protection against such prejudice and would probably not be able to prove injury in this respect in a South African court.

181 In its founding provisions the constitution proclaims in ch 1, sec 1 (a) that values such as human dignity and equality are to be promoted and protected. The Bill of Rights also emphasizes this equality in sec 9 with regards to disabled people.

It is of great importance that society accepts handicapped people as a valuable part of the community. Their right to equal treatment provided for in the constitution will empower disabled and psychologically impaired people to stand on their rights and improve their historically disadvantaged position in various spheres of life.

It could be argued that wrongful life actions are detrimental to the cause of the disabled community since the basis of the action purports that non-existence is actually preferable to handicapped life. Although this premise might be true, one must realise that this comparison is merely a method implemented by a plaintiff to establish damage in court, as non-existence was never a true option. I believe that through proper compensation such plaintiffs will at least be placed in a position to achieve their goals in life and in this way promote the cause of handicapped people in general. Compensation will also satisfy their needs for justice (and that of the community) - see ch 2 where the nature and various theories of compensation is discussed.

182 It is unclear what the writers of the constitution intended with this provision. It could be a provision with general application that were incorporated to cover all remaining grounds of discrimination. This might also be constitutional protection against the general prejudice experienced because of any number of detrimental circumstances, such as complained of in the so-called "dissatisfied life" cases.

183 *op cit* p 188.

a prohibition on unfair discrimination. 'Equality', we are told by s 9(2), 'includes the full and equal enjoyment of rights and freedoms.' To this end, special measures may be taken to ensure the protection or advancement of people who have been disadvantaged by discrimination in the past."[184]

2.1.3 Human Dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

One of the most important goals of wrongful life claims is to restore and protect the dignity of physically and mentally challenged people. In this way wrongful life actions supports the ideal entrenched in the act. Human dignity and respect for human life will also be increased with the improved medical treatment that would almost certainly follow medical malpractice litigation.[185]

2.1.4 Life

De Waal[186] refers to the case of **S v Makwanyane**[187] and conveys that the right to life and dignity is the most important of all human rights, " and the source of all other personal rights in [the Bill of Rights]".

11. Everyone has the right to life.

This provision states very clearly that every person has the basic right to life, although this is not an absolute right.[188] It would be interesting to see how the constitutional court would react to the question whether the **Choice on Termination of Pregnancy Act** is in conflict with the right to life.[189]

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184 *op cit* p 189.

185 see ch 8 where this same argument is used in favour of wrongful life.

186 *op cit* p 223.

187 1995 (3) SAM 391 (CC); 1995 (6) BCLR 665 (CC) - where it was found that the death penalty was unconstitutional.

188 all rights entrenched in the Bill of Rights are subject to limitation in terms of sec 36 - see *infra*.

189 Mahomed J in **Makwanyane** referred to the constitutional ramifications of abortion and euthanasia, but did not give any clear viewpoints: "[w]hat does the [the right to life] mean? What is a 'person'? When does 'personhood' and 'life' begin? Can there be a conflict between the 'right to life' in s 91C and the right of a mother to 'personal privacy' in terms of s 131C and her possible right to the freedom and control of her body?"

In principle one could argue that this right to life also pertains to foetuses. In defending the abortion act, however, arguments will probably be raised that a foetus is not yet a legal person and therefore is not entitled to constitutional protection and focus will be laid on the limitation of rights in terms of section 36.[190] Another consideration is that various conflicting rights should be weighed against each other.

2.1.5 Freedom and security of the person

12. (2) Everyone has the right to bodily and psychological integrity, which includes the right -

b) to make decisions concerning reproduction;

c) to security in and control over their body; and

d) not to be subjected to medical or scientific experiments without their informed consent.

Section 12 (2)(a) is probably the single most important constitutional provision relevant to the wrongful life debate. This stipulation does not only give a legal basis for all wrongful life actions in the broad sense of the word, but is also fundamental to the entire abortion debate[191] and related medical malpractice cases.[192]

The wrongful conception plaintiff is given specific legal protection. If a physician fails to give the necessary information[193] with regards to a sterilization operation or in any other way infringes on a patient's fundamental right to make decisions concerning reproduction, liability should be inevitable. The same principle applies to the parent-plaintiffs in wrongful birth actions.

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190 for a wrongful life plaintiff the right to life is not of great assistance - if one could extend this right to a right to life as a whole and functional human being (as was recognized in the case of **Park v Chessin** 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977), however, then wrongful life actions would have complete constitutional backing (in the alternative a wrongful life plaintiff would fancy a right not to live as a disabled person).

191 in the context of sec 12 (2)(b) - **The Choice on Termination of Pregnancy Act** was probably drafted in reference to this new fundamental right of a mother to make her own decisions concerning her body, also with regards to reproductive planning.

192 where physicians are sued for negligent conduct in general or when acting without a proper mandate because of a lack of informed consent from the patient.

193 It is interesting to note that specific reference is made to informed consent in sec 12. Although sec 12(2)(c) only mentions informed consent in the context of experiments, there seems to be no explicit limitation of this right to informed consent with regards to other medical spheres. Considered in the framework of sec 12(2), one can even make a special connection between the right to informed consent and decisions on reproduction and physical integrity.

In wrongful life claims the plaintiff establishes its cause of action on a right derived from it's parents right to be informed and to decide on reproductive matters.

De Waal[194] reports that Ackermann J in **Ferreira v Levin NO**[195] proposed a ' broad and generous' reading of this subsection. It is explained[196]that the standard set by section 12 could be reformulated in the form of three questions, to determine whether these rights have been infringed: has there been a deprivation of physical freedom?; is the deprivation of freedom arbitrary or without just cause?; is the manner of deprivation procedurally fair?

2.1.6 Health care, food, water and social security

27. (1) Everyone has the right to have access to -

a) health care services, including reproductive health care;

b) sufficient food and water; and

c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

The Bill of Rights also promises access to health care services. Once again, special reference is made to reproductive health care. I believe that such an affirmation of sufficient medical treatment by State hospitals, could lead to increasing numbers of patients making use of state funded and performed sterilization operations and genetic counselling services. Provincial administrations should be aware of their ever expanding responsibility towards patients, especially with regards to reproductive medicine and genetic science.

Relevant to the wrongful conception and wrongful birth debate, is the extent and quality of social state assistance. Stolker[197] writes that the more developed and advanced a country's social support system is, the less entitled a wrongful conception or wrongful birth plaintiff becomes to compensation for child-rearing expenses.

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194 *op cit* p 231.

195 1996 (2) SA 984; 1996 (1) BCLR (CC).

196 *op cit* p 234.

197 1997. Who's afraid of wrongful birth? **Weekblad voor Privaatrecht, Notariaat en Registratie** (6262:128), 193: *" In landen met een hoog sociaal vangnet, zo besluit Vranken deze optie, zal zich deze situatie minder gauw voordoen, maar uitgesloten is zij allerminst."*

2.1.7 Children

28. (1) Every child has the right -

a) to a name and a nationality from birth;

b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

c) to basic nutrition, shelter, basic health care services and social services;

d) to be protected from maltreatment, neglect, abuse or degradation.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

The most relevant provisions are found in subsection (1)(b) and (c). These clauses entitle all children to appropriate physical care including health services and other social services. What the best interests of a child is when confronted with the matter of wrongful life, is an open question. The courts have been led by this principle for many years. In each case the judge has to make a decision based on the specific circumstances of each child, taking into consideration all relevant factors, including public policy concerns.

2.1.8 Access to information

32. (1) Everyone has the right of access to -

a) any information held by the state; and

b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Section 32 (1)(b) and (c) are also provisions of vital importance to wrongful life plaintiffs generally. Subsection (b) regulates the position where a patient receives medical treatment from a state hospital and subsection (c) where a private physician or medical centre is used. This fundamental right to access to information is correlative to a patient's right to adequate medical information.

In the majority of wrongful life actions[198] the patients are reliant on and entitled to information regarding facts ranging from infertility affirmation to risks of hereditary diseases and genetic ailments as well as the results from genetic tests. This information is indeed "required for the

198 in the broad sense.

exercise or protection of rights" namely constitutionally protected rights in terms of section 12.

2.1.9 Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must -

a) provide for the review of administrative action by a court or, where appropriate, and independent and impartial tribunal;

b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

c) promote an efficient administration.

This provision is of relevance in every instance where the State is involved with an administrative action, for example where a state hospital has caused damage through negligent conduct. The purpose of this provision is to protect ordinary citizens from far reaching and overpowering state authority and seeming insurmountable bureaucracy.

> "The right to just administrative action entrenches fundamental principles of administrative law developed by the courts in the exercise of their common law review powers. It is important to note that, while the entrenchment of constitutional rights to just administrative action considerably expand the field of judicial control of administrative power they do not replace or supersede the common law of judicial review of administrative action."[199]

2.1.10 Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

a) the nature of the right;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relation between the limitation and its purpose; and

e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the

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199 De Waal *op cit* p 476.

Constitution, no law may limit any right entrenched in the Bill of Rights.

Limitation of rights affect all the provisions in the Bill of Rights. Any of the abovementioned rights could be restricted in so far as reasonable with reference to various democratic and humanistic considerations.[200]

2.1.11 Table of Non-Derogable Rights

1	2	3
Section number	**Section title**	**Extent to which the right is non-derogable**
10	Human dignity	Entirely
11	Life	Entirely
28	Children	With respect to: – subsection (1)(d) and (e); – the right in subparagraphs (i) and (ii) of subsection (1)(g); and – subsection (1)(i) in respect of children of 15 years and younger.

The table of non-derogable rights logically lists the "most important" fundamental human rights of which all three are relevant to the wrongful life debate.

200 it would be interesting to see how public opinion and policy factors relevant to wrongful life issues would correspond to the factors mentioned in section 36.

CHAPTER 11

Medical Terms and Definitions

1. Introduction

As early as the mid-1980's, at a time when American courts have started to become aware of the importance of wrongful life litigation, there were at least between 60 and 90 foetal health impediments detectable before birth.[1] According to Bey-Berkson,[2] this very availability of accurate genetic testing procedures together with legal support provided by the landmark decision of **Roe v Wade**[3] could basically be earmarked as the two main events that brought about this novel form of litigation.[4]

In this section various genetic disorders commonly associated with wrongful life will be briefly discussed in order to inform the reader of this very intricate part of the whole debate. It is of paramount importance that the reality and consequential suffering caused by these diseases and aberrations should be thoroughly considered before a final decision concerning wrongful life is made.

The genetic terminology, procedures and processes mentioned in this chapter could assist the reader without any medical background, in understanding unfamiliar medical jargon associated with and encountered in wrongful life cases. Note, however, that only a very superficial reference to basic genetic concepts are made. As this is primarily a legal work, no attempt has been made in any way to give a complete account of foetal development and genetic testing. The sole purpose of this chapter is to familiarise the reader with some relevant medical aspects.

It is therefore submitted that, in a study where the legal viewpoint to challenges created by the advancement of medical technology and the science of genetics is discussed, it is permissible

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1 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 63.

2 *ibid.*

3 in which case the American Supreme Court recognized a woman's right to an abortion on demand - see ch 3.

4 *ie* wrongful life litigation in general.

to consider the very basic foundation upon which the majority of the actions[5] are based.

> "Genetic screening should enable people to escape their fate by giving them the freedom to make an informed choice and adopt a chosen course of action which they regard as acceptable."[6]

2. Foetal development

2.1 Brief summary of gestational development[7]

Slabbert[8] gives a brief account of the normal human foetal development: Gestational development consists of various moments or phases. Shortly after insemination, the spermatozoon penetrates the woman's ovum, and if so, fertilisation will take place, a process of approximately twenty-four hours' duration in which the haploid chromosome sets of the respective gametes commingle to form a single celled embryo with a normal complement of forty-six chromosomes.

After more or less one week, implantation of the embryo may take place in the uterine wall. If the latter dos not happen, then no pregnancy occurs. By ten weeks, all human organs are present in rudimentary form and inchoate electrical activity can be detected in the embryo's brain cells. The foetal brain develops rapidly between the nineteenth and thirtieth week, with the cerebral cortex starting to mature both structurally and functionally at the twenty-second to the twenty-fourth week. The foetal lungs also become capable of respiration at this time. At this point the foetus can, with the assistance of medical technology, survive *ex utero*.

Natural birth usually occurs around the thirty-eighth week of pregnancy. The emerging infant is connected to the umbilical cord which, until parturition, remains its only source of oxygen.

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5 a large percentage of both wrongful birth and wrongful life actions originate because of the transmission of hereditary anomalies - see *infra* (for a discussion on hereditary diseases frequently found in these actions) and also ch 7 and 8.

6 Anon. 1994. Genetic screening. **Report: Health Council of the Netherlands: Committee Genetic Screening** (Publication no. 1994/22E) - see also ch 5, on lack of proper medical/ genetic information as basis for wrongful life litigation.

7 Sadler, T.W. (previous fn) discusses foetal growth and also provides illustrations thereof - aslo see end of ch.

8 1997. The fetus and embryo: Legal status and personhood. **Tydskrif vir die Suid-Afrikaanse Reg** (2), 238.

Only after the cord is cut, the infant starts breathing on its own.[9]

Sadler[10]reports that the age and level of foetal development is vitally important to the susceptibility to teratogenesis[11] and illustrates this occurrence graphically.[12] He[13] describes the occurrence of abnormalities with reference to the various developmental stages, namely abnormal zygotes,[14] abnormal blastocysts[15] and abnormal foetal growth.[16]

Shepherd[17] points out an interesting consideration with regard to the occurrence of birth defects as a result of environmental factors (teratogens) and reports that arguments have gone up stating that such outside influences break the causal link between the defendant-physician's negligence and the eventual loss suffered by the plaintiff.

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9 see ch 3 on the various theories of when a foetus attains personhood.

10 *op cit* p 123.

11 "Despite the rapid development of the field of teratology, our knowledge of congenital malformations in humans has increased relatively little. At present it is estimated that approximately 10 percent of all known human malformations are caused by **environmental factors** and another 10 percent by genetic and chromosomal factors; the remaining 80 percent are presumably caused by the intricate interplay of several genetic and environmental factors." *op cit* p 110.

12 see end of ch.

13 *op cit* p 31.

14 "16 percent of all oocytes coming in contact wit sperm are not cleaving, either because they are nog properly penetrated by sperm or the mitotic mechanism is not functioning. Another 15 percent are lost during the first week at cleavage and blastula stages. Since many abnormal zygotes are lost during the early stages of development, this process is often considered as a "self-cleaning" process, whereby abnormal embryos are eliminated without the mother being aware of it (spontaneous abortion)." *op cit* p 31.

15 "In selected fertile women under optimal conditions for pregnancy, 15 percent of oocytes fail to become fertilized and 10 to 15 percent start cleavage, but fail to implant. Of the 70 to 75 percent that implant, only 58 percent will survive until the second week and 16 percent of those will be abnormal. Hence, at the time when the first expected menstruation is missed, only 42 percent of the eggs exposed to sperm are surviving. Of this percentage, a number of cases will be aborted during subsequent weeks and a number will be abnormal at the time of birth." *op cit* p 46.

16 "Considerable variability exists in fetal length and weight and sometimes these values do not correspond with the calculated age of the fetus in months or weeks. Most factors influencing length and wight are genetically determined, but it is now known than environmental factors also play an important role. It is generally accepted that severe malnutrition as well as heavy smoking leads to reduced fetal growth. Similarly, placental insufficiency may cause severe growth retardation." *op cit* p 86.

17 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Dame Law Review** (72:1), 103.

"The Committee also notes that many diseases are multi-factorial in causation, meaning that environmental factors may interact with one family's set of genes but not with another's. Additionally, the various genes themselves may interact with each other, and this 'multiple gene action' is impossible to predict using a separate analysis of each single gene. "In such cases, definitive predictions will rarely, if ever, be possible, and it will be impossible to group individuals into two district categories - those at no (or very low) risk and those at high risk."[18]

3. Background on hereditary anomalies and foetal development

3.1 Concise summary of transfer of hereditary disease[19]

Genes are coded messages that instruct the growing body in how to develop and function. There are many thousands of different genes,[20] which come in matching pairs; one of each pare of genes comes in the egg from the mother, and the other comes in the sperm from the father. When an adult produces an egg or a sperm, one member of each pair of genes is copies into the gamete (the egg or sperm).

Genes are too small to be visible even under the microscope. However, genes are organized into physical structures called chromosomes, which are visible under the microscope. Each chromosome can be thought of as a string of beads, with each bead representing a gene. There are twenty-three pars of chromosomes in each cell in the body, with one of each pair being packaged into each egg or sperm.

Twenty-two of the chromosome pairs are the sex chromosomes, X and Y. A man has one X chromosome and one Y chromosome; a woman has two X chromosomes. The Y chromosome makes a man male, but does little else. Therefore if an X chromosome has a faulty gene on it, and if it is present in a male, that person is likely to show signs of the gene fault. Woman who carry a faulty gene on one of their two X chromosomes are much less likely to be affected by it, because they have a second (spare) copy of the gene on the other X chromosome that will usually mask it. The X chromosome carries many genes that are quite unrelated to sex, so that the sex-linked disorders that are much more common in males than females include some

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18 *op cit* p 113.

19 Clarke, A. 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge, 23.

20 the genetic information consists of between 50 000 and 100 000 genes.

types of muscular dystrophy (including the severe Duchenne type)[21], haemophilia,[22] colour-blindness and many more. Such disorders may arise as new mutations in a gene, or females in the family may be unaffected carriers. In that case, affected males will have carrier mothers, and the males will be linked in the family tree through healthy women.

Faulty copies of genes are common - everyone has at least one such gene fault (mutant gene). Most such gene faults cause no problem,[23] because a single intact copy of most genes is enough to get by on without any difficulty. However, if a person inherits a faulty copy of the same gene from both parents, then that child will have no intact copy of the gene, and may have a genetic disease such as cystic fibrosis[24] or a haemoglobin disorder such as haemophilia, sickle-cell anaemia[25] or a thalassaemia.[26] Because faulty copies of such genes do not usually manifest problems, these gene defects are termed *recessive*. Parents must be carriers of the faulty gene, and other relatives may be; brothers and sisters may be also affected, or other relatives if a carrier in the family has a partner who is also a carrier.

Some genes are sufficiently important that both copies must be intact for the person to avoid a genetic disease. Such gene faults give rise to *dominant* gene defects, which can be transmitted from one generation to the next (to 50 per cent of the children on average).

Chromosomes may also be involved in genetic disease. First, an egg or sperm may be produced that contains the wrong number of chromosomes. Many such conceptions miscarry early pregnancy, but some survive to be born. *Down syndrome*[27] occurs when a child inherits three copies of chromosome 21 instead of the normal two. Anomalies of the sex chromosome are common, and in live-born infants they are not usually associated with major physical or developmental problems.

Another type of chromosomal problem arises when a rearrangement occurs - either with two small chromosomes joining together to form a single chromosome, or when two chromosomes

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21 see *infra*.

22 see *infra*.

23 while most mutations are quite harmless, some of them affect functional characteristics - if it arises in somatic cells, the mutation is not passed on to the offspring.

24 see *infra*.

25 see *infra*.

26 see *infra*.

27 see *infra*.

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exchange segments. Such rearrangements may cause no immediate problem, but if a person carrying such a rearranged set of chromosomes has a child, the child may be at some risk of a serious developmental disorder. The *balanced chromosomal rearrangement* may cause no difficulty because all the genes are present, just arranged differently. However, there may be a risk of such a person handing on to his or her children an *unbalanced complement* of chromosomes, that contains an incorrect set of genes. The rearrangement may also be handed on in the balanced form, so that several members of a family may carry such a rearrangement before it is recognized as the cause of physical or developmental problems in a child.

3.2 Hereditary disorders in general[28]

Gene mutations are caused by molecular "errors" in DNA,[29] which are partly caused by environmental factors. Such "errors" arise during the cell division. The error may consist of the substitution of one or more building blocks (point mutation), loss of (part) of a gene (deletion) or of larger rearrangements such as insertions, duplications or the repetition of a given sequence of building blocks (repeat).

Dependent upon the moment when the disorder manifest itself, it is possible to discriminate between *congenital abnormalities* such as *spina bifida*,[30] harelip, club foot, *Down's syndrome* and *hereditary diseases* occurring later in life such as such as some forms of Alzheimer's disease,[31] Huntington's disease,[32] some cancers,[33] cardiovascular diseases and several psychiatric illnesses.

Genetic disorders can be classified in a number of different ways. One commonly used system is to distinguish between *chromosomal abnormalities* and *gene mutations*. This is based on the presence or absence of visible, morphological abnormalities of the chromosomes.

3.2.1 Chromosomal abnormalities

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28 Anon. 1994. *op cit* p 29.

29 "deoxyribonucleic acid": chemical compound whose structure is such that it is capable of storing genetic information.

30 see *infra*.

31 see *infra*.

32 see *infra*.

33 see *infra*.

Chromosomal abnormalities are taken to mean morphological abnormalities or chromosomes which can be seen with the aid of a light microscope. These features usually arise during the development of the sex cells or during the first few divisions of the fertilised egg cell. The older the pregnant woman, the greater the chance of a numerical chromosome abnormality occurring in the foetus. The chances of structural chromosome abnormalities are increased if one or both parents have been exposed to external influences such as radiation or cytostatic drugs. At least half of all spontaneous abortions are caused by chromosomal abnormalities in the foetus. The use of modern techniques has shown that, despite of this natural selection, there are chromosome abnormalities in 0.92% of live births.

3.2.2 Gene mutations

Gene mutations are variations in the structure of a gene, and they can give rise to hereditary disorders. An abnormality in a single gene which (partly) causes a disorder is described as a monogenetic abnormalities can be further classified into autosomal dominant, autosomal recessive and sex-linked disorders. The hereditary component for the development of the abnormality is determined by the interplay of various abnormal hereditary traits. Congenital abnormalities arising in this way occur in 2.5% to 4% of live births in the Netherlands, an annual total of 5000 - 8000 individuals.

Andrews[34] writes that the frightening fact about some of these diseases and conditions is that a seemingly healthy couple could be at relatively high risk of bearing a child with serious genetic anomaly, without even knowing it. This would be the case if both parents have a single gene recessive disorder. The adults themselves would suffer no ill results from hosting the singular recessive gene, but this condition would increase the risk of having a child affected by this disease to 25%.

3.3 Outline of hereditary anomalies

Eriksson *et al*[35] give a broad outline of hereditary anomalies. He reports that although monogenetic hereditary disorders occur seldom,[36] the vast number of different aberrations has the cumulative result of affecting approximately 1% of a total population.

It is reported that in the majority of cases, multi-factorial diseases affect about 1 out of every

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34 1992. Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks. **Houston Law Review** (29:1), 149.

35 1985. **Over erfelijkheid - aangeboren afwijkingen erfelijkheids voor lichting begeleiding.** Bosch & Kenning, 11.

36 1-3 out of every 1000 children born.

1000 people, examples of these being: lip, structural, heart, feet and back abnormalities, different forms of mental retardation as well as psychological illnesses. Certain of these diseases occur relatively frequently such as hereditary heart aberration in 1 out of every 200 and schizophrenia in 1 out of every 100. The various classes of hereditary abnormalities are summarised:[37]

- congenital,[38] but not hereditary[39]- for example infectious diseases contracted from the mother (AIDS);
- combination of hereditary diseases with environmental/ external factors - affecting 4% of all newborns with anomalies such as heart misformation;
- chromosome abnormalities - affecting ½ % of all newborns, 5% of all babies born dead, and 60% of all premature miscarriages;
- hereditary diseases with a Mendelian pattern - consisting of about 3500 variations affecting 1% of all newborns - these could be sub-classified into three categories: dominant (50% chance of repetition); recessive (25% chance of repetition); sex orientated (50% chance of repetition for male children where the mother is the carrier).

Sadler[40] gives interesting global figures on the prevalence of congenital malformations and states that a survey comprising of 20 million births showed that malformations occurred, according to birth certificates in 0,83%, according to hospital and clinical records in 1,26%, and according to intensive examinations by pediatricians in 4,5%of newborns. He writes that the incidence was the highest in the United States of America (8,76%) and the lowest in Germany (2,2%). He writes at the same place:

> "Summarizing, it is probable that 2 to 3 percent of all live-born infants show one or more significant congenital malformation at birth, and that at the end of 1 year this figure is doubled by discovery of malformations indiscernible at birth."

3.4 Genetic disease in developing countries

It is reported[41] that health standards, with a few exceptions, are lower in developing countries

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37 *op cit* p 14.

38 *"aangeboren".*

39 *"erfelijk".*

40 1985. **Langman's Medical Embryology** Williams & Wilkins (5th edition), 109.

41 Anon. 1999. **Report on Epidemiological transition- Genetic disorders and birth defects in developing countries.** Department of Pathology, University of Pretoria.

than the industrialised world. Eighty percent of the world's population live in the World's developing nations where 90% of the 140 million births in 1997 occurred.[42]

Compounding this situation is the AIDS pandemic which is currently ravaging many countries, particularly in Sub-Saharan Africa and South East Asia. In some instances it has already reduced life expectancy by more that a decade.[43]

In each country, the approach to the management of genetically determined disorders and birth defects will depend on local frequencies of the individual conditions, the health burden they represent, the resources available for their care and prevention, and the health care infrastructure.[44]

It is accepted that the prevalence of genetic disorders and birth defects, which are recognisable in 2-3% of all newborns, varies according to geographic, ethnic, socio-cultural and socio-economic characteristics of a population.[45] Factors that predispose to higher prevalences of these disorders in developing countries include:

- traditional consanguineous marriages resulting in a higher frequency of autosomal recessive conditions;
- advance parental age, resulting from continued child bearing into the upper end of the reproductive lifespan;[46]
- socio-economic factors. The increased risk of birth defects in families of low socio-economic status has long been recognized;[47]
- inadequate health care prior to and during pregnancy.[48]

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42 (UNICEF, 1999).

43 (World Bank, 1997).

44 (WHO Technical Report 865).

45 (ERMO Technical Publication 24, 1997, World Atlas of birth defects, 1998).

46 advanced maternal age (35 years and older) is associated with high frequencies of chromosomal abnormalities - also relevant is autosomal dominant mutations in men of advance paternal age (55 years and older).

47 at least in part this is due to inadequate pre and post conceptional nutrition, including deficient intakes of micronutrients (folic acid and other vitamins, iodine).

48 which can be predisposed to an increased frequency of congenital infections such as syphilis and *rubella*, or birth defects consequent to inadequate control of diabetes and the unsupervised intake of drugs and traditional medicines.

3.5 Genetic research terminology[49]

Allele: One of the various forms of a gene.

Amnion: Extra-embryonic membrane that lines the chorion and encloses the embryo-foetus in the so-called amniotic fluid.

Alphafoetoprotein: A protein which is produced by the foetus.

Blastocyst: A hollow ball of cells, filled with fluid, that forms about four days after fertilization and prior to the beginning of the process of implantation.

Carrier status: The presence within the genetic material of one mutated and one normal allele of a gene associated with a recessively inherited disease.

Chorion: Outermost cellular extra-embryonic membrane.

Chorionic villi: Finger-like projections growing from the external surface of the chorion that contribute to the formation of the placenta.

Chromosomes: Linear threads of DNA that transmit genetic information through genes spaced along their entire length.[50]

Cleavage (mitosis): The process whereby the cells divide and thereby multiply to become similar identical daughter cells during early embryo development.

Diploid: Having two sets of chromosomes, usually one paternal and one maternal, twice the haploid number (in humans 46).

DNA: Chemical compound whose structure is such that it is capable

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[49] Ford, N.M. 1988. **When did I begin? Conception of the human individual in history, philosophy and science.** Cambridge University Press, 210; Anon. 1994. *op cit* p 147.

[50] see *supra* - in the human somatic cell there are normally two sets of 23 chromosomes including the two (XX or XY) that determine the sex of the individual, each gamete normally contains only one set of 23 chromosomes.

of storing genetic information. Deoxyribonucleic acid, the primary constituent of chromosomes and the basis of the genetic code and inherited traits.

Embryo: Refers to the newly formed organism in its first stages of growth, these being the stages characterised by the multiplication and differentiation of the fertilised egg-cell after its implantation, until blood circulation is established between the new organism and the maternal body.[51]

Epiblast: Also called primitive or primary embryonic ectoderm. The non-endodermal part of the inner cell mass of the blastocyst.

Foetus: Refers to the embryo after two months' growth in the uterus, when the blood circulation is established and the general anatomy of the growing organism is formed. This stage of development thus follows the embryonic period and continues until birth or abortion. The transition from embryo to foetus occurs about eight weeks after fertilisation and seven weeks after implantation.[52]

Gamete: A mature reproductive cell, usually haploid eg. a sperm or ovum.

Gene: The portion of a DNA strand within a chromosome which contains the genetic information for a single trait.

Genome: The complete set of hereditary factors, as contained in the haploid assortment of chromosomes. Frequently used broadly to refer to the complete genetic material for any cell or organism.

Genotype: The hereditary or genetic constitution of an individual or of a cell, usually referring only to the nuclear material.

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51 Slabbert *op cit* p 234.

52 Slabbert, *op cit* p 236.

Heterozygote: The two alleles for a given gene (on both chromosomes where the gene is located) differ from one another.

Homozygote: The two alleles for a given gene (on both chromosomes where the gene is located) are identical to one another.

Meiosis: Division of a diploid nucleus into four nuclei, each with half the number of the chromosomes of the parent nucleus and with a mix of both maternal and paternal chromosome sets, resulting in both sperm and egg with 23 genetically unique chromosomes each.

Monogenetic: Associated with a single gene.

Mutation: An abnormality in the structure of a gene or chromosome,, or in the number of chromosomes, or the process by which such abnormalities arise.

Neonatal: The period shortly after birth (until a few weeks of age).

Oocyte: The immature female germ cell. It is called the *ovum* when it matures after the penetration of the sperm during fertilisation and the completion of the second meiotic division.

Prenatal diagnosis: Refers to a variety of medical techniques used to detect the presence or absence of a possible disease or defect in the foetus. Specific techniques of prenatal diagnosis include: amniocentesis, ultrasonography, fetoscopy, chorion villus biopsy and maternal serum alpha-fetoprotein screening.[53]

Prenatal: The time between the start of a pregnancy and birth.

Prenatal screening: Attempts to identify, either before or after conception, women who have a high risk of bearing an abnormal child.[54] Such women can be identified through the taking of a medical

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53 Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. **Harvard Law Review** (100), 2021 - see *infra*.

54 *ibid.*

history during their initial visit to the doctor. Signs of increased risk include, for example, advanced maternal age, previous offspring with a chromosomal aberration, family history of birth defects, and exposure to teratogenic agents during pregnancy.

Primitive streak: A piling up of cells on the caudal end of the embryonic disc, providing the earliest evidence of the embryonic axis and the formation of the embryo proper.

Proembryo: The developing cells produced by the division of the zygote before the formulation of the embryo proper at the appearance of the primitive streak.

Zygote: The fertilised egg - the single cell that is formed when the two haploid sets of chromosomes in the pronuclei of the male and female gametes come together at syngamy. Also used loosely to refer to the early embryo during the first few weeks.

3.6 Status of pre-born

Strauss[55] refers to the decision of **S v Collop**[56] and states that in terms of this decision, there is legally no distinction between a zygote, an embryo or a foetus in South African law.

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55 1991. **Doctor, patient and the law** JL van Schaik (3rd edition).

56 1981 (1) SA 150 (A).

4. Detection techniques[57]

4.1 Background

Lupton[58] reports on the Human Genome Project, which is a 15 year effort to draw the first detailed map of every gene in a human's DNA composition. He writes that through this and other similar projects genetic engineers worldwide are decoding life's molecular secrets and trying to use that knowledge to reverse the natural course of disease.

> "This is however just the start of a process. The growing ability to manipulate genes could eventually change everything in our society - what we eat, what we wear, how we live, how we die and most important of all, how we procreate."[59]

Lupton[60] conveys with regard to the accuracy of genetic tests that "genetic diagnosis is complex and the vast amount of new information streaming in daily from genomic studies will undoubtedly lead to premature conclusions".

Eriksson *et al*[61] confirm that knowledge with regard to genetics and cell biology has increased vastly, which knowledge has made possible various new techniques to detect an increasing number of abnormalities at ever earlier stages. A number of the differing test available[62] are DNA testing, egg nuclei tests, blood tests, urine tests and also chromosomal testing.

4.2 Application of tests

Sadler[63] summarises the value and use of the various tests, which could also be effectively used in combination:

> "Several approaches are now available to the perinatologist for assessing the growth

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57 Anon. 1994. *op cit* p 33.

58 1996. Genetic engineering: The legal implications. **Tydskrif vir Suid-Afrikaanse Reg**, 56.

59 *ibid.*

60 1996. *op cit* p 62.

61 *op cit* p 15.

62 some of which is discussed below.

63 *op cit* p 87.

and development of the fetus in utero. In combination, these techniques are designed to detect malformations, chromosomal abnormalities, and overall growth of the fetus."

It is reported[64] that these techniques are not used on a routine basis,[65] but are generally reserved for so-called high risk pregnancies, such as:

- late maternal age (35 years and older);
- history of neural tube defects in the family;
- previous birth of a child with a chromosomal abnormality;
- chromosomal abnormalities in either of the parents; and
- mothers who are carriers of X-linked recessive disorders.

Andrews[66] distinguishes between various types or classes of anomalies that can be detected by modern genetic testing. He classifies them as:

- less serious abnormalities and impairments;[67]
- serious genetic diseases and conditions that are treatable after birth[68] and
- latent hereditary conditions and defects only manifesting much later in life.[69]

He[70] consequently asks whether a general legal duty[71] rests on medical practitioners who have patients that fall in any of these categories to urge them to undergo genetic testing. To what extent will they be held accountable and where does the limit lie concerning the various groups of patients and/or family members to be informed?[72]

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64 *ibid.*

65 except ultrasonography.

66 *op cit* p 590.

67 mild hereditary abnormalities, *eg* poor eyesight, slight deafness or a tendency towards heart problems *etc.*

68 *eg* the condition of phenylketonuria, which causes retardation in children if a special diet is not followed.

69 *eg* Huntington's disease.

70 Andrews, *ibid.*

71 to inform or to take responsibility for their patient's and their patient's children health and well-being.

72 see ch 5 on informed consent.

4.3 Various tests

4.3.1 Diagnosis test

The initial test carried out in the context of early detection is referred to as a "diagnosis test." This is usually a relatively simple test whose results indicate whether the test subject has a greater than normal chance of possessing the trait in question. If this is indeed the case, then further diagnostic work is carried out. However, the definitive diagnosis can still be girded with an error margin. This general model of diagnosis does not necessarily apply in all cases. Detection sometimes takes place by means of a combination of diagnostic tests which may or may not be carried out in sequence. Sometimes detection is achieved directly, by means of the definitive diagnostic test.

4.3.2 Chromosome testing

Major chromosome abnormalities[73] can be detected by examining chromosomes within cell nuclei, under a light microscope. The test requires either a small amount of blood or, if carried out during the prenatal phase, either chorionic villi[74] (tissue projecting from the placenta) or cells from a sample of amniotic fluid.[75] If the cells to be tested come from a blood sample, then the test will take several days. Amniotic fluid for this test should be withdrawn between the fifteenth and eighteenth week of pregnancy. This test takes about two weeks since the cells first have to reach the appropriate stage of cell division. Chorionic villi to be used in this test are taken between the eleventh and thirteenth week of the pregnancy.[76] Since these villi generally contain a sufficient number of cells in the appropriate stage of cell division, the test results can be available within one week. The time gained is of importance in that it shortens the period of uncertainty. If necessary, a termination of pregnancy can usually be carried out up to the thirteenth week of pregnancy.

Where a choice has to be made between using chorionic villi or amniotic fluid as a source of cell material for chromosome testing, various factors (besides the time involved) have to be taken into consideration. Two such factors are cytogenetic reliability and the risks[77] to the

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73 *eg* abnormal number, large piece missing or additional pieces onto another chromosome.

74 *ie* **chorionic villi biopsy test**.

75 *ie* **amniocentesis test**.

76 Eriksson *et al op cit* p 65 reports that a chorion biopsy or "*vlokkentest*" could be performed, as early as from 8-9 weeks of pregnancy.

77 Eriksson *et al op cit* p 78 states that an amniocentesis or "*vruchtwaterpunktie*" generally has no detrimental consequence on the unborn child and that the risk for spontaneous miscarriage is about 0,5%.

foetus which are inherent to the procedure. If the time factor is not critical then the question of whether to opt for using chorionic villi[78] or amniotic fluid[79] involves a delicate weighing up of the benefits and drawbacks. It is also possible to draw blood from the unborn child (by umbilical puncture) for the purpose of testing for chromosome abnormalities and other disorders. However, there are only a limited number of situations in which this is indicated.

Chromosome testing can be used for the diagnosis of a number of diseases. When carried out by experienced staff, this type of testing is highly specific and extremely sensitive, which gives it considerable predictive value. While the test usually only involves the individual concerned, very infrequently it is necessary for other members of the family to be tested (usually the parents).

Fain[80] mentions the chorionic villi biopsy is less risky[81] to the mother and child and will probably be the preferred method used in future. Fain conveys that obstetricians generally feel that public discussion on amniocentesis testing has tended to de-emphasize the real risks inherent in foetal testing such as harm to the foetus, possible miscarriage, bleeding, while over-emphasizing the benefits and accuracy thereof.

4.3.3 Biochemical examination

In some cases, monogenetic gene mutations may either block the synthesis of certain enzymes or lead to the production of enzymes with abnormal structures, either situation will disrupt metabolic processes. The resultant diseases can be detected by checking whether certain products of normal metabolic processes are present in body fluids such as blood and urine (metabolite studies). About one hundred rare clinical pictures can be detected by this means. With several clinical pictures, it is possible to find out directly whether the correct form of the enzyme is present (enzyme diagnosis). In addition to patients, (healthy) carriers can be identified in this way. The test is restricted to the individual concerned. However, if an abnormality is detected, this will often lead to the testing of other family members, who may request testing to see if they are carriers.

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78 Erikkson *et al op cit* p 80 reports that a chorionic biopsy could be executed on 8-9 weeks, about 8 weeks earlier than an amniocentesis, while te results are available within days (saving another 2 weeks).

79 Eriksson *et al op cit* p 79 conveys that the results from an amniocentesis is available after
2½ - 3 weeks.

80 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

81 than an amniocentesis.

It has been known for 10 to 15 years that measurement of the amount of alphafoetoprotien in the blood of a pregnant woman can indicate a heightened chance of neural tube defects or of chromosome abnormalities in the foetus. The original triple test involves measuring the levels of alphafoetoprotien, hCG[82] and oestriol. These are used in combination with the duration of the pregnancy, and the age and weight of the mother, to calculate the probability that the woman in question is carrying a foetus with either *Down's syndrome* or an open neural tube defect. The best results are obtained by measurement of the levels of alphafoetoprotein and of the free beta chain of hCG, in combination with the age of the expectant mother. The testis carried out between the fifteenth and the eighteenth week of pregnancy.

Another form of biochemical testing which can reveal the presence of a risk factor is the determination of the amounts of cholesterol and triglycerides in the blood. Increased levels of these substances indicate a risk of cardiovascular diseases which is statistically greater than normal.

The measurement of proteins produced by cancer cells is another form of biochemical testing which can give an early indication that the person concerned is suffering from some form of cancer.

4.3.4 DNA testing

A small amount of DNA is generally sufficient for DNA testing and any nucleated body cells can be used for this purpose. With the technique of PCR (polymerase chain reaction), a method of replicating DNA, it is even possible to perform test on DNA from just a few cells, or even from a single cell. This method can be important for prenatal testing using foetal cells isolated from the mother's blood, or which have been taken from an embryo produced by test tube fertilisation (so-called re-implantation diagnosis). DNA testing can be subdivided into so-called linkage-testing and the direct detection of mutations.

4.3.5 Testing with ultrasonography

From the twelfth week of pregnancy, ultrasonography can be used to detect structural and functional abnormalities in the unborn child. The ultrasonography test which is generally carried out is primarily aimed at testing the vitality, growth and position of the foetus, the position of the placenta and the detection or exclusion of multiple pregnancies. If this type of test reveals indications of foetal abnormality, follow-up testing with advanced ultrasonography techniques is required to establish the precise nature of the abnormality involved. Such follow-up testing requires exceptional expertise and special equipment. It is also carried out if other observations have revealed a heightened risk of abnormalities which can be detected by

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82 human chorionic gonadotrophin.

ultrasonography. This is the case, for example, if the foetus exhibits abnormal growth or if a previous pregnancy resulted in a child with an abnormality of the brain, heart, kidneys, urinary ducts, skeleton, et cetera, which is detectable by ultrasonography.[83] In well equipped centres, where there is a heightened risk of particular structural abnormalities, a specificity of 98% and a sensitivity of 93% have been achieved.

4.4 Time of diagnosis[84]

The time of genetic testing is relevant to the various options open to (prospective) parents.[85] A basic distinction can be made between prenatal diagnosis[86] and diagnosis in later life.[87]

4.4.1 Diagnosis prior to conception

The aim of diagnosis prior to conception is to gain insight into the chances of hereditary diseases occurring in the offspring and to do so at a moment when all possible options with regard to procreation are still open. These options include choosing to avoid having offspring of one's own; acceptance of the risk possibly in combination with the use of prenatal diagnosis (now being possible for an increasing number of diseases); the use of donor insemination or of in-vitro fertilisation (using donor sperm cells or egg cells, or combined with pre-implantation diagnosis and the adoption of a child.

Diagnosis prior to conception is currently possible when any of the following occur in a family: an X-linked hereditary disorder, some autosomal recessive and some autosomal dominant disorders, a familial chromosome translocation or frequent spontaneous abortion. Genealogical investigation and the collaboration of members of the applicant's family are often essential in this regard. The drawbacks are a degree of intrusion by medical science into the process of procreation, the possibly irksome repercussions which the knowledge gained might have for other members of the family or for access to employment and private insurance, and the psychological burden of being faced with difficult choices.

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83 Eriksson *et al op cit* p 84 - or "echoscopie".

84 Anon. 1994. *op cit* p 39.

85 Anon. 1994. *op cit* p 65.

86 "With prenatal diagnosis, the unborn child's right not to know can be frustrated if parents decide to continue the pregnancy in a situation involving a severe, untreatable disorder which only manifests itself in later life."

87 "The hereditary nature of disorders means that any information obtained will also be of interest to other members of the family."

Regarding diagnosis prior to conception, one could cite clinical pictures such as cystic fibrosis (CF), fragile X syndrome,[88] hereditary haemoglobinopathies, Tay-Sachs disease[89] and infantile spinal hereditary muscular dystrophy (Werdnig-Hoffmann disease). These are severe disorders which become apparent at birth or shortly afterwards and for which there is no cure.

4.4.2 Prenatal diagnosis

The aim of prenatal diagnosis is to create courses of action for those involved. This is achieved via the early detection of couples with a heightened risk of having children with a hereditary of foetal disorders. The term "prenatal diagnosis" implies that a pregnancy is already under way. Prenatal diagnosis is chiefly used to detect neural defects, such as *Down's syndrome* and congenital anatomical abnormalities. In addition, prenatal diagnosis is also carried out for other disorders such as those cited for diagnosis prior to conception, and for parents with a heightened risk (usually evident from the family's medical history) of having offspring with a severe hereditary disorder.

The earliest time when prenatal diagnosis can be made, actually precedes implantation of the fertilised egg cell. Testing a foetus during pregnancy can be carried out either via ultrasonography or using cellular material from the foetus or from the future placenta (chorion). Cellular material can be obtained by taking chorionic villus biopsies, amniotic fluid or foetal blood. The invasive nature of such tissue sampling means that this type of testing involves a (small) risk of losing the pregnancy or of premature birth. The most common indication for the testing of chorionic villi or of cells derived from amniotic fluid is a heightened risk of *Down's syndrome* due to the age of the mother. Such testing may also be carried out if there is prior knowledge of other heightened risks of a foetal organic defect.

At the prenatal stage, tests are carried out either on the mother alone or on both parents. Diagnosis of the mother involves, first and foremost, factors which are known to be able to affect pregnancy (high blood pressure, diabetes, antibodies against *rubella*, blood group and blood group antibodies). In addition, the triple test[90] can be used to establish whether or not there is a heightened risk of having a child with *Down's syndrome* or an open neural tube defect. If it emerges that there is indeed a heightened risk, then this diagnosis can be followed by concentrated diagnostic testing of the foetus, either by means of ultrasonography or by using cells from the amniotic fluid. Furthermore, in the prenatal stage, the tests described in association with diagnosis prior to conception can be carried out on one or both parents.

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88 see *infra*.

89 see *infra*.

90 see *supra*.

The termination of pregnancy should be viewed in the light of the fact that, if prenatal diagnosis was not available, some of the pregnancies would never have been initiated, as the parents involved would have refrained from having (further) offspring.

4.4.3 Neonatal diagnosis

The aim of neonatal diagnosis is the prevention of (or timely intervention in) hereditary disorders, by means of timely diagnosis, genetic counselling, provision of information, treatment and counselling. With some untreatable hereditary disorders, the possibility of timely genetic counselling is mentioned. For diseases in which invalidity can be prevented by timely intervention following birth, the best option is neonatal diagnosis. This may take the form of biochemical/ endocrionological testing or DNA testing. Just a few drops of blood (obtained by means of the "heel prick") are all that is required for either test.

4.4.4 Diagnosis later in life

Furthermore, the person involved can attempt to prevent expression of the genetic predisposition, by the avoidance of certain environmental factors. The number of clinical pictures in which it is possible to detect the presence of a hereditary component will increase as more genetic information becomes known.

4.5 Effect of genetic counselling

Frets[91] gives statistics on the varying ways couples reacted in making a reproductive decision upon receiving genetic counselling:

> "Of the 164 couples under study, 137 had made a reproductive decision: 109 (66%) had decided to have (more) children, while 28 (17%) had decided to refrain from having children. Eighteen couples (12%) were undecided at the time of the follow-up. (The remaining 9 couples were excluded from the statistical analysis.)"[92]

It is obvious that genetic counselling does not preclude couples from having children, it rather gives them the "go-ahead" as confirmation is given that the child will be born healthy.

5. Related aspects

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91 1990. The Reproductive Decision after Genetic Counselling. **Proefschrift - Erasmus Universiteit, Rotterdam.**

92 *op cit* p 80.

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5.1 Sterilization

Podewils[93] reports that voluntary sterilization is the most effective and popular method of birth control in the United States,[94] as a 1988 contraception study showed that 28.3% of all American women chose sterilization.

Nicholson[95] describes the various sterilization procedures: Performance of a vasectomy[96] consists of cutting out a portion of each of the two ducts which carry sperm from the testicle to the ejaculatory duct. The cut ends are then tied surgically. After about six weeks, which is the time needed for the existing sperm to be ejected or to deteriorate within the reproductive system, the patient is normally rendered sterile.[97]

The corresponding operation performed on a female is a salpingectomy, or tubectomy. This procedure can be accomplished in one of two ways. The first method requires the surgical removal of the fallopian tube. The second involves cutting the fallopian tubes and tying the ends to prevent uniting of sperm and egg. Following successful removal or severing of the tube, the patient can no longer conceive a child.[98]

Hampton[99] reports that *tubal cauterization* is a process by which the fallopian tubes are blocked by burning them with instruments inserted through one or two small incisions in the abdomen, whereas in a tubal ligation procedure, the tubes are actually cut.

A vasectomy or tubal ligation may fail for one of two reasons. The possibility exists that nature may defeat the purpose of the operation. [In the case of a vasectomy, a process known as recanalization, although rare, sometimes occurs following the operation. It cannot be

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93 1993. Traditional Tort Principles and Wrongful Conception Child-rearing Damages. **Boston University Law Review** (73), 407.

94 U.S. Bureau of the census, statistical abstract of the United States - 1992.

95 1984. Damages: Recovery of Damages in Actions for Wrongful Birth, Wrongful Life and Wrongful Conception. **Washburn Law Journal** (23), 309.

96 male sterilization.

97 *op cit* p 312.

98 *op cit* p 313.

99 1986. The Continuing Debate over Recover ability of the Costs of Child - rearing in 'Wrongful Conception' Cases: Searching for Appropriate Judicial Guidelines. **Family Law Quarterly** (20), 47.

prevented, nor predicted,[100] by the physician.[101] Or an operation may fail due to the physician's negligence.[102]

5.2 Statistics

Habets[103] gives interesting statistics regarding failed sterilization in the Netherlands. He reports that failed sterilization procedures not only make up a substantial part of the total of annual medical injury claims, but are also responsible for a sizable portion of the total amount claimed. He indicates that claims of between ƒ20 000 and 30 000 are common, while 20% of sterilization-claims fall betweenƒ10 000 en ƒ50 000 and 13% above ƒ50 000.

It is reported[104] that the failure rate of sterilization procedures[105] for both men and women is estimated at respectively 0.3 to 0.5%. In 1993, 14742 women and 2341 men were sterilised in the Netherlands.

Habets[106] gives an enlightening account of the outcome of failed sterilization procedures in the Netherlands. A study was undertaken of 30 claims instituted against a medical insurer due to failed sterilization: 17 have been rejected first hand by the insurance company in question, while 11 were acknowledged. The remaining two patients, one instituted a civil claim, the other's actions were unknown.[107]

Of the 11 successful claims, a total amount of ƒ232 000 was awarded for patrimonial damages, the highest award being ƒ103 000. The total amount paid out for non-patrimonial damages was

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100 **Ball v Mudge**, 64 Wash. 2d 247, 249, 391 P.2d 201, 204 (1964).

101 *ibid.*

102 in a female, regeneration of fallopian tubes after a tubal ligation may negate the effect of cutting the tubes - see **Custodio v Bauer**, 251 Cal. App. 2d 303, 304, 59 Cal.Rptr. 463, 463 (1967).

103 1995. Schadeclaims naar aanleiding van mislukte sterilisaties: een dossieronderzoek. **Tijdschrift voor Gezondheidsrecht** (5), 266.

104 Habets *op cit* p 267.

105 depending on the proficiency of the physician.

106 1995. Schadeclaims naar aanleiding van mislukte sterilisaties: een dossieronderzoek. **Tijdschrift voor Gezondheidsrecht** (5), 270.

107 it is interesting to note the trend of directing one's plight of compensation towards an insurer, instead of towards the courts - Habets *op cit* p 272: *"..aangetoond worden de meeste medische aansprakelijkstellingen zonder rechterlijke tussenkomst afgehandeld."*

ƒ142 000, with highest claim of ƒ45 000.

Up to November 1993 a total amount of ƒ316 000 was paid out for both patrimonial and non-patrimonial damages. The highest claim award amounted to ƒ75 000, which included payment for legal fees. Other awards were for ƒ54 000, ƒ50 000, ƒ30 000 en ƒ17 500, while the remaining five were given ƒ10 000.

Habets[108] reports that in 50% of cases were a "second-look operation" were performed[109] it was clear that improper sterilization techniques were performed.[110] These statistics are in line with a 1993 report of the Dutch Association for Obstetrics and Gynaecology[111] which indicated that 50% of all failed sterilization procedures could be attributed to chance, such as when spontaneous re-canalisation takes place or when sterilization clips become loose and 50% due to physician negligence.

5.3 Genetic engineering

Singer[112] reports that we can distinguish two major purposes for genetic engineering in humans: to remove defects not present in normal members of the species;[113] and to produce individuals with more desirable qualities than would be the case with normal reproduction.[114]

It is suggested[115] that as remedying defects is at the core of medicine, "the ethical and policy issues do not seem appreciably different from those involved in the development of any new diagnostic or therapeutic techniques".

The medical model is no help to us in sorting out these characteristics; hence we can agree on eliminating defects much more easily than we can agree on a moral basis for enhancing

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108 *op cit* p 271.

109 such a second operation, performed specifically to inquire whether the initial procedure was properly performed, can only be done in cases of female sterilization.

110 and liability accordingly acknowledged.

111 *"Nederlandse Vereniging voor Obstetrie en Gynaecologie".*

112 1985. **Making Babies - The New Science of Ethics of Conception.** Charles Scribner's Sons, 164.

113 therapeutic genetic engineering.

114 eugenic genetic engineering.

115 *op cit* p 165.

someone's genetic constitution above what would normally be expected.

> "Whatever we call it, this form of genetic engineering can be justified on the same basis as cases that are indisputably therapeutic. It does not matter whether the outcome is a life that is or is not better than the statistical norm; the essential element is that no one disputes that, other things being equal, it is better to live longer, in good health, than to die earlier. The acceptability of genetic engineering depends not on whether it falls under the label "therapeutic" rather than "eugenic", but on the ends toward which the engineering is directed. When the goal is something that would indisputably improve the human condition, safe and successful genetic engineering would be a good thing."[116]

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116 *op cit* p 166.

6. Congenital anatomical abnormalities[117]

6.1 Genetic diseases/ anomalies found in wrongful life litigation

Two to three per cent of births involve children with severe congenital abnormalities other than neural tube defects and *Down's syndrome*. Congenital abnormalities are responsible for one quarter of all prenatal mortality. Ninety per cent of congenital abnormalities affect the children of parents who had no heightened risk in that regard. Many prenatal disorders can be detected using ultrasonography (more than 200).

Congenital abnormalities can affect various organ systems, such as the cardiovascular system, the central nervous system, the sex organs and urinary ducts, the gastro-intestinal system of the skeleton. They may be determined purely by genetics, caused by exogenous factors (infections, medicines) or by combinations of the two. Knowledge of the exact cause also provides information about the chance of prevention or of repetition. Many such abnormalities are lethal. Here is listed[118] and briefly discussed some of the most commonly found genetic anomalies that afflict real people and that have lead to actual wrongful life litigation in the past:[119]

Alzheimer's disease:

Dementia, which is characterised by progressive memory disorders, deterioration of cognitive functions and (often) personality changes, leads to the disruption of patients' ability to function. As a result, during the course of their illness, patients become gradually more dependent on others to take care of them. Dementia is not a disease of the brain in the strict sense of the word, but rather a syndrome. Alzheimer's disease is one of the most important causes of dementia syndrome in elderly people. *Down's syndrome*[120] patients frequently develop Alzheimer's disease in later life.

Anencephaly:

In 1988, the total number of new cases of anencephaly in the Netherlands[121]

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117 Anon. 1994. *op cit* p 127 *ao*, Sadler *op cit* p 110 *ao*, relevant court cases and varying other medical sources, incl the internet.

118 in alphabetical order.

119 disease/ condition, description and case reference (where possible).

120 see *infra*.

121 anencephaly is seen in the United States at a frequency of 1:1 000 births.

was estimated to be 75 per annum.[122] Anencephaly is due to failure of the anterior neural tube to close properly during very early intrauterine life. Mothers with infants having neural tube defects have high levels of alpha feto-protein.

In anencephaly, the infant is born with no cerebral hemispheres, only a rudimentarybrainstem and brainstem, and no calvarium (skull bone). Often there are associated malformations such as cleft lip and palate, abnormalities of hands and feet and other internal malformations. Usually associated with bulging, frog-like, eyes.[123]

These babies may survive outside the womb for varying amounts of time, anywhere between minutes and weeks. Although the condition is always fatal and there are no techniques to correct the problem.[124]

Cancer of the colon:

Within the clinical picture of cancer of the colon, there is a clearly described hereditary disorder called polyposis coli or familial adenomatous polyposis. This disorder is autosomal dominant.

Congenital hypothyroidism:

Congenital hypothyroidism is caused by a deficiency of thyroxin (T4). The thyroid itself may be defective or the problem may lie with those organs which stimulate the thyroid to produce thyroxin (congenital thyrotropin deficiency syndrome) via thyroid stimulating hormone. A greatly reduced T4 level can lead to severe mental retardation, behavioural disorders and motor disorders. In the past, it was not usually possible to make a diagnosis until the condition was at a relatively advanced stage (since the symptoms are relatively unspecific and only develop gradually). However, if this disorder is detected in time, treatment with hormone preparations is almost entirely effective in preventing mental retardation. Only in the case of severe T4 deficiency do mild motor disorders occur.

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122 neural tube defects - disruption of the closure of the neural tube during embryonic development can lead to anencephaly or spina bifida, dependent upon the location of the closure defect.

123 http://155.37.5.42/TMGEN/X2021000.htm.

124 http://geocities.com/HotSprings/Spa/2147/anencephaly.html.

Cri-du-chat Syndrome:

Cri-du-chat syndrome was first described as a hereditary congenital syndrome associated with deletion of part of the short arm of chromosome 5. The syndrome is characterized in young children by microcephaly, round face, hypertelorism, micrognathia, epicanthal folds, low-set ears, hypotonia, and severe psychomotor and mental retardation. One of the most characteristic features in new born children is a high pitched cat-like cry that is usually considered diagnostic for the syndrome. Although the majority of patients die in early childhood, some survive into adulthood and exhibit an IQ below 20, a loss of hypertelorism and epicanthic folds and development of a thin narrow face with prominent nasal bridge.

The cri-du-chat syndrome appears to be one of the most common human deletion syndromes with an incidence varying between 1 in 20 000 to 1 in 50 000 births. The frequency in populations of profoundly retarded patients (IQ less than 20) is approximately 1%.[125]

Cri-du-chat syndrome, also known as 5p-Syndrome (five p minus) or "Cat Cry Syndrome", is a rare genetic disorder characterized at birth by a high pitched cry, low birth weight, poor muscle tone, and other anomalies.[126]

Johnson v Yeshiva Univ.[127]

Cystic Fibrosis:

Cystic fibrosis is an autosomal recessive disease which results in damage to the respiratory system and to digestive functions. The clinical picture usually manifests itself at a very early age. The frequency of patients at birth is 1 in 3 600.[128] Such individuals receive an abnormal genetic trait from both parents. Although the severity of the disease can vary, it often leads to frequent hospital admissions and periods of treatment. Generally it is a serious handicap which forms a great burden for the parents and family. Thanks to intensive therapy and support, the average life expectancy of such patients (dependent upon when they were born) has gradually increased from

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125 http://www3.ncbi.nlm.nih.gov/htbin-post/Omim/dispmim.

126 http://www.geocities.com/CapitolHill/1703/CRI.html.

127 396 N.Y. 2d 818, 364 N.E. 2d 1340, N.Y.S. 2d 647 (1977).

128 about 3% of the population of the Netherlands carry a harmful mutation in the gene which is involved in this disease.

25 to 40. Thus 50% of such patients will have died before attaining that age.

Fain[129] reports that cystic fibrosis is the most common genetic disorder among Caucasians. This dangerous disease is discovered in about 2000 new cases per year in United States of America. Approximately 5% of all Americans are carriers.

Schroeder v Perkel[130]

Downs's Syndrome:

Down's syndrome (trisomy 21) is associated with severe mental handicap and my also be combined with characteristic abnormalities in some organ systems (e.g. the heart and the proximal part of the duodenum). Many patients develop Altzheimer's disease[131] after reaching the age of forty. Most cases of *Down's syndrome* (96%) involve a separate, extra chromosome 21 (non-hereditary form). In the remaining 4% of cases, a chromosome translocation is involved, with (part of) the extra chromosome 21 being attached to another chromosome. Both abnormalities can be detected by examination of the chromosomes in cellular material taken from the foetus. In 1% of all cases, a balanced chromosome translocation is found in one of the parents (hereditary form). Life expectancy is highly dependent on medical policy with regard to any additional congenital abnormalities.

Azzolino v Dingfelder[132], **Berman v Allan**[133], **Becker v Schwartz**[134], **James G v Casceta**[135], **Hickman v Group Health Plan Inc**[136], **Phillips v United States**[137] and **Andalon v Superior Court.**[138]

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129 *ibid.*

130 432 A. 2d 834 N.J. (1981).

131 see *supra.*

132 337 S.E. 2d 528, 537 N.C. (1985), *cert denied*, 475 U.S. 835 (1986).

133 80 N.J. 421, 404, A. 2d 8 (1979).

134 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

135 332, S.E. 2d 872 Va. (1985).

136 396 N.W. 2d 10 Minn. (1986).

137 575 F. Supp. 1309 D.S.C. (1983).

138 208, Cal. Rptr. 899, 901 (1984).

Duchenne and Becker muscular dystrophy:

Duchenne muscular dystrophy and Becker muscular dystrophy are sex-linked hereditary diseases with a progressive course, which are associated with mutations of the same gene on the X chromosome. Onset is usually between the ages of two and four years. The earliest symptom is difficulty with walking resulting from weakness in the pelvic girdle and the thigh muscles. The disease gradually spreads to the arm, neck and respiratory muscles. The cardiac musculature is often affected as well. Such children become confined to a wheelchair at around the age of eleven and they ultimately die, aged about 20, from respiratory or cardiac insufficiency. More than one third of such children are also mentally handicapped. One third of cases do not involve a mutation which has been passed down through the family. In these instances, a denovo mutation (occurring in the mother in two thirds of cases) is responsible for the disease.

Nelson v Krusen[139]

Familial hypercholesterolaemia:

Hyperlipidaemia (an excessive level of cholesterol or triglycerides in various lipoprotein fractions in the blood) is common within the population and is one of the most important risk factors in relation to cardiovascular diseases. It has been estimated that one third of the population will die from cardiovascular disease. While the genetic background to hyperlipidaemia is still poorly understood, research has indicated that a large number of genes are involved. It is possible to distinguish between monogenetic and polygenetic forms of the condition. One important monogenetic form is familial hypercholesterolaemia.

Fetal Hydantoin Syndrome:

In a retrospective study the frequency of major malformations such as heart abnormalities, facial clefts, and microcephaly was high when drugs such as phenytoin and trimethadione were used[140] by the mothers. Specifically diphenylhydantoin produces a broad spectrum of abnormalities, including craniofacial defects, nail and digital hypoplasia, growth abnormalities and mental deficiency. These defects constitute a distinct pattern of dysmorphogenesis, namely fetal hydantoin syndrome.

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139 678 S.W. 2d 918 Tex. (1984).

140 for epilepsy - the drug *in casu* was "Dilatin".

Harbeson v Parke-Davis Inc.[141]

Fragile X syndrome:

Fragile X syndrome is the most common cause of familial impaired mental development (familial mental retardation). It displays X chromosome transmission with several unusual features: about 35% of the female carriers display mild to moderate mental retardation and it is even possible for a healthy man to transmit the mutation to carrier females. Besides the impaired mental development, there are also physical abnormalities and behavioural problems. Boys with the syndrome generally attend schools for children with extreme learning difficulties. While they generally continue to live at home, they sometimes have to be removed in connection with anxiety attacks or temper tantrums. In adulthood they reside in surrogate family units, other institutions for the mentally handicapped, or with their parents. Some of them attend a sheltered workshop during the day. Women with the syndrome are often less severely mentally handicapped than affected men and, dependent upon their level of disability, they live either independently or in supervised accommodation.

Haemophilia:

Haemophilia A is a recessive, X-linked bleeding disorder affecting approximately 1/5000 males due to a deficiency of blood coagulation Factor VIII. The severity of the condition varies from severe (<1% normal clotting activity), moderate (2-5%) to mild (5-30%). Further complications may arise due to the presence of inhibitors (antibodies) to replacement factor VIII.[142]

Haemophilia is a blood condition in which an essential clotting factor is either partly or completely missing. This causes a person with haemophilia to bleed for longer than normal. Cuts and grazes are not great problems as a little pressure and a plaster are usually enough to stop bleeding. The main problem is internal bleeding into joints, muscles and sort tissues. Haemophilia is a genetically inherited condition. It is usually carried in the female genes, but generally only affects males. About a third of new diagnoses are where there is no previous family history. It is a lifelong condition, appears world-wide and occurs in all racial groups. About 10 000 people are affected in the

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141 98 Wash. 2d 460, 656 P. 2d 483 (1983).

142 http://www.leedsdna.demon.co.uk/haema.htm.

UK.[143] A hereditary disease occurring almost exclusively in males, and about 1 in 6 500 male Australians are affected.[144]

Siemienic v Lutheran Gen. Hosp.[145]

Hearing deficiency:

Turpin v Sortini.[146]

Hereditary forms of breast cancer:

In the Netherlands, more than 7 000 women are diagnosed with breast cancer each year. Of these, about 20% ultimately die from the effects of this disease. About 350 to 560 of the 7 000 patients who develop breast cancer each year have a genetic predisposition to the disease.

Huntington's disease:

Huntington's disease, which is transmitted as autosomal dominant, is associated with degeneration of the nervous system. The disorder usually becomes manifest during adult life, although some cases occur earlier and some later. Following the appearance of the first symptoms, the disease progresses gradually for 15 to 25 years with the loss of mental and physical functions as well as personality changes until the patient finally dies. All carriers of the abnormal gene have an almost 100% chance of developing the disease before they reach old age. By the time the disease makes its appearance, patients have usually had children, and have thereby passed the disease on. The disease is incurable. Carriers of the abnormal gene occur with a frequency of 1 in 5 000 among the general population.

Hydrocephalus:

An accumulation of cerebro-spinal fluid within the skull. The condition is characterized by an enlarged head and often results in mental retardation. Early treatment can save approximately half of the children born with this condition, but of those who survive approximately two-thirds will suffer some

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143 http://www.haemophilia.org.uk/whatis.html.

144 http://www.australiahealth.com/Health%20Conditions/haemophi.htm.

145 134 Ill. App. 3d 823, 480 N.E. 2d 1277 (1985).

146 182 Cal. Rptr. 337 (1982).

level of brain damage.[147]

Edmonds v Western Pennsylvania Hospital Radiology Assocs.[148]

Infantile spinal muscular atrophy:[149]

This autosomal recessive disorder is the most dramatic form of a group of disorders of the anterior horn cells in the spinal cord and in part of the brain stem. Muscle weakness and hypotonia are characteristic features of all forms, but they can differ in time of onset and in severity. In the infantile form, these symptoms appear before the child reaches an age of 6 months, and they are sometimes even apparent at birth. This results in an arrest in motor development. The motor milestone of sitting up is never achieved. Besides muscular weakness in the limbs and trunk, swallowing difficulties also occur. Treatment is only aimed at combatting the symptoms and most affected children die of pneumonia before the age of two.

Klinefelter's Syndrome:

The clinical features of this syndrome, found only in males, are sterility, testicular atrophy, hyalinization of the seminiferous tubules, and usually gynecomastia. Th incidence is about 1 in 500 males in the normal population. Among mentally defective subjects, the incidence is as high as 1 in 100 males. On the basis of statistical evidence, it is believed that non-disjunction of the XX homologs is the most common causative event. Occasionally, however, patients with Klinefelter's syndrome have 28 chromosomes, that is, 44 autosomes and 4 sex chromosomes (XXXY).[150]

Larsen's Syndrome:

Larsen Syndrome[151] is a multi-system genetic disorder that is present at birth. It is characterized by multiple bone dislocations and abnormalities, an extremely high arch of the foot, non-tapering cylindrically shaped fingers, and an unusual facial appearance. In some cases, short stature, heart problems,

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147 Silverman, A.M. 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: state action and undue burden- Edmonds v Western Pennsylvania Hospital Radiology Assocs. **Temple Law Quarterly** (66:4), 1088, with reference to **Black's Medical Dictionary** 1987 (35th Edition), 345.

148 607 A.2d 1083 Pa. Super. Ct. (1992).

149 also Werdnig-Hoffmann's disease.

150 Sadler *op cit* p 120.

151 also Desbuquois syndrome or Sinding-Larsen-Johansson disease.

cleft palate or lips, deafness, or mental retardation may also occur.[152] **Moores v Lucas.**[153]

MCAD:[154]

MCAD deficiency (deficiency of the mid-chain acylco-enzyme A dehydrogenase) is an autosomal recessive disease of fatty acid metabolism. The disorder is linked with a significant chance that metabolism will become disordered, resulting in increasing lethargy (particularly when fasting or feverish) and ultimately in coma and death. This clinical picture is held to be responsible for 2% of all cases of cot death. The symptoms usually develop at an age of 5 to 24 months. The chance of death is highest between the ages of 15 to 26 months.

Multiple birth defects:[155]

The child had one to few vessel umbilical cords, a short cord, *ventriculomegaly*, absent right leg, imperforate anus, one testicle, one kidney, a vertebrate anomaly in the lumbar sacral region, *hydrocephaly*, a large fluid-filled sac extending off the right aspect of the sacrum consistent with *meningocele (spina bifida).*[156] **Keel v Banach,**[157] **Bruggeman v Schimke.**[158]

Myotonic dystrophy:

This autosomal dominant disorder is the most commonly occurring muscular dystrophy in adults. Besides muscular dystrophy there may also be abnormalities in various other organs. Those carrying the genetic abnormality are certain to develop the disease. There is great variation in terms of severity and time of onset. With the congenital or infantile form, the

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152 http://www.stepstn.com/cgi-win/nord.exe? proc=Redirect&type= rdb_ sum&id=497.htm.

153 405 Fla. App. So. 2d 1022 (1981).

154 a disease involving fatty acid metabolism.

155 Faircloth, R.C. 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? **Cumberland Law Review** (24:3), 547.

156 Haavi Morreim, E. 1988.The Concept of Harm Reconceived: A different look at Wrongful Life. **Law and Philosophy** (7), 5.

157 624 So. 2d 1022 Ala. (1993).

158 718 P.2d 635 Kan. (1986).

symptoms of muscular weakness following birth are often so severe that the child dies within a few days. This form only occurs when the abnormal gene is inherited via the mother. If the onset of the disease occurs during childhood there is some muscular weakness, although the clinical picture is predominantly one of mental retardation. With the adult type, the initial symptoms of the disease manifest themselves between the ages of 12 and 50. In general, muscle weakness is gradually progressive. Affected men in whom disease onset occurs during early adulthood are generally sterile. Life expectancy is determined by the occurrence of acute cardiac arrest and respiratory disorders, usually as a complication during general anaesthesia. The late onset type usually begins during late middle age (above age 50) and often manifests itself primarily in the form of cataracts.

Neurofibromatosis:[159]

Is characterized by developmental changes in the nervous system, muscles, bones and skin. The condition is both congenital and *heredofamilial* (inherited by more than one member of a family). There is no known treatment or cure for this disease.

Ellis v Sherman,[160] **Speck v Finegold**.[161]

Phenylketonuria:

Phenylketonuria is a congenital autosomal recessive disorder. The disease is caused by a defective enzyme. If left untreated, the disease will cause irreversible damage to the central nervous system of affected children, and a severe mental handicap. If the disorder is detected on time, a special long-term diet can prevent damage from occurring. This disorder has a frequency of 1 in 18 000 for newborns.

Polycystic kidney disease:

Description: Inherited disorders characterized by the development and growth of cysts in the kidneys; lined by epithelium, filled with flued or semi-solid debris; accounts for 5-10% of patients with end stage renal disease.[162]

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159 A.H.S. 1983. Torts. **Journal of Family Law** (21:1),168.

160 515 A. 2d 1327 Pa. (1986).

161 497 Pa. 77, 439 A. 2d 110 (1981).

162 http://www.5mcc.com/5MCC/SUMMARY/0719.html.

Developmental disorder of the kidneys discovered in developing foetuses (by ultrasound) or in the newborn period (enlarged kidneys). Most cases that go to term die shortly after birth from respiratory difficulties due to the enlarged kidneys that have resulted in developmental pulmonary hypoplasia. This disease is negligent invariably fatal. Those cases that survive infancy may subsequently develop hepatic portal fibrosis, portal hypertension and splenomegaly.[163]

Autosomal dominant polycystic kidney disease affects about 1 in 1 000 persons in Caucasian populations and may be 2.5 to 15 times more frequent than other common hereditary disorders such as cystic fibrosis and sickle cell disease.

The disease is characterized by cyst formation in ductal organs particularly the kidney and the liver and by gastrointestinal, cardiovascular and other abnormalities. As offspring of an affected parent has a 50% risk of inheriting the disease, precise and factual genetic counselling can be provided. The impact of this measure may however be limited as far as the application of pre-natal diagnosis procedures is concerned.[164]

Park v Chessin.[165]

Quadrigeminal arachnoid cysts:[166]

A four part, fluid filled cyst between the layers of the leptomeinges lined with arachnoid membrane and most commonly occurs in the sylvian fissure of the brain.

Rh disease:

During the birthing process, blood cells from the unborn child can escape into the mother's bloodstream. These cells are recognized as foreign if they are a different blood type from the mother and a natural rejection process will ensue with the formation of antibodies. The process is known as red cell alloimmunization. This event typically occurs after the delivery of a baby at

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163 http://155.37.42?TMGEN/71026740.htm.

164 http://www.seychelles.net/smdj/orig3.htm.

165 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977).

166 Silverman *ibid* with reference to **Dorland's Illustrated Medical Dictionary** 1988. (27th Edition), 421.

the end of pregnancy, but other pregnancy-related events such as elective abortion of spontaneous miscarriage can result in antibody formation. Although the pregnancy in which the alloimmunization firts occurs results in an unaffected child, future children are at substantial risk. In these subsequent pregnancies, newly formed antibodies in the pregnant patient can cross to the unborn child and attach to its red blood cells producing a low blood count (anemia) and in the word case scenario, foetal death. These antibodies can be measured in a woman's bloodstream by a test called an indirect Coombs or antibody titer. In general, the foetus of each subsequent pregnancy exhibits more severe effects that in the previous pregnancy. The foetal and newborn effects of red cell alloimmunization are known as hemolytic disease of the newborn.

In more than 98% of cases, the red blood cell incompatibility involves the Rhesus or Rh D antigen so the disease is known as Rhesus disease or Rh disease. Rhesus disease is approximately one case per 1000 live born infants.[167]

Continental Casualty Co. v Empire Casualty Co.[168]

Rubella syndrome:

Rubella is a viral disease characterized by slight fever, rash and swollen glands. Most cases are mild.

The effect: *Rubella* infection is dangerous because of its ability to damage an unborn baby.[169] Infection of a pregnant woman may result in a miscarriage, stillbirth or the birth of an infant with abnormalities which may include deafness, cataracts, heart defects, liver and spleen damage and mental retardation. Congenital *rubella syndrome* occurs among at least 25 percent of infants born to women who have had *rubella* during the first trimester of pregnancy.[170]

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167 http://www.med.unc.edu/obgn/rh.htm.

168 713 P. 2d 384 Colo. App. (1985) - *in casu* the child suffered from a "stroke and brain damage due to *erythroblastosis*, a hemolytic disease which befell an infant when physicians had not properly treated RH factor problems in his mother's prior pregnancies.

169 congenital *rubella syndrome.*

170 webmaster@healthanswers.com.

The disease is potentially serious because of the ability to produce defects in a developing foetus if the mother is infected during early pregnancy. As many as 10 to 15% of women in their childbearing years are susceptible in infection. Congenital *rubella syndrome* occurs in 25% or more infants born to women who acquired *rubella* during the first trimester of pregnancy. Defects are rare if the infection occurs after the 20th week of pregnancy. One or more defects may occur in an infected foetus and include deafness, cataracts, microcephaly, mental retardation, congenital heart defects and other defects. A miscarriage or stillbirth may occur.[171]

Symptomes:

- history of mother having *rubella* while pregnant;
- skin rash at birth (purpura, petechiae);
- low birth weight;
- small head size (microcephaly);
- bulging fontanelle;
- lethargy;
- irritability;
- hearing loss;
- deafness;
- seizures;
- abnormal muscle tone;
- cloudy corneas or white appearance to pupil (leukocoria);
- motor-mental retardation;
- mental retardation;
- simian crease.

Robak v United States[172], **Procanic v Cillo**[173], **LaPoint v Shirley**[174], **Blake v Cruz**[175], **Eisbrenner v Stanley**[176], **Gleitman v Cosgrove**[177], **Steward v**

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171 adam.com.

172 658 F. 2d 471 (1981).

173 97 N.J. 339, 478 A. 2d 755 (1984).

174 409 F. Supp. 118 Tex. (1976).

175 698 P. 2d 315, 319 Idaho (1984).

176 106 Mich. App. 351, 308 N.W. 2d 209 Mich Ct. App. (1981).

177 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

Long Island College Hospital[178], **Jacobs v Theimer**[179] and **Dumer v St Michael's Hospital.**[180]

Sickle cell anaemia:

Sickle cell disorder is the name for several related but different inherited disorders associated with the sickling of the red blood cell. Sickle cell disorder alters the shape of the red blood cells from their usual round appearance to something which resembles a sickle, or half moon. Sickle cell anaemia is usually the most severe type of sickle cell disorder where the majority of the haemoglobin inherited is sickle. Sufferers may experience "crises", bouts of pain. Anaemia, infections or jaundice. Sickle cell anaemia does not affect a person's intelligence, except in extremely rare cases.[181]

About 1 in 12 black Americans carries the gene for the sickle cell trait (that is, they have the ability to produce children with sickle cell anemia, but have no symptoms of the disease). If both parents carry the trait, the chance of having a child with sickle cell anemia is one out of four, or 25 percent (this trait occurs only in the black population).

According to Fain,[182] approximately 200 000 deaths per year occur in the United States alone because of only two common[183] haemoglobin disease, namely: *Sickle cell anaemia*[184] and *thalassemia*

Signs and symptoms:

- pain, ranging rom mild to severe, in the chest, joints, back or abdomen;
- swollen hands and feet;
- jaundice;

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178 58 Misc. 2d 452, 296 N.Y.S. 2d 41 (1968).

179 519 S.W. 2d 846 Tex. (1975).

180 69 Wis. 2d 766, 233 NW 2d 372 (1976).

181 http://www.sicklecellsociety.org.

182 *op cit* p 585.

183 there are an estimated 100 million carriers in the world for these disorders.

184 *the sickle cell anaemia*-condition entails that due to the presence of an abnormal type of haemoglobin (S) in red blood cells, the frequency of the gene that causes the disease is high in Mediterranean and African populations.

- repeated infections, particularly pneumonia or meningitis;
- kidney failure;
- gallstones (at an early age);
- strokes (at an early age).

Dorlin v Providence Hosp.[185]

Tay-Sachs disease:

The Tay-Sachs baby may appear well at birth, but suffers from blindness, paralysis, feeding problems and seizures as the disease progresses. Death occurs between three and five years of age and the last years of life are spent in a vegetative state. There is no cure or hope of recovery for the child with this disease.

Tay-Sachs disease[186] is an autosomal recessive disorder in which the enzyme hexoseaminidase A is absent. This results in a disruption in the breakdown of fatty substances (gangliosides) and accumulation of these substances in the brain cells. The clinical picture is characterised by disrupted development of the brain and muscle functions. Children with Tay-Sachs disease initially show normal development, but the disease manifest itself at around the age of 6 months. Children with the disease usually do not live beyond the age of four. In some cases the initial symptoms only occur at around the second to the third year of life. Such children usually survive longer, until the fifth to the tenth year of life. The disease process, which causes severe mental handicap, deafness and blindness, is untreatable.

Gildiner v Thomas Jefferson University Hospital[187], **Curlender v Bio-Science Laboratories**[188], **Howard v Lecher**[189], **Goldberg v Ruskin**[190] **Naccash v Burger.**[191]

Thalassaemia:

The name thalassaemia covers several autosomal recessive clinical pictures,

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185 118 Mich. App. 831, 325 N.W. 2d 600 (1982).

186 Bey-Berkson, *op cit* p 68.

187 451 F. Supp. 692 Pa. (1978).

188 106 Cal. App. 3d 811 (1980).

189 42 NY 2d 109, 366 N.E. 2d 64 (1977).

190 113, Ill. 2d 482, 499 N.E. 2d 406 (1986).

191 290 S.E. 2d 825 Va. (1982).

which involve faulty synthesis of the red blood pigment, haemoglobin. Haemoglobin is the protein which is responsible for the take-up and release of oxygen by red blood cells. It is constructed from two pairs of protein chains, namely two alpha and two gamma chains. The gradual production of adult haemoglobin commences even during foetal development. The major shift from one form of haemoglobin to the other occurs during the first few months of life. Some forms of thalassaemia can be extremely severe. In the case of alpha thalassaemia major, the alpha chains cannot be synthesised, thereby preventing the production either of foetal or adult haemoglobin. This leads to the death of the child during pregnancy or shortly thereafter. It can also lead to severe pregnancy-related complications for the mother. With beta thalassaemia major the defect blocks the production of the beta chains. At birth, the child has normal levels of haemoglobin but an extremely severe anaemia develops soon after birth (the production of gamma chains stops naturally, but no beta chains can be produced).

Bani-Esraili v Wald.[192]

Triple X Syndrome:

Patients with triple X syndrome are infantile, with scanty menses and some degree of mental retardation. They have two sex chromatin bodies in their cells and are therefore sometimes called "superfemale". The triple X syndrome results from fertilization of an XX oocyte and an X-containing sperm. Some of the patients are of proven fertility and, surpisingly, the offspring have been uniformly normal.[193]

Trisomy 9:

Trisomy 9[194] is a rare chromosomal disorder in which parto or all of the short arm (p) of chromosome 9 is present three times rather than twice in the cells of the body. Chromosome 9, Trisomy 9p is characterized by mental retardation, characteristic physical abnormalities of the head and facial (craniofacial) area, and/or skeletal malformations. In about 25 percent of infants with this disorder, heart defects are present at birth (congenital). Affected infants may also experience growth retardation and a significant

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192 127, Misc. 2d 202, 485 N.Y. 2d 708 (1985).

193 Sadler *op cit* p 122.

194 also Trisomy 9P Syndrome (Partial), Chromosome 9, Partial Trisomy 9P, Chromosome 9, Complete Trisomy 9P Chromosome 9, Rethore Syndrome (obsolete).

delay in the acquisition of language and communication skills. In some cases of Chromosome 9, Trisomy 9p occurs because of a balanced chromosomal rearrangement between two chromosomes of one of the parents; other cases are the result of a spontaneous (de novo) genetic change early in embryonic development that occurs for unknown reasons. Chromosomal analysis is necessary for definite diagnosis.[195]

Gallagher v Duke Univ.[196]

Trisomy 13-15:

The main abnormalities of this syndrome are mental retardation, congenital heart defects, deafness, cleft lip and palate, and eye defects such as microphthalmia, anophthalmia, and coloboma. The incidence of this abnormality is about 0.2 per 1000 newborns. Most of the infants die by the age of 3 months.[197]

Trisomy 17-18:

Patients with this chromosomal arrangement show the following features suggesting a distinct clinical entity: mental retardation, congenital heart defects, low-set esrs, and flexion of fingers and hands. In addition, the patients frequently show micrognathia, renal anomalies, syndactyly, and malformations of the skeletal system. The incidence of this condition is about 0.3 per 1000 births. The infants usually die by the age of 2 months.[198]

Turner's Syndrome:

This condition, found in women with an unmistakably female appearance, is characterized by the absence of the ovaries (gonadal dysgenesis). Other abnormalities frequently found are webbed neck, lymphedema of the extremities, skeletal deformities, and mental retardation. Despite the female appearance of these patients, almost all of their cells are sex chromatin-negative. In addition, the cells have only 45 chromosomes with an XO chromosomal complement. Genetic analysis has shown that this syndrome is usually caused by non-disjunction in the male gamete during meiosis.[199]

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195 http://www.trisomy.org.

196 638 F. Supp. 979 N.C. (1986).

197 Sadler *op cit* p 120.

198 Sadler *op cit* p 118.

199 Sadler *op cit* p 121.

6.2 The future of genetic science

It is apt that this chapter is concluded with a sense of hope for possible future sufferers from birth defects. Lupton[200] convincingly argues in favour of medical advancement in general and the development of new genetic tests and techniques specifically:

> "To turn our backs on the potential offered by germ cell therapy would be short-sighted, given the magnitude of the problems facing millions of inhabitants of this planet. I do not believe that we should give up our efforts to treat genetic afflictions or to improve the quality of life of millions of people because the device we use lies on the boundary of moral and ethical acceptability."[201]

It should be noted that the development of safe genetic treatment of foetuses would create totally new causes of action. An obvious action would, for example, arise where a handicapped child is born while prenatal treatment of the condition was possible.[202]

Collins[203] reports on the modern medical advances that has made the treatment of foetuses possible:

"The therapeutic treatment of foetuses before birth is one of the fastest growing and most significant new areas in medicine. Doctors have drained flued from foetuses' vital organs and have removed a foetus from the womb and returned it after treatment. The risks are high and the techniques experimental, but the doctors who perform foetal surgery have just begun to examine the possibilities of foetal treatment. Given the stage of development of the prenatal life and the wrongful death statutes in many states, doctors may not be liable for negligence in foetal surgery.

Since the treatment of a prenatal life will probably be possible from preconception, conception or implantation in the future, some guidelines for liability and a standard of care will have to be developed by the courts and legislatures. Although it can be argued that providing a remedy for the death of a life after implantation my discourage prenatal treatment, it is more

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200 1992. Genetic engineering: Does it merely facilitate the process of evolution. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg**, 79.

201 *op cit* p 87.

202 these possibilities will doubtlessly be the topic of future studies.

203 1984. An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a new framework. **Journal of Family Law** (22), 677.

likely that such a wrongful death statute would only discourage indiscriminate and unrealistic foetal surgery. A doctor's liability, of course, would be based on the plaintiff's proof of wrongful conduct and causation."[204]

204 *op cit* p 690.

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CHAPTER 12

Final reflections

1. In review

After considering some aspects of wrongful life litigation, every reader should make up his/ her own mind whether these actions should receive legal recognition or not. On only one point there seems to be no disagreement, and that is there is no "hard and fast" solution in reaching a verdict.[1] It is suggested that a possible reason for this difficulty is the many facets of life that are involved,[2] which could all sway a decision either way. Hol[3] writes that this legal consideration requires a control of one's emotions.[4] A few final thoughts before reader will be asked to give judgement.

> "Whether it is better to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."[5]

1.1 Reasons for rejecting wrongful life[6]

- plaintiffs deny their own standing to sue when asserting they should never have been born;
- damages are not calculable because it is impossible to assess the condition of non-existence and therefore no comparison can be made with life as a handicapped

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1 of "to be, or not to be".

2 *ie* moral, ethical, social, religious, philosophical, economic, legal *etc.*

3 1996. Beantwoording rechtsvraag: Wrongful life. **Ars Aequi** (45:4), 273.

4 *"Deze rechtvraag is een oefening in de beheersing van onze emoties. In het recht zijn deze niet altijd een goede raadgever. Men is dus gewaarschuwd."*

5 **Becker v Schwartz** 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (Judge Jasen).

6 Objections raised against wrongful conception, wrongful birth and wrongful life actions are mentioned: reader must therefore distinguish which would be applicable in each instance - see ch 1 and 2 for a basic understanding of the various actions. Objections that are applicable to wrongful conception are for this reason marked with a * ,while concerns exclusively applicable to wrongful conception objections are marked ** - it is submitted that principally similar arguments are used against wrongful birth and wrongful life actions.

person;

- plaintiff has not suffered any legally cognizable injury, as life is always and under all circumstances more precious than no life at all;*
- the mother's physician owes no duty of care or any other duty towards the foetus;
- the judiciary is unable and not compelled to evaluate metaphysical, theological, philosophical issues;*
- there is no legal right "not to be born";
- the physician's wrongful[7] act did not actually cause the defect itself, therefore there is no legal causal link between the physician's conduct and the resulting damage;*
- courts recognize that the sanctity of life outweighs the consideration of quality of life;*
- there is no fundamental right to be born "as a whole, functional human being";
- the social impact of recognition of such actions could be staggering - it would open a floodgate of dissatisfied lives actions, which would be untenable from a legal public policy viewpoint;*
- the recognition of these actions against health care providers would lead to wrongful life actions against parent, which is untenable from a legal/ public policy viewpoint;*
- actions arising from childbirth have a detrimental effect on the psyche of the children involved with such litigation;*
- the benefit of having a child cannot be equated or diminished by the economic burden of rearing a child;*
- public policy deems that the birth of a healthy child to be a precious gift that outweighs the economic loss of rearing the child;**
- the cost of supporting a life and the value of life is not comparable;**
- to impose liability would be wholly out of proportion to the wrongdoer's culpability;*
- liability would be an unreasonable burden on health care providers;*
- recovery of child-rearing expenses would be a windfall to parents;*
- possibility of fraudulent claims;*
- it is against public policy and is rather a matter that should be resolved by the legislator.*

1.2 Viewpoints in favour of wrongful life

Although many critical opinions have been mentioned against the awarding of damages in wrongful life actions, Stolker,[8] conveys the following thought:

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[7] alleged.

[8] 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 531.

> "The UK Law Commission also questioned whether, in rejecting the wrongful life claim, it was not attaching too much weight to considerations of logic. Law is an artefact and, if social justice requires that there should be a remedy given for a wrong, then logic should not stand in the way."[9]

It is further argued[10] that recognition of individuals' rights[11] could be practically enforced if legal policy ensures that we proceed into a period of increased legal protection with adequate safeguards to protect those individuals' other rights based in principles of equality and liberty.

1.2.1 Hope of recovery

A worthy consideration in allowing these claims is the assistance these prejudiced plaintiffs would receive in dealing with their situation and overcoming their prejudiced state, as they would be compensated for an injury that was inflicted due to the negligence of another.[12] To achieve this goal the traditional fields of application of the law of delict should be expanded in order to accommodate this new development in the law of obligations[13]. Not only would afflicted children be compensated for wrongs committed against them, but at the same time genetic counsellors and doctors would be encouraged to accurately and responsibly undertake the important task of genetic testing and counselling.

1.2.2 Benefit to family life

Harrer[14] refers to a persuasive argument raised by the German Supreme Court in rejection of the view that child-rearing expenses should not be awarded. The court believes that because an award reduces the financial burdens associated with unwanted childbirth,[15] damage awards will improve the parent-child relationship and will cause the parents to feel more positive towards the child as a person. The reimbursed parents will at the same time be in a better financial position to cope with the inevitable high costs associated with raising a (handicapped) child.

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9 it is submitted that this is a point worthy of consideration.

10 Shepherd, L. 1996. Sophie's choices: Medical and Legal responses to suffering. **Notre Dame Law Review** (72:1), 156.

11 *eg* right to make informed procreative decisions.

12 "for every wrong committed, there should be a remedy."

13 law of delict and law or contracts both fall under the law of obligations in the South African legal framework.

14 1994. Aspects of Failed Family Planning in the United States of America and Germany. **The Journal of Legal Medicine** (15), 91.

15 it is submitted that unwanted childbirth in this sense could encompass both wrongful conception and wrongful birth actions.

1.3 Plaintiff's rights

Much have been said about the plaintiff's supposed right to be born healthy. While some have acknowledged such a right, the majority of courts have criticised the "right to be born as a whole and functional human being". It is my contention that the arguments raised against recognition of such a right are not convincing. There seems to be no logical reason why a person who is in a prejudicial state should not be allowed to claim compensation for the mere reason that he is still "better off" than others, or than would otherwise have been the case.

Here the compelling example exposing the flaws in the abovementioned point of criticism comes to mind: Should a person whose life is saved because of an excessively drastic amputation (under the reasoning in question) be prohibited from instituting action against the operating physician for the reason that he has his life thanks to the physician's improvident conduct? This could certainly not be the case, especially where it is found that a proper diagnosis would have revealed that a less drastic procedure or simply the right medication would have had the similar lifesaving effect.

If one draws a parallel between this example and the position of a wrongful life plaintiff, no substantive difference can be found. The wrongful life plaintiff does live, which is a positive attribute, but he also has to suffer from some or other hereditary condition because of another's negligence. Such a plaintiff can surely not be barred from claiming compensation for his disabilities and suffering merely for the reason that the alternative for his condition would have been non-existence?

What should be kept in mind is the fact that the physician's conduct in both instances discussed above has caused both positive and negative consequences. It would be too simplistic to consider either instance from one perspective only.[16] Concerning the positive attribute: In the first set of facts the physician saved a life, whilst in the second instance the physician caused a child to be born. With regard to the negative consequence: In the first instance the patient unnecessary lost a member of his body and in the second a child is born with severe congenital malformations.

If the negative consequence in both instances were to be an inevitable result, one could justifiably weigh the value and importance of each result and then decide whether a life without a particular member is better than death, or whether a handicapped life is more beneficial than no life at all. It is my submission, however, that in both given situations there need not be such

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16 *ie* to consider only the positive or only the negative attribute.

a weighing of interests.[17] In both the given example and wrongful life instances there need not have been either an amputation or a handicapped child.[18] It is submitted that in both cases the physician's improper diagnosis and/ or treatment has caused the unnecessary) prejudicial side-effect.

The fact remains that although a wrongful life plaintiff might be thankful for the life he has, there is no sound reason why he may not be compensated for the suffering and expenses he experience because of the fact he lives.

Commentators alternatively believe that the basis of a wrongful life plaintiff is founded on the right not to be born, of which the majority is of the opinion that such a right does not exist. It is my submission that wrongful life plaintiffs do not base their claim on this right, as it is not life itself that is complained of. The basic premise of the wrongful life plaintiff is that a medical professional's negligence has disallowed him a normal and healthy life.

1.3.1 Corresponding duty towards foetus?

Because patients seeking genetic counselling are under the medical control[19] and responsibility of their physician, Fain[20] believes that this relationship of "control"[21] imposes not only a duty on the physician towards his patients, but also creates a duty to protect[22] the *foetus*[23] from

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17 and a subsequent choice.

18 parents planning to have children who are informed that a specific drug being used by the mother could cause birth defects, could choose to discontinue the use of the dangerous drug before conceiving a child; parents who are informed of a high risk of foetal abnormality in mothers of an advanced age could plan to have children at a younger age or could closely follow the foetal development to ensure normal birth; prospective parents who are both found to be carriers of a recessive gene could responsibly decide not to have their own children and rather adopt or consider surrogate parenthood *etc.*

19 as patients will base their procreative decision on the physician's opinion, it is clear that he has control over their choices.

20 1987. Wrongful Life: Legal and Medical Aspects. **Kentucky Law Journal** (75), 585.

21 or rather "influence", derived from a special relationship based on trust and contract.

22 it is submitted that a physician could enforce such protection by performing accurate genetic tests, by providing precise genetic counselling, by appropriately warning parents of expected risks and through advising patients to take certain precautions and/ or to change certain circumstances.

23 or potential foetus.

harms such as: environmental teratogens; embryo toxins;[24] auto immune deficiency syndrome (AIDS); environmental chemicals and all other damaging circumstances.[25]

It is enthralling to consider the rational used by Fain[26] to establish a nexus between the unborn foetus and the physician. His submission that the physician should be expected to protect the unborn foetus from harm is worth contemplating. The physician is after all in an excellent position to ensure that the unborn child has a healthy development, as he will be in the unique position and have the ideal opportunity to continually examine the pregnant mother as she reports for her periodical check-ups. One point of criticism against this view is that the individual's rights to privacy, bodily integrity and self-determination[27] would be infringed by such a duty.[28]

2. Solutions

2.1 Value of legislative guidance[29]

Stolker[30] conveys a basic truth: liability in law is not established by how far we can stretch our imagination or by what we deem as "reasonable", but is rather determined by clear the beacons of breach of a norm, relativity, fault, damage and causality.

> "De grenzen van het aansprakelijkheidsrecht worden in eerste instantie niet bepaald tot waar ons voorsellingsvermogen reikt of tot waar dat voor ons gevoel 'redelijk' is,

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24 which include maternal infections such as *rubella*, syphilis, herpes, gonorrhea - see ch 11.

25 such as the inhalation of damaging substances *eg* nicotine found in cigarette smoke, excessive alcohol intake or uncontrolled drug use *etc.*

26 *op cit* p 589.

27 which rights are protected and entrenched.

28 one would therefore seriously have to question whether such a duty could legally be placed on a physician or other health care provider in any instance where the execution of such a duty to protect the interests of the foetus would infringe upon the recognized rights of the patient.

29 researcher will prepose a draft of possible wrongful life legislation in a following paper.

30 1997. Een onrechtmatig bestaan in Nederland - een stand van zaken. **Aansprakelijkheid en Verzekering** (5:2), 38.

maar door de grensstenen normschending, relativiteit, schuld, schade en causaliteit."[31]

Despite his realistic approach concerning the limitations of tort principles, Stolker[32] offers a solution: specific legislative recognition.

> "More simply, it fails because the plaintiff is unable to prove all of the traditional elements. If the traditional balance is to be altered in favour of either plaintiffs or defendants, it is up to the legislature to make that change."

Hondius[33] gives a report on legislation that was introduced in the Netherlands in 1995 that comprehensively regulates medical treatment agreements.[34] The question has arisen whether such legislative guidance is indeed necessary, or whether a general regulation by the profession or an independent authority should not rather be preferred.

One point of criticism against internal regulation[35] is that these guidelines are often unilateral and biassed, whereas modelled regulation bridges the gap between behavioural norms of an professional organisation and contractual consistency. A second suggested inadequacy of self regulation is the fact that decisions and guidelines do not bind non-members, which does obviously not hold true for legislative parameters.

It is submitted that these considerations should be taken into account when possible solutions for the wrongful life debate is discussed, especially with regard to a proposed legislative restitution.

2.2 Judicial guidelines

It is my submission that the judicial guidelines for recognition of actions based on unwanted

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31 *op cit* p 39.

32 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 521.

33 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1684.

34 in which the rights of the patient is primarily protected.

35 Hondius, *op cit* p 1685.

birth, as suggested by Hampton[36] should be considered: the birth of a child is a foreseeable consequence of the negligent conduct of the defendant; the expenses associated with the rearing and education of such a child is also foreseeable; the inquiry into wrongful conception liability should commence with recognition of an actual injury to the plaintiff;[37] in application of the mitigating principle of the benefit rule, courts must recognize the fact that the benefits associated with the birth of a child will not always be greater than it's detrimental consequences and; the courts should allow the trier of fact to make a proper evaluation of the factual situation[38] in order to come to a equitable conclusion to the matter.

2.3 Value of effective insurance

It is submitted that if liability for wrongful life cannot be recognized because of an inability of traditional tort principles to adapt to modern society, one should maybe consider alternative measures, such as compensation based on insurance.

Hondius[39] argues that medical malpractice litigation usually involves civil court procedures whereby the litigating parties are gathered in conflicting camps. He believes that this hostile relationship between patient and physician need not necessarily develop, as the injuries suffered can effectively be compensated by medical insurance. It is suggested that the Swedish system of patient-protection insurance could be considered, whereby hospitals take out a compulsory collective insurance on behalf and for the benefit of patients.

Sluyters[40] reports on the introduction of medical liability insurance in the Netherlands. He explains that the need to identify a wrongdoer would be replaced by the criteria of avoidability of damage caused by medical malpractice.[41]

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36 1986. The Continuing Debate over Recoverability of the Costs of Child-rearing in 'Wrongful Conception' Cases: Searching for Appropriate Judicial Guidelines. **Family Law Quarterly** (20), 59.

37 identifying the injury at its source, namely the fact that the physician breached the required standard of care.

38 using all relevant methods, as well as quantitative and qualitative analyses of the costs on the one side and the benefits on the other.

39 *op cit* p 1711.

40 Arisz. H.B. 1991. Inleiding: Beroepsaansprakelijkheid. **Beroepsaansprakelijkheid: Recht op een scheve schaats**, 100. Jonge Balie Congres- W.E.J. Tjeenk Willink, Zwolle.

41 *"Er wordt over gedacht in Nederland een medische ongevallenverzekering te introduceren." and also "Het toewijzingskriterium zou dan niet meer zijn; een beroepsfout, maar, vereenvoudigd gezegd, de vermijdbaarheid van schade veroorzaakt door een medische behandeling."*

Van Roermund[42] suggests that a comprehensive method of insurance could solve probably the most difficult wrongful life challenge, namely that a value must be placed on the life of an individual. He concludes that only if society as a whole has created a comprehensive and inclusive system of insurance in terms of which the vast majority financially contributes, would it be morally acceptable to keep a physician fully liable. He argues that in this way, not the value of the child, but the value of the physician's insurance would be the relevant amount of compensation.[43] It is my submission that this view of shifting off the risk of losses to an independent insurer, should be thoroughly considered as a logic alternative to expensive and complex litigation based on stringent legal rules.

It is submitted that, although this insurance-based solution might be generally more expensive than the current liability system, the greatest advantage is that the patient-physician relationship is not necessarily adversely affected by the institution of a claim by the patient. An additional advantage for physicians that could potentially be involved in wrongful life litigation, is the fact that they would not be held personally liable for payment of potentially enormous claims for damages. Insurance premiums could be generally passed on to patients by means of an increased consultation fee, or specific patients with particular genetic counselling/ testing requirements could be asked to foot the bill. A further solution would be to make specific mention of the availability of such insurance as an option to patients during their first consultation, or even for the physician to personally take out the necessary insurance. When the importance of solving the wrongful life debate has been fully appreciated, it could indeed be possible that financial state subsidy could be obtained.

Kamp[44] reports on a dramatic increase of insurance claims for (medical) professional negligence in the Netherlands.[45] He conveys that for this reason only five insurance companies have remained in this competitive field.

It is my submission that specific wrongful life liability insurance will benefit all parties involved, as patients would not need to engage in lengthy, expensive and risky civil litigation to be

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42 1997. De rekening van het kind: Aansprakelijk voor "wrongful birth". **Rechtskundig Weekblad** (39), 1313.

43 *"Alleen doordat onze sameleving een uitgebreid verzekeringsinstrumentarium heeft onworpen waar nagenoeg alle leden van die sameleving aan meebetalen, kunnen wij ons een moreel besef permitteren dat de arts voluit aansprakelijk stelt, voor zover hij althans verzekered is. Echter: niet de waarde van een kind, maar de waarde van een arts komt daarin tot uitdrukking." op cit* p 1318.

44 1995. Beroepsaansprakelijkheid in stroomversnelling. **De Naamloze Vennootschap** (73), 21

45 *"Een inhaalrace in claimgedrag tegen medische hulpverleners".*

compensated for their injuries and losses. Professional negligence insurers will undoubtedly calculate whether such insurance will be profitable and accordingly offer a market related policy.

3. Unfounded concerns

3.1 Excessive litigation?

Schoonenberg[46] believes that the bounds of litigation and liability need not get out of hand when a proper and effective social support system is in place.[47] Damage awards should, however, be kept modest.[48] She[49] also downplays the feared consequences of so-called "defensive medicine and believes that it can be prevented:

> *"Waar dit niet (meer) mogelijk is, kan een redelijke schadevergoeding de levensomstandigheden van het kind in ieder geval enigermate verbeteren. Verder reiken de juridische mogelijkheden op dit moment waarschijnlik niet."*

The fears that have been expressed that recognition of wrongful life actions would cause a floodgate of new litigants and also create an unacceptable expectance from the legal system, are to my mind, unfounded. It should be mentioned that serious doubts exist that South African courts will be as adversely affected by excessive litigation as other Western countries.

Strauss[50] has various ideas why the excessive litigation found in the United States of America will not affect South Africa to the same extent. He firstly mentions that South African courts have traditionally had a protective attitude towards the medical profession. He supports this view with reference to the fact that the evidential rule of *res ipsa loquitur*[51] does not locally

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46 Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 75.

47 as is the case in the Netherlands and most (richer) first world countries.

48 which minimises the fears of those who believe that excessive liability will follow recognition of wrongful life.

49 *ibid.*

50 1991. **Doctor, patient and the law** JL van Schaik (3rd edition) *op cit* p 245.

51 the matter speaks for itself/ it stands to reason.

apply to medical negligence cases.[52] Another strong incentive to settle a medical malpractice case out of court is the exorbitant cost factor.[53] A further reality of South Africa litigation is that our courts are relatively conservative in their awards for damages.[54] This judicial restraint will to a large extent de-motivate possible fraudulent plaintiffs from instituting action for pure financial gain. In this regard it must be mentioned that well thought through legislation will authoritively regulate the whole wrongful life debate, while closing the loopholes for possible fraudulent claims.

3.2 An acceptable solution

Weiss[55] is of the opinion that wrongful life recognition by the courts would produce a more just legal system and adds that if this were not to be, a legislatively enacted no-fault solution may ultimately be the best alternative.[56] He mentions various difficulties currently experienced by the wrongful life plaintiff: omission of information must be proved, and an omission is difficult to prove; the current tort system is inefficient, as prevailing plaintiffs receive less than half of the damages awarded in wrongful life and birth actions.[57]

A suggested alternative[58] that would be more just, is a legislated program that distributes the available pool of funds among handicapped children.

> "Although the program might not fully compensate some parents and their children because the money would provide only a fixed rate of compensation, it would reach all parents struggling with the expense of raising handicapped children and would save litigation costs. The program might resemble the current workers' compensation and

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52 **Van Wyk v Lewis** 1924 AD 438 - an obvious result or consequence of specific conduct (*eg* the fact that a child is born after the parents have been sterilised constitutes the obvious, namely that the sterilization procedure was not successfully performed), therefore, does not raise an inference of negligence as is the case in other fields of law - it is merely considered with the other evidence in the case.

53 although, it is submitted, that this is not a phenomenon restricted to our shores.

54 as opposed to high compensation orders allowed in America - note that the Americans also recognize so-called "punitive damages".

55 1987. Wrongful Birth and Wrongful Life: In search of a logical consistency. **Annual Survey of American Law**, 507.

56 *op cit* p 521.

57 fees for attorneys, expert witnesses and other litigation costs consume the rest - in America more than 60% of the amount awarded in gross compensation are spent on legal fees.

58 *op cit* p 522.

> no-fault car insurance programs. The costs of the program could be borne by obstetricians, hospitals, genetic counselors and prospective parents. Moreover, such a no-fault program, unlike current proposals for a national health insurance for all 'catastrophic illness', would be self-funded, and therefore would not be a major new source of domestic spending."[59]

It is submitted that this program would avoid the greatest difficulty in wrongful birth and wrongful life litigation, namely the traditionally required valuation of human life. I am of the believe that this suggested solution of Weiss should be seriously considered, as it addresses not legal, but also social needs.

4. Conclusion

Society should not fear the individual's increased cognizance of his legal rights and should not solely focus on the adverse consequences of increased litigation. It is praiseworthy that wrongs are exposed and wrongdoers are held accountable. It should also not be forgotten that the reality of professional accountability increases existing levels of proficiency and ensure that high standards of work ethics are maintained.

It should further not be forgotten that plaintiffs in wrongful life cases are real people who frequently suffer greatly from debilitating diseases and serious birth defects.[60] These people have been wronged by the medical profession and should be entitled to recovery whenever a complete cause of action has been established. It would be unfair if these plaintiffs were to be prejudiced by traditionally conservative courts and overburdened lawmakers who might reject liability based on rhetoric and outdated public policy considerations. It is therefore submitted that serious consideration should be given to regulate the increasingly pressing legal conundrum which is wrongful life litigation. As stated in **Curlender v Bio-Science Laboratories**,[61] courts should take a strong stance that for every wrong there should be a remedy.

> "The reality of the 'wrongful life' concepts is that such a plaintiff both *exists* and *suffers,* due to the negligence of others. It is neither necessary nor just to retreat into

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59 *ibid.*

60 see ch 11 where some of the serious hereditary ailments are discussed.

61 106 Cal. App. 3d 811, 165 Cal.Rptr. 477 (1980).

meditation on the mysteries of life."[62]

It is my submission that the viewpoint held by Belsky[63] is the correct one, also with reference to South African law. He reiterates that it is a basic principle of modern tort law that a cause of action should not be denied when the only obstacle preventing recovery is the plaintiff's inability to prove precisely calculated damages. He[64] refers to the well known American case of **Story Parchment Co. v Paterson Parchment Paper Co.**[65] where the court reasoned as follows:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer for making any amend for his acts....(I)t will be enough if the evidence show(s) the extent of the damages as a matter of just and reasonable inferences, although the result be only approximate."

I further agree with Patterson[66] who supports the dissenting judgement of Jacobs J in **Gleitman v Cosgrove**:[67]

> "While the law cannot remove the heartache or undo the harms, it can afford some reasonable measure of compensation towards alleviating the financial burdens. In declining to do so, it permits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of torts."

A real obstacle for the local plaintiff in seeking justice in the courts is the fact that the majority of South Africans are not, through personal means,[68] financially capable to take on the medical

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62 at 829.

63 1993. Injury as a matte of law: Is this the answer to the Wrongful life dilemma? **University of Baltimore Law Review** (22:3), 185.

64 *op cit* p 235.

65 282 U.S. 555, 563 (1931).

66 1982. "Wrongful Life": Should the cause of action be recognized? **Kentucky Law Journal** (70), 163.

67 227 A.2d 689, 703 N.J. (1967).

68 Strauss *op cit* p 244 conveys that the existence of a legal-aid system has done much to assist indigent plaintiffs in bringing their cases to trial.

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fraternity. It is submitted that, once legal certainty has been established,[69] one might find that few wrongful life cases would even be brought to trial. Once the legal principle has therefore been entrenched, the population at large[70] will be legally protected.

It is therefore submitted that, although our legal system is a dynamic one based rather on fundamental principles than legislative guidance (and is in essence uncodified) one should consider the importance of legal certainty and visible legislative protection of interests in a community where the majority of people is financially unable to protect their rights through lengthy and expensive court battles. Providing a remedy in statute will considerably advance the legal position of these indigent plaintiffs.

It is my submission that courts should be bold to allow recovery in meritorious cases even without legislative backing. They should have faith in the equitable operation of the justice system which will ensure that no fraudulent or undeserving plaintiffs succeed with a claim and concomitantly limited litigation to acceptable bounds.

Finally, it must be agreed that proper, workable and comprehensive legislation could attribute much to obtaining legal certainty in the wrongful life phenomenon and thereby ensure the necessary execution of justice.

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69 either by means of clear judicial acceptance and instruction, or (preferably) through clear and practical legislative guidelines.

70 many of whom is indigent and is in any event unable to enforce their rights or claim recompense where their interests have been infringed.

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CHAPTER 13

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

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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

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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.

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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, Receuil 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)

Bundesgerichthof 18 March 1980

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

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3.7 Israeli Case

Saul, Shmuel & Nvadra Katz v Dr R Zeitzev, 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.

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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).

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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).

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Dhanabakium v Subramanian 1943 AD 160.

Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd 1970 (1) SA 228 (A).

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Edouard v Administrator, Natal 1989 (2) SA 368 (D).

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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 Donelly 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)

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Gerke v Parity Insurance Co Ltd 1966 (3) SA 484 (W).

Gibson v Berkowitz 1996 (4) SA 1024 (W).

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Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A).

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Jayber (Pty) Ltd v Miller & others 1980 (4) SA 280 (W).

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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).

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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 ODPA 74.

McCullogh v Fernwood Estate Ltd 1920 AD 204.

Milne v Shield Insurance Co Ltd 1969 (3) SA 352 (A).

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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).

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Ned-Equity Insurance Co Ltd v Cloete 1982 (1) SA 734 (A).

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Novick v Benjamin 1972 (2) SA 842 (A).

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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).

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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).

R v Van Schoor 1948 (4) SA 349 (K).

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

Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A).

Reyneke v Mutual & Federal Insurance Co Ltd 1991 (3) SA 412 (W).

Richter v Estate Hamman 1976 (3) SA 226 (C).

Rissik v Pretoria Municipal Council 1907 TS 1024.

Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd 1975 (1) SA 110 (A).

S v Binta 1993 (2) SACR 553 (C).

S v Collett 1978 (3) SA 206.

S v Collop 1981 (1) SA 150 (A).

S v King 1971 2 PHH 103 (T).

S v Kiti 1994 (1) SACR 14 (E).

S v Makwanyane 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

S v Progress Dental Laboratory (Pty) Ltd and Another 1965 (3) SA 192 (T).

S v Shivute 1991 (1) SACR 656 (NM).

SA Medical & Dental Council v McLoughlin 1948 (2) SA 355 (A).

Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194.

Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd & another 1985 (1) SA 248 (W).

Santam Insurance Co Ltd v Voster 1973 (4) SA 764 (A).

Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O).

Service v Pondart-Diana 1964 (3) SA 277 (D).

Shatz Investments (Pty) Lty v Kalovyrnas 1976 (2) SA 545 (A).

Shell & BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA 1980 (3) SA 653 (D).

Sigournay v Gillbanks 1960 (2) SA 552 (A).

Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A).

Soar v JC Motors 1992 (4) SA 127 (A).

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South African Railways and Harbours v Lyle Shipping Co Ltd 1958 (3) SA 416 (A).

Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A).

Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A).

Stoffberg v Elliott 1923 CPD 148.

Sutter v Scheepers 1932 AD 165.

Swart v Provincial Insurance Co Ltd 1963 (2) SA 630 (A).

Swart v Vosloo 1965 (1) SA 100 (A).

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

Trollip v Jordaan 1961(1) SA 238 (A).

Trotman v Edwick 1951 (1) SA 443 (A).

Tulloch v Marsh 1910 TPD 453.

Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657.

Van Loggenberg v Sachs 1940 WLD 253.

Van Wyk v Lewis 1924 AD 438.

Van Staden v Central South African Lands and Mines 1969 (4) SA 349 (W).

Verhoef v Meyer (Transvaal Provincial Division, 12 September 1975).

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1.

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Wolman v Wolman 1963 2 SA 452 (A).

Wood v Davies 1934 CPD 250.

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4. News Paper Articles

Anon. Eis teen ginekoloog oor mislukte aborsie: regter beslis later.
Beeld 25 Maart 1995

Anon. Vrou swanger - kry R500 000.
Beeld 13 Augustus 1996

Anon. Aborsie 'soos doodstraf'
Beeld 24 Februarie 1996

Anon. Vrou eis van dokter nadat sy weer swanger word.
Beeld 29 Februarie 1996

Anon Ouers kry fortuin vir seuns se spiersiekte.
Rapport 15 Desember 1996, 3

Anon **The Star** Oktober 22 1997, 1

Anon Mag 'n fetus sy ma dagvaar?

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UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

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de Bruin, P. Hoë hof hoor gou betoog aan oor 'n fetus se reg op lewe.
Beeld 26 Maart 1998, 12

Holzapfel, J. Nuwe VSA-wet beskerm fetus van ma met drankprobleme.
Beeld 2 Junie 1998

Jonker, I. Grondwet 'beskerm nie fetus, maar wel vrou se reg om te kies.'
Beeld 26 Mei 1998

Jonker, I. 'Kinders het voor geboorte al regte' - Geboorte is 'n drastiese nuwe lewenstyl.
Beeld 27 Mei 1998

Jonker, I. Uitspraak voorbehou oor die regte van 'n fetus.
Beeld 28 Mei 1998

Jonker, I. Aborsiewet strook met Grondwet, sê regter in aansoek.
Naweek-Beeld 11 Julie 1998, 1

Kamerman, S. Erfelijke ziektes raken hele familie.
Ad Valvas 18 September 1997, 5

Kamerman, S. Adviseurs -voor -nakomelingschap.
Ad Valvas 18 September 1997, 5

Van Heerden, D. Egpaar eis van arts ná derde baba gebore is.
Rapport 4 Augustus 1996

Van Heerden, D. 'Ongewenste' kind bring ouers duisende in sak.
Rapport 27 Julie 1997

Vander Westhuizen, F. Ongehude ma eis R794 057 ná ginekoloog se mislukte aborsie.
Beeld 21 Maart 1995

Verster, I. Groepe Maandag hof toe oor fetus se reg op lewe.
Naweek-Beeld 23 Mei 1998, 11

Verster, I. Hofuitspraak oor aborsie verras nie, is tog omstrede.
Naweek-Beeld 11 Julie 1998, 2

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 referrd 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 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.

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 procedured: - (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 of 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

Stoll[1] 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 from the basis of a claim for damages, if the abortion fails and the child is born."

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

Opsomming

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 geboorte-verwante 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 geboorte-afwykings 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 eisoorsaak 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 díe 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 howe in 'n handjievol Amerikaanse state, Israel en Frankryk gee die *wrongful life* eiser gelyk, maar beperk die skadevergoeding tot spesiale skade vir addisionele onkostes 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-Afrikaane 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 besonderse 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.