

CHAPTER 2

Basis of Claim

1. Introduction

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

1.1 General position

According to Harrer,² the vast majority of medical negligence claims in the United States of America are based on delict. Possible reasons for this phenomenon is that physicians very seldom guarantee the successful outcome of their therapy or medical interventions and because a very small percentage of these agreements are in writing.³ Another reason could be the fact that contractual damages⁴ are limited to patrimonial losses⁵ which leave wrongful life plaintiffs, who generally suffer extensive emotional trauma, without a suitable remedy.

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

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

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

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

⁴ in terms of South African law.

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

reported⁶ that, whereas courts normally hold that ordinary child-rearing costs are not recoverable,⁷ it is generally recognized that parents may recover extraordinary expenses necessary to "treat the birth defect and any additional medical or educational costs attributable to the birth defect."⁸

Harrer⁹ further states that under German law, compensation for actions based on contract and delict are awarded on the same principles. He writes that because a valid agreement is a prerequisite for damages to arise from breach of contract, the vast majority of wrongful life litigation in Germany is also based on delict. This is an important consideration, as Harrer reports that abortion contracts¹⁰ are generally void under German law, either because they contravene relevant statutory prohibitions¹¹ or alternatively because they are unconscionable.¹²

Hondius¹³ reports on recent developments in Europe whereby legislative guidelines for medical legal issues will be introduced that will have a profound influence on the legal position of medical treatment agreements and accordingly the potential patient-plaintiff in the Netherlands. He believes that patients are medical-scientifically and legally in a much better position today than in years gone by.¹⁴ A relevant aspect in this regard is the increasing importance placed

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

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

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

⁹ *op cit* p 101.

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

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

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

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

¹⁴ *op cit* p 1681.

on the patient-medical insurer relationship.¹⁵

It is further reported¹⁶ that a patient wishing to hold a medical professional¹⁷ liable in the Netherlands could do so based on primarily two grounds, namely contract and delict.¹⁸ It is mentioned that there is currently very little difference between these two bases as both are regulated by the same principles, such as the rules concerning damage.¹⁹

Arisz²⁰ confirms this viewpoint and writes that the basis of liability of a medical practitioner, flowing either from breach of contract or delict, has no practical consequence in Dutch law, as the required standard of care by which the professional's conduct will be weighed is the same in both instances.

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

Schoonenberg²¹ believes that in both wrongful life and wrongful birth actions the most important head of damage is that of medical treatment and care of an impaired child born with a genetic defect. She writes that although these costs are generally claimed by the parents in wrongful birth actions in America, she is of the opinion that under Dutch law these expenses will not be compensable by any other person than the impaired person himself.²² It is accordingly submitted that wrongful life actions should have more scope and support in the Netherlands²³ as the parents will merely be allowed to act as legal representative of the child,

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

¹⁶ *op cit* p 1687.

¹⁷ "hulpverlener".

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

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

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

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

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

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

on its behalf.²⁴

Cleaver²⁵ explains that local wrongful life litigation could be instituted on either a delictual or contractual basis:

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

Strauss²⁷ reports that while malpractice litigation has assumed huge dimensions in certain jurisdictions, particularly in the United States of America, in the United Kingdom "judicial attitudes in the medical malpractice field have been conspicuously more reserved". It is mentioned that South African courts have been similarly lenient towards physicians, "in the sense that there has been consistent application of traditional legal principles."²⁸

Stolker²⁹ supports the view that varying actions, such as wrongful conception³⁰ and wrongful life should be totally separated because of their fundamental theoretical differences. He also remarks that the latter has much more complex juridical questions.

Chapman³¹ believes that until the courts address issues such as the use of correct terminology and note to "to take greater care in the vocabulary" of wrongful life litigation with more

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

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

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

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

²⁸ *ibid.*

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

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

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

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

It is commonly acknowledged³² that “the lack of definitional uniformity, dissimilar application of tort doctrine, and theoretical obstacles to ascertaining damages have resulted in confusion and haphazard treatment of the torts. A consistent judicial response to these actions, however, requires a clear understanding of the underlying legal doctrines”. Berenson³³ similarly distinguishes between the various genres of wrongful life, and emphasises the importance of recognition between the underlying differences between them.

2. Basic concepts

2.1 Definitions

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

2.1.1 Foetal rights

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

2.1.2 Theories of law

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

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

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

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

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

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

2.1.3 Recoverable damages

Under both wrongful birth and wrongful pregnancy claims the parent-litigants are entitled to claim damages for: pecuniary expenses of pregnancy and birth, loss of consortium, interference with established family relationship, general raising costs, extra expenses related to handicapped child (including- medical, educational expenses, satisfaction for mental pain and suffering). For the unwanted birth of a healthy child the parents can expect either to be awarded the total of child rearing costs, costs minus benefits, or no award at all. In a wrongful life action the plaintiff-child's damages are restricted to costs of additional medical expenses and satisfaction for various non-patrimonial damages. De Vries and Rifkin³⁷ report that few courts have in fact allowed special damages in wrongful life actions³⁸ and refer to the **Turpin** case³⁹ where only extraordinary expenses were compensated. In the **Harbeson** case⁴⁰ and also the **Procanik** case,⁴¹ however, recovery for general damages were explicitly rejected, while special damages were awarded. They are of the opinion that courts that have allowed special damages for wrongful life, have done so under equitable notions and humanitarian ideals, rather than by an explicit approval of the cause of action.

2.1.4 Relevance of abortion

They⁴² write that wrongful birth actions are premised on pre-conception negligence of a medical worker and dependant on the plaintiff's right to abortion. Wrongful pregnancy cases aren't dependant on a right to abortion, since it is merely an extension of traditional tort doctrine. Wrongful life actions are based on a doctor's breach of current medical standard of professional conduct, whereby parents are precluded from an informed decision. The very existence of the plaintiff is the injury complained of, which injury would not have taken place if a timely abortion could have been obtained.

2.2 Similarities

Gevers⁴³ conveys that a common denominator between wrongful life and wrongful birth actions

³⁷ *ibid.*

³⁸ in cases of limited recovery.

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

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

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

⁴² De Vries and Rifkin *ibid.*

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

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

An important aspect of Dutch law mentioned by Gevers⁴⁶ is that a physician under these circumstances not only commits a delict against the patient-parent, but potentially also against the handicapped or diseased child. He explains that a physician in the circumstances in question could be held accountable for his failure to take into account the interests of the unborn or yet-to-be-conceived child, which he reasonably could have foreseen would be directly influenced by the exercise of his profession.

In previous Dutch decisions⁴⁷ the courts have found that a physician's negligence could be deemed unlawful towards third parties. The question to be asked in each instance is whether the interests of the unborn child should be so highly considered and have accordingly become such a generally recognised norm that a legal duty has in fact evolved whereby the community expects a physician to take notice and care in these circumstances. Gevers⁴⁸ remarks that it is in each case for the judge to decide whether such a legal duty actually existed. He personally believes the fact that the plaintiff child has not yet been born at the commission of the unlawful act, should not bar recognition of the claim.⁴⁹

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

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

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

⁴⁶ *op cit* p 23.

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

⁴⁸ *op cit* p 25.

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

birth actions, it is reported⁵⁰ that although Sluyters⁵¹ is weary of accepting the wrongful life plaintiff's premise that he should not have been born, Leenen⁵² is of the opinion that both could be met with success in the Netherlands. Schoonenberg's similar positive outlook on these actions is based on the fact that there seems to be no prohibition of these actions from either the case law or legal policy perspectives.

Schoonenberg⁵³ writes that wrongful life and wrongful birth actions are principally founded on the failure by a physician to provide proper genetic information, although failed sterilization or abortion could also constitute liability. She reports that although wrongful birth actions are commonly allowed in the United States of America, wrongful life actions have generally had less success in that country. She is of the opinion, however, that a different state of affairs will develop in the Netherlands and explains why wrongful life actions would probably receive more recognition than wrongful birth.

According to Fain⁵⁴ the principle wrongful life and wrongful birth cause of action is based on essentially the same type of negligent conduct. She writes⁵⁵ that the child's claim in wrongful life is unique, however, in the sense that its life *per se* is the wrong complained of. In the mother's⁵⁶ claim for wrongful birth the actionable injury is consequential to the deprivation of her right to make an informed decision regarding normal childbirth and/ or a possible abortion.

3. General

⁵⁰ De Vries and Rifkin, *ibid*.

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

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

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

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

⁵⁵ *op cit* p 588.

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

Fain⁵⁷ emphasizes the importance of distinguishing between three unfamiliar terms which are used to describe specific types of wrongful life actions. They are the so-called actions for “stigmatised life”,⁵⁸ “unwanted life”⁵⁹ and “diminished life”.⁶⁰

One writer⁶¹ warns that wrongful birth has often been confused with other pregnancy-related causes of action such as foetal injury, wrongful life, and wrongful pregnancy. He distinguishes the first cause of action from wrongful birth:

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

3.1 General definitions

Collins⁶³ gives definitions for various relevant aspects pertaining to wrongful life litigation:

3.1.1 Prenatal tort:

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

3.1.2 Preconception tort:

⁵⁷ *op cit* p 587.

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

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

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

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

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

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

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

3.1.3 Action for wrongful death:

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

3.1.4 Wrongful impairment:

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

3.2 Wrongful life related rights

Collins⁶⁵⁶⁶ further states that a child, who is born alive, may have a **wrongful impairment** cause of action if it suffers from impairments which are the result of wrongful post-conception or preconception conduct of, generally, one other than its parents.⁶⁷ Parents may have a **wrongful formation** cause of action if their procreative rights have been denied by the wrongful conduct of another.

It is reported⁶⁸ that the term "injury" when used in wrongful life refers to the harm which results when wrongful conduct of another alters the natural course of a child's formation. She explains that the term **formation** includes: fertilization of an ovum by a sperm; implantation of the blastocyst in an environment conducive to continued development, such as a natural or an artificial womb; and foetal development until live birth.

Collins⁶⁹ writes that the child's right to be born "free from reasonably foreseeable defects" means the child has a right to be born free from naturally occurring birth defects which are reasonably foreseeable:

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

⁶⁵ *op cit* p 678.

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

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

⁶⁸ Collins *op cit* p 684.

⁶⁹ *ibid.*

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

A distinction is drawn⁷⁰ the closely related terms of wrongful conception and wrongful pregnancy. **Wrongful pregnancy**: generally applied to cases in which a healthy, but unplanned child is born because the wrongful conduct of one other than the parents results in an undetected pregnancy or in an unsuccessful abortion, sterilization, or contraceptive. **Wrongful conception**, on the other hand, generally covers cases in which conception of a healthy child takes place because of the wrongful conduct of one other than the parents.⁷¹

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

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

3.3 Wrongful birth actions

Some⁷⁴ describe wrongful birth actions as "actions in which the parents of a child suffering from birth defects sue a health care provider (most often a physician, but possibly a genetic counsellor, cytogenic laboratory or hospital) for:

⁷⁰ Collins *op cit* p 690.

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

⁷² *op cit* p 691.

⁷³ *ibid.*

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

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

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

Faircloth's⁷⁵ definition is:

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

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

3.4 Wrongful life actions

One author⁷⁶ summarised wrongful life as:

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

Faircloth⁷⁷ defines wrongful life as:

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

⁷⁶ Anon. 1987. *ibid.*

⁷⁷ *op cit*, p 546.

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

Grobe⁷⁸ has an interesting viewpoint in considering the action for wrongful life. He believes wrongful life and wrongful birth actions are precisely the same, except for one aspect namely the person of the plaintiff.⁷⁹ He gives a generally acceptable and sound definition of wrongful birth and then states: "Wrongful life is the corresponding action brought by the deformed child to recover damages."

3.5 Wrongful conception actions

One writer⁸⁰ declares:

"Wrongful pregnancy or as it is sometimes called, wrongful conception, alleges that negligence in the performance of a sterilisation operation or abortion, or in the provision of contraceptives, led to the birth of an unwanted child. Wrongful pregnancy typically involves the birth of a healthy, though unplanned, baby. There are, however, a few cases involving the birth of unplanned and congenitally defective⁸¹ children."

Faircloth's⁸² description of wrongful pregnancy or wrongful conception actions is:

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

3.6 Wrongful pregnancy/ wrongful conception actions

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

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

⁸⁰ Anon. 1987. *Op cit* p 2018.

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

⁸² *ibid.*

Bopp⁸³ distinguishes between these two closely related claims by stating:

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

Grobe⁸⁴ deals with both wrongful conception and wrongful pregnancy actions under the same description and lays special focus on the role of pharmaceutical providers in these actions:

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

4. Based on Delict

4.1 South African position

The South African law recognises three basic delictual actions that can be instituted by any person who was legally wronged⁸⁵ and who is able to satisfy the conditions of the particular action. These actions are the *actio legis Aquiliae*,⁸⁶ the *action iniuriarum*,⁸⁷ and the action for pain and suffering,⁸⁸ all three of which are important for purposes of wrongful life litigation.

4.1.1 Conduct

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

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

⁸⁴ *op cit* p 721.

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

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

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

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

another's conduct.⁸⁹

4.1.2 Wrongfulness

The question of wrongfulness has been a contentious issue in wrongful life litigation from the start. In order to succeed with an action based on delict, a plaintiff must be able to prove that defendant has infringed upon his subjective right(s) or has failed to adhere to a legal duty, which occurred contrary to the legal will/ approval⁹⁰ of the community.⁹¹

Whereas there are common circumstances for which clear legal duties have evolved over the centuries, highly unusual or altogether new situations⁹² do not have a straightforward answer whether it is unlawful or not and then one is obliged to refer to the legal convictions of the community.⁹³

4.1.3 Fault

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

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

⁹⁰ *ie* that conduct is "blameworthy".

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

⁹² such as wrongful life.

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

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

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

4.1.4 Causation

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

Van Oosten⁹⁸ reports that the South African courts have in the vast majority of cases applied the “proximate cause” or “direct consequences” principle to establish legal causation.⁹⁹

4.1.4.1 Wrongful life actions:

If the reasonable foreseeability theory should be applied to wrongful life factual situations, one can argue that a physician could have reasonably foreseen¹⁰⁰ that a medical mistake in his treatment or advise, could lead to the birth of a handicapped child. One can even argue that the birth of a handicapped child could be marked as a “direct consequence” of the physician’s negligent conduct.

It is my submission that all three limitation requirements¹⁰¹ implemented to limit the exceptionally wide liability under this theory are satisfied in an average wrongful life action-factual situation. The handicapped birth of a child is namely a direct physical consequence of

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

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

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

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

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

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

the failed medical advice of the physician. The physician could naturally have foreseen that his conduct could have detrimental consequences for the particular plaintiff. In wrongful life circumstances a physician defendant could, however, assert that the plaintiff's parent's failure to abort the handicapped foetus is a *novus actus interveniens*¹⁰² that breaks the causal link¹⁰³ of his conduct with the complained-of handicapped birth. In order to succeed with this argument, it will have to be established that it is morally and socially acceptable to expect such a difficult and excruciating decision from parents.

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

4.1.4.2 *Wrongful conception actions and Wrongful birth actions:*

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

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

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

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

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

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

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

In the same way as mentioned earlier, literally all the causation theories¹⁰⁸ could be applied with success to the average factual situation experienced by these plaintiff- parents. To illustrate: If a physician fails to warn his patient of the fact that the success of a sterilisation operation should first be acknowledged before sexual relations without alternative contraceptive measures are continued, then it could be *reasonably expected* that the patient could possibly conceive a child.¹⁰⁹ This distinct possibility as a consequence of the physician's omission is therefore not only reasonable foreseeable, but is also a natural consequence, according to human experience in the normal course of events.¹¹⁰

4.1.5 Damage

A prejudiced person¹¹¹ is entitled to be compensated to the extent, so as to place him in the same position he would have been, was it not for a damage causing event.¹¹² A plaintiff may claim patrimonial damages¹¹³ as well as non-patrimonial damages¹¹⁴ and the following heads of damage are compensable:

- compensation for medical expenses and non-patrimonial loss¹¹⁵
- damages for loss of earnings, rearing capacity, medical and related expenses and non-

¹⁰⁸ *supra*.

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

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

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

¹¹² in **General Accident Insurance CO SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens; General Accident Insurance Co SA Ltd v Nhlumayo** 1987 (3) SA 577 (A), the court stressed the fact that in the process of making an award for damages, the court must endeavour to arrive at an amount which is fair to both the plaintiff and the defendant.

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

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

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

4.2 General considerations regarding damage

4.2.1 Wrongful conception actions

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

4.2.1.1 Challenges regarding the assignment of damages in wrongful conception actions

In a wrongful conception action the plaintiff mainly claims patrimonial damages¹¹⁹ which can be calculated without much trouble. What is difficult to ascertain in these actions, is the question what heads of damages should be allowed.¹²⁰ Once these heads have been designated the calculation of the *quantum* is only a matter of applying actuarial principles and adding up relevant expenses.

4.2.2 Wrongful birth actions

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

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

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

¹¹⁸ marital rights, incl love and mutual affection.

¹¹⁹ see ch 6 on wrongful conception.

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

¹²¹ see ch 7 on wrongful birth.

by the handicapped condition of the child or its treatment,¹²² however, should be awarded as these expenses¹²³ were in fact caused by the negligent conduct of the physician.¹²⁴ In addition to these heads of damage, parents usually claim satisfaction for the infringement of their personality rights in this regard, such as loss of amenities *et cetera*.

4.2.2.1 Challenges regarding the assignment of damages in wrongful birth actions

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

Bodgan¹²⁷ reports on the fact that certain American courts¹²⁸ are not willing to award “emotional suffering damages” or satisfaction for emotional injuries in these cases, since the calculation of emotional anguish is too speculative and difficult. Bodgan answers in reply, that these damages are not more difficult to estimate in financial terms than, for example, to calculate damages for physical pain. He reminds us that emotional injuries are real injuries that should be compensated. He further asserts that because wrongful birth is in essence a negligence claim, courts should not approach it differently from any other similar claim in tort.¹²⁹

¹²² for the genetically transmitted disease/ condition.

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

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

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

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

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

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

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

Bodgan¹³⁰ believes that wrongful birth litigation is analogous to all other ordinary personal injury claims, in that the plaintiffs have been deprived of the opportunity to live life without pain and suffering. He distinguishes these cases from wrongful life actions which according to him does not fall in the same category, as the wrongful life plaintiff does not complain of the lost opportunity to live without mental pain and suffering, but rather complains of a unrealised preference not to have been born.¹³¹ It is suggested by Bodgan¹³² that for this reason the Turpin court's¹³³ objection to award satisfaction for emotional suffering should not be applied and extended to wrongful birth actions.¹³⁴

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

4.2.3 Wrongful life actions

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

Andrews¹³⁷ writes that the current¹³⁸ trend in American courts decisions is to allow both wrongful life and wrongful birth actions, but to only allocate additional costs, medical expenses and a special resource fund for the plaintiff-child. He agrees that general damages such as basic

130 *ibid.*

131 or a defunct status of non-existence.

132 *ibid.*

133 a wrongful life action.

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

135 *op cit* p 140.

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

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

138 commentary was written in 1992.

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

4.2.3.1 Challenges regarding the assignment of damages in wrongful life actions

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

4.3 Various compensation theories

It is important that one considers the different theories behind the awarding of damage claims¹⁴³ and claims for satisfaction.¹⁴⁴ It is also interesting to superficially look at the reasoning behind the awarding of satisfaction claims. Visser¹⁴⁵ explains that the basic operation of satisfaction: "that a wrongdoer is compelled to pay an amount of money to an aggrieved person in order to neutralise his unhappiness on account of the injustice done to

¹³⁹ for reasons of comparison.

¹⁴⁰ as weighed against the alternative of no life.

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

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

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

¹⁴³ *ie* patrimonial damages.

¹⁴⁴ *ie* non-patrimonial damages.

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

him.” He¹⁴⁶ writes that satisfaction does not place the emphasis on damage,¹⁴⁷ but on wrongdoing and points out that satisfaction without the idea of atonement is not viable. For this reason, the suggestion that satisfaction merely refers to some kind of consolation payment¹⁴⁸ cannot be accepted.

In South African law the *actio iniuriarum* is applied to claim satisfaction. Visser¹⁴⁹ believes that the modern application of this action still clearly reveals its penal elements. It is further reported that the action for pain and suffering, however, has developed as an action with a compensatory nature without any penal elements.

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

Visser¹⁵⁰ conveys that the main function of the law of delict is to provide for compensation and for satisfaction:

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

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

¹⁴⁶ *ibid.*

¹⁴⁷ (as in the case of compensatory damages).

¹⁴⁸ *solatium.*

¹⁴⁹ *ibid.*

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

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

example, a “market value” is given to interests of personality.¹⁵² Another theory is the so-called “pain-for-pleasure” approach, whereby the money which an injured person receives represents a measure of happiness which has to cancel out the unhappiness flowing from his injuries. Visser¹⁵³ explains that this theory approaches the problem of compensation with too much emphasis on subjective factors.

A better approach is suggested in terms of the so-called “*Überwindungsgedanke*”, which dictates that an injured person must receive an amount of money which will assist him in overcoming his problems. The theory suggests that the plaintiff will be able to develop the willpower to triumph over his setback by means of his greater economic freedom made possible by the receipt of an amount of money. It is submitted that in South Africa law both the pain-for-pleasure theory and the “*Überwindungsgedanke*” are accepted. The author suggests that these two approaches be combined to provide for a comprehensive theory of compensation of non-pecuniary loss. Visser¹⁵⁴ remarks:

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

4.4 Delictual claim for emotional shock

In terms of South Africa law, the following principles are important with regard to emotional shock: Physical harm to a plaintiff is not a requirement to succeed with a claim, as the Appeal Court¹⁵⁵ have found that the brain and nervous systems are as much part of the human body than any other member. Also the premise that a plaintiff must have been in personal physical danger has been rejected¹⁵⁶ and replaced by a yardstick of the reasonable foreseeability of emotional shock. The shock must have had a substantial effect¹⁵⁷ on the health of the plaintiff

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

¹⁵³ *ibid*.

¹⁵⁴ *ibid*.

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

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

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

before a claim will be awarded.¹⁵⁸

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

4.5 Pure economic loss

Although the Aquilian actions were traditionally only available to redress damage caused by physical and psychological injury, the need to widen its scope has become so compelling that so-called “pure economic loss”¹⁶¹ has also been principally acknowledged in South African law.¹⁶² As there is no general duty to prevent pure economic loss for others, wrongfulness must be established in each case by assessing whether there was a legal duty to avoid the loss. The courts¹⁶³ have applied the legal-duty approach to wrongfulness and established that the general criterion of reasonableness or *boni mores* should be used to ascertain whether a duty existed to avoid pure economic loss in a particular instance. All relevant factors should be taken into account,¹⁶⁴ including public interest, but especially two factors would be highly regarded: the

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

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

¹⁶⁰ **Boswell v Minister of Police**.

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

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

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

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

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

Cleaver¹⁶⁶ writes:

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

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

4.5.1 American position

Spier¹⁶⁷ reports that pure economic loss is probably one of the main problems in expanding tort law. He writes¹⁶⁸ that under American law, economic loss flowing from physical damage to the plaintiff's person or property caused by negligence is fully recoverable, whereas purely economic harm is usually not actionable,¹⁶⁹ in the absence of some special relationship between plaintiff and defendant that requires the defendant to use care for the plaintiffs purely economic loss.

4.6 Aquilian liability for negligent misrepresentation

The Appeal Court¹⁷⁰ has confirmed that liability could ensue if incorrect or misleading statements have caused damage to a party acting on such misrepresentation and suggested that the delictual elements be applied to limit such liability to acceptable bounds. The court

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

¹⁶⁶ *op cit* p 62.

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

¹⁶⁸ *ibid*.

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

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

affirmed that circumstances could exist¹⁷¹ where a legal duty rests on a defendant to furnish correct information to the plaintiff.¹⁷²

The following delictual elements must be proved:¹⁷³

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

In **EG Electric Co (Pty) Ltd v Franklin**¹⁷⁴ the court stated that the fact that a defendant had exclusive information¹⁷⁵ and knew that the plaintiff would act on the information, should be taken into account when considering whether a legal duty existed to supply the correct information.¹⁷⁶ When the identity of the plaintiff is certain, liability can only follow from a single claim and therefore there should be no fear for a multiplicity of actions.

4.7 "Once and for all"

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

4.8 Manufacturer's liability

The courts¹⁷⁸ have found that manufacturer's liability does fall within the field of application of

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

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

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

¹⁷⁴ 1979 (2) SA 702 (E).

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

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

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

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

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

Neethling *et al*¹⁸² considers the most important delictual requirements founding manufacturer's liability. With regard to wrongfulness he writes that the manufacturer has a duty, according to the legal convictions of the community¹⁸³ to ensure that defective or dangerous products¹⁸⁴ do not enter or remain in the marketplace.¹⁸⁵ Proving fault on the side of the manufacturer is a difficult task as a plaintiff will have to prove that their conduct was not in accordance with that of the reasonable person in the same circumstances, with respect to foreseeability and preventability of possible damage.

It has suggested¹⁸⁶ that the doctrine of *res ipsa loquitur*¹⁸⁷ could alleviate the plaintiff's burden of proof of manufacturer's liability.¹⁸⁸ It was found that a deduction of negligence could only be made if the damaging events would not, according to general experience, have taken place if someone had not acted negligently.

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

¹⁷⁹ 1975 (2) SA 457 (W).

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

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

¹⁸² *op cit* p 322.

¹⁸³ *boni mores*.

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

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

¹⁸⁶ *ibid*.

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

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

Giesen¹⁸⁹ also reflects on the application of *res ipsa loquitur* rule and writes that in Dutch law the judge should first ascertain whether the same harmful situation would not also have existed without improper conduct, before the facts in question can be taken as the truth. It must be calculated what influence the improper conduct actually had on the occurrence of the damage and also measure the contributory negligence of the plaintiff:

Strauss¹⁹⁰ reports that although “strict liability”¹⁹¹ in respect of products does not form part of South African law, he agrees that the *res ipsa loquitur* principle could greatly assist a plaintiff in a medical malpractice suit in proving that the manufacturer was negligent.¹⁹²

He¹⁹³ discusses the delictual liability for defective drugs and state that it would be hard to envisage an instance where a pharmaceutical manufacturer would intentionally¹⁹⁴ produce defective products and therefore contends that a plaintiff will have to prove negligence. He reports that American courts¹⁹⁵ apply strict liability in cases where a manufacturer produces a product without inspection for defects, which could be seen as a type of consumer protection.

Schoonenberg¹⁹⁶ reports that manufacturers liability in the Netherlands is founded on section 1401 BW of the Dutch Civil Code, and supplemented by the new Code section 6.3.3 NBW. In terms of these sections, a consumer or user of a defective product¹⁹⁷ can sue the manufacturer for any damages suffered as a result of the use of the product. She refers to the

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

¹⁹⁰ *op cit* p 264.

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

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

¹⁹³ Strauss *op cit* p 292.

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

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

¹⁹⁶ *op cit* p 71.

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

implementation of European Community guidelines on product liability and explains that the most important consequence thereof was the reversal of evidential burden in favour of the consumer.¹⁹⁸ This has the practical effect that a producer is liable for a defective product unless the producer can prove that, based on the then prevailing technological and scientific knowhow, there was no chance of detecting the defect in question. It is further stated¹⁹⁹ that a product is deemed defective when it is not safe for use while consumers are led to believe or reasonably could have been expected to believe that it is safe.

Schoonenberg²⁰⁰ believes that a physician has a duty thoroughly inform a patient of any genetic side-effect that prescribed medication may have and concurrently have a duty to research the composition of new medication for such possible influences.²⁰¹ Where a physician is held liable for failure to warn patients of negative side-effects, the medical professional insurer responsible will in principle have a right of recourse against the drug manufacturer.

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

Wansink²⁰⁴ refers to a recent Dutch case²⁰⁵ where the High Council found a manufacturer liable

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

¹⁹⁹ sec 6.

²⁰⁰ *ibid.*

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

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

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

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

²⁰⁵ HR 9 Okt. 1992, NJ 1994, 535.

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

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

It is reported that a pharmacist²⁰⁷ can also be held liable for dispensing incorrect medicine or products that have become unsafe. Because the pharmacist is a specialist in his particular field, it is expected from him to keep abreast of all new developments and acquired knowledge. It is even possible for a pharmacist to be sued based on breach of contract, typically where there is a latent defect in the medicine sold, as he is seen as a merchant professing skill and expert knowledge of the produce dispensed.

In conclusion the possibility is mentioned²⁰⁸ that environmental pollution could be earmarked as the cause of birth defects.²⁰⁹ Liability based on this cause of action is, although very possible in future, currently not a serious consideration for the wrongful life plaintiff.

4.9 Influence of awareness on satisfaction

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

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

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

²⁰⁸ Schoonenberg *op cit* p 75.

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

²¹⁰ 1966 (3) SA 484 (W).

should be followed when considering a claim for loss of amenities of life²¹¹ in instances where the plaintiff is unconscious.²¹² With regard to the *quantum* for such a claim, it was suggested that subjective considerations²¹³ should, however, be taken into account. The Appeal Court has on two occasions left this viewpoint uncriticised.²¹⁴

4.10 Cognisance - satisfaction

Schoonenberg²¹⁵ reports that a lessened consciousness experienced by a plaintiff does not in any way influence or diminish an award of compensation for pain and suffering.

Compensation for non-patrimonial loss in South Africa, however, is influenced by the plaintiff's ability to take notice of his circumstances.²¹⁶ Visser²¹⁷ conveys that:

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

4.11 Satisfaction based on contract or delict?

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

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

²¹² *ie* a claim is in principle possible.

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

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

²¹⁵ *op cit* p 70.

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

²¹⁷ 1983, *op cit* p 43.

²¹⁸ *ibid*.

²¹⁹ 1990 (3) SA 581 (A).

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

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

Although there are therefore differences between the delictual and contractual measures of damage,²²¹ both delictual and contractual damage is established by means of the sum-formula²²² or method of differentiation.²²³

4.12 A global perspective on awards of satisfaction for immaterial damage

Tjittes²²⁴ discusses the requirement of consciousness or awareness²²⁵ of a plaintiff when immaterial damage (*smartegeld*) is awarded. He mentions that the current most pervasive viewpoint on this question in the Netherlands is that the plaintiff must be *aware* of his loss of amenities, pain and suffering before an award is possible.

He²²⁶ is further of the opinion that the current trend to highly take the young age of a plaintiff into account when considering immaterial damages, should be reconsidered for the same reason. The logic behind this trend is that plaintiffs of very young age²²⁷ can not fully realise

²²⁰ *op cit* p 597 E-G.

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

²²² "*sommerskadeleer*".

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

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

²²⁵ regarding his loss.

²²⁶ Tjittes *op cit* p 699.

²²⁷ as is often the case in wrongful life actions.

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

Tjittes²²⁸ reports that many foreign countries view this aspect in a different light and accordingly do not require (full) consciousness of a plaintiff before allowing satisfaction for immaterial damage. He refers to French law which does not even require a sense of loss or pity for immaterial damage to be awarded²²⁹. Similarly, under Belgian law consciousness is no requirement for immaterial damage²³⁰. He is of the opinion that, because of these circumstances, it would seem the notion that satisfaction is only allowed for reasons of compensation, has finally been defeated.

It is further reported²³¹ that under German law, which is generally closely related to Dutch law, satisfaction seems to have a double edged rational, namely to redress damages *and* to satisfy the plaintiff.²³² The German courts no longer require consciousness as a requirement for full satisfaction,²³³ while the English courts have again objectivised the actual experience of loss of amenities and simply require that a plaintiff should be aware of the loss. This has the effect that an unconscious plaintiff would have no claim for satisfaction. The Pearson Commission²³⁴ has confirmed this position.

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

228 *ibid.*

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

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

231 Tjittes *op cit* p 700.

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

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

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

235 according to Tjittes, *ibid.*

236 softening the effect thereof.

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

With regard to Dutch law, Tjittes²³⁸ declares that the condition of consciousness for the awarding of satisfaction is found neither in their Civil Code²³⁹ nor in their parliamentary history, but rather in the presumption that satisfaction is awarded only on grounds of compensation. For only according to this presumption is it relevant whether the plaintiff actually suffered/ experienced pain and loss of amenities of life. Accordingly, if loss is proved, the question must further be answered whether the plaintiff as victim of this infringement could meaningfully be redressed by the award of satisfaction.²⁴⁰

In contrast to this view we find the theory that a claim for satisfaction is awarded, not only to personally benefit the plaintiff in order to soften his feeling of loss and pain, but also to redress his injured sense of justice. Tjittes²⁴¹ is of the opinion that the satisfaction element of redressing the immaterial loss of a plaintiff should be seen objectively. The function of satisfaction does not always have to be subordinate to the function of compensation when immaterial damages are awarded. *Especially in cases of unconscious plaintiffs, the character of satisfaction should play an important part.*

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

4.13 Dual based liability?

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

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

²³⁸ *ibid.*

²³⁹ Burgerlijke Wétboek art. 6:106 BW.

²⁴⁰ see theories of compensation *supra*.

²⁴¹ *ibid.*

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

possible where breach of contract at the same time constitutes a delict²⁴³ against the prejudiced contracting party, causing of patrimonial damage.²⁴⁴ Under these circumstances a plaintiff would have a choice to either sue on ground of the contract or based on delict. Neethling *et al*²⁴⁵ writes:

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

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

4.14 Duty to mitigate damages

Block²⁴⁹ has an interesting viewpoint on the relevance of the duty to mitigate damages with regard to wrongful conception actions.²⁵⁰ It is trite law that a plaintiff must limit his damages.²⁵¹

²⁴³ *damnum iniuria datum*.

²⁴⁴ see *Administrator, Natal v Edouard supra*.

²⁴⁵ *op cit* p 445.

²⁴⁶ *ie* typical instances of pure economic loss.

²⁴⁷ *ibid*.

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

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

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

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