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).

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?*

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.