

**A CASE STUDY OF THE CONSTITUTIONALITY OF PROPOSED  
FINANCIAL LIMITATIONS ON MEDICAL NEGLIGENCE CLAIMS.**

**By**

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## SUMMARY.

Dignity is the fundamental concept so many South Africans fought for during the previous political dispensation. The Constitution of the Republic of South Africa declares that dignity is a core value and that everyone has inherent dignity and the right to have their dignity respected and protected. Dignity has been described by the Constitutional Court as the most important of all human rights, and the source of all other personal rights in the Bill of Rights.<sup>1</sup> The fact that so much emphasis is placed on human dignity requires a conception of a constitutional order in which the purpose of rights is not merely to protect individual liberty against state or private power but one in which state power is used to secure the goals of dignity and equality.

Our case study researches the impact an adverse medical event has on a person's dignity to ultimately answer the question whether the proposed limitation of the amount of damages payable due to medical negligence is constitutionally viable.

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<sup>1</sup> S v Makwanyane and another 1995 3 SA (CC) 391

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## Chapter 1: Introduction and problem.

### 1.1 Introduction.

Most of us begin and end our lives in hospital. Hospitals are thus associated with two opposing and incompatible constructs, life and death. Man's dependency and vulnerability when entering the doors of a hospital is obvious. This case study aims to explore the impact of negligent service providers when man's dependency on a system that guarantees one's right to a dignified life is failing.

There has been a sharp increase in both the number and financial value associated with monetary claims for medical negligence in South Africa. A lack of data exists regarding these cases and the situation in South Africa has reached a critical stage. There may exist a lack of understanding regarding the devastating effect medical negligence has on innocent people.

Liability due to medical negligence is incurred when a patient suffers damages due to sub-standard care provided by healthcare practitioner or a healthcare provider. Although the systemic decay of public health care in South Africa has contributed to the increase in claims, the private sector has also contributed its fair share. Claims for damages for medical negligence often runs into tens of millions of Rands, money that the Government and private sector of South Africa did not budget for. These claims create situations where money that was supposed to be allocated to the provision and maintenance of health care services is now being spent defending lawsuits and paying out successful plaintiffs.

In the near future it may be South African citizens who will have to bear the brunt. This may manifest in the form of further deteriorating medical services, and medical practitioners fleeing the South African borders. A 'desperate times call for desperate measures' situation has started to evolve and one of these measures has been the proposed limitation or capping of financial amounts

awarded in claims for damages. This case study aims to focus on whether such a measure would pass constitutional muster.

## 1.2 Background.

On 3 November 2008 Peter (fictitious name) was born at the FH Odendaal Hospital in Modimolle Limpopo after his mother had an uneventful pregnancy. Immediately after birth it became evident that something was wrong because Peter displayed the following symptoms; he did not cry and lacked normal muscle tone and movements. He was transferred to the neonatal intensive care ward where he suffered his first epileptic seizure. The prognosis was that Peter sustained brain damage during birth. After being examined by a second medical practitioner it was found that he suffered Hypoxic Ischemic Encephalopathy (HIE) caused by a lack of oxygen during the birthing process and was diagnosed with cerebral palsy of the spastic quadriplegic type.

His mother (misses A) was so traumatised; she struggled to cope with his disabilities and abandoned Peter by leaving him with his Great Grandmother (misses B).

The version of events as conveyed by misses A prompted mister C (grandfather) to seek help from an attorney in their hometown, Modimolle in Limpopo. The attorney was unfamiliar with the law of delict and requested a R800.00 (eight hundred rand) deposit to be paid before the proposed consultation could take place. Mister C could not afford the consultation fee and was referred to Van Zyl le Roux Attorneys in Pretoria. A thorough consultation followed.

The first consultation revealed that the opinion of a gynaecologist and an obstetrician had to be obtained. The medical case file was located and sent to doctor CP Davis who confirmed that Peter's condition was caused by medical negligence. This set a chain of events in motion that led to one of the biggest settlements recorded in the South African Personal Injury Law history.

### 1.3 Goals and Objective of the Research Project.

In November 2015 the *Medical Protection Society* (MPS) published a document entitled: '*Challenging the cost of clinical negligence: The case for reform*'. In this document a call is made for reform of compensation due to medical negligence and certain recommendations are suggested. One of these recommendations is that the amount claimable for damages suffered due to medical negligence should be limited. This specific recommendation has also been entertained by South Africa's Department of Health specifically by Minister Aaron Motsoaledi<sup>2</sup>. The goal of this case study will be to explore the effects medical negligence has on the victims' constitutional rights and whether capping or limitation of damage awards will pass constitutional muster. There may exist a gap between understanding the devastating impact medical negligence has on the patient and the amount of financial support needed to compensate the victim by applying 'constitutional conscience'.

### 1.4 Research Question.

The question whether the limitation or capping of compensation awarded in medical negligence claims is constitutionally reasonable and justifiable.

### 1.5 Research Approach.

Albert Einstein claimed that; 'not everything that can be counted, counts and not everything that counts can be counted'. The mode of our scientific enquiry is qualitative and the aim of the study will be to generate words rather than numbers. These words will hopefully give a voice to the various victims of medical negligence, specifically to children having to live with cerebral palsy due to medical negligence. The research methodology will be discussed in more detail in Chapter 3.

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<sup>2</sup> <http://www.news24.com/Archives/City-Press/Capping-the-cost-of-negligence-20150429> (accessed 1 July 2016).  
<http://ewn.co.za/2016/03/02/First-On-EWN-Motsoaledi-wants-medical-negligence-cases-resolved-without-lawyers> (accessed 1 July 2016)  
<http://www.iol.co.za/news/politics/bid-to-cap-medical-malpractice-payouts-1813364> (accessed 1 July 2016).

## 1.6 Limitations of Study.

The ontological approach research paradigm is relativist as the reality is shaped and influenced by the context; in this case medical negligence in South Africa: the research methodology may generate new insight into this phenomenon that may apply to similar cases. Qualitative research is challenging as it explores the meaning of intangible data to truly understand the impact certain events have on people. This approach is undeniably subjective and recognises the subjective interpretation of the researcher as value adding. Yin<sup>3</sup> suggests that as a research strategy, the distinguishing characteristic of a case study is that it attempts to examine a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident. He argues that because context is part of the study, there will always be too many variables for the number of observations to be made, thus making standard experimental and survey designs irrelevant. From a quantitative research approach one may ask how much financial compensation is enough? The aim is to understand this phenomenon and not to compare the loss of quality of life with numbers. This may be regarded as a limitation from a quantitative paradigm.

The following chapter reports on literature (journals, court decisions, specialised documents and books) to contextualise the research problem.

## Chapter 2: The law in South Africa.

### 2.1 Introduction.

Chapter one suggests that it is evident that medical negligence in South Africa is a subject worth investigating. This research project aims to explore the ramification of guarantees made in the South African Constitution, specifically regarding the protection of the rights of citizens, inter alia patients who suffer

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<sup>3</sup> R Yin 'The case study crisis: Some answers' (1981) Administrative Science Quarterly vol. 26

damages due to medical malpractice. As mentioned above the research approach this study follows is qualitative and aims to contextualise damages and compensation due to medical negligence. This study further aims to identify which discipline of the law is relevant when damages are claimed through court action. This requires a brief overview of the way South African law evolved and how it is currently structured.

## **2.2 The Law in South Africa.**

South African law is sometimes referred to as Roman Dutch law and implies that it presents a mixture of two legal systems. Another source of influence of the legal system is English law (due to our country being under British rule for a long time) as well as indigenous law and the advent of the South African Constitution which highlighted human rights. History determines the character of a particular legal system and the South African legal system shares many common characteristics with other countries and certain legal rules are frequently the same in these different legal systems.

South African law is uncodified which means that it does not stem from only one source. It is evolving and can be found in legislation (statutes), precedent (previous court decisions), common law (laws that are not written down), custom, indigenous law as well as the Constitution, and it is therefore wrong to assume that South African law manifests only when a law is promulgated. Lawyers support their legal arguments by relying on provisions of statutes, previous court decisions or the opinions of subject matter specialists.

In keeping with the Roman tradition of classifying the law, South African law is classified as presented by Figure 1.1:

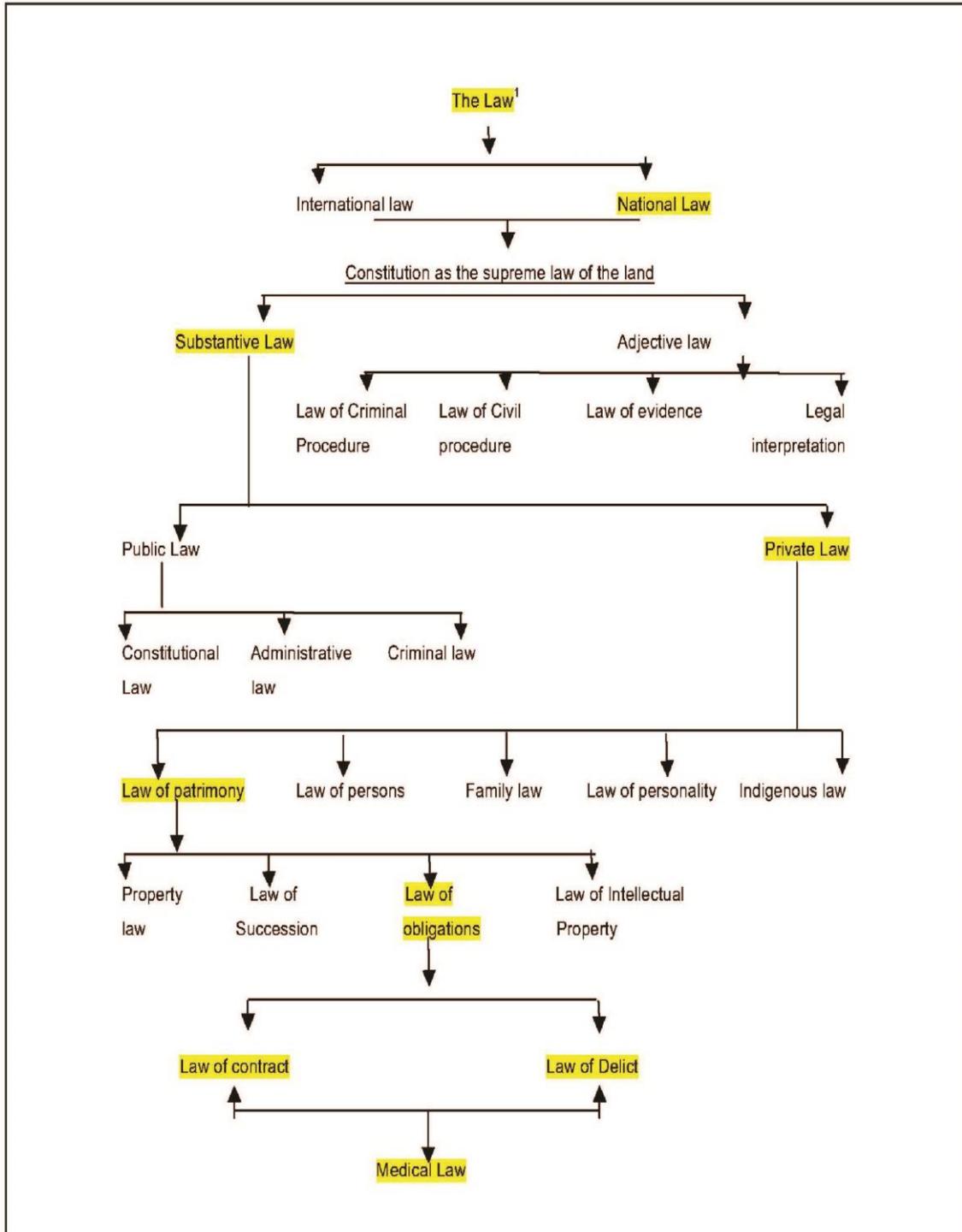


Figure 1.1 The classification of South African Law.

### **2.2.1 International Law.**

International law is the law that governs the relationships between nations. Although there is not a single set of rules governing all states, some sets of rules are created separately through international treaties (conventions). The body laying down the international laws is the United Nations and although there exists an international court (the international court of Justice, The Hague, Netherlands) no nation may be compelled to appear before it. International law applies in South Africa through the Constitution's section 39(1)(b), which states that when interpreting the bill of rights, a court, tribunal or forum must consider international law. (See Figure 1.1)

### **2.2.2 National Law.**

National Law represents the complete body of legal rules that is enforced and applied in South Africa with the Constitution being the Supreme Law of the land.

### **2.2.3 The distinction between Substantive and Adjective Law.**

Substantive law gives meaning to legal rules. It states what citizens may and may not do. Adjective law is used to enforce the substantive law. In other words, if one should commit a murder, the adjective law governs the process that is followed when prosecuting the alleged murderer. The two are interdependent and work cohesively.

### **2.2.4 Adjective law divisions.**

The adjective law consists of the law of criminal procedure that governs the way in which the state (who bears the onus of prosecuting persons who committed criminal offences) manages criminal matters. It further consists of the law of civil procedure that governs the way in which a person enforces his rights against another person for example when one person or institution causes another damage. The law of evidence is a further component of the adjective law and governs the way in which witnesses bring their evidence before a court

of law. Legal interpretation is the last component that governs the way in which the meaning of a provision of the Law is determined.

## **2.2.5 Substantive law divisions: Public and Private Law (See Figure 1.1).**

2.2.5.1 Public Law governs the way in which the state governs itself (different departments with each other) and its subjects. It is a vertical relationship and consists of Constitutional law, which divides state authority into three branches called the legislature, judiciary and executive. It further consists of administrative law, which ensures that the state's powers are exercised in a procedurally fair manner. Public law lastly consists of the criminal Law, which governs the way in which people who have committed criminal offences are punished.

2.2.5.2 Private law governs the way in which the state's subjects interact with one another. This includes the rights and duties these subjects have when dealing with one another. This is a horizontal relationship and consists of the law of persons, which dictates what a person is and also states that a company may be regarded as a person. Family law is another division of the private Law, which governs family relationships. The law of personality regulates the rights associated with a person being a person and includes the right to dignity and honour. Indigenous law represents the customary laws of certain communities in South Africa and these laws govern amongst itself certain aspects of the law such as lobola.

Private law provides the point of departure for this case study, which is further divided into the law of patrimony. Two divisions of the law of patrimony are property law and the law of succession but it is the third division called the law of obligations that falls squarely within the ambit of this study.

When one person has a right against another for performance and the other has a duty to perform, an obligation is established. Obligations and duties always stem from contracts and sometimes also stem from delicts; the

difference is that during contracts parties entering into those contracts do so willingly whereas during delicts there are no agreements. A delict is an act that is performed unlawfully which causes harm and which harm results in loss or damage<sup>4</sup>. If one person therefore suffers harm as the result of another's actions, the person who suffered harm would want to claim damages for loss suffered. Van der Walt and Midgley<sup>5</sup> state that: "...the fundamental premise in law is that damage (harm) rests where it falls, that is, each person must bear the damage he suffers" for example, if a person falls over his own untied shoelaces and sustains an injury because of the fall only he is to blame. There are however instances where a person is responsible for another's damage and subsequent loss. The law of delict sets out who has to bear the loss, the wrongdoer or the aggrieved party. If it is the wrongdoer he shall have to compensate the aggrieved party, which creates the obligation. There exists five elements that have to be proven before damages based on a delict is claimed namely; an act, wrongfulness, fault, harm and causation. Medical negligence relevant to this case study requires a thorough understanding of this phenomenon.

## **2.3 Conceptual analysis of a delict.**

### **2.3.1 Act or Conduct.**

The requirement of an act or conduct as one of the elements of a delict can further be divided into conduct in the form of a positive act (commission) or conduct in the form of an omission (not doing something). Van der Walt and Midgley<sup>6</sup> explain the position of drawing a distinction between conduct by way of a commission or an omission as follows:

In general the legal nature of conduct is determined by the particular context in which it occurs. An 'omission' or failure to take certain measures in the course of some activity is therefore not necessarily a

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<sup>4</sup> Damage is the loss or harm suffered by a person as a result of a delict committed against him/her, whereas damages are the restoration of impaired interests through money. "South African Law Commission Discussion Paper 97".

<sup>5</sup> Principles of Delict (2005) 31.

<sup>6</sup> n 5 above 65

form of conduct, but may well indicate that the action was negligently performed. Inaction as a part or a stage of some positive activity can therefore constitute or indicate negligence on the part of the actor; negligence is by definition a failure to take reasonable precautions. Many omissions are therefore merely indications of legally deficient positive conduct. To drive a car through a stop street into another car constitutes a course of positive conduct – culpa in faciendo. The mere fact that linguistic alternatives enable us to describe the positive occurrence in a negative way (for example the driver failed or omitted to stop at the stop street) is legally irrelevant in the determination of the conduct.

An omission is therefore a failure to take positive steps to prevent damage. With regard to the medical law and specifically medical negligence, negligence due to a positive act would be when a surgeon removes the wrong kidney during a nephrectomy and negligence due to an omission would be when, after an operation, the surgeon does nothing after some complications during recovery are noted.

### 2.3.2 Wrongfulness.

For an omission to constitute liability the omission has to be wrongful and the omission could only have been wrongful had there been a legal duty to act positively. Legal duties are vested through the legal convictions of the community and legal policy. Midgley<sup>7</sup> highlights the impact the Constitution had on the law of delict when reporting on the matter of Carmichele v The Minister of Safety and Security and Another<sup>8</sup> and found that of all the elements of a Delict, wrongfulness is the correct locus for enquiring whether constitutional obligations have delictual equivalents. He found that;

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<sup>7</sup> JR Midgley 'The impact of the Constitution on the law of delict: Carmichele v Minister of Safety and Security' 2002 South African Law Journal 17

<sup>8</sup> 2001 4 SA 938 (CC). In this matter a convicted sexual offender, Francois Coetzee, was released on his own recognizance after he was again charged with attempted rape and murder. Whilst released Coetzee attacked Ms Alix-Jean Carmichele. Ms Carmichele sued the Ministers of Safety and Security and Justice for damages on the grounds that these Minister's employees had owed her a legal duty to prevent her from being harmed and should not have released Coetzee. The Trial Court and Court of Appeal dismissed the claim and on Appeal to the Constitutional court, the latter court found that the matter had to be referred back to the trial court for further evidence.

In the Carmichele case ... it noted that the issue of wrongfulness involves 'weighing and the striking of balance between the interests of parties and the conflicting interests of the community' and commented that such a proportionality exercise is consistent with the Bill of Rights.

Although each case ultimately depends on its own facts it is worthy to mention that in the Carmichele matter the court paid special attention to the rights of women and other vulnerable groups in that the gender or specific circumstances had become relevant factors when wrongfulness was assessed. Taking the Carmichele route and applying it to medical negligence would mean that the victims' rights as granted in the Bill of Rights<sup>9</sup> should be taken in to account and weighed against the interests of the medical practitioner or provider and the convictions of the community, in this researcher's opinion this would mean that victims of medical negligence would be treated with dignity.

### 2.3.3 Fault.

A further requirement for the establishment of a delict is fault. Fault comes in two forms namely intention and negligence. For purposes of this study the focus is negligence. Neethling Potgieter and Visser<sup>10</sup> state that; 'In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him'. The test of negligence has been enunciated in the locus classicus of Kruger v Coetzee<sup>11</sup> where Holmes J stated that:

For the purposes of liability culpa<sup>12</sup> arises if:

- (a) A diligens paterfamilias<sup>13</sup> in the position of the defendant:
  - (i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  - (ii) Would take reasonable steps to guard against such occurrence; and

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<sup>9</sup> Chapter 2 of the Constitution of South Africa Act 106 of 1996.

<sup>10</sup> *Law of Delict* (2006).

<sup>11</sup> 1966 2 SA 428 (A) 430 E-F.

<sup>12</sup> Negligence.

<sup>13</sup> A reasonable person.

(b) The defendant failed to take such steps.

Holmes went further to state that 'Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case'. This implies that for fault to accrue due to medical negligence the healthcare practitioner or provider must have known that he should have done something but failed to do it.

Again it should be mentioned that in determining fault, each case should be studied on its own merit as the court in *Van Duivenboden v Minister of Safety and Security*<sup>14</sup> stated that negligence is not inherently unlawful but is unlawful only if the circumstances it occurs in is recognized by law to be unlawful. This suggests that negligence is determined by context.

#### 2.3.4 Damage or loss.

According to Potgieter and Visser<sup>15</sup> damage is; 'The diminution, as a result of a damage-causing event, of the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved'.

There exists a difference between the type of damages<sup>16</sup> or loss that can be claimed due to delict and the type of damages or loss that can be claimed due to breach of contract. During breach of contract only pecuniary damages<sup>17</sup> may be claimed as the goal of claiming these damages is to place the aggrieved party in the position he or she would have been had the contract been concluded successfully. During delict, non-pecuniary<sup>18</sup> as well as pecuniary damages can be claimed as these damages strive to put the aggrieved party in the position he or she would have been in but for the wrongdoing. In the matter

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<sup>14</sup> 2002 6 SA 431 (SCA).

<sup>15</sup> Assisted by L Steyberg & TB Floyd Law of Damages 2003 19.

<sup>16</sup> Damages are a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as his future damages. Damages also refer to the process through which an impaired interest may be restored through money.

<sup>17</sup> Pecuniary damages are generally assessed on the basis of calculable losses or reduction in value of a positive asset such as the plaintiff's prospective loss of earnings and profits and costs of future care, his loss of income or the loss of an ability to earn an income.

<sup>18</sup> Non-pecuniary damages **cannot** be arithmetically calculated because they compensate the plaintiff for intangible losses arising from physical and psychological pain and suffering as well as from any loss of amenities or expectations of life.

of *Collins v Administrator, Cape*<sup>19</sup> the Court stated that for non-pecuniary damages to be awarded to a plaintiff the plaintiff must be able to experience the loss. If the event caused the plaintiff to be unconscious for the rest of his or her life, non-pecuniary damages will not be awarded. Carstens and Pearmain<sup>20</sup> described it best when they argued that South African Law only awards non-pecuniary damages to the extent that such damages can fulfil a useful function in making up for what has been lost in the sense of providing for physical arrangements which can make the victim's life more endurable.

### 2.3.5 Causation.

The act or conduct described above must result in damage for a delict to arise. The most popular test for determining whether a certain act or conduct resulted in damage is the *conditio sine qua non*-test which Van der Merwe and Olivier<sup>21</sup> described as: '...according to this, an act is the cause of a result if the act cannot be thought away without the result disappearing simultaneously. The act must in other words be condition sine qua non-of the result'. Loubser<sup>22</sup> went further to explain that;

Factually the cause of any given event is the sum of all the necessary conditions of that event, in other words, the test of factual causation is whether the relevant act or commission was a necessary condition (condition sine qua non) of the event in question.

In chapter 2.3 we analysed the elements of a delict and found that a delict is an act<sup>23</sup> that is wrongful<sup>24</sup> that is either done through intent or negligence which directly causes damage. Our research study will focus on damages that was done through negligence and which of the rights guaranteed in the Bill of Rights were infringed upon by the said negligence. Medical negligence is a relatively

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<sup>19</sup>1995 4 SA 73 (C).

<sup>20</sup> Foundational Principles of South African Medical Law 2007.

<sup>21</sup> 'Onregmatige daad' 197.

<sup>22</sup> The Law of South Africa 27.

<sup>23</sup> Whether a commission or an omission.

<sup>24</sup> Wrongfulness is determined by weighing the the legal convictions of the community and legal policy against each other in context of the rights granted in the bill of rights.

new concept in our law and we therefore start by investigating the origins of medical negligence in South Africa.

## 2.4 A historic overview of medical negligence in South Africa.

The first decision involving a civil claim for medical negligence in South Africa, in which the court was asked to deal with the degree of skill and care required of a medical practitioner, is to be found in the old Cape decision of *Lee v Schonberg*<sup>25</sup>. As there was no case law on this point at that time the Court relied heavily on the English decision of *Lampher v Phipos*<sup>26</sup>, wherein it was stated that any person who enters into a learned profession undertakes to bring to the existence of it a reasonable degree of care and skill. De Villiers CJ in *Lee v Schonberg* said that:

There can be no doubt that a medical practitioner, like any professional man, is called upon to bring to bear a reasonable amount of skill and care in any case to which he has to attend; and that where it is shown that he has not exercised such skill and care, he will be liable in damages.

It took another 33 years before the South African courts were faced with a second civil claim based on medical negligence when it heard the matter of *Kovalsky v Krige*<sup>27</sup> and again the courts had to decide on the degree of skill and care expected of a medical practitioner. In this matter the doctor was sued for abandoning a baby whose penis had been damaged during circumcision. The Court also relied upon the English decision of *Lampher v Phipos* when it said:

The principles there lay down have been applied in this court, and with them I entirely agree. As to capacity, Chief Justice Tindal said that every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable care and skill. Speaking of a surgeon, he says he does not undertake that he will perform a cure, nor does he

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<sup>25</sup> 1877 7 Buch 138

<sup>27</sup> 1910 20 CTR 822

undertake to use the highest possible degree of skill, he undertakes to bring a fair, reasonable and competent degree of skill to his case.

Although borrowed from English law the principle that a medical practitioner's negligent conduct must be measured against the conduct of a reasonable skilled practitioner in his or her field was confirmed for the first time in a court of appeal in the matter of *Mitchell v Dixon*<sup>28</sup>. The reasonable expert principle has also been confirmed and developed in many criminal matters. In *R v van Schoor*<sup>29</sup> Steyn R said the following:

Coming to the case of a man required to do work of an expert as e.g. a doctor dealing with life or death of his patient, he too must conform to the acts of a reasonable man, but the reasonable man is now viewed in the light of the expert; and even such expert doctor in the treatment of his patients, would be required to exercise in certain circumstances a greater degree of care and caution than in other circumstances.

The degree of skill expected of a medical practitioner was also defined as follows in *R v Van der Merwe* in which Roper J remarked:

Negligence has a somewhat special application in the case of a member of a skilled profession such as a doctor, because a man who practises a profession which requires skill holds himself out as possessing the necessary skill and he undertakes to perform the services required from him with reasonable skill and ability. That is what is expected of him and that is what he undertakes, and therefore he is expected to possess a degree of skill which corresponds to the ordinary level of skill in the profession to which he belongs.

As to what constitutes reasonableness, in the same judgement Roper J, remarked:

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<sup>28</sup> 1914 AD 519. In this matter it was stated that "A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not:..

<sup>29</sup> 1948 (4) SA 349 (C)

In deciding what is reasonable regard must be had to the general level of skill and diligence possessed and exercised by the members of the branch of the profession to which the practitioner belongs. The standard is the reasonable care, skill and diligence, which are ordinarily exercised in the profession generally.

The criminal courts had therefore started to implement the view that although reasonableness had to be exercised, if you were medically qualified the reasonableness would be measured against other medically qualified individuals. In the locus classicus of *Van Wyk v Lewis*<sup>30</sup> the position was set out as follows by Innes CJ:

It was pointed out by this Court, in *Mitchell v Dixon*, that `a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care.

And

In deciding what is reasonable the Court will have regard to 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. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level.

The Court through Wessel, J.A. said:

We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted,

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<sup>30</sup> 1924 AD 438

or did he manifestly fall short of the skill, care, and judgement of the average surgeon in similar circumstances? If he falls short he is negligent.

The same principle applies also to anyone else who performs a medical function and is not only restricted to medical practitioners.

The above-mentioned cases set the stage for the test of a medical professional's negligence to be upgraded by viewing it subjectively instead of objectively. The subjective elements are becoming relevant when negligence is compared to that of another medical practitioner's skill and not the reasonable man's skill. This confirms the relativist research approach to this case study as reality is interpreted in context. (See Chapter 3). It is worthy to note that the matters discussed above all took place before the Constitution set in. This confirms that the Constitution and its Bill of Rights bolstered the test for medical negligence as socio economic rights have also come to the fore.

## 2.5 Medical negligence defined.

Negligence by a medical practitioner has been described and defined in various ways. Some describe it as medical malpractice where malpractice refers to; 'the negligent or intentional unlawful conduct on the part of a professional person that causes injury or damage to their client or their clients property'<sup>31</sup> and some as clinical negligence, and some have described it as professional negligence where professional negligence by doctors occurs where a patient is harmed because a doctor has failed to exercise the degree of skill and care of a reasonably competent doctor in his or her branch of the profession.<sup>32</sup>

From the above it can be concluded that medical negligence occurs when a reasonable healthcare practitioner or provider in the position of the defendant would foresee the possibility of his conduct injuring another and would normally take reasonable steps to guard against such occurrence but in this instance failed

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<sup>31</sup> D Mcquoid-Mason, *M Dada A-Z of Medical Law* 2011 271.

<sup>32</sup> 'n 30 above, 339

to take such steps. It is therefore wise to apply a test for medical negligence. The matter of *Mitchell v Dixon*<sup>33</sup> conceptualised the test for medical negligence as:

A medical practitioner is not expected to bring to bear upon the case him the highest possible degree of possible skill and care, he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not.

The question that begs to be asked is, what can be seen as reasonable skill and care?

In the matter of *van Wyk v Lewis*<sup>34</sup> the court endeavoured to define what reasonableness means; ‘... in deciding what is reasonable the court will have regard to 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’.

From the previous two cases one accepts that the test for medical negligence is applied more subjectively compared to the test of ‘normal’ negligence. The group compared to the medical practitioner’s or healthcare workers’ conduct is significantly smaller than other specialists with the same qualifications. In other words, general practitioners’ conduct are assessed and compared to the conduct of the reasonable general practitioner. The specialist surgeon’s conduct is tested against other specialist surgeons’ conduct. It is at this stage important to take note of the *Imperitia culpa adnumeratur* rule which means that a practitioner who undertakes work knowing that he lacks the skill or experience required to do a proper job will be liable if he causes damages due to his inability or inexperience. The Court in *Coppen v Impey*<sup>35</sup> confirmed this when Kotze J stated: ‘Unskillfulness on his (the medical practitioner’s) part is equivalent to negligence and renders him liable to a plaintiff, who sustained injury therefore, the maxim of law being *imperitia culpa adnumeratur*.’ Although professional

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<sup>33</sup> 1914 AD 529

<sup>34</sup> 1924 AD 519

<sup>35</sup> 1916 CPD 309

negligence may be the preferred term used by authors<sup>36</sup> one may argue that the term; medical negligence is the correct description for negligence by a health practitioner<sup>37</sup>, healthcare provider<sup>38</sup>, healthcare personnel<sup>39</sup> or healthcare worker<sup>40</sup>.

The above taken into account, medical negligence can be defined as; actions that a reasonable healthcare practitioner or provider with the required skill and care would have taken under the same circumstances to prevent a preventable event that caused damage, but failed to do so.

Although negligence has already been established in the case of Peter, this study aims to put the consequences and effects of medical negligence into perspective.

## 2.6 The rationale for financial compensation

The rationale for compensation originates from the Roman law where Pomponius stated that '*plus cautionis in re est quam in persona*'<sup>41</sup> or 'goods are better sureties than the debtor's person'. The tools developed to claim compensation developed from the; *Actio Legis Aquiliae* which is the action used to claim damages for; patrimonial damage, the *Actio Iniuriarum*, which is used to claim damage when dignity and reputation is harmed, and a third unique action in which damage for harm due to shock, loss of amenities of life and loss of life expectancy can be claimed.

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<sup>36</sup> P Carstens & D Pearmain *Foundational Principles of South African Medical Law* 2007

<sup>37</sup> Health Professions Act 56 of 1974 sec 1 any person, including a student, registered with the council in a profession registrable in terms of this Act;

<sup>38</sup> National Health Act 61 of 2003 sec 1 Means a person providing health services in terms of any law, including in terms of the:

- (a) Allied Health Professions Act 63 of 1982
- (b) Health Professions Act 56 of 1974
- (c) Nursing Act 50 of 1978
- (d) Pharmacy Act 53 of 1974
- (e) Dental Technicians Act 19 of 1979

<sup>39</sup> National Health Act 61 of 2003. Means health care providers and health workers.

<sup>40</sup> National Health Act 61 of 2003 Any person who is involved in the provision of health services to a user, but does not include a health care provider.

<sup>41</sup> Digest 50.17.25

South African common law developed to a point where the damages that were claimed had to be claimed in one single action. In the matter of *Oslo Land Co Ltd v The Union Government*<sup>42</sup> it was ruled that;

When once some damage has resulted from the wrongful act, or even if it is probable that damage will result, time begins to run and the plaintiff must bring his action within three years for all his damage and must claim for all damage once and for all.

the Court went further when it found;

So long as prospective damage is sufficiently probable, it can be assessed and awarded, although it may be impossible to ascertain with accuracy what the amount will be

and

A cause of action and the damage recoverable are an entirety and not divisible.

The Court in *Casely, NO v Minister of Defence*<sup>43</sup> confirmed this when Trollip JA ruled; 'Under the Common Law a person or his dependant is only accorded a single, indivisible cause of action for recovering damages for all his loss or damage for the wrongful causing his disablement or death'. In the matter of *Mouton v Die Mynwerkersunie*<sup>44</sup> Wessels AR interpreted the common law as;

In 'n skadevergoedingsaksie word dit normaalweg verwag dat daar aan die einde van die saak, na aanleiding van die getuienis, 'n bevinding gedoen word, vir eens en altyd, watter bedrag geld deur die verweerder aan die eiser betaal moet word ter vergoeding.

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<sup>42</sup> 1938 A.D. 584

<sup>43</sup> 1973 1 SA 630 (A)

<sup>44</sup> 1977 1 SA 119 (A)

This implies that in actions for damages it is expected of the court to come to a conclusion, once and for all, as to the extent of damages that were sustained, according to the evidence placed before it. Over the years the courts supported this rule as is shown in *Marine & Trade Insurance co Ltd v Katz NO*<sup>45</sup> when Trollop JA said that;

Hence in any action the trial court has to determine the quantum of damages or compensation for past and future loss or damage. It determines the latter by reasoned estimate, but sometimes by sheer speculation or even mere guesswork, doing the best it can on the available testimony. The amount it so determines is awarded once and for all, no matter whether or not the envisaged basis for calculating the future loss or damage subsequently eventuates, the contemplated contingencies materialise, or any unforeseen events overtake the claimant, for example, his death earlier than expected.

These dictums describe what we know today as the ‘once and for all rule’. Voet<sup>46</sup> described the rationale for the once and for all rule as ‘To prevent inextricable difficulties arriving from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different legal proceedings’, and in *Evans v Shield Ins Co Ltd*<sup>47</sup> the Court followed his reasoning when it said;

The principle of *res judicata*, taken together with the once and for all rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same cause of action additional damages in respect of further loss suffered by him (ie loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action.

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<sup>45</sup> 1979 4 SA 961 (A)

<sup>46</sup> Commentarius 44.2.1

<sup>47</sup> 1980 2 SA 814 (A).

Boberg<sup>48</sup> states that the object of the Aquilian actions is; 'to place the plaintiff in the position in which he would have been had the delict not been committed, redressing the diminution in his patrimony that the defendant has caused'.

Out of the above-mentioned decisions one notes that the damages that are claimed can only be claimed once, and the amount of damages awarded to the plaintiff should be awarded once and for all even though future damages may or may not arise. Therefore, intense and exact consideration of the injury (whether that is injury to the person or personality), its nature, and duration of the effect it will have on the aggrieved in conjunction with considerations of fairness must all be taken into account before an award is made. It is further important to note that the amount of damages awarded must bear a relation to the loss suffered. This 'rule' has been practised in our courts for decades and has sufficiently addressed the impact damage causing events had on victims and their patrimonies.

The above clearly indicates that proposed limitations imposed on financial compensation due to medical negligence justify constitutional scrutiny.

## **2.7 The Rationale for this research from a constitutional perspective.**

Peter was born with brain damage caused by negligent medical practitioners and providers. This injury he sustained resulted in a lifelong impairment, as well as past and future medical expenses, loss of the ability to earn an income and non-pecuniary damages such as the loss of enjoyment and amenities of life. The real impact of this tragedy may be better understood when this qualitative inquiry contextualises this with raw data generated by semi-structured interviews.

The central theme of this research project, shifts the attention to the constitutional rights of Peter that have been violated and this consequently set delictual remedies in action. The Constitution of the Republic of South Africa as adopted in 1996 and amended on 11 October 1996 by the Constitutional assembly states in section two that it is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

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<sup>48</sup> *The Law of Delict* 1989 at 489.

Chapter two of the Constitution, also known as the Bill of Rights enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom. Does the supremacy of the Constitution therefore grant even an unborn child rights of his or her own? The word 'everyone' is repeatedly used in the following sections: 9(1)<sup>49</sup>, 10<sup>50</sup>, 11<sup>51</sup>, 12(2)<sup>52</sup>, 27(1)<sup>53</sup> and 28<sup>54</sup>. Does an unborn foetus fall under the description of everyone? In the matter of Christian Lawyers Association of SA and others v Minister of Health and others<sup>55</sup> the status of an unborn foetus was decided. The High Court had to determine if the word 'everyone' includes a foetus, because the validity of the plaintiff's action was dependent on the assertion that 'everyone' applies to a foetus from the moment of conception. The court ruled that it was not concerned with medical or scientific evidence as to when life begins regarding foetal development; nor was it the function of the court to decide on religious or philosophical grounds; this, it held, was a legal issue that had to be decided on the basis of proper legal interpretation.

The question was not if a foetus can be regarded as a human being; but rather if a foetus is afforded the same legal protection as people already born alive. Examining the Constitution, the Court contended that there are no express provisions affording a foetus legal personality or protection. In terms of section 12(2) of the Constitution, every citizen has the right to bodily and psychological

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<sup>49</sup> Everyone is equal before the law and has the right to equal protection and benefit of the law

<sup>50</sup> Everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>51</sup> Everyone has the right to life

<sup>52</sup> Everyone has the right to bodily and psychological integrity

<sup>53</sup> Everyone has the right to have access to health care services

<sup>54</sup> (1) Every child has the right

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that

i. are inappropriate for a person of that child's age; or

ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under

sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

i. kept separately from detained persons over the age of 18 years; and

ii. treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

2. In this section "child" means a person under the age of 18 years.

<sup>55</sup> 1998 4 SA 1113 (T)

integrity. The Court found that nowhere in the Constitution could it be argued that this right is qualified in order to protect a foetus. However, this did not restrict the state from promulgating legislation that limits and regulates the termination of pregnancies. If the writers of the Constitution intended to protect a foetus, the Court could have expected this to be addressed in terms of section 28 that relates to the rights of children. The Court found that age begins at birth, therefore excluding a foetus from the provisions of section 28, since a foetus is not a child of any age. If section 28 does not include a foetus to be protected, then it can be questioned if other provisions by the Bill of Rights, including section 11, were intended to protect a foetus. In further validation of the conclusion reached, The Court turned to other provisions in the Constitution where there is referred to 'everyone', without a specific class of person singled out. It was demonstrated that in those cases where the term 'everyone' is used, it cannot be applied to or include, a foetus. If a foetus were included in the interpretation of 'everyone' in section 11, the meaning would be different from the meaning it bears everywhere else in the Bill of Rights. The Court stated that if section 11 was to be interpreted as affording constitutional protection to a foetus, far-reaching and inconsistent consequences could ensue. In other words, the foetus would enjoy the same protection as the pregnant mother. This may result in termination of pregnancies that may have been constitutionally prohibited for example; when the pregnancy poses a serious health risk to the mother or where there is a likelihood that the foetus will suffer from a serious mental or physical defect after birth, or when the pregnancy is the result of rape or incest. It was argued that the drafters of the Constitution could not have contemplated such far-reaching consequences.

The Court was in agreement with the defendants' argument that the Constitution is primarily an egalitarian Constitution, and that transformation of society along egalitarian lines involves the eradication of systemic forms of domination and disadvantage based on race, gender, class and other grounds of inequality.

It is expected of the Court to display consideration for women's constitutional rights, and to afford legal personality to a foetus would undoubtedly impinge on these rights. The plaintiff's claims were dismissed. It is however necessary to mention that the rights contained in the Constitution are bestowed onto a child

from the moment that he or she is born alive<sup>56</sup> and that once a foetus is born alive it is able to recover damages from any injury suffered whilst in-utero. The locus classicus proving this point would be the matter of *Pinchin and Another NO versus Santam Insurance Co Ltd*<sup>57</sup> where a pregnant woman was injured in a motor vehicle collision and her baby was born defective as a result of her injuries. Health care practitioners and providers guilty of injuring a foetus as a result of negligence before or during childbirth will be liable to compensate the child for damages sustained once that child is born alive.

Another aspect that deserves further investigation is that of dignity. What is dignity and to what extent does this constitutional guaranteed right bolster a claim in delict brought about by medical negligence? Chaskalson P in *S v Makwanyane*<sup>58</sup> stated that;

The Rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

Dignity is defined in the Oxford dictionary<sup>59</sup> as: 'the state or quality of being worthy of honour or respect'. Unfortunately and this has been found to be prevailing in recent times, the Constitutional Court remains ambivalent on several issues including the issue of dignity in that it has never given a comprehensive definition of this important construct. This study further aims to define dignity within the construct of damages caused by medical negligence by providing detailed information on the effects medical negligence had on a specific subject's dignity.

## 2.8 Statutory Limits on Financial Compensation.

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<sup>56</sup> *Christian League of Southern Africa v Rall* 1981 2 SA 821(0).

<sup>57</sup> 1963 2 SA 254 (W).

<sup>58</sup> 1995 3 SA 391 (CC).

<sup>59</sup> Stevenson A ed (2010) *Oxford Dictionary of English* Oxford University Press.

A limit on financial compensation received for injuries suffered due to delict is not a foreign concept to South African law. Limitations on the amount of damages awarded were brought about by legislation and legislation was created due to an uncontrollable rate at which accidents that required financial compensation occurred.

The first statutory Road Accident Compensation Scheme came into effect in May 1946. As in the rest of the world, statutory intervention became necessary due to an alarming rate at which injury causing road accidents occurred. The right of recourse under the common law proved to be limited. The system of compensation brought about in 1946 has been amended on various occasions. The most recent of which was the 2008 amendment.

One of the most important amendments was discussed in the *Marine & Trade Insurance Co Ltd v Katz*<sup>60</sup> matter, where future medical expenses of claimants came under the spotlight. This amendment proposed that any future medical expenses incurred would be repaid to the victim after he or she incurred these costs. This repayment would be made in accordance with an undertaking that the defendant gave the plaintiff or was ordered by the Court to give to the plaintiff. The goal of this amendment was to avoid once off payment for future medical expenses. This became a contentious issue at the trial, and to eliminate some of the uncertainties and imponderables attendant upon the trial that the courts had to determine, capitalize and award once and for all a lump sum for such future costs or loss.

Counsel for the Respondent contended that such an undertaking would lead to further and possibly constant disputes and litigation in the future, which could not have been contemplated by the legislature. The reason that Trollop JA dismissed this argument was that the legislature had already departed from the common law's once and for all rule: in that the Compulsory Motor Vehicle Insurance Act 56 of 1972 had been promulgated. The amendment to the Act was thus not a

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<sup>60</sup> 1979 4 SA 961 (A).

deviation from the common law itself but simply an adjustment to the deviation already in place.

A more recent amendment to the Road Accident Fund Act 56 of 1996 brought about limits to eligibility for non-pecuniary damages in that one now had to prove a 30% whole person impairment or serious injury before one could qualify for non-pecuniary damages. A further limit imposed was to that of future earnings. The base line annual amount was imposed as a cap, limit or ceiling and that one could not be granted more than the 'capped' amount.

The amendment was constitutionally challenged<sup>61</sup> but eventually the amendments were declared valid.

Compensation received in terms of the Compensation for Occupational Injuries and Diseases Act<sup>62</sup> is payable at a percentage of an employee's wage at the time of injury, death or disease for permanent or temporary disability, death, medical expenses (for a maximum of two years from date of accident, including medicine) and additional compensation. No compensation for pain and suffering (non-pecuniary damages) is granted and where a person is permanently disabled due to the injury, degrees of disability are determined and compensation for permanent disability is paid either as a lump sum or as a pension.

In a recent matter<sup>63</sup> the defendant requested the court to once again develop the common law so as to relieve the state of the financial burden which lump sum awards create and which lump sum awards hamper organs of state in progressively realising everyone's right to have access to health care services. The gist of its argument being that awards in favour of the few are said to harm the rights of many. In this case the quantum of damages regarding a newborn baby who was negligently discharged with jaundice from hospital was in dispute. In essence the defendant alleged that the existing rule (the once and for all rule) should be changed so that an award of damages may not be made 'in such a manner that the amount ultimately to be paid is dependent on when future events

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<sup>61</sup> Law Society of South Africa and others v The Minister for Transport and another 2011 1 SA 400 (CC).

<sup>62</sup> 130 of 1993

<sup>63</sup> AD and Another v The MEC for Health and Social Development, Western Cape Provincial Government 2016 ZAWCHC 116

take place, or whether they take place'.<sup>64</sup> It suggested the implementation of claw back provisions, which require that money that was paid via the lump sum rule should be paid back when the person to whom the money was paid dies, or it is found that the money was too much.

The defendant conceded that a top-up (if the money awarded via the lump sum rule runs out sooner than expected) provision should also be added if a claw back provision should be implemented. The defendant relied on its constitutional obligations<sup>65</sup> but did not convince the court. The court did however concede that a move away from the lump sum rule towards a system where future medical expenses are met as and when they arise would match current needs but that; 'a radical departure of that kind should be left to the legislature'.<sup>66</sup>

In another attempt<sup>67</sup> to limit the amount of damages the state had to pay a victim of medical negligence the defendant submitted a plea in mitigation in which it undertook to provide all relevant future medical treatment in any of its hospitals and clinics in the relevant province, free of charge and for life. The defendant aimed to implement this undertaking by appointing a person within its employ to liaise with the plaintiff. Liaison on all aspects that relate to the treatment specified in its offer. In the event of a dispute an objective third party would be appointed to intervene. Future medical costs submitted by the plaintiff were based on the rates applicable in private healthcare facilities and the court declared that the defendant had to ascertain that the level of medical care in public hospitals compare favourably to care in private healthcare facilities. The defendant omitted to establish this and it seems that the court favoured the plaintiff's view that the defendant's plea was a poorly disguised attempt to avoid the payment of a lump sum delictual damages in monetary terms. The court dismissed the defendant's plea.

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<sup>64</sup> 'n 62 above at para 59

<sup>65</sup> S 27 (1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Read with S 7(2) (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights

<sup>66</sup> 'n 62 above at para para 64.

<sup>67</sup> Kiewitz obo J v The Premier of the Western Cape Provincial Government N.O 2015

From the above it is clear that statutory provision is needed when limitations on damages are imposed. There exists no law governing civil claims due to medical negligence, the patient-plaintiffs have no choice but to institute action against government Institutions via the delictual remedies described above.

## 2.9 Possible Constitutional limitation.

All rights in the South African Bill of Rights are subject to the general limitations clause in section 36. This section states:

36 Limitation of rights.

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Although the Constitutional Court has not indicated what exactly is meant by the laws of general application the Bill of Rights confers a wide enough definition of law to include the common law. Does this mean that the once and for all rule is a law of general application? Even if the common law rule were to be classified as a law of general application we are of the opinion that it is with the second part of sub section one where the trouble might come in. Ronald Dworkin<sup>68</sup> said that 'the point of rights is to protect individuals against certain decisions that a majority might want to make, even when that majority acts in what it takes to be the general interest'. This means that individual rights often outweigh the

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<sup>68</sup> *Taking Rights Seriously* (1977)

concerns of the majority. The condition set by the Constitution that a proposed limitation must justifiable and reasonable based on dignity is to our minds an exceptionally strong condition and will not be overturn easily.

## 2.10 Research Gap.

Pepper and Slabbert<sup>69</sup> pointed out that there has been a 900% increase in claims of over Five million Rand, compared to approximately ten years ago. Oosthuizen and Carstens<sup>70</sup> confirmed the rise in both the number and value of claims. As stated above, almost no empirical data exists surrounding the frequency and size of medical negligence claims whether against the state or private institutions or medical practitioners. Coetzee and Carstens<sup>71</sup> attempted to obtain such data but stated that;

Obtaining empirical data on medical negligence in South Africa has proved very difficult. Despite numerous phone calls and e-mails to officials in the National Department of Health, the various Provincial Departments of Health, the National Department of Justice, the Health Professions Council of South Africa, and the Medical Protection Society, not a single piece of empirical data was provided by any of these parties.

Is it possible that Dr Aaron Motsoaledi (Minister of Health) has no factual base for his comments<sup>72</sup> that consequently may lead to confusion and ambiguity? (See 1.3)

Insufficient research and data exists surrounding specific cases of medical negligence. Peter received substantial financial compensation, that may be perceived as a lot of money but as this explorative research may demonstrate; the award is nothing less than what he should have received. This case study may confirm that no amount of money can ever replace the damage that an adverse medical event causes to a person's dignity and quality of life guaranteed

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<sup>69</sup> 'Is South Africa on the verge of a malpractice litigation storm?' 2011 South African Journal of Bioethics and Law 29.

<sup>70</sup> "Medical Malpractice: The extent, consequences and causes of the problem 2015 Tydskrif vir Hedendaags Romeins Hollandse Regd 269.

<sup>71</sup> L. C. Coetzee & P Carstens 'Medical Malpractice and Compensation in South Africa' (2011) 86 Chigaco-kent Law Review.

<sup>72</sup> "Motsoaledi wages war against lawyers" Medical Chronicle (2011-10-10) <http://bit.ly/1r3llSn> (accessed on 19 October 2016).

by the South African Constitution. Current awards made by the South African Courts are scientifically determined and constitutionally justified.

## **2.11 Conclusion.**

Compensation for medical negligence is based on; fault through the law of obligations more specifically the law of delict. In the event of a medical practitioner found to be negligent the plaintiff must prove (on a preponderance of probabilities) that the practitioner rendered sub-standard treatment, which the reasonable expert in the same position would not have done.

The Constitution makes South African citizens conscious of their socio-economic rights. This qualitative research aims to explore the patient's autonomy and the common law pertaining to medical negligence subject to the supremacy of the Constitution. The same medical negligence may result in a breach of contract and delict and the patient-plaintiff may not recover more damages than the actual loss he or she suffered. More than one defendant may be sued (jointly and severally) when recovering these damages. The damages a patient-plaintiff may claim consist of pecuniary (past and future medical costs, past and future loss of income) and non-pecuniary (loss of enjoyment and amenities of life, disability, emotional shock and trauma) damages.

The South African law of delict has developed to an extent where victims of a negligent act (in our case medical negligence) have received satisfactory awards. These awards are based on scientific calculations which calculations include future events occurring whether these events are for the better or for the worse. In instances where awards made threatened to destroy the ability of other claimants to receive awards, amendments have been made but the fact remains that the legislature had stepped in when it was required to. To expect the courts to develop the common law with regard to awards of damages would be unfair.

## **Chapter 3: Conceptual design.**

### 3.1 Introduction.

Chapter two puts the South African law of delict into perspective. The literature survey further revealed the elements that are required to be proven when trying to claim damages from the person who wronged another and how that wrongfulness is tested. The Bill of Rights has bolstered the common law to an extent that one cannot help but appreciate the supremacy of the South African Constitution.

The next chapters follow an inductive inquiry to explore and describe the devastating impact of medical negligence on vulnerable citizens that depend on their constitutional rights.

### 3.2 Current theory summarised.

The aim of this research project focuses on the following theory: No other consumer- provider relationship in South Africa starts off on a more unbalanced level as the relationship between the consumer of health services and the provider thereof. Often and specifically when making use of public healthcare services, the consumer has no other option but to trust the provider as there may not be any other resources available in the near vicinity (financial constraints may further limit choice in this regard) and to make things worse, the consumer is often not in a position to debate or challenge to quality of the service as he or she is physically in a poor state. It is therefore imperative that these services, whether rendered in the private or public sector, are rendered whilst having the utmost regard for the values enshrined in the constitution such as the right to dignity<sup>73</sup>, the right to life<sup>74</sup> the right to security of the person<sup>75</sup>, the right to bodily and psychological integrity<sup>76</sup>, the right to privacy<sup>77</sup> and the right to access to healthcare<sup>78</sup>.

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<sup>73</sup> Sec 10 of the Constitution of South Africa Act 106 of 1996 (the Constitution).

<sup>74</sup> Sec 11 of the Constitution.

<sup>75</sup> Sec 12(1)(e) of the Constitution.

<sup>76</sup> Sec 12(2).

<sup>77</sup> Sec 14 of the Constitution.

<sup>78</sup> Sec 27 of the Constitution.

O'Regan J in *Dawood and Another v Minister of Home Affairs*<sup>79</sup> said that:

'The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution; it is a justifiable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.'

When a person is the victim of medical negligence it quite often has an extreme influence on his or her life, with that person's dignity usually being affected the most. Dignity is defined by the Oxford dictionary<sup>80</sup> as "the state or quality of being worthy of honour or respect". It is one of the most basic rights upon which all other human rights are based. The remedies our law has afforded victims of medical negligence over the years have tended to provide some solace in the form of monetary compensation and in our specific instance it has afforded Peter the ability to live a life as close as he would have, had the adverse event on the day of his birth not happened.

The monetary award he received can buy him all that is needed for the remainder of his life except his dignity. He will never be in a position to

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<sup>79</sup> 2000 3 SA 936 (CC)

<sup>80</sup> Oxford University Press, 2010

experience honour or earn respect. Consequently this research projects aims to uncover and ascribe the impact medical negligence has on an unsuspecting patient.

### 3.3 Conceptual model of a medical negligence claim.

The following figure, Figure 3.1 represents a flow diagram that demonstrates the process introduced when compensation for medical negligence is pursued.

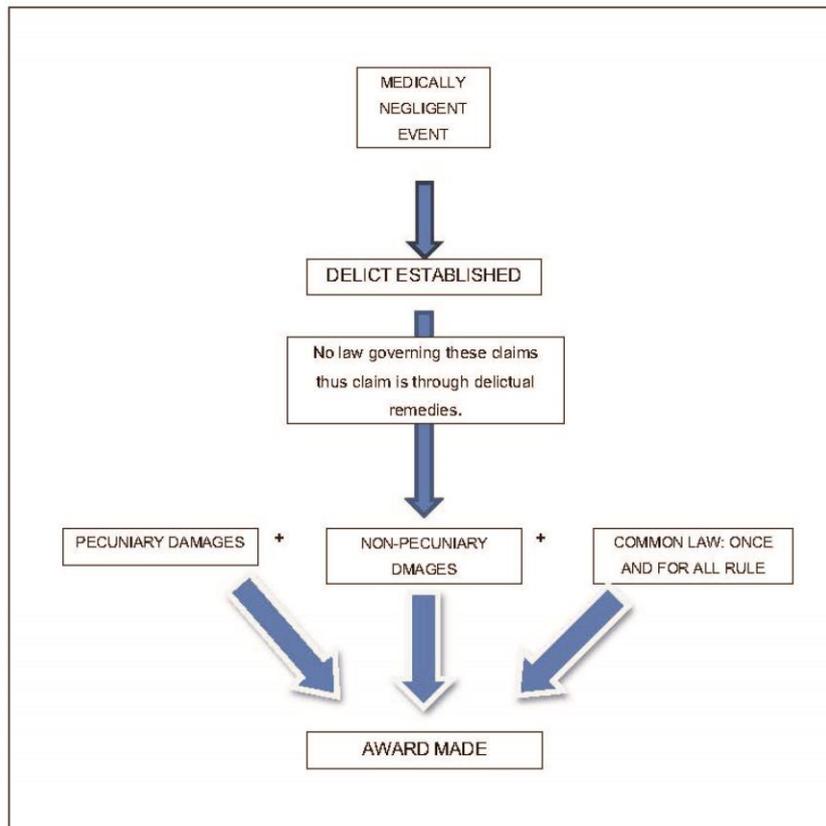


Figure 3.1: Process followed for a medical negligence claim

### 3.4 Conceptual model followed by this research project.

This research project follows the research process presented in Figure 3.2

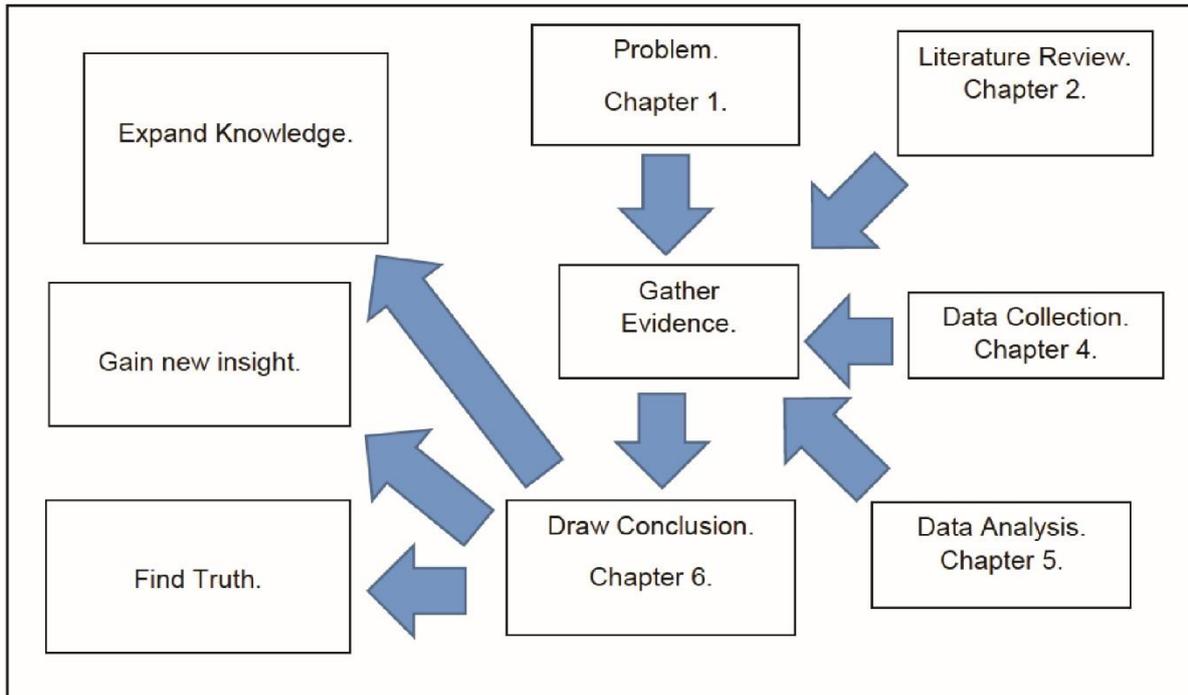


Figure 3.2

The logical procedure that guides this research is inductive and follows a cyclical process. Information is gathered as evidence is accumulated. This may lead to new insight and understanding.

Chapter 4 describes in detail the different methods employed to generate data that is relevant to deeper understanding of the impact of medical negligence

## CHAPTER 4: Research methodology.

### 4.1 Introduction.

This chapter describes the research action plan and methods by which one can gain high quality data. The research problem of: 'Proposed capping or limitation of damages on victims of medical negligence' will act as an important guideline as it aims to better understand this specific phenomenon. This process inductively builds theory about the effect an adverse medical event has on the constitutional rights of the patient and his or her family members. Knowledge about this phenomenon is unknown and this research aims to gain new insight into this

problem. Mouton (2001) describes theory-building studies as valuable to science as it acts as a vehicle for science to progress.

## 4.2 Research methodology.

This research is conducted in a specific context as it aims to explore a specific case. The context from which data will be gathered provides important information to understand the complexity of medical negligence and the implications of limiting related claims to the patient. Context matters when cultures, politics and organisational complexity impact the research data.

Case studies allow for the research process to be performed in context. The term quality in qualitative research emphasises the focus of the research on processes and meanings that are rigorously examined. It produces detailed data and depth of understanding through direct quotation, careful description of situations, events, interactions and observed behaviours<sup>81</sup>.

The qualitative research methodology employed in this research aims to illuminate and extrapolate knowledge and understanding to similar cases. Trauma caused by medical negligence is deeply rooted in the victims' (family included) emotions. This complex phenomenon is intricate and difficult to conceptualise. Research data contains sensitive issues and extracting qualitative information may be distressing to respondents (units of research).

The research method employed in this research aims to demonstrate the real consequences of medical negligence and contextualise the impact the proposed limits on financial compensation will have on the victims.

The qualitative research methodology employed in this study aims to take the following into account when data is interpreted:

### 4.2.1 Context.

The context of the phenomenon is the effect that medical negligence has on leaving a child brain damaged.

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<sup>81</sup> A Labuschagne 'Qualitative Research – Airy Fairy or Fundamental?' 2004 *The Qualitative Report* 100 -103.

#### **4.2.2 Respondents.**

The respondents represent valuable sources of qualitative data (patient, mother, father and great grandmother).

#### **4.2.3 Researcher.**

The researcher is a practicing attorney and was the attorney of record (see Chapter 1.1). Qualitative research relies on interpretation and acknowledges the effect the researcher has on the units of study (respondents). The researcher is therefore regarded as an instrument of data collection.

#### **4.3 Validity.**

It is very important to use the best research instruments (see 4.4) to optimise the credibility of the data and consequent findings. The internal validity of this case study depends on the extent to which the data describes reality. Credibility or validity does not depend on the sample size but on the depth and quality of the information gathered. Optimisation of the validity of these research findings will involve a concept generally known as triangulation of data. By introducing different data sets (expert reports used in court proceedings, respondents verbal accounts and field notes) and assessing whether what they say correlate, will enhance validity.

#### **4.4 Research instruments.**

Although the researcher acknowledges his subjective involvement he strives for empathetic neutrality. The researcher intends to maintain empathy towards the victims but applies neutrality towards findings. According to Patton in Hoepfl<sup>82</sup> a

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<sup>82</sup> Hoepfl, M.C. (1997). Choosing Qualitative Research; A Primer for Technology Education Researchers. *Journal of Technology Education*.

researcher who is neutral tries to be non-judgemental, and strives to report what is found in a balanced way.

#### **4.4.1 Conformability audit.**

The above taken into account it is clear that the researcher has to demonstrate a neutral viewpoint. This will be done through a conformability audit that consists of the following:

- I. Raw data: This will be extracted by engaging in semi-structured interviews with the victims.
- II. Analysis of notes: Valuable data has been documented through court proceedings.
- III. Reconstruction and synthesis: Qualitative data generated from interviews as well as case files, affords the researcher the opportunity to reconstruct the chain of events that culminated in an act of medical negligence. This contextualises the event to make inferences and enhances understanding.
- IV. Field notes: Without compromising empathy and attention to verbal data, the researcher will take notes during interviews to capture data not accessible via tape recordings. These may include, physical signs of stress, crying, mannerisms, gestures, eye contact and general body language of victims during the interview.
- V. Personal notes: The subjective involvement of the researcher stands central to this qualitative research. Personal notes before and after interviews will reveal the researcher's state of mind and how his standing central to this data gathering process affects his interpretation of data.
- VI. Qualitative research checklist by Marshall:
  - 'The study's method should be explicated in detail so that the reader can judge whether it was adequate and makes sense. In addition, a

rationale needs to be presented in an attempt to move sceptics to accept the qualitative approach;

- Assumptions should be stated, biases expressed, and the researcher should undertake a kind of self-analysis for personal biases and a framework analysis for theoretical biases;
- The researcher should guard against value judgements in data collection and in analysis;
- There needs to be abundant evidence from raw data to demonstrate connection between the presented findings and the real world, and the data need to present in readable, accessible form, and perhaps aided by graphics, models charts and figures
- The research questions should be stated, and the study should answer those questions and generate others;
- The relationship between this study and previous studies must be explicit. Definitions of phenomena should be provided, with explicit reference to previously established frameworks; thus challenging old ways of thinking;
- The study must be reported in a manner that is accessible to other researchers, practitioners, and policymakers. It must make adequate translation of findings so that others will be able to use the findings in a timely way;
- Evidence must be presented showing that the researcher was tolerant of ambiguity, searched for alternative explanations, checked out negative instances, and used a variety of methods to check the findings (i.e., triangulation);
- The report should acknowledge the limitations of generalisability while assisting the readers in seeing the transferability of findings;
- It should be made clear that there was a phase of “first days in the field” in which a problem focus was generated from observation, not from library research. In other words, it needs to be a study that is an exploration, and not one merely to find contextual data to verify old theories;
- Observations are to be made (or sampled) of a full range of activities over a full cycle of activities;

- Data needs to be preserved and should be available for reanalysis;
- Methods should be devised for checking data quality (e.g., informants' knowledgeability, ulterior motives, and truthfulness) and should guard against ethnocentric explanations;
- In-field work analysis needs to be documented;
- Meaning should be elicited from cross-cultural perspectives;
- The researcher should be careful about sensitivity of those being researched-ethical standards need to be maintained;
- Data collection strategies should be most adequate and efficient and available'.<sup>83</sup>

#### **4.5 Ethical guidelines.**

Ethics represent the norms and standards of behaviour that guide the researcher when extracting qualitative data, in this case study, by introducing a semi-structured interview.

##### **4.5.1 Voluntary participation.**

Respondents have to be involved on a voluntary basis. They will be informed that they may discontinue their participation any time during the interview.

##### **4.5.2 No harm to participants.**

The researcher has to explain to the respondents that the interview will be stopped if questions are found to be too invasive. Reliving the traumatic experiences of giving birth in abusive conditions may be traumatic.

##### **4.5.3 Informed consent.**

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<sup>83</sup> C Marshall & G Rossman *Designing Qualitative Research* (1995) (2<sup>nd</sup> Ed.)

The respondents will be informed about their involvement in the research project. Informed consent will be recorded during the interview.

#### **4.5.4 Anonymity.**

The respondents have the right to remain anonymous. This case study aims to highlight the plight of Peter (fictitious name), to focus the attention on the emerging trend of medical negligence.

#### **4.6 Conclusion.**

Scientific research is associated with a process aimed at gaining knowledge and understanding. This case study consists of multiple intangible realities, and endeavours to unlock the truth of human experience. Chapter five reports on a process to understand people's experiences in a natural context.

## **CHAPTER 5: Analysis and interpretation of data.**

### **5.1 Introduction**

Previous chapters bear testimony of an inductive process that was initiated by giving a background description of the case at hand. Chapter 2 followed a rigorous and explicit review of court cases and findings as well as articles and hand books to contextualise the magnitude of the problem when compensation for medical negligence is debated. Qualitative data will be analysed and interpreted in this chapter. Non-probability sampling will be used because of the availability of the units of analysis, in this case the close family members of Peter. This sampling technique is practical and may assist in answering the research question. The researcher used his judgement in choosing this historic case as representative of a trend associated with medical negligence in South African hospitals; this sampling method is generally referred to as purposive sampling

### **5.2 Ethical considerations.**

Collection of qualitative data by semi-structured interviews require that norms and standards will guide the following moral choices:

1. The researcher was well prepared and trained in conducting a semi-structured interview;
2. The participants participated freely based on informed consent and were informed about the research objective.

### 5.3 Interpretation of data.

A semi-structured interview took place at a guesthouse in Pretoria on 2 October 2016. Peter and his family previously stayed over in this guesthouse. This was taken into account when a setting was identified for the interview. The familiar environment put them at ease in preparing for the interview. Internal validity or credibility depends on the degree of accuracy with which findings are interpreted. The credibility of the data generated and reported below is enhanced by means of triangulation of the data. Three different data sets were introduced to assess the degree of synergy between these sets of data. The following sets of data are presented under the following headings: Transcript data from semi-structured interviews (5.3.1), Field notes documented (5.3.2), Reports by subject experts (5.3.3).

#### 5.3.1 Transcript data from semi-structured interviews:

##### 5.3.1.1 The effect of negligence on Peter’s mother (Miss A).

Reference	Constitutional Dimension Aspect	Analysis
<i>‘Peter was conceived while I was in a romantic relationship with his biological father, Mr Botha. Mr Botha and I were living 27 km’s outside of</i>	Section 27: Everyone has the right to have access to healthcare services, including	Section 27 encompasses the right to health care services. Ms A was completely aware of her right to access to health care but chose to make use of a different



<p><i>Rustenburg and I heard terrible stories of the Hospital in Rustenburg so I felt I had to be closer to a hospital I knew and my parent's home was in Modi-Molle so that when the time came to give birth I would be close to a hospital I knew. As this was my first child I was a bit scared and I would need some assistance from my mother and grandmother. I was very happy to be pregnant'.</i></p>	<p>reproductive health care.</p>	<p>public hospital. This reflects the first time her trust in the health care system was violated. She trusted FH Odendaal Hospital (government sponsored hospital) in Modi-Molle and felt comfortable in moving there to enjoy the assistance of her family.</p>
<p><i>'I went for checkups at a clinic in the town of Modi-Molle where I was now living with my parents, my grandmother also stayed there, I went for these checkups once a month and my "date" was given to me as the 27<sup>th</sup> of October 2008'.</i></p>	<p>Section 27: Everyone has the right to have access to healthcare services, including reproductive health care.</p>	<p>Miss A's right as granted in sec 27 was being exercised during this period of her life but as will be shown later the clinic made a mistake with her due date.</p>
<p><i>'On the morning of 3 November 2008 (a week later than anticipated but this was described to be normal by my check-up clinic) I experienced the first pains at about 10am. I arrived at the hospital at</i></p>	<p>Section 27: Everyone has the right to have access to healthcare services, including reproductive health care.</p>	<p>Her rights to access to healthcare was exercised but her rights to dignity, freedom and security of the person, bodily and psychological integrity and security and control over her body were clearly violated. By not</p>



<p><i>approximately 11, was admitted and Peter's heart rate was checked with a sonar and confirmed to be fine. I was told to wait. My body did not go in to labour by itself and I had to be helped so a drip with medication to make the contractions stronger was inserted in my arm and I was told to walk up and down the hall. While I was walking in the halls I requested help from the nurses on several occasions as the pain was becoming unbearable... I begged them to give me a caesarean section... The nurses ignored me and remained in a room together. At 7 that night the day and night nurses changed shifts. As soon as the night nurses came in they checked me and immediately assisted me and Brandon was born at 28 minutes past 7'.</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.</p> <p>Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.</p> <p>Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.</p>	<p>adhering to her cries for help or her decision to elect for a caesarean section.</p>
<p><i>'When Peter was born he did not cry and seemed sick</i></p>	<p>Section 10: Everyone has</p>	<p>Ms A's right to dignity was clearly violated as access to</p>



<p><i>because he was dark blue and purple and the nurses took him away immediately. I did not get the chance to hold him or even look at him. About 30mins later my father informed me that the nurses told him that Peter had a 50/50 chance of dying. I could also not see him that night despite requesting to see him. I could not sleep I kept on worrying what if he dies. Nobody told me what was happening. Every time I asked I was told that they were still busy with Brandon. I was panicking the whole night; it was the worst night of my life’.</i></p>	<p>inherent dignity and the right to have their dignity respected and protected.</p> <p>Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.</p> <p>Section 32(1)(a): Everyone has the right of access to information held by the state.</p>	<p>her new born child was denied. She was treated cruelly and inhumane by not allowing her to hold or even see her new born child. Her right of access to information held by the state was also denied as she was not told what the situation with her son was.</p>
<p><i>‘As soon as I woke up I demanded to see Peter, the nurses moved me to the maternity ward and I saw Peter in a plastic box in the neonatal intensive care unit. He was attached to an oxygen machine with only a nappy on. He also had a drip inserted into his little head but no one was in there with him. I moved my</i></p>	<p>Section 27: Everyone has the right to have access to healthcare services, including reproductive health care.</p> <p>Section 12(1)(e): Everyone has the right to freedom and security of the person, which</p>	<p>Ms A’s right to healthcare was violated by not being placed in the maternity ward as directed by the Maternal Guidelines of South Africa. Ms A’s rights granted in Section 12 were violated by not being able to be near her child during his hour of need.</p>



<p><i>mattress and put it on the floor next to his bed. I never left his bedside. Three days later he had what looked like a fit. I shouted for help and an Indian doctor came and gave Peter medication. I had a huge fright. This is when I knew my and Peters' lives were not going to be normal but I kept on praying and hoping that everything will go back to normal'.</i></p>	<p>includes the right not to be treated or punished in a cruel, inhuman or degrading way.</p>	
<p><i>'After being discharged we went home and life went on. I fed Brandon as good as I could and at approximately 4 months I started realising that Brandon was not normal as he could not sit. He didn't even try to sit. He was very stiff... We took him to the paediatrician at the hospital who told us that he was sick. He had cerebral palsy and would never be like a normal child. He would need all kinds of therapy for the rest of his life... We started taking him to physiotherapy at the hospital as there was a young student giving</i></p>	<p>Section 27: Everyone has the right to have access to healthcare services, including reproductive health care.</p> <p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.</p> <p>Section 12(1)(e): Everyone has the right to freedom and security of the</p>	<p>Ms A and Peter's right of access to health care was unjustifiably limited by not being able to provide replacement therapy or even providing details of other hospitals or institutions that could provide therapy.</p> <p>Ms A and her son's rights of inherent dignity were violated by not providing follow up treatment or assistive devices. Ms A had to carry her son wherever he needed to go.</p> <p>Ms A and her son's rights not to be treated cruelly or inhumanely were violated by not providing therapy. Peter's rights</p>



<p><i>therapy but the student left after a year and there was not a replacement coming. We asked the hospital several times for help but they just kept on saying that there was nothing they could do...we had no money to pay for private therapy...I was very worried and thought that Brandon was going to die...Brandon started choking badly whenever I tried to give him food this became so bad that I could not take it anymore and I moved to another town. I left Brandon with my grandmother’.</i></p>	<p>person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.</p>	
<p><i>‘I feel very sorry for Brandon. I think about it every day, sometimes I wonder if I did enough, was it perhaps my fault? I was very hurt and I wanted someone to blame. Deep down I knew it had to be someone’s fault because he was healthy until birth. I knew deep down that the hospital was responsible for this... if I could have given them a star for their work</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.  Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right</p>	<p>Ms A’s dignity is no doubt affected in the worst possible manner as the events of 3 November 2008 haunts her every day to the point where she sometimes blames herself. Her right to psychological integrity has been violated. She however exercised her right in terms of Sec 34 which granted her the opportunity to have this matter heard in a court of law.</p>



<p><i>performance I would have given them no star...I needed help, Brandon needed help...we needed money to properly take care of Brandon...I have no friends...I feel sad....'</i></p>	<p>not to be treated or punished in a cruel, inhuman or degrading way.</p> <p>Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.</p> <p>Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.</p>	
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<p><i>'This was not the way I thought my life would turn out. If I should speak the truth I feel embarrassed to be seen with Brandon, I know I shouldn't feel that way and maybe I am a bad mother for saying it but I can't help it...it is between feeling sorry for him and not wanting people to look at me in the way that they do... I feel less of a woman, less of a mother because of Brandon...I could never leave the house...I could never go out with my friends because Brandon cannot be left alone...if you are with Brandon he takes up all of your time, you have no time to yourself..I suffered a type of shock that cannot be taken back...I am psychologically hurt...I am so hurt that I left my boy with his great grandmother...I was very scared to become pregnant again...I didn't even cry after what happened that is how shocked I was...I only cried months afterwards...'</i></p>	<p>Section 10          Everyone has inherent dignity and the right to have their dignity respected and protected.          Section 12(1)(e):          Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.          Section 12(2)(a) &amp;(b):          Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.</p>	<p>Ms A's right to dignity has been severally infringed upon. Her dignity has been taken away from her. Ms A feels that Brandon's condition and her unpreparedness therefore and her failure to handle the problem has resulted in a lifelong cruel punishment totally robbing her of her psychological integrity.</p>
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### 5.3.1.2 The effect of negligence on Peter's Great Grandmother (Mrs B).

Reference	Constitutional Dimension aspect	Analysis
'The constitution is there to make things better'.		This was an answer she gave on the question of whether she knew what the constitution is.
<i>'I don't think I had a choice, I could see that someone was going to have to take care of Brandon otherwise...who knows'</i>	Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.	Mrs B's right to dignity has been infringed upon as a liability has fallen on her that otherwise would not have.
<i>'Normal 62year olds probably do much less than what I do because I take care of Peter every day. They probably do their hair and play crossword puzzles I want to start with it again as soon as Peter has someone to take care of him...I have no more friends because they can't visit me without Peter coming in between...'</i>	Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.	Mrs B's dignity as well as her psychological integrity has been violated. She has been robbed of the ability to live out her twilight years in the way she wanted to.
<i>'At first it was extremely hard. Brandon was very frustrated and so was I. I hurt my body when trying to move him, later on I could not move him when he wanted to be moved. I had to</i>	Section 10: Everyone has inherent dignity and the right to have their dignity	Mrs B's dignity, her right to security of the person and right to bodily and psychological integrity has been violated. She is not physically able to lift and move



<p><i>pay someone out of my old age pension to come and move Brandon whenever he wanted to move. It was a very difficult time but now, as he is older and we know each other better, now it's easier. The problem that now arises is that he gets bored with me, he constantly yells at me, he wants other distractions, he wants to play with friends and because he can't he gets extremely frustrated and mad. My whole world revolves around Brandon. I try and make his life easier but it is getting harder for me. Brandon is starting to realise that he is different. He is starting to realise that he cannot do what others can. Brandon thinks he is going to get better someday. It is as if he is waiting for it to happen and it makes me sad to know that he is going to wait forever.'</i></p>	<p>respected and protected. Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.</p>	<p>Peter, she has to use her constitutionally granted pension to pay someone to come and move Peter. This is not in line with what is expected of a 70 year old lady.</p>
<p><i>'If that is the case then he should go without the operations..I will never go to a government hospital...'</i></p>	<p>Section 27: Everyone has the right to have access to healthcare services.</p>	<p>Mrs B's response to whether she would take Peter for medical attention at a government hospital. Her right to access to healthcare has taken a hit due to her loss of faith in the public healthcare system.</p>

<p><i>'I don't feel like a great grandmother or even a grandmother'</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.</p>	<p>Mrs B's dignity has been violated by the incident, which robbed her of her ability to feel like a great grandmother.</p>
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### 5.3.1.3 The effect of negligence on Peter's Constitutional rights:

Reference	Constitutional Dimension aspect	Analysis
<p><i>Ms A: '...While I was walking in the halls I requested help from the nurses on several occasions as the pain was becoming unbearable... I begged them to give me a caesarean section... The nurses ignored me and remained in a room together...'</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected'. Section 11: Everyone has the right to life. Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.</p>	<p>Peters right to dignity had experienced damage even before he was born due to the staff at the FH Odendaal hospital refusing to assist his mother, which in turn resulted in him sustaining brain damage and being diagnosed with cerebral palsy. Peter's right to life had suffered negatively due to the nurses at the FH Odendaal Hospital not adhering to Ms A's cries for help specifically a caesarean section. Peters right to bodily and psychological integrity was also severally compromised when the staff at the hospital refrained from assisting his</p>

	Section 27: Everyone has the right to have access to healthcare services.	mother which led to his brain damage. Peter's right of access to healthcare was violated by the nurses when they refused to assist his mother.
<i>Ms A: 'We started taking him to physiotherapy at the hospital as there was a young student giving therapy but the student left after a year and there was not a replacement coming. We asked the hospital several times for help but they just kept on saying that there was nothing they could do...we had no money to pay for private therapy'</i>	Section 27: Everyone has the right to have access to healthcare services.	The hospital's failure to provide the necessary therapy and further failure to assist in at least referring Peter to further therapy is a blatant disregard of his right to healthcare.
<i>Mrs B: 'We requested a wheelchair from the hospital but they never gave us one. We then got a wheelchair that was too big. Peter fell out and the wheelchair hurt him where it squeezed his skin, it became a problem when the sores became infected'.</i>	Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected. Section 11: Everyone has the right to life. Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.	The right to healthcare encompasses the right to access to assistive devices and the fact that the hospital denied Peter even this most basic right infringes on his dignity. His bodily integrity is violated when pressure sores start to develop due to the wrong wheelchair he was given. His dignity suffers when he suffers the humiliation of falling out of a



	<p>Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.</p> <p>Section 27: Everyone has the right to have access to healthcare services.</p> <p>Section 28(1)(c): Every child has the right to basic health care services and social services.</p> <p>Section 28(2): A child's best interests are of paramount importance in every matter concerning the child.</p>	<p>chair that is too big for him.</p> <p>The fact that Peter is subjected to this low standard of care is proof that his interests are not protected as is enshrined in the constitution.</p>
<p><i>Mrs B: 'We were the saddest when all of the doctors told us that Peter would never be able to walk or stand or wash or dress or feed himself, they also told us that he will never be able to work and that he would require therapy and a caretaker for the rest of his life but the worst was when that Professor in America told us that Peter would only</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.</p> <p>Section 11: Everyone has the right to life.</p> <p>Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2)(a) &amp;(b): Everyone has the right to bodily and</p>	<p>Peter's reduction in life expectancy brought about by the cumulative effect of the cerebral palsy violates his right to life in the most severe way possible. Him not being able to do the most basic things that a human being does affects his dignity in a profound permanent and degrading way. The fact that Peter will never be alone, even when naked or using the bathroom, infringes directly on his right to privacy.</p>

<i>live another thirty years, that makes me very sad'.</i>	psychological integrity, which includes the right to security in and control over their body. Section 14: Everyone has the right to privacy.	
<i>Mrs B: 'Peter knows that there is something wrong with him, some days he gets very angry and frustrated, he throws tantrums and it takes days for these to blow over'.</i>	Section 12(2)(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.	Peter's right to psychological integrity is affected severely by the frustration caused by the cerebral palsy. This frustration makes him more prone to psychiatric disorders.

The data gathered in this section indicates that Ms A, Mrs B and Peter's Constitutional rights were infringed upon on numerous occasions.

Table 5.1: Empirical data from interviews

Respondent	Dignity	Security	Integrity	Healthcare	Privacy	Access to information	Life	Total
Ms A	5	6	4	5		1		21
Mrs B	4	1	1	1				7
Peter	3	3	3	3 + 1	1		1	15

Table 5.1 provides an indication of the number of times the respondents' Constitutional rights were violated as they reflect on the effect of negligent acts.

### 5.3.2 Field notes documented by the researcher.

Remark	Field Note	Constitutional Dimension Aspect	Analysis
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<p><i>Ms A: ‘...and I heard terrible stories of the Hospital in Rustenburg so I felt I had to be closer to a Hospital I knew and my parent’s home was in Modi-Molle...’</i></p>	<p>Ms A gave the impression that she thought this decision through a thousand times, in hindsight, was it the right decision not to go to the Rustenburg Hospital, would her life have been different if she had?</p>	<p>Section 27: Everyone has the right to have access to healthcare services. Section 12(2)(a): Everyone has the right to bodily and psychological integrity.</p>	<p>The Stories she heard about bad health services at the hospital in Rustenburg caused self-doubt: her right of access to healthcare was compromised. The fact that she doubts whether she took the right decision (to move to Modi-Molle) causes feelings of guilt and self-doubt. This compromises her right to psychological integrity.</p>
<p><i>Miss A: ‘I begged them to give me a caesarean section... The nurses ignored me and remained in a room together...When Peter was born he did not cry and seemed sick because he was dark blue and</i></p>	<p>Ms A had tears rolling down her face at this stage, her lips were trembling, she had to stop talking on several occasions to compose herself. Reliving the experience was very traumatic to all the participants</p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected. Section 12(2)(a): Everyone has the right to bodily and psychological integrity.</p>	<p>Ms A’s dignity and psychological integrity have been violated and this severely compromise her self-concept.</p>



<p><i>purple and the nurses took him away immediately. I did not get the chance to hold him or even look at him. About 30mins later my father informed me that the nurses told him that Peter had a 50/50 chance of dying. I could also not see him that night despite requesting to see him. I could not sleep I kept on worrying what if he dies. Nobody told me what was happening’.</i></p>			
<p><i>Mrs B: ‘...It was a very difficult time but now, as he is older and we know each other better, now it’s easier...’</i></p>	<p>Whenever Mrs B addressed Peter or when Peter became aware of her voice, they both smiled. A deep trust relationship clearly</p>	<p>Section 28(1)(b): Every child has the right to family care or parental care.</p>	<p>The incident on 3 November 2008 alienated miss A from Peter that consequently deprived him of his right to parental care. He is currently cared for by his</p>

	exists between them.		Great Grandmother of 71 years of age..
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With regard to the field notes it is evident that Ms A's right to dignity was infringed upon once, her right to access to healthcare was infringed upon once and her right to bodily and psychological integrity was infringed upon twice.

With regard to Peter and the fact that his Mother had abandoned him, his right to parental care has been violated.

Table 5.2: Empirical data from field notes and observations

<u>Respondent</u>	<u>Dignity</u>	<u>Security</u>	<u>Integrity</u>	<u>Healthcare</u>	<u>Privacy</u>	<u>Parental care</u>	<u>Life</u>	<u>Total violations</u>
Ms A	1		2	1				4
Peter						1		1

Table 5.2 provides an indication of the number of times the respondents' Constitutional rights were violated as observed by the interviewer during the interviews.

### 5.3.3 Reports by subject experts.

Extracts of expert medico-legal reports which were composed during Peter's trial:

<b>Reference</b>	<b>Constitutional Dimension aspect</b>	<b>Analysis</b>
Dr CP Davis, expert gynaecologist and obstetrician: <i>'In the clinical notes of the FH Odendaal Hospital, an entry was made at 10h05</i>	Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected. Section 11: Everyone has the right to life.	Miss A's right to dignity was severely violated when no attention was given to her during the labour process.



<p><i>and the next entry was made at 18h45 where it is stated that the patient was found in the ward with the cervix fully dilated. We have no idea how long miss A was fully dilated before this time. The partogram that represents a graphic picture of the progress of labour was poorly kept. There is an entry made that stated that the cervix was 9cm dilated, but this entry cannot be found in the notes on the progress of labour. Except for this questionable entry at 15:00 no record of the foetal heart rate can be found after admission for the entire labour process. The fact that the baby was not monitored during labour does not comply with the guidelines and reflects a dysfunctional maternity unit'.</i></p>	<p>Section 12(1)(e): Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2)(a) &amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.</p> <p>Section 27: Everyone has the right to have access to healthcare services.</p>	<p>Peters right to life was also severely violated by this sub-standard actions that followed as his life was in danger throughout the day. Ms A's right not to be treated in an inhumane way was violated by the staff's refusal to assist her. Miss A's right to psychological integrity was also severely violated by the degrading way in which she was treated by the staff of the hospital.</p> <p>Both miss A and Peter's rights to access to healthcare was violated in the most extreme way when no medical attention was given to them for nearly 8 hours.</p>
<p>Professor Lorna Jacklin, Neuro-developmental paediatrician: <i>'Peter will be dependant for the rest</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.</p>	<p>Peter's right to dignity is severely affected by the fact that he will remain dependant on others for</p>



<p><i>of his life and will need full- time care. He will never be able to earn a living...He is going to remain dependant on others for his feeding’.</i></p>	<p>Section 11: Everyone has the right to life.</p>	<p>everyday tasks and have to be fed. His right to life has been diminished by the fact that he will never be able to earn a living and live a dignified life.</p>
<p>Dr F van Wijk, Urologist <i>‘...Peter does not have bladder and bowel control and his bladder empties whenever it is full...this condition will not improve and the patient will have to stay [on] permanent[ly] on nappies for the rest of his life..’</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected. Section 11: Everyone has the right to life. Section 12(2)(a)&amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.</p>	<p>The fact that Peter will never be able to urinate voluntarily and have to wear “nappies” for the rest of his life, destroys his right to dignity, diminishes his right to life and severely harms his right to bodily integrity.</p>
<p>Professor David Strauss, Life expectancy expert: <i>‘Based on his overall pattern of abilities and disabilities, I estimate Peter’s life expectancy to be 38.6 additional years, i.e., to age 45.7. This life expectancy represents 62% of the normal South African figure’.</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected. Section 11: Everyone has the right to life.</p>	<p>Peter’s diminished life expectancy violates his right to life as granted by the Constitution. He will, at best, only be alive for two thirds of the average life expectancy of the South African compounded by the fact that his life will be compromised by physical and mental disabilities.</p>
<p>Occupational Therapy joint minute between Ms E Kingsley and Ms W van der Walt: <i>‘Peter is</i></p>	<p>Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.</p>	<p>Peter’s dignity is compromised, by never being able to do something on his own. His right to a</p>

<p><i>expected to be care dependant lifelong in respect of his personal care and home care’.</i></p>	<p>Section 11: Everyone has the right to life.</p> <p>Section 12(2)(a)&amp;(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.</p> <p>Section 14: Everyone has the right to privacy.</p>	<p>normal life will be affected by being dependant on physical caretaking by other people. His body will become an obstacle, an object that will frustrate him especially when he interacts with children of his own age that are living normal lives. The frustration and anger he will experience during puberty will be unimaginable. A life of dependency awaits a young boy who’s biggest mistake was the trust his mother placed on health care provided by the Government.</p>
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The subject expert reports indicate that Ms A's rights to dignity, freedom and security of the person, bodily and psychological integrity and access to healthcare were infringed upon once.

The reports further indicate that Peter's right to dignity was violated 4 times, his right to life 3 times, his right to bodily and psychological integrity twice and his right to privacy once.

Table 5.3: Empirical data from subject experts

<u>Respondent</u>	<u>Dignity</u>	<u>Security</u>	<u>Integrity</u>	<u>Healthcare</u>	<u>Privacy</u>	<u>Access to information</u>	<u>Life</u>	<u>Total violations</u>
Ms A	1	1	1	1				4
Peter	4	3	2		1		3	13

Table 5.3 provides an indication of the number of times the respondents' Constitutional rights were violated as observed by expert doctors and therapists.

#### **5.4 Conclusion.**

The above information thus confirms that Ms A's right to dignity was violated a total of 7 times, her right to security of the person was violated a total of 7 times, her right to bodily and psychological integrity was violated a total of 4 times and her right of access to information was violated once.

Mrs B's right to dignity was violated a total of 4 times, her right to freedom and security of the person, bodily and psychological integrity and access to healthcare were violated once.

Peter's right to dignity was violated a total of 7 times, his right to life a total of 4 times, his right to freedom and security of the person a total of 3 times, his right to bodily and psychological integrity 5 times, his right to access to healthcare 3 times his right to basic healthcare as a child, to have his best interests protected and parental care were all violated once. With regard to his right to privacy it is clear that this right has been impaired for the rest of his life.

What is important to note is that rights to dignity, life, security of the person, bodily and psychological integrity and privacy are rights that if once violated remain violated for life and often contribute to further deterioration of these rights over time. This fact confirms the qualitative research design.

The above data clearly highlights that the fact that the devastating impact medical negligence has on patients can never be quantified in monetary terms.

Chapter 6 finally contextualises the findings and suggests further research to proactively address this highly litigious problem.

## Chapter 6: Conclusion and Recommendations.

### 6.1 Introduction.

The aim of this research is to explore the relatively unknown topic of medical negligence, and the effect this has on unsuspecting South African citizens. In chapter five a wealth of information is documented that contributes to new insight into the magnitude of this problem. The qualitative data revealed that most of the human rights violated by medical negligence are connected to the right to dignity.<sup>84</sup> When one faces the immediate effect of Hypoxic Ischemic Encephalopathy (HIE) the attention on the immediate physical needs of the child overshadow the fact that this person will develop unfulfilled socio-psychological needs that will translate in an undignified life.

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<sup>84</sup> Figure 6.1

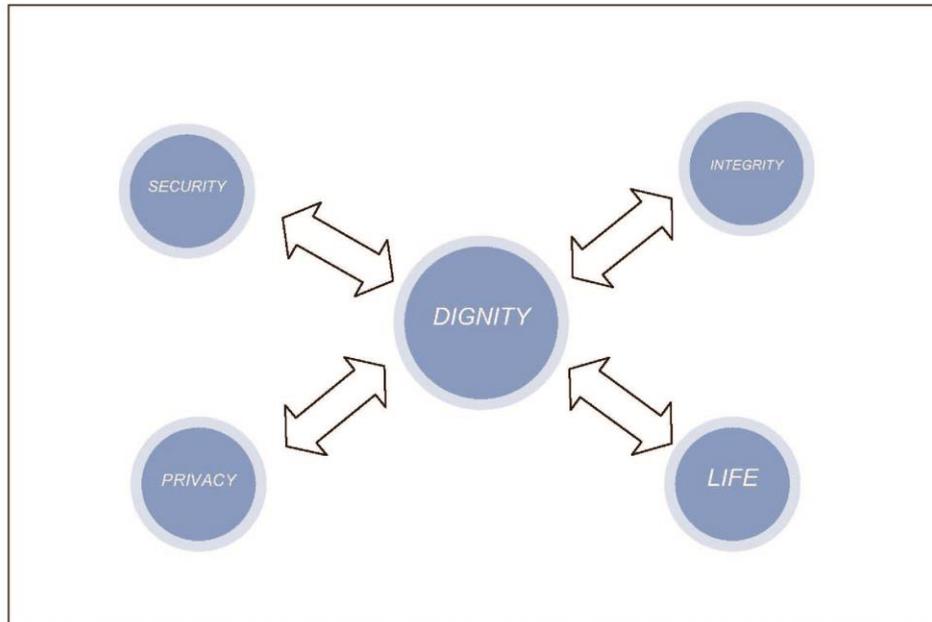


Figure 6.1: A visual presentation of the rights to life, bodily and social integrity, privacy and security of the person stemming from the right to dignity.

In review of the research process, chapter one introduces Peter: one of many past and future victims of a dysfunctional medical system, offered to South African citizens. Chapter two contextualises the rights of all South Africans to *inter alia* medical healthcare as enshrined by the Constitution. The data generated by literature research and analysis describes delict and how the idea of monetary compensation for damages sustained evolved in South-African law. The complexity of changes to the common law without legislative endorsement is given perspective. Chapter three provides a conceptual overview to this research problem. A conceptual model that illustrates how an adverse event causing a delict, manifests into monetary rewards. Chapter four explains the research process and technique and chapter five interprets the raw data and its relevance to the Constitution.

Chapter six aims to put the new information generated by inductive exploration into perspective.

The unfortunate events of 3 November 2008 during the birth of Peter, have changed the initial expectations of a normal birth of a healthy, normal baby, growing up to be a regular child, becoming a normal adolescent and experiencing normal adult life, to a life robbed of dignity. Because of medical negligence that took place on 3 November 2008 Peter was deprived of any normalcy for life. The court found the MEC for the Limpopo Department of Health vicariously liable for the negligence committed by his employees at the FH Odendaal Hospital on 3 November 2008 and ordered the department to pay an amount of money to a Trust created in Peter's name. This amount was compiled so to provide for all of Peter's basic needs for the remainder of his life.

## **6.2 General.**

Very little empirical data exists surrounding the prevalence of medical negligence in South Africa. Miss A was ignored by healthcare providers (nurses) because a lack of respect for human dignity and work ethic.

The current way, in which medical negligence matters are settled, is unsustainable. Paying a large settlement amount to an individual impairs services to the masses. This large settlement amount could have been avoided had the focus of treatment been on the Constitutional right of every citizen to dignity.

The lack of infrastructure and personnel is an immediate threat to the well being of many patients in South Africa. This situation could have been avoided if those in control acted with other people's dignity in mind.

South Africa's troubled past gave berth to a Constitution to address the wrongs of the past in the form of legislation. The great Nelson Mandela stated that "Never, never and never again shall it be that this beautiful land will again

experience the oppression of one by another”. This quotation had resonated with the writers of our Constitution and it was confirmed that many injustices of the past had occurred due to a lack of respect for dignity. Dignity was therefore placed as the central theme of the new South African Constitution.

The new Constitutional order has given new impetus to the law of delict; the legal duty of a person is not only tested against the convictions of a typical community, but the convictions of a community aware of their socio-economic rights more than ever. This has no doubt raised the proverbial bar with regard to a test for negligence. In the first case<sup>85</sup> which took Constitutional rights into consideration, and the assurances to the South African citizens was weighed up, the court found that specific circumstances such as being a member of a vulnerable group plays a significant role and again emphasised the importance of judging each matter on its own merit. The matter of Carmichele contributed to the understanding that a person’s right to dignity does not fall away the moment he or she is a victim of medical negligence, their Constitutionally guaranteed rights become more important because of their vulnerability.

The fact remains that a victim of medical negligence has sustained damage to various dimensions of life. The damage stems from the fact that the victim can no longer continue or develop in a normal way. Many forms of damage impair the victim’s physical abilities, which in turn affect emotional health and the only physical way to provide comfort is provided in a monetary way.

The two most important rights with regard to the Constitution are the rights to dignity and life and this concurs with Chaskalson P<sup>86</sup> when he alleged that these should always be regarded as the most important rights above all others. When a healthcare practitioner or healthcare provider treats members of the public it is the patient’s right to dignity that should be held in the highest regard. This state of affairs undeniably begs the question whether the practitioner or

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<sup>85</sup> Carmichele v The Minister of Safety and Security 2001 4 SA 938 (CC).

<sup>86</sup> Human Dignity as a Foundational Value of our Constitutional Order’ (2000)16 SAJHR 193, 196.

provider's understanding of dignity is sufficient. The following conclusions based on qualitative data generated confirm this shocking revelation.

### 6.3 Recommendations:

Without diverging from the adverse influence a medical negligent event has on a person's life, it is important to note that this case study deals with a boy who is cerebral palsied, who will only live two thirds of his expected lifetime, who will have to wear nappies due to his inability of controlling his bladder and bowel and who will have no privacy due to his caretaker having to be involved in even the most intimate times of his life.

The following recommendations are suggested in an effort to weigh the gravity of the rights granted in the Constitution against Peter's personal circumstances:

1. Every medical negligent claim should be assessed on its own merit, thus allowing the legal process formed through decades to run its course.
2. Budgetary constraints of government or the MPS should not be an excuse to impose limitations on financial compensation, but the focus should rather be on the cause of negligent behaviour and not the effect.
3. No court has the inherent ability to deviate from the common law merely because economic factors justify the deviation. A legislative process should be initiated of which the result should be an act that regulates proposed reforms to awards made due to medical negligence. This will grant the public a chance to participate and comment on what they feel would be constitutionally justified.
4. Punishment for unprofessional medical conduct and negligence should be severe to put the vulnerability and dependency of a patient into perspective.
5. Compulsory training and regular refresher training and assessment of the constitutional astuteness for all health care practitioners in South Africa.
6. Further research is recommended to define the concept of dignity, in a South African constitutional context. From the elaborate literature study no concrete definition of the concept could be found. The Constitution is the supreme law of the land and this implies that in the event of a right granted in the

Constitution is limited through section 36, the limitation should still not affect a person's dignity. However, Peters' dignity was destroyed repeatedly in the past and will remain violated for the rest of his life.

## 6.4 Conclusions

This case study gives a voice to victims of many past and present incidences of medical negligence. The courts have attempted to counter the wrongs inflicted by medical negligence by applying nearly a century of legal knowledge to every situation. This includes the "once and for all rule" which has deviated from legislation. Therefore limiting financial compensation due to medical negligence can only be considered through legislation. Legislation will of course have to be rigorously tested against the Constitution.

The governments' political obsession to rectify injustices of the past made the central theme of dignity to all guaranteed by the Constitution obsolete. Some injustices will take longer to rectify than others. For instance, healthcare practitioners and providers often have a patient's life in their hands.

The respondents involved in this case study had their constitutional rights violated a total sixty-five times. Chapter 5 concludes by stating that some of the constitutional violations committed against the respondents could never be rectified or compensated. The right to dignity is not a socio-economic right. Arthur Chaskalson<sup>87</sup> said that:

As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, healthcare, food, water or in the case of persons unable to support themselves, without appropriate assistance?

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<sup>87</sup> 'Human Dignity as a Foundational Value of our Constitutional Order' (2000)16 SAJHR 193, 196.

This research therefore concludes that financial reward is the only form of tangible compensation that can partly compensate for intangible losses suffered by innocent, vulnerable and unsuspecting patients. This catastrophe is the result of the failure of a government to respect the supreme law of the land and this would not have happened had the focus been on the dignity of a patient in her moment of agony.

## Bibliography

### 1. Books

- 1.1 Carstens P & Pearmain D (2007) *Foundational Principles of South African Medical Law* Durban: Lexis Nexis.
- 1.2 I Currie & J de Waal (2005) *The Bill of Rights Handbook* Cape Town: Juta.
- 1.3 D Kleyn & F Viljoen (2010) *Beginners Guide for Law Students* Cape Town: Juta.
- 1.4 D McQuoid-Mason & M Dada (2011) *A-Z of Medical Law* Cape Town: Juta.
- 1.5 C Marshall & G Rossman (1995) *Designing Qualitative Research Thousand Oaks: SAGE Publications.*
- 1.6 J Neethling et al (2012) *Casebook on the Law of Delict* Cape Town: Juta.
- 1.7 J Neethling et al (2006) *Law of Delict* Durban: Lexis Nexis.
- 1.8 I Rautenbach & E Malherbe (2004) *Constitutional Law* Durban: Lexis Nexis.
- 1.9 J van der Walt & J Midgley (2005) *Principles of Delict* Durban: Lexis Nexis.
- 1.10 P Visser et al (2003) *Law of Damages* Cape Town: Juta.
- 1.11 South African Law Commission Discussion Paper 97: *Sentencing A Compensation Scheme for Victims of Crime in South Africa* Report July 2001.

### 2 Journal Articles.

- 2.1 W Oosthuizen & P Carstens "Re-evaluating medical malpractice: A patient safety approach" (2015) 3 *Journal of Contemporary Roman-Dutch Law* 380.
- 2.2 W Oosthuizen & P Carstens "Medical Malpractice: The extent, consequences and causes of the problem" (2015) 3 *Journal of Contemporary Roman- Dutch Law* 269.
- 2.3 JR Midgley 'The impact of the Constitution on the law of delict: *Carmichele v Minister of Safety and Security*' (2002) *South African Law Journal* 17.

- 2.4 M Pepper & M Slabbert “Is South Africa on the verge of a malpractice litigation storm?” (2011) 4 South African Journal of Bioethics and Law 29.
- 2.5 C Coetzee & P Carstens “Medical Malpractice and Compensation in South Africa’ (2011) 86 Chigaco-kent Law Review.
- 2.6 R Wilson et al “Patient safety in developing countries: retrospective estimation of scale and nature of harm to patients in hospital” (2012) 832 British Medical Journal.
- 2.7 A Labuschagne “Qualitative Research – Airy Fairy or Fundamental?” *The Qualitative Report* 100-103.
- 2.8 R Yin “The case study crisis: Some answers” (1981) Administrative Science Quarterly vol. 26.

### 3. Internet Articles.

- 3.1 <http://www.news24.com/Archives/City-Press/Capping-the-cost-of-negligence-20150429> (accessed 1 July 2016).
- 3.2 <http://ewn.co.za/2016/03/02/First-On-EWN-Motsoaledi-wants-medical-negligence-cases-resolved-without-lawyers> (accessed 1 July 2016).
- 3.3 <http://www.iol.co.za/news/politics/bid-to-cap-medical-malpractice-payouts-1813364> (accessed 1 July 2016).

### 4. Case citations.

- 4.1 *Lee v Schonberg* 1877 7 Buch 138.
- 4.2 *Kovalsky v Krige* 1910 20 CTR 822.
- 4.3 *Mitchell v Dixon* 1914 AD 519.
- 4.4 *Coppen v Impey* 1916 CPD 309.
- 4.5 *Van Wyk v Lewis* 1924 AD 438.
- 4.6 *Oslo Land Co Ltd v The Union Government* 1938 AD 584.
- 4.7 *R v Van Schoor* 1948 4 SA 349 (C).
- 4.8 *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 2 SA 254 (W).
- 4.9 *Kruger v Coetzee* 1966 2 SA 428 (A).

- 4.10 *Casely NO v Minister of Defence* 1973 1 SA 630 (A).
- 4.11 *Mouton v Die Mynwerkersunie* 1977 1 SA 119.
- 4.12 *Marine & Trade Insurance Co Ltd v Katz* NO 1979 4 SA 961 (A).
- 4.13 *Evans v Shield Insurance Co Ltd* 1980 2 SA 814 (A).
- 4.14 *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O).
- 4.15 *S v Makwanyane and Another* 1995 3 SA 391 (CC).
- 4.16 *Collins v Administrator, Cape* 1995 4 SA 73 (C).
- 4.17 *Christian Lawyers Association v Minister of Health and Others* 2005 1 SA 509 (T).
- 4.18 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).
- 4.19 *Minister of Safety and Security v Van Duivenboden* 2002 3 All SA 741 (SCA).
- 4.20 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).
- 4.21 *Kiewitz obo J v The Premier of the Western Cape Provincial Government* N.O 2015.
- 4.22 *AD and Another v The MEC for Health and Social Development, Western Cape Provincial Governemnt* 2016 ZAWCHC.