

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 constitution¹⁷² 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

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 specific¹⁷⁸ grounds of discrimination are addressed in

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 birth¹⁸² 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

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 Waal¹⁸⁶ 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

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 debate¹⁹¹ and related medical malpractice cases.¹⁹²

The wrongful conception plaintiff is given specific legal protection. If a physician fails to give the necessary information¹⁹³ 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.

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 its parents right to be informed and to decide on reproductive matters.

De Waal¹⁹⁴ reports that Ackermann J in **Ferreira v Levin NO**¹⁹⁵ proposed a ' broad and generous' reading of this subsection. It is explained¹⁹⁶ 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. Stolker¹⁹⁷ 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.

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 actions¹⁹⁸ 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

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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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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: <ul style="list-style-type: none"> - 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.

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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.