
# The *Nasciturus* Non-Fiction

## The Libby Gonen Story

## Contemporary Reflections on the Status of *Nascitural* Personhood in South African Law

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***By***
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# *DECLARATION*

I, Marc Schulman, declare that this dissertation is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Master of Laws by Dissertation at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Student Number

**31st March 2014**
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Date

In Loving Memory
of
Libby Gonen
02-04-1988

# *ACKNOWLEDGEMENTS*

I owe thanks to a variety of people, in no particular order of importance, who have contributed in time, advice, and guidance to the compilation of this dissertation. The seeds of this dissertation were first planted in early 2012 when I began researching this subject matter for an Independent Research Essay which I submitted to the University of the Witwatersrand, School of Law, in partial fulfilment of the requirements for an LLB degree. Prof Cathi Albertyn, from the WITS School of Law, emphasised at the outset of that process the importance of maintaining an academic distance when dealing with an emotional and controversial subject matter. I have kept this advice in the forefront of my mind throughout my research and writing journey and I am grateful to Prof Albertyn for imparting her wisdom to me.

I would like to thank my supervisor, Prof Wesahl Domingo, of the WITS School of Law, for her endless patience, guidance, and encouragement. Her constructive assistance and objective direction have been a source of motivation to me throughout the research and writing process. I owe special thanks to Camilla Pickles, from the University of Pretoria, School of Law, who acted as a co-supervisor on this project in her private capacity. Her detailed commentary on earlier drafts of this dissertation proved to be invaluable to me in coming to grips with some of the more complex issues surrounding the subject matter. Camilla shared her expert knowledge freely with me and encouraged me constantly through every phase of my research and writing expedition. I am eternally grateful to her for her generous assistance.

I would like to thank Prof Gerard Casey from the University College of Dublin for very kindly sending me an autographed copy of his book, *Born Alive – The Legal Status of the Unborn Child in England and the U.S.A*. This book was enormously helpful to me in the drafting of Chapter 4 – 'The Born Alive Rule'. Thank you to Prof Daniel Terris from Brandeis University in Boston Massachusetts for agreeing to provide me with a research assistant in the United States of America. My research assistant was Miriam Sievers from the University of Maryland, Carey School of Law. Miriam provided me with a great deal of research in the context of United States jurisprudence and I am grateful to her for her professional assistance.

I would like to thank Kerryn Campion from Next Entertainment for providing me with written permission to include *In The Womb* as a companion DVD to this dissertation. Thank you to Meir Gonen whose story was the catalyst to me probing the realms of *nascitural* existence. I thank him for sharing his story, opening up his heart, and for wanting to make a difference in the lives of those who are adversely affected by the impact of stillbirth in the context of alleged medical negligence and non-consensual *nascitural* destruction.

To my family and friends, without your tolerance, reassurance, encouragement, and faith in me and my abilities, I would not have been able to complete this process. My heartfelt gratitude and thanks goes to all of you.

Marc Schulman
*Johannesburg*
*March 2014*

# *NOTES & REFERENCING STYLE*

As far as possible the referencing guidelines of the South African Journal on Human Rights (SAJHR) have been followed. These have been deviated from only insofar as no referencing guidelines were available. Written permission was obtained from the Chair of the School of Law Postgraduate Studies Committee, Prof Pamela Andanda, to reference Amazon Kindle E-Books in the notes.[1] A style in line with the format of the SAJHR guidelines has been followed in this regard.

The notes in many parts of this dissertation are lengthy and detailed. This dissertation departs from the premise that the reader is not intimately familiar with the myriad of nuances attached to *nascitural* development and the social worlds that are implicated in this development. Detailed notes are therefore crucial in order to gently guide the reader through the various moral, legal and academic paradigms that are presented throughout this dissertation. Comprehensive and detailed explanatory and illustrative particulars have been provided in the notes where it was felt that these were essential.

Historical sections of the dissertation, especially those parts dealing with Roman law and Roman Dutch law, required meticulous and credible reasoning for the conclusions reached. The arguments that have been advanced in this dissertation have been bolstered and reinforced by solid, reliable, and well recognised academic and jurisprudential resources. Reference to sources for additional reading has also been provided in the notes for those readers who are intrigued by the subject matter and wish to undertake further reading. The subject matter presented in this dissertation represents relatively unchartered territory in the context of the South African legal landscape. Every effort has been made through the notes to ensure the reader's comfort in engagement with this subject matter.

[1] A copy of the e-mail discussions pertaining to the referencing style to be utilised for Amazon Kindle E-Books is available from the author upon request at: marc@odyssey88.com.

## *INTERNET LINKS*

Several internet resources have been referred to throughout this dissertation.[2] All internet links which have been provided and specified in the notes were active and fully functional as at the 19th of March 2014. An apology is extended to readers in advance should any of these internet links have become redundant since the 19th of March 2014.

## *WORD LIMIT*

According to the University of the Witwatersrand Standing Orders for Postgraduate Degrees and Diplomas (2011), '[A]n LLM dissertation must be between 35 000 and 50 000 words in length. It may exceed the maximum length if the Chair of the Postgraduate Studies Committee (acting after consultation with the supervisor) approves a request by the candidate to exceed this limit.'[3] The written permission of the Chair of the School of Law Postgraduate Studies Committee, Prof Pamela Andanda, was obtained on the 23rd of September 2013, to extend the word limit of this dissertation to 65 000 words.[4] The final number of words which make up this dissertation from Chapter 1 to Chapter 7 is 69 968 words.

[2] Refer to 'Additional Internet Resources' on page 140 of this dissertation.
[3] The WITS School of Law Standing Orders for Postgraduate Degrees and Diplomas (2011) is available for download from the Internet at: <http://www.wits.ac.za/files/6tbeh_857984001365373723.pdf>.
[4] A copy of this permission is available from the author upon request at: marc@odyssey88.com.

# *GLOSSARY OF TERMS & PHRASES*

**Note:** The words, terms, and phrases, which have been defined in this glossary have been repeated in notes throughout this dissertation for the reader's convenience. Many of the definitions contained in this glossary have been repeated intentionally, several times, in order for the reader to avoid the necessity of constantly having to refer back to the glossary for clarification or understanding.

**Maternal Intention** – This term refers to the intention of a pregnant woman as it relates to *nascitural* gestation i.e. whether a pregnant woman intends to complete a successful full term gestation with a live birth outcome or whether she intends to abort the *nasciturus* in the early stages of gestation as per the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. More specifically, maternal intention can be either positive or negative in relation to the *nascitural* outcome i.e. whether or not the *nasciturus* is destroyed or born. Maternal intention does *not* determine whether or not the *nasciturus* is a person *in the legal sense*. Maternal intention is but one of many factors which determines whether or not the *nasciturus* in fact *becomes* a legal subject.

***Nascitural* Personhood** – The concept of *nascitural* personhood recognises Dworkin's theory[1] which postulates the intrinsic value of human life. *Nascitural* personhood refers to the biological status of a *nasciturus in utero*, the undisputed fact that it is a recognisable living human organism in the early stages of gestation and a recognisable human being in the later stages of gestation. The recognition of *nascitural* personhood is the recognition of a form of human and moral personhood. It is important to note that in ancient societies the exact biological and scientific nature of the *nasciturus* was unknown but its intrinsic value was nevertheless recognised.

***Nascitural* Safeguards & Protections** – The use of this phrase is an attempt to steer clear of the more frequently used terms to describe the possible 'rights', 'interests', or 'entitlements', which the *nasciturus* may enjoy. *Nascitural* safeguards and protections imply an extrinsic bestowal of 'rights', 'interests', or 'entitlements'.

[1] R. Dworkin *Life's Dominion – An Argument About Abortion, Euthanasia, and Individual Freedom* (1994).

In other words, the *nasciturus* is protected by a third party such as the pregnant woman or someone else with a vested interest in safeguarding the *nasciturus*. On the other hand, the terms 'rights', 'interests', or 'entitlements' in isolation, imply an intrinsic entitlement by the *nasciturus* which is difficult to justify scientifically, biologically, philosophically or legally.

***Nasciturus*** – Hiemstra and Gonin's *Trilingual Legal Dictionary* defines a *nasciturus* as a 'child conceived but not yet born'.[2] The word '*nasciturus*' has been utilised throughout this dissertation to signify an *in uterine* foetus. There are two main reasons for the use of the word '*nasciturus*' instead of the word 'foetus'. First of all, the word '*nasciturus*' is in line with the title of this dissertation, and secondly, its use avoids emotive perceptions and interpretations. The word '*nasciturus*' is an impassive word which is neutral in its use and application. Wherever words other than '*nasciturus*' appear in this dissertation, it is either because of the use of a direct quotation or the use of empirical data where the words of the interviewee have been used verbatim. There may also be instances where other words are used in the context of Roman law discussions. In Chapter 2 – 'The Libby Gonen Story', which is the empirical component of this dissertation, the words 'foetus', 'infant' and 'baby' have been used specifically in various parts at the sole discretion of the interviewee.

**Negative Maternal Intention** – A pregnant woman who has negative maternal intention intends to abort the *nasciturus* in terms of the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. The 'negativity' aspect is in relation to the *nascitural* outcome only i.e. the fate of the *nasciturus*. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. The destruction of the *nasciturus* is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a negative outcome. Destruction generally serves as a negative outcome for the object of the destruction. Euthanasia or mercy killing where there is a living will, for example, could serve as exceptions to this general rule.

**Positive Maternal Intention** – A pregnant woman who has positive maternal intention intends to carry the *nasciturus* full term with the end result being a live birth. The 'positivity' aspect is in relation to the *nascitural* outcome only. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. Successful full term gestation and live birth is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a positive outcome.

[2] V.G. Hiemstra & H.L Gonin *Trilingual Legal Dictionary* 3rd ed (1992) 232.

Survival is generally considered to be a positive outcome for the object of such survival. Euthanasia or mercy killing where there is a living will, for example, could serve as exceptions to this general rule. It is acknowledged that regardless of the presence of positive maternal intention it is not always possible, for a multitude of unforeseen reasons that do not always hinge on criminality, that the pregnant woman will carry the *nasciturus* full term. Nevertheless, the *intention* to gestate full term with a live birth outcome is all that is required for the presence of positive maternal intention regardless of whether or not the intended outcome becomes an eventuality.

# *ABSTRACT*

The non-consensual destruction of a *nasciturus* is a disturbing societal phenomenon that negatively permeates the lived realities of pregnant women with positive maternal intention. These women choose to experience a full term gestation and they choose to give birth to a live and healthy infant. At some point during their gestation they are non-consensually deprived of their choices through active third party violence by commission or passive third party negligence by omission. These women have no legal recourse for their loss, because in South African law, the non-consensual destruction of a *nasciturus* is not a crime. The *nasciturus* is not recognised as a victim separate from the pregnant woman despite the manner in which the pregnant woman freely chooses to interpret her pregnancy. The consensual destruction of a *nasciturus* enjoys legal protection in South African law by virtue of the provisions contained in the Choice on Termination of Pregnancy Act 92 of 1996. The choice to terminate a pregnancy is therefore legally recognised in South African law, whereas the choice to continue a pregnancy is not legally recognised. Argument is advanced in this dissertation for the legal recognition of the choice to continue a pregnancy by criminalising non-consensual *nascitural* destruction through the creation of a Choice on Continuation of Pregnancy Act. Non-Consensual *nascitural* destruction occurs as a result of violence against pregnant women as well as in situations of medical negligence. Empirical data is provided to demonstrate how non-consensual *nascitural* destruction can occur in medical settings where negligence is suspected. The inherent human need to safeguard and protect the *nasciturus* has been in existence since time immemorial. Despite this need, in South African law, legal subjectivity, and the ability to be recognised as a separate victim of crime, remain contingent upon a live birth. Evidence suggests that the requirement of live birth in law developed as an evidentiary mechanism and not as a substantive rule of law. Its relevance in circumstances of non-consensual *nascitural* destruction is doubtful at best. The law in South Africa has failed to take cognisance of the psychosomatic dimensions of personhood and argument is advanced in favour of a nuanced and constitutionally sensitive approach to matters of moral as well as legal personhood. Authentic female autonomy and reproductive freedom requires a re-evaluation of the paradigms that surround *nascitural* safeguarding and protection, and a transformative approach to constitutional interpretation. The establishment of a legislative scheme to criminalise the non-consensual destruction of a *nasciturus* is proposed. Within this legislative scheme certain precautions and fortifications are suggested in order to avoid any potential erosion of the rights of pregnant women who have negative maternal intention. It is demonstrated that it is in fact possible for pregnant women with positive maternal intention and pregnant women with negative maternal intention to both enjoy legal protection without encroaching upon one another's constitutional rights to reproductive freedom, bodily autonomy and privacy. It is contended that achieving the aforementioned is the final barrier to authentic female reproductive freedom in South Africa.

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## Supplementary Documentation

# *CHAPTER 1*

# Brief Overview of the Research Paradigm

## 1.1 Introduction

This dissertation is not an attempt to undermine the existing legal protection enjoyed by pregnant women who have negative maternal intention.[1] The legal right to terminate a pregnancy must always be respected, protected, and recognised as an integral and important component of female reproductive autonomy, bodily integrity, and freedom of choice. This dissertation is also not an attempt to elevate the status of the *nasciturus*[2] beyond that which the pregnant woman with positive maternal intention[3] chooses. This dissertation represents a celebration of difference, the importance of authentic freedom of choice, and the ideal of creating a society in which all pregnant women, regardless of maternal intention,[4] enjoy legal protection and recognition of their varied interpretations of pregnant embodiment.

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[1] Negative Maternal Intention – A pregnant woman who has negative maternal intention intends to abort the *nasciturus* in terms of the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. The 'negativity' aspect is in relation to the *nascitural* outcome only i.e. the fate of the *nasciturus*. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. The destruction of the *nasciturus* is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a negative outcome. Destruction generally serves as a negative outcome for the object of the destruction. Euthanasia or mercy killing where there is a living will, for example, could serve as exceptions to this general rule.

[2] *Nasciturus* – Hiemstra and Gonin's *Trilingual Legal Dictionary* defines a *nasciturus* as a 'child conceived but not yet born' (V.G. Hiemstra & H.L Gonin *Trilingual Legal Dictionary* 3rd ed (1992) 232). The word '*nasciturus*' has been utilised throughout this dissertation to signify an *in uterine* foetus. There are two main reasons for the use of the word '*nasciturus*' instead of the word 'foetus'. First of all, the word '*nasciturus*' is in line with the title of this dissertation, and secondly, its use avoids emotive perceptions and interpretations. The word '*nasciturus*' is an impassive word which is neutral in its use and application. Wherever words other than '*nasciturus*' appear in this dissertation, it is either because of the use of a direct quotation or the use of empirical data where the words of the interviewee have been used verbatim. There may also be instances where other words are used in the context of Roman law discussions. In Chapter 2 – 'The Libby Gonen Story', which is the empirical component of this dissertation, the words 'foetus', 'infant' and 'baby' have been used specifically in various parts at the sole discretion of the interviewee.

[3] Positive Maternal Intention – A pregnant woman who has positive maternal intention intends to carry the *nasciturus* full term with the end result being a live birth. The 'positivity' aspect is in relation to the *nascitural* outcome only. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. Successful full term gestation and live birth is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a positive outcome. Survival is generally considered to be a positive outcome for the object of such survival. Euthanasia or mercy killing where there is a living will, for example, could serve as exceptions to this general rule. It is acknowledged that regardless of the presence of positive maternal intention it is not always possible, for a multitude of unforeseen reasons that do not always hinge on criminality, that the pregnant woman will carry the *nasciturus* full term. Nevertheless, the *intention* to gestate full term with a live birth outcome is all that is required for the presence of positive maternal intention regardless of whether or not the intended outcome becomes an eventuality.

[4] Maternal Intention – This term refers to the intention of a pregnant woman as it relates to *nascitural* gestation i.e. whether a pregnant woman intends to complete a successful full term gestation with a live birth outcome or

This dissertation argues for a pre-birth jurisprudence that promotes, protects, and respects authentic freedom of choice and provides the assurance and peace of mind that each unique construction of pregnant embodiment will count for something and will never be ignored by the law.[5]

## 1.2 Contextual Background to the Research

The precursor to this dissertation was an Independent Research Essay (IRE) completed by the present author in 2012 in partial fulfilment of the requirements for an LLB degree.[6] The primary focus area in the IRE was on non-consensual *nascitural* destruction in the context of alleged medical negligence which results in stillbirth. A pressing need was identified to explore the historical origins and contemporary relevance of safeguarding and protecting the *nasciturus* in the context of pregnant women who have positive maternal intention. As a result of the limited scope and focus of the IRE, the next logical step was to extend and build upon the initial investigation at LLM research level.

This dissertation is the product of this extended research and represents a detailed exposition of the variable gradients that pregnant embodiment encompasses. The behind the scenes account of *Van Heerden v Joubert*[7] in the context of alleged medical negligence which results in stillbirth, and *S v Mshumpa*[8] in the context of violence against pregnant women, are the two cases that most significantly demonstrate the need in South Africa for a pre-birth jurisprudence that endorses *nascitural* safeguarding and protection in circumstances where pregnant women have positive maternal intention. It is in the context of these two cases and the powerful messages which they have conveyed to society at large that this dissertation has come to life.[9]

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whether she intends to abort the *nasciturus* in the early stages of gestation as per the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. More specifically, maternal intention can be either positive or negative in relation to the *nascitural* outcome i.e. whether or not the *nasciturus* is destroyed or born. Maternal intention does *not* determine whether or not the *nasciturus* is a person *in the legal sense*. Maternal intention is but one of many factors which determines whether or not the *nasciturus* in fact *becomes* a legal subject.

[5] It is the interpretation and representation of all pregnancies which requires legal protection, not only those that are underscored by negative maternal intention.

[6] M. Schulman 'The *Nasciturus* Non-Fiction – *Van Heerden v Joubert* Revisited – The Libby Gonen Story – "I was a person!"' (2012) *Social Sciences Research Network*. Available for download at the following Web Address: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261847>.

[7] *Van Heerden v Joubert* 1994 (4) SA 793 (A). The behind the scenes account of the *Van Heerden* case is provided in Chapter 2 – 'The Libby Gonen Story' page 10.

[8] *S v Mshumpa* 2008 (1) SACR 126 (E).

[9] Both *Van Heerden* (note 7 above) and *Mshumpa* (note 8 above) convey a message that seriously undermines female constructions of pregnant embodiment, in the presence of positive maternal intention, and perpetuates a pre-birth jurisprudence that undervalues the existence of *nascitural* life.

## 1.3 Purpose & Significance of the Research

The purpose of this research is to create an awareness of the varied ways in which pregnancies and *nascitural* personhood[10] in the twenty first century are construed. A further purpose of this research is to put forward a valid and relevant set of reasons for the creation of a pre-birth jurisprudence and legislative framework that recognises the need to safeguard and protect the *nasciturus* in certain limited circumstances where its existence is underpinned by positive maternal intention. The law in South Africa is deficient insofar as it has failed to take cognisance of, or acknowledge, the need to safeguard and protect the *nasciturus* in these limited circumstances. There is a shortage of research in South Africa on pregnant embodiment and its broader moral, legal, and societal implications. This dissertation attempts to alleviate this shortage by making a contribution to the furtherance of the debate around potential *nascitural* safeguarding and protection.

## 1.4 The Research Questions

The predominant research question that underlies this dissertation is whether or not there is a rational and valid basis for valuing *nascitural* life. In order to address this predominant research question it was necessary to assess whether or not valid moral and legal needs exist which seek to safeguard and protect *nascitural* life in certain circumstances. These broader overarching enquiries necessitated the interrogation of a narrower subset of more focused questions:

1.4.1 What are the consequences of the *nasciturus* doctrine and the born alive rule on the contemporary need to safeguard and protect the *nasciturus*? Do these legal doctrines remain relevant in twenty first century South Africa?

1.4.2 Are the varied dimensions of moral as well as legal personhood taken into account by the law in South Africa? Is the manner in which the law in South Africa approaches legal personhood justifiable in an open and democratic society based on human dignity, equality and freedom?

[10] *Nascitural* Personhood – The concept of *nascitural* personhood recognises Dworkin's theory (R. Dworkin *Life's Dominion – An Argument About Abortion, Euthanasia, and Individual Freedom* (1994)) which postulates the intrinsic value of human life. *Nascitural* personhood refers to the biological status of a *nasciturus in utero*, the undisputed fact that it is a recognisable living human organism in the early stages of gestation and a recognisable human being in the later stages of gestation. The recognition of *nascitural* personhood is the recognition of a form of human and moral personhood. It is important to note that in ancient societies the exact biological and scientific nature of the *nasciturus* was unknown but its intrinsic value was nevertheless recognised.

1.4.3 Based on the history of the *nasciturus* in South African law, which legal mechanisms are best suited to address the need to safeguard and protect the *nasciturus* in cases of non-consensual destruction that are underpinned by positive maternal intention?

1.4.4 Is it possible for the Choice on Termination of Pregnancy Act 92 of 1996 to harmoniously co-exist with a Choice on Continuation of Pregnancy Act?

In line with the purpose of this research and the aforementioned research questions, one is compelled to ask what it is that creates the need for raising awareness of the diverse ways in which pregnancies are interpreted and understood. The answer to this question lies in the methods employed which result in non-consensual *nascitural* destruction. Violence against pregnant women and alleged medical negligence are the principal drivers of this destruction.

## 1.5 The Research Methodology

There are two main components to the research methodology that has been employed in the drafting of this dissertation. The first is the empirical component contained in Chapter 2 – 'The Libby Gonen Story'. The empirical data in this chapter was gathered through a series of interviews conducted with the second respondent in *Van Heerden v Joubert* (the interviewee).[11] These interviews were not recorded electronically. The answers to various questions that were posed by the present author to the interviewee were transcribed directly into Chapter 2 and were later edited with the guidance and assistance of the interviewee. Certain sections of Chapter 2 required legal analysis and critical legal evaluation. The analysis and evaluation undertaken was done so by the present author in conjunction with input and commentary from the interviewee.

The second component to the research methodology that has been utilised is desk top research. The approach to the desk top research was analytical in nature. The main sources that were consulted for the desk top research component were academic journal articles and related publications, books and textbooks, electronic books, chapters in books and textbooks, statistics and related research, and internet resources. The academic journal articles that were consulted proved to be the richest and most valuable source of critical legal evaluation in foreign jurisdictions. Case law from various foreign jurisdictions such as Australia, Canada, the United Kingdom and the United States of America was also consulted.

[11] *Van Heerden* (note 7 above).

Comparative evaluations of these foreign jurisdictions were undertaken against the backdrop of existing South African case law and jurisprudence. The purpose of these comparative evaluations has been to establish the extent to which foreign jurisprudential paradigms are capable of being imported into a South African context without jeopardising existing entrenched constitutional rights. In addition to an examination of case law across a broad spectrum, an examination of existing legislation, both local and foreign, has also been undertaken. In this regard, rules and regulations, as well as training manuals, were also consulted. The United Kingdom and the United States of America are the main focus of comparisons between South Africa and foreign jurisdictions.

There is also an audio visual component to this dissertation in the form of a companion digital versatile disk (DVD) which has been included in the front cover insert for the reader's convenience. This DVD provides an audio visual perspective of pregnant embodiment from the vantage point of the pregnant woman with positive maternal intention. The reader is guided in detail by brilliant visual effects through the full period of *nascitural* gestation and eventual live birth. This visual component is intended to complement the academic, theoretical, moral, and legal, aspects of this dissertation and aims to provide the reader with a holistic picture of pregnant embodiment and the social worlds which it inhabits, from the perspective of pregnant women with positive maternal intention.

## 1.6 Study Limitations & Difficulties Experienced

One of the most noteworthy study limitations experienced was the shortage of literature in a South African context which grapples with, analyses, and critically evaluates *nascitural* life and its contemporary moral and legal implications. There is no research in existence, to the best of the present author's knowledge, which deals specifically with the legal possibility of a dual choice[12] approach to *nascitural* personhood.

A further significant difficulty which has been experienced is the severe shortage of relevant South African case law. *Nascitural* personhood, life before birth, pregnant embodiment, and constructions of the social worlds that are implicated in the aforementioned, are not subjects that our courts in South Africa are inclined to engage with at any meaningful level. Pre-birth jurisprudence in South Africa is sparse and there is no focus on theories of personhood.

[12] A 'dual choice' approach, in the sense that all pregnant women should enjoy legal protection whether they choose to terminate their pregnancies or whether they choose to continue their pregnancies. At present the law in South Africa adopts, respects, and protects a choice approach in relation to termination of pregnancy only.

*Van Heerden*[13] and *Mshumpa*[14] are the only two reported South African cases, at present, which deal with *nascitural* personhood in a criminal context, where pregnant women with positive maternal intention have been non-consensually deprived of their choice to undergo a full term gestation with an anticipated live birth outcome. Other study limitations have included the rigid adherence of South African academics to the tenets of the *nasciturus* doctrine and the born alive rule, without any critical engagement in the legal textbooks. Limited research in a purely South African context has been undertaken to question the continued relevance of the *nasciturus* doctrine and the born alive rule. South African jurisprudence tends to lean towards an unquestioning adherence to the common law in this regard.

## 1.7 Scope of the Research

The scope of the research conducted has been limited to a personal study of pregnant embodiment and the social realities that are created based on positive maternal intention. This scope has been deviated from only insofar as it has been necessary to undertake historical evaluations of the impact of various legal doctrines on the aforementioned social realities. The research conducted does not extend to a study of international law and international human rights instruments, as it was felt that this would create too broad a spectrum within which to focus on the individual human dimensions of *nascitural* personhood. The bulk of the research conducted is limited to individual case studies, local and foreign case law, and legislative provisions at a domestic and foreign level only. The scope of this research is further limited to natural human gestation only. Artificial womb technology, ectogenesis,[15] and the implications of this technology on moral and legal personhood are only briefly touched upon in various sections and notes, without any attempt to enter into detailed discussions on the topic.

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[13] *Van Heerden* (note 7 above).
[14] *Mshumpa* (note 8 above).
[15] R.E. Allen (ed) *The Concise Oxford Dictionary of Current English* 8th ed (1990) 372, defines ectogenesis as 'the production of structures outside the organism.' Ectogenesis in the context of this dissertation refers to the development of a human *nasciturus* in an artificial environment such as a mechanical womb in a scientific or biological laboratory. See M. Sander-Staudt 'Of Machine Born? A Feminist Assessment of Ectogenesis and Artificial Wombs' in S. Gelfand & J.R. Shook (eds) *Ectogenesis – Artificial Womb Technology and the Future of Human Reproduction* (2006) 109, where it is stated by the author that '[e]ctogenesis poses the end to the fact that up to this point in history, all human life has been "of woman born." Scientists predict that within the next 30 years, artificial wombs will become a reality. If this technology is perfected the day could come when conception, gestation and birth is a controlled process regulated by machines in labs or hospitals, and womb transplants are as common as caesarian sections. Among other things this social development promises to significantly alter women's physical and social connections to pregnancy and birth… Ectogenesis is a word that many dictionaries omit, reflecting that this concept is yet to be fully defined.'

## 1.8 Structure of the Dissertation

This dissertation consists of five substantive chapters, an introductory chapter, and a concluding chapter. There are seven chapters in total, moving from a broad theoretical base in Chapters 3 and 4 to a more nuanced and individuated structure in Chapters 5 and 6. Chapter 2 is the empirical component of this dissertation. Chapters 1 and 7 serve as the introduction and conclusion respectively. Broad theoretical structures are critically evaluated in each chapter and conclusions reached are further analysed and expounded upon in the following chapters. Each chapter has been broken down into significant main headings followed by appropriate sub-headings that probe relevant aspects drawn from the body of the main headings. The notes in each chapter constitute an important part of the overall structure of the dissertation and provide the reader with detailed explanations and sources of additional reading. The way in which this dissertation has been structured aims to be as user friendly to the reader as possible.

## 1.9 Chapter Overview & Outline of the Research

What follows is a succinct overview of each chapter and what it aims to achieve:

### *1.9.1 Chapter 1 – Brief Overview of the Research Paradigm*

The purpose of this chapter has been to contextualise the research that has been conducted. A brief overview of the purpose and significance of the research has been provided. Concise research questions have been advanced and the methodology that has been employed to provide answers to these questions has been explained. Study limitations together with difficulties which have been experienced have also been highlighted. The scope and structure of the dissertation has been explained in order to provide the reader with an organisational framework going forward.

### *1.9.2 Chapter 2 – The Libby Gonen Story*

The empirical component of this dissertation is contained in Chapter 2, which aims to provide a behind the scenes account of *Van Heerden v Joubert*,[16] together with a critical analysis of the legal proceedings and jurisprudential landscape within which this case unfolded in the late 1980's and the earlier part of the 1990's.

[16] *Van Heerden* (note 7 above).

The primary purpose of Chapter 2 is to demonstrate that it is not only through violence against pregnant women that a *nasciturus* can be non-consensually destroyed. The non-consensual destruction of a *nasciturus* can also take place when alleged medical negligence results in stillbirth. The emotional aspects of non-consensual *nascitural* destruction are touched upon in this chapter and a vivid portrait is painted of the heartache and trauma that accompanies non-consensual *nascitural* destruction. The shortcomings of the law in South Africa in this regard are introduced in Chapter 2.

### *1.9.3 Chapter 3 – The Nasciturus Doctrine*

Chapter 3 examines the extent to which *nascitural* safeguards and protections[17] have been sought in a historical context. The primary focus of this chapter is on the often cited *nasciturus* doctrine. The *nasciturus* doctrine is critically analysed by delving into detailed excerpts from the Roman law Digest. Contemporary interpretations and applications of the *nasciturus* doctrine are canvassed in an attempt to interrogate the continued relevance of the narrow application of the doctrine. It is demonstrated that the manner in which the doctrine is understood requires a revised approach in twenty first century South Africa.

### *1.9.4 Chapter 4 – The Born Alive Rule*

This chapter provides an in-depth examination of the common law born alive rule and sets out to prove that its contemporary application and relevance is problematic at best. The treatment of the born alive rule in the United States of America and the United Kingdom is examined. The ultimate goal of this chapter is to question and probe the legitimacy of the continued existence of the born alive rule in South Africa in the context of non-consensual *nascitural* destruction.

### *1.9.5 Chapter 5 – Theories of Personhood*

The way in which the legal person has been constructed in South African law is the main focus of this chapter. The concepts of organic and psychosomatic personhood are introduced and explored in this chapter.

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[17] *Nascitural* Safeguards & Protections – The use of this phrase is an attempt to steer clear of the more frequently used terms to describe the possible 'rights', 'interests', or 'entitlements', which the *nasciturus* may enjoy. *Nascitural* safeguards and protections imply an extrinsic bestowal of 'rights', 'interests', or 'entitlements'. In other words, the *nasciturus* is protected by a third party such as the pregnant woman or someone else with a vested interest in safeguarding the *nasciturus*. On the other hand, the terms 'rights', 'interests', or 'entitlements' in isolation, imply an intrinsic entitlement by the *nasciturus* which is difficult to justify scientifically, biologically, philosophically or legally.

The extent to which the law in South Africa has taken cognisance of each of these dimensions of personhood is questioned. The depth and breadth of personhood from a moral as well as a legal standpoint is examined in detail in Chapter 5.

### *1.9.6 Chapter 6 – Choice on Continuation of Pregnancy*

Chapter 6 undertakes an examination of the concept of freedom of choice in a constitutional democracy and its impact on the social and private worlds of pregnant women who have positive maternal intention. This chapter aims to demonstrate that the choice to continue a pregnancy is a deeply personal choice that impacts on the lives of pregnant women with positive maternal intention on many levels. The concept of human dignity as constituting a fundamental component of the freedom to choose is also examined. Argument is advanced for the development of a pre-birth jurisprudence that recognises freedom of choice across all spheres of pregnant embodiment. A Choice on Continuation of Pregnancy Act is proposed to address the need for authentic reproductive freedom in South Africa.

### *1.9.7 Chapter 7 – Concluding Remarks*

Chapter 7 serves as the conclusion to this dissertation. The *nasciturus* as an entity worthy of safeguarding and protection is summarised, reframing the debate concerning live birth is discussed, and positive maternal intention as the primary defining factor in situations of determining and evaluating the concept of *nascitural* personhood is reiterated. The importance of authentic reproductive freedom in South Africa is restated. The dissertation ends off with a brief overview of the continuing phenomenon of non-consensual *nascitural* destruction in society.

# *CHAPTER 2*

# The Libby Gonen Story

## An Empirical, Behind the Scenes Account, of *Van Heerden v Joubert*[1]

### 2.1 Disclaimer & Non-Liability Notice

The opinions, thoughts, allegations, sentiments, and beliefs put forward in this chapter are entirely the opinions, thoughts, allegations, sentiments, and beliefs of the interviewee, Mr Meir Gonen, Libby's father (Second Respondent in *Van Heerden v Joubert* 1994 (4) SA 793 (A)). The opinions, thoughts, allegations, sentiments, and beliefs conveyed in this chapter in no way whatsoever represent the opinions, thoughts, allegations, sentiments, or beliefs of the author, the University of the Witwatersrand School of Law, or the University of the Witwatersrand Johannesburg, unless expressly indicated to the contrary in the body of this chapter. The opinions, thoughts, allegations, sentiments, and beliefs conveyed in this chapter in no way whatsoever reflect the official policy or position of any hospital, medical facility, medical council, insurance company, or judicial institution. The legal analysis set forth in this chapter is that of the author, based solely on the information provided by the interviewee. Examples within such legal analysis are examples only. Assumptions made within any legal analysis are not reflective of the position of the University of the Witwatersrand School of Law or the University of the Witwatersrand Johannesburg. The legal analysis and commentary provided in this chapter has not been drafted or compiled to be specific to any particular individual's needs and is further not intended to provide any legal or other professional advice in respect of any similar situations. The factual information contained in this chapter has been gathered from empirical data that was collected by the author and does not purport to contain all possible information available regarding the *Van Heerden* case. Every effort has been made to compile this chapter in a manner that is as accurate, truthful, and authentic, to the interviewee's recollections as possible. Neither the author, the University of the Witwatersrand School of Law, or the University of the Witwatersrand Johannesburg, shall be liable or have any responsibility whatsoever to any person or entity whatsoever, regarding any loss or damage of any nature whatsoever, incurred, or alleged to have been incurred, directly or indirectly, by the information contained in this chapter.

[1] *Van Heerden v Joubert* 1994 (4) SA 793 (A).

## 2.2 Chapter Objectives & Guidelines

This chapter is not intended to be theoretical in nature in the sense that it represents an exhaustive exposition of the relevant law and legal doctrines. This chapter 'does not fall within the positivist view of legal academia.'[2] It is an empirical, factual, and at times, emotional account of a lengthy legal process.[3] The primary aim of this chapter is to tell a story, a previously untold story,[4] of two parents anticipating the birth of their third daughter. This chapter is further intended to highlight the need for legal recognition of non-consensual *nascitural* destruction in the context of alleged medical negligence and stillbirth. A chronological account of events is provided from the day of Libby's stillbirth on the 2nd of April 1988 to the day that judgment was finally handed down by the then Appellate Division (AD) on the 19th of August 1994. This chapter concludes with an interesting and thought provoking account of the legal setting and jurisprudential landscape in which judgment was handed down by the AD in 1994, followed by some of the interviewee's reflections and thoughts on the legal process as it unfolded over the years.

Non-consensual *nascitural* destruction is not only the result of violence against pregnant women as in the case of *Mshumpa*.[5] It can also occur in medical settings where negligence causes the destruction of the *nasciturus*. Libby's father describes the grief of a stillbirth as unlike any other form of grief that he has experienced. For him, as in the case of many other parents of a stillborn infant, the months of planning, anticipation, and the drama of labour, all magnify the shocking disbelief of giving birth to an infant bearing no signs of life.[6]

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[2] I am indebted to my supervisor, Prof Wesahl Domingo, for raising this pertinent point with me. Although this chapter is not strictly academic in nature, it is academic nevertheless, in that it makes a positive contribution to the general body of knowledge in the field of *nascitural* safeguards and protections and female reproductive freedom and autonomy rights.

[3] See R.J. Coombe 'Critical Cultural Legal Studies' (1998) 10 *Yale J of Law & the Humanities* 478, 479, where the author states: 'Rather than stress isolated decisions, statutes, or treatises, we need to attend to the social life of law's textuality and the legal life of cultural forms as it is expressed in the specific practices of socially situated subjects… Law is constitutive of social realities, generating positivities as well as prohibitions, legitimations, and oppositions to the subjects and objects it recognizes.' I am once again indebted to Prof Domingo for drawing my attention to this article.

[4] The 'Libby Gonen Story' was first revealed by the author in an Independent Research Essay that was submitted for examination at the University of the Witwatersrand School of Law on the 12th of October 2012 in partial fulfilment of the requirements for an LLB degree. The essay is titled 'The *Nasciturus* Non-Fiction – *Van Heerden v Joubert* Revisited – The Libby Gonen Story – "I was a Person!"' The essay is available for download on the Social Sciences Research Network at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261847>. The primary motivation for retelling this story is to create academic awareness of the hidden tragedy behind *Van Heerden*. Libby's story also contains many interesting anecdotes and asides that bring her story to life.

[5] *S v Mshumpa* 2008 (1) SACR 126 (E).

[6] See Z. Mullan & R. Horton 'Bringing Stillbirths out of the Shadows' (2011) 377 *The Lancet's Stillbirths Series* 1291.

To an expectant mother and father, a stillbirth is no less a tragedy than the death of a newborn infant or child.[7] When a stillbirth occurs as a result of medical negligence, whether alleged or confirmed, the shock, grief, and lack of understanding, becomes even more acute, overwhelming, and disturbing. The frustration of the *nasciturus* not being recognised as a victim, and not being able to obtain legal redress for the tremendous loss that has been suffered, compounds these emotions to the point of utter despair.[8]

## 2.3 Libby's Stillbirth – The 2nd of April 1988[9]

On the 2nd of April 1988, a baby girl named Libby Gonen, weighing approximately three kilograms, was stillborn at the Flora Clinic (the clinic) in Florida, on the West Rand of Johannesburg, under the care and supervision of Dr Patricia Hawke (Hawke) who was a practicing and registered obstetrician and gynaecologist at the time. Whether or not Libby was born alive and was therefore a legal person was to become the subject of immense controversy over the next six years, culminating in the handing down of judgment in the AD by Grosskopf JA on the 19th of August 1994 in *Van Heerden v Joubert*.[10]

The expectant parents were eagerly anticipating the birth of their third daughter. They arrived at the clinic at 06:00 on the morning of the 2nd of April 1988. At approximately 07:30, Libby's mother, who had by this time already been placed in a delivery room, was induced by Hawke to bring on labour. Hawke had also attended to the birth of the couple's previous daughter by induction on a predetermined date, and as far as the couple were aware, this was a standard and common practice. Libby's mother was attached to various machines to monitor the vital signs of both mother and child. An intravenous drip was inserted into Libby's mother's arm to administer various medications in liquid form. An epidural was also administered at this point so that Libby's mother would not feel any pain.

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[7] Mullan & Horton (note 6 above) 1292; These sentiments were also expressed several times by Libby's father during the course of the interviews.

[8] All the thoughts that were expressed and the statements that were made in this section are extracted from the interviews conducted with Libby's father, unless expressly indicated otherwise.

[9] The Libby Gonen Story is based on five independent interviews which were conducted by the author with the Second Respondent (Libby's father) in *Van Heerden v Joubert* 1994 (4) SA 793 (A), on the 14th of April 2012, the 12th of May 2012, the 14th of July 2012, the 11th of August 2012 and the 22nd of September 2012 respectively. There are also various references in this chapter to the judgment of Grosskopf JA in *Van Heerden v Joubert*. All times and dates provided by the interviewee are approximate and have been indicated to the best of the interviewee's knowledge, in hindsight and reliance on more than twenty five years of memory. The interviewee was also recently given the opportunity to re-read Libby's story, and any new recollections on the part of the interviewee, which have subsequently come to the fore, have been included in this chapter and its contents reflect the recollections of the interviewee as at the 21st day of March 2014.

[10] *Van Heerden* (note 1 above).

Two midwives, a woman by the name of Inamarie Van Heerden (Van Heerden) and a man by the name of Mark Boshoff (Boshoff) were attending to Libby and her mother, together with Hawke and an additional regular hospital nurse. Libby's father was present at all times in the delivery room as he had been for the births of his previous two children. The 2nd of April 1988 was the Saturday before the Easter Sunday of that year. The clinic was functioning on skeleton staff and it was noticeably quieter. At approximately 08:30, Hawke left the clinic to do her Easter shopping while Libby and her mother remained in the care of Van Heerden, Boshoff and the hospital nurse. Hawke had successfully delivered the couple's previous child and they had no reason at all to be apprehensive or suspicious about Hawke's actions.

At approximately 10:15, Libby's mother began to feel uncomfortable and Van Heerden and Boshoff noticed that Libby's heart rate was becoming elevated and as a result she was going into stress. Hawke was immediately contacted on her pager to no avail. It subsequently emerged that Hawke was in a busy shopping centre and she did not hear her pager because of the high noise levels. The grave concern on the faces of the two midwives was clearly evident to the couple and they became concerned for the first time. At 10:30 the midwives paged Hawke for the second time and again there was no response. Libby's mother was becoming even more uncomfortable and Libby was by this time under severe stress and moving around excessively in her mother's womb.[11] Hawke was paged for the third time at 10:45 and for a third time there was no response. The midwives made Libby's mother as comfortable as they could under the circumstances and anxiously awaited a response from Hawke. Libby's mother was already dilated sufficiently to indicate that Libby was well on her way to making an appearance. Approximately thirty minutes later, at 11:15, Hawke finally telephoned the clinic to speak with the midwives. This was close to an hour after the first attempt was made by the midwives to contact Hawke. Hawke said that she was on her way, and she finally arrived at the clinic at around 12:00.

Upon Hawke's arrival, she entered the delivery room carrying approximately ten plastic shopping bags, around five in each hand. She laid the shopping bags down in a corner of the delivery room and proceeded to attend to Libby and her mother. Hawke apologised for not hearing her pager and started to administer approximately six different medications to Libby's mother, including tranquilising drugs and various other liquid substances administered intravenously to gain control of the situation.

[11] This issue was subsequently brought to the attention of the couple by Dr Gliksman (who will be introduced later in this chapter) as per the printout from the heart rate monitor that was attached to Libby.

Hawke then remained at the clinic for roughly twenty minutes while monitoring the situation, which eventually appeared to be stable and under control. Hawke nonchalantly stated that everything was 'fine' and that the couple should not concern themselves. Hawke then asked to please be excused so that she could 'run home to put her ice-cream in the freezer before it melted.' Hawke left the clinic just before 12:30, leaving Libby and her parents with the two midwives and the nurse, once again.

At approximately 13:30, Libby's mother began to feel uncomfortable once more. Libby's heart rate was again elevated and she was, as before, moving around excessively in her mother's womb. By this stage, Libby's mother was already fully dilated and Libby's head was beginning to emerge. The midwives were extremely concerned. At approximately 13:45, the midwives paged Hawke for the fourth time that day. Hawke telephoned the clinic several minutes later and instructed the midwives to prepare for Libby's delivery. Hawke told the midwives that she would be at the clinic 'shortly'.

At 14:15 Hawke finally arrived at the clinic. She immediately began to carry out delivery procedures and all indications were that Libby was alive, albeit under severe stress only minutes before her stillbirth. Libby was stillborn at 14:25 after having been in her mother's birth canal for almost an hour. Hawke, together with the midwives, immediately took Libby to the other side of the delivery room where they appeared to be desperately attending to Libby. It later transpired that they were in fact attempting to resuscitate Libby without the help of any paediatricians.

Libby's parents had no idea what was going on, until Libby's mother realised that something was wrong, because her baby wasn't crying. Ten or fifteen minutes later, the couple were informed by Hawke that Libby was stillborn. Hawke appeared to be visibly disturbed, but not to the extent of Libby's parents and the two midwives. Libby was handed to her mother where her lifeless body lay cradled in her mother's arms. The couple were devastated and in a state of severe shock. The distraught parents left the clinic on or about Sunday the 3rd of April 1988 and returned home. Libby's mother particularly, was understandably hysterical and inconsolable and could not bear remaining in the clinic any longer. The entire experience was completely surreal for the couple, who never imagined in their wildest dreams that they would ever find themselves in the midst of such and emotionally devastating situation. Their hearts were broken over the loss of their little girl and the manner in which she had to suffer.

## 2.4 The Birth of a Legal Battle of Mammoth Proportion

In the days and weeks following Libby's death, the couple came to the dreadful realisation that the circumstances surrounding Libby's death were completely untenable, and it became clear to them, that in their opinion, Hawke had been grossly negligent in the way in which she had handled Libby's situation. It was apparent to the couple that Hawke had continually delayed Libby's birth, for what they describe, as her own selfish convenience, firstly by misleading the couple into believing that planned births by induction were commonplace,[12] and secondly, by not delivering Libby at 12:00, by caesarean section, when she returned from the shopping centre.

Within weeks of Libby's death, Libby's father made contact with a partner at Edward Nathan & Friedland Inc Attorneys (now Edward Nathan Sonnenbergs), a woman by the name of Petra Visser (Visser), to discuss the matter. Visser said that she would have to research the case extensively because it posed a series of exceptionally intricate and complicated legal questions that required a thorough analysis. Visser spent many weeks comprehensively researching all the legal issues that she felt were relevant. Initially a complaint was laid on behalf of Libby's parents by Visser at the Medical and Dental Council (MDC). After several weeks of behind the scenes deliberation, the MDC returned its verdict, stating that they accepted Hawke's explanation and that the matter was closed. No reasons were given to Libby's parents for the MDC's decision. The couple appealed the MDC's decision and requested that they hold an open enquiry where Hawke and various other key witnesses could be questioned. The couple's request was denied outright, once again without the furnishing of any reasons.[13]

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[12] It must be noted that up until this point, the couple were labouring under the misapprehension that inductions were performed for convenience. They did not realise that inductions should only be performed for medical reasons. An induction is recommended when the risks of waiting for labour to commence naturally are higher than the risks associated with the induction procedure. Labour is generally induced for the following reasons: When the pregnant woman is one to two weeks past her due date, when the pregnant woman's water breaks and labour does not commence naturally, when medical testing indicates that the placenta is not functioning properly, when there is not sufficient amniotic fluid in the womb, when the *nasciturus* isn't thriving or growing as it should, any other serious medical conditions that threaten the life of the pregnant woman or the *nasciturus*, or when the pregnant woman has previously had a stillbirth. An induction may also be recommended for logistical reasons, for example, if the pregnant woman lives far away from the hospital or has rapid labours. Induction is not medically indicated for trivial reasons. The information provided in this note was sourced online at: <http://www.babycenter.com/0_inducing-labor_173.bc#articlesection2>.

[13] Today we have the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as The Promotion of Access to Information Act 2 of 2000 (PAIA). It is doubtful whether a refusal to furnish reasons for such a decision would stand today based on our contemporary jurisprudence. Libby's father believes that the MDC's refusal to furnish reasons could today be challenged on various grounds. An analysis of these grounds falls beyond the scope of what this chapter aims to achieve.

Visser eventually presented the couple with two options. Firstly, a civil claim which would not achieve the desired result of punishing Hawke for her alleged gross negligence. The second option was to lay a criminal charge of culpable homicide against Hawke. The couple abandoned the idea of a civil claim and decided to pursue the criminal route. Visser advised the couple in advance that they were venturing into unchartered territory and that they should tread with caution. Libby's parents nevertheless went ahead and proceeded to lay a criminal charge of culpable homicide against Hawke. The charge was laid within a few months of Libby's death at the Roodepoort Police Station,[14] situated on the West Rand of Johannesburg.

Visser was not at all enthusiastic about the criminal avenue that Libby's parents wished to pursue and the couple subsequently decided to appoint a new attorney of record. The couple terminated Visser's mandate and appointed Peter Soller (Soller) as their new attorney of record. Soller was regarded as a crusader in the field of medical negligence in the late 1980's and he was frequently featured in the media, particularly in newspapers and on the radio. Soller was appointed by the couple to drive the police investigation into the circumstances surrounding Libby's death. Soller relentlessly pushed the police to hold an inquest into Libby's death. The police did not know how to deal with the matter as they had never before been faced with a situation where a stillbirth[15] had to be investigated.

The purpose of an inquest is to investigate cases of deaths or alleged deaths apparently occurring from other than natural causes.[16] If it had not been for Soller, the investigation would have gone nowhere. Libby's father has repeatedly stated that Soller was 'unbelievable' and made every conceivable effort to assist the couple.

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[14] The Flora Clinic falls within the Roodepoort police precinct.

[15] According to S1 of the Births and Deaths Registration Act 51 of 1992 a stillbirth is the birth of a child of at least 26 weeks gestational age which shows no signs of life after birth. See D. McQuoid-Mason & M. Dada *A-Z of Nursing Law* 2nd ed (2011) 270; The definition of stillbirth recommended by the World Health Organisation (WHO) for international comparison is 'a baby born with no signs of life at or after 28 weeks' gestation'. According to the WHO, in 2009 there were over 2.6 million stillbirths globally which translates to more than 8200 deaths a day. 'The majority of these deaths occur in developing countries. Ninety-eight percent occurred in low and middle-income countries. At least half of all stillbirths occur in the intrapartum period [occurring during childbirth or during delivery], representing the greatest time of risk. Intrapartum deaths account for 45% of third-trimester stillbirths globally but only 14% of third-trimester deaths in developed countries… The stillbirth rate in sub-Saharan Africa is approximately 10 times that of developed countries (28 vs. 3 per 1000 births)… Worldwide, the stillbirth rate has declined by 14% from 1995 to 2009, representing an annual decline of 1.1% per year. The improvement in stillbirth rate is less in developing countries. The rate of decline in the African region is 0.7% compared to 3.8% in the Western Pacific region… The major causes of stillbirth include: childbirth complications, maternal infections in pregnancy, maternal disorders (especially hypertension and diabetes), fetal growth restriction and congenital abnormalities.' The information provided in this note was sourced online at: <http://www.who.int/maternal_child_adolescent/epidemiology/stillbirth/en/>. See further J.F. Froen & J. Cacciatore et al 'Stillbirths: Why They Matter' (2011) 377 *The Lancet's Stillbirths Series*.

[16] See the Preamble to the Inquests Act 58 of 1959.

Soller was a maverick and did not stick to conventional and accepted forms of legal analysis. He was willing to explore new avenues and was not afraid to challenge his opponents as well as the Judges in court. The aforementioned was important to Libby's father because he felt that Libby's case needed a fresh and aggressive approach.

## 2.5 Preparing for the Inquest – January to November 1989

At the outset it must be noted that in terms of the various insurance companies involved in relation to the clinic, Hawke and the midwives, nobody was permitted to discuss 'The Libby Gonen Story'. The case had already attracted a substantial amount of media attention in the newspapers and Libby's father was interviewed on the radio. As part of preparing for the inquest, Libby's parents consulted with Dr Dawid Gliksman (Gliksman), a registered obstetrician and gynaecologist. One of the main points of contention with regard to Libby's death was an issue to do with the paper printout from the heart rate monitor that was attached to Libby's mother in order to monitor Libby's heartbeat. The heart rate monitor was continuously printing out Libby's heart rate on a roll of paper, similar to an echocardiogram (ECG) machine, from the moment that Libby's mother was connected to it. Copies of these paper-roll printouts together with all other medical records pertaining to Libby's birth were obtained from the clinic.

At around 12:20 on the 2nd of April 1988, Libby's heart rate did not register on the heart rate monitor for several minutes. The monitor then picked up a lower heart rate which lasted until 14:10, when again no heart rate was registered. Gliksman's view was that Libby died at around 14:10. Hawke's contention was that Libby died at around 12:20 when the monitor stopped recording for the first time. Hawke stated that when the monitor resumed recording, it was picking up the heart rate of Libby's mother, as the heart rate was lower than a few minutes previously, and an expectant mother's heart rate is always lower than that of her unborn child. While it is true that the heart rate of an expectant mother is always lower than that of her unborn child,[17] it was Gliksman's assertion that the heart rate was lower when the monitor resumed recording a few minutes later because of all the palliative and sedative medication that Hawke had administered to Libby's mother between 12:00 and 12:10. Gliksman was convinced that this medication had a similar effect on Libby.

[17] See K. Lweesy et al 'Extraction of Fetal Heart Rate and Fetal Heart Rate Variability from Mother's ECG Signal' (2009) 54 *World Academy of Science, Engineering and Technology* 704, where the authors state that '[t]he heart rate of the fetus is usually higher than that of the mother.'

When Hawke was questioned at the inquest, purely in relation to whether or not Libby was in her opinion born dead or alive, about the lack of recording between 14:10 and 14:25 when Libby was born, she replied that when a birth is imminent or underway, it is common for the heart rate monitor to lose contact with the baby's heartbeat (in this case the mother's heartbeat according to Hawke). Gliksman did not agree with Hawke's conclusions and stated that regardless of whether the heart rate monitor was recording Libby's heartbeat or her mother's, Libby should have been delivered by caesarean section no later than 12:00 when Hawke arrived back at the clinic from the shopping centre. According to Gliksman, Libby should definitely have been delivered alive before Hawke rushed home to attend to her melting ice-cream.

Libby's father is of the firm belief that Libby died at 14:10. He remembers clearly that the midwives were listening to Libby's heartbeat manually with a 'stethoscope-like device' every twenty to thirty minutes.[18] Libby's father contends that if the midwives never heard Libby's heartbeat between 12:20 and 14:10, then it is possible that they were hiding the fact that Libby had died earlier than 14:10. However, there were never any substantive or investigative questions asked at the inquest in relation to the actual circumstances surrounding Libby's death and no other formal investigation was ever undertaken. Nobody will ever know what really happened, but what is certain is that on the face of it, Libby was alive fifteen minutes before she was born.[19] Furthermore, Gliksman expressed grave and serious concern at the nature of some of the medications that were administered to Libby's mother between 12:00 and 12:10 on the 2nd of April 1988 by Hawke.

Gliksman stated categorically that many of the medications that were administered would have directly affected Libby by increasing her stress level. Vital issues such as the aforementioned could never be meaningfully investigated because the primary motivation for the inquest as a whole was to establish whether or not Libby was born alive and not what the circumstances were leading up to her death.

[18] Probably some sort of a 'Doppler' device which is used in maternity and obstetrical settings to listen to the heartbeat of the *nasciturus*.

[19] Hawke was only ever questioned in relation to whether or not, in her opinion, Libby was born alive. Hawke was never submitted to intense cross examination in relation to the circumstances leading up to Libby's death. The legitimacy of the medication regime that was ordered by Hawke could not be questioned. The credibility of the medical decisions made by Hawke on that fateful day could not be interrogated. Hawke's alleged unprofessional conduct could not be scrutinised. Libby's parents were never given the opportunity to submit Hawke to any form of cross examination whatsoever, in relation to any other issue, and therefore Gliksman was also not permitted to give any evidence at the inquest.

A substantive inquest never took place in Libby's case because South African law does not make allowance for it in the context of an investigation into the death of a stillborn *nasciturus*. There was therefore no practical legal mechanism available whereby it could be conclusively established that Hawke was in fact responsible for Libby's stillbirth as alleged.

The involvement of Van Heerden and Boshoff also became the subject of intense scrutiny in the period leading up to the inquest. Libby's parents at no stage whatsoever intended to involve the midwives or the clinic in the charge that had been levelled against Hawke. As preparation for the inquest progressed, it was brought to the attention of Libby's parents that in terms of the Scope of Practice of a Registered Midwife (SPRM), a midwife is required to prevent complications relating to labour,[20] which implies that in the event of a midwife observing severe foetal stress,[21] the midwife would be required to execute the birth.

Libby's father believes that if Libby was born in a government hospital, she would in all probability have been alive today because the midwives would have executed Libby's birth at around 10:30 to 11:00 on the 2nd of April 1988 and would not have had to wait for a doctor. In private hospitals however, there are monetary issues involving delivery charges in the context of childbirth and various other ancillary financial issues which midwives are required to adhere to.[22] The aforementioned is not in relation to the SPRM but refers to internal clinic policies and procedures as well as doctor protocol.[23] There are also issues in relation to general deference to medical chains of command in private settings that must be taken into account.[24] In a private clinic, midwives are therefore required to wait for doctors to execute births regardless of foetal stress levels.[25]

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[20] S3(e) of the South African Nursing Council Regulations Relating to the Scope of Practice of Persons who are Registered or Enrolled under the Nursing Act, 1978 R2598 Chapter 3 of 30 November 1984 – The Scope of Practice of a Registered Midwife.

[21] Libby's mother feeling uncomfortable, Libby moving around excessively in her mother's womb, and the issues surrounding Libby's heart rate, were all indications of stress. Foetal distress during labour generally signals the need for an emergency caesarean section and time is of the essence. See L. Regan *Your Pregnancy Week by Week – What to Expect from Conception to Birth* (2010) 291, where the author states that 'travelling through the birth canal is the most dangerous journey a human being ever embarks upon.' An extensive amount of time and effort is therefore expended on monitoring the progress of labour and evaluating the ability of the unborn *nasciturus* to cope with the labour. All the signs were there that Libby was struggling to cope with the intensity of labour and yet it took an inordinate amount of time, according to Libby's parents, for Hawke to attend to her delivery. When Hawke finally did turn her undivided attention to Libby, it was too late.

[22] Dr Gliksman furnished the couple and their legal representatives with this information.

[23] Ibid.

[24] Ibid.

[25] This information was revealed during various investigations which took place during preparation for the inquest. This information was also furnished to the couple and their legal representatives by Dr Gliksman. The receipt of this information was very disturbing to Libby's parents.

## 2.6 The Commencement of the Inquest – The 6th of December 1989

The inquest into Libby's stillbirth commenced on the 6th of December 1989,[26] four months shy of two years after Libby died, under the supervision of Magistrate J.J. Joubert (Joubert), who was later to become the First Respondent in *Van Heerden v Joubert*.[27] From the time that the inquest commenced, Soller went up against an intimidating barrage of approximately ten attorneys and advocates representing Hawke, Van Heerden, Boshoff and the clinic.

At the start of the inquest Hawke raised an objection to the inquest.[28] Counsel for Hawke stated that in terms of the Inquests Act 58 of 1959 an inquest could only be held into the death of a 'person' and since Libby was stillborn, she was not a 'person' as contemplated by the Inquests Act.[29] Hawke's submission was concurred in by the legal teams of Van Heerden, Boshoff and the clinic. Initially Joubert accepted the objection on the basis that Libby was not a 'person'. After acceptance of the objection, Joubert as well as counsel for Hawke, Van Heerden, Boshoff and the clinic started to pack up. At this point Soller stood up and pronounced that 'with respect, whether or not Libby was a "person" is not the only question that needed to be dealt with' and the inquest could therefore not be discontinued. Joubert and the various counsel ceased packing up and stared at Soller. Soller then raised three issues.

Firstly, he stated that the inquest court was not aware of the circumstances surrounding Libby's death and therefore they could not factually state whether or not Libby was stillborn. There was evidence to prove that there was oxygen in Libby's lungs. The autopsy that was undertaken on Libby on Tuesday the 5th of April 1988 revealed that she was a perfectly healthy, full-term, baby girl with oxygen in her lungs. Hawke was of the opinion that the oxygen in Libby's lungs was due to the resuscitation and not due to the fact that she had taken her first breath. The official cause of death according to the autopsy report was inhalation of amniotic fluid. In other words, Libby drowned. It was discovered that Libby had amniotic fluid in her lungs, which means that she must have tried to breathe during delivery and couldn't because the delivery process had allegedly been unreasonably and negligently delayed by Hawke.[30]

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[26] *Van Heerden* (note 1 above) 793 F--G.
[27] *Van Heerden* (note 1 above).
[28] *Van Heerden* (note 1 above) 793 G--H.
[29] Ibid. See further Chapter 5 – 'Theories of Personhood', where the interaction of social and legal personhood is discussed and arguments are formulated in favour of values that should inform legal personhood. The way in which legal personhood is constructed in South African law is also critically analysed and assessed in Chapter 5.
[30] The allegations of unreasonable delay during the delivery process make sense in this context.

Secondly, Soller stated that he was in possession of a death certificate and that anything which was dead, must have been alive at some point in time beforehand. Thirdly, Soller stated that inquests could also be held in terms of public interest and that the Libby Gonen story had received an enormous amount of media attention, both in the newspapers as well as on the radio, and that there was extensive public interest in the outcome of the investigation.[31] After listening intently to Soller's arguments and submissions, Joubert overruled the objection. Counsel for Hawke immediately instituted review proceedings in the then Transvaal Provincial Division (TPD) to set aside Joubert's ruling.

## 2.7 The First High Court Review Proceeding – The 4th of December 1990

The matter came before Zulman J who refused the application and remitted it back to Joubert to enable him to determine as a matter of fact whether or not Libby was dead or alive at the time of her birth.[32] Joubert would then have to act in accordance with his findings. Zulman J was not prepared to deal with the issues surrounding the definition of a 'person' at all. According to Libby's father, Zulman appeared to ignore and evade the concerns that were raised by both sides in this regard and refused to engage with them. [33]

## 2.8 The Resumed Inquest – The 26th of August 1991

When the inquest resumed on the 26th of August 1991, Joubert found on the evidence and testimony presented, that Libby had indeed been stillborn. Joubert once again attempted to terminate the inquest into the circumstances surrounding Libby's death in light of the fact that Libby was stillborn and therefore she did not fall within the definition of a 'person' as contemplated by the Inquests Act.

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[31] Libby's father was interviewed by Chris Gibbons on Talk Radio 702 where he had an opportunity to talk about the inquest into Libby's death. People who heard the story expressed their outrage and indignation and also expressed their sadness. Many people offered prayers and well wishes for the family. The family's immediate community also offered their support and condolences. Neighbours, friends, and members of the broader Jewish community offered their support as well. Hawke was constantly harassed by reporters and photographers and the Libby Gonen story featured prominently in the media during this time. After every court appearance Hawke would be chased down the road by a barrage of reporters and photographers who were making her life increasingly uncomfortable. The television program Carte Blanche, were also very interested in Libby's story but wouldn't deal with it because the matter was *sub judice*. The media frenzy that was generated at the time was largely influenced by a public outcry at the injustice of the legal system as it pertains to difficult and heart wrenching situations such as the Libby Gonen story. Twenty years later South Africa would witness a similar public outcry in *S v Mshumpa* (note 5 above) where a ten thousand strong march took place in support of Melissa Shelver whose unborn child was shot and killed whilst *in utero* at 38 weeks gestation. See H. Kruuse 'Fetal "Rights"? The Need for a Unified Approach to the Fetus in the Context of Feticide' (2009) 72 *THRHR* 127.

[32] *Van Heerden* (note 1 above) 793 H--I.

[33] See the arguments put forward in Chapter 5 – 'Theories of Personhood', pages 93--100, around the reluctance of the judiciary to engage with the concept of what it entails to be a human person.

Soller again stood up and raised the same three issues that he had raised on the 6th of December 1989 at the commencement of the inquest. In addition, Soller raised two further points, insisting that because the Inquests Act did not specifically define a 'person' and further that because the then Births, Marriages and Deaths Registration Act 81 of 1963 (BMDRA) specifically dealt with the issue of 'viability' in relation to a foetus, the inquest should proceed.[34] Soller was attempting to link the fact that a death certificate was required for a 'viable' foetus to the notion of 'death' in the Inquests Act. If no value should be attached to a viable foetus why should its death necessitate the issuing of a death certificate? Joubert again reversed his original decision and ordered that the inquest should continue.

Van Heerden and Boshoff then raised the same objections as to jurisdiction which had previously been raised by Hawke.[35] Van Heerden and Boshoff contended that once it was found that Libby was stillborn, Joubert had no jurisdiction to continue with the inquest as the enquiry would not concern the death of a 'person'.[36] The reason why it was Van Heerden and Boshoff who raised the objection and not Hawke in this instance was because they had a different insurance company to Hawke and the insurance companies had made an agreement with one another in advance with regard to the costs of the litigation.[37] The agreement made by the insurance companies was that they would share the costs amongst themselves and therefore it was not Hawke who objected this time. If there had been a third objection at a later stage, the clinic's insurance company would in all probability have covered the costs related to that particular objection. On the 27th of August 1991, Joubert decided that notwithstanding his finding that Libby was stillborn, he did in fact have jurisdiction to proceed with the inquest.[38] Van Heerden and Boshoff then instituted review proceedings in the TPD to once again set aside Joubert's decision.

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[34] S1(xxii) of the BMDRA stated that 'viable', in relation to a child, means that it had at least six months of *in uterine* existence. It should also be noted that in contemporary legal terms, 'viability' refers to the ability of the *nasciturus* to survive independently outside its mother's uterus. Although no minimum period of gestation can be determined for viability, there is a recognised period of *nascitural* development that makes it capable of independent life (e.g. maturation of the lungs). See McQuoid-Mason & Dada (note 15 above) 132; Note further that according to McQuoid and Dada, '[a]lthough there is no legal definition of viability for the foetus, the Births and Deaths Registration Act, 1992 (Act 51 of 1992) states that a stillbirth refers to a foetus of at least 26 weeks gestational age (S1), *which implies that this is the minimum age of viability* [emphasis added]. However, in clinical obstetric practice, a foetus of 20 weeks or more, or weighing 500g or more, or with crown-heel length of 25cm or more, may be regarded as viable. This has been recognised in the Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996) which provides greater protection for the foetus after 20 weeks gestational age by restricting the grounds for a legal termination of pregnancy.'

[35] *Van Heerden* (note 1 above) 793 I.

[36] *Van Heerden* (note 1 above) 794 A--B.

[37] Libby's father was informed of this by his attorney and counsel and it appeared that insurance companies underwriting medical personnel routinely operated in this manner.

[38] *Van Heerden* (note 1 above) 794 A--B.

## 2.9 The Second High Court Review Proceeding – The 23rd of April 1992

The matter was heard on the 23rd of April 1992 by Heyns J (Heyns). The advocate who represented Libby's parents in this matter was Percy Yutar (Yutar).[39] The main point of contention in argument before Heyns was that even if one accepts that a *nasciturus* is a 'person' for the purposes of the Inquests Act and thereafter finds that a doctor was negligent in causing the death of the *nasciturus*, this conclusion would lead nowhere because there would be no basis upon which to charge the doctor for either murder or culpable homicide because these crimes do not include the killing of a *nasciturus*.[40] Heyns's main concern was that even if Hawke was found to be responsible for Libby's death, the matter could go no further, because there would be no criminal charge that could be brought against Hawke.

Heyns reserved his judgment for the following morning. When Heyns handed down judgment the next day he refused the application with costs and ordered Joubert to continue with the inquest until its final determination.[41] Heyns gave no reasons for his decision in open court. It was however clearly apparent to Libby's father, and others that he had spoken to in court, that Heyns had a change of heart overnight. After judgment was handed down, Yutar went to visit Heyns in his chambers to find out what had made him change his mind. Heyns allegedly, openly admitted to Yutar, that the previous evening his wife had observed him agonising over the issues raised in court that day. When she enquired as to the nature of the proceedings, Heyns allegedly informed her of the facts of the case, whereupon his wife allegedly instructed him to find a way to have Libby's death investigated, no matter what. The following morning, Heyns J ordered that the inquest into Libby's death should continue. Van Heerden and Boshoff then appealed Heyns's decision and thus was born *Van Heerden v Joubert* 1994 (4) SA 793 (A).

## 2.10 The Appellate Division Hearing – The 13th of May 1994

Libby's father admits in hindsight that he never expected much after witnessing the events as they unfolded in the AD on the 13th of May 1994. It was clear that the bench was comprised of a 'panel of conservatives'. Libby's father recalls that Mohamed AJA was the only member of the bench who attempted to ask questions that leaned towards a more progressive stance.

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[39] Percy Yutar was the first Jewish Attorney General of South Africa. Yutar was also the Chief Prosecutor in Nelson Mandela's Rivonia Trial. See N. Mandela *Long Walk to Freedom* (1995) 417--419.

[40] Various arguments are advanced in later chapters of this dissertation which call for the criminalisation of non-consensual *nascitural* destruction.

[41] *Van Heerden* (note 1 above) 794 B--C.

Bearing in mind what Mohamed AJA was up against, his attempts were short-lived. Libby's father feels that the two main issues which were badly neglected in the hearing were the issues of what constitutes a 'viable' foetus and the fact that medical doctors literally have a 'licence to kill' because they are better off leaving a 'problematic' foetus in its mother's womb as opposed to delivering it, because the moment the foetus takes its first breath, the doctors become liable for possible negligence if the infant dies shortly after birth.

During the hearing the bench became entangled in issues surrounding the then Abortion and Sterilisation Act 2 of 1975 and did not afford counsel for the Respondents any significant opportunity to engage substantively with the issues at hand relating to viability and medical negligence. Libby's father contends that counsel for the Respondents were also exceedingly weak and subservient and failed to present forceful and compelling arguments. Overall, the hearing did not go well for Libby's parents.

## 2.11 The Appellate Division Judgment – The 19th of August 1994

Libby's parents endured a lengthy legal battle which lasted for a period of six years and four months up until judgment was finally handed down in the AD on the 19th of August 1994. Judgment was delivered by Grosskopf JA and was concurred in by Hefer JA, Harms JA, Nicholas AJA and Mohamed AJA. The main question that the AD had to decide in *Van Heerden*[42] was whether or not the Inquests Act contemplated an investigation into the death of a stillborn infant and this question in turn hinged on whether or not a *nasciturus* was a 'person'. In order to answer these questions the court relied exclusively on *Voet*, who is an ancient Roman Dutch authority, dictionaries, and various other basic canons of interpretation.[43] The court failed to link the concept of 'human life' or a 'living human organism' with the concept of being a 'human person' in the real sense. Grosskopf JA simply stated that there was no suggestion in any dictionary meanings that the word 'person' can also connote a stillborn child, an unborn child, a viable unborn child, an unborn human being, or a living *nasciturus*.[44]

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[42] *Van Heerden* (note 1 above).

[43] *Van Heerden* (note 1 above) 796 A--J, 797 A--J. A detailed discussion relating to the born alive rule, which determines legal subjectivity or legal personhood in South African law, is provided in Chapter 4 – 'The Born Alive Rule' page 45. The rigid adherence of our courts to this doctrine is also critically evaluated in Chapter 4.

[44] *Van Heerden* (note 1 above) 796 F--G. Dictionaries do not rely on legal norms and standards when the definitions contained within them are formulated. Dictionaries rely on social realities, well established facts, and normative principles to formulate their definitions. If the court was looking to a dictionary for the definition of a person then it should have also looked to a broader organic and psychosomatic context to attempt to understand

Libby's father contends that one cannot say on the one hand that a foetus in the womb of its mother is alive, which it obviously is, and then on the other hand state that it is not a human 'person'. To Libby's father and mother, and most other couples who intend to give birth to a live and healthy child, a human being is a human person, particularly in the context of a gestating *nasciturus*. Several questions come to the fore for these parents in this context. If the *nasciturus* is not a developing human person, a living human being in its mother's womb, then what is it? How does one analyse and rationally justify that a *nasciturus* in the womb of its mother is not an evolving human person for legal as well as moral and theoretical purposes in the twenty first century?[45]

*Van Heerden*[46] is primarily an extremely frustrating case, purely from the point of view that it did not delve into any of the applicable facts and circumstances leading up to Libby's death, because the court was unduly preoccupied with arguments surrounding Libby's status.[47] Was she a person or not? The court stated emphatically that the Inquests Act does not make provision for an inquest into the death of a stillborn infant and it was not for the court to extend the application of the Act beyond the ordinary meaning of the word 'person'.[48] The bottom line with *Van Heerden*[49] is that the actual circumstances surrounding Libby's death could never be investigated to any meaningful extent, because in South African law, when an expectant mother gives birth to a stillborn infant, the parents are unable to investigate the infant's death if they suspect doctor negligence or intentional killing because the Inquests Act only makes allowance for an investigation into the death of a 'person'. If the focus was on 'death' instead of 'being a person', perhaps doctors and medical staff in obstetrical, paediatric, and gynaecological settings, would think twice before taking chances where unborn *nascituri* are concerned. Libby's father contends that if there was a threat of investigation and possible criminal liability hanging over their heads, they would exercise extreme caution when presiding over lengthy delivery procedures and prenatal complications.

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the substantive application of the word 'person' together with the influence that social constructions of lived realities have on legal paradigms, and it failed to do so.

[45] According to Libby's father, these questions were at the forefront for Libby's parents, throughout the protracted legal proceedings.

[46] *Van Heerden* (note 1 above).

[47] *Van Heerden* (note 1 above) was not only an extremely frustrating case for Libby's parents. It is also an extremely frustrating case for anyone who has been privy to the background information contained in this chapter. It is strongly felt, generally, that Libby's story should have been heard. A clearer understanding of the rationale behind this case could have yielded a very different result. The *Van Heerden* case would for all intents and purposes also be an extremely frustrating case for any parents who find themselves in a situation similar to Libby's in the future.

[48] *Van Heerden* (note 1 above) 798 G--H.

[49] *Van Heerden* (note 1 above).

Libby's father feels that had extreme caution been exercised, as he feels it should have been, on the day that Libby bas stillborn, she would have been born alive.

## 2.12 A Retrospective Analysis of the Prevailing Jurisprudential Landscape[50]

The *Van Heerden*[51] court failed to take cognisance of the fact that the Interim Constitution[52] had come into force on the 27th of April 1994.[53] The provisions of the Inquests Act would possibly have yielded a completely different interpretation had they been construed in light of constitutional norms and standards. S9(1) of the Interim Constitution stated that every 'person' shall have the right to life and the definition of a 'person' could have been investigated in light of the provisions of the Interim Constitution and not using *Voet*, other Roman Dutch authorities, and various dictionaries.[54] The fact that the Inquests Act was interpreted according to the dictates of ordinary cannons of construction and not the Interim Constitution is also questionable.[55] *Van Heerden*[56] was heard in the AD on the 13th of May 1994 while the Interim Constitution had been in force for 17 days. Judgment was handed down by the AD on the 19th of August 1994, more than three and a half months after the coming into force of the Interim Constitution and nobody raised concerns that perhaps the Interim Constitution should be consulted, not counsel for either of the parties, not the parties themselves and none of the judges.[57] The High Courts in South Africa have a wide discretion to determine their own processes[58] and the *Van Heerden* bench were therefore fully entitled to raise the issue of the Interim Constitution of their own volition and they failed to do so.

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[50] This section has been included with the consent of the interviewee and is based on observations made by the author.
[51] *Van Heerden* (note 1 above).
[52] The Interim Constitution Act 200 of 1993; The document is available for viewing and download online at: <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/> .
[53] I. Currie & J. de Waal *The New Constitutional & Administrative Law* Vol 1 (2001) 64.
[54] *Van Heerden* (note 1 above) 796 A--J, 797 A--J.
[55] Libby's father feels strongly that acknowledgment by the court of our new Constitutional dispensation, and the Bill of Rights which it embraces, would have provided new avenues of interpretive approach.
[56] *Van Heerden* (note 1 above).
[57] S4(1) of the Interim Constitution stated that: 'This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.'
[58] See C. Theophilopoulos & C.M. van Heerden et al *Fundamental Principles of Civil Procedure* 2nd ed (2012) 57--58, where the authors state that 'a High Court is not constrained by the Rules of Court. Therefore, if a matter is not prescribed by the High Court Rules, the High Court may, in so far as the rules are deficient, grant orders which further the administration of justice. [See *Ncoweni v Bezuidenhout* 1927 CPD 130. See also *Osman v Jhavary and Others* 1971 (2) SA 630 (O)]… [T]he Supreme Court of Appeal has held that it will deviate from the ordinary rules of procedure only in exceptional circumstances and where the requirements of justice so demand and, even then, the court will attempt to deviate from existing procedure as little as possible.' [See *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469 G--J]. Notwithstanding the exceptional circumstances surrounding Libby's death, the coming into force of South Africa's first democratic Constitution should surely qualify as 'exceptional circumstances' that require, if not demand, the court's consideration.

*S v Makwanyane*[59] (*Makwanyane* AD) was heard in the AD on the 3rd of May 1994, ten days before *Van Heerden.*[60] In *Makwanyane* AD the court avoided interpreting the provisions of the Interim Constitution and referred the matter to the Constitutional Court to be decided.[61] The Interim Constitution provided specifically that the AD 'shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.'[62] The Interim Constitution provided further that the Constitutional Court would have jurisdiction as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Interim Constitution, including any alleged violation or threatened violation of any fundamental right entrenched in the Bill of Rights.[63] Further, the Constitutional Court was the court of final instance in respect of any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of the Interim Constitution.[64] Whether or not any matter fell within the exclusive jurisdiction of the Constitutional Court was also to be determined by the Constitutional Court.[65] S2(1) of the Inquests Act could therefore have been interpreted in light of S9 (Life) and S10 (Human Dignity) of the Interim Constitution and it was not.

Libby's father contends that in retrospect, it is highly questionable whether the AD had jurisdiction to hear Libby's case in the first place. The irony lies in the fact that *Van Heerden*[66] in the context of the right to life of a *nasciturus* could have been the first case heard by the Constitutional Court and not *S v Makwanyane*[67] in the context of the right to life of two murderers. Nevertheless, *Makwanyane*[68] offers some valuable insight into Libby's case, both from a jurisprudential perspective as well as from a philosophical perspective. Libby's father asks: 'Is it rational that two callous murderers have the right to life but not an innocent, perfectly normal in all respects, 38 week old *nasciturus*, on the verge of being born alive?'

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[59] *S v Makwanyane* 1994 (3) SA 868 (A).
[60] *Van Heerden* (note 1 above).
[61] *Makwanyane* (note 59 above) 870 A--C.
[62] S101(5) of the Interim Constitution (note 52 above).
[63] S98(2)(a) of the Interim Constitution (note 52 above).
[64] S98(2)(c) of the Interim Constitution (note 52 above).
[65] S98(2)(f) of the Interim Constitution (note 52 above).
[66] *Van Heerden* (note 1 above).
[67] *S v Makwanyane* 1995 (3) SA 391 (CC); For details regarding the first hearing to take place at the newly formed Constitutional Court, see: <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#hearing>. On the 15th of February 1995, 11 Justices of the Constitutional Court took their seats to hear *S v Makwanyane*. *Makwanyane* raised the question of the constitutionality of the death penalty. The core issue in *Makwanyane* was what bearing the Interim Constitution had on the death penalty.
[68] *Makwanyane* (note 67 above).

Grosskopf JA contended in *Van Heerden*[69] that resolving the question of when life begins is a difficult one.[70] The reader is left to contemplate the validity of this statement earnestly in light of the evidence and research presented in this dissertation.

## 2.13 Reflections & Thoughts – Looking Back Over the Legal Proceedings

Libby's parents were not present when judgment was handed down in the AD on the 19th of August 1994. They were informed of the outcome by their attorney who at the time was Roy Krawitz. Soller had become unaffordable as the process up until the AD stage had cost Libby's father in excess of R250,000-00 (Two Hundred and Fifty Thousand Rand). This equates to approximately R3,500-000-00 (Three Million Five Hundred Thousand Rand) in today's terms.[71] The couple were completely disillusioned with the entire legal process as it had unfolded, and for them, there was no sense of justice.

> 'I have shed more tears for my daughter in the last twenty months, reliving the events of twenty five years ago, than I have in my entire life, up until the day that Libby passed away. Twenty five years later, it is still very difficult to comprehend what happened. Whenever I go to the cemetery for other people's funerals I always visit Libby's grave and every time I fall to pieces. I can't get over what happened and I don't think that anybody could. What I would really like to have is closure and I don't think that I will until I can understand what happened that day and until someone pays the price. I think that I also can't have closure because the law did not recognise my daughter as a "person". How can you have closure if your child was perfectly healthy, normal and fully alive before she was born and then died under such shocking circumstances? Libby was good enough to have a legal person's death certificate, yet her tragic death could not even be investigated so that the alleged perpetrators could stand trial. We held her, we buried her, and we fought for a long time to have the truth exposed. We fought for over six years and we failed because the law did not recognise Libby as a "person". What was she then? An alien? A dog? If I was given an opportunity to find out what really happened that day, perhaps I would have had closure. If the law in South Africa changed, perhaps I could have closure. We, in South Africa, allegedly have one of the most advanced Constitutions in the world, protecting more human rights than most other countries; however, the life of an unborn child is totally ignored. As things stand now there is a state of legal limbo, animals have more rights than unborn children. I am not an emotional person, but this is incomprehensible.'[72]

For more than twenty five years, Libby's parents have had to live with the knowledge that their daughter died because of someone else's alleged carelessness.

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[69] *Van Heerden* (note 1 above).
[70] *Van Heerden* (note 1 above) 798 F--G; This question should have been decided by the Constitutional Court.
[71] This calculation was made by Libby's father who is a chartered accountant. The calculation was arrived at by applying the Consumer Price Index (CPI) over a 25 year period.
[72] Meir Gonen – Libby's Father – The Second Respondent in *Van Heerden v Joubert* (note 1 above).

Libby's father feels that it is patently clear that Libby's stillbirth boils down to nothing less than an appalling, traumatic, and wholly ill-fated event due exclusively to doctor negligence and gross medical misconduct by all parties concerned. Living with this knowledge on a daily basis, and knowing that nothing can be done about it, is terribly distressing for Libby's father. The Libby Gonen story is one of needless bereavement and grief. Most importantly, it is a story of injustice and inequality in the face of unrelenting and archaic jurisprudential reasoning, which explicitly and categorically no longer holds value of any kind in a constitutional democracy governed by values such as the rule of law, freedom of choice, and most significantly, that of human dignity. There are countless stories of stillbirths in South Africa that have never been told, stories of extreme suffering and anguish.[73] Situations such as Libby's are clearly unacceptable and intolerable from both a legal as well as a moral perspective.

After reading the Libby Gonen story one is left with the uneasy feeling that the law should somehow recognise the value inherent in *nascitural* existence and *in uterine* life. Chapter 3 goes on to demonstrate that the law has in fact developed an appreciation of *in uterine* life over the centuries in varying contexts through its application of the *nasciturus* doctrine. The need for *nascitural* safeguarding and protection is examined in historical perspective in Chapter 3 in an attempt to understand the underlying logic of valuing unborn life. The theme which constantly emerges throughout Chapter 3 is that in order to accrue any tangible legal value, the *nasciturus* must be born alive. Chapter 4 examines the contemporary relevance and legal integrity of the common law born alive rule which determines that live birth equates to human legal subjectivity. The analysis in Chapter 4 raises several important considerations surrounding moral and legal personhood. A thorough analysis of both the psychosomatic as well as the organic dimensions of moral and legal personhood takes place in Chapter 5. Ways in which to implement a legal framework that sufficiently safeguards and protects the *nasciturus* to the satisfaction of a pregnant woman with positive maternal intention[74] will be dealt with in Chapter 6, which is the final substantive chapter of this dissertation.

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[73] See A. Baleta 'South Africa Takes Steps to Reduce Perinatal Mortality' (2011) 377 *The Lancet's Stillbirths Series* 1303. It is clear from Balata's article that there is an unacceptably high stillbirth rate in the public sector. See further the Saving Babies 2010--2011: Eighth Report on Perinatal Care in South Africa, available online at: <http://www.ppip.co.za/wp-content/uploads/Saving-Babies-2010-2011.pdf >. According to the Saving Babies Report, there were 32,178 stillbirths in South Africa between 1 January 2010 and 31 December 2011.

[74] Positive Maternal Intention – A pregnant woman who has positive maternal intention intends to carry the *nasciturus* full term with the end result being a live birth. The 'positivity' aspect is in relation to the *nascitural* outcome only. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. Successful full term gestation and live birth is for all intents and purposes, from the perspective of the

Non-consensual *nascitural* destruction, in whatever context or form it arises, raises important questions around the moral and legal significance and status of *in uterine* life. In the chapters that follow an attempt is made to shed some light on the complex and intricate answers to some of these questions. Every attempt has been made to draw a clear 'line in the sand' which separates the rights of pregnant women who have negative maternal intention from the rights being argued for on behalf of women who have positive maternal intention.

The constitutionally entrenched legal rights of women who have negative maternal intention[75] should always be respected and protected and treated with the dignity which they deserve.[76] Personal choices attached to bodily autonomy, reproductive freedom, and privacy should always be appreciated and legally secured. This is all that pregnant women with positive maternal intention are asking for, no more and no less.

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*nasciturus*, if such a perspective is in fact justifiably possible, a positive outcome. Survival is generally considered to be a positive outcome for the object of such survival. Euthanasia or mercy killing where there is a living will for example could serve as exceptions to this general rule. It is acknowledged that regardless of the presence of positive maternal intention it is not always possible, for a multitude of unforeseen reasons that do not always hinge on criminality, that the pregnant woman may not be able to carry the *nasciturus* full term. Nevertheless, the *intention* to gestate full term with a live birth outcome is all that is required for the presence of positive maternal intention regardless of whether or not the intended outcome becomes an eventuality.

[75] Negative Maternal Intention – A pregnant woman who has negative maternal intention intends to abort the *nasciturus* in terms of the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. The 'negativity' aspect is in relation to the *nascitural* outcome only i.e. the fate of the *nasciturus*. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. The destruction of the *nasciturus* is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a negative outcome. Destruction generally serves as a negative outcome for the object of the destruction. Euthanasia or mercy killing where there is a living will for example could serve as exceptions to this general rule.

[76] See J. Baumgardner *Abortion & Life* Kindle ed (2011); S. Wicklund *This Common Secret – My Journey as an Abortion Doctor* Kindle ed (2007); A. Faúndes & J. S. Barzelatto *The Human Drama of Abortion – A Global Search for Consensus* Kindle ed (2011); D. Boonin *A Defense of Abortion* Kindle ed (2002); A. Marzilli *Fetal Rights – Point / Counterpoint* Kindle ed (2005).

# *CHAPTER 3*

# The *Nasciturus* Doctrine

## 3.1 Chapter Objectives & Guidelines

This chapter aims to demonstrate that the *nasciturus* has been a subject of consideration and an object of protection for centuries because of an innate recognition of its intrinsic worth and the potentiality of its *ex utero* existence.[1] A *nasciturus* is defined as a 'child conceived but not yet born'[2] and it is primarily associated with a doctrine which enables it to accrue benefits *in utero* which it is later able to enjoy, provided it is born alive. The *nasciturus* doctrine is either interpreted as a fiction or as a rule. There are clear differences between these two interpretations and these differences will be explored in this chapter. Arguments will be developed in support of the contention that the *nasciturus* doctrine requires a deeper and more meaningful understanding in the context of the manner in which it has developed and been applied over the centuries. By closely examining the two interpretations of the *nasciturus* doctrine, it will be demonstrated that the doctrine should be understood from a broadly liberal perspective as opposed to a legally conservative narrow perspective, which provides no palpable devices for the advancement of the doctrine's jurisprudential value. The true significance and enduring worth of the *nasciturus* doctrine lies in its appreciation of *in uterine* life.

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[1] R. Dworkin *Life's Dominion – An Argument About Abortion, Euthanasia, and Individual Freedom* (1994) 84; Dworkin's concept of 'intrinsic worth' stems from the *undeniable* recognition that '[t]he life of a single human organism commands respect and protection… no matter in what form or shape, *because of the complex creative investment it represents* [emphasis added] and because of our wonder at the divine or *evolutionary* [emphasis added] processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come [the potentiality of *ex utero* existence is demonstrated here] to absorb and continue hundreds of generations of cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, [we can recognise this if we each consider our own life's work thus far] and which is therefore the most powerful and inevitable source of empathy and communion we have *with every other creature* [emphasis added] who faces the same frightening challenge. [This is an extremely important aspect of the intrinsic worth that we recognise. It could be that most people feel exactly this in relation to non-consensual *nascitural* destruction]. The horror we feel in the wilful destruction of a human life reflects our shared inarticulate sense of the intrinsic importance of each of these dimensions of investment.' Dworkin's concept of 'intrinsic worth' should not be understood as the intrinsic worth of the *nasciturus* as an entity in and of itself but rather as the intrinsic worth that we as *homo sapiens* recognise *within ourselves*. We in turn project this intrinsic worth onto the *nasciturus* by instinctively recognising its potentiality. Thus, we are not looking at the *nasciturus* and saying – "We recognise your intrinsic worth as a human being." We look at the *nasciturus* and we say – "We recognise the intrinsic worth of our own individual existences and we identify the *potentiality* of this existence within you." The *nasciturus* is therefore not vested with intrinsic worth in and of itself and through its own awareness.

[2] V.G. Hiemstra & H.L. Gonin *Trilingual Legal Dictionary* 3rd ed (1992) 232.

The *nasciturus* doctrine will further be examined in historical context together with an analysis of excerpts from the Digest of the Emperor Justinian.[3] A contemporary interpretation and application of the *nasciturus* doctrine will be undertaken in order to arrive at an informed opinion of the doctrine as a whole. The proposed development of a *nasciturus* non-fiction will serve to conclude this chapter.

## 3.2 Introduction to the Concept of the *Nasciturus* Doctrine

The most important distinction between a fictional interpretation of the *nasciturus* doctrine and an interpretation as a rule is that as a fiction, legal subjectivity is not antedated to the moments[4] of conception.[5] When interpreted as a rule, legal subjectivity is said to commence from the moments of conception.[6] The *nasciturus* doctrine is mostly perceived in the context of a fiction. The fictional aspect of the *nasciturus* doctrine should be understood against the backdrop of retrospectivity, where benefits are applied to the *nasciturus* as if it is a fully fledged legal subject at the time that the benefit materialises.

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[3] This chapter focuses exclusively on the Roman texts and provides a detailed translation and evaluation of the original excerpts from the Digest of the Emperor Justinian. Roman-Dutch authorities are referred to, but no analysis of the Roman-Dutch texts has been undertaken, as delving into the manner in which the Roman texts were incorporated into the general body of Roman-Dutch jurisprudence and the extent to which these translations and subsequent incorporations are flawed, falls beyond the scope of what this chapter intends to achieve and that is to provide the reader with a glimpse, albeit a rather succinct glimpse, into the Roman jurist's thought paradigms where the *nasciturus* was concerned.

[4] J.D. Van Der Vyver 'The Right to Life of the Unborn in South African Law' in E. Kahn (ed) *The Sanctity of Human Life – Senate Special Lectures 1983 University of the Witwatersrand Johannesburg* (1984) 10, states that '… it is becoming increasingly clear that conception is no longer a practical point of departure for any legal fact and perhaps least of all for the purpose of scrutinizing the primordium of legal subjectivity. New embryological data appear to indicate that conception is a process over time rather than an event that occurs at a precise moment.' In this regard Van Der Vyver refers to *Roe v Wade* 410 US 113 (1973) 161. It is therefore preferable to refer to the 'moments' of conception as opposed to the 'moment' of conception.

[5] J. Heaton *The South African Law of Persons* 3rd ed (2008) 11; Heaton states that '… a person's legal personality begins at birth. The conceived but unborn child is thus not a legal subject and cannot have rights, duties and capacities. From very early times the law has, however, taken into account that in the normal course of events the unborn child will eventually become a legal subject, and that situations may arise before the child's birth which would have benefited him or her had he or she already been born (such as qualifying as a beneficiary under a will). If such a situation arises, the law protects the potential interests of the *nasciturus*… by employing the fiction that he or she is regarded as having been born at the time of his or her conception whenever it is to his or her advantage.'

[6] Van Der Vyver (note 4 above) 8, 10, states that '… one should not construct a rule of law in the shape of a fiction unless, reasonably speaking, one has no other alternative; and with that principle in mind, … the nasciturus rule does not in fact predate the *birth* of a child, but realistically affords to the unborn child, as from the date of his conception, legal subjectivity attended by those rights of a person in esse [in being] which come with the range of the rule. … The law pertaining to the commencement of legal subjectivity can be summarized by saying that a person with concomitant rights and obligations comes into being at the moment of birth, or, alternatively, if it would be in the interest of the person concerned, on the date of his conception. Stated in this way, there is nothing fictional about the nasciturus rule. … [I]n the final analysis, the fallibility of human understanding will continue to generate imperfections in the law governing the status of the unborn – not for lack of good intentions, but on account of the inability of mortals to come to grips with that supreme wonder of creation which is called life.'

According to the fiction, the birth of the child is therefore predated to allow for the accrual of the benefit. The law has however developed in a way which has subconsciously programmed many people to think of the *nasciturus* itself (as an individual entity) in terms of a fiction, as if its very existence is somehow fictional and not worthy of protection unless it is subsequently born alive. This is evident particularly in South Africa where the law has failed to move beyond the confines of the born alive rule (BAR) in the context of *nascitural* destruction.[7] The fiction proposes that the *nasciturus* should be treated *as if* it is already in existence *ex utero* if this would be to its advantage.

The *nasciturus* doctrine, however it is construed, recognises that the *nasciturus* is in existence *in utero* from the earliest possible moments of its development. The existence of the *nasciturus* is not dependent upon its birth, its enjoyment of the benefit is. The *nasciturus* doctrine demonstrates the value that humanity places on the *nasciturus* and seeks to provide a tangible legal mechanism whereby its protection can be secured when this is to its advantage.

[7] The BAR will be discussed in detail in Chapter 4. Notwithstanding the discussion of the BAR in Chapter 4 and the behind the scenes account of *Van Heerden v Joubert* 1994 (4) SA 793 (A) in Chapter 2, the following is worth reiterating for the sake of context, clarity and convenience: The *Van Heerden* case essentially hinged on whether or not a stillborn child is in fact a person i.e. had the child in *Van Heerden* taken its first breath, was it born alive? In *Van Heerden* the *nasciturus* was stillborn at 38 weeks due to what appears for all intents and purposes to have been medical negligence. (In *Hoffman v Member of the Executive Council Department of Health, Eastern Cape* 2011 JDR 1018 (ECP) the facts of the case were similar to those in *Van Heerden* and the court ruled that the child was stillborn as a result of medical negligence. A delictual claim by the plaintiff was successful and but for the negligence of the medical personnel the child would have been born alive.) The *Van Heerden* court did not consider the BAR contextually. The court made no attempt whatsoever to consider the BAR in a contemporary legal or social context or to evaluate the validity of the rule based on scientific and biological advancements. The historical development of the BAR was not interrogated and its reasons for coming into being in the first place were not considered. The court took note at 797 C--D of a submission made by counsel that until born alive a child has no legal personality according to the common law. The findings in *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) were repeated at 797 F--G as regards the *nasciturus* doctrine, to the extent that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child whenever this is to its advantage. The court stated in passing at 797 G--H that the child which formed the subject matter of the dispute was not born alive. The aforementioned was the complete extent of the court's engagement with the concept of the BAR in the context of *nascitural* destruction. In *S v Mshumpa and Another* 2008 (1) SACR 126 (E), which will also be discussed in more detail in later chapters, the enquiry in essence hinged on whether or not the common law crime of murder could be extended to include the destruction of a *nasciturus in utero*. The *Mshumpa* court was more forthcoming regarding the BAR than the *Van Heerden* court. In *Mshumpa* the *nasciturus* was stillborn at 38 weeks due to a violent assault upon it through the person of a pregnant woman. The court stated at 149 E--F that the crime of murder consists of the unlawful and intentional killing of another person and in order to qualify as a person one must be born alive. Therefore, the killing of an unborn child does not amount to murder. At 150 B--C the court stated that an unborn child that is not born alive holds no rights in its unborn state. In countries where murder is a common law crime, the BAR has never been discarded or developed in order for an act to fall within the ambit of the definition of murder (150 C--D). Further, courts have not developed or interpreted statutory homicide laws to do away with the BAR where they did not contain express words to that effect (150 D--E). 'The dominant trend where unborn baby killing has been criminalised has been to enact specific 'feticide laws' aimed at killing by third parties and not the mother, and not to change the definition of the crime of murder to accommodate such instances.' (150 E--F). The *Mshumpa* court also made no attempt to consider the BAR in a contemporary legal or social context or to evaluate the validity of the rule based on scientific and biological advancements. The historical development of the rule was again not interrogated and its reasons for coming into being in the first place were not considered.

The remainder of this chapter examines the *nasciturus* doctrine in historical context, critically evaluates its philosophical underpinnings, considers its contemporary interpretations and applications, and attempts to provide the reader with a deeper insight into the doctrine's *raison d'etre*. The main thrust of this chapter is to illustrate that despite the complexity which surrounds the interpretation of the *nasciturus* doctrine, it remains the only viable option at present to secure a restricted amount of *nascitural* benefits, safeguards, and protections notwithstanding its limitations.

## 3.3 The *Nasciturus* Doctrine in Historical Context

The *nasciturus* doctrine has its origins in Roman law[8] whereafter it later found its way into the annals of Roman-Dutch jurisprudence[9] which forms the foundation of the law in South Africa.[10]

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[8] As translated and commented on by C.H. Monro *The Digest of Justinian Volume One* (1904) 25, 28, 366--367: D 1.5.7 'An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question; though no one else can derive any benefit through the child before its birth.' D 1.5.26 'Unborn children are in almost every branch of the civil law regarded as already existing. They are allowed to take statutable inheritances, and if a woman with child is taken prisoner by the enemy, and a child is born, it comes under the law of *postliminium*, moreover it follows the condition of its father or its mother [as the case may be]; lastly, if a slavewoman who is with child is stolen, then, although she should be delivered when in the hands of a *bona fide* purchaser, the child will be regarded as stolen goods, and consequently ownership in it will not be acquired by *usus*. Again, on the same principle, after the death of a patron, so long as a son of the deceased can possibly be born, a freedman is in the same legal position as one whose patron is living.' D 5.4.3 'The old lawyers had so much consideration for an unborn child which would be free on its birth (*libero ventri*) that they kept for it all its possible rights unimpaired against the day of its birth. We see an instance of this in the law of succession, as those persons who are in a more remote degree of relationship to the deceased than the unborn child are not entitled, so long as it is uncertain whether there will be a child born or not. Where however, the others are related to the deceased in the same degree as the unborn child, then the question has been raised how much of the inheritance ought to be kept in suspense, on the ground that it was impossible for them to tell how many children might be born. There are, in fact, so many various and incredible stories told in connexion [sic] with this subject that they are generally set down for fictions. It is related that a married woman had four daughters at birth, again some authors of repute have left it on record that a Peloponnesian woman five times had four children at birth, and that many Egyptian women have borne seven children at one time. We have all heard of the three twin-brothers Horatii, all senators, girt for battle; and Laelius tells us that he saw on the Palatine a free woman who was brought from Alexandria to be shown to Hadrian, with five children, four of whom, so he says, she was reported to have brought forth on the same occasion, and the fifth forty days later. What is to be said then? The legal authorities, very well deserving the name of "*prudentes*," have adopted a kind of middle course, viz. that of taking into consideration what may happen with tolerable frequency; in other words, inasmuch as it was possible that three children should be born on one occasion, they gave a fourth part to the existing son; what comes once or twice, as Theophrastus says, lawyers do not heed, consequently, even if, as a matter of fact, the mother is destined to have only one child eventually, the existing son will be heir in the meantime not to the extent of half but of quarter.' D 15.16.231 'When we say that a child, who is expected to be born, is considered as already in existence, this is only true where his rights are in question, but no advantage accrues to others unless they are actually born.' D 15.16.231 is a translation by S.P. Scott and is available online at: http://webu2.upmf-grenoble.fr/DroitRomain/Anglica/D50_Scott.htm#XVI.

[9] Van Der Vyver (note 4 above) 8; Heaton (note 5 above) 11; R.A. Jordaan & C.J. Davel *Law of Persons* 4th ed (2005) 13; W. Domingo & J. Mahler-Coetzee et al *Law of Persons and the Family* (2012) 26.

[10] Van Der Vyver (note 4 above) 8, where the writings of Grotius, Voet and Van der Keessel are referred to; Heaton (note 5 above); Jordaan & Davel (note 9 above); Domingo & Mahler-Coetzee (note 9 above); E. Spiro 'Minor and Unborn Fideicommissaries and the Alienation of Fiduciary Property' (1952) 69 *SALJ* 71, 77; N.M.

The Roman law references highlighted and discussed in this chapter refer to the Digest of the Emperor Justinian[11] which was promulgated on the 16th of December 533 A.D.[12] The Digest contains excerpts from ancient literature dating back to approximately 82 B.C.[13] The bulk of the Digest is made up of writings compiled between 100 A.D. and 250 A.D.[14]

It is remarkable when one considers that approximately two thousand and ninety five years ago, discourse existed which centred on *nascitural* personhood,[15] its legal implications and its philosophical underpinnings. The *nasciturus* was being thought of in terms of benefits that were believed to be due to it and its *ex utero* potentiality was given serious consideration. Not only were such paradigms being thought about and their implications pondered upon, but they were being codified, and as a result, juristic as well as academic discussion and debate was encouraged. In ancient civilisations and cultures, the legal status of the *nasciturus* surfaced in several contexts including succession, abortion, and violence against pregnant women.[16] The Hittites, Assyrians, Babylonians, Greeks, Romans and several other post-Roman barbarian kingdoms have all reflected on the issues involved with and surrounding *nascitural* personhood.[17]

## 3.4 A Contextual Analysis of the Excerpts from the Digest

The translations of the excerpts from the Digest are rich in clues as to how ancient societies perceived the *nasciturus in utero*.[18] *Nascituri* were to be taken care of just as much as if they were in existence *ex utero* when this was to their advantage.[19]

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Meyer 'A Delictual Remedy for the Unborn Child' (1963) 80 *SALJ* 439, 448; See further H.F. Sampson 'The Status of Unconceived Children' (1957) 74 *SALJ* 105, 106.

[11] The Emperor Justinian ruled over the Eastern Roman Empire from 527 A.D. to 565 A.D. See A.B. Edwards *The History of South African Law – An Outline* (1996) 12.

[12] B. Nicholas *An Introduction to Roman Law* (1962) 41; A. Borkowski & P. du Plessis *Textbook on Roman Law* 3rd ed (2005) 60; Edwards (note 11 above) 12.

[13] Nicholas (note 12 above) 40; See Borkowski & du Plessis (note 12 above) 54--60 generally; See Edwards (note 11 above) 12--13 generally.

[14] Ibid.

[15] *Nascitural* Personhood – The concept of *nascitural* personhood recognises Dworkin's theory (note 1 above) which postulates the intrinsic value of human life. *Nascitural* personhood refers to the biological status of a foetus *in utero*, the undisputed fact that it is a recognisable living human organism in the early stages of gestation and a recognisable human being in the later stages of gestation. The recognition of *nascitural* personhood is the recognition of a form of human personhood. It is important to note that in ancient societies the exact biological and scientific nature of the *nasciturus* was unknown but its intrinsic value was nevertheless recognised. Refer to (note 1 above) for further clarification on the concept of 'intrinsic worth'.

[16] G. Casey *Born Alive – The Legal Status of the Unborn Child in England and the U.S.A.* (2005) 1.

[17] Ibid.

[18] Refer to (note 8 above).

[19] D 1.5.7 Commentary based on the interpretation and translation of the Digest's full text by Monro (note 8 above).

It was acknowledged that *nascituri* were recognised in almost every branch of the civil law as already existing *ex utero*.[20] The *nasciturus* was seen as a separate entity.[21] The possible birth of the *nasciturus* secured for other people any benefits which they were previously entitled to.[22] The potentiality of *ex utero* existence was clearly a consideration of paramount importance not only in relation to possible birth but also possible benefits, not only for the *nasciturus* but also for other people. All probable benefits which a *nasciturus* could enjoy were kept for it, unimpaired until the day of its birth arrived.[23] Where 'rights' were concerned, a 'child' who was expected to be born was considered as already born, and no advantage could accrue to anyone else unless they were actually born.[24]

Ancient texts which refer directly to the *nasciturus*, apart from those which have been incorporated into the body of the Digest, appear to be extremely scarce, if not non-existent. The most significant excerpts from the Digest have been highlighted in this chapter together with their full translations. This brief synopsis in no way professes to be an exhaustive account of jurisprudential reasoning in relation to *nascitural* personhood in primordial societies. It is further acknowledged that much of the original intent of the Roman jurists as encapsulated in the Digest may have been lost in translation or distorted with the passage of time. What remains steadfast and unwavering however is the recognition of the notion that the *nasciturus* is worthy of consideration when this would be to its advantage.

It is clear from the aforementioned that an extensive amount of time was devoted to contemplating the true nature of *nascitural* personhood and the legal implications of these considerations.[25] Why were these ancient societies thinking about *nascituri* in this way? It appears as mentioned previously that they recognised the intrinsic value of human life in one way or another.[26]

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[20] D 1.5.26 Commentary based on the interpretation and translation of the Digest's full text by Monro (note 8 above).
[21] D 1.5.26 A child delivered of a slavewoman was regarded as stolen goods. Despite the requirement of 'delivery' the potentiality of the *nasciturus in utero* ultimately enjoying an *ex utero* existence upon its birth was recognised. Commentary based on the interpretation and translation of the Digest's full text by Monro (note 8 above).
[22] D 1.5.26 If the patron (former owner) of an emancipated slave dies and there is possibly a son to be born to such patron, the emancipated slave remains in the same legal position as one whose patron is already born. Commentary based on the interpretation and translation of the Digest's full text by Monro (note 8 above).
[23] D 5.4.3 Commentary based on the interpretation and translation of the Digest's full text by Monro (note 8 above).
[24] D 15.16.231 Commentary based on the interpretation and translation of the Digest's full text by Scott (note 8 above).
[25] See (note 8 above) generally.
[26] See Dworkin (note 1 above).

They placed a great deal of value on the potential existence *ex utero* of the *nasciturus*, once born alive being a fully-fledged legal persona, a person in its own existential right, with time, developing the ability to shape its own individual destiny. There is also perhaps a more profound explanation that is difficult to articulate clearly, a subliminal association with something of one's own kind that intuitively necessitates fortification.

In a more contemporary sense, there is a wide-ranging amount of literature available which discusses the legal status of the *nasciturus* from the eleventh century to the late sixteenth century.[27] One of the most interesting stories told about the *nasciturus* doctrine involves John I, who succeeded to the French throne while still *in utero*.[28] Louis X, who was the father of John I, died on the 5th of June 1316, six months before John I was born.[29] Through the ages, the *nasciturus* and its associated connotations; scientific, biological, philosophical and instinctively perceived, have captivated the minds of scholars and jurists alike. It is no different today in the twenty first century.

## 3.5 Contemporary Interpretation & Application of the *Nasciturus* Doctrine

'*Nasciturus pro iam nato habetur quotiens de commodo eius agitur.*' This Latin phrase is what is commonly referred to as the *nasciturus* fiction or the *nasciturus* rule,[30] which states that an unborn child in the womb of its mother (*en ventre sa mère*) 'is deemed to have been born, and therefore to have acquired legal personality, prior to the date of its actual birth, if this would be to its advantage.'[31] Alternatively, the *nasciturus* is regarded as having been born at the time of his or her conception whenever it is to the advantage of the *nasciturus* and one does not infer the acquisition of legal personality *in utero*.[32]

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[27] See Casey (note 16 above) 9--20, for an account of available English literature.
[28] L. Schafer *Child Law in South Africa – Domestic and International Perspectives* (2011) 32.
[29] Schafer (note 28 above): 'John I's reign, as it happened, was very short: he was born on the 15th of November 1316 and died on the 20th of November 1316.'
[30] Those academics who refer to the *nasciturus* doctrine as a 'fiction' include: Domingo & Mahler-Coetzee (note 9 above) 25; Heaton (note 5 above) 11; Jordaan & Davel (note 9 above) 13; Schafer (note 28 above) 32; Those academics who refer to the *nasciturus* doctrine as a 'rule' include Van Der Vyver (note 4 above) 8; B. Van Heerden & A. Cockrell et al *Boberg's Law of Person's and The Family* 2nd ed (1999) 30; For the purpose of remaining neutral, the term '*nasciturus* doctrine' will be used in this section unless specifically referring to the use of the 'fiction' or the 'rule'; See further Heaton (note 5 above) 27--28 & Jordaan & Davel (note 7 above) 13--14.
[31] Translation by Van Heerden & Cockrell et al (note 30 above) 31; This particular version implies interpretation as a 'rule' because according to the way in which this translation is worded, the *nasciturus* acquires legal subjectivity *in utero*; See further D 1.5.7, D 1.5.26 & D 15.16.231. Interpretation and translation of the Digest's full text by Monro & Scott (note 8 above); See further references to the Roman-Dutch authorities in the aforementioned work by Van Heerden & Cockrell et al (note 30 above) as well as Heaton (note 5 above).
[32] Heaton (note 5 above) 11; This particular version implies interpretation as a 'fiction' because according to this interpretation there is no inferred legal subjectivity *in utero* and by implication the *nasciturus* acquires legal

The aforementioned is in essence the distinction between the *nasciturus* rule and the *nasciturus* fiction. On the one hand, according to the rule, legal subjectivity accrues *in utero*, and on the other hand, according to the fiction, legal subjectivity only accrues once the *nasciturus* has emerged from the womb of a pregnant woman and taken its first breath.

In order for the mechanics of the *nasciturus* doctrine to become operational there are three requirements which must be fulfilled. First of all the *nasciturus* must have already been conceived in order for the benefit to accrue to it, the application of the doctrine must be to the advantage of the *nasciturus* and the *nasciturus* must subsequently be born alive.[33]

The *nasciturus* doctrine has been tried and tested successfully in several spheres of law in South Africa. The most frequent application of the *nasciturus* doctrine takes place in the law of succession.[34] The doctrine also finds application in divorce proceedings where maintenance for a *nasciturus en ventre sa mère* is provided for.[35]

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subjectivity *ex utero* only; See further D 1.5.7, D 1.5.26, D 50.16.231. Interpretation and translation of the full text by Monro & Scott (note 8 above); See further references to the Roman-Dutch authorities in the aforementioned work by Van Heerden & Cockrell et al (note 30 above) as well as Heaton (note 8 above).

[33] Heaton (note 5 above) 12; See Van Der Vyver (note 4 above) 8, where reference is made to the Roman & Roman-Dutch authorities as well; See also Jordaan & Davel (note 9 above) 14; Jordaan & Davel (note 9 above) 12, state that when the term 'birth' is used to indicate the beginning of legal subjectivity the meaning is determined by the common law requirements in this regard. The most significant requirement is that the *nasciturus* must have lived independently after separation, even if only for a moment. Legal subjectivity does not attach to a stillborn *nasciturus* or a *nasciturus* that has died during the birth process. Medical evidence by means of a post-mortem investigation is performed to determine whether or not the child actually breathed. A procedure known as the hydrostatic test is performed. The lungs of the dead *nasciturus* are cut up into pieces and placed in a container filled with water. If they float, it can be accepted that breathing took place to absorb oxygen. Jordaan & Davel note further that care must 'be taken to ensure that gases released during decomposition do not have a similar effect. If decomposition has started, these gases have to be forced out with a flat object. Oxygen taken up by the lung tissue cannot be expelled in this way.' An additional requirement for birth is that the foetus must be separate from the mother but the umbilical cord need not be cut.

[34] In *Estate Lewis v Estate Jackson* (1905) 22 SC 73, 75, the court considered the material portions of the testator's will and held that under the circumstances disclosed, the testator could fairly be presumed to have intended to include a grandchild *en ventre sa mère* among his beneficiaries; *Estate Delponte v De Fillippo and Others* 1910 CPD 334, 346, where the court made it clear that only *nascituri en ventre sa mère* at the time that the vesting takes place are entitled to share in a bequest. *Nascituri* conceived post-vesting are not entitled to share in a bequest. In *Hopkins v Estate Smith and Others* 1920 CPD 558, 565, the court took into account the fact that the *nasciturus* was *en ventre sa mère* at the time that the testator made his will. The court reaffirmed the notion that only *nascituri en ventre sa mère* at the death of the testator are to benefit from a will. The court justified this by saying that 'If all after-born children are to take, it may be twenty or thirty years before it can be ascertained who are to benefit and what the share of each child is to be.' This would be illogical and defeat the intentions of the testator; See *Botha and Others v Thompson NO* 1936 CPD 1, 6--7, 9--10; *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 (O) 956 B--C where the court stated that it is common cause that a child in its mother's womb is presumed to be alive for the purposes of succession, provided the child is subsequently born and that it is to the advantage of such child. (Heaton's translation (note 5 above) 13). The court went on to refer to Voet 1.5.5 translated by Gane who stated that 'Still by a fiction of law they (children *en ventre sa mère*) are regarded as already born whenever it is a question of their advantage.' See further Van Heerden & Cockrell et al (note 30 above) 30--31; Further, the *nasciturus* doctrine has found its way into South African Legislation in the form of S2D(1)(c) of the Wills Act 7 of 1953 which states: 'In the interpretation of a will, unless the context

Further applications include claims for loss of support where the father of a *nasciturus en ventre sa mère* is killed through the negligence of a third party,[36] and claims involving pre-natal injuries.[37] Within the realms of *nascitural* benefits, legal minds have sought to find application for the *nasciturus* doctrine in various ways in order to secure these benefits within an acceptable legal framework. However, as alluded to previously, there is a divergence of thought with regard to whether the *nasciturus* doctrine operates within the confines of a fiction or a rule.

### 3.6 The *Nasciturus* Doctrine as a Fiction & The *Nasciturus* Doctrine as a Rule

When one refers to a *nasciturus* fiction, the implication is that legal subjectivity i.e. personhood in the legal sense while the *nasciturus* is *in utero* is but a mere fiction. The *nasciturus* is not vested with legal subjectivity until it is born alive. Therefore, in certain circumstances such as those referred to in 3.5 above, benefits or potential benefits are kept in abeyance, their ultimate enjoyment dependent upon the live birth of the *nasciturus*.[38] The *nasciturus* fiction implies that the *nasciturus* will be a legal subject only once it is born alive and the *nasciturus* is thus seen as a *potential* legal subject according to the fiction.[39]

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otherwise indicates – any benefit allocated to the children of a person, or to members of a class of persons, mentioned in the will shall vest in the children of that person or those members of the class of persons who are alive at the time of the devolution of the benefit, or who have already been conceived at the time and who are later born alive.'

[35] Van Der Vyver (note 4 above) raises this category and refers to *Shields v Shields* 1946 CPD 242, 242--243, where the court in effect positioned itself as the upper guardian of a *nasciturus en ventre sa mère* by refusing to allow a parent on behalf of a child, yet to be born, to refuse maintenance for such a child. Jordaan & Davel (note 9 above) 16, take exception with the fact that the *nasciturus* doctrine was not explicitly mentioned in the *Shields* case; Van Heerden & Cockrell et al (note 30 above) 41, refer to the case of *Pretorius v Pretorius* 1967 (2) PH B17 (O) where a woman gave birth to twins and the court extended its order to include both children. Jordaan & Davel (note 9 above) 16, take exception once again with the fact that the *nasciturus* doctrine was not explicitly mentioned in the *Pretorius* case either; See Heaton's comments in this regard (note 5 above) 15.

[36] In *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297, 301, the court stated that the well-known principle that a posthumous child is to be considered as born at the death of the father, if such a fiction will be to its advantage (Voet 1.5.5), places *nascituri en ventre sa mère* in the same position as children already born when dealing with claims for loss of support; *Stevenson NO v Transvaal Provincial Administration* 1934 TPD 80, 85, where the court stated that 'an unborn infant, provided it is afterwards actually born, is sometimes by a legal fiction regarded as already born, in so far as such presumption will be for its benefit.'

[37] *Pinchin* (note 7 above); Forty two years later in the case of *Road Accident Fund v Mtati* 2005 (6) SA 215, 227 G--H, 228 E--F, the Supreme Court of Appeal ruled that it is unnecessary to invoke the *nasciturus* doctrine in delictual claims for pre-natal injuries and that the ordinary principles of delict will suffice for a claim to succeed. It is important to note with regard to *Pinchin* that the court's view was rendered *obiter* by its finding that the 'causal connection between the disability with which the child was born and the injuries sustained by his mother before his birth had not been sufficiently proved.' See Van Heerden & Cockrell (note 30 above) 33; See Domingo & Mahler-Coetzee et al (note 9 above) 30.

[38] Jordaan & Davel (note 9 above) 13--14.

[39] Jordaan & Davel (note 9 above) 14.

As soon as the *nasciturus* is born alive, the benefit is then capable of being attributed to it as a legal subject. The fiction thus assumes that legal subjectivity *always* starts at birth.[40] When one refers to a *nasciturus* rule, by implication, the *nasciturus* attains legal subjectivity at the time that the benefit accrues to the *nasciturus*, provided it has been conceived at the said time. According to the *nasciturus* rule, legal subjectivity commences at conception and not birth. Some, who advocate for the rule as opposed to the fiction, do so, on the basis that the *nasciturus* doctrine has been misunderstood.

According to this viewpoint, the Latin phrase in which the *nasciturus* doctrine is expressed tells us that in the appropriate circumstances the birth of the *nasciturus* is to be *assumed* to have occurred at the moment of conception.[41] The *nasciturus* doctrine according to the rule has been construed in the *shape* of a fiction or in other words as a *quasi*-fiction.[42] An assumption should not automatically or by default be construed as a fiction because doing so could undermine the original intent of the party calling for the assumption to be made.

### 3.7 A Critical Analysis of the *Nasciturus* Fiction vs. the *Nasciturus* Rule

The *nasciturus* doctrine has in many respects become clouded by the issue of legal subjectivity and whether it is conferred upon the *nasciturus* at the moments of conception or upon its birth. The fact of the matter is that realistically, and for all intents and purposes, whether or not the *nasciturus* enjoys legal subjectivity prior to its birth is irrelevant because until the *nasciturus* is in fact born alive, it is not physically or legally capable of enjoying any benefits, rights, entitlements or interests in a corporeal sense.[43] Although the *nasciturus* is theoretically capable of enjoying incorporeal benefits in a non-legal sense while *in utero*, the operation of the *nasciturus* doctrine remains subject to live birth. The *nasciturus* doctrine is therefore at best a *quasi*-fiction because the *nasciturus* is only capable of exercising its legal subjectivity *ex utero*.[44]

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[40] Ibid.
[41] Van Der Vyver (note 4 above) 8.
[42] Ibid.
[43] The words being used here, namely 'rights', 'entitlements', and 'interests', are being used specifically and deliberately in the context of live birth. The use of these words while the *nasciturus* is *in utero* creates confusion because in a legal context, only a legal person can be the bearer of rights, and until such time as the *nasciturus* is born alive, it is not a legal person according to the current legal *status quo* in South Africa.
[44] Its implied operation as an assumption requires it to be treated as a fiction, and because of its contentious nature, it is at best treated *as if* it is a fiction i.e. a *quasi*-fiction. The reason for highlighting this issue is to demonstrate one of the narrow ambits that is and has been the focus of the *nasciturus* doctrine. Another of the narrow ambits within which the *nasciturus* doctrine operates is the extent to which it finds application in various areas of the law in South Africa. Refer to (notes 34--37) above.

The *nasciturus* doctrine in whatever form one chooses to interpret it, serves as a practical legal mechanism to protect potential *nascitural* benefits before birth by securing them for the *nasciturus* until such time as it is born alive and acquires *bona fide* legal subjectivity which enables it to take legal ownership in a sense of such benefits.[45]

The moment at which legal subjectivity commences in the context of personhood is without doubt a contested subject.[46] Whether the *nasciturus* is discussed within the framework of a rule or a fiction has no bearing on its validity as a topic of prolific discussion. The *nasciturus* is recognised as an entity in its own right that provokes jurisprudential debate and philosophical contemplation.

The value of the *nasciturus* as a topic for discussion is uncontested in a general sense and only remains a point of contestation in a contextual sense.[47] The Roman law codification of issues relating to the *nasciturus* continues to provide us with a rich and meaningful source of academic dialogue, the continuance of which is critical if law reform in the sphere of *nascitural* safeguards and protections[48] is to become a reality in South Africa. The perspectives surrounding the *nasciturus* doctrine should not be restricted to technical aspects only and should incorporate a more expansive dialogue.

## 3.8 A Critical Analysis of the *Nasciturus* Doctrine as a Whole

The thrust of the *nasciturus* doctrine in a broad sense is that the potential protection of the *nasciturus* is recognised, its intrinsic value[49] understood, and its potentiality *ex utero* respected. The *nasciturus* doctrine in a narrow sense, in terms of its everyday application, has maintained public interest for far too long.[50]

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[45] See Heaton (note 5 above) 27--28, for additional arguments surrounding legal subjectivity.

[46] The divergent viewpoints in this regard are highlighted in *Van Heerden v Joubert* (note 7 above) 797 F--J; See further the discussion in Jordaan & Davel (note 9 above) 20--22 & Heaton (note 5 above) 27--28; In *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) 827 F--G, the court preferred the view that legal subjectivity begins at birth.

[47] In the context of whether or not, according to the *nasciturus* doctrine, the *nasciturus* acquires legal subjectivity at conception or birth.

[48] *Nascitural* Safeguards & Protections – The use of this phrase is an attempt to steer clear of the more frequently used terms to describe the possible 'rights', 'interests', or 'entitlements', which the nasciturus may enjoy. *Nascitural* safeguards and protections imply an extrinsic bestowal of 'rights', 'interests', or 'entitlements'. In other words, the *nasciturus* is protected by a third party such as the pregnant woman or someone else with a vested interest in safeguarding the *nasciturus*. On the other hand, the terms 'rights', 'interests', or 'entitlements' in isolation, imply an intrinsic entitlement by the *nasciturus* which is difficult to justify scientifically, biologically, philosophically or legally.

[49] Dworkin (note 1 above).

[50] See H.R. Hahlo 'Nasciturus in the Limelight' (1974) 91 *SALJ* 73--83; H.R. Hahlo 'More About the Nasciturus' (1974) 91 *SALJ* 526--527.

The value of the *nasciturus* doctrine in a narrow sense should however not be underestimated because a vast amount of conditional protection[51] is afforded to the *nasciturus* in this context. The true value of the *nasciturus* doctrine lies in its guiding principle which is the recognition of the necessity to afford a measure of protection to the *nasciturus* in a general sense because of its humanness. Once legal discourse has shifted from the narrow confines of a conservative jurisprudence towards a broader platform, with foundational values rooted in logic and dignity, the legal landscape that the *nasciturus* presently occupies will forever be changed. Once positive maternal intention acquires the recognition that it deserves, *nascitural* safeguards will be ensured.[52] The *nasciturus* doctrine serves as a prime example of the reluctance inherent in juristic thought paradigms when uncharted territory is in dire need of exploration, understanding and development.

## 3.9 The Primary Barrier to Unqualified Legal Subjectivity *In Utero*

The only hindrance to providing the *nasciturus* with unqualified blanket legal subjectivity from the moments of conception,[53] is the possible infringement on the rights of the pregnant woman who has negative maternal intention.[54] The debate in this arena should move beyond conflicting benefits, rights, entitlements or interests onto a platform where there is some semblance of congruence, to a point of departure where *nascitural* benefits are in harmony with positive maternal intention.

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[51] The term 'conditional protection' is used here because the protection itself is of no real value until such time as the *nasciturus* is born alive. The enjoyment of the benefits which accrue from *in uterine* protection are contingent upon live birth.

[52] Positive Maternal Intention – A pregnant woman who has positive maternal intention intends to carry the *nasciturus* full term with the end result being a live birth. The 'positivity' aspect is in relation to the *nascitural* outcome only. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. Successful full term gestation and live birth is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a positive outcome. Survival is generally considered to be a positive outcome for the object of such survival. Euthanasia or mercy killing where there is a living will, for example, could serve as exceptions to this general rule. It is acknowledged that regardless of the presence of positive maternal intention it is not always possible, for a multitude of unforeseen reasons that do not always hinge on criminality, that the pregnant woman will carry the *nasciturus* full term. Nevertheless, the *intention* to gestate full term with a live birth outcome is all that is required for the presence of positive maternal intention regardless of whether or not the intended outcome becomes an eventuality.

[53] Van Der Vyver (note 4 above).

[54] Negative Maternal Intention – A pregnant woman who has negative maternal intention intends to abort the *nasciturus* in terms of the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. The 'negativity' aspect is in relation to the *nascitural* outcome only i.e. the fate of the *nasciturus*. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. The destruction of the *nasciturus* is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a negative outcome. Destruction generally serves as a negative outcome for the object of the destruction. Euthanasia or mercy killing where there is a living will for example could serve as exceptions to this general rule.

When potential *nascitural* benefits are in harmony with positive maternal intention, there should very seldom be any conflict, apart from situations where the pregnant woman has a change of heart regarding her pregnancy or in situations where the pregnant woman is faced with serious health risks should she continue to gestate.

For as long as the *nasciturus* develops in the womb of a living human being, the womb of a *bona fide* legal subject, its ultimate fate will be dependent in large part on maternal intention.[55] This reality cannot be evaded or escaped until such time as artificial womb technology,[56] and the ability of the *nasciturus* to gestate inside a mechanical womb, becomes a reality. Once there is no longer a potential conflict of rights, interests, or entitlements, a complete re-evaluation of the nature of the *nasciturus* will be required.

There is strong evidence to suggest that artificial womb technology will in fact become a reality in the future.[57] The legal implications for *nascitural* personhood in this regard would *prima facie* render the *nasciturus* a separate legal entity with full and unqualified legal subjectivity from the moments of conception.[58] How would one then balance the interests of the 'ordinary'[59] *in utero nasciturus* with those of the 'extraordinary'[60] *in utero nasciturus*? The answer to this question lies beyond the scope of the arguments advanced in this dissertation and a completely separate epistemological thesis is required in order to provide a comprehensive response to such an enquiry.

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[55] Maternal Intention – This term refers to the intention of a pregnant woman as it relates to *nascitural* gestation i.e. whether a pregnant woman intends to complete a successful full term gestation with a live birth outcome or whether she intends to abort the *nasciturus* in the early stages of gestation as per the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. More specifically, maternal intention can be either positive (note 52 above) or negative (note 54 above) in relation to the *nascitural* outcome i.e. whether or not the *nasciturus* is destroyed or born. Maternal intention does *not* determine whether or not the *nasciturus* is a person *in the legal sense*. Maternal intention is but one of many factors which determines whether or not the *nasciturus* in fact *becomes* a legal subject.

[56] See S. Gelfand & J.R. Shook (eds) *Ectogenesis – Artificial Womb Technology and the Future of Human Reproduction* Kindle ed (2013) Loc 61--69, where it is stated that '[e]ctogenesis is defined by Webster's [Dictionary] as: "Development of a mammalian embryo in an artificial environment." While bioethics textbooks and journals contain numerous essays discussing human cloning, there is little published research addressing the moral permissibility of ectogenesis or the use of artificial womb technology. This is both surprising and troubling given that it is likely that an artificial womb designed for human use will be developed in the near future, and the moral and social implications of ectogenesis are complex and far-reaching.'

[57] See H.J. Son 'Artificial Wombs, Frozen Embryo's, and Abortion: Reconciling Viability's Doctrinal Ambiguity' (2005) 14 *UCLA Women's Law Journal* 213; J.H. Schultz 'Development of Ectogenesis: How will Artificial Wombs Affect the Legal Status of a Foetus or Embryo?' (2010) 84 *The Chicago-Kent Law Review* 877.

[58] Van Der Vyver (note 4 above); The key phrase here is '*prima facie*'. On the face of it, the *nasciturus* who gestates inside the artificial womb is not dependent on the body of another human being for its sustenance or for its continued existence and there is as such no clash of interests and no conflicting rights or entitlements.

[59] This is the natural way of gestating i.e. the *nasciturus* that develops inside the womb of a female human being.

[60] This is the artificial way of gestating i.e. the *nasciturus* that develops inside a mechanical womb.

## 3.10 The *Nasciturus* Non-Fiction

The *nasciturus* non-fiction encapsulates the recognition that the *nasciturus* is alive *in utero* from the earliest moments of conception[61] and that *nascitural* personhood[62] is a concept worthy of protection in certain circumstances.[63] The *nasciturus* non-fiction is grounded in scientific and biological knowledge which recognises that the *nasciturus* is a living, evolving and emergent human organism from the most primitive instants of formation.[64] The *nasciturus* non-fiction also recognises the contentious nature and highly divergent views that exist with regard to what constitutes life and personhood in a legal sense.

The *nasciturus* non-fiction is about coming to terms with the realisation that a woman with positive maternal intention should be entitled to employ channels of criminal sanction in order to punish the perpetrator who destroys her *nasciturus* without her consent. Above all, the *nasciturus* non-fiction calls for urgent law reform in the arena of *nascitural* destruction where positive maternal intention is present. Just as the choices made by a pregnant woman who has negative maternal intention are respected and protected by the Choice on Termination of Pregnancy Act,[65] so do the choices made by a pregnant woman with positive maternal intention need to be recognised, respected, and legally protected.

Now that it has been conclusively established that the will to safeguard and protect the *nasciturus* has been in existence for centuries, the need arises to question why such safeguarding and protection, in a real and tangible legal sense, continues to be contingent upon a live birth according to South African law. The next chapter examines the born alive rule in detail and questions its contemporary relevance in light of medical advancements which are able to monitor, analyse, and observe the development of the *nasciturus* from the very earliest moments of its conception to seconds before its birth. In order to establish the modern-day significance of live birth as a prerequisite for legal subjectivity, it is necessary to establish for what particular purpose the born alive rule was developed in the first place. Did it come into being as a substantive rule of law or did it develop out of pure evidentiary need?

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[61] Therefore negating the requirement of live birth.
[62] '*Nascitural* Personhood' is defined in (note 15 above).
[63] Primarily in circumstances where positive maternal intention is present. Once the provisions of the Choice on Termination of Pregnancy Act 92 of 1996 have been invoked, protection of the *nasciturus* is no longer possible.
[64] Refer to Van Der Vyver (note 4 above) generally. Refer further to the companion DVD included in the front cover insert of this dissertation.
[65] The Choice on Termination of Pregnancy Act 92 of 1996.

# *CHAPTER 4*

# The Born Alive Rule

## 4.1 Chapter Objectives & Guidelines

Only someone who has been born alive can be the victim of murder[1] and a person cannot be held responsible for injuries inflicted on a *nasciturus in utero* unless and until it is born alive.[2] This is known as the 'Born Alive Rule' (BAR) which originated in the English common law. The often quoted passage from Sir Edward Coke's *Institutes of the Laws of England* is:

> 'If a woman be quick with childe [sic], and by a potion or otherwise killeth it in her wombe [sic]; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision [misdemeanour], and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura* [in existence], when it is born alive… And so horrible an offence should not go unpunished.'[3]

The purpose of this chapter is to examine the extent to which the BAR remains relevant as a substantive rule of law. It will be demonstrated that the BAR was created as an evidentiary rule to prove through the provision of concrete evidence that the *nasciturus* was alive *in utero*. Argument will be put forward for the contention that the BAR was not developed as a criterion for the assignment of legal subjectivity. The justifiability of the BAR in instances of non-consensual *nascitural* destruction will be questioned. In South African Law the BAR prevents criminal liability in cases of non-consensual *nascitural* destruction caused by violence against pregnant women[4] and alleged medical misconduct that results in stillbirth.[5]

The research conducted for the drafting of this chapter reveals that in light of contemporary advancements in medical technology, which are now able to map *nascitural* development from the moments of conception to ultimate birth, with a high degree of certainty, the BAR has become redundant in the context of non-consensual *nascitural* destruction.

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[1] B. Steinbock *Life Before Birth – The Moral and Legal Status of Embryos and Fetuses* 2nd ed (2011) 127.
[2] G. Casey *Born Alive – The Legal Status of the Unborn Child in England and the U.S.A* (2005) viii, ix.
[3] E. Coke *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1797) 50.
[4] In this regard refer to the facts as stated in *S v Mshumpa and Another* 2008 (1) SACR 126 (E).
[5] In this regard refer to the facts as stated in Chapter 2 – 'The Libby Gonen Story' page 10 of this dissertation, with reference to *Van Heerden v Joubert* 1994 (4) SA 793 (A).

As a result of these medical advancements, it can now be conclusively proved that a *nasciturus* was alive *in utero* and destroyed because of a specific act or omission. There is therefore no reason to deny prosecution for its non-consensual destruction.[6] There is good reason to argue for the abolition of the BAR in South Africa in the context of non-consensual *nascitural* destruction based on its evidentiary origins and the principle of positive maternal intention.[7] It no longer makes sense for the law to retain an evidentiary principle that has no rational relationship to contemporary facts concerning *in uterine nascitural* development.[8] In particular, the continued application of the BAR in a constitutionally democratic setting will be challenged and it will be shown that the law in South Africa has failed to develop in accordance with well-reasoned and well- recognised foreign jurisprudential benchmarks.

## 4.2 The Born Alive Requirement in South African Law

South African law holds that legal subjectivity, or alternatively, legal personality, begins when the birth process is complete.[9] In order for the birth process to be complete, the newborn must be entirely separated from the pregnant woman[10] and it must be born alive.[11]

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[6] K. Savell 'Is the Born Alive Rule Outdated and Indefensible?' (2006) 28 *Sydney LR* 625, 630; See further C.D. Forsythe 'Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms (1987) 21 *Valparaiso Univ LR* 563, 626, at 576, the author states that '[t]hese technologies did not exist before 1965.' See also Casey (note 2 above) generally.

[7] Positive Maternal Intention – A pregnant woman who has positive maternal intention intends to carry the *nasciturus* full term with the end result being a live birth. The 'positivity' aspect is in relation to the *nascitural* outcome only. It is in no way whatsoever implied that the concept of abortion in and of itself is a negative practice. Successful full term gestation and live birth is for all intents and purposes, from the perspective of the *nasciturus*, if such a perspective is in fact justifiably possible, a positive outcome. Survival is generally considered to be a positive outcome for the object of such survival. Euthanasia or mercy killing where there is a living will for example could serve as exceptions to this general rule. It is acknowledged that regardless of the presence of positive maternal intention it is not always possible, for a multitude of unforeseen reasons that do not always hinge on criminality, that the pregnant woman may not be able to carry the *nasciturus* full term. Nevertheless, the *intention* to gestate full term with a live birth outcome is all that is required for the presence of positive maternal intention regardless of whether or not the intended outcome becomes an eventuality.

[8] Forsythe (note 6 above) 626.

[9] B. Van Heerden & A. Cockrell et al *Boberg's Law of Persons and The Family* 2nd ed (1999) 28; 'Birth' is defined in S1 of the Births and Deaths Registration Act 51 of 1992 as '… in relation to a child, means the birth of a child born alive.' It is interesting to note that the predecessor to this Act, The Births, Marriages and Deaths Registration Act 81 of 1963 went further by defining 'birth' as meaning '… the birth of any viable child whether such child is living or dead at the time of birth…' S1 of the 1963 Act defines 'viable' as meaning 'in relation to a child, … that [the child] has had at least six months of intra-uterine existence.' The 1992 Act makes no attempt to venture beyond the notion of a child 'born-alive'.

[10] This is known as 'parturition' which is defined by R.E. Allen (ed) *The Concise Oxford Dictionary of Current English* 8th ed (1990) 868, as 'the act of bringing forth young; childbirth'. According to K. Kavanagh (ed) *South African Concise Oxford Dictionary* (2002) 849, the word 'parturition' is of Latin origin – *parturire* – meaning 'be in labour' & *parere* – meaning 'bring forth'.

[11] See Van Heerden & Cockrell et al (note 9 above); R.A. Jordaan & C.J. Davel *Law of Persons* 4th ed (2005) 11--12; J. Heaton *The South African Law of Persons* 3rd ed (2008) 7; W. Domingo & J. Mahler-Coetzee *Law of Persons and the Family* (2012) 31; L. Schafer *Child Law in South Africa – Domestic and International Perspectives* (2011) 16; Being born 'alive' requires an existence independent of the pregnant woman.

It is not necessary that the umbilical cord be cut in order for the requirement of separation to be satisfied.[12] There has unfortunately been a tendency in scholarly literature in South Africa to resort to the uncontextualised use of references to excerpts from the Digest of the Emperor Justinian, of Roman law vernacular, in order to garner support for the view that separation and live birth are substantive requirements for legal subjectivity.[13]

Despite the aforementioned, legal subjectivity in South African law does not commence until live birth. The BAR is used intentionally and specifically for the purpose of conferring legal subjectivity on a *nasciturus* born alive.[14] The BAR is also a requirement in the successful application of the *nasciturus* doctrine which was discussed in Chapter 3 above.

*Nascitural* viability, which will be discussed in Chapter 5, is not a requirement for live birth and legal subjectivity in South African law.[15] Viability in this context is best understood as meaning the ability of the *nasciturus* to live independently from the body of the pregnant woman without any physical connection.

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[12] Heaton (note 11 above).

[13] References to excerpts from the Digest in this note refer to the translations of S.P. Scott, available online at <http://webu2.upmf-grenoble.fr/DroitRomain/Anglica/digest_Scott.htm>; Heaton (note 11 above) states that 'before birth the *foetus* is not a legal subject but merely forms part of its mother.' Heaton relies on D 25.4.1.1 & D 35.2.9.1 in support of the aforementioned contention. D 25.4.1.1 relates to a title in the Digest concerning the examination of pregnant women and the precautions to be taken with reference to their delivery in the context of a divorced pregnant woman who denies her pregnancy. The beginning of legal subjectivity or legal personality is not discussed in D 25.4.1.1. D 35.2.9.1 concerns itself with a title in the Digest in respect of 'Falcidian law' which is the law on the subject of testamentary disposition (see <http://thelawdictionary.org/falcidian-law/>). The unborn child of a female slave is discussed in this context, and once more, there is no mention of this excerpt relating to the beginning of legal subjectivity or legal personality; See further Jordaan & Davel's (note 11 above) 12, uncontextualised use of the same references to the Digest; In support of the contention that the child must live after separation even if only for a short period, Heaton (note 11 above) as well as Jordaan & Davel (note 11 above) 12, refer to D 50.16.129 which falls under a title in the Digest concerning commentary on the *Lex Julia et Papia Poppaea* in the context of stillborn infants and whether they should be counted for demographic purposes. The *Lex Julia et Papia Poppaea* was not concerned with legal subjectivity and its beginnings. It was 'purely eugenic and demographic in its conception, framed with the object of preserving and perpetuating the back-bone of the Augustan state, the senatorial and the equestrian orders.' Refer in this regard to the writing of J.A. Field 'The Purpose of the *Lex Julia et Papia Poppaea*' (1945) 40, 7 *The Classical Journal* 398, 399; Jordaan & Davel (note 11 above) 12, refer further to D 28.2.12 & D 50.16.141 in support of the contention that completion of the birth is not influenced by the use of scientific aids or even by the death of the mother. D 28.2.12 refers to a title concerning the appointment and disinheritance of children and posthumous heirs and D 15.16.141 relates to the previously mentioned title in the Digest concerning commentary on the *Lex Julia et Papia Poppaea* which was not concerned with legal subjectivity but rather with eugenics and demographics. Purely in relation to the commencement of legal subjectivity or legal personality, ancient jurists may well have had contrary views to those expressed in the aforementioned analysis, in unrelated contexts. Cognisance should be taken of the fact that no references are made by academic authors in this field to titles or sections in the Digest which relate specifically to the beginning of legal subjectivity or legal personality as a stand-alone topic. The present author's research to date has not revealed any such specific titles or sections.

[14] See *Van Heerden v Joubert* (note 5 above) as well as *S v Mshumpa* (note 4 above) generally.

[15] See Van Heerden & Cockrell et al (note 9 above) 29; Jordaan & Davel (note 11 above) 12, refer to viability in this context as meaning that '… the child must have reached a certain stage of development within the mother's body. The most important organs must have developed to such a degree that the child could live independently, with or without aids, but definitely without being fed from the mother's bloodstream.'

Although most authors are of the opinion that viability is not a necessary requirement for legal subjectivity, primarily for the purpose of succession,[16] it is nevertheless contended that this train of thought leads to a rationally untenable situation. A perpetrator who intentionally destroys a *nasciturus* born after 22 weeks of gestation that shows *any* signs of life,[17] such as a pulse in its umbilical cord,[18] could be held liable for the crime of murder and the same perpetrator who destroys a 38 week *nasciturus* by shooting it *in utero* is at most guilty of aggravated assault upon the pregnant woman and the destruction of the *nasciturus* is seen as nothing more than an aggravating circumstance to be taken into account at the sentencing stage.[19]

The BAR thus serves as a mechanism for the creation of impunity in circumstances where a *nasciturus in utero* is non-consensually destroyed. Although one could argue that the destruction of the *nasciturus* serves as an aggravating factor to be taken into consideration at the sentencing stage, the end result remains untenable, because positive maternal intention, the intrinsic value placed on the *nasciturus* by the pregnant woman, and the potentiality of *ex utero* existence is completely undermined and ignored in favour of a callous construction that is devoid of any meaningful interpretation from the perspective of the pregnant woman. It is important to grasp a basic fundamental understanding that the relationship of the pregnant woman towards the *nasciturus* is completely diluted by the current legal *status quo*.

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[16] See Jordaan & Davel (note 11 above) 12--13.

[17] See Jordaan & Davel (note 11 above) where *any* sign of life includes crying, heart activity, breathing (here the hydrostatic test is used to definitively determine whether or not breathing occurred); See note 33 in Chapter 3, page 38 above, which provides a brief explanation of the hydrostatic test; See Domingo & Mahler-Coetzee (note 11 above) 31, where the authors state that *any* other medical evidence besides breathing may also prove life.

[18] The United Nations Statistics Division, for the purpose of demographic and social statistics, defines 'live birth' as '… the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy, which after such separation, breathes or shows any other evidence of life, such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached; each product of such a birth is considered live-born (all live-born infants should be registered and counted as such, irrespective of gestational age or whether alive or dead at the time of registration, and if they die at any time following birth they should also be registered and counted as deaths.' See: <http://unstats.un.org/unsd/demographic/sconcerns/natality/natmethods.htm#A>.

[19] See the facts of *S v Mshumpa* (note 4 above); See also R.W. MacCartee 'Infanticide in California: The Impact of Keeler v Superior Court of Amador County and the September 17, 1970, Amendment to Penal Code Section 187' (1970) 7 *California Western LR* 272, 282, where the author states that '[t]he absurdity of the born alive concept is obvious when you consider the thousands of premature babies born each year. A prematurely delivered infant is every bit as dependent upon an incubator for life as it would be of its mother had it not been born early. Certainly, if one was to murder a premature baby in an incubator he would have committed homicide. But the born alive rule would hold that there is no homicide where one unlawfully kills the very same infant still in its mother's womb. It is inescapable that the born alive doctrine is irrational and obsolete.' The author states further at 285, that '[t]he born alive rule of the common law had its origin in a time when little or nothing was known of the process of reproduction. Since that time giant strides have been made in obstetrical medicine. Where childbearing was once a risky and uncertain ordeal, it is at present a minor undertaking with live birth a statistical certainty. Unfortunately, legal reasoning in the common law has failed to keep pace with medical advancements.'

## 4.3 The Historical Development of the Born Alive Rule

English common law authority on the destruction of a *nasciturus in utero* can be traced back to the late thirteenth and early fourteenth century[20] when the destruction of a quickened *nasciturus* was considered to be homicide.[21] The *nasciturus* was clearly a pervasive topic of discussion during this period and it appears to have remained so ever since. In later law, by 1327,[22] the *nasciturus* had to be seen *ex utero* to observe its physical appearance and whether or not it showed any visible signs of life.[23] The emphasis being placed on the need for observation highlights the evidentiary nature and function of the BAR.[24]

The BAR became firmly entrenched in English law in the seventeenth century[25] and was later received into other common law jurisdictions such as the United States of America, Australia, New Zealand and Canada.[26] The reception of English law into South Africa took place in 1828 at the Cape and it was during this time that English judicial precedent began to make its mark on the South African legal landscape.[27] The reception of English rules of law and English legal terminology in South Africa took place in no small measure.[28]

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[20] S.R. McCavitt 'The "Born Alive" Rule: A Proposed Change to the New York Law based on Modern Medical Technology' (1991) 36 *New York Law School LR* 609, 611; See Casey (note 2 above) 12--13; See further Forsythe (note 6 above) 580--581; See also Savell (note 6 above) 627, where reference is made to a brief history; C. Jolicoeur-Wonnacott 'The Unborn Victims of Violence Act: Friend or Foe to the Unborn?' (2000) 17 3 *Thomas M. Cooley LR* 563, 568; P.H. Winfield 'The Unborn Child' (1942--1944) 8 *The Cambridge LJ* 76, 78; D.E. Johnsen 'The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection' (1986) 95 3 *The Yale LJ* 599, 602.

[21] Forsythe (note 6 above) 580--581; Casey (note 2 above) 12; The first physical sensation of the *nasciturus* stirring inside the womb of a pregnant woman came to be known as 'quickening'. According to Forsythe (note 6 above) 568, 'during the period of the formulation of the common law, quickening was the most important point in pregnancy in both law and medicine. It was assumed that the fetus first became alive at quickening. At common law, the primitive state of medical knowledge made quickening legally significant, "since quickening was determinable, at least by the mother, in a time when little else about the fetus was readily understood." Later, in the 19th century, physicians came to understand that the fetus was alive at conception. Nevertheless, prior to the 20th century, quickening remained the first reliable proof that the mother was pregnant.'

[22] See Winfield (note 20 above) 78.

[23] Forsythe (note 6 above) 581; Jolicoeur-Wonnacott (note 20 above) 568--569; Johnsen (note 20 above) 602; See further Casey (note 2 above) 1--19 for a detailed 'Historical Background'.

[24] Forsythe (note 6 above) 581.

[25] See Casey (note 2 above) 20--43 where English case law from 1601 (*R v Sims* (1601) 75 ER 1075) to 1935 (*Elliot v Lord Joicey* [1935] A.C. 209) is discussed; See further the Australian case of *R v Iby* [2005] NSWCCA 178, 25, heard in the Supreme Court of New South Wales – Court of Criminal Appeal, where it was confirmed that the entrenchment of the BAR can be traced back to the seventeenth century; See MacCartee (note 19 above) 273; L. Westerfield 'The Born Alive Doctrine: A Legal Anachronism' (1976) 2 *Southern University LR* 149; Jolicoeur-Wonnacott (note 20 above) 568; McCavitt (note 20 above) 611; Forsythe (note 6 above) 567, 583, 604, 606; Savell (note 6 above) 625; C.L. Leventhal 'The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law' (1998) 103 1 *Dickinson LR* 175.

[26] R. Pillay 'The Beginning of Human Personhood: Is South African Law Outdated?' (2010) 2 *Stellenbosch LR* 230, 231.

[27] A.B. Edwards *The History of South African Law – An Outline* (1996) 79.

[28] Edwards (note 27 above) 83.

The English common law relied heavily on judicial precedent, and it is this judicial precedent, which was binding in South Africa, that resulted in the import of the BAR into the South African legal system.[29]

### *4.3.1 The Original Purpose of the Born Alive Rule*

Academic literature from the sixteenth and seventeenth centuries in the field of *nascitural* gestation and *nascitural* medical jurisprudence indicates the rudimentary state of medical knowledge in this arena at the time.[30] The ability to establish whether or not a woman was pregnant proved to be a bewildering undertaking.[31] The 'Quickening Doctrine' developed to prove that a woman was in fact pregnant.[32] The first physical sensation of the *nasciturus* stirring inside the womb came to be known as quickening and this served as conclusive proof that a woman was pregnant.[33] Once it was known that a woman was pregnant, the next challenging task was to establish the living existence of the *nasciturus* and this could not be done until such time as it was born.[34] The *nasciturus* had to be observed outside the womb to determine its general physical state and more importantly whether or not it was alive:

> '… even after quickening, it was extremely difficult to determine whether the child died before or during labor and subsequent expulsion from the womb. Moreover, it was nearly impossible to attribute the injury or death of the child to one cause or another and thus to distinguish between natural causes and inflicted injuries. As a result, live birth was required to prove that the unborn child was alive and that the material acts were the proximate cause of death, *because it could not otherwise be established if the child was alive in the womb at the time of the material acts.*' [emphasis added].[35]

The BAR thus developed as a rule of evidence in order to establish whether or not the *nasciturus* was alive *in utero*.

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[29] See B. Beinart 'The English Legal Contribution in South Africa: The Interaction of Civil and Common Law' (1981) *Acta Juridica* 7, 8--13.
[30] Forsythe (note 6 above) 571.
[31] Forsythe (note 6 above) 571, contends that 'Obstetrics as a branch of medical science was not regularly practiced as a discipline by physicians until the 19th century. Until the middle of the 19th century, female midwives, not physicians, cared for women throughout pregnancy and delivery.'
[32] Forsythe (note 6 above) 568, 571; See also Savell (note 6 above) 627.
[33] Forsythe (note 6 above) 567.
[34] Forsythe (note 6 above) 575.
[35] Forsythe (note 6 above) 575; See further A.S. Taylor *Medical Jurisprudence* (Fifth American from the Seventh and Revised London Edition) (1861) 317, who states that '[i]t is well known that, in the course of nature, many children come into the world dead, and that others die from various causes soon after birth. In the latter, the signs of their having lived are frequently indistinct. Hence, to provide against the danger of erroneous accusations, the law humanely presumes that every new-born child has been born dead, until the contrary appears from medical or other evidence. The onus of proof is thereby thrown on the prosecution; and no evidence imputing murder can be received, unless it be made certain, by medical or other facts, that the child survived its birth, and was actually living when the violence was offered to it.'

Its purpose was to impute civil and criminal liability onto a perpetrator by establishing conclusively that the *nasciturus* was alive *in utero* at the time that the material act was committed. The BAR was never intended as a substantive rule of law used to ascribe legal subjectivity to a human being.[36] If a *nasciturus* was not born alive it could never be known conclusively whether the injuries caused to it *in utero* were the ultimate cause of its destruction because it could have died of natural causes before the infliction of the injury. The BAR was also never intended to represent any moral judgment on the criminality of destroying a *nasciturus in utero*.[37]

### *4.3.2 The Distortion & Misconception of the Born Alive Rule*

In the nineteenth century, English and American courts imposed a gloss on the common law by engaging in elaborate tests to determine live birth.[38] There were two reasons for doing this. First of all, when a *nasciturus* died *in utero* or shortly after birth, the death was usually shrouded in secrecy and did not occur in the presence of witnesses, other than the person being accused of the murder, and therefore a test to prove live birth had to be developed.[39] Secondly, the law was guarded and cautious when attributing criminal liability in cases of *nascitural* destruction, and as a result of this caution, the law adopted the presumption that a newborn was born dead, unless definite evidence was provided of live birth.[40]

In light of the aforementioned, the courts had to develop what they believed at the time to be *conclusive* proof of life tests. The two main tests that were established were a breathing test and an independent circulation test.[41] The courts began to assume, possibly because of the intricate nature of these tests, that the BAR was a substantive element at common law, which designated the unborn *nasciturus* as non-human, a non-person and without legal subjectivity if it was not born alive.

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[36] Refer to Forsythe (note 6 above) generally.
[37] Forsythe (note 6 above) 564.
[38] Forsythe (note 6 above) 564, 597--598.
[39] Westerfield (note 25 above) 151--152.
[40] Forsythe (note 6 above) 590; See further Taylor (note 35 above) together with the accompanying quotation from his writing.
[41] Forsythe (note 6 above) 598--599; Forsythe (note 6 above) 602, states that the '... independent circulation test developed by American courts in the 19th century was based on contemporary medical theories of maternal and fetal physiology. In particular, courts relied on the antiquated and incorrect biological and medical assumption that the mother's blood flowed through the fetus.' Eventually the courts rejected these tests when 'medical science repudiated the notion of "separate existence" as medically erroneous.' See also D. Seaborne Davies 'Child-Killing in English Law – Part I' (1937) 1 *Modern LR* 203, 207, where there was an erroneous belief that '… after birth circulation from the mother proceeds for a few minutes and then ceases, whereupon an independent circulation begins in the child; severance of the cord terminates the connected circulation.'

As the general body of judicial precedent expanded the courts invariably followed this assumption about the BAR. The assumption was however erroneous because the courts never examined the underlying purpose of the rule in its historical context.[42] The next two main sections hereinunder will look to specific foreign jurisdictions to observe the manner in which these jurisdictions have dealt with the BAR from both historic and contemporary perspectives. The first jurisdiction to be examined will be the United Kingdom, followed by the United States of America. Thereafter, the treatment of the BAR in a purely South African context will be examined.

## 4.4 Treatment of the Born Alive Rule in the United Kingdom

The conservative nature of the English common law is notorious.[43] The law surrounding the BAR has developed in the United Kingdom not through a forceful engagement with its origins and contemporary relevance, but rather through an avoidance of interrogating its common law legitimacy as a tool to serve the needs of an ever evolving society.

> 'Once a rule is established [in the United Kingdom], there are only two ways to escape its reach. The first way is via the blunt instrument of statute, a remedy not without its own dangers but having its uses as a sword to cut through Gordian knots [inflexible problems]; the second way to escape the reach of an established rule is by distinguishing it to death. The status of the born alive rule in England is such that there is at present no movement to circumvent it by the making of distinctions and the whole thrust of legislation has been in the opposite direction to what is required by the revelations of medical science.'[44]

### *4.4.1. The Complexity of the Live Birth Tests that were Implemented*

There was a substantial amount of difficulty associated with the tests that were employed to prove that the *nasciturus* was in fact born alive. The independent circulation test proved to incite substantial criticism.[45] The breathing test was also problematic because breathing was not always considered to be conclusive proof of live birth as some courts reasoned that the *nasciturus* could breathe before birth.[46]

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[42] Forsythe (note 6 above) 604.
[43] Casey (note 2 above) ix.
[44] Casey (note 2 above) ix--x.
[45] Westerfield (note 25 above) 150.
[46] Westerfield (note 25 above) 150; See also Seaborne Davies (note 41 above) 207, where the author states that '[t]he earlier cases ruled that proof of independent respiration was not sufficient to establish live-birth as the child may have breathed in the act of birth and died before complete extrusion from the womb.' This proposition appears to be more reasonable and plausible than implying that the *nasciturus* may have breathed while still

In other instances proof of breathing was considered relevant but not conclusive in determining the question of independent circulation.[47] As a result of the uncertainty surrounding the breathing test, the courts insisted on proof of independent circulation for the purpose of proving life in murder cases.[48] There were usually no witnesses to testify to the fact that there was independent circulation and proof thereof became problematic.[49] Medical science had not developed to the extent that a medical determination of independent circulation could be made and the courts had not developed a legal meaning for the term.[50] Because the legal requirements for an independent circulation had never been established, post-mortem testing was almost always inconclusive.[51]

In light of all these technical difficulties of proof, judges and juries often took advantage of the situation and acquitted the accused whenever possible.[52] The live birth tests were conceived in the context of primitive medical science and they disregarded the basic evidentiary nature of the BAR and focused not simply on *any proof of life* as the common law did, but on more elaborate tests that created additional and unnecessary jurisprudential difficulties.[53] The elaborate live birth tests that were employed by the English courts resulted in the common law purpose of the BAR being understood as the common law substantive definition of a *person* or a *human being*. Despite subsequent medical advances which eliminated the original evidentiary reasons necessitating the rule at common law, most courts still held on to the BAR with a tenacity that was unwarranted in light of their illiterate examination of the rule.[54]

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inside the womb. See further Taylor (note 35 above) 346--349, where the author discusses various issues surrounding the hydrostatic test particularly. At 348 the author states that '… the hydrostatic test is no more capable of showing whether a child has been *born alive or dead,* than it is of proving whether it has been murdered or died from natural causes.'

[47] J.A. Meldman 'Legal Concepts of Human Life: The Infanticide Doctrines' (1968) 52 *Marquette LR* 105, 107; See Seaborne Davies (note 41 above) 207, where the author states that 'The question of proof of separate breathing seems to have been connected as late as 1866 in Victorian minds with the theological view of the emergence of the soul.'

[48] Winfield (note 20 above) 79.

[49] Westerfield (note 25 above) 150.

[50] Ibid.

[51] Meldman (note 47 above) 107.

[52] Ibid.

[53] Forsythe (note 6 above) 564.

[54] Forsythe (note 6 above) 565; Even though Forsythe discusses this further development in the context of American courts, it is evident from some of the earliest cases in English law that the BAR was evidential in nature and that despite this knowledge, English courts persisted in an interpretation on a substantive basis grounded in legal personhood. It is therefore highly probable that this development took place not only in the United States of America, but also in the United Kingdom. In this regard see Casey (note 2 above) 113--124, where the author undertakes an in-depth examination of the BAR in order to determine whether it developed as a substantive rule or as an evidentiary rule.

The adoption of these stringent live birth tests in murder cases presented a situation where the law was unable to impart criminal liability on a perpetrator who destroyed a *nasciturus in utero* and unless new offences were created, such perpetrators would continue to enjoy impunity.[55]

### *4.4.2 Legislative Enactment vs. Development of the Common Law*

Instead of turning to the common law and a re-evaluation of the BAR in historical context with specific reference to its original purpose, the English jurists decided to remove the necessity of proving live birth by passing the Infant Life Preservation Act of 1929 (ILPA).[56] The reason that the jurists preferred this route seems to have been that even if they had revisited the historical purpose of the BAR, they knew that their state of medical knowledge at the time could not provide a feasible avenue for the reformulation or abolition of the BAR. If the live birth test could be met, the accused was found guilty of murder and the newborn was protected as a human being and citizen of the state.[57] The ILPA made the destruction of a twenty-eight week *nasciturus in utero* a separate crime and the question of live birth became irrelevant.[58]

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[55] See Seaborne Davies (note 41 above) 211.
[56] See Westerfield (note 25 above) 150--151.
[57] Westerfield (note 25 above) 151.
[58] Ibid; The relevant parts of the Infant Life Preservation Act of 1929 read as follows: S1(1) – '… any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life. Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.'… S1(2) – '… evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be primâ facie proof that she was at that time pregnant of a child capable of being born alive.' See further S. Fovargue & J. Miola 'Policing Pregnancy: Implications of The Attorney-General's Reference (No. 3 of 1994)' (1998) 6 *Medical LR* 265, 268--269, where the authors state that '[a]lthough the I.L.P.A. was originally passed with the aim of closing a lacuna which had developed in the English law (the lacuna had developed due to the fact that it was neither homicide nor abortion to kill a child in the course of its birth, as the former offence required a live human being, and the latter a foetus *in utero*. With its offence of "child destruction" the I.L.P.A. attempted to close this gap), in fact it went further than this. The provisions in section 1(1), when coupled with those in section 1(2), were intended to complement the protection provided by the law of homicide, but also had the effect of protecting a child in the process of being born *and* any child in the womb which is "capable of being born alive". Thus, if the proviso in section 1(1) is not complied with, the I.L.P.A. prohibits the killing of an unborn but viable child, *and* the killing of such a child in the course of it's birth… [The ILPA] was the first statute to permit abortion [see the proviso in S1(1) of the ILPA], albeit in very circumscribed situations, and therefore acknowledged the existence of both foetal *and* maternal interests in relation to pregnancy.' A statute such as the ILPA could assist situations such as Libby's where a late term *nasciturus* is non-consensually destroyed as a result of alleged medical negligence or a case such as *Mshumpa* (note 4 above). The twenty-eight week timeframe stipulated in the ILPA, would however not suit situations where one is dealing with a pregnant woman who has positive maternal intention in the earlier stages of pregnancy. In this regard it is important to emphasise that constructions of pregnant embodiment in a psychosomatic sense are unique and particular to each individual pregnancy. The focus should therefore be on maternal intention and not on gestational age. These issues are discussed in greater detail in Chapter 5 – 'Theories of Personhood' page 72.

Infanticide[59] and feticide[60] were both attended to with one stroke of the legislative brush. This did not however deter from the problems inherent in the live birth tests employed by courts in murder cases. There was a definite culture of legislating in the United Kingdom as opposed to questioning the veracity and intention of the common law.[61] In the nineteenth and early twentieth centuries particularly, there was a prolific amount of legislating around the killing of children both born and unborn.[62] Legislative reviews were constant, the establishment of investigative committees was routine and the views of commissioners who sat on the various committees were regularly exchanged and vigorously debated.[63]

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[59] Allen (note 10 above) 605, defines 'infanticide' as 'the killing of an infant soon after birth; the practice of killing newborn infants; a person who kills an infant'. It is interesting to note that some people who are pro-choice and support abortion are also in favour of infanticide. See for example M. Tooley 'Abortion and Infanticide' (1972) 2 1 *Philosophy & Public Affairs* 37, 62--65, where the author states that '[a]n organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity… [E]veryday observation makes it perfectly clear… that a newborn baby does not possess the concept of a continuing self, any more than a newborn kitten possesses such a concept. If so, infanticide during a time interval shortly after birth must be morally acceptable… [I]n the vast majority of cases in which infanticide is desirable, its desirability will be apparent within a short time after birth. Since it is virtually certain that an infant at such a stage of its development does not possess the concept of a continuing self, and thus does not possess a serious right to life, there is excellent reason to believe that infanticide is morally permissible in most cases where it is otherwise desirable. The practical moral problem can thus be satisfactorily handled by choosing some period of time, such as a week after birth, as the interval during which infanticide will be permitted. This interval could then be modified once psychologists have established the point at which a human organism comes to believe that it is a continuing subject of experiences and other mental states… Once one reflects upon the question of the *basic* moral principles involved in the ascription of a right to life to organisms, one may find himself driven to conclude that our everyday treatment of animals is morally indefensible, and that we are in fact murdering innocent persons.' See further for a different viewpoint, M.A. Warren 'The Moral Significance of Birth' (1989) 4 3 *Hypatia* 46, 62--63, where the author states that '[b]irth is morally significant because it marks the end of one relationship and the beginning of others. It marks the end of pregnancy, a relationship so intimate that it is impossible to extend the equal protection of the law to fetuses without severely infringing women's most basic rights. Birth also marks the beginning of the infant's existence as a socially responsive member of a human community. Although the infant is not instantly transformed into a person at the moment of birth, it does become a biologically separate human being. As such, it can be known and cared for as a particular individual. It can also be vigorously protected without negating the basic rights of women. There are circumstances in which infanticide may be the best of a bad set of options. But our own society has both the ability and the desire to protect infants, and there is no reason why we should not do so.'

[60] Kavanagh (note 10 above) 425, defines 'feticide' as 'destruction or abortion of a fetus'.

[61] See Seaborne Davies Part I (note 41 above) generally; See further D. Seaborne Davies 'Child Killing in English Law – Part II' (1938) 1 *Modern LR* 269 generally.

[62] Ibid; An example of such legislating includes but is certainly not limited to S58 of the Offences Against the Person Act of 1861 which states that 'Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years – or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' For interesting discussions on the killing of people and what makes it wrong see R. Young 'What is so Wrong with Killing People?' (1979) 54 210 *Philosophy* 515; R.E. Ewin 'What is Wrong with Killing People?' (1972) 22 87 *The Philosophical Quarterly* 126.

[63] See Seaborne Davies Part 1 (note 41 above) generally; See Seaborne Davies Part II (note 61 above) generally.

### *4.4.3 Vast Evidence in Favour of an Evidentiary Construction of the Born Alive Rule*

The evidence is overwhelming that the English common law BAR was moulded out of a necessity for proof of *in uterine* life and that it was of evidentiary value and not a substantive rule of law where the presence of life created legal subjectivity.[64]

> 'The Latin phrase, *in rerum natura*, means in English "in the nature of things; in the realm of actuality; in existence."… "reasonable creature in being."… the unborn child is *in rerum natura* when it is born alive. …since the subject of homicide had to be *in rerum natura*, the unborn child could not be the subject of homicide because one could not prove the cause of the injury. … [The] statement that the child is "*in rerum natura* when it is born alive" does not mean that the common law did not view the unborn child as a human being or person before it was born alive. … [the unborn child was viewed as a person], but not one that could be the subject of homicide, because the evidentiary problems prevented proof of the *corpus delicti*[65] of homicide in the case of a stillborn child. … For other purposes such as inheritance – where it was not necessary to prove with certainty that the child at the precise moment was dead or alive – the unborn child was recognized as a person *in rerum natura* in the womb. Likewise, for the same reason, the legal significance of quickening as evidence of life was limited to criminal cases and was not material in inheritance cases.'[66]

It is possible that original intent can be lost in the translation and continuous interpretation of legal doctrines. These doctrines then spark diverse interpretations. The large number of legal scholars who view the BAR as purely evidentiary is inescapable.

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[64] See Forsythe (note 6 above); Casey (note 2 above); Savell (note 6 above); K. Savell 'The Legal Significance of Birth' (2006) 29 2 *University of New South Wales LJ* 200, 204; Westerfield (note 25 above); See Winfield (note 20 above) generally, for a detailed historical account of issues relevant to the BAR; Pillay (note 26 above); C. Pickles 'Personhood: Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability' (2013) 1 *Stellenbosch LR* 146; MacCartee (note 19 above); Meldman (note 47 above) for a comprehensive account of early English doctrines and the difficulties associated with the live-birth tests that the courts employed; McCavitt (note 20 above); Seaborne Davies Part I (note 41 above); Seaborne Davies Part II (note 61 above); Part I & Part II of Seaborne Davies's works are a comprehensive source of child killing in English law, including feticide and infanticide; S.B. Atkinson 'Life, Birth, and Live-Birth' (1904) 20 *The Law Quarterly Review* 134, for a comprehensive exposition on the meaning and definition of live-birth; *R v Iby* (note 25 above) 25--67, for a detailed account of the development of the BAR in the United Kingdom & the United States of America; G.A. du Plessis 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *Stellenbosch LR* 73, 76, 86--87; G. Casey 'Pregnant Woman and Unborn Child: Legal Adversaries?' (2002) 8 2 *Medico-Legal Journal of Ireland* 75, where the BAR as an evidentiary mechanism is discussed crisply, available at <http://www.ucd.ie/philosophy/staff/gerardcasey/casey/PregWomUnbrnChld.pdf>; J.A. Parness 'The Abuse and Neglect of the Human Unborn: Protecting Potential Life' (1986) 20 2 *Family LQ* 197; J.A. Parness 'Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life' (1985) 22 *Harvard J on Legislation* 97; Johnsen (note 20 above) generally; See C.M. Sperling Pickles '*S v Mshumpa:* A Time for Law Reform' (2010) LLM Dissertation 24--25; Jolicoeur-Wonnacott (note 20 above) 568--579; See Taylor (note 35 above) generally, for a detailed volume on medical jurisprudence in the nineteenth century where there is an excellent account of medical jurisprudence in relation to infanticide and the live-birth tests that were utilised at the time.

[65] Forsythe (note 6 above) 565, states that '[t]he expression *corpus delicti* as understood in homicide cases, means the body of the crime, and consists of two component parts, the first of which is the death of the person alleged to have been killed, and the second that such death was produced through criminal agency.'

[66] Forsythe (note 6 above) 587--588.

Even those authors, who doubt the evidentiary origin of the BAR, nevertheless concede that the proof in favour of an evidentiary origin and construction is remarkable.[67] Despite the aforementioned, the English common law as regards the BAR remains unchanged. Recognition of the necessity for *nascitural* safeguards and protections in the United Kingdom has grown and developed in a purely legislative context with little if any direction from a judicial perspective.

### *4.4.4 The Entrenchment of the Born Alive Rule in the United Kingdom*

The BAR is firmly entrenched in the United Kingdom; there is no palpable need to circumvent it; and constant legislative progression provides no hope for the reasonable prospect of its abolition.[68] Irrespective of the common law having remained intact as regards the BAR, constructive legislative measures have been taken to secure a space in which *nascitural* safeguards and protections can be cultivated. The narrative which flows from this space will no doubt develop into a comprehensive legal doctrine defending *nascitural* safeguards and protections ever closer to the moments of conception.

## 4.5 Treatment of the Born Alive Rule in the United States of America

The development and evolution of the BAR in the United States of America has proven to be a far more contemplative, insightful and significant process than in the United Kingdom.[69] This is due in large part to the manner in which the functioning and administration of the law takes place in the United States. Each of the fifty states which comprise the United States, legislate according to their own needs and desires, taking into account the expansion of judicial precedent, the evolution of the common law and the needs of society at large.[70] This makes for the growth and entrenchment of a far more representative, progressive and thought-provoking jurisprudence. The manner in which the law regarding the BAR has advanced in the United States has made for a very interesting dynamic when considering the various approaches which will be discussed hereinunder.

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[67] See Savell (note 6 above) generally.
[68] Casey (note 2 above) 115.
[69] See MacCartee (note 19 above); Jolicoeur-Wonnacott (note 20 above); Westerfield (note 25 above); Winfield (note 20 above); Johnsen (note 20 above); Forsythe (note 6 above); *R v Iby* (note 25 above); Parness 'Crimes Against the Unborn…' (note 64 above); Casey (note 2 above); McCavitt (note 20 above).
[70] Ibid; See also A. Wagner 'Texas Two-Step: Serving Up Fetal Rights by Side-Stepping *Roe v. Wade* has set the Table for Another Showdown on Fetal Personhood in Texas and Beyond' (2001) 32 *Texas Tech LR* 1085, 1103, where the author states that '[m]any states have made the harming of a fetus a crime recognized under the law, punishable in the same way as the killing of any person, on a finding that a fetus is a "person" or "human being" for purposes of the state's homicide statutes.'

### *4.5.1 The Development of a Multidimensional Jurisprudence*

The three main ways in which the BAR has developed to be in line with contemporary societal beliefs and expectations is firstly through direct legislative measures where various state legislatures have adopted *nascitural* safeguards and protections.[71] Secondly, judicial intervention, where the courts have rejected the BAR, thereby indirectly guiding the legislature to cultivate the appropriate *nascitural* safeguards and protections, has been developed.[72] Finally, some states in the United States have arrived at *nascitural* safeguarding and protection provisions not by means of direct legislative measures or indirect judicial intervention, but by court-led statutory interpretation where existing homicide statutes were deemed to include the viable *nasciturus in utero*.[73]

Thirty eight states in the United States currently recognise the unlawful destruction of a *nasciturus in utero* as homicide in at least some circumstances.[74] Twenty eight states recognise the *nasciturus in utero* at any stage of gestational development as a potential victim.[75] Ten states recognise the *nasciturus in utero* as a victim but only during part of the gestational period.[76] Seventy six percent of the states in the United States have recognised some form of protection against the unlawful destruction of the *nasciturus in utero* through a combination of direct legislating and judicial directives recognising the redundancy of the BAR.[77] This sends out a very strong message to common law jurisdictions around the world who continue to cling to rules that were developed for reasons that are no longer applicable.

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[71] See Leventhal (note 25 above) 173, 177.

[72] See A.M. Leonard 'Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or "Gestational Gestapo"?' (1998) 32 *New England LR* 615, 633, where the author states that '[t]he cases of *Commonwealth v. Cass* 467 N.E.2d and *State v Horne* 319 S.E.2d were the first to expressly reject the "born alive" rule by holding that injury to viable fetuses were common law crimes against the state, regardless of whether the viable fetus was later "born alive". While *Horne* remains a heavily cited case, it is not cited as frequently as *Cass*. One factor contributing to the frequent citation of the *Cass* opinion is its "concise, logical, and tightly reasoned analysis" expressly rejecting the born alive rule. Another factor is the *Cass* court's novel use of "conclusive medical testimony" and the use of this medical evidence to "prove the constituent elements of the crime."' See also *R v Iby* (note 25 above) 63; See further Forsythe (note 6 above) 605.

[73] For a comprehensive account of 'The American Experience' with the BAR see Casey (note 2 above) 125--155.

[74] A comprehensive breakdown and summary of the laws relating to *in uterine nascitural* destruction in the various states is available at: <http://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/>. The statistics available on the aforementioned website are current and up to date as at the 24th of May 2013.

[75] Refer to the aforementioned website at (note 74 above). The following states are included: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia & Wisconsin.

[76] Refer to the aforementioned website (note 74 above). The following states are included: California, Florida, Indiana, Maryland, Massachusetts, Montana, Nevada, Rhode Island, Washington & New York. *Note:* New York has conflicting statutes. In this regard refer to the aforementioned website at (note 74 above).

[77] See (note 69 above).

It is possible to develop the common law to serve as a fair and useful representation of the values that society at large hold to be relevant and representative of their legal convictions.

### *4.5.2 Judicial Direction as a Vibrant Source of Law Reform*[78]

The main difference between the ways in which the law regarding the BAR has developed in the United States compared to the ways in which it has developed in the United Kingdom is the extent to which the judiciary have recognised the redundancy of the BAR at common law, thereby prompting legislative intervention and ultimate law reform.

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[78] The judicial system in the United States is not the same as the judicial system in the United Kingdom. See H. Corder 'The Appointment of Judges: Some Comparative Ideas' (1992) 3 *Stellenbosch LR* 207, 219--220, 217, where the author states that '[in the United States of America] [t]he president of the USA appoints about 500 federal judges, subject to Senate approval, to the Supreme Court, the Courts of Appeal of eleven regional circuits and District Courts exercising federal jurisdiction throughout the 50 states, as well as the many specialised federal tribunals. No specific qualifications are laid down and party politics plays a significant role, especially in regard to courts high in the hierarchy. Various customary practices exist in relation to nomination of federal judges to office in the states, and those nominated are screened by the Justice Department, a White House committee, the American Bar Association and the Federal Bureau of Investigation. At state level, there is no uniform method of appointing judges, though most states use some form of the electoral process, as well as the "Missouri plan". This scheme, devised in 1913, provides for the drawing up of a short list of qualified candidates for the Bench by an impartial commission (on which lawyers and lay people are represented), from which list the appropriate state official selects a nominee for appointment. After several years in office, the electorate is required to vote on the simple question of whether s/he should continue as a judge – there is no direct competition or political partisanship involved. If rejected, the process is repeated; if confirmed s/he remains a judge for a relatively long term, after which s/he may seek re-confirmation… [In the United Kingdom] [t]he key figure in appointments to the English Bench, at High Court and Circuit Court levels, is the Lord Chancellor, who is assisted in the discharge of this personal responsibility by a section within his office, the Judicial Appointments Division. Such appointments are not a matter for discussion at Cabinet. The Prime Minister is responsible for appointments to the Court of Appeal and the House of Lords, usually relying on advice from the Lord Chancellor. The Lord Chancellor, the Permanent Secretary of his department and the head of the Judicial Appointments Division maintain extensive links with the judiciary and practising lawyers in order to keep informed of those barristers suitable for appointment to judicial office.' For further reading on aspects of the judicial system in the United States of America refer to: D.E. Pozen 'The Irony of Judicial Elections' (2008) 108 2 *Columbia LR* 265; S.P. Croley 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (2012) 79 4 *The University of Chicago LR* 689; A.P. Bruhl & E.J. Leib 'Elected Judges and Statutory Interpretation' (2012) 79 4 *The University of Chicago LR* 1215. For further reading on aspects of the judicial system in the United Kingdom refer to: T.W.D. 'The English Judicial System' (1869) 17 2 *The American Law Register* 65; F.H. Lawson 'A Summary Description: The English Judicial System' (1957) 43 5 *American Bar Association Journal* 403; L. Baum 'Review Article: Research on the English Judicial Process' (1977) 7 4 *British Journal of Political Science* 511. It is possible that the process of being elected into judicial office may impact upon the types of decisions that are reached by a particular judge. Some may argue that the courtroom becomes a political playground. Regardless of these reservations, the courts have the *potential* to play a meaningful role in the moulding and implementation of laws in both jurisdictions. Judicial law making often proves to be a more speedy method of law reform than reliance on legislative processes. There are however drawbacks to judicial law reform such as the implementation of new laws where reforms are directed at legislatures for construction and implementation. A detailed discussion of the pitfalls of courtroom law reform falls beyond the scope of what this section aims to demonstrate. Despite the differences in judicial appointment in these two foreign jurisdictions, creative decision making in both jurisdictions remains possible. The willingness, based on political and other ancillary factors, to in fact cultivate such decisions is another matter altogether. The system of judicial appointment in South Africa is similar to that of the United Kingdom. The appointment of judges in South Africa is governed by the Judicial Service Commission whose responsibility it is to advise the President of the country on the appointment of judges. See I. Currie & J. de Waal *The New Constitutional & Administrative Law* Vol 1 (2001) 303--305.

Another marked difference in the approach of the two jurisdictions is the extent to which society at large has seen fit to engage in the debate regarding the protection of the *nasciturus in utero* from non-consensual destruction.[79] In the United States, the debate appears to be far more robust and aggressive than in the United Kingdom and the courts have taken notice, incorporating the legal convictions of the community in the process of formulating the reasoning behind the judgments which are handed down.

### *4.5.3 Landmark Judicial Precedent*

The judicial precedent that has emerged from the United States is, generally speaking, a rich source of reason, logic, and common sense with regard to the treatment of the BAR.[80] The courts have spoken eloquently and with enthusiasm about the need to develop the common law and have provided a well-reasoned approach towards the production of *nascitural* safeguards and protections. Some of the most articulate assertions and explications have come, not from an overwhelming majority, but rather from a dissenting minority. Whether the reasoning in these judgments is espoused from a majority or a minority perspective deters little from the fact that cognisance has been taken of the thinking behind these judicial interpretations and many of these thoughts come to life in the new legislative enactments and existing legislative amendments that have taken place in the various states across the United States. Proposed n*ascitural* safeguards and protections are frequently on the reform agenda.

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[79] All of the research conducted by the present author in relation to United States dealings with the BAR has revealed a vigorous, outspoken, and passionate participation by society at large. There appears to be constant engagement with issues surrounding the recognition and importation of *nascitural* safeguarding and protection measures both at a legislative as well as a judicial level. Engagement with this subject matter is encouraged, constant, and highly efficient, with the result that issues surrounding the *nasciturus* become dynamic, constantly evolving, and contemporarily reflective of societal paradigms. See (note 69 above) generally; See (note 6 above) generally; See (note 64 above) generally.

[80] An interesting aside to this point is derived from a book recently published by C.D. Forsythe (note 6 above), who has been extensively referenced in this chapter. See C.D. Forsythe *Abuse of Discretion – The Inside Story of Roe v. Wade* Kindle ed (2013) Loc 1579--1581, where the author asserts that the legal history surrounding the BAR was completely lost on the Justices who decided *Roe*. Forsythe claims that the BAR was misunderstood to signify moral standing rather than evidence. At Loc 1589--1594, 1598--1602, Forsythe states that '[t]here is conclusive evidence that the born-alive rule was not a rule of biological development but a rule of evidence: injuries imposed on the unborn child in utero could be prosecuted as a homicide as long as the child was not stillborn but came out alive and died thereafter. If "rights" were truly "contingent" on birth, then the injury inflicted would have to come only after birth; if the unborn child was truly a non-entity, the injury could not be inflicted while the child was in the womb. This is the principle of congruence: the entity that is injured inside and the entity that dies outside is the same entity, the same human being. By granting a remedy for injuries inflicted in utero, the law recognized that the child before and after birth was the same human being… The fact that the born-alive rule recognized that the entity injured in the womb was the same entity that died outside the womb, and was the subject of homicide, meant that the entity in the womb was considered a human being inside and outside. If the law did not recognize the child in utero as a human being, then the law could only have granted a remedy if the injuries were inflicted after birth, but that was never the law. Neither the briefs filed in the Supreme Court nor the attorneys clarified the evidentiary nature of the [BAR].'

In *Keeler v. The Superior Court of Amador County,* a Supreme Court of California judgment, Burke ACJ in a dissenting opinion stated the following:[81]

> '[T]he majority ignore significant common law precedents… and defy reason, logic and common sense. The majority pursue the meaning of the term "human being" down the ancient hallways of the common law… to the effect that the slaying of a "quickened" (i.e. stirring in the womb) child constituted "a great misprision" [misdemeanour] but not murder.[82] … The majority cast a passing glance at the common law concept of quickening, but fail to explain the significance of that concept: At common law, the quickened fetus *was* considered to be a human being, a second life separate and apart from its mother… "Life is… a right inherent by nature in every individual; *and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb*." … [A]lthough the common law did not apply the labels of "murder" or "manslaughter" to the killing of a quickened fetus, it appears that at common law this "great misprision" was severely punished. As late as 1837, the wilful aborting of a woman quick with child was punishable by *death* in England.[83] … The common law reluctance to characterize the killing of a quickened fetus as a homicide was based solely upon a presumption that the fetus would have been born dead. … Based upon the state of the medical art in the 17th, 18th and 19th centuries, that presumption may have been well-founded. However, as we approach the 21st century, it has become apparent that "This presumption is… contrary to common experience and the ordinary course of nature." … No one doubts that the term "human being" would include the elderly or dying persons whose potential for life has nearly lapsed; their proximity to death is deemed immaterial. There is no sound reason for denying the viable fetus, with its unbounded potential for life, the same status.'[84]

A fundamental characteristic of the approach towards the BAR which has been adopted in the United States is common-sense. In *The People v. Chavez* which was a District Court of Appeal case in California, Barnard J stated the following:[85]

> 'There is not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother… It is well known that a baby may live and grow when removed from the body of its dead mother by a Caesarian operation. … [T]he rules of law should recognize and make some attempt to follow the natural and scientific facts to which they relate. … It would be a mere fiction to hold that a child is not a human being because the process of birth has not been fully completed, when the destruction of the life of its mother would not end its existence and when, if separated from the mother naturally or by artificial means, it will live and grow in the normal manner. … That a [fetus at some point becomes] a human being does not rest upon pure speculation.'[86]

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[81] *Keeler v. Superior Court of Amador County* 2 Cal.3d 619 (June 12, 1970).
[82] Burke ACJ expressed his displeasure at this point with the fact that interpretations are construed as they would have been in 1648 or 1765. See *Keeler* (note 81 above) 640.
[83] Lord Landsdowne's Act of 1828. See *Keeler* (note 81 above) 641.
[84] *Keeler* (note 81 above) 640--644.
[85] *People v. Chavez* 77 Cal.App.2d 621 (January 10, 1947).
[86] *Chavez* (note 85 above) 625--627.

Logic and balanced reasoning are further key ingredients in the recipe for the development and successful advancement of the law. In *Commonwealth v Cass* which was a Supreme Court of Massachusetts decision, Hennessey CJ stated that:[87]

> 'An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb… [H]eretofore the law has not recognized that the pre-born could be the victims of homicide because of difficulties in proving the cause of death; but problems in proving causation do not detract from the personhood of the victim.'[88]

The distinct engagement of the courts in the United States with the concept, implications and continuing relevance of the BAR has led to extensive law reform across the United States. The courts have not shied away from engagement with common law principles. Without ever seeing the light of day, or inhaling a breath of fresh air, the *nasciturus* has gradually acquired and continues to acquire legal protection as a *bona fide* legal subject in the United States of America.[89] The creation of laws in the United States that construct *nascitural* safeguards and protections will not lead to the erosion of constitutionally protected abortion rights because of one essential distinction: that of a woman's right of choice regarding her health and body versus the right of a perpetrator to intentionally or negligently destroy a *nasciturus in utero*.[90] The United States appears to have successfully navigated the distinction between second party (lawful abortion) and third party (unlawful abortion) *nascitural* destruction.[91]

### *4.5.4 Intervention at Federal Level*

At a Federal level, the United States has enacted two pieces of important legislation relevant to safeguarding and protecting the *nasciturus*. The first is the Born Alive Infants Protection Act of 2002 which provides for the protection of a *nasciturus* born alive at any stage of development as a result of an abortion. The second relevant piece of legislation is the Unborn Victims of Violence Act of 2004 which criminalises third party *nascitural* destruction. The *nasciturus* has enjoyed some form recognition at every level of the legal system in America.

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[87] *Commonwealth v Cass* 392 Mass. 799, 467 N.E.2d 1324 (August 16, 1984).
[88] *Cass* (note 87 above) 801.
[89] Leventhal (note 25 above) 177.
[90] Leventhal (note 25 above) 185; The author states something along similar lines directly related to the 'Crimes Against the Unborn Child Act' which is a legislative enactment in the State of Pennsylvania. There is however no reason not to apply this train of thought to the broader context of *nascitural* safeguards and protections across a much wider spectrum. This line of thought is especially poignant and relevant when understood in the context of the pregnant woman who has positive maternal intention. Non-consensual *nascitural* destruction undermines the rights of the pregnant woman with positive maternal intention in a distressing and degrading manner.
[91] Many of the authors which have been cited in this chapter refer to second party versus third party foeticide. For an example of this reasoning, refer to Casey (note 2 above) 125.

The position of the *nasciturus* has shifted from being largely unrecognised by the law to being recognised by different states in varying degrees for the varying purposes of administrative law, property law, the law of delict and criminal law.[92] It is generally recognised in the United States that justice cannot be adequately served when an unborn *nasciturus* is non-consensually destroyed without the perpetrator being seriously punished and stigmatised for committing the act.[93] The laws that have been enacted for foetal homicide in the United States 'may not be the perfect solution, but laws seldom are perfect. They are, however; certainly closer to perfection than the born alive rule'.[94] In the United States, 'extension of protection and respect for the unborn through criminal laws is in line with significant societal interests. Such interests are founded at times on both a general public interest and a particularised individual interest in the unborn human.'[95]

## 4.6 Treatment of the Born Alive Rule in South Africa

Based on the evidence presented in this chapter it is respectfully submitted that the treatment of the BAR in South Africa lies on the periphery of logical rationality. The main reason for this assertion is the serious lack of cases that have come before the judiciary where the issue at hand has been the non-consensual destruction of a *nasciturus in utero*. When cases which assert the wrongfulness of non-consensual *nascitural* destruction are litigated, they generate an enormous amount of public attention which is a key factor in the drive behind law reform.[96] When such cases are scarce, public attention is drawn in other directions and the impetus needed to generate law reform becomes almost impossible to achieve.

There are only two known criminal cases in South African judicial precedent which have directly interrogated the non-consensual destruction of a *nasciturus in utero*. These cases are *Van Heerden v Joubert*[97] and *S v Mshumpa*.[98] In both of these cases the BAR was not sufficiently questioned. There is very little robust academic discussion and debate taking place at the moment in South Africa around the status of the *nasciturus in utero*.[99]

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[92] Casey (note 2 above) 155.
[93] McCavitt (note 20 above) 641.
[94] Ibid.
[95] Parness 'Crimes Against the Unborn…' (note 64 above) 98.
[96] Refer to Chapter 2 – 'The Libby Gonen Story', note 31, page 21, for an overview of the type of publicity that was generated in *Van Heerden v Joubert* (note 5 above) and *S v Mshumpa* (note 4 above).
[97] *Van Heerden v Joubert* (note 5 above).
[98] *S v Mshumpa* (note 4 above).
[99] Although there has always been, and continues to be, academic debate about the status of the unborn in South African law, the volume of writing is not vast, and the number of academics writing on the subject is limited.

The discussion that is taking place is not generating sufficient interest to provoke an extensive array of new ideas, proposed formulations and suggested solutions. A vibrant and academically challenging atmosphere would surround potential *nascitural* safeguards and protections if people at every level of the legal fraternity in South Africa were prepared to undertake far-reaching, intensive and meaningful engagement with the topic.

### *4.6.1 A Lack of Serious Judicial Engagement with the Born Alive Rule*

In South African law it is taken for granted that until such time as a *nasciturus* is born alive it has no legal subjectivity and is for all intents and purposes a non-entity as far as legitimate and lawful recognition of its *in utero* existence is concerned. South African judicial precedent is deficient in terms of its engagement with the BAR and the concept of being born alive in general.[100] There are three main reasons for this deficiency.

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The most well versed authors in this field in a South African context, who have recently written on this topic are: C.M. Sperling Pickles of the University of Pretoria, R. Pillay of the University of KwaZulu-Natal, H. Kruuse of Rhodes University, D. Meyerson of the University of Cape Town, D.J. McQuoid-Mason of the University of KwaZulu-Natal, S.A. de Freitas of the University of the Free State, G.A. du Plessis (Previously Myburgh) of the University of the Free State. This list of academics is not exhaustive and represents sources most frequently consulted by the present author for a relatively contemporary viewpoint on the topic. This list is rather short when compared to foreign jurisdictions such as the United States and the United Kingdom where there are many more academics engaging with this topic.

[100] Based on the Juta Law and LexisNexis databases, there are twenty one cases from 1903 to 2012 which mention either the concept of being 'born alive' or the 'born alive' rule / principle itself. The relevant cases are: *Rex v Adams* (1903) 20 SC 556 (exposure of an infant born alive is a criminal offence); *Rex v Ganyana* 1917 EDL 319 (the killing of a child once born alive constitutes the crime of murder); *Kalamie v Armadien* 1929 CPD 490 (maintenance for a child *in utero* comes into operation once the child is born alive), in this regard refer further to (note 35) in Chapter 3, page 39, which discusses maintenance for a *nasciturus en ventre sa mere*; *Groeschel v Groeschel* 1938 SWA 9 (per *obiter dictum* it was stated that the bastardisation of a child born in wedlock is restricted to the case of a child born alive); *Jacobs v Lorenzi* 1942 CPD 394 (maintenance claimed in respect of a child if born alive is payable); *Ex Parte Muller and Others* 1946 OPD 117 (a *curator ad litem* may only be appointed in respect of a child already born and not in respect of a child not yet born alive); *Ex Parte Strauss and Another* 1949 (3) SA 929 (O) (the power of the court to consent on behalf of unborn persons in the context of a *fideicommissum* and the alienation of immovable property); *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 (O) (the born alive rule in the context of the *nasciturus* doctrine and inheritance); *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) (delictual claim for injuries sustained by a *nasciturus in utero* allowed based on the *nasciturus* doctrine); *S v D* 1967 (2) SA 537 (N) (no evidence of the child being born alive in a case involving concealment of birth); *S v Rufaro* 1975 (2) SA 387 (RA) (the killing of a child born alive is murder); *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) (the application of the *nasciturus* doctrine does not clothe the *nasciturus en ventre sa mere* with any legal subjectivity and there is no scope for the extension of the *nasciturus* doctrine to protect the *nasciturus* against abortion or to provide the *nasciturus* with a *curator ad litem*); *Connolly and Others v AA Mutual Insurance Association Ltd* 1991 (1) SA 423 (W) (the *nasciturus* doctrine referred to in the context of legal personality and juristic persons); *S v Jasi* 1994 (1) SACR 568 (ZH) (case considered in the context of concealment of birth – in order for the child to have been born alive it must have breathed independently – a child for the purposes of the crime of concealment of birth is one who has reached a stage of development, irrespective of the duration of the pregnancy, which makes the child capable of being born alive); *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) (a stillborn child is not a person for the purposes of the Inquests Act 58 of 1959 – nor does a *nasciturus in utero* possess any legal subjectivity until born alive); *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) (a *nasciturus en ventre sa mere* does not enjoy any constitutional right

First of all, as previously mentioned, there is a lack of case law in South Africa which could prompt direct engagement with the BAR. Secondly, the contexts in which the BAR and the concept of being born alive arise are not always conductive to a detailed examination. Finally, the general perception in judicial circles is that the BAR represents good law and therefore no interrogation is necessary. Being born alive is spoken of simplistically as the quintessential, non-negotiable, and indispensable element of human legal subjectivity. The case law reveals only a superficial and uncontextualised engagement with and understanding of the BAR's underlying principles and overall purpose.

The most comprehensive discussion to date in the context of South African judicial precedent with regard to the BAR took place in *S v Mshumpa*.[101] Despite the engagement of the *Mshumpa* court with the BAR, it remains insufficient. The *Mshumpa* case dealt with the intentional killing of a 38 week old *nasciturus in utero*.[102] The court was presented with the perfect opportunity to grapple with and constructively engage with the origins and contemporary relevance of the BAR and it failed to do so.[103] The court in its judgment referred to only two foreign cases, one from the United Kingdom and one from the United States of America.[104] There were at least seventy or possibly even eighty foreign cases that the court could have referred to in its deliberations surrounding the BAR.[105] The approach which the *Mshumpa* court adopted was largely one of avoidance and the relegation of law reform strategies to the legislative branch of government.[106]

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to life); *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) (the right of a child to sue for prenatal injuries only becomes complete once the child is born alive – an action to sue for prenatal injuries can take place without employing the *nasciturus* doctrine as in *Pinchin* above – the ordinary principles of delict can be used to recover damages for prenatal injuries); *S v Ngondore; S v Mudzingwa* 2007 JDR 0627 (ZH) (an essential element of the crime of infanticide is that the child must have been born alive); *S v Mshumpa and Another* 2008 (1) SACR 126 (E) (the killing of a *nasciturus en ventre sa mere* is not murder – at most the killing of a *nasciturus en ventre sa mere* can serve as an aggravating circumstance to be taken into consideration at the sentencing stage); *Hoffman v Member of the Executive Council Department of Health, Eastern Cape* 2011 JDR 1018 (ECP) (child born still as a result of medical negligence – delictual claim by plaintiff successful - but for the negligence of the medical personnel the child would have been born alive); *S v Molefe* 2012 (2) SACR 574 (GNP) (in a case of concealment of birth there must be evidence that the *nasciturus* had the potential to be born alive).

[101] *S v Mshumpa* (note 4 above).

[102] *Mshumpa* (note 4 above) 133 C--D.

[103] *Mshumpa* (note 4 above) 148--152.

[104] *Attorney General's Reference* (No 3 of 1994) [1997] 3 All ER 936 HL; Refer to Casey (note 2 above) 103--124, for a comprehensive summary of *Attorney General's Reference*; *Keeler v The Superior Court of Amador County* (note 81 above); Refer to Casey (note 2 above) 126--131, for a comprehensive summary of *Keeler*.

[105] These numbers represent the bare minimum of cases that were available for consultation. The United States of America is a rich source of jurisprudence where the BAR is concerned and the court looked at only one case from this foreign jurisdiction. Refer to the academic writings listed in (note 64 above) and the multitude of authorities cited therein for a comprehensive and holistic, but by no means exhaustive database of relevant judicial precedent.

[106] *Mshumpa* (note 4 above) 152 D--E.

Froneman J could have extended the common law definition of murder to include the non-consensual destruction of a *nasciturus in utero* by making a prospective declaration.[107] He declined to do so on several grounds.[108] Firstly he stated that protection could only be extended to an existing class of persons in society and based this statement on the case of *Masiya v Director of Public Prosecutions*.[109] Referring to *Masiya* Froneman J stated that 'rape is a crime which impinges upon the fundamental rights of dignity, privacy and physical integrity of a woman in a brutal and degrading manner.'[110] He stated further that '[t]here is no counterpart in the Constitution for the protection of the rights of an unborn child.'[111] It is contended here by the present author that Froneman J could have extended the common law crime of murder based on these same rights of the expectant mother instead of contemplating the extension of rights to a *nasciturus in utero*.[112]

The non-consensual destruction of a *nasciturus in utero* also impinges upon the fundamental rights of dignity, privacy and physical integrity of women in a brutal and degrading manner. One could only imagine that giving birth to a lifeless infant, that was destroyed *in utero* because of non-consensual third party intervention, would be a disturbingly cruel and undignified experience. When a pregnant woman with positive maternal intention is non-consensually deprived of her reproductive autonomy, she should be able to turn to the law.

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[107] Allowance has been made in the Constitution of the Republic of South Africa for the courts to develop the common law. S8(3)(a)--(b) states: 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and – may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1)'; S39(2) states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'; S173 states: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[108] *Mshumpa* (note 4 above) 151 F--J & 152 A--E.

[109] *Masiya v Director of Public Prosecutions* 2007 (2) SACR 435 (CC); *Mshumpa* (note 4 above) 151 F--G.

[110] *Mshumpa* (note 4 above) 151 G--H.

[111] *Mshumpa* (note 4 above) 151 G.

[112] The extension of legal rights to a *nasciturus in utero* carries the potential risk of a conflict of legal rights between those of the pregnant woman and those of the *nasciturus*. The victim remains the *nasciturus* and the destruction of its life based on the constitutional rights of the pregnant woman could be made a crime. If the common law crime of murder were extended to include a *nasciturus* gestating inside a woman with positive maternal intention, the rights of women with negative maternal intention, who procure a termination of their pregnancies, within the legal parameters of the Choice on Termination of Pregnancy Act 92 of 1996, would not be impinged upon. The victim, as far as the crime of murder would lie, is not the pregnant woman, and her 'right' to be a parent is not the right that is being violated. The rights which are being violated are the pregnant woman's constitutional rights to bodily autonomy, reproductive freedom and privacy. If the common law crime of murder included the non-consensual destruction of a *nasciturus in utero* it would not automatically imply that the *nasciturus* has its own independent set of constitutional rights. The killing of the *nasciturus* can be a crime without it being a legal subject with legal rights. See Chapter 5 – 'Theories of Personhood', page 72, where argument is advanced at various levels for the moral rights of the *nasciturus*. The *nasciturus* could have a moral interest in its own life that is violated by non-consensual destruction to constitute murder.

Froneman J then went on to cite two further technical issues which in his opinion were a barrier to the advancement of the common law.[113] At the very least Froneman J could have given some sort of direction to the legislature instructing the urgent investigation of non-consensual third party *nascitural* destruction.

### *4.6.2 The South African Law Reform Commission as a Source of Reform*

In the wake of *Mshumpa* the South African Law Reform Commission (SALRC) launched a preliminary investigation into violence against pregnant women on request from the National Prosecuting Authority in Grahamstown in the Eastern Cape.[114] The preliminary investigation was completed and the project came to a standstill. The *nasciturus in utero* in the *Mshumpa* case was non-consensually destroyed on the 14th of February 2006.[115] The first proposal paper was served before the SALRC on the 25th of October 2008, more than two and a half years after the non-consensual destruction in *Mshumpa*.[116] A further supplementary proposal paper was considered by the SALRC commission on the 10th of October 2009.[117] Thereafter a request was sent to the Minister of Justice and Constitutional Development to approve the inclusion of the project in the SALRC's programme. The commission continues to await the Minister's decision, now more than seven and a half years after the non-consensual destruction in *Mshumpa*. These timeframes are clearly unacceptable.[118]

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[113] *Mshumpa* (note 4 above) 152 B--D.

[114] See the South African Law Reform Commission Thirty Eighth Annual Report 2010 / 2011, 45, available at: <http://www.justice.gov.za/salrc/anr/2010-2011-anr.pdf> - Preliminary Investigations - Violence Against Pregnant Women – 'In South African Law, the common law offence of murder consists in the intentional and unlawful killing of another person. The culpable and unlawful killing of an unborn baby by a third party does not constitute a crime since a foetus is not considered to be a person. The current position in South African law is that a person only attains legal subjectivity at birth. The Deputy Director of Public Prosecutions in Grahamstown requested the inclusion of an investigation with regard to the culpable and unlawful killing of an unborn baby by a third party in the SALRC's programme. A proposal paper dealing with the South African legal position (referring to the Constitution, the 'born alive' rule in the common law, delict and succession, procedural law, murder, attempted murder, abortion and sentencing), the international legal position, relevant international instruments, regional treaties, foreign jurisdictions, the phenomenon of violence against pregnant women and local cases to recommend the inclusion of the investigation served before the Commission on 25 October 2008. After consideration of a supplementary proposal paper on 10 October 2009, the Commission approved the inclusion of the project, but under an amended title, namely 'Violence against Pregnant Women'. A memorandum to request the Minister of JCD to approve the inclusion of the project in the SALRC's programme was submitted to the Department. The Commission is still awaiting the Minister's decision on whether to include this investigation in the SALRC's programme.'

[115] *Mshumpa* (note 4 above) 133 B--J.

[116] See (note 114 above).

[117] Ibid.

[118] The present author has been following up regularly with the SALRC to find out what progress has been made. In an e-mail received from Mr Pierre van Wyk, a Principal State Law Adviser at the SALRC, on the 17th of July 2013, the present author was advised as follows: 'I should point out that the working methodology of the SALRC is to commence its work on an investigation once it has been approved and included on the programme. Hence, if we receive a proposal for the inclusion of an investigation on our programme, it is assigned for a pre-

There is currently nobody at the SALRC driving this potential investigation and it could well take a further seven and a half years before this investigation ever sees the light of day. In retrospect, the *Mshumpa* court, by delegating law reform to the legislature, has achieved very little towards the advancement of the rights of pregnant women who have positive maternal intention.

The legislative advancement of *nascitural* safeguards and protections could also be initiated in the political arena by a member of the cabinet tabling a Bill in Parliament.[119] Political priorities in South Africa are a contentious issue and priorities lie elsewhere at the moment. Engagement with this subject matter appears, for all intents and purposes, to be non-existent at governmental level. Apart from a limited amount of academic writing that is taking the matter no further, there is little hope for the rights of pregnant women with positive maternal intention, or the legal safeguarding and protection of the *nasciturus*, being amplified in the near future.

### *4.6.3 A Lack of Existing Legislative & Academic Engagement with the Born Alive Rule*

The extent to which the BAR has been dealt with in terms of existing legislative measures is minimal and of no real practical value in the greater scheme of advancing the common law as it relates to non-consensual *nascitural* destruction.[120]

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investigation, a proposal paper is then developed and considered by the Commission. An investigation only commences upon its inclusion on the programme. For this reason no one at the SALRC is presently heading the investigation into violence against pregnant women. It is also standard practice at the SALRC for the Secretariat to follow-up with the Ministry on awaited decisions. I will therefore forward your enquiry to the head of our office to further enable her to enquire about the Minister's awaited decision on the Commission's recommendation for the inclusion of the investigation into violence against pregnant women on the SALRC's programme…'. A copy of this e-mail is available from the present author upon request by e-mail to the following address: marc@odyssey88.com.

[119] Currie & de Waal (note 78 above) 170, state that '[o]ften, a new law will be the result of a new government policy or the reformulation of existing policy. The process of formulating policy may be done either with or without public consultation. Where public cooperation is sought, the process will be initiated by the publication of a discussion document called a *Green Paper*. Officials of the government department concerned usually draft this document, which sets out, in broad terms, the thinking of the government on a particular issue. A period of between one and three months is then given for the public to submit comments on the draft policy.' This is the start of a long process.

[120] S239(1) of the Criminal Procedure Act 51 of 1977 deals with evidence on a charge of infanticide or concealment of birth and states that '[a]t criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.' S239(2) states that '[a]t criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.' The Births and Deaths Registration Act 51 of 1992 makes no attempt to define what 'live-birth' means or what the concept of being 'born alive' entails. To the best of the present author's knowledge, there is no other National Legislation dealing with the requirement of being 'born alive' and what this concept entails.

There are many academics that have had the opportunity to engage meaningfully with the BAR and have failed to do so. Nevertheless, there is an extensive amount of academic literature in a South African context which grapples with issues surrounding the *nasciturus in utero* in general terms.[121] South African academics who have written about the BAR have done so in passing without any detailed analysis of its underlying rationale, the legitimacy of its continued existence or the legal implications of its possible obsolescence. There is no doubt that in an academic context, a far more forceful engagement with the BAR is required in order to ignite much needed debate and transformative discourse.

The questioning of entrenched legal paradigms is undoubtedly necessary if law reform in South Africa around *nascitural* safeguards and protections is ever to become a concrete reality. Conservative legal thinking and blind adherence to black letter law will never prompt the necessary re-evaluation of the methods presently being employed to cultivate arguments for or against *nascitural* safeguards and protections.

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[121] The following authors are of relevance: du Plessis (note 64 above); Pickles (note 64 above); Pillay (note 26 above); C. Pickles 'The Introduction of a Statutory Crime to Address Third-Party Foetal Violence' (2011) 74 *THRHR* 546; C. Pickles 'Termination of Pregnancy Rights and Foetal Interests in Continued Existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996' (2012) 15 5 *Potchefstroom Electronic LJ* 403; C.M. Sperling Pickles *S v Mshumpa: A Time For Law Reform* (note 64 above); N.M. Meyer 'A Delictual Remedy for the Unborn Child' (1963) 80 *SALJ* 447; S. Bedil 'Can a Foetus be Protected From its Mother?' (1981) 98 *SALJ* 462; L.M. Du Plessis 'Jurisprudential Reflections on the Status of Unborn Life' (1990) 1 *TSAR* 44; M.C. Buthelezi & M. Reddi 'Killing with Impunity: The Story of an Unborn Child' (2008) 2 *De Jure* 429; E. Spiro 'Minor and Unborn Fideicommissaries and the Alienation of Fiduciary Property' (1952) 69 *SALJ* 71; L.M. Du Plessis 'Reflecting on Law, Morality and Communal Mores (With Particular Reference to the Protection of Pre-Natal Life)' (1991) 56 3 *Koers* 339; H.F. Sampson "The Status of Unconceived Children' (1957) 74 *SALJ* 105; D. Meyerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50; H.J. Kruuse 'Fetal "Rights"? The Need for a Unified Approach to the Fetus in the Context of Feticide' (2009) 72 *THRHR* 126; F.F. Stone 'The *Nasciturus* and Personal Injuries' (1978) *Acta Juridica* 91; H.R. Hahlo '*Nasciturus* in the Limelight' (1974) 91 *SALJ* 73; H.R. Hahlo 'More About the *Nasciturus*' (1974) 91 *SALJ* 526; M.L. Lupton 'The Legal Status of the Embryo' (1988) *Acta Juridica* 197; J.D. Van Der Vyver 'The Right to Life of the Unborn in South African Law' in E. Kahn (ed) *The Sanctity of Human Life – Senate Special Lectures 1983 University of the Witwatersrand Johannesburg* (1984) 6; T. Jenkins 'The Parents' Right to a Healthy Child' in E. Kahn (ed) *The Sanctity of Human Life – Senate Special Lectures 1983 University of the Witwatersrand Johannesburg* (1984) 1; L.J. Suzman 'The Moral Rights of the Unborn' in E. Kahn (ed) *The Sanctity of Human Life – Senate Special Lectures 1983 University of the Witwatersrand Johannesburg* (1984) 13; E. Kahn 'Murder as a Fine Art' in E. Kahn (ed) *The Sanctity of Human Life – Senate Special Lectures 1983 University of the Witwatersrand Johannesburg* (1984) 24; M. Ovens 'Maternal Substance Abuse in South Africa: An Area for Concern?' (2008) 1 *Acta Criminologica – CRIMSA Conference Special Edition* 77; S.A. de Freitas & G.A. Myburgh 'The Relevance of Science for the Protection of the Unborn' (2009) *Tydskrif vir Christelike Wetenskap* 61; S.A. de Freitas & G.A. Myburgh 'The Unborn and A, B, & C v Ireland (2010) 35 1 *J for Juridical Science* 93; S. de Freitas & G. Myburgh 'Seeking Deliberation on the Unborn in International Law' (2011) 14 5 *Potchefstroom Electronic LJ* 9; G.A. Myburgh & A.W.G. Raath 'Duty, Right and Social Benevolence: An Alternative Approach to Debates About Abortion' (2012) *Tydskrif vir Christelike Wetenskap* 289; S. Hall 'Is the Choice on Termination of Pregnancy Act Guilty of Disability Discrimination?' (2013) 32 1 *South African J of Philosophy* 36; D.J. McQuoid-Mason 'Are the Restrictive Provisions of Sections 2(1)(c) and 5(5)(b) of the Choice on Termination of Pregnancy Act 92 of 1996 Unconstitutional? (2006) 31 1 *J for Juridical Science* 121; S. de Freitas 'The South African Constitutional Court and the Unborn' (2012) 5 2 *International J for Religious Freedom* 51; S.A. de Freitas 'A Critical Retrospection Regarding the Legality of Abortion in South Africa' (2005) 30 1 *J for Juridical Science* 118.

### *4.6.4 The Legitimacy of the Continued Existence of the Born Alive Rule in South Africa*

'It is revolting to have no better reason for a rule of law than [the fact that] it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'[122] The evidence in a South African context indicates that the BAR perseveres as a substantive rule of law because of a failure to question its authenticity within a modern-day legal framework. The BAR is more likely than not a primitive common law ideology that no longer serves to add substance to jurisprudential reasoning as it relates to *nascitural* destruction.

What is lacking in South Africa when compared to other foreign jurisdictions is a spirited engagement with the historical development of the BAR, in all of its contextual incarnations, in order to arrive at a reasoned conclusion to justify the continued application of the BAR in a contemporary setting.[123] Instead, the application of the BAR continues unquestioned, unreasoned, and without consideration of modern consequences and potential redundancy. The BAR may remain a relevant consideration when dealing with the *nasciturus* doctrine, delictual claims for harm suffered *in utero*, and in matters related to succession, but in cases of non-consensual *nascitural* destruction its relevance is at best a dubious proposition.

The common law is often perceived as a source of consistency and certainty. 'Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge [Oliver Wendell Holmes] has reminded us "the life of the law has not been logic; it has been experience."'[124] South Africa serves as a prime example of a society that has questioned entrenched legal doctrines and the longer we continue to ignore dogmatic reasoning for the sake of jurisprudential convenience, the more we undermine what our society truly stands for.

Are there other reasons why the BAR should no longer be relevant? In order to answer this question it is necessary to dissect the BAR from a different perspective. Instead of looking to its historical origins and critically analysing its contemporary legal relevance, one needs to scrutinize the essential elements that actually result in a live birth. What are the component parts, both organic and psychosomatic, that result in the creation of a legal person?

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[122] O.W. Holmes 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 469; See further Casey (note 2 above) 113--114 and the authorities cited therein.
[123] For an example of robust engagement with the BAR at a judicial level in a foreign jurisdiction, refer to the Australian case of *R v Iby* (note 25 above) 25--67.
[124] *Read v J. Lyons & Company Limited* [1947] A.C. 156; See further Casey (note 2 above) x--xi.

Which of these component parts does the law take cognisance of and which of these component parts does the law designate as insignificant? Is the way in which the law approaches legal personhood in South Africa justifiable in an open and democratic society based on human dignity, equality and freedom? These are among the many questions for which answers are sought in Chapter 5 – 'Theories of Personhood'. Central in attempting to answer these questions is an examination of these theories of personhood and their value in the normative creation of the legal human subject.

# *CHAPTER 5*

# Theories of Personhood

## 5.1 Chapter Objectives & Guidelines

This chapter traverses the ways in which the *nasciturus's* existence is interpreted in relation to the concept of personhood and against the backdrop of the continuum of life.[1] The ultimate goal of this chapter is to understand, in practical terms, which distinguishable elements cause the legal person to come into existence. In order to arrive at an informed conclusion, various interpretations of personhood in a broad sense,[2] and what it means to be a human person in an individual sense have been explored.[3]

It will be demonstrated in some detail that human personhood is comprised of both organic as well as psychosomatic components whereas legal personhood in isolation is only comprised of organic components. Argument will be advanced for a legal construction of personhood which comprises of both organic as well as psychosomatic components that produce *nascitural* safeguards and protections based on the moral personhood of the *nasciturus*.[4] In order to properly understand personhood it is necessary to acknowledge the importance and significance of emotional interpretations of *nascitural* life. There is no general consensus about when human life begins or at what particular point in the developmental cycle personhood attaches to the *nasciturus*. Perceptions of personhood are contested and they operate in subjective environments that are dynamic and constantly subject to reinterpretation and new understanding.[5]

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[1] See D. Lupton *The Social Worlds of the Unborn* Kindle ed (2013) Loc 1348--1349. The assurance of continuity as a human species is an important consideration when attempting to understand our interpretations and perceptions of personhood and what it means to be a human person.

[2] Whenever the word 'personhood' is utilised in isolation in this chapter it refers to the concept of 'personhood' in a *broad* moral sense and not 'personhood' in a narrow legal sense.

[3] A meaningful understanding of personhood requires a collective and synergistic interpretation of personhood's component parts, the most important and significant of which are discussed in this chapter. The component parts of personhood feed off one another, they are symbiotic and collaborative, and seen in unison produce a potential universal understanding of personhood. The component parts of personhood discussed in this chapter by no means represent an exhaustive account of the concept's composition in its entirety. For a further and deeper insight into the concept of personhood refer to the work of C. Kaczor *The Ethics of Abortion – Women's Rights – Human Life and the Question of Justice* Kindle ed (2013). An individually categorised view of the component parts of personhood does not lead to a coherent framework for the safeguarding and protection of the *nasciturus*. The main focus in this chapter is on the pregnant woman with positive maternal intention.

[4] The moral personhood of the *nasciturus* will be discussed in more detail in Chapter 6 – 'Choice on Continuation of Pregnancy' page 102.

[5] See Lupton (note 1 above) generally; See also Kaczor (note 3 above) generally.

Various factors including personal, sociocultural, historical, political and legal, influence the manner in which personhood is understood and the stage at which the *nasciturus* should be viewed as having attained legal subjectivity.[6] 'Personhood, therefore, is both biological and social, both natural and cultural, phrased in different ways according to the specific context in which it is debated and understood.'[7]

In Chapter 3 the concept of personhood was explored in the context of the historical development of the *nasciturus* doctrine. It was demonstrated that in ancient societies there was a rudimentary yet tangible understanding of *in uterine* personhood. There was recognition of primitive forms of personhood. The intrinsic worth of the *nasciturus* was acknowledged and from this developed a conception of *in uterine* personhood that was worthy of safeguarding and protection in certain circumstances.[8] Chapter 3 also introduced the concept of *nascitural* personhood which is a form of human personhood.[9]

In Chapter 4 it was demonstrated that legal personhood or the acquisition of legal subjectivity only occurs in South African law once the *nasciturus* has been born alive. The concept of personhood developed in Chapter 4 was thus a conditional type of legal personhood that was contingent upon the occurrence of a live birth. The law in South Africa thus views the safeguarding and protection of personhood in a legal sense as an *ex uterine* entitlement only. Unconditional *in uterine* protection is non-existent in South African law.

The legal construction of personhood in South African law is flawed because only objective organic criteria are considered at the expense of psychosomatic subjective criteria that vindicate a woman's experience of pregnancy[10] and give credence to social constructions of *nascitural* life. This chapter begins with a detailed overview of the concept of personhood in a broad general sense and then moves on to the various potential ingredients which make up the organic person and the psychosomatic person respectively.

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[6] Lupton (note 1 above) Loc 389--390.

[7] See Lupton (note 1 above) Loc 336--337 and the authorities cited therein; See further Kaczor (note 3 above) generally, where the author explores philosophical constructions of personhood and undertakes an interesting and enlightening discussion on the subject of personhood in general.

[8] For a detailed discussion of the intricacies which comprise the *nasciturus* doctrine refer to Chapter 3 – 'The *Nasciturus* Doctrine', page 31.

[9] *Nascitural* personhood recognises Ronald Dworkin's theory of the intrinsic value of human life. *Nascitural* personhood refers to the biological status of a foetus *in utero*, the undisputed fact that it is a recognisable living human organism in the early stages of gestation and a recognisable human being in the later stages of gestation. The recognition of *nascitural* personhood is the recognition of a form of human personhood.

[10] The women referred to in this context are women with positive maternal intention. Unless expressly indicated otherwise, the term 'pregnant woman' or 'pregnant women' referred to in this chapter refer only to those women with positive maternal intention.

Finally, the composition of the legal person in South African law is considered together with an examination of the law's failure to recognise any of the potential component parts of the psychosomatic person. Suggestions are made in an attempt to formulate a less arbitrary construction of legal personhood that takes account of a broad spectrum of theories on the subject. This chapter explores several of the most popular theories and examines the extent to which the maternal conception of personhood is given credibility by the law.

## 5.2 Overview of Personhood as a General Concept

When discussing the various constructions of personhood, the language that is used is of vital importance because of the subjective images that can be conjured up in the mind of the reader.[11] As far as possible, every attempt will be made to make use of words, concepts and phrases that are as impartial as practically possible. There are a multitude of theories about what the concept of personhood entails and the extent to which being considered a person entitles one to be the holder of rights, both moral and legal, or merely the recipient of legal safeguarding and protection.[12]

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[11] See Lupton's (note 1 above) Loc 551, discussion on the importance of the language that is used when discussing the 'politics of defining unborn personhood.' See further Lupton (note 1 above) Loc 199--201, where the author states that the *nasciturus* from the perspective of human personhood is a complex entity that is 'composed of medical and scientific practices, technologies and physical spaces, but also of social relations, interpretations and understandings between human actors that are part of a constantly negotiated social order.'

[12] See J. Harris 'Four Legs Good, Personhood Better!' (1998) 4 1 *Res Publica* 51; P. Lee 'Soul, Body and Personhood' (2004) 49 *The American J of Jurisprudence* 87; C. Wells & D. Morgan 'Whose Foetus Is It?' (1991) 18 4 *J of Law and Society* 431; C. Dillard 'Empathy with Animals: A Litmus Test for Legal Personhood?' (2012) 19 *Animal Law* 1; M.A. Warren 'On the Moral and Legal Status of Abortion' (1973) 57 1 *The Monist* 43; J.H. Ely 'The Wages of Crying Wolf: A Comment on *Roe v Wade*' (1973) 82 5 *The Yale LJ* 920; B.A. Rich 'Postmodern Personhood: A Matter of Consciousness' (1997) 11 3&4 *Bioethics* 206; D. Fagundes 'What We Talk About When We Talk About Persons: The Language of a Legal Fiction' (2001) 114 *Harvard LR* 1745. Fagundes's article on personhood is also available on the Social Sciences Research Network at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921133##>; S.F. Sapontzis 'A Critique of Personhood' (1981) 91 4 *Ethics* 607; M.J. Casper 'At the Margins of Humanity: Fetal Positions in Science and Medicine' (1994) 19 3 *Science, Technology & Human Values* 307; J.D. Ohlin 'Is the Concept of Person Necessary for Human Rights?' (2005) 105 *Columbia LR* 209; L.M. Morgan '"Life Begins When They Steal Your Bicycle": Cross-Cultural Practices of Personhood at the Beginnings and Ends of Life' (2006) 34 *J of Law, Medicine & Ethics* 8; E.L. McHugh 'Concepts of the Person Among the Gurungs of Nepal' (1989) 16 1 *American Ethnologist* 75; B.A. Conklin and L.M. Morgan 'Babies, Bodies, and the Production of Personhood in North America and a Native Amazonian Society' (1996) 24 4 *Ethos* 657; M.A. Warren 'Do Potential People Have Moral Rights? (1977) 7 2 *Canadian J of Philosophy* 275; R. Weiss 'The Perils of Personhood' (1978) 89 1 *Ethics* 66; R. Macklin 'Personhood in the Bioethics Literature' (1983) 61 1 *The Milbank Memorial Fund Quarterly – Health and Society* 35; B. Larvor 'The Owl and the Pussycat' (1994) 44 175 *The Philosophical Quarterly* 233; R. Young 'What is So Wrong with Killing People?' (1979) 54 210 *Philosophy* 515; R.E. Ewin 'What is Wrong with Killing People?' (1972) 22 87 *The Philosophical Quarterly* 126; D.F. Forte 'Life, Heartbeat, Birth: A Medical Basis for Reform' (2013) 74 1 *Ohio State LJ* 121; L.M. Morgan 'The Potentiality Principle from Aristotle to Abortion' (2013) 54 7 *Current Anthropology* S15; B. Simpson 'Managing Potential in Assisted Reproductive Technologies – Reflections on Gifts, Kinship, and the Process of Vernacularization' (2013) 54 7 *Current Anthropology* S87; J. Harris 'The Concept of the Person and the Value of Life' (1999) 9 4 *Kennedy Institute of Ethics J* 293; D. Haraway 'Animal Sociology and a Natural Economy of the Body Politic, Part I: A Political Physiology of Dominance' (1978) 4 1 *Signs* 21.

As demonstrated in Chapter 4, the law in South Africa maintains a rigid adherence to archaic common law principles and distances itself from engagement with the psychological and subjective nuances of the maternal experience. The maternal relationship with the developing *nasciturus* commands little respect and the choice of a pregnant woman to continue her pregnancy is given no jurisprudential credibility. The instinctive recognition of the value inherent in procreation[13] by the pregnant woman with positive maternal intention is ignored in favour of a bland construction of personhood that leaves the pregnant woman who is the victim of non-consensual *nascitural* destruction feeling dispossessed and deprived of justice.[14]

> 'The law of the person is fraught with deep ambiguity and significant tension, and the problem extends far beyond the standard interpretive difficulties attending the meaning of legal metaphors. The law's use of the fiction "person" to define its object inevitably evokes the anxiety that accompanies social definitions of personhood. This difficulty is exacerbated by the tension between our strongly individualist legal culture and the utter dependence of the law on this metaphor. Moreover, social anxiety about personhood matters not only because it exposes ambivalence within the law, but also because the law, through its expressive dimension, signals norms and values that influence ideas and opinions about personhood.'[15]

Personhood comprises of a complex matrix of scientific, biological, political, legal, social and personal factors. Individual interpretations of personhood often revolve around the implications of these various constructions, with justifications, arguments and counterarguments developed to the extent that they are capable of further advancing new and unique constructions of personhood.[16] These unique constructions of personhood add to the ongoing and vibrant debate among students, academics, and ardent jurisprudential philosophers, about what it is that affords us the description of person, morally and legally.

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[13] Recognition of the value inherent in procreation is of the same ilk as recognition of the intrinsic worth of human life. In this regard refer to note 1 in Chapter 3 – 'The *Nasciturus* Doctrine', page 31, where Ronald Dworkin's concept of 'intrinsic worth' is discussed.

[14] See the behind the scenes account of *Van Heerden v Joubert* 1994 (4) SA 793 (A) in Chapter 2 – 'The Libby Gonen Story', page 10, as well as *S v Mshumpa* 2008 (1) SACR 126 (E).

[15] Fagundes (note 12 above) 1768.

[16] See B. Steinbock *Life Before Birth – The Moral & Legal Status of Embryos and Fetuses* 2nd ed (2011) 42--65; See further R. Dworkin *Life's Dominion – An Argument About Abortion, Euthanasia, and Individual Freedom* (1994) 30--101; A. Giubilini & F. Minerva 'After-Birth Abortion: Why Should the Baby Live?' (2013) 39 *J of Medical Ethics* 261, 261--262, where the authors argue that the moral status of a newborn is the same as that of a *nasciturus* and as a result of this conclusion, the same reasons which justify the killing of a *nasciturus in utero* also justify the killing of a newborn baby. These authors link the concept of human personhood to the ability of the human being to have a moral right to life by virtue of the fact that it is able to attribute basic value to its existence and that being deprived of this existence would represent a loss to the human being. In other words, 'individuals who are not in the condition of attributing any value to their own existence are not persons. Merely being human is not in itself a reason for ascribing someone a right to life.'

Personhood is not a static stand-alone concept and it holds different meanings for different people.[17] The law in South Africa however, only recognises one type of person that deserves safeguarding and protection in a legal sense and that is the born alive *nasciturus*.[18] Despite the aforementioned the concept of human personhood in one form or another is recognised by the law in South Africa in varying degrees for other purposes such as the cut off point for elective abortions[19] and the contingent applications of the *nasciturus* doctrine.[20] The exercise of legal rights as a person with legal subjectivity remains contingent upon live birth. The reason why these constructions of personhood are important is because they serve as yardsticks in varying guises representing the point at which argument is put forward for *nascitural* safeguards and protections.

## 5.3 The Organic Person

The organic person is that scientific and biological being that is a physical manifestation of anthropological genetic development and humanoid cellular production that grows and develops *in utero* subsequent to fertilisation and exists *ex utero* subsequent to the completion of a successful live birth.[21]

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[17] See generally, Steinbock (note 16 above); Dworkin (note 16 above); D. Marquis 'Why Abortion is Immoral' (1989) 86 4 *The J of Philosophy* 183; G. Cohen 'Personhood' (2012) 2 *J of Law* 437; S.A. de Freitas & G.A. Myburgh 'The Relevance of Science for the Protection of the Unborn' (2009) 1&2 *Tydskrif vir Christelike Wetenskap* 61; H. Keane 'Foetal Personhood and Representations of the Absent Child in Pregnancy Loss Memorialization' (2009) 10 *Feminist Theory* 153; N. Naffine 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 3 *The Modern LR* 346; Wells & Morgan (note 12 above).

[18] See generally *Mshumpa* (note 14 above) and *Van Heerden* (note 14 above).

[19] In terms of S5(5)(b) of the Choice on Termination of Pregnancy Act 92 of 1996, a pregnant woman may procure an abortion after the 20th week of gestation if 'the continued pregnancy – (i) would endanger the woman's life; (ii) would result in a severe malformation of the fetus; or (iii) would pose a risk of injury to the fetus…' The law indirectly recognises some measure of personhood in respect of terminations beyond the 20th week of gestation; See D. Meyerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50, 57, where the author states that '[i]t is clear that, as pregnancy progresses, the destruction of the foetus becomes a matter of increasing regret and the value of human dignity is increasingly under threat. Importantly, the foetus becomes capable of feeling pain at approximately the time at which it also becomes viable or capable of independent existence. It follows that the later in pregnancy abortion is sought, the stronger the arguments on the woman's side need to be. In fact, the Choice Act [The Choice on Termination of Pregnancy Act 92 of 1996] probably strikes just the right balance between the competing considerations, inasmuch as it does restrict the circumstances in which abortion may be performed in the second trimester, and virtually never allows it in the third. But had it struck the balance differently, by allowing abortion on demand right up to the point of birth, it could have been challenged on the grounds of violating the constitutionally imposed duty to respect human dignity.' Human dignity could arguably be considered a component part of personhood.

[20] In this regard refer to the various applications of the *nasciturus* doctrine outlined in Chapter 3 – 'The *Nasciturus* Doctrine' notes 34--37, pages 38--39, where the following applications are highlighted: The law of succession, divorce proceedings where maintenance for a *nasciturus en ventre sa mère* is provided for, claims for loss of support, and claims involving prenatal injuries. The phrase 'contingent applications' refers to the fact that in South African law, the *nasciturus* must be born alive in order for any legal rights to be exercised.

[21] This definition has been developed by the present author and the definition itself represents the culmination of *all* physical attributes of the human species from conception to live birth and subsequent lifespan.

The organic person represents the embodiment of all the human senses and is the moral recipient of these senses all at once.[22] The organic person comes into being at the moments of conception[23] and ceases to exist upon its death, when all its vital organs stop functioning in a life sustaining manner.[24] The point at which the human being as a purely organic manifestation should be recognised as the recipient of personhood is a matter of degree and speculation. The main contenders are discussed below.

### *5.3.1 Personhood from the Moments of Conception*

Fertilisation[25] takes place when a single male sperm cell fuses with a single female egg to produce the first cell of a new human life.[26] On the extreme end of the anti-abortion spectrum one finds pro-lifers[27] who believe that from the point of fertilisation onwards, the developing human being[28] deserves safeguarding and protection.[29] The underlying rationale of the pro-life movement in general, is that from the moments of conception the entity that begins to develop is unquestionably alive and of human origin.

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[22] Even though various persons may be deprived of certain of the human senses, they remain persons. If for example, someone is blind, deaf, or brain damaged, they are seen as no less of a human person than someone who is fully *compos mentis* and who has all his faculties about him.

[23] Conception is also sometimes referred to as fertilisation. These two words are often used interchangeably. See Steinbock (note 16 above) 43--45; See further L. Regan *Your Pregnancy Week by Week – What to Expect from Conception to Birth* (2010) 17--21. It appears that the completed process of fertilisation is sometimes referred to as conception. Fertilisation and conception are best understood as two words that define the same event.

[24] Kaczor (note 3 above) Loc 1832--1877, puts forward an interesting discussion on brain death and its implications for the continued life sustaining functioning of the organs in the human body. It should also be noted that even after complete death and the subsequent decomposition of the corpse, there remains a set of bones, a physical manifestation of the *living* person *that once was*.

[25] See (note 23 above).

[26] See Regan (note 23 above) 20, where the author explains that '[t]he process during which the sperm enters the egg, fuses with it, and the egg starts dividing takes about 24 hours to complete and usually takes place while the egg is still travelling down the Fallopian tube.' See further J. Behar (ed) *Your Baby's Journey – The Pregnancy Companion Book to In the Womb – Explore the Remarkable Journey from Conception to Birth* (2007) 8, where it is stated that '[t]he human body has about 100 trillion cells (100,000,000,000,000) all of which come from one single cell – the fertilized egg. Size dictates the processes that make up natural selection. The egg, the largest cell in the body made when the mother herself was in the womb, is a well-stocked embryo that sits and waits for the strongest and fittest sperm to arrive. The sperm, the smallest cell in the body, is both vigorous and abundant. Made at the rate of 1000 per second in the testes, each sperm has a 12-day trek through the epididymis, a 20 foot-long series of tubes, before ejaculation. Of the 200-500 million sperm ejaculated by a healthy male only one sperm will fuse with the egg to make the first cell of a new human life.' See also de Freitas & Myburgh (note 17 above) 63.

[27] The term 'pro-life' or 'pro-lifer' is used to denote the anti-abortion stance and the term 'pro-choice' or 'pro-choicer' will be used to denote the stance which is in favour of abortion.

[28] The term 'human being' should be understood in this context as referring to an entity of human origin, an entity which is human in nature, an organism with the potential (barring any unforeseen circumstances) to undergo a successful live birth in the context of a human being who is still *in utero*. The term 'human being' should generally speaking not be understood as referring to someone of a particular level of maturity like you (the reader) or me (the writer). See Regan (note 23 above) 8, where the author states that during the first eight weeks of gestation the developing human being is known as an embryo and by eight to nine weeks of gestation, the embryo is referred to as a foetus.

[29] Steinbock (note 16 above) 42.

The developing human being at the point of fertilisation is known as a single-celled zygote.[30] The extreme pro-lifer justifies protection from this point in development onwards based on a two-fold argument. First of all, the zygote is indisputably genetically human,[31] and secondly, fertilisation has no less moral significance than any other developmental benchmark during gestation.[32] Pro-choice arguments and responses would include the views that being alive, being of human origin and personhood are distinct concepts that are not indisputable and whose interactions are multifaceted and irregular.[33] Arguments in favour of or against abortion are strongly influenced by personal perspectives and subjective considerations. From the perspective of a pregnant woman with positive maternal intention, a live *nasciturus in utero* and the concept of personhood are symbiotic realities that are grounded in instinctive perceptions[34] and profound feelings of meaning and gestational responsibility.[35] These emotional internalisations often begin as soon as such a woman finds out that she is pregnant.

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[30] Steinbock (note 16 above) 43, where the author states that '[t]he fertilized egg, or single-celled zygote, has the full complement of 23 pairs of chromosomes, one in each pair from each parent. From this single cell develop all the different types of tissue and organs that make up the human body. Fertilization thus marks the spatiotemporal beginning of a new human being.' Behar (note 26 above) 10, states that '[o]ur unique genetic code is made up of 23 chromosomes found in the nuclei of our cells. Each chromosome is made up of a super coiled strand of DNA. The DNA molecule is shaped like a double helix and when uncoiled is a sequence of genes some two meters long. When the sperm and egg nuclei fuse to form one nucleus, the two sets of chromosomes, one from the mother and one from the father, lie together in pairs and exchange chunks of their DNA sequence. It is these genes, recessive or dominant, that will give [a] baby its unique characteristics and only as [a] baby's journey progresses from cell to embryo to fetus and beyond, will they unfold.' See further Regan (note 23 above) 69, who states that '[t]he newly fertilized egg starts to divide repeatedly to form a cluster of cells called a blastocyst.'

[31] Steinbock (note 16 above) 43; See further the arguments and counterarguments around fertilization / conception as the point at which personhood should accrue to the *nasciturus* which have been advanced by Kaczor (note 3 above) Loc 2065--2707. Kaczor deals with personhood in a moral sense only.

[32] Steinbock (note 16 above) 43.

[33] Cohen (note 17 above) 444.

[34] See L.C. Wooster 'The Genesis and Development of Human Instincts' (1903) 19 *Transactions of the Kansas Academy of Science* 381; See further C.F. Amery 'Instinct'(1892) 20 512 *Science – by the American Association for the Advancement of Science* 300.

[35] The profound feelings of loss that are experienced through non-consensual *nascitural* destruction are testimony to these emotional internalisations. When non-consensual *nascitural* destruction occurs, justice is sought by the maternal victim based on these instinctive feelings. See *Mshumpa* (note 14 above); See *Van Heerden* (note 14 above); Refer to Chapter 2 – 'The Libby Gonen Story' for a detailed behind the scenes account of *Van Heerden*; See further Keane (note 17 above) generally; M. Schulman 'The *Nasciturus* Non-Fiction *Van Heerden v Joubert* Revisited – The Libby Gonen Story – "I was a Person!"' (2012) *Social Sciences Research Network* – available online at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261847>; There are several reputable websites on the internet which serve as further evidence of the aforementioned. Three such websites in the context of stillbirth and early neonatal loss are <www.nowilaymedowntosleep.org>; <www.toddhochberg.com> and <http://www.missfoundation.org/>; See also L.L. Layne 'He was a Real Baby with Baby Things – A Material Culture Analysis of Personhood, Parenthood and Pregnancy Loss' (2000) 5 3 *J of Material Culture* 321; M. Godel 'Images of Stillbirth: Memory, Mourning and Memorial' (2007) 22 3 *Visual Studies* 253; The term 'gestational responsibility' is the sense of accountability towards the *nasciturus* that the pregnant woman feels throughout the period of gestation, culminating in the eventual live birth of the *nasciturus*. See L.M. Morgan 'Fetal Relationality in Feminist Philosophy: An Anthropological Critique' (1996) 11 3 *Hypatia* 47; K. Veale 'Online Memorialisation: The Web as a Collective Memorial Landscape for Remembering the Dead' (2004) 3 *The Fibreculture J* – Available online at: <www.fibreculturejournal.org>.

Whether or not *nascitural* development from the moments of fertilisation deserves safeguarding and protection has always been and remains a topic of staunch debate.[36] Besides the controversy which surrounds the actual process of fertilisation, there is also a substantial amount of discussion and uncertainty surrounding the true nature of the resultant embryo.[37]

### *5.3.2 Personhood from the Point of Implantation*

Implantation takes place when the embryo attaches itself to the lining of the uterus and this occurs approximately one week after fertilisation.[38] Implantation is a process that lasts for approximately another week.[39] Proponents of implantation as the decisive moment to afford safeguarding and protection to the *nasciturus* proffer two reasons for their hypothesis. First of all, once implantation has occurred, the odds of the *nasciturus's* survival increase dramatically, and secondly, implantation coincides with the early stages of spinal cord and nervous system formation which is known as gastrulation.[40]

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[36] See J. Jarvis Thomson 'A Defense of Abortion' (1971) 1 1 *Philosophy & Public Affairs* 47; D. Boonin-Vail 'A Defense of "A Defense of Abortion": On the Responsibility Objection to Thomson's Argument' (1997) 107 2 *Ethics* 286; For a comprehensive and detailed discussion of the various points in gestation at which the *nasciturus* could possibly enjoy safeguarding and protection refer generally to Steinbock (note 16 above); Kaczor (note 3 above); D. Boonin *A Defense of Abortion* Kindle ed (2003).

[37] See Lupton (note 1 above) Loc 349--353, Loc 1622--1624, Loc 1627--1631, and the authorities cited therein. Lupton states that 'the embryo is a particularly ambiguous, complex, hard-to-pin-down entity. At the embryonic stages of development in particular, the unborn appears like another creature gradually morphing into a human-like body. It is not until about the tenth week of gestation (eight weeks following fertilisation), at which point in development the embryo technically becomes a foetus, that it begins to look human. Even at the foetal stage of development, the unborn body still has a certain strangeness to it, a liminality that may challenge accepted concepts of humanness and of living creatures… The embryo was described by opponents of hESC science [human embryonic stem cell research] as a tiny citizen, "one of us" (full human subjects) because it had its own unique genome and because "we have all been embryos"… The Human Fertilization and Embryology Authority in the UK and the European Society of Reproduction and Embryology Task Force on Ethics and Law have ruled that while it has a unique genetic makeup, the pre-14-day embryo – technically termed the "pre-embryo" and also referred to as the blastocyst – lacks distinct individual moral status. These authorities therefore deem it acceptable to discard it or use it for scientific research or therapeutic procedures. In contrast the post-14-day embryo is positioned as human and therefore not appropriate to be used for hESC purposes.' See further Kaczor (note 3 above) Loc 1806--1831, for a discussion about how human appearance is perceived to decide personhood. See also J. English 'Abortion and the Concept of Person' (1975) 5 2 *Canadian J of Philosophy* 233.

[38] Steinbock (note 16 above) 50, states that '[the] process of implantation begins approximately on the sixth day following fertilization, and it takes about a week.' Behar (note 26 above) 12, 14, states that '[o]n the first day following the fusion of the egg and sperm cells to make a single cell with its new and unique genetic code, the cell then divides producing two identical cells. They in turn divide to make four cells and this division continues until there is a ball of identical cells. In the first week, these cells activate and specialize to become different parts of the body, such as the liver or arms or muscles… During week one the cells keep dividing as they travel down the fallopian tube towards the uterus. After four or five days, this tiny ball of around 100 cells, now called a blastocyst, divides itself into an inner and outer ring of cells. The latter is destined to become a placenta while the inner ring of cells will become the embryo itself.' See further Regan (note 23 above) 21.

[39] Steinbock (note 16 above) 50.

[40] Steinbock (note 16 above) 50, states that gastrulation is sometimes referred to as the formation of the 'primitive streak' which is the precursor of the spinal cord and nervous system; See further Regan (note 23 above) 69, where the formation of the spinal cord, neural tube, and primitive brain are discussed.

Once gastrulation has occurred, there is no chance of embryonic fission[41] taking place which produces identical twins.[42] The significance of this in the context of personhood is that at the point of fertilisation there is a chance that more than one human being could develop but at the point of gastrulation in the absence of embryonic fission, there is only one human being.[43] Implantation marks the beginning of what is known as a clinical pregnancy.[44]

### *5.3.3 Personhood from the Point of Sentience*

Sentience is the ability to have the power of perception through the senses.[45] In the context of *nascitural* gestation, sentience refers to the ability of the *nasciturus* to have visual experiences,[46] auditory experiences,[47] and to respond to stimuli such as touch, taste, motion, and other kinds of sensory stimulation.[48] The main focus of pro-lifers when it comes to *nascitural* sentience is the ability of the *nasciturus* to feel pain.[49] It is felt that the ability to feel pain grants one a moral right not to be deliberately subjected to pain in the absence of some compelling reason.[50] It is claimed that the capacity for sentience thus gives an entity some moral standing.[51] It is generally accepted that the *nasciturus* does not have the ability to feel pain until about twenty four weeks of gestation.[52]

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[41] See Regan (note 23 above) 21, who states that embryonic fission is '[w]hen one egg is fertilized by one sperm and then divides into two separate zygotes, the result is two separate embryos. These share identical genetic structures and will therefore become identical twins.'
[42] Steinbock (note 16 above) 50.
[43] Steinbock (note 16 above) 51.
[44] Ibid; See further Kaczor (note 3 above) Loc 1901--1903, where the author states that 'implantation has no essential connection to personhood. If artificial wombs become a reality, it would be possible for a human being to develop from conception to infancy without being connected to a mother. Would it follow that such children never attain personhood?'
[45] R.E. Allen (ed) *The Concise Oxford Dictionary of Current English* (1990) 1103.
[46] See M.A. Warren 'The Moral Significance of Birth' (1989) 4 3 *Hypatia* 46, 49--52, where the author states that the *nasciturus in utero* 'will often turn away from bright lights, and those who have done intrauterine photography have sometimes observed a similar reaction in the late-term fetus when bright lights are introduced in its vicinity.'
[47] Warren (note 46 above) 49--50. The *nasciturus* 'may respond to loud noises, voices, or other sounds…'
[48] Warren (note 46 above) 50.
[49] See Steinbock (note 16 above) 46, where the author states that '[the] capacity to experience *pain* is not in itself significant, but as it is arguably the most primitive form of conscious experience, we can be confident that before a fetus is sentient, it is incapable of any other kinds of experiences, thoughts or feelings.'
[50] Warren (note 46 above) 50.
[51] Ibid; See further Kaczor (note 3 above) Loc 1726--1731, and the authorities cited therein. Kaczor states that 'according to some philosophers, it is with sentience, the capacity to suffer pain or enjoy pleasure, that a being begins to have interests; and if one links interests and rights [in a moral sense], sentience would mark the beginning of the right to life. According to this view, as soon as a human being in utero develops the capacity to feel pleasure or suffer pain, the human fetus would begin to have interests that should count equally with every other sentient being's interests. Indeed, if interests give rise to rights, then at this point the human fetus could acquire rights, including the right to life. On this view, the rights of the human fetus, including the right to life, would arise at the same time as the capacity for pain and pleasure developed.'
[52] Regan (note 23 above) 108.

There is however strong evidence to suggest that the *nasciturus* can in fact, feel pain at twenty two weeks of gestation.[53] On the 18th of June 2013, based on this evidence, the United States House of Representatives passed landmark legislation to provide nationwide protection for *nascituri* from twenty weeks after fertilisation which equates to approximately twenty two weeks of gestation.[54] Sentience thus marks a point in gestation where the *nasciturus* begins to react, albeit it primitively, to stimuli which it is exposed to. The *nasciturus* begins to develop rudimentary awareness of its *in uterine* environment and its surroundings.

### *5.3.4 Personhood as Viability*

The *locus classicus* for the definition of *nascitural* viability is the United States case of *Roe v Wade*.[55] The *Roe* court defined viability as the ability of the *nasciturus* to live outside the womb of the pregnant woman, albeit with artificial aid.[56] The *Roe* court in effect designated viability as an important point in gestation that distinguishes *nascituri* that deserve a measure of protection from those that do not.[57]

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[53] Twenty two weeks of gestation is the equivalent of twenty weeks after fertilisation. Lupton (note 1 above) Loc 2252--2255, defines 'gestational age' as '[the] method used in medicine to date the stage of development of embryos and foetuses. The age in days or weeks of the [*nasciturus*] from the date of the pregnant woman's last menstrual period, calculated as occurring two weeks (14 days) before conception. This age is therefore two weeks longer than the actual age of development of the embryo / foetus post fertilisation.' See further with regard to the *nasciturus* possibly feeling pain by twenty two weeks gestation: <www.doctorsonfetalpain.com>; See further Regan (note 23 above) 108, 153, where the author states that from ten to thirteen weeks gestation the *nasciturus* starts to make 'reflex responses to external stimuli'. If the uterus is prodded, the *nasciturus* will try to turn away from the intrusive finger. 'If a hand or foot happens to brush against the *nasciturus's* mouth, the lips purse and the forehead may wrinkle… Similarly, if the eyelids are touched, an early blinking reflex can be seen. However, these are only reflex movements…' At thirteen to seventeen weeks gestation the tiny bones in the inner ear of the *nasciturus* have hardened, which allows the *nasciturus* to hear sounds for the first time. The retina at the back of the eye has become sensitive to light and the *nasciturus* has started to become aware of bright light beyond the abdominal wall of the pregnant woman. Inside the *nasciturus*'s mouth, taste buds are appearing on the tongue. For a detailed discussion on the ability of the *nasciturus* to feel pain, refer to the following authors: K.J.S. Anand & P.R. Hickey 'Pain and its Effects in the Human Neonate and Fetus' (1987) 317 21 *The New England J of Medicine* 1321; N.L. Schechter & A.L. Beck 'Pain in the Neonate and Fetus' (1988) 318 21 *The New England J of Medicine* 1398; M.A. Rosen & S.J. Lee et al 'Fetal Pain – A Systematic Multidisciplinary Review of the Evidence' (2005) 294 8 *The J of the American Medical Association* 947.

[54] The legislation, to be known as the 'Pain-Capable Unborn Child Protection Act', was referred to the United States Senate on the 19th of June 2013. If passed by the Senate, the legislation will be sent to the President of the United States to sign into law. Refer to the United States Senate website to view the Bill at: <http://www.gpo.gov/fdsys/pkg/BILLS-113hr1797rfs/pdf/BILLS-113hr1797rfs.pdf>; Refer further to <www.senate.gov> generally. The US Congress found that pain receptors are present throughout the *nasciturus's* entire body, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks after fertilisation. It was found that by 8 weeks after fertilisation, the *nasciturus* reacts to touch. After 20 weeks, the *nasciturus* reacts to stimuli that would be recognised as painful if applied to an adult human.

[55] *Roe v Wade* 410 U.S. 113 (1973); See Lupton (note 1 above) Loc 1423--1425, and the authority cited therein, who states that '[t]he foetus in the USA has consequently acquired a measure of legal personhood and protection from the age of viability which is far greater than in most other developed countries. It is very difficult to seek permission to terminate after the age of viability, even if the foetus is found to be grossly malformed or have a life-limiting medical condition.'

[56] *Roe* (note 55 above) 160.

[57] Kaczor (note 3 above) Loc 1591--1592.

Bearing in mind that *Roe* was decided in 1973, the court stated that '[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks [gestation].'[58] The understanding and construction of viability as a significant concept attached to *nascitural* development, is intimately linked to the state of medical technology at any given time and in any particular place.[59] Today it is possible, given all the right circumstances and available resources, for viability to occur at around 22 or 23 weeks gestation.[60]

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[58] *Roe* (note 55 above) 160; For a South African perspective see *Mshumpa* (note 14 above) 148 C--D, where the court stated that '[g]enerally speaking medical science now considers a foetus viable… by the 25th week of pregnancy.' The *Mshumpa* court associated the concept of viability with being *born alive* and *healthy*. For an enlightening and informative exposition of the way in which the concept of *nascitural* viability is defined in South Africa together with associated case law, refer to C. Pickles 'Personhood: Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability' (2013) 1 *Stellenbosch LR* 146, 151--155; In the context of the United Kingdom in the late 19th Century, a further enlightening definition of viability is provided by A.S. Taylor *Medical Jurisprudence* (Fifth American from the Seventh and Revised London ed) (1861) 467, where *nascitural* viability is defined as '[the] earliest period at which a child may be born living'. The author states further that '[a]ccording to the English law [which is the same as the current legal position in South Africa], it is not necessary that a child, when born, should be capable of living, or *viable*, in order that it should take its civil rights. Thus it may be born at an early period of gestation: it may be immature, and not likely to survive: or again it may be born at the full period of pregnancy, but it may be labouring under some defective organization, or some mortal disease, which must necessarily cause its death within a short time after its birth. Fortunately, these points are of no importance in relation to the right of inheritance: an English medical jurist has only to prove that there was some well-marked physiological sign of *life* after birth, whether the child were mature or immature, diseased or healthy, is a matter which does not at all enter into the investigation.'

[59] See A. Christoffersen-Deb 'Viability – A Cultural Calculus of Personhood at the Beginnings of Life' (2012) 26 4 *Medical Anthropology Quarterly* 575; Refer further to Pickles (note 58 above); See Steinbock (note 16 above) 43, where the author states that '[t]he argument for regarding viability as having moral significance is that before the fetus can survive independently of the mother, it is really only a part of her body, like an organ or a limb. By contrast, a viable fetus, though *within* the body of the mother, is not merely a part of her body. A mere bodily part is not capable of living on its own. A viable fetus can be separated from its mother and remain alive. [The counterargument to this is] that it is a mistake to identify *independent* existence with *separate* existence. The nonviable fetus admittedly cannot exist independently of its mother, but it is nevertheless a separate individual, with its own genetic code.'

[60] N. Rhoden 'Trimesters and Technology: Revamping *Roe v Wade*' (1986) 95 4 *The Yale LJ* 639, 661. In 1986 Rhoden wrote that '[t]he current threshold of viability is usually estimated at about 24 weeks, with survival before this time exceedingly unlikely. However, a few infants have survived at 23 weeks, and there is the occasional report of survival at 22 weeks… [P]hysicians are attempting to push the threshold of viability back even further… Many experts believe that because of the extreme immaturity of a fetus of less than about 23 weeks, 22 or 23 weeks represents an absolute lower limit on fetal viability…' It is interesting to note that not much has changed 27 years later. See for example a contemporary study conducted at the University of Leicester in the United Kingdom by S.E. Seaton & S. King et al 'Babies Born at the Threshold of Viability: Changes in Survival and Workload Over 20 Years' (2013) 98 *Archives of Diseases in Childhood – Fetal & Neonatal Edition* F15. In this particular study, '[d]ata of all babies born between 1 January 1991 and 31 December 2010 with a gestational age of 22 to 25 weeks and admitted to a neonatal unit were extracted from The Neonatal Survey… The proportion of babies surviving to discharge [from hospital] increased significantly over time in those born at 24 and 25 weeks but failed to achieve statistical significance for those at 23 weeks. No babies born at 22 weeks survived.' It is interesting to note further that in 1861 (152 years ago), the situation was also very similar. In this regard refer to Taylor (note 58 above) 468--473, where the author relates medical evidence of *nascituri* surviving after as little as 20 to 22 weeks of gestation. One particular story worth mentioning is that of a *nasciturus* surviving after 22 weeks of gestation. '[The *nasciturus*] weighed one pound [453.59 grams] and measured eleven inches [27.9 centimetres]. It had only rudimentary nails, and very little hair, on the back of the head. The eyelids were closed, and remained closed until the second day. The nails were hardly visible; the skin was shrivelled. The child did not suck properly till after the lapse of a month, and she did

Many states in the United States of America have prohibited abortion at 20 weeks gestation except in cases where the health or life of a pregnant woman is in danger.[61] *Nascitural* viability is the criterion most often cited as the point at which *nascitural* safeguards and protections should commence.[62] According to traditional notions of *nascitural* viability, objective factors that are medically ascertainable to determine gestational age are the only factors that are considered when making a determination about the likely viability of a *nasciturus*.[63]

A definitively nuanced examination of viability reveals that both objective organic factors as well as subjective psychosomatic factors contribute to the ultimate feasibility of a particular *nasciturus*. Whilst a wide range of traditional objective factors including socio-economic as well as scientific and biological developmental benchmarks play a significant role in organic *nascitural* development, they are insufficient in isolation for the establishment of an *absolute* personhood narrative. The aforementioned are but one set of building blocks necessary for the creation of an unassailable moral and legal personhood paradigm. Personhood is multidimensional, its definitional component is interdisciplinary, and it is therefore probably best described as a cluster concept.

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not walk until she was nineteen months old. When born the child was wrapped up in a box, and placed before the fire. Three years and a half afterwards this child was in a thriving state and healthy, but of small make.' Finally, in a contemporary and up-to-date context refer to Lupton (note 1 above) Loc 123--124, where the author states that '[i]nfants born as early as 22 weeks of gestation can now be kept alive for a time in specialist neonatal intensive care units (although the vast majority of these infants eventually die or suffer permanent disabilities as a result of extreme prematurity).'

[61] Refer in this regard to a publication by the Guttmacher Institute which is a pro-choice organisation in the United States and is dedicated to advancing sexual and reproductive health worldwide through research, policy analysis and public education: 'State Policies in Brief – As of October 1, 2013 – An Overview of Abortion Laws' *Guttmacher Institute*. Available online at: <http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf>.

[62] See for example R. Pillay 'The Beginning of Human Personhood: Is South African Law Outdated?' (2010) 2 *Stellenbosch LR* 230; Christoffersen-Deb (note 59 above); The attitude of the South African National Prosecuting Authority to viability is referred to in an article by H.J. Kruuse 'Fetal "Rights"? The Need for a Unified Approach to the Fetus in the Context of Feticide' (2009) 72 *THRHR* 126, 128; For a discussion on the moral and legal significance of viability in an American context refer to Steinbock (note 16 above) 99--101; See further Kaczor (note 3 above) Loc 1588--1656, for an excellent discussion on viability; See also Boonin *A Defense of Abortion* (note 36 above) Loc 1965--2009.

[63] See Seaton & King (note 60 above) generally; Steinbock (note 16 above) 43, 96--101, 186--188; Pillay (note 62 above) generally; Warren (note 46 above); de Freitas & Myburgh (note 17 above); Meyerson (note 19 above); Cohen (note 17 above); Naffine (note 17 above); Pickles (note 58 above) 156--164, provides a powerful, in-depth, and well-reasoned approach towards objective factors that need to be considered when dealing with *nascitural* viability. The author takes into account and considers both *in uterine* as well as *ex uterine* factors. *In uterine* factors include but are not limited to sex, weight, presence or absence of deformities, exposure to corticosteroids which assist in pulmonary development, and whether or not one is dealing with a single or a multiple gestation. *Ex uterine* factors include but are not limited to socio-economic factors such as access to good quality healthcare, the efficient functioning of the public healthcare system, and society's means in general as well as hospital culture. For a similar discussion in the context of empirical research conducted in a United States teaching hospital, refer to Christoffersen-Deb (note 59 above) generally.

A concept made up of several important and meaningful components, none of which is sufficient in isolation to define personhood comprehensively.[64]

## 5.4 The Psychosomatic Person

The organic theories of personhood all fail to capture the depth of necessary understanding embedded in the concept of personhood.[65] Organic notions of personhood in isolation lack a necessary intrinsic connection to the psychosomatic human dimensions of personhood which acknowledge the importance of subjective factors such as maternal intention in determining the boundaries of personhood.[66]

Psychosomatic conceptions of personhood are rooted in maternal, paternal, social, extended social, philosophical, theological, and spectral understandings of what it means to be a human person endowed with personhood.[67] This section does not purport to be anything other than an expressive account of the concept of personhood through the experiences of pregnant women with positive maternal intention. The associated private and more broadly social dimensions which accompany these experiences and interpretations are also explored. The presence of positive maternal intention adds a psychological and subjective dimension to the concept of personhood, necessary for the creation of *nascitural* safeguards and protections that do not encroach on a pregnant woman's general reproductive rights.

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[64] See Rhoden (note 60 above) 672, in the context of viability, where the author refers to one understanding of viability being 'the complex, value-laden notion that once a fetus can survive *ex utero* and is substantially developed, its claim to societal protection increases.' Rhoden refers to this *version* of viability as a cluster concept. The same train of thought could be applied to the different *versions* of personhood. Personhood similarly, is also a complex, value-laden, subjectivity sensitive, conceptualisation that requires significant amounts of contemplation to arrive at a well-informed viewpoint.

[65] For an interesting discussion on metaphysical personhood vs. moral personhood which in relation to certain aspects of the arguments advanced in this chapter can be compared to organic vs. psychosomatic personhood, see T.L. Beauchamp 'The Failure of Theories of Personhood' (1999) 9 4 *Kennedy Institute of Ethics J* 309.

[66] The necessity of this intrinsic connection is rooted in reality and the lived experiences of pregnant women with positive maternal intention. The way in which a pregnant woman interprets her pregnancy determines her concept of personhood to a certain extent. A pregnant woman with negative maternal intention may see the developing *nasciturus* as a non-person, whereas a pregnant woman with positive maternal intention may see the developing *nasciturus* as a person. For a discussion on the real life experiences of pregnant women with positive maternal intention and pregnant women with negative maternal intention, refer to the following two texts respectively: M. Migliorino Miller *Abandoned – The Untold Story of the Abortion Wars* Kindle ed (2012); S. Wicklund *This Common Secret – My Journey as an Abortion Doctor* Kindle ed (2007). It is important to note further that the tension that exists in respect of maternal rights in a legal sense vs. *nascitural* safeguards and protections, in a moral and legal sense, is to a large degree eased in the presence of positive maternal intention. Positive maternal intention serves as a tangible mechanism that could lead to the legal enforcement of *nascitural* safeguards and protections without any conflict of legal or moral rights.

[67] Psychosomatic personhood should not be confused with the progeny of organic personhood which comprises of *ex uterine* characteristics such as the capacity for language, rationality and self-consciousness. In this regard refer to Beauchamp (note 65 above) 312, in the context of what he terms 'metaphysical' personhood.

An integrated understanding of personhood is therefore required in order to create a credible and articulate framework for safeguarding and protecting *nascitural* life without threatening the rights of a pregnant woman who has negative maternal intention.[68]

### *5.4.1 Maternal Conceptions of Personhood*

There is no single uniform maternal conception of pregnancy or personhood.[69] Varying understandings and constructions of pregnant embodiment fluctuate across social, political, legal, personal and inter-personal boundaries.[70] Maternal conceptions of personhood are dynamic in nature and the meaning attributed to the *nasciturus* alters according to the fluid contexts in which it is perceived and experienced, configured and reconfigured.[71] Many pregnant women, including women with positive maternal intention, conceptualise the *nasciturus* as an integral part of their body and they struggle to accept the *nasciturus* as an entity in its own right, while many women experience the opposite feeling.[72]

Positive as well as negative pregnancy outcomes, which are underpinned by positive maternal intention, provide a lucid context in which to understand maternal conceptions of personhood. Pregnancy loss whether through the natural processes of the human body, non-consensual *nascitural* destruction or unexplained stillbirth, creates a platform of understanding that opens a window into the thought paradigms of a pregnant woman with positive maternal intention.[73]

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[68] An integrated understanding of personhood would thus incorporate both organic as well as psychosomatic factors in creating legally sound mechanisms for the safeguarding and protection of *nascitural* life without eroding the rights of pregnant women who have negative maternal intention.

[69] See Lupton (note 1 above) Loc 2214--2217, where the author states that '[P]regnant women themselves often tend to articulate a shifting and ambivalent concept of their embodiment and selfhood in relation to their unborn. Their unborn are sometimes positioned as Other to one's Self and sometimes as an inextricable part of one's Self. In some contexts unborn entities may be considered alienable from the maternal subject, and therefore able to be traded or sold, and in other contexts as inalienable. These configurations may even change for the same woman during the term of her pregnancy.'

[70] See Lupton (note 1 above) Loc 1340--1345, where the author states that 'for women themselves the lived experience of pregnancy is a shifting state involving various permutations of the unborn-maternal assemblage. [Lupton's] research suggests that there is nothing particularly essential or predictable about the experiences of pregnancy. The unborn may be conceptualised as mine / not mine, part of me / separate from me, companion / antagonist, baby / parasite, Self / Other, depending on the particular context in which the woman finds herself and her own life experiences. These issues again come to the fore in cases of pregnancy termination, pregnancy loss and choices about the use of surplus embryos from [*in vitro* fertilisation] treatment.'

[71] Lupton (note 1 above) Loc 2221--2223.

[72] Lupton (note 1 above) Loc 2226--2227.

[73] See N. Pfeffer 'What British Women Say Matters to Them About Donating an Aborted Fetus to Stem Cell Research: A Focus Group Study' (2008) 66 *Social Science & Medicine* 2544, 2547, who identified in participants of the study that she undertook, a tendency to associate the word 'foetus' with an unwanted pregnancy and the word 'baby' with a wanted pregnancy. 'Participants could confidently attribute visible physical differences in a "fetus" and a "baby" which made the fetus seem less than human.'

The pregnant woman who successfully navigates a full term pregnancy with a healthy live birth outcome also serves as a valuable resource that contributes to meaningful and relevant insights about the values and subjective discernments that personhood encompasses and how it is perceived.[74] The process of gestation is fraught with uncertainties and doubts that highlight the complexities of the maternal-*nascitural* bond and the fact that many women struggle to come to terms with 'harbouring another body within their own'.[75]

Maternal conceptions of personhood draw attention to the need for a rational and introspective dialogue that acknowledges the social reality of the way in which *nascitural* life is understood. It is however imperative that all persons with a vested interest in *nascitural* safeguarding and protection, remain critically attuned to the legal, social and political constructions of personhood that see fit to valorise certain interpretations of personhood while degrading others.[76] Many pregnant women with positive maternal intention begin to individually and socially construct opinions and personal philosophies about personhood unique to their particular pregnancies from the moment that they find out they have conceived.[77] These constructions represent a personal odyssey that is intimate and private and they develop in social and reserved spaces which the pregnant woman believes to be safe and secure and free from unwanted intrusion.

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[74] See for example J.S. Taylor 'Of Sonograms and Baby Prams: Prenatal Diagnosis, Pregnancy, and Consumption' (2000) 26 2 *Feminist Studies* 391, 402, who states that 'women's relationship to reproduction has been transformed in recent decades, such that even conservative defenders of traditional values now frame motherhood not as women's biological destiny but rather as the result of a conscious decision to embrace their reproductive potential.' See further Lupton (note 1 above) Loc 1286--1291, 1296--1299, where the author states that '[r]esearch on pregnancy surrogates who have been commissioned to gestate and give birth to infants on behalf of others suggests that maternal-foetal bonding is by no means inevitable and that the emotional relationship between the pregnant woman and the unborn developing inside her is a product of sociocultural context. In surrogacy, indeed, such bonding is not considered appropriate, as the surrogate must relinquish the infant when it is born to the commissioning parents. For the surrogate to develop a strong affective bond with the unborn child could result in significant emotional distress on her part after birth and even in the desire to keep the infant herself. Surrogates must therefore engage in deliberate strategies to conceptualise the unborn they are gestating as Other to themselves and to maintain some emotional distance between themselves and the unborn… [W]hile the surrogate was harbouring their unborn, the commissioning mothers tended to view their surrogate's body as an extension of their own body, a kind of appendage, or even saw their body and that of the surrogate as one body merged together. They employed strategies, therefore, that attempted to develop a bond with their unborn even though the unborn were not physically inside them.'

[75] Lupton (note 1 above) Loc 1015--1017.

[76] See Keane (note 17 above) 154.

[77] See Layne (note 35 above) 322; See further L. Oaks 'Smoke-Filled Wombs and Fragile Fetuses: The Social Politics of Fetal Representation' (2000) 26 1 *Signs* 63, 67, 75, 87, 88, 90, 95, where the author states that 'many women experience and think of their babies-to-be as specific individuals.' Oaks further draws attention to the fact that women have diverse ways of understanding and caring for the *nasciturus* and they also have different ways of experiencing and thinking about their pregnancies. Oaks explores the varied ways in which *nascitural* subjects are understood and demonstrates how constructions of *nascitural* identity are contingent on women's historical, socio-cultural, economic, political, and health-care contexts. It is clear from Oaks's work that many pregnant women with positive maternal intention feel a responsibility towards the *nasciturus*.

Pregnant women with positive maternal intention are, generally speaking, conscious of the fact that a live human being is developing and growing *in utero* and as the process of gestation progresses they feel physically and emotionally different.[78]

> 'Part of the procreative experience for women [with positive maternal intention] may be awareness of the positive dimensions of the interconnectedness and interembodied nature of pregnancy and nurturing for children, the lack of individuation and the pleasures of permeability of selfhood and embodiment… [D]istinctions between Self and Other may change at different points of time in the pregnancy. Women sometimes feel as if their unborn is part of them but at other times position the unborn as an Other to their Selves. They may move back and forth between these positions… [Many women] find it difficult to conceptualise or articulate the ontology of pregnant embodiment… Some women even find the experience of pregnancy like an invasion, viewing their bodies as being taken over by an "alien thing" and expressing the idea that their body therefore "no longer belongs" to them… Feelings of hostility, of viewing the unborn as an invader or a parasite, are often evident in the accounts of women who are experiencing an unwanted pregnancy [negative maternal intention], particularly if they have become pregnant from an act of rape. In these situations, because the unborn is a product of violence and is generally part of the perpetuator of this violence, pregnant women often conceptualise the entity within them as monstrous, less than human, even as a kind of cancerous growth, and certainly not as an "innocent baby". They may view their pregnant bodies and the unborn contained with[in] them as "disgusting". If the rape was part of war, the notion that a captor's or invader's genetic material is gestating within them can be horrifying for such women. They may feel as if their bodies have become battlegrounds. Here the unborn is conceptualised and experienced in unambiguous terms as a foreign and repellent Other and most definitely not as part of the Self… [Women with positive maternal intention] tend to conceptualise their unborn more positively and find the generation of this Other body within their own as a miraculous and awe-inspiring process… [These women talk] about their unborn as "constant companions" and [make] reference to enjoying the warm embodied sensations of "cuddling up" to them. While this type of discourse also positions the unborn as an Other body to one's Self, this is in a far more positive light [positive maternal intention] compared to the concept of the antagonistic or parasitic unborn Other [negative maternal intention].[79]

The relationship between the *nasciturus* and the pregnant woman is known in feminist discourse as 'relationality'.[80] The concept of relationality between the *nasciturus* and the pregnant woman serves as the catalyst for maternal conceptions of personhood.

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[78] Regan (note 23 above) 76.
[79] Lupton (note 1 above) Loc 1072--1074, 1078--1079, 1083, 1112--1113, 1131--1137, 1140--1141, 1142--1144.
[80] 'Relationality' is a broad concept that not only focuses on the maternal / *nascitural* relationship but which focuses on the theoretical relational aspects of pregnancy and pregnant embodiment as a whole in a broad feminist sense. See S. Sherwin *No Longer Patient: Feminist Ethics and Health Care* Kindle ed (1992) Loc 637--639, where the author states that '[t]he general consensus of female theorists is that such theories should involve models of human interaction that parallel the rich complexity of actual human relationships and should recognize the moral significance of the actual ties that bind people in their various relationships.' See further

Perceptions of *nascitural*-maternal relationality are to a large extent influenced by obstetrical ultrasound equipment and *nascitural* imaging technologies which in turn contribute even further to maternal conceptions of personhood.[81] These technologies assist the pregnant woman to crystallise previously indecisive beliefs about the *nasciturus* and to concretise, in her own mind, the nature of the relationship that she is forming with the *nasciturus*.[82] Ultrasound and *nascitural* imaging are technologies that are primarily employed by the pregnant woman with positive maternal intention.[83]

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Morgan *Fetal Relationality* (note 35 above) 51, where the author states that '[r]elationality is presented as an ideologically undervalued but experientially accurate dimension of social interaction.'

[81] See Lupton (note 1 above) Loc 1194--1195, 1212--1213, 1216--1217, where the author states that 'quite apart from any medical reason for ultrasound, it has come to serve an important social function in assisting prospective parents to forge an emotional bond with their unborn.' The ultrasound printout is generally the first photograph that prospective parents have of their unborn child. When the sex of the unborn child is divulged, it solidifies the parental concept of personhood in the minds of the prospective parents. See further Taylor (note 74 above) 406--407, where the author states that 'the ultrasound exam also seems to promise an emotionally gratifying moment of "reassurance" and "bonding" that has itself come to be regarded by many as a not-to-be-missed part of the experience of pregnancy.'

[82] See Lupton (note 1 above) Loc 2201--2203, who states that 'concepts of personhood develop earlier than the moment of physical birth via visualising technologies and the emotions and imaginings of expecting parents. The unborn, therefore, typically enter the social world as members in their own right well before they are physically born and separated from the maternal body.' The latest ultrasound technology offers three dimensional (3D) scanning and well as four dimensional (4D) moving scans. 4D moving scans provide a real time 'home movie' of the *nasciturus in utero*. These scans are available to the pregnant woman from the earliest stages of *nascitural* development to the very latest. For ease of reference and to experience this technology, a companion digital versatile disk (DVD) has been included in this dissertation, in the front cover insert, should the reader wish to see first-hand to what extent these technologies have advanced in recent years. See further Oaks (note 77 above) 80, who states that '[v]isual access to fetal life through obstetric imaging technologies has been crucial to social and medical definitions of the fetus as a patient and a person.' Lupton (note 1 above) Loc 686--691, states that '[d]evelopments in sonographic technologies have allowed for the capturing of embryonic development at its earliest stages. If it is deemed necessary, ultrasounds of embryos may now be undertaken using a transvaginal transducer (a tube-shaped probe inserted into the vagina). This is the preferred method until the eighth week of gestation, because it produces better images of the embryo than the more commonly employed abdominal ultrasound. Those women who have suffered recurring miscarriages, are experiencing vaginal bleeding or have a suspected multiple pregnancy because of medical treatment involving ovarian stimulation may undergo an ultrasound even earlier in the pregnancy (from the fifth week of gestation, when the [*nasciturus*] may first be apparent on an ultrasound scan using a transducer) to check on the viability of the embryo, as may those women who have become pregnant via IVF [*in vitro* fertilisation].'

[83] See R. Pollack Petchesky 'Fetal Images: The Power of Visual Culture in the Politics of Reproduction' (1987) 13 2 *Feminist Studies* 263, 279, where the author states that pregnant women with positive maternal intention 'frequently express a sense of elation and direct participation in the imaging process, claiming it "makes the baby more real," "more our baby"; that visualizing the fetus creates a feeling of intimacy and belonging, as well as a reassuring sense of predictability and control… Some women even talk about themselves as having "bonded" with the fetus through viewing its image on screen… [U]ltrasound imaging in pregnancy seems to evoke in many women [particularly those with positive maternal intention] a sense of greater control and self-empowerment than they would have if left to "traditional" methods or "nature"'. See further Lupton (note 1 above) Loc 378--387, who states that 'for those couples who have undergone IVF, the opportunity to view their embryos at this very early developmental stage through an electron microscope can be an important way in which they come to visualise and think about these products of conception. For some people this process of viewing the blastocysts, even though at this stage they have no human form, serves to reinforce the notion of these entities as the beginning of life, the precursor to their "baby". As one Japanese woman who was undergoing IVF commented, "When I saw my embryo through the microscope, I thought that I had finally met my child." However, this is not a universal reaction. For other people undergoing IVF, viewing their embryos supports their concept of these organisms as "just cells" that have not attained personhood. In an Australian

Positive maternal intention is however not a uniform indicator of the pregnant woman's relationship to these imaging technologies.[84] Notwithstanding the aforementioned, a sole reliance on physical live birth as the defining time for the presence of legal personhood, fails to sufficiently express the lived realities of women with positive maternal intention who wish to legally safeguard and protect their *nascituri* from the first moment that they find out they are pregnant.

### *5.4.2 Paternal Conceptions of Personhood*

Even though a man who shares in the positive maternal intention of a pregnant woman is not as intimately connected to the maternal experience as the pregnant woman herself, there is a possibility of the development of a strong emotional paternal bond with the *nasciturus* in anticipation of its eventual birth.[85] The sense of loss that is experienced in the wake of non-consensual *nascitural* destruction is acutely felt by both expectant parents albeit to differing degrees of intensity.[86] Differing degrees of intensity in no way detract from the concrete reality that an emotional trauma has been experienced when dealing with prenatal loss. Many men do begin to construct notions of personhood from the very early stages of gestation.[87] These notions are incrementally constructed over the entire period of gestation and represent a uniquely intimate male experience of pregnancy that augments the maternal conception of personhood and adds another dimension to the concept of *nascitural*-maternal relationality.[88]

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study, for example, one man described the appearance of the blastocyst he had viewed as "just a little blob", likening its appearance to "bubbly eggwhite", while a woman commented that her embryos "don't look real".'

[84] Pollack Petchesky (note 83 above) 280, states that 'women's relationship to reproductive technologies and images differs depending on social differences such as class, race, and sexual preference, and biological ones such as age, physical disability, and personal fertility history. Their "reproductive consciousness" is constituted out of these complex elements and cannot easily be generalized or, unfortunately, vested with a privileged insight.'

[85] See Regan (note 23 above) 76--77, where the author states that 'there is a fundamental difference in how men and women feel about pregnancy in the early stages… [M]en have nothing tangible to relate to in the first few weeks. Until [the *nasciturus*] can be visualized on an ultrasound scan or can be felt and seen moving inside [the pregnant woman, the man] may find it hard to feel as involved as [the pregnant woman].'

[86] See the paternal experience of non-consensual *nascitural* destruction in Chapter 2 – 'The Libby Gonen Story', page 28, where Libby's father provides an emotional account of his experience.

[87] See for example P.T. O'Neill & I. Watson 'The Father and the Unborn Child' (1975) 38 2 *The Modern Law Review* 174, where in the context of United Kingdom jurisprudence, the father's legal rights in respect of the *nasciturus* is explored. A nuanced reading of this article clearly illustrates that some expectant fathers do construct notions of *nascitural* existence and personhood from the earliest stages of gestation.

[88] See Lupton (note 1 above) Loc 1219--1224, who states that '[p]rospective fathers in particular may find it difficult to conceptualise and give meaning to what is going on in their female partners' bodies when they are pregnant. For these men the unborn may seem very mysterious and absent. For many men it is only until they see the foetus on an ultrasound or feel its movements through the wall of their partner's abdomen in the later stages of pregnancy that they begin to accept the "reality" of its existence. Indeed men often privilege the visual display of the unborn entity offered by ultrasound over the haptic indications of its presence such as foetal movement they can feel.'

### *5.4.3 Social Constructions of Personhood*

In a broadly social context the concept of the maternal experience and what it entails is contested.[89] Self-reflective and inherent notions of the maternal experience also inform social and extended social constructions of personhood.[90] Broadly societal interpretations of publicised or generally known self-reflective and inherent notions of *nascitural*-maternal relationality, inform the legal convictions of the community in situations of non-consensual *nascitural* destruction, as well as the general societal understanding of personhood in the context of the *nasciturus*.[91]

Ultrasound imagery, *in uterine* photography,[92] and the public portrayal of *nascitural* imagery in general has largely contributed to social constructions of personhood.[93] This imagery in its various forms has also contributed to the 'blurring of boundaries' between the concept of the *nasciturus* and that of the infant.[94] This phenomenon is due in large part to the manner in which ultrasound and imaging technicians, and prospective parents, interpret these images.[95] It is through these visual mediums and their various translations that society at large forms and internalises its own unique understandings and constructions of *nascitural* life and its concomitant association with the concept of personhood.[96]

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[89] See for example D. Purkiss 'The Children of Medea: Euripides, Louise Woodward, and Deborah Eappen' (1999) 11 1 *Cardozo Studies in Law and Literature* 53.
[90] See Morgan *Fetal Relationality* (note 35 above) generally; See also Layne (note 35 above) generally.
[91] See Kruuse (note 62 above) 127, with regard to the public outrage caused by the *Mshumpa* killing. See further Chapter 2 – 'The Libby Gonen Story', note 31, page 21, in relation to *Van Heerden v Joubert* and the public outrage caused by that case as well.
[92] The two most well known *in uterine* photographers in this regard are Lennart Nillson, whose work is available for viewing online at: http://www.lennartnilsson.com and Alexander Tsiaras whose work is available for viewing online at: http://www.thevisualmd.com.
[93] See J.S. Taylor 'The Public Fetus and the Family Car: From Abortion Politics to a Volvo Advertisement' (1992) 4 2 *Public Culture* 67; See further Pollack Petchesky (note 83 above) generally; See also Lupton (note 1 above) Loc 670--672, who states that 'visualising devices such as obstetric ultrasound technology, powerful microscopes, foetal photography and computer-generated imagery, as well as news and social media outlets, commercial commodities and museum displays have been used to depict and represent embryos and foetuses in both medical and popular culture.' See Taylor (note 74 above) 409, 415, who states that '[t]he visual image of the fetus on the screen, the take-home Polaroid snapshot, the diagnosis, the medically certified knowledge that it is a girl or a boy, the narrative descriptions provided by the sonographer in the course of the ultrasound exam – all contribute to the process by which a pregnant woman and the people around her construct for her fetus a more specific social identity… [O]bstetrical ultrasound plays a part in constructing the fetus more and more as a commodity at the same time and through the same means that it is also constructed more and more as a person… [T]he fetus is also increasingly constructed as a baby, a person, from the earliest moments.'
[94] Lupton (note 1 above) Loc 699--701.
[95] Ibid; See further Lupton (note 1 above) Loc 703--705, where the author states that '[t]hese images have… resulted in the "social birth" of the new human to shift from the moment of physical separation from the maternal body at birth to earlier phases of unborn development, so that the bestowing of such social attributes as gender, personality and name often takes place before physical birth.'
[96] See for example Pollack Petchesky (note 83 above) generally; See also Lupton (note 1 above) generally.

Providers of ultrasound technology have created a social space in which consumption of their technology can take place.

> 'Several providers advertise that they can bring their technology to the clients' homes and carry out the scan there. Some pregnant women have begun holding "ultrasound parties" employing these services, in which family members and friends are invited to their home to view the 3/4D images of their foetus as a type of baby shower. This party may include a "gender reveal" moment, where the sonographer identifies the sex of the foetus for the first time to parents and their guests, thus incorporating an element of surprise and additional entertainment… [T]echnologies such as ultrasound that were originally designed for medical use have expanded beyond the social world of the clinic into the public domain of commodity culture; the transformation of figures of the unborn into popular cultural artefacts and commodities; the dominant tendency to aestheticise and infantilise representations of the unborn in visual medical and popular culture; and the intensely political nature of unborn images… [Some parents in a social context] have even set up separate Facebook and Twitter accounts for their unborn, posting updates on their behalf and in the process representing them as fully cognisant persons making statements about how much they love their "mummy" and "daddy" and "can't wait to get here" (that is, be born).'[97]

The understanding of *in uterine* life takes on a new dimension in the public domain, a domain that is open to constant debate, analysis, and nuanced considerations of the *nasciturus* as an entity worthy of safeguarding and protection. These understandings manifest themselves as polarised views on the true nature of *in uterine* existence.[98] Just as parental conceptions of personhood nourish social constructions of personhood, so do social constructions of personhood, as contested as they are, inform and contribute toward parental conceptions of personhood.

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[97] Lupton (note 1 above) Loc 712--716, 1006--1009, 844--847. Lupton states at Loc 760--761, that '[t]he technologies of medical photography and computer imaging have played an important role in bringing highly detailed and aestheticized portrayals of the unborn into popular consciousness.' Lupton states further at Loc 847--853 that '[w]hen the pregnancy of Kate Middleton, the Duchess of Cambridge, was officially announced in early December 2012, both the traditional news and social media coverage of the announcement configured what quickly became the most famous unborn entity in the world. Within hours several spoof Twitter accounts were created for this new individual, dubbed in the news and social media the "royal baby" or the "royal foetus", which apparently was tweeting from "inside the royal womb" and giving commentary on its experiences. Depictions of the "royal foetus" used ultrasound images showing it already wearing a crown in utero. Various comments were made on Twitter concerning the wealth and social standing that the "royal foetus" already enjoyed. All this while the first trimester of the royal pregnancy had not yet elapsed.' Refer further to the following internet resources for a view of the commercialised *nasciturus* as it is portrayed in the public domain: The Visible Embryo - <http://www.visembryo.com>; The Multidimensional Human Embryo - <http://embryo.soad.umich.edu>; Snowflakes Embryo Adoption and Donation Program (Based in the United States of America) - <http://www.nightlight.org/snowflakes-embryo-donation-adoption>. There are also several videos available for viewing on YouTube with simple search terms such as 'foetus', 'abortion' or 'embryo'.

[98] One only need undertake an examination of the vast and detailed scholarly literature available on the pro-life vs. pro-choice movements in the United States of America. Social conceptions of personhood in relation to *in uterine nascitural* life have polarised an entire nation in the United States. The abortion debate in the United States of America is highly politicised, visceral and emotionally charged.

These bilateral communal influences operate in a circular motion and symbiotically feed off one another ultimately swaying the legal convictions of the community. The law does take the legal convictions of the community into account when it attempts to understand a particular set of circumstances that require it to do so.[99] Social constructions of personhood as well as parental conceptions of personhood are further influenced by philosophical, theological, and spectral constructions of personhood.

### *5.4.4 Philosophical, Theological & Spectral Constructions of Personhood*

Philosophy as truth attempts to make sense of the human experience and included in this investigation is an attempt to understand the entrenched meanings which underlie the human species and our *in uterine* origins.[100] Trying to understand the nature of the *nasciturus* and the meanings which we attach to it is seen by many as a quest for the truth. Religious beliefs have a profound effect on the way in which the *nasciturus* is viewed and whether or not it is seen as being endowed with personhood. The various sacred principles of the major world religions convey diverse perspectives on the *nasciturus*.[101]

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[99] In *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) 528--529, the court stated the following: '[T]he community's perception of *boni mores* [the legal convictions of the community] is closely linked to the concept of good faith in community relations. These concepts, again, are similarly associated with the community's perception of justice, equity and reasonableness. This has been recognised not only in historical and comparative context, but in the contemporary decisions of our own Courts… From this it appears that public policy, in the sense of *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness, which are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations.' For detailed discussions about the judicial application of the legal convictions of the community in a delictual sense refer to the following texts: J. Burchell *Principles of Delict* (1993) 24--29; J.C. Van Der Walt & J.R. Midgley *Principles of Delict* 3rd ed (2005) 68--78; M. Loubser & R. Midgley (eds) *The Law of Delict in South Africa* (2010) 140--142; J. Neethling & J.M. Potgieter et al *Law of Delict* 6th ed (2010) 36--49.

[100] See generally P. Higgs and J. Smith *Rethinking Truth* 2nd ed (2006).

[101] See Lupton (note 1 above) Loc 1377--1384, 1390--1391, where the author states that '[t]he doctrines of the various major world religions teach a different perspective on the unborn. In Judaism the unborn is considered a person in its own right only once its head has emerged from the mother's body and it has drawn its first breath. The Roman Catholic Church's official position is that human life and personhood begin at the moment of conception. Hinduism proposes that human life does not have a clear beginning or clear end. In traditional Islamic teaching the unborn entity becomes a person at "ensoulment", occurring either at 40, 90 or 120 days after conception, depending on the school of thought. Abortion is considered acceptable if it takes place before this time as long as there is a justifiable reason, but it is generally forbidden after the point at which "ensoulment" is considered to have occurred. Buddhist teachings view all killing as wrong and position the unborn as living beings from the moment of conception… Japanese Buddhists, for example, view abortion as a regrettable but necessary practice, and represent the terminated pregnancy as a "child" that due to circumstances must be "returned" to the world of the non-living.' Refer further to the following: S.M. Rigdon 'Abortion Law and Practice in China: An Overview With Comparisons to the United States' (1996) 42 4 *Social Science & Medicine* 543; R.W. Perrett 'Buddhism, Abortion and the Middle Way' (2000) 10 2 *Asian Philosophy* 101; S. Dubow *Ourselves Unborn – A History of the Fetus in Modern America* Kindle ed (2011); D.C. Maguire *Sacred Choices – The Right to Contraception and Abortion in Ten World Religions* Kindle ed (2001); D.C. Maguire (ed) *Sacred Rights – The Case for Contraception and Abortion in World Religions* Kindle ed (2003); J.S. Kruger & G.J.A. Lubbe et al *The Human Search for Meaning – A Multireligion Introduction to the Religions of Humankind* 2nd ed (2009).

Superstitions, meditations, supernatural beliefs, and non-religious spiritual theories all form part of spectral constructions of personhood.[102] These constructions are all intimate and personal and depend upon individual beliefs.[103] Philosophical principles, religious politics, and ethereal convictions, as and where they are relevant, all contribute to the incarnation of the psychosomatic person. The manifestation of the psychosomatic person is informed by catalysts across a broad social and intellectual spectrum that acknowledge the complexities inherent in the notion of personhood.

## 5.5 The Legal Person in South African Law

Once the *nasciturus* is born alive it becomes a legal person.[104] The fulfilment of the born alive requirement in order to achieve the status of legal person is dependent upon a variety of factors which are both objective and subjective. These factors thus contribute to the ability of the *nasciturus* to be born alive.[105] The law only concerns itself with the end result (live birth) and fails to acknowledge the preceding commitments, investments, and efforts that cause the end result to materialise. The long term sustainability of this narrow approach is questioned in light of the existence of the psychosomatic person discussed in 5.4 above. This section further undertakes an investigation of legal personhood in South African law by examining the factors that the courts have taken into consideration in making their determinations concerning legal subjectivity and when it commences. Argument is advanced for the legal recognition of the psychosomatic person, based on its integral contribution to the personhood debate, in order to achieve the goal of safeguarding and protecting the *nasciturus*.

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[102] See E.M. Carman & N.J. Carman *Cosmic Cradle – Spiritual Dimensions of Life Before Birth* Kindle ed (2013) Loc 289--295, where the authors state that '[w]e are explorers who come to Earth as a cosmic spark of consciousness from a higher Source. Our Soul, defined here as our consciousness or immortal essence, seeks experiences in a human body and agrees to a life plan. Once a Soul enters the womb, it helps to spark the growth of the fetus. The Soul adapts to the earthly world by flitting in and out of the womb and may even return to Source. By the time a baby takes its first breath, it has already completed an extensive sojourn. Once we are born, we become trapped inside a human body and wonder where we have come from. We forget our pre-birth memories. A life-long search is spent trying to remember our cosmic status. How we happen to be born seems as mysterious as the way a caterpillar transforms itself into a chrysalis and finally into a butterfly. The Soul's journey to find its true nature is the quest of human life.'

[103] See for example: E. Hallett *The Mystery and Delight of Pre-Birth Communication – Stories of the Unborn Soul* Kindle ed (2002); E.C. Prophet *Nurturing Your Baby's Soul – A Spiritual Guide for Expectant Parents* Kindle ed (1998); W. Makichen *Spirit Babies – How to Communicate with the Child You're Meant to Have* Kindle ed (2008); L. Kröger & M.R. Anderson (eds) *The Ghostly and the Ghosted in Literature and Film – Spectral Identities* Kindle ed (2013); K. Bhavnagri *The Laws of the Spirit World* Kindle ed (2013).

[104] Refer to Chapter 4 – 'The Born Alive Rule', page 45, for a detailed discussion on the beginning of legal subjectivity in South African law.

[105] The ingredients which contribute to a live birth include but are not limited to: Objective *in uterine* medical determinations such as gestational age, physical developmental benchmarks, and the absence of *nascitural* anomalies. Objective *ex uterine* factors include access to neonatal intensive care facilities. Objective maternal factors encompass maternal health, maternal lifestyle, and socioeconomic status. Subjective factors include the presence or absence of positive maternal intention, and maternal conceptions of personhood.

Legal recognition of the psychosomatic person does not need to entail the *nasciturus* being the bearer of legal rights. The recognition of moral rights is possible through the safeguarding and protection of the *nasciturus* without it necessarily enjoying any specific legal rights.[106] In other words, it is possible to protect the *nasciturus* by criminalising its non-consensual destruction, without affording it legal rights which may clash with those of the pregnant woman. The legislative criminalisation of non-consensual *nascitural* destruction is discussed in detail in Chapter 6 together with an analysis of the derivative status of the *nasciturus* and the *nasciturus* as a separate organic entity.

### *5.5.1 The Composition of the Legal Person in South African Law*

A one dimensional approach towards legal personhood has been adopted in South African law. This is true not only in light of the singular requirement of live birth for legal personhood but is also clearly evident based on comparisons with various foreign jurisdictions.[107] Comparisons with foreign jurisdictions vividly highlight the serious lack of multidimensional analysis necessary when interrogating the concept of legal personhood.

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[106] For the sake of convenience and legal certainty, the law in South Africa has preferred to adopt a purely pragmatic approach to legal personhood and at what particular point in time it should commence. In South African law a human being is not entitled to be the bearer of rights until such time as it is born alive. Legal rights may therefore not be exercised until such time as a live birth has taken place. It remains possible however, to safeguard and protect the *nasciturus in utero* without the *nasciturus* having any legal rights by simply criminalising the non-consensual destruction of a *nasciturus in utero*. The functioning of such legal protection in the context of a pregnant woman with positive maternal intention would detract little from the rights of the pregnant woman with negative maternal intention. Recognising maternal conceptions of personhood, and criminalising the non-consensual destruction of a *nasciturus in utero*, requires that the law take cognisance of the make-up of the psychosomatic person.

[107] See for example the manner in which the born alive rule has been dealt with in certain states in the United States of America. Several of these developments have been discussed in Chapter 4 – 'The Born Alive Rule', page 45. See further, Lupton (note 1 above) Loc 1462--1466, 1470--1471, who states that '[a]ccording to the German constitution the embryo is viewed as human from the time of implantation into the uterus. The German position has been influenced both by Catholic religious beliefs and the legacy of the Holocaust [psychosomatic factors]. Concern about Nazis' unethical and often inhumane treatment of research subjects from Jewish and other minority groups, including people with disabilities, has produced a heightened sensitivity to decisions over the value of human life in that country… [By contrast] Israeli law allows termination of the unborn at any stage of gestation. Once the infant is born, however, it acquires full moral personhood.' See further, Y. Hashiloni-Dolev & S. Shkedi 'On New Reproductive Technologies and Family Ethics: Pre-Implantation Genetic Diagnosis for Sibling Donor in Israel and Germany' (2007) 65 *Social Science & Medicine* 2081; M.L. Gross 'Abortion and Neonaticide: Ethics, Practice and Policy in Four Nations' (2002) 16 3 *Bioethics* 202; S. Sperling 'Converting Ethics into Reason: German Stem Cell Policy Between Science and the Law' (2008) 17 4 *Science as Culture* 363; T. Krones & E. Schlüter et al 'What is the Preimplantation Embryo?' (2006) 63 *Social Science & Medicine* 1; Y. Hashiloni-Dolev & N. Weiner 'New Reproductive Technologies, Genetic Counselling and the Standing of the Fetus: Views from Germany and Israel' (2008) 30 7 *Sociology of Health & Illness* 1055; J. Savulescu 'Is Current Practice around Late Termination of Pregnancy Eugenic and Discriminatory? Maternal Interests and Abortion' (2001) 27 *J of Medical Ethics* 165; J. Savulescu 'Abortion, Embryo Destruction and the Future of Value Argument' (2002) 28 *J of Medical Ethics* 133; Rigdon (note 101 above); S.A. de Freitas & G.A. Myburgh 'The Unborn and A, B, & C v Ireland' (2010) 35 1 *J for Juridical Science* 93; N. Pfeffer (note 73 above) 2544.

In *Christian Lawyers Association of Southern Africa v Minister of Health*[108] the court was in agreement with a *dictum* of the Canadian Supreme Court in *Tremblay v Daigle*[109] where the following was stated:

> 'The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person… Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification… Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.'[110]

The above reference to *Tremblay*[111] by the *Christian Lawyers*[112] court aptly illustrates the extent to which the judiciary in South Africa is prepared to employ the various theories of personhood to arrive at a balanced viewpoint which serves to acknowledge the human dimensions of the concept. There are numerous additional examples in a South African setting which further serve to illustrate the reluctance of our courts to engage with the issue of personhood and the manner in which its interpretation impacts society at large.[113]

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[108] *Christian Lawyers Association of Southern Africa v Minister of Health* 1998 (4) SA 1113 (T).
[109] *Tremblay v Daigle* [1989] 2 S.C.R. 530.
[110] *Tremblay* (note 109 above) 552 I--J, 553 A--B; See further *Christian Lawyers Association* (note 108 above) 1118 D--F.
[111] *Tremblay* (note 109 above).
[112] *Christian Lawyers* (note 108 above).
[113] In *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) 259 A--D, the court referred to foreign legal commentary dealing with 'viability' as the decisive moment for obtaining legal status and then found it unnecessary to complicate its reasoning with 'viability' as a significant point in *nascitural* development which could possibly dictate legal personhood; In *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) 827 F--G, the court stated that in our law the unborn *nasciturus* has no legal subjectivity and only acquires such subjectivity upon its live birth. The *nasciturus* cannot therefore be the bearer of rights which can be exercised on its behalf prior to its live birth. Sometimes the judiciary is presented with opportunities to engage meaningfully with the concept of personhood and it prefers to avoid the issues involved because of their inherent complexities and polycentric consequences. For example in *G v Superintendent, Groote Schuur Hospital* 1993 (2) SA 255 (C) 259 D--G, the court preferred not to enter into the realm of the complexities involved in the protection of the unborn *nasciturus* even though it had an opportunity to do so. The court did however intimate that perhaps a measure of protection was in order in situations where the existence of the *nasciturus* was threatened; In *Van Heerden v Joubert* (note 14 above) 798 B--E, the court preferred to avoid serious engagement with the concept of human personhood and its effect in a legal sense. It restricted its comments to within the context of the Inquests Act 58 of 1959 even though it could have entered into a brief *obiter* discussion on personhood in a broader context. The court did however highlight in some detail the possible negative consequences of extending the definition of a person, impliedly indicating its reluctance to engage meaningfully with the concept of personhood; In *S v Makwanyane* 1995 (3) SA 391 (CC) 268--269, the court raised some rather interesting questions as to what it means for every 'person' to have a right to life. The court asked – What is a person? When does 'personhood' and 'life' begin? The court then went on to find it unnecessary to give the word 'life' a comprehensive legal definition which would have provided some answers to complex questions such as those posed by the court. In retrospect the court missed out on a valuable opportunity for the construction of a

This reluctance on the part of the judiciary negatively influences communal perceptions about the interaction of law and society when personhood is at stake.

In *S v Mshumpa* the court made it blatantly clear,[114] in line with the reasoning of the *Christian Lawyers*[115] court above, that it was the responsibility of the legislature to engage with the philosophical and psychosomatic nuances of personhood, once again indicating the reluctance of the judiciary to evaluate the concept of what it means to be a person with or without the endowment of legal subjectivity. It is submitted that the *Mshumpa* court is correct in stating that the responsibility for law reform lies with the legislature. Based on the track record of the South African judiciary to date, the non-consensual destruction of a *nasciturus in utero* will remain nothing more than an aggravating factor to be taken into consideration at the time of sentencing.[116] All indications are that this indefensible state of affairs will continue indefinitely, until the legislature introduces a satisfactory remedy for pregnant women with positive maternal intention who are the victims of non-consensual *nascitural* destruction. The perpetuation of this inhumane approach is plainly flawed.[117] There is undoubtedly a substantial amount of merit in making the non-consensual destruction of a *nasciturus* a crime based on a cumulative view of the varying theories of personhood.[118] The *Mshumpa*[119] court, did after all, acknowledge the 'unique togetherness' of the pregnant woman and the *nasciturus*.[120]

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constitutional understanding of personhood which would, no doubt, have canvassed several philosophical theories; In *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) 24, arguments were restricted to a delictual context only. The court quoted with approval from *Montreal Tramways Company v Léveillé* [1933] S.C.R 456, 464, that the principle of natural justice demands that if a child is born alive and viable it should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person whilst *en ventre sa mere*; Pillay (note 62 above) 235--236, states that 'in contrast to a purely legal approach to the beginning of personhood, the [South African] judiciary has preferred a predominantly non-legal approach when considering the *end* of human personhood. Thus in *S v Williams* [1986 (4) SA 1188 (A) 1194 F--G] the former Appellate Division of the Supreme Court, in an *obiter* statement, expressed the view that a legal determination of the end of human personhood should be predominantly informed by a combination of non-legal factors such as medical science, morality, religion, and even the opinion of the community.' Pillay's translation (from Afrikaans) of this statement by the court in *Williams* is interesting because it begs the question why the beginning of human personhood should not also be predominantly informed by a combination of legal and non-legal factors including a broad spectrum of analysis that hinges on the varied theories of personhood.

[114] *Mshumpa* (note 14 above) 65.

[115] *Christian Lawyers* (note 108 above).

[116] *Mshumpa* (note 14 above) 64, 80.

[117] The inhumanity of this approach is first and foremost in respect of the pregnant woman who has positive maternal intention. The status of the *nasciturus* is relegated to the realms of non-existence. Secondly, the current approach is inhumane in light of the moral reality of *nascitural* personhood and the moral reality of psychosomatic conceptions of personhood.

[118] The bulk of the merit lies in a universal and holistic acceptance of the moral realities inherent in *nascitural* life and the acute awareness of these realities by a pregnant woman who has positive maternal intention.

[119] *Mshumpa* (note 14 above).

[120] *Mshumpa* (note 14 above) 64, 80.

Personhood as a concept has been mentioned in passing several times in South African case law without any attempt to define what it means or analyse its nature.[121] These cases stand as testimony to the unfortunate reality that the concept of personhood is largely based on assumed understandings that remain judicially unarticulated. Because the core meaning of personhood remains unexplained in a judicial context, the result is that theories of personhood are tacitly portrayed as abstract and elusive models that remain inaccessible from a legal perspective. It is imperative that a comprehensive jurisprudential formulation of personhood be undertaken in order to remedy these defects.

> 'Although the literature of legal theory abounds with attempts to make sense of what it means to be a person, judicial opinions relating to legal personality have incorporated few, if any, of these ideas… [There] is a disinclination on the part of the courts to engage in theoretical inquiry into the nature of personhood as a basis for conclusions about legal personhood… [Courts rely] on assumptions about legal personhood but [decline] to include in their reasoning any reference to the considerable theoretical literature on this topic. The absence of any coherent theory raises an inference that courts' determination of legal personality are strongly result driven, with judges selecting whatever theories of personhood suit the outcomes they desire.' [122]

In *Christian Lawyers Association v National Minister of Health* 2005,[123] the court referred with approval to *Planned Parenthood of Southeastern Pennsylvania v Casey*[124] in the context of women having a constitutional right to determine the fate of their own pregnancy.[125] The court quoted *Planned Parenthood*[126] as follows:

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[121] These cases are not concerned with the *nasciturus*. However, an analysis of personhood in any context could serve to inform views on *in uterine* life. See: *S v Vilakazi* 2012 (6) SA 353 (SCA); *The Citizen v McBride* 2011 (4) SA 191 (CC); *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC); *City of Johannesburg v Rand Properties* 2007 (1) SA 78 (W); *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC); *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC); *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* 2005 (3) SA 280 (CC); *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA); *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *S v Jordan* 2002 (6) SA 642 (CC); *S v Banana* 2000 (3) SA 885 (ZS); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *August v Electoral Commission* 1999 (3) SA 1 (CC); *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC); *Holtzhauzen v Roodt* 1997 (4) SA 766 (W); *Gibson v Berkowitz* 1996 (4) SA 1029 (W).

[122] Fagundes (note 12 above) 1747, 1759. Although this extract was written in the context of the United States of America, much of what it has to say is relevant in a South Africa context. See further Pillay (note 62 above) 232--236.

[123] *Christian Lawyers Association v National Minister of Health and Others* 2005 (1) SA 509 (T).

[124] *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833 (1992).

[125] *Christian Lawyers* 2005 (note 123 above) 523 I--J.

[126] *Planned Parenthood* (note 124 above).

> 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.'[127]

How could such logic be possible in the face of consensual *nascitural* destruction only? Surely the same logic could be applied to a woman with positive maternal intention who has carved out an understanding of personhood based on her own unique observations of life, the meaning of the universe, and the mystery of human existence? How is it that legal attitudes about personhood are formed under compulsion of the state in South Africa[128] and the legislature remains silent,[129] the South African Law Reform Commission crippled[130] and the voices of those most profoundly affected by non-consensual *nascitural* destruction unheard?

### *5.5.2 The Failure of the Law to Recognise the Psychosomatic Person*

As demonstrated in 5.4.1 – 5.4.4 above, there are various psychosomatic dimensions to personhood that the law does not acknowledge. Most significantly, the law fails to recognise the varying ways in which a pregnant woman with positive maternal intention perceives her pregnancy. The law acknowledges the way in which a pregnant woman with negative maternal intention perceives the organic as well as the psychosomatic dimensions of her pregnancy and provides her with a satisfactory legal remedy in the form of the Choice on Termination of Pregnancy Act 92 of 1996. The law fails to do the same for the pregnant woman with positive maternal intention. If a pregnant woman with positive maternal intention is non-consensually deprived of her choice to continue her pregnancy, the law denies her legal recourse in recognition of the manner in which she has chosen to interpret the organic as well as the psychosomatic dimensions of her pregnancy. The law thus gives expression to termination of pregnancy but not to continuation of pregnancy. The law's failure to recognise basic notions of psychosomatic personhood has delegitimised the private internalisation and intimate interpretation of pregnant embodiment for the pregnant woman with positive maternal intention. These women become disempowered and their rights to reproductive freedom and bodily autonomy are rendered meaningless when they become the victims of non-consensual *nascitural* destruction.

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[127] *Planned Parenthood* (note 124 above) 851.

[128] The law in South Africa is clear. Personhood as a concept is intrinsically tied to the purely organic legal dimension of personhood which commences with a live birth.

[129] To date the legislature has made no attempt to attend to a re-evaluation of personhood in the context of safeguarding and protecting the *nasciturus in utero* in South Africa from non-consensual destruction.

[130] Attempts to initiate change through the South African Law Reform Commission (SALRC) have to date been unsuccessful. Refer in this regard to the discussion on the SALRC in Chapter 4, page 67--68.

The regulation of societal behaviour and the implementation and enforcement of legal principles and rules is a primary function of any legal system. In order to effectively achieve the aforementioned the law must embody and signal social values and aspirations and reflect social ideals aiming to create 'social norms that people use to measure the morality and worth of their actions.'[131]

> '[L]egal statements regarding personhood express normative assumptions about social status… The law of the person entails considerably more than a functional abstraction of a disembodied notion of legal capacity. When law uses the metaphor "person" to define its object, that metaphor acts as a vehicle for expressing beliefs and values about persons, both legal and natural… [The issue of legal personhood] is closely tied to moral and ethical considerations. [W]hat the law refers to as persons, and the act of the law's referring to entities as persons, shapes what society thinks of as human… Judges seem almost embarrassed that any pronouncement about the law of persons might have philosophical implications for the broader social meaning of personhood. In most cases, this attitude manifests itself in the absence of any reflection on the issue from a theoretical or interdisciplinary perspective.'[132]

### *5.5.3 Why Should the Law Recognise the Psychosomatic Person?*

The legal subjectivity of the *nasciturus*, when considered in the context of psychosomatic personhood, remains closely tied to the social debate over *nascitural* humanity.[133] The concept of personhood represents an intimately private inner sanctum that should be shielded from erosion by the conflicting views of the law and society.[134] 'Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.'[135] The human relationship that a pregnant woman with positive maternal intention nurtures with the unborn *nasciturus* is the quintessential representation of an intimately private relationship nurtured within the inner sanctum of pregnant embodiment.

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[131] Fagundes (note 12 above) 1760.

[132] Fagundes (note 12 above) 1760--1762. See further Fagundes (note 12 above) 1763--1764, where the author states that '[j]udges' reluctance to engage these issues itself suggests that denying or granting legal personality to fetuses sends a strong message about the state's valuation of fetal life, either by countenancing the visceral moral wrong of feticide or by threatening the foundational assumptions of abortion rights. The ambivalence and anxiety that courts experience in attempting to determine whether fetuses are legal persons reflect and express society's own strong feelings regarding the issue.'

[133] Fagundes (note 12 above) 1764.

[134] See *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC), (Judgment delivered on the 3rd of October 2013), 59--64, where the concept of privacy is discussed. In *Bernstein v Bester* 1996 (2) SA 751 (CC) 67, the court linked the constitutional right to privacy (enshrined in S14 of the Constitution of the Republic of South Africa) to the 'inner sanctum' of personhood. See further Fagundes (note 12 above) 1745, where it is stated that '[t]he expressive dynamic through which law communicates norms and values to society renders impossible a clear divide between the legal definition of "person" and the colloquial understanding of the term.'

[135] *National Coalition for Gay and Lesbian Equality* (note 121 above) 32.

When non-consensual *nascitural* destruction ruptures this inner sanctum, the consequential injury inflicted upon the body and psyche of the pregnant woman with positive maternal intention requires justice as a remedy. In *S v Jordan*[136] the court stated in their minority judgment that the following factors should be taken into consideration when distinguishing the core of the right to privacy from its indistinctness:

> 'One of the considerations is the nature of the relationship concerned: an invasion of the relationship between partners, or parent and child, or other intimate, meaningful and intensely personal relationships will be a strong indication of a violation close to the core of privacy. Another consideration is the extent to which the body of a person is invaded.'[137]

Pregnancy for many women with positive maternal intention represents the most intimate, meaningful and intensely personal relationship that they will ever experience in their lifetime.[138] When a pregnant woman with positive maternal intention becomes a victim, either actively through a commission,[139] or passively through an omission,[140] of non-consensual *nascitural* destruction, it constitutes an extensive invasion to her person. The consequences both physical and emotional are often irreparable and the scars which remain serve as a constant reminder of a life acknowledged by the pregnant woman with positive maternal intention and a life denied by the law.

Interdisciplinary perspectives[141] are becoming increasingly important for the law to maintain its legitimacy in a contemporary society which demands objectivity, impartiality and informed jurisprudential reasoning.[142] Fairness, truth, and justice, demand a reappraisal of the theories of personhood in order for the law to remain principled and contemporarily relevant.[143] The conflicting views held by the law and society with regard to personhood need to be resolved in an effort to create a functionally cohesive legal framework that impartially acknowledges both the termination and the continuation of pregnancy.

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[136] *S v Jordan* (note 121 above).
[137] *Jordan* (note 121 above) 80.
[138] As discussed in some detail in 5.4.1 above, every pregnancy is different and each pregnant woman experiences pregnant embodiment in her own unique way. This does not however detract from the fact that for many pregnant woman with positive maternal intention pregnancy represents an intensely meaningful process.
[139] Such as in the case of *Mshumpa* (note 14 above) where the pregnant woman was shot in the abdomen killing the unborn *nasciturus*.
[140] Such as in *Van Heerden* (note 14 above) where the pregnant woman was not delivered by Caesarian section even after the *nasciturus* had allegedly endured severe stress for an extensive period of time. See further the behind the scenes account of *Van Heerden* in Chapter 2 – 'The Libby Gonen Story', page 10.
[141] In the context of personhood, an interdisciplinary perspective would require acknowledgement of organic as well as psychosomatic constructions of personhood.
[142] Pillay (note 62 above) 238.
[143] Ibid.

It has been plainly demonstrated in the preceding chapters that there are valid grounds for criminalising the non-consensual destruction of a *nasciturus*. The next question which arises is how to practically go about implementing such a legal mechanism and what the social and legal implications and consequences of realising such a mechanism would be. Is the implementation of a Choice on Continuation of Pregnancy statute practically feasible in light of South Africa's existing Choice on Termination of Pregnancy Act?[144] Is it possible for Choice on Continuation of Pregnancy legislation to be on an equal footing with the Choice on Termination of Pregnancy Act?[145] To what extent would the implementation of Choice on Continuation of Pregnancy legislation encroach upon female reproductive autonomy rights? In Chapter 6, the final substantive chapter of this dissertation, an attempt is made to provide reasoned answers to the aforementioned questions.

[144] Choice on Termination of Pregnancy Act 92 of 1996.
[145] Ibid.

# *CHAPTER 6*

# Choice on Continuation of Pregnancy

## 6.1 Chapter Objectives & Guidelines

The choice to continue a pregnancy in the hope of a successful full term gestation and live birth outcome is as fundamental an aspect of female reproductive autonomy as exercising the choice to terminate a pregnancy.[1] The freedom of choice to continue a pregnancy is discussed in this chapter underscored by positive maternal intention.[2] The creation of a viable legislative framework to safeguard and protect the *nasciturus* in the presence of positive maternal intention and in the absence of consent to termination of pregnancy is the principal motivation of this chapter.

A consideration of paramount importance when attempting to criminalise the non-consensual destruction of a *nasciturus* is to undertake an examination of the extent to which such criminalisation will encroach upon existing female reproductive freedom and reproductive autonomy rights.[3] In order to address the parameters within which such considerations would fall, the significance of freedom of choice in a constitutional democracy is examined, followed by a concise synopsis of choice specific to the freedom to choose to continue a pregnancy. Human dignity as fundamental to the exercise of this freedom of choice is thereafter put into perspective. The importance and significance of maternal intention and consent in the context of reproductive autonomy is then highlighted to allay fears of perceived threats to existing termination of pregnancy rights. The final part of this chapter provides a preamble to a Choice on Continuation of Pregnancy Act followed by a brief overview of various elements which are believed to be essential to the drafting of legislation which deals with the legal recognition of the choice to continue a pregnancy. It is argued that the final barrier to authentic female reproductive freedom is the absence of such legislation.

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[1] The main focus in discussions around reproductive freedom and female reproductive autonomy rights generally hinges on termination of pregnancy and not on continuation of pregnancy. See for example M. O'Sullivan 'Reproductive Rights' in S. Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed, Original Service: 02-05) 37.i. See further a brief reference to decisions concerning reproduction by I. Currie & J. de Waal *The Bill of Rights Handbook* 5th ed (2005) 308.

[2] The freedom of choice to continue a pregnancy in the context of *nascitural* rights has not been canvassed in this chapter. A discussion on the feasibility of the creation of *nascitural* rights falls beyond the scope of this dissertation and more specifically what this particular chapter aims to achieve.

[3] See O'Sullivan (note 1 above) 37-1, who states that 'reproductive rights demand respect for women's bodily integrity and an environment for decision making free from fear of abuse, violence and intimidation.'

## 6.2 Freedom of Choice in a Constitutional Democracy

Freedom of choice is a complex psychological and philosophical phenomenon that is integral to an egalitarian understanding of human nature.[4] To be able to exercise true freedom of choice is to express oneself in a manner that gives effect to one's inherent sense of self-worth, and independent moral agency.

> 'Responsible action presupposes freedom of choice, the capacity to select and accept any of the alternatives we envisage at any time. Unless we can choose freely, our actions are not really free, and we are not responsible for the course we pursue. We may choose freely, of course, and yet automatically act in another way, or we may choose freely and find that we are prevented from actually performing what we decided to do. Freedom of choice is not freedom of action; it is only its precondition.'[5]

For many pregnant women, the freedom to choose to continue their pregnancies represents their first opportunity to influence the trajectory that their family life will take[6] and further characterises a turning point in their lives, reinforcing the notion that they have control over their own destinies.[7] The exercise of freedom of choice in the context of reproductive autonomy fosters a sense of self-confidence, individual responsibility and competence.[8]

Freedom of choice is intrinsically tied to the concept of human dignity[9] and the respect and protection of human dignity is a cornerstone of our constitutional democracy.[10] 'An important aspect of human dignity is the capacity to exercise one's own judgment [make choices for oneself], to shape oneself, to develop one's personality and to strive for self-fulfilment…'[11] The manner in which a pregnant woman with positive maternal intention chooses to interpret her pregnancy and portray it to the outside world vindicates her capacity to exercise her own judgment, shape herself, develop her personality, and strive for self-fulfilment. The aforementioned are completely undermined when non-consensual *nascitural* destruction is not given the type of legal recognition that pregnant women with positive maternal intention feel it deserves in a contemporary, constitutional, democratic society.

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[4] See R.C. Skinner 'Freedom of Choice' (1963) 72 288 *Mind – A Quarterly Review of Psychology and Philosophy* 463; P. Weiss 'Freedom of Choice' (1942) 52 2 *Ethics* 186.
[5] Weiss (note 4 above) 186.
[6] This statement is primarily true in the context of a first pregnancy.
[7] W.J. Cohen 'Freedom of Choice' (1967) 1 23 *Studies in Family Planning* 4.
[8] Ibid.
[9] The concept of human dignity and its relationship to choice will be discussed in more detail in 6.4 below.
[10] S10 of the Constitution of the Republic of South Africa states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.'
[11] L. Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 103.

## 6.3 The Choice to Continue a Pregnancy

The choice to continue a pregnancy gives rise to a polycentric amalgam of considerations that affects the lives of pregnant woman across a broad spectrum of personal, interpersonal and social interactions. The choice to continue a pregnancy is a choice not only limited to family planning and the exercise of personal democratic freedoms; it is a choice that highlights the significance and importance of the concept of choice itself. It brings to the fore the derivative status of the *nasciturus* and its existence as a separate organic entity. From an objective external perspective it creates the realisation that for all intents and purposes, not all *nascituri* are the same. The legal recognition of the choice to continue ones pregnancy further prompts one to question the impact that this may have on existing termination rights.

### *6.3.1 The Significance of Respect for Choice*

The South African Bill of Rights[12] is comprised, in large part, based on freedom of choice.[13] Many of the rights contained in the Bill of Rights prompt and encourage the democratic exercise of freedom of choice.[14] Not only are individual choices to be respected, they are also to be protected and promoted and the state has an obligation to fulfil the rights in the Bill of Rights.[15] The choice of a pregnant woman with positive maternal intention to continue her pregnancy touches on entrenched constitutional rights such as freedom of belief an opinion[16] regarding the status of her *nasciturus* and freedom of the way in which she chooses to express her pregnancy to herself and those closest to her.[17] The Choice on Termination of Pregnancy Act[18] vindicates female reproductive autonomy rights by providing for the legal termination of a pregnancy based on negative maternal intention.

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[12] Chapter 2 of the Constitution of the Republic of South Africa 1996.

[13] For detailed discussions on the South African Bill of Rights refer to the following texts: I. Currie & J. de Waal *The New Constitutional & Administrative Law Vol 1* (2001) 317--418; I. Currie & J. de Waal *The Bill of Rights Handbook* 5th ed (2005); S. Woolman 'Application' in S. Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed, Original Service: 02-05) 31-i; I.M. Rautenbach & E.F.J. Malherbe *Constitutional Law* 5th ed (2009) 315--396; G.E. Devenish *The South African Constitution* (2005) 43--213; H. Klug *Constitutional Systems of the World – The Constitution of South Africa – A Contextual Analysis* (2010) 113--151; For a perspective in the context of relevant case law, refer to: T. Ngcukaitobi & J. Brickhill et al *The Constitutional Law Casebook* (2012) 27--282.

[14] See for example the following sections of the Constitution of the Republic of South Africa: S12 – Freedom and security of the person, S15 – Freedom of religion, belief and opinion, S16 – Freedom of expression, S17 – Assembly, demonstration, picket and petition, S18 – Freedom of association, S19 – Political rights, S21 – Freedom of movement and residence, S22 – Freedom of trade, occupation and profession, S30 – Language and culture, S31 – Cultural, religious and linguistic communities.

[15] S7(2) of the Constitution of the Republic of South Africa 1996.

[16] S15 of the Constitution of the Republic of South Africa 1996.

[17] S16 of the Constitution of the Republic of South Africa 1996.

[18] The Choice on Termination of Pregnancy Act 92 of 1996.

A Choice on Continuation of Pregnancy Act would vindicate female reproductive autonomy rights by providing for the criminalisation of non-consensual *nascitural* destruction based on positive maternal intention. In the absence of legal protection for the choice to continue a pregnancy, female reproductive freedom and female reproductive autonomy rights are not being truly realised, positive maternal intention is being undermined, and the democratic realisation of equal protection under the law is rendered non-existent in the context of reproductive freedom. In order for termination rights and continuation rights to exist on an equal footing, a paradigm shift needs to take place. Reproductive freedom in the context of female autonomy rights applies to choices that involve termination as well as continuation of pregnancies.

### *6.3.2 The Derivative Status of the Nasciturus*

Choices made by pregnant women who aim to determine their pregnancy outcomes involve particular personal conceptualisations about the nature and status of the *nascitural* entity. The *nasciturus* therefore derives its value to the pregnant woman based on maternal intention.[19] It is the value placed on the *nasciturus* by the pregnant woman which generally determines whether a pregnancy progresses based on positive or negative maternal intention.[20] This reality cannot be escaped for as long as the only viable option for *nascitural* gestation involves a female human womb.[21] Contemporary reproductive realities dictate that the *nasciturus* is only capable of gestating to term inside the womb of a live human woman.[22]

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[19] Chapter 5 – 'Theories of Personhood', page 72, clearly demonstrated that the way in which a particular pregnancy is interpreted has a direct bearing on the value placed on the *nasciturus* by the pregnant woman. The choice to terminate or continue a pregnancy is therefore contingent upon the value placed on the *nasciturus* by the pregnant woman. It is submitted that the value placed on the *nasciturus* by the pregnant woman and not the value placed on the *nasciturus* by society at large is the only relevant consideration when deciding the fate of a particular pregnancy.

[20] It should be noted that instances may arise where a high value is placed on the *nasciturus* by the pregnant woman but the pregnancy is nevertheless terminated for other reasons such as a serious threat to the life or health of the pregnant woman. The value placed on the *nasciturus* by the pregnant woman is therefore, *generally,* the most important consideration when formulating maternal intent but not the *only* consideration in certain instances.

[21] If the *nasciturus* were to develop inside an artificial womb its value would be based purely on its intrinsic worth as a member of the human species. The value of the *nasciturus* would be inherent and not derivative. There would be no need for the *nasciturus* to derive its value based on the intention of a woman capable of gestating. See L.B. McCullough & F.A. Chervenak 'A Critical Analysis of the Concept and Discourse of "Unborn Child"' (2008) 8 7 *The American J of Bioethics* 34. Regarding the concept of intrinsic worth refer to the work of R. Dworkin *Life's Dominion – An Argument about Abortion, Euthanasia and Individual Freedom* (1993); See also note 1 in Chapter 3 – 'The *Nasciturus* Doctrine', page 31.

[22] There is however powerful and convincing evidence to suggest that medical science is on the verge of developing an artificial environment in which a *nasciturus* would be able to gestate to term. Refer to the collection of essays in S. Gelfand & J.R. Shook (eds) *Ectogenesis – Artificial Womb Technology and the Future of Human Reproduction* Kindle ed (2013).

The moral personhood of the *nasciturus* is determined by maternal intention to the extent that it is capable of creating a personal justification for the choice to terminate or continue a pregnancy.[23] When the termination of a pregnancy takes place as a result of non-consensual *nascitural* destruction, the status which the *nasciturus* has derived, through the existence of positive maternal intention, should serve as an important consideration for the criminalisation of non-consensual *nascitural* destruction.

### *6.3.3 The Nasciturus as a Separate Organic Entity*

The choice to continue a pregnancy is generally based on the recognition that the *nasciturus* is a separate organic entity.[24] When the non-consensual destruction of a *nasciturus* takes place, the pregnant woman with positive maternal intention therefore perceives the destroyed *nasciturus* as a separate victim.[25] When the law fails to recognise a victim separate from the pregnant woman, positive maternal intention and maternal conceptions of personhood that acknowledge the *nasciturus* as a separate organic entity are devalued and undermined. The choice to continue a pregnancy together with its concomitant personal realisations and social ramifications is rendered empty and meaningless in the face of a legal regime that sees the pregnant woman as the only legitimate victim.

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[23] See McCullough & Chervenak (note 21 above) 37, where the authors state that '[s]ince there is no indisputable view on the independent moral status of… fetuses that every pregnant woman is intellectually obligated to accept, these decisions are a function solely of the pregnant woman's autonomous decision. She is therefore free to confer, withhold, or, having conferred, withdraw the moral status of being a patient on or from the fetus… drawing on cultural, religious, or other sources of moral instruction and reflection that she prefers. In other words, whether [a] fetus should be regarded by the pregnant woman and others as an unborn child is entirely autonomy-based.' See further J.T. Eberl 'The Moral Status of "Unborn Children" Without Rights' (2008) 8 7 *The American J of Bioethics* 44; See J.D. Ohlin 'Is the Concept of Person Necessary for Human Rights?' (2005) 105 *Columbia LR* 209, 237, where the author states that 'the ascription of personhood is nothing but our declaration that an entity is a valid object of our moral concern. In other words, personhood is a moral and legal concept *all the way down* (as opposed to a metaphysical concept with legal consequences). We do not ascribe human rights because an entity is a person – it is a person because we ascribe human rights to it. We have it all backwards.' For a view on the stand-alone moral status of the *nasciturus* refer to M.A. Warren 'Do Potential People Have Moral Rights? (1977) 7 2 *Canadian J of Philosophy* 275; See also L.M. Morgan 'Life Begins when they Steal your Bicycle: Cross-Cultural Practices of Personhood at the Beginnings and Ends of Life' (2006) 34 *J of Law, Medicine & Ethics* 8; B. Larvor 'The Owl and the Pussycat' (1994) 44 175 *The Philosophical Quarterly* 233.

[24] See L. Regan *Your Pregnancy Week by Week – What to Expect from Conception to Birth* (2005).

[25] See Chapter 2 – 'The Libby Gonen Story', page 10. See further H. Kruuse 'Fetal "Rights"? The Need for a Unified Approach to the Fetus in the Context of Feticide' (2009) 72 *THRHR* 126, 131, where the author states, referring to *S v Mshumpa* 2008 (1) SACR 126 (E) – '[J]ust because the mother and unborn child share a special type of relationship, it does not mean that they should be treated as one person in circumstances such as these. In the context of *Mshumpa*, the grouping of the action under another offence relating to another person, albeit the mother, seems inadequate and unsatisfactory when the intention was not only directed at the fetus itself but when one considers the mother's own feeling that the law had failed her: failed her in that she could not ensure the fetus's protection from third party threat or injury. When judgment was handed down, the mother of the killed fetus in *Mshumpa* is reported to have said: "My child is dead. She was my life. Is nobody guilty of murdering her?" (Who'll pay for killing my baby, asks mother" *Daily Dispatch* 12 May 2007).'

A valid and urgent legal need exists for the non-consensual destruction of a *nasciturus* to constitute more than a mere aggravating circumstance at the sentencing stage[26] of a trial and more than the mere non-recognition of legal personhood in the absence of a live birth.[27] When a pregnant woman with positive maternal intention is non-consensually deprived of her reproductive freedom and is subsequently denied the legal recognition of the loss that she has suffered, the pain caused is incomprehensible.[28] It would amount to nothing less than a terrible tragedy if it takes another *Van Heerden*[29] or another *Mshumpa*[30] before the legal need to criminalise the non-consensual destruction of a *nasciturus* is seriously addressed by the legislature or the Law Reform Commission in South Africa.[31] Choice can therefore not be exercised or perceived in isolation from its logical and foreseeable consequences. If freedom of choice is integral to a legitimate human rights regime, the consequences which flow from its legal exercise cannot be ignored for the sake of jurisprudential convenience.

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[26] See the facts of *Mshumpa* (note 25 above).

[27] See the facts of *Van Heerden v Joubert* 1994 (4) SA 793 A; See further Chapter 2 – 'The Libby Gonen Story'.

[28] See A. Marzilli *Point – Counterpoint – Fetal Rights* Kindle ed (2005) Loc 635--644, Loc 677--683, where the author relates the following story: 'In 1992, five days before their son was due, Tracy Marciniak's husband attacked her brutally in their Milwaukee home. She recalls in chilling detail how her husband's obvious purpose was to kill their unborn son, whom Tracy had planned to name Zachariah: "He held me against a couch by my hair. He knew that I very much wanted my son. He punched me very hard twice in my abdomen. Then he refused to call for help, and prevented me from calling. After about 15 minutes of my screaming in pain that I needed help, he finally went to a bar and from there called for help. I and Zachariah were rushed by ambulance to the hospital, where Zachariah was delivered by emergency Caesarean section. My son was dead. The physicians said he bled to death inside me because of blunt-force trauma." While Tracy was spending three weeks in hospital recovering from life-threatening injuries, she received some news that made her emotional pain even worse: Law enforcement officials had visited her sister and told her that, under Wisconsin law, they could not charge Tracy's husband with murder. [Had this scenario played itself out in Johannesburg or Cape Town in present day South Africa, the outcome would be identical]. Tracy recalls: "[When] I was told that in the eyes of the law, no murder had occurred[,] I was devastated. My life already seemed destroyed by the loss of my son. But there was so much additional pain because the law was blind to what had really happened. The law, which I had been raised to believe was based on justice, was telling me that Zachariah had not really been murdered."… [In hearings for the proposed introduction of a Federal Law (The Unborn Victims of Violence Act)] Tracy Marciniak brought with her a photograph in which she was holding her stillborn son at his funeral. She asked the members of the committee, "Does [this photograph] show one victim, or two?" and pleaded, "If you look at this photo and see two victims – a dead baby and a grieving mother who survived a brutal assault – then you should support the Unborn Victims of Violence Act." Marciniak explained how a single-victim law would cause even more grief to women who had lost their babies by denying that a murder took place: "Some lawmakers say that criminals who attack pregnant women should be punished more severely, but the law must never recognize someone's unborn child as a legal victim. For example, I have read Congresswoman Lofgren's proposal, which she calls the 'Motherhood Protection Act'. There is only one victim in that Bill – the pregnant woman. So if you vote for that Bill, you are really saying all over again to me, "We're sorry, but nobody really died that night. There is no dead baby in the picture. You were the only victim."' See further Kruuse (note 25 above) 134, where the author states that 'in the case of *Mshumpa* photographs of the 38-week-old Jenna-May were displayed at the trial with steel rods through her spine to indicate the trajectory of the bullets through her body. This argument relies on an emotional and visceral response which states that a fetus at a certain stage not only looks human but *is* human.'

[29] *Van Heerden* (note 27 above).

[30] *Mshumpa* (note 25 above).

[31] The scenario described in (note 28 above) could well have played itself out in a Johannesburg or Cape Town suburb. The unfortunate reality of the current legal situation in South Africa is that unless law reform is urgently addressed it *is* going to take another *Van Heerden* or *Mshumpa* to prompt any law reform.

### *6.3.4 Not all Nascituri are the Same*

When one attempts to place an equal value on all *nascituri*, regardless of maternal intention, disputes surrounding the extent to which the *nasciturus* should be safeguarded and protected become irresolvable.[32] Jurisprudence in foreign jurisdictions has demonstrated that when one attempts to achieve blanket recognition of all *nascituri* as being the bearers of rights, interests, entitlements, safeguards or protections, one is faced with a result that creates acrimony between advocates for women's reproductive autonomy and freedom and advocates for the interests of the *nasciturus*.[33] Since the *nasciturus* derives its moral worth, value to the pregnant woman, and resultant prospects for eventual live birth, based on maternal intention, not all *nascituri* are the same.[34] Any arguments which purport to establish that *all nascituri* are of equal worth are fundamentally flawed without a discussion that evaluates the relevance of maternal intention. Any hypothesis which attempt to denigrate the value of maternal intention in favour of a construction of the *nasciturus* which elevates its status beyond reproach is irrational and ignorant.[35] The mere fact that a *nasciturus* is physically in existence does not accord it any value devoid of the choices which the pregnant woman is legally entitled to exercise. For as long as *nascituri* gestate inside the human female bodies of fundamental rights bearers that are each unique, they will never be of equal worth or moral value and will therefore never be the same.[36]

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[32] See McCullough & Chervenak (note 21 above) 36. When the *nasciturus* is perceived in isolation of the pregnant woman, the reality of the *nasciturus's* existence is ignored. It does not gestate in a bubble cut off from the world at large. It gestates inside the body of a female human vested with human rights and constitutional protections. To ignore maternal intention is to envisage the *nasciturus* as the product of an immaculate conception, which it is not. These disputes become irresolvable because not all *nascituri* are the same. They are not all planned, they are not all wanted, they are not all respected, and they are not all destined to be born alive.

[33] See McCullough & Chervenak (note 32 above); See further S. Wicklund *This Common Secret – My Journey as an Abortion Doctor* Kindle ed (2007); S. Volk *Gosnell's Babies – Inside the Mind of America's Most Notorious Abortion Doctor* Kindle ed (2013); A. Faúndes & J.S. Barzelatto *The Human Drama of Abortion – A Global Search for Consensus* Kindle ed (2011); C.D. Forsythe *Abuse of Discretion – The Inside Story of Roe v Wade* Kindle ed (2013); C. Kaczor *The Ethics of Abortion – Women's Rights, Human Life and the Question of Justice* Kindle ed (2013); D. Boonin *A Defense of Abortion* Kindle ed (2003); J. Baumgardner *Abortion & Life* Kindle ed (2008); M. Migliorino Miller *Abandoned – The Untold Story of the Abortion Wars* Kindle ed (2012).

[34] They may be identical based on their status as a particular organic entity but their real value lies in the psychosomatic conceptions of their existence as perceived by the pregnant woman.

[35] A gestating *nasciturus* cannot be construed in isolation of the pregnant woman and her affiliated, intrinsic, maternal intention.

[36] Present social, scientific, and biological reality, dictates that *nascituri* gestate inside the bodies of women who are capable of childbearing. The personal circumstances under which these entities come into being are vastly different from pregnancy to pregnancy. Not all pregnancies are wanted and not all pregnancies are destined to end in a live birth outcome. The context in which the *nasciturus* comes into being cannot be ignored in favour of a broad construction of all *nascituri* constituting uniform entities that exist in isolation of any other human interactions. The *nasciturus* itself cannot be the main point of focus, with the choices being exercised by a pregnant woman constituting only a secondary consideration. The lived reality of the pregnant woman is integral to the nature of the *nasciturus*, its biological make-up, its general moral significance, and the importance of its potential safeguarding and protection.

## 6.4 Human Dignity as Fundamental to Choice

The focus in this section is on human dignity as it specifically relates to the pregnant woman with positive maternal intention.[37] S10 of the South African Constitution[38] states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.'

> 'I propose that the human dignity (worth) of each and every person be understood as both the capacity for and the right to respect as a human being. Human dignity arises from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separate human beings from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives; it also arises from the capacity of human beings to enter into meaningful relationships with others and thereby achieve self-fulfilment at least in part.'[39]

When a pregnant woman with negative maternal intention is denied the right to terminate her pregnancy it infringes upon her right to human dignity.[40] When a pregnant woman with positive maternal intention is non-consensually denied a full-term gestation and is thereafter forced to confront the legal non-recognition of her loss, this also serves as an affront upon her inherent dignity. Freedom of choice is integral to one's sense of self-worth and therefore one's inherent dignity. When a pregnant woman with positive maternal intention consciously chooses to endow her *nasciturus* with moral personhood separate from hers and the law refuses to recognise this endowment, the value inherent in human dignity is clearly unappreciated. The non-recognition of the *nasciturus* as a victim in such circumstances disempowers the pregnant woman with positive maternal intention and leaves her doubting and questioning her sense of self-awareness, self-worth, and her capacity to exercise authentic freedom of choice. Her freedom to make and act upon decisions concerning her reproductive autonomy rights as well as her freedom to choose the manner in which she desires to interpret her pregnancy is brutally demoralised.

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[37] For a view on human dignity as it relates to the *nasciturus* refer to Ackermann (note 11 above) 26, 51--52, 124, 127, 144, 147, 149, 151--152, 158--162, 175--176. See further D. Meyerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50; Z.R. Calo 'Human Dignity and Health Law: Personhood in Recent Bioethical Debates' (2012) 26 *Notre Dame J of Law, Ethics & Public Policy* 473.

[38] Constitution of the Republic of South Africa 1996.

[39] Ackermann (note 11 above) 86.

[40] O'Sullivan (note 1 above) 37-23; See further Calo (note 37 above) 477, where the author states that '[f]or some, human dignity as human rights demands, above all, respect for autonomy and consent… To respect human dignity is thus to respect a zone of negative liberty that circumscribes what might be done to a person absent consent. Human dignity, in other words, undergirds a principle of restraint that sharply delimits the circumstances under which individual liberty might be interfered with.'

The non-consensual destruction of the *nasciturus*, coupled with the legal non-recognition of the *nasciturus* as a victim in such circumstances, patently brings to the fore the basic human need for legal recognition and acknowledgement, and ultimate law reform, to vindicate reproductive autonomy rights for pregnant women with positive maternal intention who are non-consensually dispossessed of their pregnancies.

### *6.4.1 Human Dignity & The Capacity to Create Meaning*

'An individual's capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues.'[41] In *Ferreira v Levin*[42] Ackermann J stated that:

> 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.'[43]

A pregnant woman with negative maternal intention has the freedom of choice to interpret her pregnancy in a manner that creates meaning in her life and in a manner that is consistent with the unique set of ends which she seeks to achieve for herself. The law has acknowledged, recognised, and attached value to these choices by legalising the consensual termination of a pregnancy.[44] A pregnant woman with negative maternal intention has the legally recognised freedom of choice to determine for herself what type of entity the *nasciturus* which she is carrying represents and she is able to justify her perceptions within a socially acceptable legal framework.[45]

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[41] S. Woolman 'Dignity' in S. Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed, Original Service: 12-05) 36-11.
[42] *Ferreira v Levin* 1996 (1) SA 984 (CC).
[43] *Ferreira* (note 42 above) 49.
[44] The Choice on Termination of Pregnancy Act 92 of 1996.
[45] It is not being implied that the Choice on Termination of Pregnancy Act meets with the blanket approval of society at large in South Africa. There are divergent viewpoints, heated social and academic debates around abortion, and no firm consensus on the legal or moral status of the *nasciturus*.

Although a pregnant woman with positive maternal intention also enjoys the freedom of choice to interpret her pregnancy in a manner that creates meaning in her life and in a manner that is consistent with the unique set of ends which she seeks to achieve for herself, the law fails to acknowledge, recognise, or attach any value to these choices, by distinguishing the *nasciturus* as a *bona fide* victim and by criminalising the non-consensual destruction of a *nasciturus*. Although a pregnant woman with positive maternal intention also has the freedom of choice to determine for herself what type of entity the *nasciturus* which she is carrying represents, it is not legally recognised, and she is unable to justify her perceptions within a socially acceptable legal framework. Whereas the freedom of choice enjoyed by the pregnant woman with negative maternal intention is vindicated within the prevailing legal framework in South Africa, the freedom of choice enjoyed by the pregnant woman with positive maternal intention is undermined, devalued, and made to appear irrational by the prevailing legal framework in South Africa.

### *6.4.2 Human Dignity & The Right to Bodily Integrity*

S12(2)(a) of the South African Constitution[46] grants everyone the right to bodily integrity which includes the right to make decisions regarding reproduction. In *Christian Lawyers Association v National Minister of Health*[47] it was held that S12(2)(a) of the Constitution guarantees the right of every woman to determine the fate of her pregnancy.[48] The right to dignity in the context of reproductive freedom encompasses several linked concepts, including, but not limited to, equal concern and equal respect, self-actualisation, being able to act as an autonomous moral agent, the capacity to create meaning and the right to pursue a unique set of ends.[49] South African law fails to afford equal concern and equal respect to the pregnant woman with positive maternal intention. The law only concerns itself with the rights of the pregnant woman who has negative maternal intention, by acknowledging, recognising, respecting, and attaching value to her choice to terminate her pregnancy. The choice to continue a pregnancy is afforded no legal recognition at all, not even when it is undermined by non-consensual *nascitural* destruction.

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[46] Constitution of the Republic of South Africa 1996.
[47] *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509 (T); See Woolman (note 41 above) 36-34.
[48] *Christian Lawyers Association* (note 47 above) 526.
[49] C.M. Sperling Pickles '*S v Mshumpa*: A Time for Law Reform' (2010) University of Pretoria Masters of Law Thesis 69; See further Woolman (note 41 above) 36-10--36-17. This list by no means purports to be exhaustive of all the possible human attributes that combine, or in singular form, add to the depth and breadth of the concept of human dignity in the context of reproductive freedom.

A pregnant woman with negative maternal intention is able to act as a legally relevant and authentically autonomous moral agent whereas the pregnant woman with positive maternal intention is not able to do so. Self-actualisation, the ability to create meaning, and the capacity to pursue a unique set of ends are considerations relevant to all pregnancies. These uniquely human dimensions of pregnant embodiment can only be vindicated for all pregnant women when the law places all pregnant women on an equal footing, by affording them equal protection regardless of the nature of the maternal intention which they attach to their individual reproductive experiences. The experience of an intended full-term gestation has a direct bearing on the ability of a pregnant woman with positive maternal intention to create personal meaning in her life. Such a woman pursues her own unique set of ends when she intends for her nine month gestation to culminate in the live birth of a healthy child. Human dignity should unequivocally secure this entitlement for the pregnant woman with positive maternal intention, but thus far it has not.

## 6.5 The Perceived Threat to Termination Rights

When legislation is proposed that acknowledges the choice and legal right of a pregnant woman to continue her pregnancy, recognises that the *nasciturus* can be a potential victim of crime, and accepts the construction of the *nasciturus* internalised and portrayed by the pregnant woman with positive maternal intention, potential threats to termination rights are alleged.[50] The proposed safeguarding and protection of the *nasciturus* is further perceived as the catalyst to what has become known, in United States literature, as 'maternal-fetal conflict'.[51]

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[50] See for example the recently proposed Australian Bill – Crimes Amendment (Zoe's Law) Bill 2013 (No 2), available at: <http://www.parliament.nsw.gov.au>. The object of the Bill is to recognise the separate existence of the foetus of a pregnant woman that is of at least 20 weeks' gestation (as a living person) so that proceedings for certain offences relating to grievous bodily harm may be brought against an offender who causes the unlawful destruction of or harm to any such foetus as proceedings for grievous bodily harm to the foetus rather than proceedings for grievous bodily harm to the pregnant woman. The Bill does not apply to anything done in the course of a medical procedure or to anything done by or with the consent of the pregnant woman that causes the destruction of or harm to a foetus.' Despite the aforementioned explicit exclusions, 'Zoe's Law' has caused a public outcry. It was felt that the Bill gives legal personhood to a foetus. It was felt that 'recognising the foetus as an independent "person" was the first step towards prosecutions of women where they are deemed to have acted contrary to the interests of the foetus they are carrying.' See <http://ourbodiesourchoices.good.do>. It was also felt that the Bill has the potential to undermine the reproductive rights of women. For a further example, from the United States of America, in relation to its Federal Unborn Victims of Violence Act, see: H. Minkoff & L.M. Paltrow 'The Rights of "Unborn Children" and the Value of Pregnant Women' (2006) 36 2 *Hastings Center Report* 26.

[51] The concept of 'maternal-fetal conflict' arises most often in the context of substance abuse during pregnancy. See B. Steinbock *Life Before Birth – The Moral & Legal Status of Embryo's and Fetuses* 2nd ed (2011) 155--198, for an in-depth analysis of this conflict. See further D.E. Johnsen 'The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection' (1986) 95 3 *The Yale LJ* 599.

Legislation that criminalises the non-consensual destruction of a *nasciturus* by recognising the choices of pregnant women with positive maternal intention should not pose a threat to termination rights provided such legislation is carefully and specifically contextualised and crafted.[52] A clear understanding of the importance of 'intent' and 'consent' in the context of reproductive freedom of choice is crucial to the successful implementation of any proposed Choice on Continuation of Pregnancy legislation.[53] The cordial co-existence of termination and continuation of pregnancy legislation is theoretically possible and practically attainable given the right amount of impetus and legitimate expectation.

### *6.5.1 Maternal Intention as the Primary Defining Paradigm*

Throughout this dissertation the significance, relevance, and importance of maternal intention has been emphasised. Maternal intention involves a value judgment about pregnant embodiment that has a direct bearing on the course, duration, and ultimate success of a particular pregnancy. Maternal intention determines the derivative moral personhood of the *nasciturus* in a particular pregnancy.[54] Maternal intention is the bedrock of termination rights in South African law,[55] but not of reproductive autonomy rights and freedom of choice as a whole. Maternal intention is integral to the preservation and fortification of termination rights. It is not logically or practically possible for positive maternal intention, embodied in a singular pregnancy, to pose any significant threat to termination rights in general. The key is mutual respect for freedom of choice, respect for the choices that are made by others, and the recognition that the imposition of dogmatic opinions on those who hold contrary views is a violation of freedom of choice that poses a clear and present danger to termination rights.

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[52] The existence of a clear divide between consensual and non-consensual destruction of a *nasciturus* is imperative. The specific purpose of the legislation must be clear, i.e. to vindicate the freedom of choice exercised by the pregnant woman with positive maternal intention. Furthermore, the *nasciturus* can be specifically safeguarded and protected without giving it explicit human rights. By not giving the *nasciturus* explicit rights, the potential threat to the termination rights of the pregnant woman who has negative maternal intention is significantly reduced. Notwithstanding the aforementioned, it should be noted that it is theoretically possible for the *nasciturus* to be the bearer of rights that are not absolute, in other words, rights that will *always* be limited by those of the pregnant woman. An in-depth examination of a rights-based approach in respect of the *nasciturus* falls beyond the scope of this dissertation. A non-rights based approach has been adopted in this chapter in order to avoid a detailed discussion on possible rights clashes between the *nasciturus* and the pregnant woman.

[53] A pregnant woman with positive maternal intention *intends* to complete a full term live birth gestation and does not *consent* to the destruction of her *nasciturus*. The non-consensual destruction of a *nasciturus* violates the *intent* of the pregnant woman with positive maternal intention and takes place against her will and without her *consent*. In contrast, the pregnant woman who has negative maternal intention terminates her pregnancy with *consent* and in accordance with her maternal *intent* (in most instances).

[54] Views on the moral personhood of the *nasciturus* in and of itself is a separate matter altogether. As previously stated in (note 35 above) the *nasciturus* cannot be construed in isolation of the pregnant woman within which it is gestating.

[55] The Choice on Termination of Pregnancy Act 92 of 1996.

Maternal intention should be positioned in South African law as the custodian of female reproductive freedom and female reproductive autonomy rights in general. Just as freedom of choice is unique to each individual person, so is maternal intention unique to each individual pregnancy. Maternal intention is integral to freedom of choice in the context of pregnancy, and its exercise is therefore to be protected and promoted on an equal footing with all entrenched constitutional rights and values. It is only once maternal intention, both negative and positive, is given the respect that it deserves, that all women in South Africa will be united in their diversity and equally protected by the law.[56]

### *6.5.2 The Significance of Consent*

Termination of pregnancy rights are premised upon on the consensual termination of a pregnancy[57] whereas proposed continuation of pregnancy rights are premised upon the non-consensual termination of a pregnancy.[58] Consent lays the foundation for a clear divide between termination and continuation rights. The legality of a consensual termination of pregnancy and the proposed illegality of a non-consensual termination of pregnancy are based entirely on consent which is a product of intent. Intent is in turn a product of the freedom to choose, which is a constitutionally protected right.[59] Consent to termination of a pregnancy is generally absent in instances where positive maternal intention is present.[60] Any actions or omissions which threaten such absence of consent should be criminalised. There may also be instances where a pregnant woman with negative maternal intention is forced to undergo a non-consensual termination.[61] The presence or absence of consent is most relevant at the point at which the termination or destruction takes place. A legal termination of pregnancy, in compliance with the Choice on Termination of Pregnancy Act,[62] takes place with consent at the moment of termination.

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[56] See the Preamble to the Constitution of the Republic of South Africa 1996: '… South Africa belongs to all who live in it, united in our diversity… [G]overnment is based on the will of the people and every citizen is equally protected by law…'

[57] The Choice on Termination of Pregnancy Act 92 of 1996.

[58] The non-consensual termination of a pregnancy can occur through negligent omission as alleged in the background information to *Van Heerden v Joubert* (note 27 above), contained in Chapter 2 – 'The Libby Gonen Story', page 10 of this dissertation, or through intentional commission as in *S v Mshumpa* (note 25 above).

[59] Refer to the South African Bill of Rights – Chapter 2 of the Constitution of the Republic of South Africa. Refer further to (note 14 above).

[60] A pertinent exclusion in this regard would be instances where a wanted pregnancy is overshadowed by a risk to the health or life of the pregnant woman.

[61] For example, if a woman discovers that she is pregnant and decides to terminate her pregnancy in three weeks' time, and is then subsequently violently attacked, prior to the arranged date of her termination, and the violent attack results in the non-consensual destruction of the *nasciturus*.

[62] The Choice on Termination of Pregnancy Act 92 of 1996.

An illegal termination of pregnancy, apart from the offences and penalties outlined in S10 of the Choice on Termination of Pregnancy Act,[63] would take place in contravention of the Choice on Continuation of Pregnancy Act and therefore without consent at the moment that the *nasciturus* is destroyed.

## 6.6 Specific & Explicit Statutory Provisions

Any legislative enactment which criminalises the non-consensual destruction of a *nasciturus* must contain clear and unambiguous exclusions.[64] The language used in the drafting of any proposed legislation must be sensitive to the needs and attitudes of all pregnant women regardless of maternal intention. The language used must be particularly sensitive to the needs of pregnant women with negative maternal intention. The right of a pregnant woman to terminate her pregnancy in terms of the provisions of the Choice on Termination of Pregnancy Act would therefore be explicitly excluded from the ambit of criminalisation. Care must be taken to observe the impact that any proposed legislation may have on the rights of all pregnant women to exercise authentic freedom of choice. The object of any proposed legislation must be to minimise potential conflicts between freedom of choice and *nascitural* safeguards and protections and to optimise the recognition of universal reproductive autonomy rights for all women in South Africa. A concerted effort must be made to lay a solid foundation of guidelines for future judicial interpretation, in order to avoid distortions of the legislative rationale and intent. Every effort must be made to dispel the fears of staunch feminists who are sceptical of attributing any kind of recognition to the *nasciturus* that may prejudice or threaten existing termination legislation.

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[63] The Choice on Termination of Pregnancy Act 92 of 1996. The offences and penalties as contained in S10 of the Choice on Termination of Pregnancy Act are not appropriate in cases of non-consensual destruction where positive maternal intention is present because the *nasciturus* is not recognised as a victim. Furthermore, S10 of the Choice on Termination of Pregnancy Act implies the consent of the pregnant woman which also does not satisfy a non-consensual situation that results in the termination of a pregnancy.

[64] In the context of the United States of America, see Chapter 26 §2608 of a Pennsylvania statute titled 'Crimes Against Unborn Child' (18 PA. CONS. STAT. ANN § 2608 (West 1998)), which deals with Nonliability and defences: '(a) Nonliability – Nothing in this chapter shall impose criminal liability: (1) For acts committed during any abortion or attempted abortion, whether lawful or unlawful, in which the pregnant woman cooperated or consented. (2) For the consensual or good faith performance of medical practice, including medical procedures, diagnostic testing or therapeutic treatment, the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilised ovum within the uterus. (3) Upon the pregnant woman in regard to crimes against her unborn child.' See further the United States National Conference of State Legislatures website for a comprehensive list of *nascitural* homicide laws in the United States of America. A detailed listing is available at: <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>. According to the website there are currently 38 states in the United States of America that have fetal homicide laws. For a discussion on a legislative framework being the preferred mode for criminalising non-consensual *nascitural* destruction in a South African context, refer to G.A. du Plessis 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *Stellenbosch LR* 73.

### *6.6.1 Preamble to a Choice on Continuation of Pregnancy Act*[65]

Recognising the values of human dignity, the achievement of equality, security of the person, freedom of choice and expression, and the advancement of human rights and freedoms which underlie a democratic South Africa; Recognising that the Constitution protects the right of all women to make decisions concerning reproduction and to security in and control over their bodies; Recognising that pregnant women have the right to interpret and express their individual pregnancies in a manner consistent with their religious beliefs, consciences, personal convictions and opinions, cultural practices, and world views; Recognising that all pregnant women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth; Recognising that the decision to continue a pregnancy is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, continuation of pregnancy, as well as sexuality education and counselling programmes and services; Recognising that the state has the responsibility to provide reproductive health to all women, and also to provide safe conditions under which reproductive freedom of choice can be exercised without fear, harm or prejudice; Believing that being denied the choice to continue a pregnancy amounts to more than a crime against the pregnant woman alone; The Choice on Continuation of Pregnancy Act promotes reproductive rights for all pregnant women and extends freedom of choice by affording every pregnant woman the right to choose how she wishes to interpret her pregnancy according to her individual beliefs.

### *6.6.2 The Exclusion of Abortion by Consent*

The provisions of a Choice on Continuation of Pregnancy Act should not apply to acts or omissions committed during an abortion performed by or under the supervision of a licenced medical practitioner to which the pregnant woman has consented.[66] The Act should further not apply to acts or omissions that are committed pursuant to usual and customary standards of medical practice during diagnostic or therapeutic treatment performed by or under the supervision of a licenced medical practitioner to which the pregnant woman has consented.[67]

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[65] This section is based in part on the preamble to the Choice on Termination of Pregnancy Act 92 of 1996.
[66] See S.L. Smith 'Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application' (2000) 41 *William and Mary LR* 1877, referring to a North Dakota (A State in the United States of America) statute (N.D. CENT. CODE §12.1-17.1-07 (1997)).
[67] Ibid.

### *6.6.3 The Exclusion of Conduct by the Pregnant Woman*

Nothing in the Choice on Continuation of Pregnancy Act should be interpreted as creating a cause of action against a pregnant woman for indirectly harming the *nasciturus* by failing to properly care for herself or by failing to follow any particular program of prenatal care or by failing to understand the potential health risks to the *nasciturus* associated with substance abuse.[68]

## 6.7 The Final Barrier to Authentic Reproductive Freedom

A carefully crafted Choice on Continuation of Pregnancy statute is the final barrier to authentic reproductive freedom in South Africa. The specific exclusions and proposed objects outlined in 6.6 above merely serve to illustrate the basic logic behind prospective continuation of pregnancy legislation and by no means purport to represent the only valid objects or exclusions that require consideration. A collaborative effort on the part of all stakeholders is a necessary precondition for any relatively successful legislative implementation. A law which truthfully asserts the factual nature of pregnant embodiment, and maternal intention, at both ends of the reproductive spectrum, being the choice to terminate or continue a pregnancy, is long overdue in South Africa. *Van Heerden*[69] and *Mshumpa*,[70] each in their own unique ways, are tragic examples of female reproductive autonomy rights and reproductive freedom of choice not being authentically portrayed. That law reform is set in motion based on the *bona fide* recognition, that in and of itself, an urgent need exists, and not because another pregnant woman is non-consensually dispossessed of her pregnancy, is the best possible outcome. To what extent this outcome is to be achieved in the foreseeable future, remains to be seen.

[68] Smith (note 66 above) referring in part to a Missouri (A State in the United States of America) statute (MO. ANN. STAT. § 1.205.4 (West Supp. 1999)).
[69] *Van Heerden* (note 27 above).
[70] *Mshumpa* (note 25 above).

# *CHAPTER 7*

# Concluding Remarks

## 7.1 The *Nasciturus* as an Entity Worthy of Safeguarding & Protection

We cannot escape the reality that everything we know and understand as a species, and everything that we live on a daily basis, is premised upon, and is the product of, the existence of human life in its most primitive form. To the extent that the *nasciturus* is not an entity worthy of safeguarding and protection in the presence of negative maternal intention, it has been demonstrated that it is an entity worthy of safeguarding and protection in the presence of positive maternal intention. For thousands of years the value attached to the *nasciturus* in one form or another has been acknowledged and accepted by varying legal regimes.[1] The realisation that the *nasciturus* is in fact an entity worthy of safeguarding and protecting in certain limited circumstances should no longer be denied or called into question.[2] Doing so undermines the intensely personal, and intimately authentic relationship, that the pregnant woman with positive maternal intention shares with the *nasciturus*, and delegitimises the narrative that the pregnant woman with positive maternal intention has constructed around her experience of pregnant embodiment.[3]

## 7.2 Reframing the Debate Concerning Live Birth

There is overwhelming evidence in favour of the contention that the requirement of live birth in law was never intended to serve as a prerequisite for legal subjectivity or human personhood.[4] The sole function of the live birth requirement in law was to prove that the *nasciturus* was alive *in utero* and that it died as a result of the injuries inflicted upon it whilst gestating. The live birth requirement in law therefore functioned as an evidentiary mechanism to prove *in uterine* life and not as a substantive rule of law which gave rise to legal personhood. The born alive rule was developed at a time when very little was known or understood about the life cycle of the gestating *nasciturus*.

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[1] Refer to Chapter 3 – 'The *Nasciturus* Doctrine', page 31, for a detailed discussion on the acknowledgement of the *nasciturus* as an entity worthy of safeguarding and protection.
[2] It has been demonstrated throughout this dissertation that the limited circumstances in which the safeguarding and protection of the *nasciturus* is relevant is primarily in the presence of positive maternal intention as discussed in detail in Chapter 5 – 'Theories of Personhood', page 72.
[3] Refer to Chapter 5 – 'Theories of Personhood', page 100 in particular.
[4] Refer to Chapter 4 – 'The Born Alive Rule', page 45, for a detailed discussion on the born alive rule in law.

The live birth requirement in law was thus developed at a time when obstetrical and paediatric medical knowledge was in its infancy. Despite the aforementioned, the context in which the born alive rule came into being has received no jurisprudential analysis, judicial reflection or legislative consideration in South Africa.

The law in South Africa recognises and acknowledges that the perpetrator who inflicts injuries upon a gestating *nasciturus* should be held accountable.[5] An action for damages only lies once the *nasciturus* has been born alive. Reframing the live birth debate would bring into question the rationality and logic of the legal recognition of injuries inflicted *in utero* and the legal non-recognition of death inflicted *in utero*. A legal landscape which is predominantly inhabited by organic conceptions of personhood would be reconceptualised to incorporate the psychosomatic dimensions of human personhood that will be instrumental in the development of a sound jurisprudential personhood narrative.

The multidimensional component parts that make up the social worlds inhabited by the *nasciturus* will ultimately contribute to the establishment of a coherent and authentic pre-birth jurisprudence. The formation of such a jurisprudential paradigm is imperative if authentic reproductive freedom is to become a reality in South Africa. A pre-birth jurisprudence that recognises not only the derivative value of the *nasciturus* but also the human dignity inherent in maternal intention will ensure the creation of a reproductive platform that values not only the choice to terminate a pregnancy, but also the choice to continue a pregnancy.

## 7.3 Positive Maternal Intention & *Nascitural* Personhood

Negative maternal intention has successfully secured a space for pregnant women to safely, effectively, and legally terminate their pregnancies, without fear of persecution, ridicule, or legal isolation.[6] Negative maternal intention has contributed positively to the interdisciplinary perspectives that are becoming increasingly important for the law to maintain its legitimacy in a constitutional democracy.[7]

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[5] *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W); *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA).

[6] The choice to terminate a pregnancy is most often underscored by negative maternal intention. It is however acknowledged that pregnancies may be terminated for reasons other than negative maternal intention, such as in instances where a termination of pregnancy has been medically advised in the absence of negative maternal intention.

[7] Refer to Chapter 5 – 'Theories of Personhood', page 100 in particular. The Choice on Termination of Pregnancy Act 92 of 1996 came into being within two years of the birth of South Africa's democracy.

Positive maternal intention, in conjunction with the notions of human and moral personhood, as encapsulated in the concept of *nascitural* personhood, has the potential to carve out a niche where pregnant women are able to safely and meaningfully continue their pregnancies with legal protection. Pregnant women with positive maternal intention should be able to see their pregnancies through without the fear that their personal interpretations of pregnant embodiment will be perceived as a threat to existing termination rights or that the intensely personal relationship that they have developed with the *nasciturus* will be ignored by the law in the event that they are non-consensually deprived of their pregnancies.

The powerful and significant value of positive maternal intention in instances of non-consensual *nascitural* destruction has yet to be realised. At present positive maternal intention remains to be judicially articulated or legislatively acknowledged in South Africa. Female reproductive rights and reproductive autonomy rights are primarily associated with termination of pregnancy and not with continuation of pregnancy. A shift in the thought processes underlying this construction of reproductive freedom is required if authentic reproductive freedom is to become a reality in South Africa.

Positive maternal intention has the capacity to unite the conflicting views held by the law and society at large which surround pre-birth personhood. Positive maternal intention can unite these conflicting views by calling for the acknowledgement by the law and of society that each and every pregnancy represents a uniquely intimate experience of pregnant embodiment where termination and continuation choices are to be respected and protected at all costs. What negative maternal intention has achieved in the context of termination rights, positive maternal intention is capable of achieving in the context of proposed continuation rights.

## 7.4 Authentic Reproductive Freedom in South Africa

Human gestation dictates that the ultimate fate of the *nasciturus* is dependent in large part upon maternal intention.[8] Reproductive freedom of choice enables the pregnant woman with negative maternal intention to give unequivocal legal effect to her freedom of choice by terminating her pregnancy in accordance with the dictates and provisions contained in the Choice on Termination of Pregnancy Act 92 of 1996.

[8] This statement is true insofar as any extenuating circumstances are eliminated. Non-consensual *nascitural* destruction determines the fate of the *nasciturus* regardless of maternal intention in its positive or negative form. Maternal intention is therefore a relevant and important consideration in a general sense only.

Authentic reproductive freedom of choice would likewise enable the pregnant woman with positive maternal intention to continue her pregnancy in accordance with the dictates and provisions contained in a proposed Choice on Continuation of Pregnancy Act. Such proposed legislation would recognise the value and necessity inherent in an authentic reproductive freedom of choice regime in a constitutional democracy. Authentic reproductive freedom acknowledges the importance of freedom of choice in all dimensions and spheres of pregnant embodiment, not only those which impact upon the decision to terminate a pregnancy. Authentic reproductive freedom acknowledges that the choice to continue a pregnancy deserves the same legal recognition as the choice to terminate a pregnancy.

The achievement of authentic reproductive freedom is possible in the judicial arena as well as in the legislative domain. Judicial responses to the pre-birth personhood debate have however been disappointing, and adherence to archaic common law principles remains steadfast.[9] Legislative intervention has been identified as the most suitable mechanism to create a comprehensive and coherent legal framework that would lay the foundation for authentic reproductive freedom in South Africa.[10] Both the *Van Heerden*[11] and *Mshumpa*[12] courts have expressed their displeasure at having to engage in the personhood debate. The *Mshumpa*[13] court in particular, pronounced that it is the legislature which is best equipped and most suitable to bring forth law reform in pre-birth jurisprudence.[14]

Legislative intervention is therefore imperative for the development and advancement of a sound pre-birth jurisprudence in South Africa. The achievement of such an intervention would however be greatly advanced by positive judicial direction. The attainment of the necessary judicial direction is however wholly dependent upon the launch of challenges to pre-birth jurisprudence in our courts, and these challenges will unfortunately only arise when cases of non-consensual *nascitural* destruction occur.

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[9] Refer to Chapter 5 – 'Theories of Personhood'. In particular see 5.5 on page 93, as well as 5.5.1--5.5.3 on pages 94--100.
[10] Refer to Chapter 6 – 'The Choice on Continuation of Pregnancy', page 102.
[11] *Van Heerden v Joubert* 1994 (4) SA 793 (A).
[12] *S v Mshumpa* 2008 (1) SACR 126 (E).
[13] Ibid.
[14] In *Mshumpa* (note 12 above) 65, Froneman J stated the following: 'I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the legislature is, as the major engine for law reform, better suited to effect that radical kind of reform than the courts.' In *Van Heerden* (note 11 above) 798 G--I, the court stated that the Inquests Act 58 of 1959 makes no provision for an inquest into the death of a stillborn child and it is not for the court to extend the application of the Inquests Act beyond the ordinary meaning of the word 'person'. The *Van Heerden* court thereby indirectly deferred law reform to the legislature who is presently the only other viable alternative for law reform besides the South African Law Reform Commission.

## 7.5 The Continuing Phenomenon of Non-Consensual *Nascitural* Destruction

'Mom's Childbirth Ordeal – Baby dies in Hospital with Head Stuck in Birth Canal.'[15] The aforementioned could very well have been the headline in the Star Newspaper on Tuesday the 5th of April 1988, three days after Libby's stillbirth, but it was not. This headline appeared in the Sowetan Newspaper on Monday the 24th of February 2014, almost twenty six years after Libby's tragic death. Stillbirths due to alleged doctor negligence remain a stark reality in South Africa. The maternal victim in the article referred to 'is seeking legal advice'[16] based on the alleged negligent stillbirth of her daughter. Should she decide to pursue a criminal route, as Libby's parents did, *Van Heerden v Joubert*[17] will no doubt be proffered as sound legal precedent for the proposition that no criminal liability lies in the absence of a live birth. Next time the violent attack of a pregnant woman, which results in a stillbirth, makes the newspaper headlines, *S v Mshumpa*[18] will no doubt be proposed as the preferred legal precedent. The perpetuation of these erroneous jurisprudential value judgments and legal logic is what this dissertation has aimed to bring into question.

The debate surrounding pre-birth personhood is an important one because it impacts on the lives of many thousands of women in South Africa on a daily basis.[19] Pregnant women with positive maternal intention should be able to enjoy their pregnancies safe in the knowledge that should unforeseen circumstances arise which non-consensually deprive them of their pregnancies, they have the backing of a legal system that has their best interests at heart. Access to a legal system that acknowledges the relevance, importance, and significance of pre-birth personhood in the presence of positive maternal intention is an important step toward the creation of a jurisprudence that promotes authentic female reproductive autonomy in South Africa.

[15] Mom's childbirth ordeal – Baby dies in hospital with head stuck in birth canal – Living Baby Declared Dead. *Sowetan* (24 February 2014).
[16] Ibid.
[17] *Van Heerden* (note 11 above).
[18] *Mshumpa* (note 12 above).
[19] According to the United Nations Children's Fund, formerly the United Nations International Children's Emergency Fund (UNICEF), there are 1.1 million babies born in South Africa every year. See <http://www.unicef.org/southafrica/reallives_4264.html>.

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