REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO : 262 / 97

In the matter between

DR H. MUKHEIBER **Appellant**

and

SANDI RAATH **First Respondent**

ANDRE RAATH **Second Respondent**

CORAM **Smalberger, Olivier, Streicher JJA, Melunsky , Madlanga AJJA**

DATE OF HEARING **7 May 1999**

DATE OF JUDGMENT **28 May 1999**

A negligent misrepresentation was made by a medical practitioner to a married couple that he had sterilised the wife, when in fact no sterilisation had been done. The couple, acting on such misrepresentation desisted from contraceptive measures, and a child was conceived and born. The couple is entitled to damages under the heads of confinement costs and maintenance of the child

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JUDGMENT

OLIVIER JA

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[1] Since the middle of the 1960's actions for 'wrongful conception' (an action for damages brought by the parents of a normal, healthy child born as a result of a failed sterilisation or abortion performed by a medical doctor), 'wrongful birth' (an action brought by the parents on similar grounds but where the child is born handicapped) and 'wrongful life' (an action brought by a deformed child, who was born as a result of a negligent diagnosis or other act by a doctor) have troubled courts in England, the USA, Canada and Germany. In South Africa it was for the first time given judicial attention in the High Court in *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) and by this Court in *Administrator, Natal v Edouard* 1990 (3) SA 581 (A). The *Edouard* case was a claim for 'wrongful conception' and was based on breach of contract.

[2] The appeal before us is a novel one. It does not fit neatly into the scheme described above. It is a claim based squarely on delict, more particularly on negligent misrepresentation. It is alleged by the parents that the doctor negligently misrepresented to them that the wife had been sterilised, when in fact no sterilisation was done at all. Relying on such representation, they failed to take contraceptive measures. A child was conceived and born as a healthy, normal boy. The claim is aimed at compensation under two heads of pure economic loss, *viz.* confinement costs and maintenance of the child until it becomes self-supporting.

[3] In the trial court, the question of the doctor's liability was separated from the quantification of the claim. The trial court found on the facts that it had not been proved on a balance of probabilities that the defendant, Dr Mukheiber, had made the alleged misrepresentation. The plaintiffs, Mr and Mrs Raath, appealed to the Full Court of the Cape of Good Hope Provincial Division of the High Court. The appeal was upheld and the order of the trial court was substituted with one declaring Dr Mukheiber to be liable to compensate Mr

and Mrs Raath under the two heads of damages mentioned above, the precise quantification of the damages to be proceeded with in due course before the trial court. With special leave of this Court, Dr Mukheiber appeals against the judgment of the Full Court.

The cause of action

[4] The legal matrix in which the plaintiffs' claim is to be placed and judged, is that of negligent misrepresentation which causes pure economic loss, *i.e.* as opposed to physical injury to person or property, and not made in a contractual context.

Such a claim is recognised in our law as one of the instances of the application of the extended *actio legis Aquiliae*. This was established by this Court in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A)
at 831 B - 833 C. That decision by this Court introduced an innovation. It was realised at the time that the scope and application of the innovation would have to be carefully controlled. But - as was predicted in that case - it is now clear that the said action has a useful role to play in our law.

[5] This action was again affirmed in *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 904 D - G, again in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 498 D - E and more recently in *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568 B - D.

[6] Reflecting the general principles and requirements of Aquilian liability in our law, the action now under discussion is available to a plaintiff who can establish :

(i) that the defendant, or someone for whom the defendant is vicariously liable, made a misstatement (whether by *commissio* or *ommissio*) to the plaintiff;

(ii) that in making the misstatement the person concerned acted unlawfully;

(iii) that such person acted negligently;

(iv) that the plaintiff suffered loss;

(v) that the said damage was caused by the misstatement; and

(vi) that the damages claimed represent proper compensation for such loss. (See *Bayer* at 568 B - D for a statement of these requirements.)

[7] In all the cases cited above this Court cautioned against the danger of limitless liability produced by the application of the extended Aquilian action. That danger is ever present, particularly where a medical practioner runs the risk of having in effect to maintain the child of his patient without having any real control over the vicissitudes that attend the child's upbringing. In order to keep the cause of action within reasonable bounds, each and every element of the delict should be properly tested and applied. This includes, according to Corbett CJ in *Bayer* at 568 D :

> *... the duty of the Court (a) to decide whether on the particular facts of the case there rested on the defendant a legal duty not to make a misstatement to the plaintiff (or, to put it the other way, whether the making of the statement was in breach of this duty and, therefore, unlawful) and whether the defendant in the light of all the circumstances exercised reasonable care to ascertain the correctness of his statement; and (b) to give proper attention to the nature of the misstatement and the interpretation thereof, and to the question of causation.*

The danger of limitless liability in particular as far as negligent misrepresentation as a cause of action is concerned can be averted if careful consideration is given to the dictates of public policy, keeping in mind that public policy can easily become an unruly horse.

[8] I will deal with the factual and legal disputes in the appeal before us in the matrix of the cause of action, set out above, and in the same manner as was done in *Bayer*.

(A) The representation (statement)

[9] This factual issue was hotly contested. On this issue, the trial court and the Full Court came to different conclusions. A careful re-examination of the question whether the representation that Mrs Raath had been sterilised had in fact been made, is therefore called for.

It is common cause that Mr and Mrs Raath are married out of community of property and both are estate agents. Mrs Raath has given birth to four children :

a son, Zane, who was born in 1986 and who died when he was 5 years years old;

a son, Timothy, born in 1988;

a daughter, Taryn, born in 1993; and

a son, Jonathan, born in 1994.

The birth of Jonathan gave rise to the present claim.

[10] Dr Mukheiber is a gynaecologist who has been practising as such for more than 30 years. A doctor-patient relationship existed between him and Mrs Raath from before Timothy's birth, attended to by Dr Mukheiber and done by way of caesarian section in 1988. In 1992, Mrs Raath became pregnant with Taryn. Dr Mukheiber once again was chosen by the prospective parents to attend to the pre-natal treatment of Mrs Raath. She visited him a number of times in the ordinary course of her confinement.

[11] On 28 January 1993, Mrs Raath again visited Dr Mukheiber on a routine ante-natal gynaecological visit. During the course of that visit it was decided that she would give birth to the child she was then carrying by elective caesarian section on 8 February 1993, which was to be done by Dr Mukheiber. During the course of the same consultation, she informed him that she did not wish to fall pregnant again and the question of sterilisation was raised. Dr Mukheiber informed her that he required her to discuss the

matter with her husband and to tell him at their next consultation what they had decided. Mr and Mrs Raath had previously discussed the prospect of her sterilisation but not, as they described it, *"...in depth..."*. They did not, on the evening of 28 January 1993, discuss the issue of sterilisation. However, during the early hours of 29 January 1993 Mrs Raath went into spontaneous labour and, at approximately 6.30 am, Dr Mukheiber delivered her of a healthy daughter (Taryn) by emergency caesarian section. The following day Dr Mukheiber visited Mrs Raath in hospital and on Monday, 1 February 1993, she was discharged from hospital.

[12] It is common cause that at no stage was it agreed that Dr Mukheiber would perform a sterilisation procedure. The prescribed forms required by the hospital where Mrs Raath gave birth to Taryn that permit a doctor to perform a sterilisation had not been completed. The pathological examination which Dr Mukheiber always insisted upon after he had done a tubal ligation had not been requested or done. He had, in fact, not performed a sterilisation on Mrs Raath, and his patient's card and records did not reflect such an operation at all, although meticulously correct in all other respects.

[13] So far so good. The cause of the unhappiness of the Raaths and the alleged cause of action arose on 4 February 1993, when Mrs Raath, accompanied by her husband, visited Dr Mukheiber's consulting rooms and surgery at approximately 13:00 to have the sutures, inserted during the caesarian section, removed.

The plaintiffs' version is that, having removed the sutures, Dr Mukheiber called Mr Raath, who was in the waiting room, into the surgery to show to him how neatly the operation had been done. According to them, Dr Mukheiber then told them that he had performed a sterilisation on Mrs Raath, that she was now a "sports model", and that they did not need to worry about contraception.

[14] Dr Mukheiber disputes this version. He cannot remember having

removed Mrs Raath's sutures, but concedes that he must have done so. However he denies that he ever made the alleged misstatement. His denial was articulated as follows :

> *I don't think I made a mistake* [i.e. the alleged misrepresentation] *for the following reasons : it was very soon after the caesarian section, six days, and I remember the procedure very, very clearly. The second thing that was uppermost in my mind would have been the fact that when I phoned the Libertas Hospital* [just before the emergency caesarian] *I asked the sister to please inquire from Mrs Raath if she wants to be sterilised. If she wants to be sterilised, get consent from her and her husband. And the third thing is that I would have had my clinical notes in front of me as well as a pathological report, and if I'd seen a pathological report then I would have known that she'd had a sterilisation. But if there was no pathological report I cannot possibly see how I could have made that mistake.*

[15] During August 1993 Mrs Raath telephoned Dr Mukheiber and informed him that she was not feeling well and that her menstrual periods had stopped. Her evidence is that she asked him whether it was possible to fall pregnant after a sterilisation, and that he replied that it was highly unlikely and that, in more than 30 years of practice, he had never had a sterilisation that had gone wrong because he cuts, ties and cauterises the Fallopian tubes. According to her he said that she was probably overworked and that it was more likely that her hormones had not yet settled down after the sterilisation.

Dr Mukheiber admitted in evidence to a telephonic conversation with Mrs Raath in August 1993. According to him she asked him whether a person who had been sterilised could possibly fall pregnant, to which he replied that it was highly unlikely but that anything was possible. He denied that she accused him of doing a sterilisation on her :

> *... otherwise I would have panicked and got my notes to see what procedure actually had been done. The impression I got was she was only asking me an opinion and the thought went through my mind that she may have had a tubal ligation done by a colleague, because there was now a six months interval between seeing her and the phone call.*

He denied having told her that, in performing a sterilisation, he also

cauterises the Fallopian tubes - that is not his practice. He also denied having told her that he had never had a failed sterilisation, because, in fact, he had had two such failures. He also denied telling her that it was likely that her hormones had not yet settled down, because a tubal ligation would not affect the hormonal balance at all.

[16] On 21 September 1993 Mrs Raath visited a general practitioner, Dr Andrea Steinberg, who diagnosed that she was 12 weeks pregnant. Mrs Raath testified that she was devastated and burst into tears, because they did not want to have more children. Dr Steinberg (who was not available to testify) telephoned Dr Mukheiber and the latter then spoke to Mrs Raath over the telephone. According to her, he said that he was *"... absolutely flabbergasted ..."* to learn that she was pregnant, because he cuts, ties and cauterises the tubes and that there must be some technical problem. He requested her to come and see him the following day in his surgery.

Dr Mukheiber recalled the telephonic conversation with Dr Steinberg. He testified that it was put to him that he had sterilised Mrs Raath and that she was now three months pregnant. He testified that this was the first time that he had been accused of having performed a sterilisation on Mrs Raath. His evidence is that he said to Dr Steinberg that he did not have his clinical notes with him, but that he would check his notes the following morning, which he did. He also telephoned the records department of the Libertas Hospital and ascertained that only a caesarian section had been performed and no sterilisation.

[17] Mrs Raath testified that she visited Dr Mukheiber the next day, *i.e.* 22 September 1993. Her evidence is that he called her into his surgery and told her that he had not done a sterilisation on her. She replied that he had told her that he had done a sterilisation, whereupon, in her words, he said :

> *... he knows he told me, he was mistaken but he was too lazy to check his records at that time. He said that he felt morally responsible about what had happened, and asked me what I*

wanted him to do about it.

After Mrs Raath, according to her evidence, explained to him that they had no medical aid assistance, Dr Mukheiber undertook not to charge her for the future ante-natal care and caesarian section itself, but stated that she would have to pay the hospital fees.

Dr Mukheiber recalled this consultation with Mrs Raath. He flatly denied that he told her that he had made the alleged misrepresentation or that he had made a mistake and had been too lazy to consult his notes. He admitted not having charged Mrs Raath for the consultation, but denied that it indicated guilt; according to him he did so for compassionate reasons. He conceded that it is possible that for compassionate reasons he also undertook to attend to the prenatal care and the delivery free of charge.

[18] Mrs Raath did not use Dr Mukheiber's professional services after this date. The very next day her husband consulted an attorney who wrote a letter to Dr Mukheiber on 28 September 1993, containing the following allegation :

> *I confirm that in or about January 1993 you advised Mrs Raath that you had carried out a sterilisation operation on her and that it would be impossible for her to fall pregnant and that she need not continue the use of contraceptives ... The purpose of this letter is to place on record the fact that my client holds you liable for the damages which she has and will sustain as a result of the incorrect information and advice which you gave to her.*

In a replying letter, dated 5 October 1993, Dr Mukheiber stated *inter alia* that *"post-operatively the question of bilateral tubal ligation was never mentioned."*

[19] Mr Raath also testified. He supported his wife's version of the events of 4 February 1993 in Dr Mukheiber's surgery.

[20] The trial court absolved the defendant, Dr Mukheiber, from the instance with costs. The crux of the decision was formulated as follows:

> *It follows from the aforegoing that I find myself in the unenviable position of not being able to decide the probabilities on either side. I cannot find that the general probabilities favour Plaintiffs' case more than Defendant's, or* vice versa. *As far as the credibility of the witnesses is concerned, I cannot*

> *fault the evidence of either side to the extent that I would reject their evidence as being untrue. In the result, I am unable to find that Plaintiffs have discharged the onus upon them of establishing that Defendant made the alleged misrepresentation that he had sterilised First Plaintiff.*

[21] The Full Court of the Cape High Court reversed the trial court's judgment. Accepting that Mrs Raath *bona fide* believed that a sterilisation had been performed on her by Dr Mukheiber (which belief was never questioned during the trial), the Full Court found it inconceivable that such belief might have been due to some delusion or confusion of which no suggestion whatsoever was made during her cross-examination. The court found it *"... highly improbable .."* that anyone other than Dr Mukheiber, or any actual or imaginary incident or circumstance not suggested or referred to in evidence, might have conjured up the firm belief in her mind that she had been sterilised. The probabilities rather favour the inference that Dr Mukheiber must have sown the seed in the minds of the Raaths that they could discontinue contraceptive practices.

[22] I am not inclined to doubt or to reject the trial court's finding as to the credibility of the three *dramatis personae*. I agree, however, that the probabilities favour the case of the Raaths, for the following reasons :

(i) It was never even suggested that there had been a conspiracy between the Raaths falsely to accuse Dr Mukheiber of making the alleged misrepresentation. It must be accepted that they both believed Mrs Raath to have been sterilised and consequently dispensed with contraception, notwithstanding their earnest desire not to have more children. Their belief must have stemmed from something that occurred between them and Dr Mukheiber subsequent to the birth of Taryn at the end of January 1993. The version of the Raaths as to what occurred in Dr Mukheiber's surgery on 4 February 1993 is consistent with such a

belief and rings true.

(ii) Dr Mukheiber's offer on 22 September 1993 not to charge any fees for the future pre-natal care of and caesarian section on Mrs Raath (that the offer had been made, I accept as a fact) is significant. Mrs Raath's evidence that the offer was made immediately after Dr Mukheiber had admitted his mistake (the false representation) and having made the excuse that he was, on 4 February 1993, too lazy to consult his notes, is much more natural and probable than his denial of an admission and excuse as set out above, and that he had made the offer merely out of compassion.

(iii) It is significant that on the day after Dr Mukheiber had made the admission described above, Mr Raath consulted an attorney and gave instructions to institute the present action, referring to the very misstatement which forms the cause of action. The very form of the letter, beginning with the statement that it is being placed on record, substantiates Mrs Raath's version that Dr Mukheiber admitted the misrepresentation.

(iv) I find it significant that the evidence of Mr Raath that he had only visited Dr Mukheiber's surgery once, on 4 February 1993, and his accurate description of the arrangement of the furniture and desk inside the surgery, was not contested. There is very little basis for rejecting as false his corroboration of his wife's evidence of what had happened in the surgery on that occasion.

(v) I also emphasise that Dr Mukheiber conceded that the words and expressions which the Raaths allege he used in his surgery on 4 February 1993 were exactly the words and expressions that he would have used had he wished to convey to a patient that she

had been sterilised.

(vi) Finally, the circumstances on 4 February 1993 under which Dr Mukheiber is alleged to have made the misrepresentation are significant. He was in a hurry to leave his surgery and to proceed to a hospital where he had to perform an operation at 13:30. The Raaths arrived at approximately 13:00. According to them Dr Mukheiber's receptionist had already left for her lunch break. It seems natural and probable that Dr Mukheiber removed the sutures, a procedure which would have taken but a few minutes, and that he did not consult his notes, which would have been in the receptionist's office. Mrs Raath's version that Dr Mukheiber later admitted that he had made the mistake because he was too lazy to consult his notes, has a ring of truth about it.

[23] For these reasons, I am of the view that, on a balance of probabilities, it has been proved that Dr Mukheiber did make alleged representation.

(B) Falsity of the representation

[24] Mrs Raath was not sterilised by Dr Mukheiber when he performed the caesarian section on her on 29 January 1993. The representation by him that he had done so was false.

(C) Unlawfulness

[25] There are different ways in which the unlawfulness of a misrepresentation can be approached. Common to all approaches is the fundamental principle that tortious liability is founded not upon the **act** performed by the defendant, but upon the **consequences** of that act (Viscount Simonds in *Overseas Tankship (U.K.) Ltd v Morts Dock and Engineering Co. Ltd* [1961] 1 All ER 404 (PC) (*"Wagon Mound No 1"*) at 415 A: *"But there can be no liability until the damage has been done. It is not the **act** but the **consequences** on which tortious liability is founded. Just as (as it has been said) that there is no*

such thing as negligence in the air, so there is no such thing as liability in the air." (My emphasis) See also Boberg, *The Law of Delict*, vol 1, 1984, 31). Further, common to all approaches is that unlawfulness, in the relevant sense, is to be found in the violation of the rights of the person suffering damage as a consequence of the act complained of, and that whether or not there was a violation of a right of the claimant (or the converse, a dereliction of a duty by the defendant) depends on a number of consideration, including in the final instance, public policy (*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 403 A; *Schultz v Butt* 1986 (3) SA 667 (A) at 679 A - F; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 121 G - 122 F; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596 G - 597 H).

[26] The South African legal position relating to the unlawfulness of a misrepresentation was admirably encapsulated by Corbett CJ in an article entitled *"Aspects of the Role of Policy in the Evaluation of our Common Law"* in 104 *SA Law Journal* 1987, 52 at 59. It bears full quotation :

> *Thus the key to liability is the existence of a legal duty on the part of the defendant, that is, the person making the statement, not to make a misstatement to the plaintiff, that is, the person claiming to have been damnified by the statement. For without this legal duty there can be no unlawfulness. And unlawfulness is a* sine qua non *of Aquilian liability. The legal duty is, however, not an absolute one. It simply requires the defendant to take reasonable care to ensure the correctness of his statement before making it. This requirement of a legal duty, together with the nature of the misstatement and its interpretation, and the question of causation, enables the courts to keep within bounds the potentially unruly concept of liability for economic loss caused by a negligent misstatement.*
>
> *In deciding to give its imprimatur to this cause of action, the Appellate Division unquestionably took a policy decision of paramount importance in the law of delict. Moreover, as in the case of liability for an omission, the general test adopted for determining wrongfulness or unlawfulness poses the question whether in all the circumstances of the case there was a legal duty to act reasonably. The application of this test in each individual case, where there is no clear precedent, entails the making of a further policy decision, or value judgment. Here the law must keep in step with the attitudes of society and consider whether on the particular facts society would require the imposition of liability. Factors which would no doubt*

> *influence the court in coming to a conclusion would be whether the extent of the potential loss incurred is finite and identifiable with a particular claimant or claimants; whether the misstatement relates to a field of knowledge in which the defendant possesses or professes skill; whether the misstatement was made in a business or professional context or merely casually or in a social context, whether the loss suffered was a reasonably foreseeable consequence of the misstatement; and so on."*

Whether there is such a duty, depends on the circumstances of each case *(see King v Dykes* 1971 (3) SA 540 (RA) at 546 A - E).

[27] It seems to me that in the context of misrepresentation one must ask the question : was there in the particular circumstances an invasion of the rights of the claimant as a consequence of the misrepresentation? Conversely, was there a legal duty upon the defendant before making the representation, to take reasonable steps to ensure that it was correct (*Bayer* at 574 I - J)?

[28] The following circumstances, in the case before us, indicate that there was such a duty :

(i) The relationship between Mrs Raath (and her husband) and Dr Mukheiber and the nature of his duties towards them amounted, in my view, to a special duty on his part to be careful and accurate in everything that he did and said pertaining to such relationship.

(ii) The representation was not only objectively material, carrying the real, objective risk of the conception and birth of an unwanted child; the representation was also subjectively material : the dangers of a false representation of the kind under discussion should have been obvious to the mind of a gynaecologist in the position of Dr Mukheiber.

(iii) It is plain that the misrepresentation induced the Raaths not to take contraceptive care.

(iv) It must have been obvious to a person in Dr Mukheiber's position

that the Raaths would place reliance on what he told them, that the correctness of the representation was of vital importance to them, and that if it were incorrect they could suffer serious damage.

(v) The representation related to technical matters concerning a surgical procedure about which the Raaths as lay people would necessarily be ignorant and Dr Mukheiber would, or should be, knowledgeable.

[29] A failure on a doctor's part to take reasonable steps to desist from making the sort of representations now under discussion unless and until he has taken all reasonable steps to ensure the accuracy of the representation would, in my view, render the misrepresentation unlawful.

[30] Are there, in the present case and its unique circumstances, special considerations of public policy which would deny the plaintiffs their claim? Is there, for example, significance in the fact that the misrepresentation gave rise to the birth of a normal and healthy child? Or is there significance in Mrs Raath's motive for wishing to be sterilised?

To these and similar questions of public policy I will return presently. I proceed to examine the other elements of the alleged delict committed by Dr Mukheiber.

(D) Negligence

[31] In our law, the standard of conduct expected from all members of society is that of the *bonus paterfamilias*, *i.e.* the reasonable man or woman in the position of the defendant. An act which falls short of this standard and which causes damage unlawfully is described as negligent; *i.e.* it is tainted with *culpa.*

The test for *culpa* can, in the light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A) be stated as follows (see Boberg, *Law*

of Delict, 390) :

> For the purposes of liability *culpa* arises if -
>
> (a) a reasonable person in the position of the defendant -
> (i) would have foreseen harm of the general kind that actually occurred;
> (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
> (iii) would have taken steps to guard against it, and
>
> (b) the defendant failed to take those steps.

[32] In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person, and the court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs (*Van Wyk v Lewis* 1924 AD 438 at 444).

[33] Dr Mukheiber did not dispute that, if it was found that he had made the representation under discussion, his action was negligent. Applying the tests set out above, it is clear that Dr Mukheiber should reasonably have foreseen the possibility of his representation causing damage to the Raaths, and should have taken reasonable steps to guard against such occurrence, and that he failed to take such steps.

(e) Causation

[34] The next enquiry (still following the *Bayer* sequence) then relates to **causation**. On this issue, our law is not as clear as it should be. As far as **factual causation** is concerned, this Court follows the *condictio sine qua non* - or "but for" - test (*Minister of Police v Skosana* 1977 (1) SA 311 (A) at 34 F - 35 G).

[35] Once factual causation has been established, however, the question of limiting the defendant's liability for the factual consequences of his or her conduct arises. It is here that views differ radically. There are two main

schools of approach amongst our academic writers and in the case law.

[36] The "relative view" (see Boberg, The Law of Delict, 381) proposes that one should

> *... see both wrongfulness and culpability*, *not* in abstracto*, but as relative to the actual consequences in issue. The question is not whether the defendant's conduct was wrongful and culpable, but whether the harm for which the plaintiff sues was caused wrongfully and culpably by the defendant. Wrongfulness is determined by applying the criterion of objective reasonableness* ex post facto *to the actual harm and the manner of its occurrence; culpability is satisfied only where the defendant intended or ought reasonably to have foreseen and guarded against harm of the kind that actually occurred. Having thus accorded the requirements of wrongfulness and fault an active role in the limitation of liability, those who adopt this approach have no need to postulate a further requirement that the plaintiff's damage be not 'too remote'. Their finding that the defendant acted wrongfully and culpably in causing the harm actually complained of inherently also confines his liability within acceptable limits. And the policy considerations that must ultimately determine* what *limits of liability are acceptable receive due judicial recognition when the discretionary 'objective reasonableness' test of wrongfulness and the flexible 'foreseeable kind of harm' test of negligence are applied.*

[37] The other view

> *... is that limitation is best achieved by postulating a further requirement for liability, namely that the plaintiff's damage must not be 'too remote'. Also called 'legal causation', remoteness may be determined in various ways. Some favour the 'direct consequences' test, some the 'foreseeability' test, some the 'adequate cause' test and some a composite solution. Common to all, however, is the premiss that culpability is an 'abstract' attribute of conduct unrelated to its actual consequences, and so having no function in limiting liability for those consequences, which is the province of 'legal causation'. The traditionalists therefore approach the issue of remoteness already armed with a wrongful and negligent act that has in fact caused harm, and proceed to enquire whether the causal connection is sufficient - according to the test that each favours - to found legal liability."* (Boberg, *The Law of Delict*, 381)

[38] In general our courts have in the past on occasions followed the first-mentioned, relative, approach. Among others Boberg (*The Law of Delict*, 382) has pleaded for a rejection of the second approach on the grounds that

> *the need to have recourse to remoteness is a self-imposed burden of those who refuse to see that negligence, being a failure to act as a reasonable man would have done in* ***particular circumstances****, cannot be divorced from those circumstances and therefore contains all the ingredients for the effective limitation of liability.*

[39] Nevertheless, this Court has applied the test of so-called legal causation in recent times on more than one occasion, and Counsel for Dr Mukheiber has relied on these cases for his argument that the damages now claimed by the Raaths, or part of it, are too remote and should either be refused *in toto* or limited. The cases are *Minister of Police v Skosana, supra,* at 34 (Corbett JA, majority judgment); *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 702 *et seq* (Corbett CJ); *Smit v Abrahams* 1994 (4) SA 1 (A) at 14 A *et seq* (Botha JA); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764 I *et seq* (Corbett CJ); *Groenewald v Groenewald* 1998 (2) SA 1106 (A) at 1113 C - J in respect of intentional acts.

[40] What appears from the 'legal causation' cases is that **public policy** plays a role, even a decisive role, in limiting liability. On the other hand, in the relative approach, public policy plays the very same role in establishing which consequences of an act are to be regarded as wrongful, thus creating and at the same time limiting liability.

[41] The two approaches differ in methodology and approach, but not in substance. If properly applied, they would generally give the same legal result in each case. What is clear in the present case is that the element of **factual causation**, the 'but for" test, is not in issue : but for Dr Mukheiber's misrepresentation, the Raaths would have taken contraceptive measures, and the child, Jonathan, would probably not have been conceived and born.

[42] What remains in dispute is whether **public policy** excludes or limits the liability of Dr Mukheiber in the present case.

[43] The role and ambit of public policy in a claim by the father of a normal

and healthy child conceived and born after an unsuccessful tubal ligation performed on his wife, the mother of the child, against the doctor was considered by this Court in ***Edouard***. The action was based on breach of contract. Damages were claimed for (a) the cost of supporting and maintaining the child up to the age of 18 years and (b) for the discomfort, pain, suffering and loss of amenities of life suffered by the mother. This Court disallowed claim (b) on the basis that in our law general damages of the type claimed under this head are not recoverable in a breach of contract action. Claim (a) was upheld.

[44] In upholding claim (a), this Court undertook an extensive review of overseas cases and legal literature dealing with claims for 'wrongful conception', 'wrongful birth' and 'wrongful life' in the context of public policy. Van Heerden JA, with whose judgment the other four judges concurred, found (at 589 F - G) that the majority of the objections against the said type of claims are based on no more than two basic themes pertaining to public policy, *viz*

> *(i) that the birth of a normal and healthy child cannot be treated as a wrong against his parents, and (ii) that as a matter of law the birth of such a child is such a blessed event that the benefits flowing from parenthood as a matter of law cancel or outweigh the financial burden brought about by the obligation to maintain the child. Thus it has been suggested in somewhat florid language that the birth of a healthy child is an occasion for the popping of champagne corks rather than for the preferring of a claim for damages*.

As far as objection (ii) is concerned, Van Heerden JA held that it is simply not the position in our law that benefits of a non-pecuniary nature can be subtracted from patrimonial loss (at 590 A - E).

Van Heerden JA dismissed objection (i) with equal decisiveness:

> *... the 'wrong' consists not of the unwanted birth as such, but of the prior breach of contract (or delict) which led to the birth of the child and the consequent financial loss. Put somewhat differently, the Bundesgerichtshof has succinctly said that, although an unwanted birth cannot as such constitute a 'legal loss' (*i.e. *a loss recognised by law), the burden of the parents' obligation to maintain the child is indeed a legal loss for which*

damages may be recovered. (at 590 E - G)

Van Heerden JA quoted, with approval, *dicta* from the dissenting opinion of Clark J in *Cockrum v Baumgartner* 447 NE 2d 385 (1983) at 392 - 3; the dissenting opinion of Cadena J in *Terrell v Garcia* 496 SW 2d 124 (1973) at 131 and the judgment in *Jones v Malinowski* 473 A 2d 429 (1984) at 435.

[45] But are the policy considerations underlying the decision of this Court in *Edouard* also applicable to the dispute now before us? There are differences which cannot simply be glossed over.

[46] The first and obvious is that while *Edouard* dealt with contractual liability, we are faced with a delictual claim.

In *Edouard* Van Heerden JA, (590 F) in dealing with the nature of the wrong complained of, indicated that the wrong consists of the prior breach of contract or delict which led to the birth of the child and the consequent financial loss. I consider this approach of the law to be correct. There can be but one test for wrongfulness, based as it is ultimately on considerations of public policy, and whether the claim is brought in contract or delict. It is well recognised today that a contract between a patient and a doctor imposes on the latter a duty to exercise due care and skill; but even in the absence of a contract between them there is a duty of care on the doctor (see the remarks in *Lillicrap, Wassenaar and Partners v Pilkington Brothers* *supra* at 499 A - I). The duty of care in either case seems inevitably to be measurable by the same yardstick and I am of the view that the same policy considerations that underlie the *Edouard* judgment are applicable in the appeal now under consideration. These considerations do not stand in the way of allowing the Raath's action.

[47] Secondly, there is the question of the underlying motive of the mother (and the father) for not wanting a child to be conceived and born.

In *Edouard* the court *a quo* (reported as *Edouard v Administrator, Natal 1989* (2) SA 368 (D)) where the claim was of contractual nature, Thirion J at 375 I came to the conclusion that

> *... an agreement for a sterilisation operation to be performed on a married woman with her husband's consent where the reason for the operation is the prevention of the birth of a child whom they would be unable to support, is valid.*

In dealing with the arguments *pro* and *contra* the recognition of an action for damages based on breach of contract in respect of wrongful birth, Thirion J limited himself to claims of parents in a wrongful birth action for damages in respect of the expense which the parents will have to incur in connection with the maintenance of the child born, as a result of the breach of contract to perform the sterilisation operation

> *... **and where the reason for their seeking sterilisation was the couple's inability to maintain the child. Different considerations might well apply where the consideration influencing the decision to have the operation was not an economic one.*** (My emphasis)

When the appeal in *Edouard* was adjudicated in this Court, Van Heerden JA also concluded his remarks by stating that his finding (that the claim was admissible) was intended to pertain

> *... only to a case where, as here, a sterilisation procedure was performed for socio-economic reasons. As pointed out by Thirion J [in the court* a quo*] **different considerations may apply where sterilisation was sought for some other reason.*** (at 593 D - E, my emphasis)

[48] I see no reason for limiting claims such as those under discussion to requests made only by married couples (what of the spinster or widow who needs the operation for preventative medical reasons?) or where the husband has given his consent (is a woman not in control of her own body?) or where the request is made for socio-economic reasons only (which may be the worst reason : what if it is requested for reasons of health - the father or mother is HIV positive - or there is a genetic defect in the family, etc?).

[49] In the present case the Raaths did not wish to have any more children

for socio-economic and other family reasons. These are socially acceptable reasons, and it does not lie in the mouth of Dr Mukheiber to say that he is not liable because the Raath's reasons for not wanting a child were not legitimate or *contra bonos mores* (see also Goldblatt J in *Friedman v Glicksman* 1996 (1) SA 1134 (W) at 1139 I - 1140 B).

[50] A third problem in the type of case now under consideration is the fear of imposing too heavy a burden on the doctor. In contract, the doctor can contract out of liability. While generally it is not impossible or *contra bonos mores* to contract out of delictual liability, it is difficult to see how it could realistically have been done in the present case. The response to the fear expressed above must rather be that professional people must not act negligently. *In casu*, they should not make unsolicited misrepresentations. (See also Bruce Cleaver, *'Wrongful Birth' - dawning of a new action* 108 South African Law Journal 1991:47 at 66).

[51] A fourth problem is this : how far is Dr Mukheiber's liability to go? As far as the confinement cost is concerned, there can be no defence : such costs were reasonably foreseeable and there is no reason to limit them. The problem arises in connection with the maintenance claim. The cost of maintaining the child Jonathan is a direct consequence of the misrepresentation. It was foreseeable by a gynaecologist in Dr Mukheiber's position. In principle he is, by virtue of considerations of public policy, not protected against such a claim, as pointed out above. But the claim cannot be unlimited. His liability can be no greater than that which rests on the parents to maintain the child according to their means and station in life, and lapses when the child is reasonably able to support itself.

[52] In the result I am of the view that considerations of public policy do not militate against holding Dr Mukheiber liable for compensating the Raaths for the damages claimed by them.

[53] Finally, an unrelated matter has to be addressed. Shortly before the

date allocated for the hearing of this appeal, application was made by Dr Mukheiber to have the case re-opened and to have further evidence received. The further evidence relates to an alleged act of dishonesty on the part of the Raaths during the pre-trial procedures. In a letter by their attorney, it was stated that they do not operate a banking account. From subsequent enquiries it appears that this information was wrong, also that their income was higher than that furnished to Dr Mukheiber's attorney. The object of the application was to prove that the sterilisation was not necessary or required for socio-economic reasons (shades of ***Edouard***) and that the Raaths were untruthful. This application, in turn, led to an application, on behalf of the Raaths, to strike out the proposed further evidence on the basis that it related to information furnished during the course of settlement negotiations and was thus inadmissible.

[54] In the light of my view that socio-economic reasons are not the only criterion for deciding the legitimacy of the wish not to have further children and conversely that it is not the only criterion for establishing the wrongfulness of Dr Mukheiber's misrepresentation, the first consideration for the introduction of the new evidence falls away. As far as credibility is concerned, this is not a proper case for exercising our discretion to re-open the case. There may be many explanations for the apparent contradictory facts. But even if the information relating to the bank accounts was wrong, I cannot see how that would affect the factual findings to which I have come, based as they are on the probabilities. It follows that the application to receive further evidence must fail. There is consequently no need to consider the application to strike out. As the latter application was a direct consequence of the former it would in my view be both appropriate and fair that the costs awarded against the appellant in respect of the failed application to receive further evidence should include the costs of the application to strike out.

[55] The following orders are made :

1 The appeal is dismissed with costs.

2 The application for the re-opening of the case by the Appellant and the application for condonation in that connection are dismissed with costs, such costs to include the costs of the Respondents' application to strike out.

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P.J.J. OLIVIER JA

CONCURRING :
SMALBERGER JA
STREICHER JA
MELUNSKY AJA
MADLANGA AJA