

**Stolen Sperm:  
Should the Law Absolve an Involuntary Father  
from the Duty to Furnish Child Maintenance?**

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## DECLARATION

This dissertation is presented for the approval of Senate in fulfilment of the requirements for the degree of Master of Laws (by dissertation).

I hereby declare that I have read and understood the regulations governing the submission of the Master of Laws (LL.M) dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## **METHODOLOGY**

This dissertation is entirely theoretical. It was researched and written using published materials.

The primary sources which were used include statutes, Regulations, foreign case law, South African case law, International treaties and foreign legislation. The secondary sources which were used predominantly consist of books and journal articles.

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## CHAPTER ONE

### INTRODUCTION

*It is impossible to afford a lawsuit for every deed of unkindness or betrayal and there is much evil in this world which must necessarily be left to other agencies of social control.*<sup>1</sup>

The terrain of family law is increasingly complex and diverse and is constantly adapting to the changing social, cultural, political and economic landscape in which it is located.<sup>2</sup> It is thus open to much development, particularly in the area of parenthood. In its simplest form, parenthood results when two consenting adults, knowingly and willingly, engage in sexual intercourse to conceive a child. The allocation of parental rights and responsibilities is therefore simplified on the basis that both parties consented to becoming parents. However, the assignment of legal parenthood is not always as clear-cut. Over the past three decades, the courts in the United States, in particular, have been tasked with adjudicating cases in which a biological father has refused to furnish child maintenance on the grounds that he was sexually forced into parenthood.<sup>3</sup> These claims have highlighted the tension between biological fatherhood and legal parenthood, and have thus created a legal, ethical and practical quagmire in family law. Therefore this dissertation will explore the instances in which paternity is deceitfully imposed, the plethora of legal problems that arise and the possible legal routes open to involuntary fathers to avoid paying child support.

#### **Categorising deceitful paternity**

The term 'stolen sperm' may be used to encompass a multitude of scenarios in which a woman takes positive steps to conceive a child with a particular man. For the purposes of this dissertation, the act of 'stealing sperm' may fall into, and overlap

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<sup>1</sup> WP Keeton & WL Prosser *Prosser and Keaton on Torts* 5ed (1984) at 4.

<sup>2</sup> N Lowe *The Continuing Evolution of Family Law* (2009) at 3.

<sup>3</sup> D Hubin 'Fractured Fatherhood: An Analytic Philosophy Perspective on Moral and Legal Paternity' (2014) 6 *Journal of Family Theory & Review* 76 at 76-7.

with, one of three categories, namely sexual assault, the non-consensual use of sperm and natural conception through deceit.

### *Sexual assault*

Conceiving a child through sexual assault occurs where a woman has sexual intercourse with a man, performs oral sex or stimulates his genitals without the latter's consent.<sup>4</sup> Here, sexual assault primarily occurs where the man is drugged or heavily intoxicated. This category also encompasses sex with a minor and a mentally-handicapped man. Importantly, these scenarios are characterised by a complete absence of consent to any form of sexual activity in that the male is not in his full and sober senses or lacks the capacity to provide consent.

### *Non-consensual use of sperm*

The non-consensual use of sperm refers to the instance where sperm is obtained through a consensual sexual act, not including vaginal intercourse, and is later self-inseminated by the woman to conceive a child. Alternatively, the sperm may be saved for use in an artificial fertilisation procedure. In this scenario, the sperm is commonly obtained via consensual oral sex or manual stimulation and kept for subsequent use without the knowledge of her sexual partner.

### *Natural conception through deceit*

Natural conception through deceit occurs where a child is conceived through consensual sexual intercourse.<sup>5</sup> The deceitful act, in this case, takes the form of an assertion by the woman that she was using birth control or was infertile at the time that the couple engaged in intercourse. Alternatively, she may have created holes in the condom if contraception was used during sex.

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<sup>4</sup> It is submitted that if a woman has sex with a man without his consent, she rapes him as per section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007. However, all instances of non-consensual sexual conduct fall under the category of "sexual assault" for the purposes of this dissertation.

<sup>5</sup> In this regard, sexual intercourse refers to vaginal intercourse that is the penetration of the vagina by the penis.

### **Statement of the dissertation**

This dissertation will argue that the conception of a child through deceitful means is a contemporary problem which generates severe implications for all involved parties, especially the unwilling father and his biological child. A South African court has yet to adjudicate a matter in which a man claims to have been sexually foisted into fatherhood. Nevertheless it is only a matter of time before a court is asked to consider the legal ramifications of involuntary paternity. It is for this reason that the legal consequences of non-consensual fatherhood must be explored within the South African context.

The existing legal framework, however, is insufficient to provide an equitable outcome in cases of this nature. In South Africa, the notion of stolen sperm and the legal consequences thereof is very much uncharted territory. Accordingly, the law will not provide considerable guidance to judges faced with balancing the interests of an innocent child against the rights of an involuntary father. For this reason, a selection of cases from the United States prove instructive in showcasing how courts in a foreign jurisdiction have balanced the right of a man to avoid fatherhood and the interest a child has in receiving maintenance. The approach adopted by the American courts has generated much criticism because it places the best interests of the child before other considerations. Therefore this dissertation will examine whether a man who is sexually foisted into parenthood still owes a legal duty to support his offspring under South African law.

### **Focus of the dissertation**

It is imperative to point out that this dissertation specifically focuses on men who have been sexually forced into parenthood through sexual assault, the non-consensual use of their sperm or natural conception through deceit. This dissertation, however, does not deny that the reality in contemporary South Africa is that the overwhelming majority of rape victims are women. It is estimated that tens of thousands of women are raped in South Africa every year and many of those rapes result in unwanted pregnancy. In fact, a woman who bears a child as a result of being raped retains the civil obligation to support her offspring if she elects to keep the

child. However, a woman who is forced into the obligations of parenthood through no fault of her own has the legal right to unilaterally terminate the pregnancy or place the child up for adoption. Indeed these options are available whether she engaged in consensual sex that resulted in pregnancy or was sexually forced to submit to a sexual act in which a child was conceived. Conversely, a man in this position does not have the legal right to order the woman carrying his child to terminate the unwanted pregnancy or to proceed with an adoption post-birth. For this reason, it is worth exploring the legal options open to men who are sexually foisted into fatherhood.

### **Structure of the dissertation**

This dissertation will commence with an outline of the law as it relates to child maintenance and the determination of paternity. This outline is necessary to illustrate the way in which the law assigns legal parenthood that is on the basis of biology. It further highlights how the law has not contemplated the possibility of non-consensual paternity and therefore offers no protection to men who have been tricked into becoming fathers. This will be followed by an analysis of the best interests of the child principle which receives recognition under section 28(2) of the Constitution.<sup>6</sup> It is in a child's best interests to receive financial support from both biological parents. As such, a discussion of the significance of the principle will be accompanied by an examination of how American courts have strictly applied the principle. The shortcomings of the strict liability approach will be critically evaluated demonstrating the extent to which the bodily integrity, victimisation and reproductive rights of unwilling fathers have effectively been ignored by American courts.

This is followed by a discussion of the law as it relates to artificial fertilisation which provides biological fathers with the only legal defence against paternity claims under both American and South African law. The purpose of this discussion is to illustrate the unfairness of absolving sperm donors from child support liability where men who have not consented to paternity are ordered to pay maintenance.

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<sup>6</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

This is preceded by a debate as to whether legal parenthood may be severed from genetic parenthood. It will be argued that a biological relationship between a man and his offspring should be seen as constituting a parcel of normative and empirical aspects which may be factually separated depending upon whether the father consented to the act which led to the child's conception. A distinction will be drawn between the various categories in which paternity is deviously imposed and separate conclusions will be specified as to whether an involuntary father may be absolved from child support liability in each case. In addition, this dissertation will propose both legislative reform and offer a suggested guideline for courts in the event that an involuntary father contests a maintenance claim under South African law.

This dissertation will further ruminate the possibility of instituting a separate claim in delict against the child's mother to counterbalance a maintenance claim. In this regard, the dissertation will examine whether, and in which instances, the conduct of the child's mother is wrongful under the law of delict. To this end, the likelihood of extending Aquilian liability to cover fathers who were robbed of their reproductive autonomy will depend upon whether considerations of public policy favour an extension.

Finally, this dissertation will consider whether the law should recognise a person's property interest in his or her bodily products. To this end, it is proposed that the advances in medical technology and the increasing commercialisation of bodily materials necessitate a re-examination of the principles underlying property law. This dissertation will therefore examine whether the unwelcome legal consequences of involuntary fatherhood could possibly be avoided if the law recognised property rights in one's reproductive material.

## CHAPTER TWO

### THE ASSIGNMENT OF LEGAL PARENTHOOD

*'The paternal duty of support seems to be founded on the blood relationship.'*<sup>7</sup>

#### **The South African framework on the law of maintenance**

It is said that the duty to maintain one's child flows from 'a sense of natural justice, the affection of blood and parental dutifulness'.<sup>8</sup> Indeed the obligation to financially maintain one's child is firmly entrenched in both Roman and Roman-Dutch law.<sup>9</sup> The law imposes the responsibilities of parenthood on persons who engage in sexual intercourse and bear children as a consequence of their conduct. It would be deleterious and farcical if persons were permitted to create life yet avoid the legal duty to care and provide for their offspring. Accordingly, it is the parents of a child and not the State who must shoulder the social, psychological and financial burdens of parenthood.

#### *The common law duty of support*

The parental obligation to furnish child maintenance is governed by the common law. In terms of the common law, a person will have a legal duty to support another provided that three conditions have been met.<sup>10</sup> First, the person attempting to claim support must be unable to support himself.<sup>11</sup> Second, the individual from whom support is claimed must have the requisite means to support the claimant.<sup>12</sup> Third, there must be an existing legal relationship between the claimant and the person from whom he is claiming support.<sup>13</sup> The requirements as to need and existing means are both questions of fact which must be determined by a court of

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<sup>7</sup> PQR Boberg *Boberg's Law of Persons and Family* 2ed (1999) at 240.

<sup>8</sup> *Ford v Allen* 1925 TPD 5 at 7.

<sup>9</sup> Boberg *Boberg's Law of Persons* at 240.

<sup>10</sup> At 233.

<sup>11</sup> *Ibid.*

<sup>12</sup> At 234.

<sup>13</sup> *Ibid.*

law.<sup>14</sup> The final requirement considers whether the relationship between the parties is such as to establish a legal duty of support.<sup>15</sup>

Under the common law, the relationship between a parent and child generates an automatic duty of support.<sup>16</sup> The duty of support is reciprocal in nature and is based on a blood relationship. However, it is not discharged as a result of a tight-knit bond or familial affection. The duty arises *ex lege* that is by operation of the law and falls jointly on both parents who are expected to contribute *pro rata* as determined by their respective means and living standards.<sup>17</sup> Accordingly, the obligation to financially maintain one's offspring will persist until such time as the child becomes self-supporting.<sup>18</sup>

#### *Statutory regulation*

The duty to furnish child maintenance forms part of a bundle of parental rights and responsibilities. These rights and responsibilities are based on the common law duties of support and are statutorily regulated under the Children's Act 38 of 2005. The Act outlines the statutory rights of children and provides a non-exhaustive list of the rights and obligations of parents. Section 18(2) stipulates that a parent has four elementary rights and responsibilities, namely to care for his child,<sup>19</sup> to maintain contact with his child,<sup>20</sup> to act as the child's guardian<sup>21</sup> and to contribute to the maintenance of his child.<sup>22</sup> The definition of 'care' under the Act provides that

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> At 240.

The law attaches an automatic duty of support to three other kinds of relationships namely, married persons, siblings, and grandparents and their grandchildren. See *Boberg's Law of Persons* at 234.

<sup>17</sup> J Heaton *South African Family Law* 3ed (2010) at 322.

<sup>18</sup> At 327. Heaton notes that, as a general rule, parental rights and responsibilities end when the child reaches majority. According to section 17 of the Children's Act, the age of majority is 18. Under the common law, a financially dependent adult child is entitled to support from his parents as confirmed by the Supreme Court of Appeal in *Burse v Bursey* 1999 (3) SA 33 (SCA). Since the Children's Act does not abolish this common law rule, dependent adult children may claim maintenance from their parents.

<sup>19</sup> Children's Act, section 18(2)(a).

<sup>20</sup> Section 18(2)(b).

<sup>21</sup> Section 18(2)(c).

<sup>22</sup> Section 18(2)(d).

these duties include the provision of financial support,<sup>23</sup> suitable housing<sup>24</sup> and living conditions which are favourable to the child's development, health and well-being.<sup>25</sup>

The obligation to maintain one's child is further regulated under the Maintenance Act 99 of 1998. Section 15(1) of the Act provides that a maintenance order is directed at enforcing the common law duty of support which falls on the child's parents and is present at the time the order is granted. The Act elucidates that the ambit of child maintenance encompasses the provision of necessities such as food, clothing, shelter, education and medical care and covers anything the child may reasonably require to ensure his or her proper upbringing.<sup>26</sup> In addition, section 15(3) confirms that the obligation to financially maintain one's child is jointly vested in both parents<sup>27</sup> regardless of whether the child was born in or out of wedlock.<sup>28</sup>

#### *Children and the Constitution*

A child's right to receive financial support is not directly mentioned in the Constitution. However, section 28(1) of the Constitution protects the right of a child to receive parental or familial care, basic nutrition, accommodation and access to rudimentary health care. The significance of protecting the rights of children is exemplified under section 28(2) which provides that in any matter involving the child, his or her best interests are of paramount importance. As such, the constitutional provisions, which have been given legislative effect under section 18 of the Children's Act and section 15 of the Maintenance Act, inform the interpretation of the common law rules illustrating that a child's right to be properly cared for chiefly rests with his or her parents.<sup>29</sup>

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<sup>23</sup> Section 1(1)(a)(iii).

<sup>24</sup> Section 1(1)(a)(i).

<sup>25</sup> Section 1(1)(a)(ii).

<sup>26</sup> Maintenance Act, section 15(2).

<sup>27</sup> Section 15(3)(a)(i).

<sup>28</sup> Section 15(3)(a)(iii).

<sup>29</sup> *Bamatyane v Bannatyne and Another* 2003 (2) SA 363 (CC) at para 24; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at paras 76-7.

It is worth mentioning that millions of South African children qualify for state assistance through the child support grant which is regulated under the Social Assistance Act 13 of 2004.

### *Securing child maintenance*

Child maintenance generally involves the continuing obligation to furnish payments to sustain a child.<sup>30</sup> However, many single parents, mostly women, struggle to secure maintenance payments<sup>31</sup> from their previous partners. In fact, it is estimated that only one third of South African children live with both parents.<sup>32</sup> The useful machinery that is the Maintenance Act aptly facilitates the procurement of maintenance payments. Under the Act, every Magistrate Court is also a maintenance court<sup>33</sup> which provides a quick and cost-effective route for mothers (or fathers) who seek to have a maintenance order granted or an existing order enforced. Section 2(1) specifically states that the Act will be of application where there is a legal duty of any person to maintain another. To this end, a mother can only claim child support if the person from whom maintenance is sought owes a legal duty to support the child in question.

### **The South African framework of legal paternity**

Paternity law is concerned with proving a legal relationship between a biological father and his child. Legal rights and obligations, including the duty to furnish child maintenance, flow from the parent-child relationship as a result of positively establishing parentage.<sup>34</sup> In this light, the law automatically imposes liability on those men (and women) who naturally conceive children through sexual intercourse. The changing face of family structures and reproductive decision-making seen in an increase in the number of unmarried parents and the high incidence of single-parent households has inevitably contributed to a rise in paternity

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<sup>30</sup> Where the child's parents live together, the child is simply supported as part of the household. If the parents live separately, the non-resident parent may pay the child's school fees and or contribute to the running of the household.

<sup>31</sup> It must be emphasised that the focus of this discussion is child maintenance. Nevertheless, the Maintenance Act gives legislative effect to the common law duty of support. Thus anyone may institute a claim for maintenance against another person provided that there is a legal relationship between the parties, the claimant needs financial support and the other party has the requisite means to provide support.

<sup>32</sup> 'Only 33% of SA kids live with both parents' *News24* 11 March 2013, available at <http://www.news24.com/SouthAfrica/News/Only-33-of-SA-kids-live-with-both-parents-20130311>, accessed on 2 December 2014.

<sup>33</sup> Maintenance Act, section 3.

<sup>34</sup> Boberg *Boberg's Law of Persons* at 353.

disputes.<sup>35</sup> Correctly establishing a child's paternity is necessary for the assignment of parental rights and obligations, and is of vital importance to the psychological, emotional and social well-being of all involved parties, particularly the child and his or her biological father.<sup>36</sup> The law relating to the determination of paternity is statutorily regulated by the Children's Act and aided by the common law.

#### *Acknowledging paternity*

The simplest way for a man to confirm that he is a particular child's legal father is by registering the birth of that child. Under section 9(1) of the Births and Deaths Registration Act 51 of 1992, either parent must furnish notice of the birth of his or her child, in the prescribed manner, to the Director-General within thirty days of the child's birth. The Regulations on the Registration of Births and Deaths<sup>37</sup> provide content as to the specific procedural requirements for registering a child's birth. Where the circumstances permit, a notice of birth must be provided by both parents<sup>38</sup> and accompanied by proof of birth confirmed by a medical practitioner who was present during birth<sup>39</sup> or examined the mother or child after the birth,<sup>40</sup> the foot or fingerprints of the child,<sup>41</sup> the parents' fingerprints,<sup>42</sup> certified copies of the parents' identity documents<sup>43</sup> and, if applicable, a certified marriage certificate.<sup>44</sup>

Where a child is born to unmarried parents, additional procedural requirements apply. In this case, the man who acknowledges that he is the child's father must affix his particulars and signature to the same form that the mother completes when registering the birth of their child.<sup>45</sup> The father must attach an affidavit in which he states his relationship with the child's mother<sup>46</sup> and acknowledges paternity.<sup>47</sup> He is further required to have his fingerprints confirmed

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<sup>35</sup> P Naidoo "The experiences of divorced mothers as single-parents" (1998) 23 *Psychology in society* 17 at 17.

<sup>36</sup> D Hubin "Daddy Dilemmas: Untangling the Puzzles of Paternity" (2003) 13 *The Cornell Journal of Law and Public Policy* 29 at 31.

<sup>37</sup> GN 128 of GG 37373 of 26 February 2014.

<sup>38</sup> Reg 3(3).

<sup>39</sup> Reg 3(3)(a)(i).

<sup>40</sup> Reg 3(3)(a)(ii).

<sup>41</sup> Reg 3(3)(c).

<sup>42</sup> Reg 3(3)(d).

<sup>43</sup> Reg 3(3)(e).

<sup>44</sup> Reg 3(3)(h).

<sup>45</sup> Reg 12(2)(a).

<sup>46</sup> Reg 12(2)(b)(i).

<sup>47</sup> Reg 12(2)(b)(ii).

online against the national population register.<sup>48</sup> The child's birth will be registered under the mother's surname unless both parties jointly request that the father's surname appear on the child's birth certificate.<sup>49</sup>

The Director-General is vested with the power to accept or reject a notice of birth. He may refuse to register the child's birth where he is satisfied that the notice does not comply with the Act,<sup>50</sup> the information contained in the notice is inaccurate or non-verifiable,<sup>51</sup> or where the notice constitutes fraud or misrepresentation.<sup>52</sup> The acknowledgment of paternity is thus legally effective upon the successful registration of the child's birth.

There may, however, be doubt as to the paternity of the child. In that event, it will be necessary to first establish a child's paternity before parental rights and duties can be assigned to a particular man.

#### *The presumptions of paternity*

In cases where the paternity of the child is in dispute, two presumptions of paternity have been formulated to assist the parties. The application of each presumption is dependent upon whether or not the child's mother was married at the time the child was conceived, at the time of the child's birth or during the period between conception and birth.<sup>53</sup>

#### *Married mothers*

Under the common law, the maxim *pater est quem nuptiae demonstrant*<sup>54</sup> provides that where a woman is legally married between the conception and birth of the child, her husband,<sup>55</sup> and not a third party, is presumed to be the father of that child.<sup>56</sup> The presumption applies equally to children who were conceived prior to marriage but born during its existence, and children who were conceived during the

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<sup>48</sup> Reg 12(2)(c).

<sup>49</sup> Births and Deaths Registration Act, section 10(1)(b).

<sup>50</sup> Regulations on the Registration of Births and Deaths, reg 2(3)(a).

<sup>51</sup> Reg 2(3)(b).

<sup>52</sup> Reg 2(3)(c).

<sup>53</sup> J Heaton *The South African Law of Persons* 4ed (2012) at 54.

<sup>54</sup> The Latin maxim literally means "marriage denotes paternity."

<sup>55</sup> The presumption similarly applies where a woman is a party to a valid heterosexual union sometime between the child's conception and birth. See section 13 of the Civil Union Act 17 of 2006.

<sup>56</sup> *Van Lutterveld v Engels* 1959 2 All SA 47 (A) at 50; *D v L* 1990 (1) SA 894 (W) at 898.

course of a marriage but born after the dissolution of that marriage.<sup>57</sup> This presumption may be rebutted by the mother, presumed father or any other interested party.<sup>58</sup> For example, the child's father may rebut the presumption by proving, on a balance of probabilities, that he did not engage in sexual intercourse with the child's mother at the time of conception.<sup>59</sup> Our courts, however, have adopted a conservative stance by expressing a reluctance to declare a child to be born out of wedlock where it would not be in the child's best interests to do so.<sup>60</sup>

Section 20 of the Children's Act confers full parental rights and responsibilities on a biological father where he is married to the mother of the child at the time the child was conceived or born, or at any time during the period between conception and birth. The use of the word 'biological' in section 20 further suggests that a man who is married to the child's mother is presumed to be the child's genetic father. Indeed, most marital children are the genetic offspring of the men who were married to their mothers at the time of conception. The marital presumption of paternity is therefore not directly mentioned in the Act. Nevertheless, section 20 may be interpreted as codifying the common law principle that a man obtains parental rights and obligations where he is married to the child's mother at any time between, and including, the conception and birth of that child.<sup>61</sup>

#### *Unmarried mothers*

There is no automatic presumption to aid an unmarried mother who alleges a particular man fathered her child. It is possible that the man whom an unmarried woman identifies as the father of her child may contest paternity. He may not believe that the child is his or may not want a relationship with his offspring. Therefore the child's mother bears the onus of producing admissible evidence to corroborate her claim.<sup>62</sup>

Section 36 of the Children's Act statutorily regulates the proof of paternity of a child born out of wedlock. The provision stipulates that in any legal proceedings

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<sup>57</sup> Heaton *Law of Persons* at 55.

<sup>58</sup> *Ibid.*

<sup>59</sup> Section 3 of the Civil Proceedings Evidence Act 25 of 1965.

<sup>60</sup> Heaton *Law of Persons* at 55. See *B v E* 1992 (3) SA 438 (T).

<sup>61</sup> J Heaton 'Parental responsibilities and rights' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2013) Sixth Revision Service at 10.

<sup>62</sup> F Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) at 217.

involving the establishment of paternity, a presumption of paternity will arise if it can be proven, on a balance of probabilities, that the man alleged to be the child's biological father engaged in sexual intercourse with the child's mother during the period in which the child could have been conceived. Section 36 further postulates that the presumption operates in the absence of evidence to the contrary which raises a reasonable doubt which suggests that the man reputed to be the child's father can rebut the presumption by adducing evidence which places his paternity in doubt.<sup>63</sup> In this regard, the use of the word 'evidence' indicates that the presumed father only has an evidentiary burden, and not a full legal burden of proof, to rebut the presumption.<sup>64</sup> The Children's Act neglects to define 'evidence' therefore any appropriate evidence, be it direct or circumstantial, may be presented to raise reasonable doubt as to paternity.<sup>65</sup>

Despite the mere evidentiary burden, the statutory presumption generated by section 36 may be unconstitutional. According to section 1 of the Children's Status Act 82 of 1987, which was repealed by the Children's Act, the presumption of paternity operates in the absence of evidence to the contrary. Section 36 of the Children's Act, by contrast, includes the phrase 'which raises reasonable doubt'. In civil matters, the burden of rebuttal is usually on a balance of probabilities.<sup>66</sup> Section 36 thus departs from the general rule as the requirement that the adduced evidence must raise 'reasonable doubt' places a higher burden of rebuttal on the presumed father.<sup>67</sup> The provision therefore generates an incongruity between married and unmarried men as the former are simply required to rebut the marital presumption of paternity on a balance of probabilities.<sup>68</sup> In this light, section 36 possibly discriminates against unmarried men on the grounds of marital status as encapsulated under section 9(3) of the Constitution.<sup>69</sup>

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<sup>63</sup> PJ Schwikkard & SE van der Merwe *Principles of Evidence* 3ed (2009) at 505-6.

<sup>64</sup> *Ibid.*

<sup>65</sup> Heaton *Commentary* at 45.

<sup>66</sup> At 44.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

The marital presumption being the *pater est quem nuptiae demonstrant* as discussed in the preceding paragraphs.

<sup>69</sup> *Ibid.*

## Evidence

There has been much disagreement as to what evidence may be discharged to counteract the presumption of paternity. What follows is a brief examination of the different forms of evidence which may be adduced by the man presumed to be the child's father in rebuttal.

### *The exceptio plurium concubentium*

The South African Law Commission has suggested that the evidentiary burden may be satisfied if the presumed father can prove that the mother engaged in sexual intercourse with other men during the period in which the child could have been conceived.<sup>70</sup> Predictably, doubt has been raised as to whether this defence, known as the *exceptio plurium concubentium*,<sup>71</sup> is by itself sufficient to discharge the burden of rebuttal.<sup>72</sup> When it is proved that other men had sex with the child's mother, the defence simply grounds the possibility of non-paternity as opposed to generating reasonable doubt as to paternity.<sup>73</sup> Similarly, the defence of *coitus interruptus*<sup>74</sup> has been rejected in case law as a preventative that is so peculiarly infallible it cannot be relied upon in legal proceedings.<sup>75</sup>

### *Absence of sexual intercourse*

The man presumed to be the father of the child can rebut the presumption of paternity by adducing evidence that he did not have sexual intercourse with the child's mother during the time in which the child was likely to have been conceived.<sup>76</sup> He may prove this by presenting medical evidence that shows he was

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<sup>70</sup> South African Law Commission Report on the *Investigation into the Legal Position of Illegitimate Children* Project 38 (1985).

<sup>71</sup> The defence against a mother who has had multiple sexual relations during the probable period of conception.

<sup>72</sup> Du Bois Wille's *Principles* at 218. The *exceptio* has been rejected as a valid defence on the grounds that it is unnecessary to revert to an ancient exception where modern procedure (scientific testing) traverses the same ground. See *MacDonald v Stander* 1935 AD 325 at 328-9; *A v C* 1986 (4) SA 227 (C) at 229. In addition, the exception may be discriminatory in that it unjustly categorises unmarried women as promiscuous and unreliable. It is also unlikely to pass judicial scrutiny given that the introduction of a complainant's prior sexual history in criminal proceedings is subject to strict limitations under section 227 of the Criminal Procedure Act 51 of 1977.

<sup>73</sup> Boberg *Boberg's Law of Persons* at 358-9.

<sup>74</sup> The practice of coital withdrawal.

<sup>75</sup> *S v Jeggels* 1962 (3) SA 704 (C) at 706.

<sup>76</sup> Heaton *Law of Persons* at 57.

impotent during the duration of his relationship with the mother.<sup>77</sup> Alternatively, he may produce documentary evidence which proves he was overseas or in another city or town during the time in which the child was conceived.<sup>78</sup> Some authors hold the view that because sexual intercourse has already been proven, a reliance on evidence which shows an absence of sexual intercourse or impotence is not applicable.<sup>79</sup> The problem with this view is that the child's mother only needs to show that sexual intercourse around the time of conception was more likely than not. Accordingly, the presumption should remain open to rebuttal.

#### *Use of contraceptives*

The use of contraceptives as evidence against paternity has largely been dismissed in case law.<sup>80</sup> The regular or once-off use of contraceptive devices carries minimal weight in rebutting the presumption of paternity, especially if it is the only evidence relied upon.<sup>81</sup> Proof of the use of condoms or birth control is difficult to ascertain and the effectiveness of contraceptive mechanisms is not guaranteed.<sup>82</sup>

#### *Physical features of the child*

On its own, a child's physical features carry little, if any, weight irrespective of whether he or she closely resembles the alleged father.<sup>83</sup> After all, a child may resemble a number of genetic ascendants.<sup>84</sup> However, the child's physical attributes may possibly be taken into account in combination with other factors to confirm or disprove paternity.<sup>85</sup>

#### *Blood tests*

In the past, standard blood tests were rarely used in paternity disputes as they were regarded as unreliable and inaccurate.<sup>86</sup> A blood test could not identify who the

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<sup>77</sup> *S v Swart* 1965 (3) SA 454 (A) at 460. The presumed father of the child may also adduce evidence that proves he was sterile at the time of the child's conception. See *Mahomed v Shaik* 1978 (4) SA 523 (N) at 526.

<sup>78</sup> Boberg *Boberg's Law of Persons* at 357.

<sup>79</sup> CJ Davel & RA Jordaan *Law of Persons* (2005) at 123.

<sup>80</sup> *MacDonald v Stander* supra at 334; *R v Swanepoel* 1954 (4) SA 31 (O) at 41.

<sup>81</sup> *R v Van der Merwe* 1952 (1) SA 647 (O) at 653.

<sup>82</sup> *Ibid.*

<sup>83</sup> *M v R* 1989 (1) SA 416 (O) at 419; *Seetal v Pravitha* 1983(3) SA 827 (D) at 828.

<sup>84</sup> E Bonthuys 'What You Don't Know Can't Hurt You: The Supreme Court of Appeal and the Presumptions of Paternity' (2011) 3 *SALJ* 427 at 429-30.

<sup>85</sup> *A v C* supra at 237.

<sup>86</sup> Heaton *Law of Persons* at 59.

genetic father was and instead assisted in simply *disproving* paternity.<sup>87</sup> Therefore, a test which revealed that the alleged father shared the same blood group as the child did not necessarily prove that he was the biological father.<sup>88</sup> However, advances in medical and scientific technology have altered this. The advent of DNA testing has become instrumental in proving paternity. Every person's genetic blueprint is inherited from his or her parents and is stored in the chemical deoxyribonucleic acid, or DNA for short.<sup>89</sup> It is located in every cell of the human body and does not alter during the course of a person's lifetime.<sup>90</sup> The primary sources of DNA include blood, semen, teeth, bones and saliva.<sup>91</sup> For this reason, DNA testing is an invaluable technique in determining paternity as it relies on genetic typing and not simply blood grouping.<sup>92</sup> Accordingly, the statistical reliability of a paternity test may be as high as 99.9%.<sup>93</sup>

Therefore, the paternity of a child may be conclusively ascertained through scientific testing. Indeed the circumstantial nature of evidence relating to an absence of sexual intercourse or the use of contraception means that the use of scientific tests is the preferred option to convincingly establish or negate paternity.<sup>94</sup> Even if the man presumed to be the child's father manages to rebut the presumption, a DNA test would conclusively resolve the dispute.

### **Power of the courts to order scientific testing**

It is clear that the reliability of using scientific tests to establish paternity is no longer in dispute. Instead, the question is whether the courts have the power to order an adult or minor child to submit to blood tests for the purpose of determining paternity. In paternity disputes, the courts have had to balance their responsibility to ascertain the truth by employing scientific methods with the right of individuals to not be subjected to medical tests that may infringe their rights to privacy and bodily

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<sup>87</sup> A Diduck & K O'Donovan (eds) *Feminist Perspectives on Family Law* (2006) at 62.

<sup>88</sup> *Ibid.*

<sup>89</sup> Hubin *–Daddy Dilemmas* at 30.

<sup>90</sup> JM Butler *Forensic DNA Typing: Biology, Technology, and Genetics of STR Marking* (2005) at 17.

<sup>91</sup> At 34. But these sources of biological evidence are continually expanding.

<sup>92</sup> At 531-2.

<sup>93</sup> *M v R* 1989 (1) SA 416 (O).

<sup>94</sup> *S v L* 1992 (3) SA 713 (E) at 726.

integrity.<sup>95</sup> Section 37 of the Children's Act envisions the use of blood tests in paternity proceedings by detailing the pejorative impact of refusing to submit blood samples for testing.<sup>96</sup> It does not oblige a court to order the taking of blood samples nor does it restrict a court from doing so.<sup>97</sup> The section simply enacts a presumption which aids the party who wishes to have blood tests conducted.<sup>98</sup> It provides that where a person involved in any legal proceedings in which the paternity of a child is in doubt refuses to submit himself or the child to blood tests to determine the child's paternity, the court must inform him of the effect his refusal will have on his credibility.

### *Conflicting decisions of the courts*

The courts have reached conflicting decisions as to whether a person or their child may be ordered to undergo blood tests to establish parentage. In *Nell v Nell*,<sup>99</sup> the court intimated that ordering an unwilling person to submit to blood tests goes beyond the principles of procedure.<sup>100</sup> The court therefore declined to grant the order as it would implicate principles of substantive law because the extracting of blood constitutes a violation of bodily integrity.<sup>101</sup> In *S v L*,<sup>102</sup> the High Court also refused to order blood tests on the basis that it does not have the power to compel a parent to submit his or her child to blood tests irrespective of the court's views.<sup>103</sup> However, the Durban High Court in *Seetal v Pravitha*,<sup>104</sup> held that, as the upper guardian of all minors, it has the power to order the conducting of blood tests where it is in the child's best interests to do so.<sup>105</sup> In this regard, the court will consider the specific

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<sup>95</sup> Boberg *Boberg's Law of Persons* at 374.

<sup>96</sup> It is worth noting that section 37 does not specifically mention blood tests. Instead, it refers to "blood sample[s]" and "scientific test[s]". It is possible that the Legislature elected to frame the provision broadly enough to encompass all scientific procedures used to ascertain paternity. The use of "blood sample[s]" and not "biological material" for example, indicates that the section deals specifically with the use of blood in determining paternity. The taking of blood is arguably more invasive than producing saliva for a DNA test, and a parent could simply use an ear bud to swab his or her child's tongue and submit it for DNA testing without the other parent's knowledge.

<sup>97</sup> Bonthuys "What You Don't Know Can't Hurt You" at 431.

<sup>98</sup> Heaton *Law of Persons* at 60.

<sup>99</sup> [1990] 3 All SA 550 (T).

<sup>100</sup> At 554.

<sup>101</sup> At 554-5.

<sup>102</sup> 1992 (3) SA 713 (E).

<sup>103</sup> At 720.

<sup>104</sup> 1983 (3) SA 827 (D).

<sup>105</sup> At 862-4.

circumstances of that child and the precise facts of the litigation surrounding his or her paternity.<sup>106</sup>

The Supreme Court of Appeal, in *YM v LB*,<sup>107</sup> was recently presented with its first opportunity to provide guidance as to the use of DNA testing<sup>108</sup> in paternity disputes. In this particular case, the paternity of the child was not in dispute thus it was neither necessary nor appropriate to order scientific testing.<sup>109</sup> The SCA, however, said *obiter* that a court has the inherent power to order persons to submit to DNA testing provided that it is in the best interests of the child to do so.<sup>110</sup> In this regard, the ordering of scientific tests to determine paternity may impinge upon a person's rights to bodily integrity and privacy.<sup>111</sup> However, the infringement of these rights may be justified under section 36(1) of the Constitution as the need to ascertain the truth generally trumps a minor intrusion into one's rights to privacy and physical integrity.<sup>112</sup>

In an application for child maintenance, the court must be satisfied that the man identified by the mother as liable to make payment is indeed the child's father. Under section 21(1) of the Maintenance Act, a court hearing a maintenance enquiry may order that scientific tests be conducted where the maintenance officer is of the opinion that the child's paternity is in dispute. However, both the mother and alleged father must be prepared to submit themselves and the child<sup>113</sup> to testing.<sup>114</sup> The child's mother or alleged father may request a paternity test. The provision thus clarifies that a court cannot order the test where both parties do not consent to it being conducted. In this light, only a High Court has the power to compel a party and his or her child to submit to a paternity test where it is in the best interests of the child to do so. Nevertheless the legal significance of conclusively ascertaining

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<sup>106</sup> At 865.

<sup>107</sup> 2010 (6) SA 338 (SCA).

<sup>108</sup> It should be noted that the previously-discussed cases involved the taking of blood tests to establish paternity. Here, DNA testing was requested. The concerns, however, remain relevant. Whether the biological sample that is used to establish paternity is blood, saliva or semen is immaterial. The applicable legal question is whether a court has the power to force a person or their child to undergo a scientific test to establish paternity where it is in doubt.

<sup>109</sup> At para 12.

<sup>110</sup> At para 15.

<sup>111</sup> At paras 14-15.

<sup>112</sup> *Ibid.*

<sup>113</sup> Provided the mother has parental authority over her child.

<sup>114</sup> Maintenance Act, section 21(1)(a)-(b).

paternity remains clear as the Act even makes provision for the State to cover the full or partial cost of conducting scientific tests where the parties are not of sufficient means.<sup>115</sup>

### **Unmarried fathers**

For unmarried fathers, the assignment of legal parenthood is not automatic. Where the paternity of a child is not in dispute, an unmarried father who wishes to acquire parental rights and responsibilities may nevertheless rely on section 21 of the Children's Act. Under section 19(1) of the Act, an unmarried mother automatically acquires full parental rights and responsibilities in respect of her child. Similarly, a biological father who is married to the child's mother automatically acquires full parental rights and responsibilities in respect of his child.<sup>116</sup> An unmarried father, by contrast, can only acquire full parental rights and duties in a number of specified instances which are listed under section 21(1). The provision states that an unmarried father will acquire full parental rights and responsibilities if he is in a permanent life-partnership with the child's mother when the child is born.<sup>117</sup> Alternatively, he will acquire parental responsibility where he consents to being named as the child's father<sup>118</sup> and has contributed, or at least attempted to contribute, to raising the child<sup>119</sup> and his or her living expenses for a reasonable time.<sup>120</sup> Regardless of whether he can satisfy the requirements of section 21(1), he still retains the obligation to contribute to maintaining the child.<sup>121</sup>

### **Application of the law to hypothetical scenarios**

It is clear from the above discussion that the law relating to the establishment of paternity is based on the principle that legal parenthood is determined by biology. Accordingly, genetic parenthood establishes the obligation to financially maintain one's offspring. It is fair and just that adults who participate in consensual sex must

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<sup>115</sup> Section 21(3)(a). Provided of course that both parties consent to testing.

<sup>116</sup> Children's Act, section 20.

<sup>117</sup> Section 21(1)(a).

<sup>118</sup> Section 21(1)(b)(i).

<sup>119</sup> Section 21(1)(b)(ii).

<sup>120</sup> Section 21(1)(b)(iii).

<sup>121</sup> Section 21(2).

bear the legal consequences of their actions. The problem, however, is that the law does not provide for the instances where a biological father was sexually conscripted into fatherhood. To illustrate this point, the current South African framework on paternity law and maintenance will be applied to a range of hypothetical examples in which paternity has been deceitfully imposed.

### *Sexual assault*

Ben, 34 and Jessica, 37, both busy professionals, meet at a bar. Ben is not looking for a serious relationship or a one-night stand and is simply interested in exploring the dating scene. Jessica, on the other hand, is aware of her ticking biological clock and desperately wants to have a child. They enjoy a night of drinking, flirting and dancing. At the end of the night, Jessica suggests that Ben accompany her to her apartment for a few more drinks. He agrees. When they arrive at her home, Jessica puts on some music, removes Ben's jacket and heads to the kitchen to pour two glasses of champagne. Unbeknownst to Ben, who is relaxing on a sofa in the lounge, Jessica dissolves a date rape drug, GHB,<sup>122</sup> in Ben's glass of champagne. Soon after Ben finishes his drug-laced champagne, he complains of drowsiness and weary vision. He passes out. Jessica removes his clothing and undresses herself. She manually stimulates Ben's penis<sup>123</sup> and then proceeds to have sex with him. He awakes the next morning half-naked on Jessica's sofa. She tells him that they were both inebriated and had sex after a few glasses of champagne. Nine months later, Jessica telephones Ben to inform him that she has given birth to his daughter and demands child maintenance.

In the scenario above, Jessica raped Ben in order to conceive a child with him. Notwithstanding any liability under criminal law, it is necessary to establish whether Ben is the child's legal father. Ben has the option of admitting paternity by

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<sup>122</sup> Gamma-hydroxybutyrate. In some studies, participants have reported that the ingestion of GHB inhibits physiological stimulation that is the maintenance of an erection. See S Edwards, HR Sumnall & K Woolfall et al. "Use, function, and subjective experiences of gamma-hydroxybutyrate" (2008) 92 *Drug and Alcohol Dependence* 286 at 288-9.

However, anecdotal evidence suggests that it amplifies sexual experience making it easier to develop and sustain an erection.

See [http://www.reddit.com/r/Drugs/comments/1fsis9/from\\_experience\\_what\\_was\\_ghb\\_like/](http://www.reddit.com/r/Drugs/comments/1fsis9/from_experience_what_was_ghb_like/), accessed on 3 January 2015.

<sup>123</sup> A man does not need to be conscious to have an erection. See *S.F. v Alabama ex rel. T.M.* 695 so.2d 1186 (Ala. Civ. App. 1996) at 1188.

However, as described above, the ingestion of certain stimulants may inhibit this. For argument's sake, let us assume that GHB did not affect Ben's involuntary erection.

submitting an affidavit containing an acknowledgment that he is the child's father when the parties jointly register the child's birth. However, the deceitful circumstances surrounding the child's conception and Ben's unwillingness to enter into a serious relationship, suggests that the chances of him acknowledging paternity are slim. Instead Ben would rather wholly deny paternity. In a maintenance enquiry, the marital presumption of paternity would not apply as the parties are not married. Therefore Jessica would have to show, on a balance of probabilities, that she and Ben engaged in sexual intercourse around the time the child was conceived. Her evidence may take various forms. For example, she may lead evidence that they were seen leaving the bar by several people and later had a one-night stand at her apartment around the same time the child was likely to have been conceived.

Alternatively, she could simply request a paternity test. In the maintenance court, Ben cannot be compelled to submit to blood tests. The High Court, however, has the inherent power to order the parties to submit to tests as it is in the child's best interests to receive maintenance if Ben is her father. In any event, his refusal to provide blood samples would negatively impact upon his credibility. However, if Ben genuinely believes that he is not the child's father, he would happily undergo a paternity test which would have the effect of conclusively determining paternity. Either way, a court will likely declare paternity to have been established and Ben will be ordered to contribute to the maintenance of his daughter. The extent of his contribution will be determined by his financial means.

#### *Non-consensual use of sperm*

Kate, 33 and Damien, 32 have been friends since childhood. Kate has endured a series of bad relationships and cannot find a suitable man to settle down with. She has decided to have a baby through fertility treatments and will raise the child in a single-parent household. Damien has always been a good friend to Kate and is supportive of her decision. Kate enquires as to the cost of conceiving a child through *in vitro* fertilisation using donor sperm and realises that she cannot afford to undergo treatment. Instead she hatches a plan to find her own sperm donor and inseminate herself. She eyes Damien as a potential donor. He is good looking, successful and in very good health.

After a night on the town, Kate and Damien end up at Damien's flat. Kate says she is too intoxicated to drive herself home. She begins to kiss Damien and unbuttons his trousers as he hesitantly agrees to oral sex. After Damien has ejaculated, Kate rushes to the bathroom and quickly ejects the semen into a small plastic container.<sup>124</sup> She places the contents of the container into a needleless plastic syringe which she purchased at the local pharmacy. She then inserts the syringe into her vagina. Nine months later, Kate gives birth to twin girls. As the costs of raising two babies escalate, Kate tells Damien that he is the father of her children and requires financial assistance.

In this instance, Kate induced oral sex so that she could harvest Damien's sperm and conceive a child through self-insemination. Clearly, Damien has not engaged in vaginal intercourse with Kate and would deny paternity. He may admit to participating in oral sex and likely reveal Kate's desperation to have a child using donor sperm. Damien may also realise the possibility that Kate kept the sperm that he ejaculated after she performed fellatio. Given the uncertain circumstances surrounding conception, a maintenance court will likely order a DNA test to establish or disprove paternity provided both parties consent. On the understanding that Damien vehemently denies having sexual intercourse with Kate, he would certainly consent to scientific testing. Unfortunately for him, the test will prove that he is the twins' biological father. Therefore he will be liable for child maintenance as it is in the twins' best interests to receive monetary support from both biological parents, particularly if their mother is struggling financially.

#### *Natural conception through deceit*

Jason, 29 and Brittany, 28 have been in a relationship for three years. Jason informs Brittany that he does not wish to have children. Brittany assures him that she is using birth control. Jason maintains that they should still use condoms as additional protection. Brittany hesitantly agrees as she secretly wishes to fall pregnant with Jason's child. Every Thursday, Jason plays squash with his work colleagues. While he is at practice, Brittany lights some candles, puts on romantic

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<sup>124</sup> Sperm can survive outside of the human body for several hours. See "Sperm FAQ" WebMD, available at <http://www.webmd.com/infertility-and-reproduction/guide/sperm-and- semen-faq?page=1#1>, accessed on 29 May 2014.

music and takes a bubble bath. When Jason returns home, Brittany is waiting for him in a negligee. They head to the bedroom. She collects a condom from the medicine cabinet and, unbeknownst to Jason, pokes several holes near the tip of the condom. Jason is equally unaware that Brittany has not used birth control in three months. They have sex. Two months later, Brittany tells Jason that she is pregnant. Jason is infuriated and demands to know how she could have fallen pregnant if she has been taking the pill and he has always worn a condom. Brittany blames it on an irregular menstrual cycle. She elects to keep the baby and gives birth to a healthy boy seven months later.

In the aforementioned scenario, Brittany deceitfully tricked Jason into conceiving a child with her. The primary differences between this hypothetical example and the previous scenarios are that Jason and Brittany are in a committed relationship and engaged in consensual sexual intercourse. This means that Jason is less likely to contest paternity and will probably accept the pregnancy as an honest mistake. However, if he believes that he was deceived into becoming a father, he will have a difficult time proving his version of events. As the couple are not married, Brittany will simply have to prove that she and Jason had sexual intercourse around the time that the child was likely to have been conceived. Jason may present evidence to show that he routinely uses condoms and that Brittany assured him of her use of birth control. However, the reliability of this evidence is questionable. Nevertheless, Brittany may request a paternity test. If Jason refuses to submit to DNA testing, the court will draw the inference that he is trying to conceal the truth. On the other hand, consenting to the paternity test will conclusively establish that he is in fact the child's biological father. Either way, he will be ordered to contribute to financially maintaining his child irrespective of whether he continues his relationship with Brittany.

The aforementioned hypothetical scenarios are helpful and instructive for four chief reasons. Firstly, these examples demonstrate the variety of instances in which men become involuntary fathers through devious means. Secondly, each hypothetical scenario illuminates the practical significance of assigning legal parenthood on the basis of a genetic link. Thirdly, these examples highlight the tension between legal parenthood and the absence of consent surrounding a child's

conception. Finally, the scenarios illustrate that the law, as it stands, has failed to provide an adequate solution for involuntary parenthood.<sup>125</sup>

### **The lacuna in the law**

Section 36 of the Children's Act makes reference to "sexual intercourse". The term is not defined in the Act. However, in the context of paternity claims, it refers to sexual contact between two individuals involving "the penetration of the vagina by the penis".<sup>126</sup> The only other reference to "sexual intercourse" is located under section 242 of the Act which details the effect of an adoption order prohibiting sexual intercourse between a child and another person.<sup>127</sup> A child under the age of 16 cannot legally consent to sexual intercourse.<sup>128</sup> Therefore if sexual intercourse under section 242 may be non-consensual,<sup>129</sup> where the child is below the age of 16, or consensual provided the child is older than 16 but younger than 18, then by parity of reasoning, the sexual intercourse referred to under section 36 may be either consensual or non-consensual. It would follow that the Legislature, in its formulation of the provisions relating to the proof of paternity, overlooked the possibility that a woman could have conceived a child through sexual assault, using a man's sperm without his consent or by poking holes into her partner's condoms. Accordingly, the Legislature failed to contemplate the position of an unmarried man who never engaged in consensual intercourse<sup>130</sup> but is nevertheless held to be the biological, and legal, father of the resulting child.

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<sup>125</sup> In a non-medical setting, that is. Under the law of delict, damages are awarded to persons who have become parents as a result of medical negligence. This is discussed in Chapter Six.

<sup>126</sup> J Law (ed) *Oxford Dictionary of Law* 7ed (2009) at 509.

<sup>127</sup> Children's Act, section 242(2)(c).

<sup>128</sup> Section 1(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>129</sup> Within the definition of statutory rape (a child below the age of 16 cannot consent to sexual intercourse) or otherwise.

<sup>130</sup> In this regard, the absence of consensual sexual intercourse would cover male victims of sexual assault and men who never engaged in vaginal penetration but whose sperm was later purloined and used without their consent.

## **Conclusion**

The law of maintenance and the rules pertaining to the determination of paternity have their origins in the common law. The advancements in medical technology have forced the Legislature to regulate the scientific proof of paternity. Nevertheless, the law remains relatively rudimentary. The primary consideration in a claim for child maintenance is whether the man from whom maintenance is sought is the biological father of the recipient child. The question of consent to paternity, however, is in no way addressed under the common law or statute. Accordingly, the law currently offers no protection to those men who have been sexually foisted into fatherhood and who are legally obligated to support children they didn't agree to have. The failure to reconsider the law will result in uncertainty and inequitable outcomes, and will effectively marginalise the rights and interests of involuntary fathers.

## CHAPTER THREE

### BEST INTERESTS OF THE CHILD V REPRODUCTIVE RIGHTS OF THE INVOLUNTARY FATHER

*'This question of the interests of the children is a golden thread which runs throughout the whole fabric of our law relating to children.'*<sup>131</sup>

The best interests of the child standard has its origins in the common law and has traditionally been used as the yardstick against which the High Court, in exercising its inherent jurisdiction as the upper guardian of all minors, adjudicates a matter which involves a child.<sup>132</sup> It has been adopted as an invaluable guiding principle in balancing the rights and interests of a child against those of other parties in legal proceedings, and is entrenched under section 28(2) of the Constitution. The provision succinctly stipulates that a child's best interests are of paramount importance in every matter concerning the child. Its inclusion under the Bill of Rights indicates the importance of a child-centred approach where a decision implicates the well-being of a child.<sup>133</sup> For this reason, there is a potential for conflict as the paramountcy of the child's best interests creates the risk of subverting the rights and interests of other parties in cases involving factual scenarios not yet considered under South African law.

#### Paramountcy

The best interests of the child standard under section 28(2) of the Constitution constitutes the benchmark in all proceedings in which children are concerned. The provision is preceded by section 28(1) which elucidates a number of children's

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<sup>131</sup> Tebbutt A.J. in *Kaiser v Chambers* 1969 4 SA 224 (C) at 228.

<sup>132</sup> *Kotze v Kotze* 2003 (3) SA 628 (T) at 630; *H v Fetal Assessment Centre* 2015 (2) BCLR 127 (CC) at para 64.

The first case in South Africa to acknowledge the best interests standard is *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 134.

<sup>133</sup> J Heaton 'An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34 *Journal for Juridical Science* 2 at 2-3.

rights, including the right to family or parental care<sup>134</sup> and the rights to shelter, basic nutrition and health care.<sup>135</sup> Literally-interpreted, the use of the phrase ‘in all matters’ in section 28(2) indicates that the standard extends well beyond the ambit of the rights enunciated under section 28(1).<sup>136</sup> Therefore the application of the principle has been expanded beyond the realms of children’s rights and family law to any and every matter affecting a child.<sup>137</sup> This expansion suggests that the best interests of the child standard should be a central consideration in every area of the law.<sup>138</sup>

The centrality and importance of a child’s best interests is evident by the use of the word ‘paramount’ in section 28(2). Indeed the provision goes further than Article 3(1) of the Convention on the Rights of the Child<sup>139</sup> which requires the best interests of the child to be a ‘primary’ consideration in all matters concerning children regardless of whether the matter is undertaken by private or public institutions, legislative bodies or courts of law.<sup>140</sup> ‘Paramount’ carries more weight than ‘primary’ and implies that the best interests of the child are of greater importance than other considerations.<sup>141</sup> A narrow interpretation of the principle indicates that judicial officers must elevate and prioritise the child’s interests above the interests of other parties.<sup>142</sup> In fact, the wording of section 28(2) suggests that the interests as opposed to the rights of the child should be weighed against the rights and not the interests of other parties.<sup>143</sup> In this regard, the criterion generates the potential for conflict as a court effectively has to balance the mere interests of a child against the rights of parents or other family members.<sup>144</sup> The paramouncy of a

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<sup>134</sup> Constitution, section 28(1)(b).

<sup>135</sup> Section 28(1)(c).

<sup>136</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at para 17; *Petersen v Maintenance Officer and Others* 2004 (2) BCLR 205 (C) at 213.

In fact, section 6(2)(a) of the Children’s Act, which reinforces a child-centred approach, provides that all legal proceedings, legislation and state measures involving children must respect and protect children’s rights and uphold the best interests of the child standard.

<sup>137</sup> Heaton ‘An individualised, contextualised and child-centred determination’ at 3.

<sup>138</sup> *Ibid.*

<sup>139</sup> International Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25. The Republic ratified the UNCRC in 1995. It is not deemed a direct source of human rights but enjoys elevated status in South African law primarily because the children’s rights enunciated in the Convention have been included under section 28 of our Constitution.

<sup>140</sup> Article 3(1).

<sup>141</sup> E Bonthuys ‘The Best Interests Of Children In The South African Constitution’ (2006) 20 *International Journal of Law, Policy and the Family* 23 at 34.

<sup>142</sup> A Moyo ‘Reconceptualising the ‘paramouncy principle’: Beyond the individualistic construction of the best interests of the child’ (2012) 12 *African Human Rights Law Journal* 142 at 143.

<sup>143</sup> Bonthuys ‘Best Interests’ at 28.

<sup>144</sup> *Ibid.*

child's best interests thus raises significant questions regarding the contours of parental rights.

*Clarity from the Constitutional Court*

The Constitutional Court in *S v M*<sup>145</sup> has provided a measure of clarity to the meaning of 'paramount importance'. Sachs J stressed that section 28(2) does not literally imply that the best interests of the child must be seen to 'oust or override' other interests and considerations.<sup>146</sup> The provision clearly affords every child a constitutionally-protected right to have his or her best interests considered in all matters concerning his or her well-being. However, it is unfavourable to exploit the best interests standard to intercede the rights of other members of the family.<sup>147</sup> Indeed the principle must be applied in a way that is meaningful and realistic and which promotes the purpose and objective of section 28(2) without encroaching upon other constitutional rights.<sup>148</sup>

In *De Reuck*,<sup>149</sup> the Constitutional Court similarly held that the paramountcy principle does not render other constitutionally-protected rights irrelevant nor does it mean that section 28(2) is not subject to limitation.<sup>150</sup> The Court stressed that like every other right contained in the Bill of Rights, section 28(2) is capable of limitation under section 36 of the Constitution.<sup>151</sup> After all, the Constitution does not contain a hierarchy of rights and the limitation of any right is perfectly permissible provided only that it is reasonable and justifiable.<sup>152</sup> It would follow that the rights of parents and other family members must be considered alongside and not secondary to the interests of their children.

<sup>145</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

<sup>146</sup> At para 25.

<sup>147</sup> Bonthuis 'Best Interests' at 38.

<sup>148</sup> *S v M* supra at paras 25-6.

<sup>149</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC).

<sup>150</sup> At para 55.

<sup>151</sup> Ibid.

Section 36(1) provides: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

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

<sup>152</sup> *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC) at para 19.

### **Broad formulation**

Section 9 of the Children's Act, which gives legislative effect to section 28(2), proffers a measure of content to the best interests of the child standard. The provision states that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied." This provision, like section 28(2), is unequivocally broad. It could be argued that the wide formulation of the standard inhibits an objective evaluation as a result of changing social values and customs.<sup>153</sup> Thus the concern is not whether a court is well-placed to make an assessment as to what is in the best interests of a child but rather which values, standards and factors should be applied.<sup>154</sup>

Section 28(2) is undoubtedly broadly-formulated and wide-reaching in application, but for good reason. The best interests of the child standard constitutes an effective legal mechanism for shielding children from an arrangement which is not in their best interests.<sup>155</sup> Accordingly, the Constitutional Court has cautioned that the objectives of section 28(2) may be subverted where the "paramountcy principle is spread too thin" in practice.<sup>156</sup> In this light, the principle risks being reduced to an ineffectual phrase that pays lip service to children's rights.<sup>157</sup> Nevertheless, it must be applied in a cogent and determinate manner.<sup>158</sup>

#### *A contextualised approach*

Ideally, the application of the best interests standard necessitates a flexible, contextualised approach which considers all relevant social, cultural and economic factors in establishing what is best for a particular child.<sup>159</sup> In *Fitzpatrick*, the Constitutional Court postulated that the application of the principle should require a thorough consideration of the rights of children in conjunction with the rights of the child's parents or family members having regard to the individual circumstances of the case.<sup>160</sup> To this end, the factors to be considered in each case are innumerate and

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<sup>153</sup> Heaton "An individualised, contextualised and child-centred determination" at 8.

<sup>154</sup> *Ibid.*

<sup>155</sup> *S v M* at para 25.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> Heaton "An individualised, contextualised and child-centred determination" at 9.

<sup>160</sup> *Fitzpatrick* at para 18.

are dependent on the specific factual scenario at hand.<sup>161</sup> Indeed section 7(1) of the Children's Act creates a measure of specificity through the provision of a list of factors which, where relevant, must be considered where a decision impacts upon a child's welfare. These factors include the nature of the relationship between the child and parents,<sup>162</sup> a parent's ability to provide for the child,<sup>163</sup> the child's emotional and physical security<sup>164</sup> and the child's need to reside in a stable, healthy environment.<sup>165</sup>

Despite the criticism levelled at the best interests of the child principle, South African courts appear to favour a contextualised approach, taking into account the rights and interests of other parties, in applying the principle. However, a South African court has yet to adjudicate a matter which involves balancing the interests of an unwilling father sexually foisted into parenthood with the interest his child has in receiving maintenance. The chief concern is that a court, having never adjudicated a factual scenario of that kind, will determine that a child's interest in enjoying a financially secure upbringing always outweighs a consideration of the recalcitrant circumstances surrounding his conception. For this reason, there is much uncertainty as to the approach that should be adopted if a case of this nature is heard in South Africa.

### **Trans-Atlantic guidance**

In the United States, the courts in almost every state have heard a multitude of claims in which a father has refused to furnish maintenance on the grounds that he did not consent to paternity. The facts of these cases are nearly as bizarre and sensational as the decisions these courts persistently reach. In applying the principle that it is in the best interests of a child to receive maintenance from both parents, American courts have routinely rejected these claims in spite of the mother's deceitful conduct.<sup>166</sup> In essence, the duty to furnish child maintenance is a form of

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<sup>161</sup> *Ibid.*

<sup>162</sup> Children's Act, section 7(1)(a)(i).

<sup>163</sup> Section 7(1)(c).

<sup>164</sup> Section 7(1)(h).

<sup>165</sup> Section 7(1)(k).

<sup>166</sup> D Johnson "Child Support Obligations that Result from Male Sexual Victimization: An Examination of the Requirement of Support" (2005) 25 *Northern Illinois University Review* 515 at 516.

strict liability justified by the idea that the child is an innocent party and has the right to be financially supported by both parents.

Accordingly, an analysis of the approach adopted by the US courts is essential for three reasons. Firstly, the case law provides a measure of guidance for South African judges who have yet to adjudicate a matter in which a biological father has contested his duty to pay child maintenance on the basis that the child's mother stole his sperm. Secondly, the strict liability approach of the American courts may be reconciled with the best interests of the child principle encapsulated under section 28(2) of the Constitution. Lastly, the case law highlights how a strict application of the best interests of the child principle can generate unjust and inequitable results.

What follows is a discussion of a selection of US cases in which the courts have persistently rejected the defence of non-consent in child support claims. The point of this section is to thus demonstrate the harshness of a blanket approach which, notwithstanding its underlying purpose, places the best interests of the child before all other considerations.

#### *Sexual assault*

The courts in the United States have held that fathers whose sexual assault resulted in a pregnancy remain legally obligated to support their offspring. In *S.F. v. Alabama ex rel. T.M.*,<sup>167</sup> a father contended that he should be relieved of the obligation to furnish child support on the basis that he was sexually assaulted by the child's mother.<sup>168</sup> The appellant did not dispute paternity but argued that he was deprived of the voluntary choice to become a parent.<sup>169</sup> He testified in court that he had attended a party at the home of the child's mother where he subsequently passed out after drinking heavily, only to wake up the next morning wearing nothing but an unbuttoned shirt.<sup>170</sup> His brother testified to the same facts. In addition, two more witnesses attested that the mother had admitted to having sex with the appellant while he was unconscious and later boasted to friends that the act had saved her a trip to the sperm bank.<sup>171</sup> A physician further testified that a heavily intoxicated man

<sup>167</sup> 695 So.2d 1186 (Ala. Civ. App. 1996).

<sup>168</sup> *Id.* at 1187.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Id.* at 1188.

is still capable of experiencing an erection and ejaculating as such activities are not conscious or voluntary.<sup>172</sup>

Despite the wrongful conduct of the mother, the appeal court affirmed the lower court's ruling ordering the appellant to pay maintenance for the child.<sup>173</sup> Yates J explained that any wrongful conduct on the part of the child's mother cannot extinguish the father's parental duty to support his child whose welfare rights are paramount.<sup>174</sup> Moreover, the court summarily dismissed the appellant's argument that requiring him to pay maintenance is tantamount to punishment.<sup>175</sup>

Interestingly, the dissenting judgment of Crawley J in *S.F.* concurred with the majority that the father was liable for child support.<sup>176</sup> However, the judge suggested that payments should have been decreased.<sup>177</sup> Given the unusual circumstances of the case and the reprehensible conduct of the mother, the presumptive child support guidelines, which impose strict liability, should be deviated from.<sup>178</sup> Accordingly, the father should have only been ordered to support the child if the earning capacity of the mother was insufficient to maintain the child.<sup>179</sup>

In *State v. Daniel G.H. (In of re Paternity Derek S.H.)*,<sup>180</sup> the defendant argued that the mother of his child had laced his drink with a date rape drug which enabled her to have non-consensual sex with him resulting in a pregnancy.<sup>181</sup> Interestingly, the trial court prohibited the defendant from introducing evidence establishing an absence of consent, but submitted that it may be considered for the purpose of determining child support.<sup>182</sup> The issue of consent was tried before a jury and the defendant was required to establish non-consent by "clear, satisfactory and convincing evidence" in discharging the burden of proof.<sup>183</sup> The jury held that the sexual intercourse between the defendant and the mother was involuntary, but that

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<sup>172</sup> *Ibid.*

<sup>173</sup> *Id.* at 1190.

<sup>174</sup> *Id.* at 1189.

<sup>175</sup> *Id.* at 1190.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Id.* at 1191.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> 642 N.W. 2d (Wis. Ct App 2002).

<sup>181</sup> *Id.* at 2.

<sup>182</sup> *Id.* at 3

<sup>183</sup> *Id.* at 5.

there was unsatisfactory evidence to establish that she had in fact drugged him.<sup>184</sup> Therefore, any culpable conduct on the part of the mother was insufficient to bar a claim for child support. In this case, the Court of Appeals of Wisconsin affirmed that it is in the best interests of the minor child to secure financial support from both parents which constitutes the paramount goal in the adjudication of child maintenance.<sup>185</sup>

The courts have equally applied the strict liability approach in adjudicating claims where the father is a minor whose statutory rape led to pregnancy. In *State ex. rel. Hermesmann v Seyer*,<sup>186</sup> the Supreme Court of Kansas found an adolescent boy to be liable for child maintenance despite the fact that he was a twelve-year-old at the time of conception.<sup>187</sup> In that case, the court clarified that sexual intercourse which leads to parenthood cannot obviate the right of the child to receive financial support even if conception results from sexual assault within the meaning of the criminal law.<sup>188</sup> Despite the fact that children below the age of 16 cannot legally consent to sex, the court found that it was enough that he did not register complaints regarding the sexual liaison with his parents.<sup>189</sup>

Similarly, in *Hamm v. Office of Child Support Enforcement*,<sup>190</sup> an Arkansas court ordered a biological father to financially maintain a child who was conceived as a result of his sexual victimisation as a 13-year-old.<sup>191</sup> He argued that he should not have to pay child support as the child was conceived when he was below the age of consent and thus could not have legally consented to sexual intercourse.<sup>192</sup> It was thus contended that a victim of statutory rape should not have to contribute to supporting a child whose birth is the unwanted consequence of a sex crime.<sup>193</sup> The court held that a mother's criminal liability does not absolve a biological father from

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<sup>184</sup> Ibid.

<sup>185</sup> Id. at 7.

<sup>186</sup> 847 P.2d 1273 (Kan. 1993).

<sup>187</sup> Id. at 1279.

<sup>188</sup> Id. at 1278.

<sup>189</sup> Id. at 1275.

<sup>190</sup> 336 Ark. 391 (1999).

<sup>191</sup> Id. at 400.

<sup>192</sup> Id. at 397-8.

<sup>193</sup> Id. at 398.

the civil duty to maintain his offspring.<sup>194</sup> After all, the recipient of the monetary support is the child and not his mother.

In his dissenting judgment, Corbin J took issue with imposing child support liability on a teenager.<sup>195</sup> The judge argued that placing the obligation on a minor to maintain a child conceived through statutory rape frustrates the public policy of shielding children from decisions they are not capable of making on their own.<sup>196</sup> Furthermore, granting a child support order against the victim of a sexual offence conveys the message that it is acceptable to financially penalise the victim for the perpetrator's conduct.<sup>197</sup>

The aforementioned American case law makes it clear that a biological father remains obligated to financially support his offspring notwithstanding his own sexual victimisation. Indeed the child's interest in receiving maintenance overrides the consideration that he or she was conceived as a result of a sexual offence.

#### *Non-consensual use of sperm*

The courts in the United States have enforced child support orders against fathers who, despite never consenting to the use of their sperm, engaged in a voluntary sexual act with the child's mother. In *State of Louisiana v. Frisard*,<sup>198</sup> the state instituted a claim for child maintenance against the father of a child whose mother had inseminated herself with the contents of a used condom. The child's mother was a nurse employed at the hospital where the defendant's ill parents were being treated.<sup>199</sup> During the course of a visit, the mother had offered to perform oral sex on the defendant on the condition that he wore a condom.<sup>200</sup> The defendant agreed and later testified that "as any male would, I did not refuse but vehemently denied consenting to vaginal sex."<sup>201</sup> After removing the condom, and without his knowledge or consent, the child's mother successfully inseminated herself with the

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<sup>194</sup> Id. at 399.

<sup>195</sup> Id. at 400.

<sup>196</sup> Ibid.

<sup>197</sup> Id. at 401.

<sup>198</sup> 694 So. 2d 1032 (La. Ct. App. 1997).

<sup>199</sup> Id. at 1035.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

father's semen utilising a syringe and glass tube.<sup>202</sup> A witness later attested that he had observed the child's mother lying on the floor of a hospital bathroom using the aforementioned medical paraphernalia on the same day the defendant had agreed to oral sex.<sup>203</sup>

In deciding the matter, Dufresne J disregarded the mother's conduct and solely relied on the results of a paternity test which revealed a 99.9994% probability that the defendant was the child's father.<sup>204</sup> The court affirmed that the establishment of paternity creates an obligation on the father to maintain his child.<sup>205</sup> Hence it was sufficient to hold the defendant liable for child support because his own testimony proved that he had engaged in some sort of sexual contact with the child's mother at the time of conception.<sup>206</sup> In this light, the court neglected to draw a distinction between a sexual act which naturally leads to pregnancy, and one which does not.

In *Phillips v. Irons*,<sup>207</sup> a father instituted proceedings against the mother of his child for damages on the basis that she fraudulently acquired his sperm for the purpose of impregnating herself.<sup>208</sup> The parties had been dating and had on three occasions exclusively participated in oral sex.<sup>209</sup> They later ended the courtship and the defendant gave birth after successfully inseminating herself with the plaintiff's gametic material.<sup>210</sup> In a petition to establish paternity, blood tests revealed the plaintiff to be the child's father.<sup>211</sup> The Illinois court, much like in *Frisard*, dismissed the deceptive manner in which the child was conceived and ordered the plaintiff to pay child support.<sup>212</sup>

It follows that a biological father cannot escape the legal duty to financially support his child where he engaged in a consensual sexual act which culminated in the depositing of his sperm with a woman who later fell pregnant. Accordingly, the application of the strict liability standard guarantees that, despite the absence of

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<sup>202</sup> Id. at 1034.

<sup>203</sup> Id. at 1035.

<sup>204</sup> Id. at 1036.

<sup>205</sup> Id. at 1037.

<sup>206</sup> Id. at 1036.

<sup>207</sup> No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005).

<sup>208</sup> Id. at 1.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Id. at 7.

natural conception, the innocent child's interest in receiving maintenance from both parents is upheld.

*Natural conception through deceit*

The US courts have vehemently refused to absolve a biological father from child support obligations where he alleges that his partner deceived him into becoming a father by lying about her fertility or use of birth control. In *Wallis v. Smith*,<sup>213</sup> the plaintiff instituted proceedings against the defendant for damages based on breach of contract, the conversion of his sperm and fraud.<sup>214</sup> The parties were involved in a sexual relationship for three years.<sup>215</sup> They discussed birth control methods and the plaintiff made it clear that he did not wish to father any children.<sup>216</sup> The defendant agreed to use birth control and the plaintiff subsequently discontinued using contraception and instead relied upon the efficacy of the defendant's birth control pills to avoid pregnancy.<sup>217</sup> The defendant later stopped taking birth control and fell pregnant.<sup>218</sup> The court held that the plaintiff cannot avoid the legal duty to maintain his offspring simply because of the deceptive circumstances surrounding the child's conception.<sup>219</sup> The court further explained that the child's interest in receiving financial support persists regardless of the mother's fraudulent conduct.<sup>220</sup> Furthermore, the plaintiff had the option of using his own contraception but he failed to do so.<sup>221</sup> As for the allegation that the defendant's actions constituted a breach of contract, the court elucidated that it would not be in the interests of public policy to reduce a consensual sexual relationship to a contractual agreement.<sup>222</sup>

In *Welzenbach v. Powers*,<sup>223</sup> the court similarly denied an action for birth control fraud instituted by an unhappy father ordered to pay child maintenance.<sup>224</sup> The father argued that he had engaged in sexual intercourse with the assurance that the child's mother was using birth control and was therefore absolved from child

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<sup>213</sup> 22 P.3d 682 (N.M. Ct. App. 2001).

<sup>214</sup> *Id.* at 683.

<sup>215</sup> *Id.* at 682.

<sup>216</sup> *Id.* at 683.

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> *Id.* at 685.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> 139 N.H. 688 A.2d 1133 (1995).

<sup>224</sup> *Id.* at 688.

support liability.<sup>225</sup> The New Hampshire court rejected his claim on the basis that the sexual arrangements of consenting adults are beyond the control of the courts.<sup>226</sup> To this end, it is not in the interests of society to permit a court to encroach upon the intimate affairs of sexual partners. The court explicated that to allow the action would interfere with the legislative intention to hold biological fathers liable for the children they conceive.<sup>227</sup> Accordingly, it would be unreasonable to recognise an action of this nature while concurrently encouraging mothers to file paternity suits.<sup>228</sup>

The reasoning followed by American courts in cases involving natural conception through deceit clearly demonstrates that a father may not avoid paying child support despite the deceptive manner in which the child was created.

### **A critical analysis of the strict liability approach**

Parenthood automatically establishes the duty to financially sustain one's child which forms part of a parcel of parental rights and responsibilities.<sup>229</sup> Few people would contest that a couple who voluntarily engages in sexual intercourse and conceives a child as a result should not be liable for the consequences of their actions. As such, the courts in the United States have asserted that the allocation of parental duties is determined by voluntary parenthood. However, by adopting a strict liability standard, which postulates that a father is liable for child support irrespective of the circumstances surrounding the child's conception, these courts have importunately rejected a lack of consent as an exception to a claim for child support. Consequently, countless men have been forced to maintain children who were conceived as a result of sexual assault, statutory rape, women furtively inseminating themselves with discarded semen and misrepresentation as to the use of birth control. Therefore it is not surprising that the approach has attracted a wealth of criticism from legal academics.

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<sup>225</sup> Id. at 689.

<sup>226</sup> Ibid.

<sup>227</sup> Id. at 692.

<sup>228</sup> Id. at 691.

<sup>229</sup> Hubin "Daddy Dilemmas" at 61.

### *Male victimisation*

A rudimentary analysis of the jurisprudence of American courts in child support cases reveals two crucial findings. The first conclusion is that the courts have assigned child support liability on the sole basis of a biological connection. In this regard, the courts have not given any consideration to the social, emotional or psychological connections between the father and his biological child.<sup>230</sup> American judges have continually expressed an unwillingness to consider the circumstances surrounding the child's conception to avoid intruding into the private domain of sexual relationships.<sup>231</sup> The second finding is that the courts have refused to recognise the absence of consent as a defence to paying child support.<sup>232</sup> In this light, the sexual victimisation of men, who have become fathers as a result of devious conduct, is largely ignored.

By requiring sexually victimised men to financially maintain children conceived as a result of that victimisation, the courts have sent a clear message that little weight is attached to sheltering men from sexual abuse. Statistically, women and girls comprise the majority of victims of sexual offences, particularly rape.<sup>233</sup> To this end, statutes<sup>234</sup> punishing sexual offences may be formulated as gender-neutral but the underlying purpose of the legislation, particularly in the South African context, is to shield women from the consequences of sex crimes.<sup>235</sup> In applying a strict liability standard, the courts have articulated that a child's right to receive maintenance overrides the sexual victimisation of the father. To this end, the prioritisation of the best interests of the child trivialises the father's victimisation and conveniently deflects focus away from the mother's culpable conduct.<sup>236</sup> Unsurprisingly, the imposition of financial responsibility on men who have been

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<sup>230</sup> E London 'A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape' (2004) 152 *University of Pennsylvania Law Review* 1957 at 1958.

<sup>231</sup> See *L. Pamela P. v. Frank S.*, 462 N.Y.S.2d 819 (1983); *Stephen K. v. Roni L.*, 105 Cal. App. 3d 640, 164 Cal. Rptr. 2d 618 (1980).

<sup>232</sup> London 'A Critique of the Strict Liability Standard' at 1958.

<sup>233</sup> H Moffett 'These Women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post-Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 129 at 134.

<sup>234</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, for example.

<sup>235</sup> Johnson 'Child Support Obligations' at 518.

<sup>236</sup> At 529.

subjected to sexual assault magnifies their victimisation by saddling them with the long-term pecuniary obligations of parenthood.<sup>237</sup>

The inequitable results of a strict liability approach and, by extension, the re-victimisation of involuntary fathers reflects the law's failure to consider the impact of gender and sex. To this end, a blanket approach reveals the almost implicit acceptance of gender-based stereotyping.<sup>238</sup> It is for this reason that the sexual victimisation of boys and men is not viewed with the same repulsion and fury as sex crimes against girls and women.<sup>239</sup> Patriarchal society has conditioned young men into believing that every sexual encounter is meant to be enjoyed as men are perceived as the stronger sex and are therefore positioned as powerful and sexually dominant.<sup>240</sup> From a young age, boys are discouraged from expressing their feelings and are therefore less likely to report sexual abuse.<sup>241</sup> Young girls, on the other hand, are socialised into believing that their womanhood is defined by whether they succeed in finding a suitable husband and starting a family.

The gendered construction of heterosexual relations is reinforced by patriarchal ideology. Men are traditionally perceived as breadwinners and guardians who are expected to economically provide for their families.<sup>242</sup> Women, on the other hand, are tasked with the responsibility of taking care of the children, looking after the household and preparing meals. This gendered division of labour is sustained by the traditional nuclear family unit.<sup>243</sup> Indeed it may be argued that the strict liability approach penalises unmarried fathers because it requires them to furnish child maintenance regardless of the conditions surrounding the child's conception.<sup>244</sup> To this end, the approach attempts to reconstruct traditional family values by transferring the burden of child support from the State to the biological father.<sup>245</sup> As

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<sup>237</sup> R Jones 'Inequality From Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children resulting from their Victimization?' (2002) 36 *Georgia Law Review* 411 at 412.

<sup>238</sup> London 'A Critique of the Strict Liability Standard' at 1972.

<sup>239</sup> Johnson 'Child Support Obligations' at 519.

<sup>240</sup> At 518-9.

<sup>241</sup> At 519.

<sup>242</sup> L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) at 57.

<sup>243</sup> E Adjin-Tettey 'Claims of Involuntary Parenthood: Why the Resistance?' In *Emerging Issues in Tort Law* (eds) E Chamberlain, JW Neyers & SGA Pitel 85-109 (2007) at 95-6.

<sup>244</sup> KL Gromelski 'You Have Made Your Bed - Now You Are Going to Pay for It: An Analysis of the Effects of Virginia's Mandatory Paternal Identification in AFDC Cases Will Have on the Rights of Unwed Fathers' (1999) 5 *William & Mary Journal of Women and the Law* 383 at 390.

<sup>245</sup> *Ibid.*

such, an involuntary father who may not want to form a relationship with his offspring remains legally obligated to financially support him or her.<sup>246</sup>

The fashionable perception is that men are to blame for all unintended pregnancies.<sup>247</sup> This view posits men as the accountable party in consensual sexual encounters and women as lacking sexual agency.<sup>248</sup> However, it is women who hold the cards when it comes to initiating sex in heterosexual relationships. Women dictate the timing and frequency of sexual relations as determined by menstruation and birth control. In this light, the understated exchanges which take place around sexual intimacy create the impression that sex constitutes a reward for men.<sup>249</sup> Accordingly, a woman's role in heterosexual relationships is underestimated. The power to determine when and where sex occurs coupled with an assumed control over contraceptive measures makes it easier for women to deceive men. In this light, the courts have failed to consider how notions of gender-based power operate within the sphere of sexual relationships.

#### *Men's reproductive rights*

The focal criticism directed at the strict liability approach is that the bodily integrity and reproductive rights of men are wholly ignored when a court places the best interests of the child first. In its simplest form, the recognition of reproductive choice envisages the liberty to avoid pregnancy.<sup>250</sup> Absent this freedom, one would incur parental rights and obligations heralded by pregnancy and child birth.<sup>251</sup> No one is morally or legally required to produce children. At most, it could be reasoned that all human beings owe a collective duty to bear children to prevent the extinction of the human race.<sup>252</sup> Therefore we have the basic reproductive choice as to whether

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<sup>246</sup> At 386.

It is submitted that the nuclear family unit is not the norm in South Africa. Nevertheless, a strict liability approach attempts to preserve the traditional family unit by economically tying the father to the mother and her child.

<sup>247</sup> As in instances of unplanned parenthood that do not include the rape of a woman by a man. A man who impregnates a woman by raping her is solely and unequivocally responsible for causing that pregnancy.

<sup>248</sup> London *v* A Critique of the Strict Liability Standard at 1972.

<sup>249</sup> At 1975.

<sup>250</sup> R. Scott *Choosing Between Possible Lives: Law and Ethics of Prenatal and Preimplantation Genetic Diagnosis* (2007) at 16.

<sup>251</sup> *Ibid.*

<sup>252</sup> At 13.

we reproduce, and if so, how many children we choose to bear.<sup>253</sup> In this light, reproduction is intimately linked to the right to self-determination as it shapes the way in which we conduct our lives and the values we choose to ascribe to.<sup>254</sup>

Reproductive autonomy is thus a central value from which flows the right to welcome or avoid procreation.<sup>255</sup> Accordingly, reproductive autonomy is at the heart of our personal morality and from which other rights are derived.<sup>256</sup> In this regard, reproductive autonomy is intrinsically tied to the body as the latter constitutes the vehicle through which reproduction takes place. The body is an essential element of identity.<sup>257</sup> It is socially-constructed and as much as it is determinative of selfhood, it is equally in need of protection.<sup>258</sup> The right to avoid procreation entails that a person retains sovereignty over his body. As such, a person's interest in his bodily integrity flows from and is underpinned by reproductive autonomy.<sup>259</sup>

The right to bodily freedom is enshrined under section 12(2) of the Constitution. The provision stipulates that everyone has a right to bodily integrity which encompasses the freedom to make reproductive choices<sup>260</sup> and includes the right to have security in one's body and control over one's body.<sup>261</sup> The rights enunciated in section 12(2) are directly linked to and supplemented by the rights to privacy<sup>262</sup> and human dignity.<sup>263</sup> In the seminal case of the *Christian Lawyers Association*,<sup>264</sup> the High Court confirmed that section 12(2) of the Constitution incorporates reproductive powers and thus confers the right to terminate a pregnancy

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<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> J Raz 'Right-based Moralities' in J Waldron (ed) *Theories of Rights* (1984) 182 at 187.

<sup>256</sup> At 188.

<sup>257</sup> London 'A Critique of the Strict Liability Standard' at 1977.

<sup>258</sup> Ibid.

<sup>259</sup> Raz 'Right-based Moralities' at 189.

It may, however, be argued that the right to freedom from the intrusion of one's bodily integrity does not necessarily mean a right to be free from the use of one's bodily products. There is a difference between a woman keeping a used condom and its contents and removing semen from a man's testes with a syringe whilst he is asleep. The former instance does not rest on the shield of bodily integrity because once sperm is ejaculated it is no longer attached to the body. As such, men who allege that their sperm has been used without their consent would chiefly rely on the right to reproductive decision-making. See G Cohen 'The Right Not To Be A Genetic Parent?' (2008) 81 *Southern California Law Review* 1115 at 1126-7.

<sup>260</sup> Constitution, section 12(2)(a).

<sup>261</sup> Section 12(2)(b).

<sup>262</sup> Section 14.

<sup>263</sup> Section 10.

<sup>264</sup> 1998 (11) BCLR 1434 (T).

on every woman.<sup>265</sup> The court further intimated that the constitutional right to terminate is supported by the mutually-constitutive rights to privacy, life, dignity, access to reproductive health care and by the right to not be subjected to unfair discrimination on the grounds of gender and sex.<sup>266</sup>

The right to terminate a pregnancy is given legislative effect under the Termination of Pregnancy Act 92 of 1996. Section 5(1) of the Act stipulates that a pregnant woman may terminate her pregnancy provided only that she furnishes informed consent. Section 5(2) confirms that the consent of the child's father is not necessary. Accordingly, a woman's right to reproductive decision-making has been recognised judicially and under statute thus demonstrating the extent to which women are specifically protected from the consequences of an unwanted pregnancy.

#### *Women's reproductive decision-making*

The women of contemporary society, unlike their earlier counterparts, have far greater power to shape their futures economically, socially and reproductively. The advancement of reproductive technology means that a woman may reproduce using donated sperm, store her ova with a fertility clinic for later use or opt for a variety of contraceptive measures to prevent pregnancy. A woman may exercise her reproductive rights at one of three stages, namely conception, during pregnancy and at birth. She has the option of using birth control or insisting on a condom at the time of sexual intercourse to avoid pregnancy. If she falls pregnant, she alone may opt to terminate the pregnancy. Alternatively, she may give the child up for adoption.<sup>267</sup> By contrast, a man's role in the reproduction process is limited to the time of conception where he has the option of utilising contraception or abstaining from sexual intercourse.

These extensive and varying options available to women, and not men, reflect the physical demands placed on a woman's body during pregnancy. A woman is expected to carry her offspring for nine months whilst enduring pain, physical constraints and bodily changes. To this end, the child's birth founds the identity of the mother as her physical role in birthing the child generates automatic parental

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<sup>265</sup> At 1441.

<sup>266</sup> At 1443.

<sup>267</sup> In accordance with the provisions of Chapter 15 of the Children's Act.

rights and responsibilities.<sup>268</sup> In effect, pregnancy places greater limits on a woman's liberty and mobility which justifies the disparate allocation of reproductive rights and gives her the right to unilaterally supersede the requests of her child's father. Therefore it is plausible to argue that a man has no conceivable right to dictate whether the woman he has impregnated remains pregnant or elects to terminate. Indeed to permit such a right would essentially grant men "dominium" over women's bodies.<sup>269</sup> However, the physical disparity between men and women during pregnancy should not justify the exclusion of men from reproductive decision-making prior to conception.

*A case in point*

The American case of *Dubay v. Wells and Attorney General*<sup>270</sup> aptly illustrates the tension between women's reproductive choices and men's frustration with child support laws. In this case, the appellant, an unwilling father, contested a child maintenance order.<sup>271</sup> The parties began a sexual relationship after the respondent had informed the appellant that she was infertile and generally used condoms as an additional measure to avoid pregnancy.<sup>272</sup> The respondent, who stated that he did not want to procreate, voluntarily engaged in sex in reliance on the appellant's assertions.<sup>273</sup> After the couple ended their relationship, the respondent notified the appellant that she was pregnant with his child.<sup>274</sup> She elected to carry the child to term while the respondent persistently clarified that he did not want to be a father.<sup>275</sup>

Shortly thereafter, the appellant instituted proceedings challenging the provisions of the Michigan Paternity Act 205 of 1956 which, he alleged, violated his constitutional right to equality.<sup>276</sup> Section 2 of the Act postulates that the "parents of a child born out of wedlock are liable for necessary support and education of the child" Section 7 of the Act is geared toward enforcing this duty by requiring a court

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<sup>268</sup> Jones "Inequality From Gender-Neutral Laws" at 443.

<sup>269</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 898.

<sup>270</sup> 506 F.3d 422 (6th Cir. 2007).

<sup>271</sup> *Id.* at 426.

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

<sup>276</sup> *Id.* at 427.

to enter an order declaring paternity and providing for the support of the child where paternity has been determined. Where the child's father fails to abide by the order, he may be subject to a garnishee order, have his driver's license revoked or jailed.<sup>277</sup> The respondent contended that the enforcement of the child support order deprived him of reproductive decision-making.<sup>278</sup> It was argued that, unlike his former partner, he did not have the option of terminating the pregnancy or placing the child up for adoption and was entrapped into the obligations of parenthood.<sup>279</sup>

The court rejected the respondent's arguments and held that the statute was not unconstitutional for it is directly related to a legitimate government purpose that is to ensure minors born to unmarried parents are sufficiently supported.<sup>280</sup> Hence the determination of paternity and the requirement that both parents provide support facilitates the realisation of this purpose.<sup>281</sup> In this regard, a father does not have the right to terminate his parental obligations because the duty to provide for the child rests with both parents. The court further opined that a woman's right to have an abortion is premised on her rights to privacy, mental health and physical integrity and not the right to relieve herself of child support liability.<sup>282</sup>

Given the inequitable and unfair results generated by the strict liability standard, a different approach to determining legal parenthood is sorely needed. After conception, reproductive decision-making largely rests with the child's mother. Regardless of the father's wishes, he will either have to accept a terminated pregnancy or support a child he didn't plan to have. To this end, a strict liability approach appears to normalise the deprivation of men's reproductive rights. Accordingly, the question to be answered is not whether awarding child support is in the best interests of the child. Instead the inquiry should focus on whether it is in the child's best interests to receive financial support from a man who was finagled or coerced into fatherhood.<sup>283</sup> On this view, the courts should adopt an approach which satisfies the objectives of sexual and procreative autonomy.<sup>284</sup>

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<sup>277</sup> Id. at 428.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Id. at 430-1.

<sup>281</sup> Id. at 431.

<sup>282</sup> Id. at 430.

<sup>283</sup> Johnson -Child Support Obligations at 530.

<sup>284</sup> Ibid.

### The underlying purpose of the strict liability approach

Despite its many shortcomings, the strict liability approach serves the important practical purpose of securing child support payments with relative ease. It creates certainty and ensures the preservation of judicial time and resources. In addition, it reflects society's interest in placing the burdens of parenthood on a child's biological parents.

#### *Recouping welfare*

The primary policies behind the adoption of a strict liability approach in maintenance proceedings are the best interests of the child principle and the need to preserve state funds.<sup>285</sup> In fact, it is this latter policy which distinguishes the United States from South Africa. In addition to the criticism levelled at the strict liability approach, the divergent welfare systems of South Africa and the United States provide an additional reason as to why South African courts may not, and should not, adopt the strict liability standard in the adjudication of child maintenance cases.

In the United States, a large portion of claims involving instances of involuntary paternity are instituted by the State itself.<sup>286</sup> Over the last few decades, America has witnessed a steady increase in poverty levels.<sup>287</sup> To counteract rising poverty, the government has amplified its spending on welfare programmes.<sup>288</sup> Welfare beneficiaries in the States may receive up to \$14 450 per year which equates to approximately R153 000 in South African Rands.<sup>289</sup> By contrast, an indigent parent in South Africa may claim a monthly child support grant of R320<sup>290</sup> provided she does not earn above R3 100 per month.<sup>291</sup> Thus there is a large discrepancy between the welfare regimes of South Africa and the States.

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<sup>285</sup> Gromelski "You have Made Your Bed" at 386.

<sup>286</sup> At 396.

<sup>287</sup> M Turner "The American Welfare State: How We Spend Nearly \$1 Trillion a Year Poverty is and Fails" (2012) 164 *Cato Institute* 1 at 2.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> This works out to R3 840 per year per child, which is substantially less than what an American child receives.

<sup>291</sup> "Child support grant" available at <http://www.gov.za/services/child-care-social-benefits/child-support-grant>, accessed on 28 April 2014.

The introduction of stricter legislative reforms in many US states means that a mother must identify the father of her child and assist in providing his personal details in order to receive welfare benefits.<sup>292</sup> As a result, government-controlled welfare agencies initiate paternity proceedings against the child's named father for the recovery of the costs of child welfare.<sup>293</sup> In this light, the US government has a greater interest in recouping the costs of child support than the South African government. In fact, the application of the best interests of the child standard proves immaterial in the American context. If a US court absolves an involuntary father of child support liability, the child will not be left economically destitute as the mother will simply seek welfare.<sup>294</sup> Indeed the child's right to receive financial maintenance from both parents is ceded to the state.<sup>295</sup>

### **Conclusion**

The unfair, and sometimes bizarre, rulings of the courts in the United States demonstrates that a blanket approach to adjudicating involuntary parenthood claims discounts the rights of the father by placing the interests of the child first. Despite the criticism directed toward the approach, the courts have expressed great reluctance to excuse biological fathers from paying child maintenance notwithstanding the wrongful circumstances surrounding the child's conception. While the best interests of an innocent child are important, it is nonsensical that the law effectively permits women to victimise, manipulate and coerce men in pursuit of their reproductive desires. Accordingly, South African courts should adopt a contextualised approach, which equally considers the rights and interests of all involved parties, when applying the best interests of the child standard in child support matters involving non-consensual parenthood.

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<sup>292</sup> Gromelski -You Have Made Your Bed at 390.

<sup>293</sup> At 386.

<sup>294</sup> Jones -Inequality From Gender-Neutral Laws at 449.

<sup>295</sup> Ibid.

As described above, child support grants are relatively small in South Africa. It is submitted that in some cases a grant will be far less than what an involuntary father will be able to pay according to his means. For guidance in those instances, refer to pages 77-80 which outline the approach a South African court should follow where a child's mother is not of sufficient means to support her child.

**CHAPTER FOUR**

**THE CURIOUS CASE OF ARTIFICIAL FERTILISATION AND THE  
REQUIREMENT OF CONSENT**

*—A surge of interest and direct involvement with artificial insemination has interposed complicated and presently unsolved legal, social, cultural, religious, emotional, and psychological problems.<sup>296</sup>*

The advancement of assisted reproductive technology has generated novel ways in which men and women may use their own or donated gametic material to have children. Assisted reproduction refers to an assortment of fertility procedures which allows an individual to conceive children without engaging in sexual intercourse. Reproductive technology has therefore removed the baby-making process from the bedroom to the laboratory. A single woman with fertility problems may wish to store her embryos for future use. Similarly, a man with a low sperm count may want to store his sperm samples before he becomes infertile. To this end, assisted reproduction is a useful option for an individual who wants a genetic child without having to conceive naturally. However, the idea that a woman may conceive a child with donor sperm is susceptible to misuse, particularly where the sperm is used outside of the clinical environment.

Under South African law, the procedures governing artificial fertilisation are regulated by Chapter 8 of the National Health Act 61 of 2003 in combination with the Regulations Relating to the Artificial Fertilisation of Persons<sup>297</sup> which are enacted under section 68(1)(l) of the National Health Act. The legal consequences of artificial fertilisation, however, are regulated in terms of the common law and section 40 of the Children's Act.

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<sup>296</sup> GP Smith —Through A Test Tube Darkly: Artificial Insemination And The Lawø (1969) 67 *Michigan Law Review* 127 at 128.

<sup>297</sup> GNR175 of GG 35099 of 2 March 2012.

### The law of artificial fertilisation

Artificial fertilisation is statutorily defined under section 1(1) of the Children's Act, and reiterated under the Regulations, as 'the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction' and includes the process of artificial insemination which refers to 'the placing of male gametes into the female reproductive tract by means other than copulation'.<sup>298</sup> The procedures to be followed in performing fertility treatments are strictly regulated under statute. The removal of gametes from a living person's body is prohibited under section 55 of the National Health Act unless the person from whom the gametic material originates furnishes written consent<sup>299</sup> and the removal is performed in accordance with prescribed conditions.<sup>300</sup> Section 56(1) of the Act further prohibits the use of gametic material unless it is used for a prescribed medical purpose, namely a fertility procedure.<sup>301</sup>

In terms of the Regulations Relating to the Artificial Fertilisation of Persons, a fertility treatment may only be performed at an 'authorised institution'<sup>302</sup> and by a 'competent person'<sup>303</sup> who is registered under the Health Professions Act 56 of 1974.<sup>304</sup> Similarly, the donation of gametes is restricted to use in artificial fertilisation by medical practitioners and fertility clinics.<sup>305</sup> A prerequisite for donation, however, is that the donor must provide informed consent before his gametes may be removed or withdrawn and used for the purposes of artificial

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<sup>298</sup> Reg 1.

<sup>299</sup> National Health Act, section 55(a).

<sup>300</sup> Section 55(b).

<sup>301</sup> Reg 3(1)(c) of the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes GNR 180 of GG 35099 of 2 March 2012.

<sup>302</sup> Regulations Re Artificial Fertilisation, reg 9(1).

The Regulations do not define 'authorised institution'. Section 1 read with section 54(1) of the National Health Act, however, indicates that an authorised institution is any institution designated by the Minister of Health as an authorised institution after notice in the *Gazette*. Guidance as to what constitutes an authorised institution may be found in reg 4 of the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes. Reg 4 provides a number of institutions and persons to whom tissues may be donated, which include medical practitioners, hospitals and tissue banks.

<sup>303</sup> Reg 9(2). In reg 1, a 'competent person' is defined as 'a medical practitioner specialising in gynaecology with training in reproductive medicine' or 'a medical scientist with training in reproductive biology and related laboratory procedures'.

<sup>304</sup> Reg 9(2) read with reg 1.

<sup>305</sup> Regulations Re General Control, reg 4.

fertilisation.<sup>306</sup> Informed consent will be deemed to have been provided if the donor is fully aware of and appreciates the techniques, consequences and risks associated with the process.<sup>307</sup> The Regulations further provide that the identity of the donor must remain confidential subject only to a court order or a law which stipulates otherwise.<sup>308</sup> Moreover, the ownership of the donated gametic material vests in the authorised institution which effects the artificial fertilisation.<sup>309</sup> Accordingly, a man may anonymously donate his sperm to a sperm bank or a licensed physician for use in artificial fertilisation.

*The exemption of sperm donors*

The legal consequences of conceiving a child through fertility treatments differ for the donor and recipient. Under section 40(2) of the Children's Act, any child born to a woman as a result of artificial insemination, with the exception of surrogate mothers, is regarded as the biological child of that woman. Where the spouse<sup>310</sup> of the birth mother has furnished his consent, any child born to his wife as a consequence of artificial fertilisation using donor sperm will also be considered his biological child.<sup>311</sup> Consent will be presumed to have been provided by both spouses until such time as the contrary is proved.<sup>312</sup> As for the sperm donor, section 40(3) extinguishes any parental rights and responsibilities that may arise between the donor and the child, unless he is married to the birth mother at the time artificial fertilisation is effected.<sup>313</sup> It follows that where a man provides his gametic material so that a woman may conceive a child through artificial processes, he will not acquire any parental rights or duties vis-à-vis the resultant child.

The discussion of the law relating to artificial fertilisation reveals two significant findings. Firstly, the provisions governing the processes pertaining to the

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<sup>306</sup> Regulations Re Artificial Fertilisation, reg 7(e). Reg 10(1)(c) further postulates that persons under 18 cannot donate their gametes for use in artificial fertilisation.

<sup>307</sup> A Nienaber –The regulation of informed consent to participation in clinical research by mentally ill persons in South Africa: An overview (2010) 16 *SAJP* 118 at 120.

<sup>308</sup> Regulations Re Artificial Fertilisation, reg 8(2)(d).

<sup>309</sup> Reg 18(1)(a)(i).

<sup>310</sup> Section 40(1) of the Children's Act uses the word "spouse" so as to include lesbians who use sperm donors. In *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC), the Constitutional Court held that section 5 of the Children's Status Act (now repealed) was unconstitutional on the grounds that it discriminated against same-sex couples.

<sup>311</sup> Children's Act, section 40(1).

<sup>312</sup> Section 40(1)(b). This reflects the common law position that consent is presumed to have been furnished by both parties.

<sup>313</sup> Section 40(3)(b).

use, removal and donation of sperm samples illustrate that the Legislature intended to prohibit the unauthorised use of gametic material and other bodily products. The intention is to thus protect persons from having their bodily fluids extracted or used without their permission. The essential requirement of informed consent demonstrates the necessity of ensuring that the donor is aware that his sperm may potentially render children. Secondly, the legal consequences which flow from the conception of a child through artificial fertilisation exempt a donor from parental responsibility. Therefore, as long as a man's sperm is used to impregnate a woman in a clinical environment, he will be statutorily protected from any paternity claims. The problem with this concept, however, is that it is completely at odds with the strict liability approach adopted in child maintenance claims. In addition, it is unclear whether a man whose sperm is purloined and used without his consent is similarly exempt from child support liability.

### **A legal chasm**

To demonstrate the efficacy of the legal shield afforded to sperm donors, it is helpful to consider three variations of one hypothetical scenario:

Chris, 36 and Angela, 35 have been married for eight years. Two years into their marriage, the couple discovers that Chris has severely low sperm count and that their chances of conceiving naturally are low. The couple elects to have *in vitro* fertilisation<sup>314</sup> using donor sperm. The procedure is successful and Angela gives birth to a healthy daughter nine months later.

According to the law, Angela is regarded as the child's biological mother. Chris is not genetically-related to the child. However, if he consented to the procedure he will be regarded in law as the child's biological father. Therefore he will have a legal duty to provide for the child. The sperm donor, on the other hand, will not acquire any parental rights or responsibilities in respect of his genetic child.

Alternatively, suppose that Chris and Angela are fertile but want to delay having children. The couple submit their gametic material to the fertility clinic to be fertilised together in the creation of embryos. These embryos are later stored for future use. Two years later, the couple separates and Chris files for divorce. Soon

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<sup>314</sup> That is the egg is fertilised with sperm outside of the body.

after their divorce is finalised, Angela elects to use the embryos to conceive a child. She fails to inform the clinic that Chris and she are divorced. The embryos are implanted and Angela gives birth nine months thereafter.

Under the law, the essential requirement of consent means that Chris will not be regarded as the child's legal father as he did not consent to the implantation. Since the couple are divorced, Angela cannot rely on section 40(3)(b) of the Children's Act because she and Chris were not married at the time the procedure took place. Accordingly, he will not be burdened with the legal obligations of parenthood despite the fact that he is the child's genetic father.

Lastly, presume instead that Chris and Angela find the costs of fertility treatment too high. As an alternative, Chris decides to purchase a DIY kit that allows him to freeze his sperm in the comfort of his own home. Not long after, the couple encounter marital problems and Chris moves out. He neglects to take his stored sperm samples. Angela discovers his kit and, in a bid to fall pregnant and salvage her marriage, she inseminates herself with Chris's sperm. She successfully falls pregnant and informs Chris that she is carrying their child. He refuses to have anything to do with Angela or the child.

Naturally, Chris would be outraged. Unfortunately for him, the law does not safeguard men in his position. Statutory protection is only afforded where artificial fertilisation occurs in a clinical setting and is performed by a medical practitioner. In this example, Angela inseminated herself in the comfort of her own home. It follows that Chris will be legally obligated to maintain his offspring.

### **Navigating the boundaries of artificial fertilisation**

In the absence of any available South African case law, a selection of American cases proves instructive in further delineating the distinction between artificial fertilisation performed by a physician and self-insemination performed without clinical assistance. In most US states, an unmarried man who donates his sperm for use in artificial fertilisation is not regarded as the resultant child's legal or natural father. The Uniform Parentage Act 2000, which is a federal statute and applies to all states that have enacted it, postulates that "[t]he donor of semen

provided to a licensed physician [or] sperm bank for use in artificial insemination<sup>315</sup> is treated in law as if he were not the natural father of a child thereby conceived, unless otherwise agreed to in writing signed by the donor and the woman prior to the conception of the child.<sup>315</sup>

In *Jhordan C. v. Mary K.*,<sup>316</sup> a sperm donor had directly delivered sperm to the child's mother who inseminated herself at home without the assistance of a medical practitioner. The sperm donor was held to be the father of the subsequent offspring and therefore liable for child maintenance on the basis that the procedure was not conducted within a medical setting.<sup>317</sup> Similarly, in *C.O. v. W.S.*,<sup>318</sup> the plaintiff provided the defendant with a sample of his sperm in order to conceive a child.<sup>319</sup> The plaintiff argued that their arrangement constituted artificial insemination and that he was exempt from paying child support.<sup>320</sup> The court dismissed the plaintiff's claim on the grounds that the legal requirements for a case of artificial insemination were not complied with.<sup>321</sup>

In *Jo D. v. Ronnie C.*,<sup>322</sup> the mother of triplets born as a consequence of artificial insemination instituted proceedings for child support against a known sperm donor who had agreed to deposit his sperm with a sperm bank.<sup>323</sup> The court held that their joint arrangement, which was undertaken to ensure the mother would know the identity of her sperm donor, fell within the ambit of the statute and therefore nullified the right to claim child maintenance from the donor.<sup>324</sup> It followed that any informal agreement between the parties acknowledging a mutual recognition of biological parenthood could not alter the application of the statute.<sup>325</sup>

Conversely, the parties in *E.E. v. O.M.G.R.*,<sup>326</sup> had attempted to enter into a private contract terminating the donor's rights after the woman had successfully

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<sup>315</sup> Uniform Parentage Act, section 7613(b).

<sup>316</sup> 179 Cal. App. 3d 386 (1986).

<sup>317</sup> *Id.* at 397.

<sup>318</sup> 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994).

<sup>319</sup> *Id.* at 10.

<sup>320</sup> *Id.* at 11.

<sup>321</sup> *Id.* at 12.

<sup>322</sup> B229344, California Court of Appeals, Second Appellate District, March 19 2012.

<sup>323</sup> *Id.* at 2.

<sup>324</sup> *Id.* at 9

<sup>325</sup> *Ibid.*

<sup>326</sup> 420. N.J. Super. 283 (Ch. Div. 2011).

inseminated herself with his sperm.<sup>327</sup> Sandson J rejected the agreement on the grounds that it fell beyond the ambit of the protection afforded by the Uniform Parentage Act because insemination took place outside of the clinical environment.<sup>328</sup> The unhappy donor was thus ordered to pay child support.<sup>329</sup> The Supreme Court of Indiana in *Straub v. B.M.T. by Todd*,<sup>330</sup> equally held that an agreement purporting to exempt a child's father from child support obligations was void.<sup>331</sup> The court reiterated that the duty to maintain a child cannot be avoided where conception occurs in a non-medical setting.<sup>332</sup>

The outcomes of the aforementioned cases clearly illustrate the extent to which sperm donors are statutorily insulated from paternity claims where the child was conceived through assisted reproduction. As such, these decisions highlight two important features of the donor sperm arrangement. Firstly, a sperm donor will be absolved from child support liability provided that artificial fertilisation is performed at a hospital, doctor's practices or fertility clinic. Secondly, a sperm donor may elect to become the child's legal father provided he consents in writing before the procedure is performed. There is, however, uncertainty as to whether this would be the case in the South African context.

### *Self-regulation*

Consider the example of a single, desperate woman who cannot afford the cost of fertility treatments. Nothing precludes her from seeking a gratuitous donation of sperm from a known man and inseminating herself. She may even consult an attorney to draft a water-tight agreement purporting to extinguish the donor's parental rights and responsibilities. However, it would appear that such an arrangement falls outside the scope of statutory protection. The Children's Act broadly defines 'artificial fertilisation' as a process involving unnatural means, which effectively means anything other than copulation.<sup>333</sup> The Regulations Relating to the Artificial Fertilisation of Persons, however, provide more technical guidelines. There 'artificial fertilisation' and 'artificial insemination' are distinguished; the former

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<sup>327</sup> Id. at 284.

<sup>328</sup> Id. at 291.

<sup>329</sup> Id. at 289.

<sup>330</sup> 645 N.E.2d 597 (1994).

<sup>331</sup> Id. at 600.

<sup>332</sup> Id. at 601.

<sup>333</sup> Children's Act, section 1(1).

encompassing the latter as one of the means through which sperm is inserted into a female's internal reproductive system.<sup>334</sup> Thus "artificial insemination" is relatively narrow and the question whether it includes self-insemination is unclear.

The Regulations stipulate that a fertility treatment may only be performed by a competent person<sup>335</sup> which suggests that any procedure not involving a medical practitioner will have no bearing on the donor's parental duties. In addition, an agreement purporting to terminate parental duties may not be legally enforceable, particularly if the woman is unmarried and requires child maintenance. Given the courts' attitude toward enforcing orders that give effect to the best interests of the child, it is possible that any arrangement involving self-insemination will fall beyond the sphere of statutory protection.

### **Conclusion**

The principle that a child is entitled to financial support from both parents is not applicable within the context of artificial fertilisation. The law views a child born as a result of artificial fertilisation to an unmarried mother as having only one parent.<sup>336</sup> The requirement of consent within the arena of assisted reproduction is two-fold; it encourages sperm donation and affirmatively protects donors from maintenance claims and recipients from paternity claims. Under the common law and section 40(1)(a) of the Children's Act, the husband of a woman who undergoes fertility treatment will not be responsible for any children born as a result of the procedure unless he furnishes consent. For men who are deprived of their sperm through sexual assault or other deceitful means, no such protection exists. In this light, the law relating to artificial fertilisation poses problems for the strict liability approach. By statutorily shielding sperm donors but wholly denying protection to those men whose sperm is harvested and inseminated without their consent, the law has failed to consider the non-consensual use of sperm in a non-medical environment.

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<sup>334</sup> Regulations Re Artificial Fertilisation, reg 1.

<sup>335</sup> Reg 9(2).

<sup>336</sup> Children's Act, section 40(2).

**CHAPTER FIVE**

**SEVERING THE BOND: SEPARATING BIOLOGY FROM LEGAL PARENTHOOD**

*—We treat another as a means if we treat his person in a way that he did not consent to.*<sup>337</sup>

The courts in the United States have unequivocally clarified that a man who was forced into fatherhood cannot escape the obligation to provide child support. Indeed the duty to furnish child maintenance is solely based on the financial means of the child's parents and not the personal circumstances or arrangements surrounding the child's conception. The adoption of a strict liability standard has consequently trivialised male victimisation and unsurprisingly generated inequitable results sparking an inquiry as to whether men have any right to avoid involuntary paternity. In spite of growing criticism, American courts have persistently stated that the wrongful act which resulted in pregnancy is irrelevant and must be separated from its consequence, namely an innocent child.<sup>338</sup> In this light, legal paternity has been interpreted as inseparable from biological parenthood. Unfortunately, the courts have failed to consider the notion that parenthood is not a unitary concept and that fatherhood comprises genetic and causal elements, both of which should be present to ground child support liability.<sup>339</sup> If South African courts are presented with matters involving involuntary fatherhood, it is this neglected consideration which must be explored and applied.

**The importance of establishing legal paternity**

The determination of legal parenthood is essential for it grounds social, psychological and financial links between a parent and his child.<sup>340</sup> Legal paternity

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<sup>337</sup> G Cohen *—The Right Not To Be A Genetic Parent?* (2008) 81 *Southern California Law Review* 1115 at 1149.

<sup>338</sup> *State ex. rel. Hermesmann v. Seyer* 847 P.2d 1273 (Kan. 1993) at 1279; *San Luis Obispo County v. Nathaniel J.* 50 Cal. App. 4th 842 (1996) at 844-5; *S.F. v. Alabama ex rel. T.M.* 695 so.2d 1186 (Ala. Civ. App. 1996) at 1189.

<sup>339</sup> Hubin *—Daddy Dilemmas* at 61-2.

<sup>340</sup> At 31.

enables a father to form social and emotional bonds with his offspring which promotes the psychological well-being of the child and adds purpose to the father's life. Accordingly, research has shown that the presence of a caring and supportive father figure is an important factor in a child's social and psychological development.<sup>341</sup> The establishment of genetic parenthood is essential to uncovering a child's medical history and his or her susceptibility to health problems and mental disorders.<sup>342</sup> Indeed children whose biological fathers cannot be identified or are not known are at a medical disadvantage, particularly if they require organ transplant surgery or tissue donation.

Crucially, the determination of paternity establishes a child's right to receive maintenance which often constitutes the difference between economic struggle and financial security.<sup>343</sup> In this regard, positively identifying a father who shares the financial responsibility to maintain the child alleviates the demand for social welfare.<sup>344</sup> Thus the assignment of parental rights and responsibilities is not simply a legal exercise, it is a vehicle through which the assignment of relational roles is attributed. In turn, these fundamental interpersonal roles inform our ideas as to the meaning of fatherhood in contemporary society and encourage the efficient establishment of paternity.

### **The problem with a biological conception of parenthood**

The established approach to the adjudication of paternity suits and child support matters in the United States has predictably generated illogical outcomes and undermined the purpose of legal parenthood. The determination of non-marital paternity and the consequent assignment of parental rights and duties is reduced to one basic question: Which man's sperm impregnated the mother of the child?<sup>345</sup> The law's current approach to ascertaining legal parenthood means that this enquiry is easily resolved through the use of a DNA test which establishes paternity with an extremely high degree of certainty.<sup>346</sup> As a consequence, the conditions surrounding the child's conception are wholly ignored in favour of confirming a genetic link

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<sup>341</sup> At 41.

<sup>342</sup> At 74.

<sup>343</sup> Jones 'Inequality From Gender-Neutral Laws' at 451.

<sup>344</sup> Hubin 'Daddy Dilemmas' at 45.

<sup>345</sup> Hubin 'Fractured Fatherhood' at 78.

<sup>346</sup> Ibid.

between the child and a particular man. The courts have therefore sanctioned the establishment of legal parenthood in cases involving sexual assault, statutory rape and the misappropriation of sperm.

The outlook of the courts in these decisions is that a biological relationship is adequate to establish legal paternity.<sup>347</sup> Indeed the courts have solely relied upon a biological understanding of parenthood, which posits that a man is legally and morally obligated to maintain his genetic offspring irrespective of extenuating factors, to impose legal responsibility on involuntary fathers.<sup>348</sup> The fact that a man is a particular child's genetic parent is convincing evidence that he participated in an act which subsequently resulted in pregnancy.<sup>349</sup> However, as has been demonstrated in the preceding chapters, a sexual act which results in the conception of a child is not always consensual. It follows that the establishment of genetic parenthood should not necessarily ground child support liability where there is an absence of consent to paternity.

### **Archetypal fatherhood**

The current approach to the adjudication of paternity claims and child support matters neglects to consider the idea that fatherhood is a splintered concept constitutive of various factors which intersect and influence each other.<sup>350</sup> Archetypal parenthood is inclusive of both empirical and normative elements which in turn consist of a range of factors which shape our understanding of fatherhood.<sup>351</sup> What follows is a brief discussion of these various elements of paternity.

An empirical understanding of paternity dictates that biological factors and social features combine to create the stereotypical father.<sup>352</sup> A biological relationship between a father and his offspring is based on two primary factors. Firstly, the father is the direct genetic predecessor of that child in that his sperm and the egg of the child's mother were fertilised through a particular act resulting in pregnancy and the subsequent birth of that child. Secondly, the biological relationship is an unswerving

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<sup>347</sup> Hubin "Daddy Dilemmas" at 55.

<sup>348</sup> At 56.

<sup>349</sup> At 76.

<sup>350</sup> At 47.

<sup>351</sup> Ibid.

<sup>352</sup> Hubin "Fractured Fatherhood" at 81.

product of the father's causal agency.<sup>353</sup> The birth of a child is indirectly impacted by a multitude of factors including the mother's overall health and dietary choices, the medical practitioners who deliver the child and the conditions under which the child is delivered.<sup>354</sup> A genetic father, however, fulfils a greater and fairly direct role in the child's conception.<sup>355</sup> Crucially, the father's causal role assumes that he engaged in sexual intercourse voluntarily or consented to the use of his sperm for reproductive purposes. In other words, he should have reasonably known that his actions could result in procreation.<sup>356</sup>

The biological relationship between a father and his child is typically the basis from which a social and psychological bond may commence. From a descriptive perspective, fatherhood is constitutive of psychological bonding between a man and his offspring which fosters shared love, care and appreciation.<sup>357</sup> The archetypal father provides sufficient emotional and financial support which ensures that the child grows up in a nurtured environment that fosters healthy psychological development, and where his or her material needs are adequately met. It is important to note, however, that the emotional and psychological bond between a father and child may develop irrespective of a biological connection.<sup>358</sup>

The normative elements of paternity are intrinsically-linked to the empirical features of parenthood.<sup>359</sup> According to a normative understanding of paternity, a father is invested with parental rights and responsibilities.<sup>360</sup> These parental rights and responsibilities originate in the common law but may also be statutorily enshrined, the clearest example of which is the Children's Act. Under this statute, a parent has a legal duty to financially maintain his child and to provide care for that child.<sup>361</sup> The right to parent a child is constitutive of more specific rights, including the right to raise the child according to a particular culture or religion, the right to discipline and morally instruct the child and the right to conclude decisions regarding

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<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> Hubin 'Daddy Dilemmas' at 65.

<sup>357</sup> Hubin 'Fractured Fatherhood' at 82.

<sup>358</sup> For example, a stepfather may take up the role as a social father to a child whose biological father has died, is absent or has remarried.

<sup>359</sup> At 82.

<sup>360</sup> Ibid.

<sup>361</sup> Children's Act, section 18(2).

the child's medical treatment, extra-curricular activities and possible earnings.<sup>362</sup> Similarly, statutorily-embodied parental obligations include the duty to shelter one's child from emotional and physical abuse and the responsibility to not expose one's child to television, radio or print media that is detrimental to his or her psychological well-being.

*The social father*

The assignment of parental rights and duties, and in particular, the obligation to furnish child maintenance is essentially dependent upon the presence of empirical elements of paternity.<sup>363</sup> In this regard, the responsibilities of fatherhood are attributed to a particular man in two instances. The most common basis upon which legal parenthood is assigned is where a biological connection has been established between a particular man and his child. An empirical understanding of parenthood, however, posits that fatherhood is constitutive of a biological link and a social relationship between a father and his child.<sup>364</sup> For this reason, a man who is genetically unrelated to a child may nevertheless act as the child's father by fulfilling the social role of a father. In the South African context, it is relatively common for the biological father to be absent.<sup>365</sup> Sometimes a man not related to the child may live with the child's mother and take on parenting responsibilities by buying groceries, providing lifts to social functions or attending the child's soccer matches.

The notion of a social father is aptly demonstrated by two novel American cases. In an uncited case,<sup>366</sup> a man was awarded primary custody of his girlfriend's minor son despite having no genetic connection to the child.<sup>367</sup> The court stated that the child had developed a close and special bond with the man he identified as his father and that separating the two would result in him suffering grave psychological trauma.<sup>368</sup> Similarly, in *Michael H. v Gerald D.*,<sup>369</sup> the US Supreme Court refused to

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<sup>362</sup> Hubin "Fractured Fatherhood" at 82.

<sup>363</sup> Ibid.

<sup>364</sup> At 81-2.

<sup>365</sup> Richter & Morrell *Baba: Men and Fatherhood in South Africa* at 126.

<sup>366</sup> H Chu "Man Receives Custody of Child, 4, He Didn't Father: Family law: Custody struggle may set precedent in state. Boy's most likely biological father consents to suspension of his rights" *Los Angeles Times* 28 January 1992 at 1, available at [http://articles.latimes.com/1992-01-28/local/me-818\\_1\\_biological-father](http://articles.latimes.com/1992-01-28/local/me-818_1_biological-father), accessed on 1 September 2014.

<sup>367</sup> At 1.

<sup>368</sup> Ibid.

Under section 23(1) of the Children's Act, an "interested person" may apply to the High Court for an order granting him or her contact with, or care of, the child. According to section 23(2), the court

recognise the biological father of a child conceived through an adulterous relationship as the child's legal father.<sup>370</sup> Instead the court elected to uphold the marital presumption of paternity as the child had established an excellent relationship with the mother's husband.<sup>371</sup> The court intimated that if it were to award the child's biological father legal rights, it would disrupt the marital family and emotionally damage the child.<sup>372</sup>

The concept of social parenting, highlighted in the aforementioned cases, illustrates that legal parenthood may be assigned where a non-genetic father voluntarily acts as the child's caregiver.<sup>373</sup> It follows that these examples of non-genetic parenthood reveal an obvious tension between biological parentage and the determination of legal paternity. Accordingly, the assignment of parental rights and duties is not always reliant on the existence of a genetic link between a parent and his child, and nor should it be.<sup>374</sup>

### **The misapplication of biological paternity**

Earlier in the Chapter it was stated that the biological element of paternity consists of two components, namely the genetic link between a man and his offspring and the causal role played by that man in conceiving the child. The role of a genetic father is thus factually separate from the role of a procreator.<sup>375</sup> However, the implementation of a strict liability standard in the adjudication of child maintenance matters conveniently ignores this distinction. In the plethora of American cases involving sexual assault, embezzled sperm and misrepresentation, involuntary fathers have been declared legally responsible for child support payments solely on the basis

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hearing the matter must consider the child's best interests, the applicant's existing relationship with the child, the commitment shown by the applicant, whether the applicant has contributed to the child's living expenses and any other relevant fact. Alternatively, a person may make application to become the child's guardian under section 24(1) which would necessitate a consideration of the child's best interests, the relationship between the child and applicant and any other factor deemed relevant as per section 24(2).

<sup>369</sup> 491 U.S. 110 (1989).

<sup>370</sup> *Id.* at 128-9.

<sup>371</sup> *Id.* at 123-4.

<sup>372</sup> *Ibid.*

<sup>373</sup> A more common example of non-genetic parenthood is adoption. An adoptive parent shares no biological relationship with his child but is legally regarded as having all the rights and duties of a natural parent. To this end, the child is treated as if he or she is the blood child of the adoptive parent(s) thus severing the relationship with the birth parents.

<sup>374</sup> It is accepted that these cases did not involve a claim for maintenance. However, the point remains that the determination of paternity is not always a matter of who the genetic father is.

<sup>375</sup> Hubin "Fractured Fatherhood" at 86.

of the genetic component of biological paternity.<sup>376</sup> The courts have repeatedly stipulated that the child in these circumstances is an innocent party who has a legal right to receive maintenance from both parents.<sup>377</sup> It is not denied that a minor child is entitled to financial support from his or her parents. However, the problem with the courts' line of reasoning is that it imposes child support liability on a genetic father simply because he is biologically related to the child in question. This approach therefore fails to ruminates the possibility that a biological relationship may be separated from legal parenthood in instances in which the causal component of biological paternity is missing.

To illustrate the crucial distinction between a genetic connection and a causal, procreative relationship, it is perhaps useful to consider several hypothetical scenarios in which a biological connection is present and human agency absent.

*Hypothetical scenario 1*

Rhonda, 32, is a single woman living in a townhouse complex who desperately wishes to fall pregnant. Her neighbour, Carlos, 29, is handsome, athletic and genuine and possesses all the characteristics she is looking for in a sperm donor. Carlos is happily engaged and enjoys a healthy sex life. One evening, Rhonda notices Carlos, wrapped in a towel, depositing a large black bag of refuse in the complex bin. After Carlos returns to his townhouse, she quickly rummages through the contents of his waste and salvages a newly-used condom. She returns to her abode and inseminates herself with the contents of his condom using a turkey baster. Nine months later, Rhonda gives birth to Carlos's daughter.

In the hypothetical instance described above, Carlos is the biological father of Rhonda's child. He therefore fulfils the genetic requirement of biological paternity. However, Carlos played no active role in the child's conception. There was no physical contact between the parties and the discarded sperm is a consequence of sexual intercourse between Carlos and his fiancé. A pregnancy would never have resulted but for Rhonda's perverse actions in sifting through his garbage and inseminating herself with the contents of his discarded condom. Considering the

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<sup>376</sup> At 77-8.

<sup>377</sup> *Ibid.*

circumstances, it would be grossly unfair to require Carlos to financially support a child he did not actively conceive.

*Hypothetical scenario 2*

Candice and Tyla, both 18, have recently completed their final Matric examinations. To celebrate, Candice suggests that they enjoy a night out on the town with their boyfriends. Jeff, 20, is Candice's partner of three years. Tyla has recently begun a relationship with Michael, 19. After dancing, Jeff proposes that the four of them return to his apartment for drinks. When the couples arrive at Jeff's apartment, they immediately indulge in alcohol and it is not long before Candice and Jeff retreat to the latter's bedroom. The couple have previously engaged in sexual intercourse. Candice is on birth control and Jeff uses condoms as an additional layer of protection.

After sex, the couple return to the lounge where they find Tyla and Michael kissing on a sofa. Candice and Jeff decide to go for a swim in the apartment complex's pool. Tyla and Michael, alone in the apartment, decide to have sex. Unfortunately, Michael doesn't have a condom and Tyla isn't using birth control. The couple rummage through Jeff's cupboards in search of contraception but to no avail. Michael notices Jeff's discarded condom in a waste paper basket. He reluctantly turns it inside out and engages in sexual intercourse with Tyla who is aware that the condom was previously used. A month later, Tyla discovers that she is pregnant. After the child is born, a paternity test proves that Jeff is the child's biological father.

In this scenario, Jeff is the genetic forbearer of Tyla's child. However, he and Tyla did not participate in any form of sexual activity. In fact, Jeff is in a committed relationship with Candice and uses adequate contraception to avoid pregnancy. Michael and Tyla therefore acted irresponsibly by relying on a used condom they had no right to take. Furthermore, Jeff was not given the opportunity to intercept Michael from using his discarded condom. He played no causal role in the conception of the child and it would prove grossly unfair to impose child support liability on a man in his position.

*Hypothetical scenario 3*

Eric, 27, a handsome athlete, is admitted to a private hospital for a knee operation. The procedure is successful and he spends one night in recovery in the post-surgery unit. Jane, 39, is an experienced nurse who often performs her shifts in the unit. She recently lost her seven-year-old son in a car accident. She would like to have another child but is single and suffers from low fertility. Jane visits Eric in his private room. To Jane's delight, he is sound asleep. As a measure of precaution, she quickly places a chloroform-laced cloth over Eric's nose to ensure that he remains asleep. She administers local anaesthetic and then proceeds to perform testicular sperm extraction by removing a small amount of tissue from Eric's testicle. She quickly deposits the tissue with a lab technician, Sarah, at a fertility clinic within close proximity of the hospital. Sarah, 28, is Jane's younger cousin and has agreed to help her. Sarah fertilises Jane's eggs *in vitro* with Eric's sperm and implants the zygote in Jane's uterus. Nine months later, Jane gives birth to a son.

In this example, Eric is the biological father of Jane's son. Despite the presence of a genetic relationship between father and child, Eric did not participate in any physical act whatsoever and is only connected to Jane insofar that he was treated at the hospital where she is employed. He was physically violated while asleep and simultaneously became a genetic parent without active participation in the process of conception. Notwithstanding the criminal and professional repercussions of Jane and Sydney's behaviour, the complete absence of Eric's causal agency in respect of the child's conception should absolve him of the parental responsibility.

The hypothetical instances outlined above contain two mutually supportive factors. In every example there was no physical contact of a sexual nature between the particular child's biological parents. Secondly, as a consequence of a third party's actions, a genetic relationship was nevertheless formed despite a lack of human agency on the part of each biological father. Accordingly, the presence of the genetic component of biological parenthood is accompanied by an absence of the causative element in every hypothetical scenario. As highlighted above, the possibility of ordering any one of the men in these examples to financially support his biological child would prove illogical and incalculably unfair. However, the established use of a genetic link as the singular determinant of legal paternity in child support matters

would yield this very result. In other words, it would not matter how far removed a man is from the process of conception; he will be liable for child maintenance insofar as a paternity test proves that he is the genetic father. Thus the potential for absurd and inequitable outcomes should dissuade South African courts from adopting a strict liability standard in the adjudication of maintenance claims involving the deceitful attribution of paternity. As an alternative, the law should carefully consider the element of causal agency in establishing legal paternity.

### **Consent as causal agency**

The failure to consider the genetic relationship in conjunction with human agency in the assignment of child support obligations is logically unsound. However, it is possible that the courts in the United States have avoided dealing with this conceptual distinction for the sake of convenience. Although many claims involving involuntary parenthood have emerged throughout that jurisdiction, cases which exclusively concern male sexual assault and pilfered sperm are relatively infrequent within the context of child support claims.<sup>378</sup> A second possible reason for the failure to draw a distinction is the very close connection between a genetic relationship and active procreation. Pregnancy is a natural consequence of sexual intercourse, and most children are conceived naturally. On this basis, it may be argued that a child is presumed to have been conceived through sexual intercourse between two willing adults. However, as has been shown, this is not always the case. In fact, what ultimately separates a genetic forbearer from a genetic procreator, that is a man who is both the biological father and has actively participated in conceiving the child, is the absence of consent.

When a man and woman engage in consensual sex, both parties tacitly accept the risk of pregnancy. Accordingly, a person who voluntarily participates in an activity which he knows or reasonably should know may yield a pregnancy will be held legally responsible for the consequences of his actions that is the imposition of child support liability.<sup>379</sup> In other words, a man who partakes in consensual sex has a legal obligation to care for the child he has causally produced. On the other hand, where a couple does not voluntarily engage in sexual intercourse, a pregnancy cannot

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<sup>378</sup> R Collier & S Sheldon *Fragmenting Fatherhood: A Socio-Legal Study* (2008) at 42.

<sup>379</sup> Hubin "Daddy Dilemmas" at 65.

naturally occur without external interference.<sup>380</sup> Thus where a man becomes a genetic parent without voluntarily partaking in sex, it is the child's mother and or a third party whose actions are causally responsible for the child's conception. In this light, the absence of consensual sex means the biological link between the involuntary father and his child is essentially an artificial construction. The crucial question for determination, therefore, is whether an absence of consent to paternity can absolve an involuntary father of the civil obligation to provide child maintenance.

### **Delineating the boundaries of application**

The theory of causal agency within the context of legal paternity is formulated to protect non-consenting fathers. However, the nature of causal agency means that not all men who believe that they were sexually conned into parenthood can escape the obligation to provide child maintenance. Indeed a South African court may be hesitant to absolve every man who becomes a father unwillingly from paying child support. To this end, it is imperative to delineate the limited circumstances in which an involuntary father may be relieved of parental responsibility.

Predictably, this necessitates a careful consideration of the three broad categories used in this dissertation to compartmentalise the instances of involuntary fatherhood, namely sexual assault, the non-consensual use of sperm and natural conception through deceit.<sup>381</sup> In each instance, the unwilling father has been deprived of the choice to become a genetic parent. For example, where a man is sexually assaulted and used as a vehicle for pregnancy, his absence of consent vitiates his causal agency. Similarly, where a man receives oral sex or manual stimulation, he only consents to the sexual act in question. He does not, however, exercise causal agency where his discarded sperm is harvested and inseminated without his consent.

Accordingly, the men in these scenarios are essentially removed from the process of conception because they have not consented to sex. Conversely, a man who sleeps with his partner after he is duped into believing that she cannot fall pregnant because she is infertile or using birth control, still consents to intercourse.

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<sup>380</sup> In this regard, 'naturally' refers to the instance where a child is conceived through vaginal intercourse.

<sup>381</sup> Refer to Chapter One for a refresher. See pages 1-2.

Notwithstanding any misrepresentation, the risk of pregnancy persists even where birth control is used as contraceptive measures drastically reduce the possibility of pregnancy but do not eliminate it.<sup>382</sup> As for the infertility claim, it is a personal decision as to whether a man chooses to believe his partner's assertions of the consequences of which must be accepted.

The argument that a man who produces children through consensual sexual intercourse should remain liable for child support despite his partner's dishonesty is an attempt to hold men accountable for their sexual choices. More than that, however, it supports the need to distinguish deceitful sex from sexual victimisation.<sup>383</sup> Unsurprisingly, the strict liability standard does not make this distinction. In fact, the courts in the United States have consistently refused to recognise the absence of consent as a valid defence to paying child support in all instances where paternity is involuntary.<sup>384</sup> Consequently, the man who is drugged and raped is deemed equally responsible for his child's conception as a man who agreed to sex in reliance on the mistaken belief that his girlfriend was taking the Pill. This blanket approach thus demonstrates the problematic nature of imposing parental obligations on a genetic father who did not function as an agent in conceiving a particular child.

Indeed the failure to consider the distinction between physical violation and misrepresentation not only proves illogical, but suggests that the law is not designed to protect men from sexual victimisation.<sup>385</sup> The failure to recognise the absence of consent to paternity as affecting the assignment of parental obligations implies that a man does not have the right to avoid becoming a genetic parent. It further suggests that women may freely use men as the means to achieve their reproductive objectives.<sup>386</sup> For these reasons, it is imperative that the law affords a measure of protection to men who are sexually victimised and forced into fatherhood. To achieve this, men who consent to sex assume the risk of reproduction and cannot be shielded from the consequent responsibilities of parenthood. Therefore, by

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<sup>382</sup> C Ammer *The Encyclopedia of Women's Health* 6ed (2009) at 122.

Furthermore, it may be argued that notwithstanding the use of birth control, a man has the choice to use a condom as an extra layer of protection which will simultaneously guard against STD infection.

<sup>383</sup> In this regard, "sexual victimisation" refers to sexual assault.

<sup>384</sup> Johnson "Child Support Obligations" at 516.

<sup>385</sup> London "A Critique of the Strict Liability Standard" at 1962.

<sup>386</sup> Cohen "The Right Not To Be A Genetic Parent?" at 1149.

disallowing claims premised on natural conception through deceit, a South African court will simultaneously define the boundaries of viable claims while retaining a measure of austerity in the adjudication of child support matters.

### **Potential legal mechanisms**

It has been shown that the singular reliance on the genetic element of biological paternity is an inapposite approach to grounding child support liability in perplex paternity matters. Accordingly, a different method is sorely required in adjudicating claims implicating sexual assault and the non-consensual use of sperm.<sup>387</sup> The South African court system has the luxury of categorising claims of this nature as unexplored territory. However, it is purely a question of time before cases of involuntary fatherhood are heard. It follows that the time is ripe for the introduction of alternative mechanisms to assist the courts in adjudicating claims involving the deceitful attribution of paternity. One suggestion is to amend the Maintenance Act to include an exemption clause that relieves men of the legal obligation of furnishing child support if a child was conceived as a result of a sexual offence for which the mother was convicted. A second possibility is to develop a set of guidelines a court may employ to decide whether the conditions are such that an involuntary father should be absolved from paying child maintenance.

#### *Legislative amendment*

The law relating to the determination of paternity was outlined in detail in Chapter Two. To recap, the determination of paternity is assisted by the marital presumption of paternity which originates in the common law or section 36 of the Children's Act which regulates the proof of paternity of children born out of wedlock. The establishment of legal paternity generates binding parental rights and responsibilities. To this end, section 18(2) outlines the basic rights and obligations of parenthood, including the duty to contribute to financially supporting the child.<sup>388</sup>

As alluded to in Chapter Two, the Children's Act neglects to provide for the scenario in which paternity is deceitfully imposed. Indeed the Legislature's failure to contemplate this possibility means that a biological link between a particular man

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<sup>387</sup> As provided above, the instance of natural conception through deceit that is where pregnancy results from consensual sex involving an act of deceit, does not apply to this discussion.

<sup>388</sup> Children's Act, section 18(2)(d).

and child is regarded as a sufficient determinant of legal paternity. In this regard, the duty to maintain the child flows automatically from the positive outcome of a DNA test. The most suitable way to rectify this impasse is to address the legislation which governs the enforcement of child support. For this reason, it is suggested that the Maintenance Act should be amended to create an exception to maintenance liability in circumscribed instances.

Interestingly, the Children's Act implicitly recognises that biology may be separated from legal paternity in limited circumstances. Section 26 of the Act stipulates that an unmarried man may apply to be identified as his biological child's father on the Birth Registration provided that the child's mother consents.<sup>389</sup> In the event that she does not consent to this amendment,<sup>390</sup> is suffering from a mental illness,<sup>391</sup> cannot be found<sup>392</sup> or has died,<sup>393</sup> the father may apply to court for an order confirming paternity. The section, however, does not apply where the child was conceived as a result of the rape of the child's mother.<sup>394</sup> In this regard, the Act recognises that the circumstances surrounding a child's conception may affect the assignment of parental rights and responsibilities. A man who produces a child through rape is a genetic procreator; he caused a pregnancy through non-consensual sex and arguably has an obligation to financially support his progeny. However, the law does not recognise rape as a sufficient basis for acquiring the rights and duties of parenthood. In this regard, the experience of the mother coupled with the manner in which the child was conceived rightly deprives the rapist of a relationship with his offspring.

Given the legal ramifications which flow from section 26 of the Children's Act, it is clear that there is room for the statutory regulation of other instances in which it is appropriate to sever genetic parenthood from legal parenthood. To this end, it is suggested that the Maintenance Act incorporate a provision which exempts involuntary fathers from the obligations of child support where the child was conceived through a sexual offence committed by the child's mother. This proposed

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<sup>389</sup> Section 26(1)(a).

<sup>390</sup> Section 26(1)(b)(i).

<sup>391</sup> Section 26(1)(b)(ii).

<sup>392</sup> Section 26(1)(b)(iii).

<sup>393</sup> Section 26(1)(b)(iv).

<sup>394</sup> Section 26(2)(a).

amendment is modelled on sections 89Y and 89Z of the New Zealand Child Support Act 91 No. 142.<sup>395</sup>

### **Guidance from New Zealand**

#### *Section 89Y*

Section 89Y postulates the conditions required to make an application for child support exemption on the grounds pertaining to a sexual offence:

(1) A liable parent may, by notice in writing to the Commissioner, apply for an exemption from the payment of child support in relation to a particular child if<sup>6</sup>

(a) either<sup>6</sup>

(i) another person has been convicted of a sex offence; or

(ii) another person has been proved to have committed a sex offence before a Youth Court; and

(b) the liable parent is the victim of that sex offence; and

(c) the liable parent believes that the child was conceived as a result of that sex offence.

(2) For the purposes of this subpart,<sup>6</sup>

*sex offence* means an offence under sections 127 to 144C of the Crimes Act 1961

*victim* means, in relation to a sex offence, the person against whom the offence is committed by another person.

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<sup>395</sup> The Act lists its primary objectives under section 4, the most relevant of which are:

(a) to affirm the right of children to be maintained by their parents

(b) to affirm the obligation of parents to maintain their children

(d) to provide that the level of financial support to be provided by parents for their children is to be determined according to their capacity to provide financial support

Like South Africa, New Zealand is a common law jurisdiction and boasts a sophisticated piece of legislation in the Child Support Act adapted to suit the evolving needs of society and the changing landscape of Family Law.

The provision makes it clear that another person, namely either of the child's biological parents must have been convicted of a sex offence that the other parent is a victim of, and which the other parent believes resulted in the conception of the child in question. In this regard, it is mandatory that the sexual offence resulted in conviction. An alleged sexual offence is insufficient to achieve an exemption.

*Section 89Z*

Section 89(Z) outlines the requirements which must be met in order for an exemption to be granted:

(1) The Commissioner must, as soon as practicable after receiving an application under section 89Y in respect of a liable parent and a particular child, exempt the person from the payment of child support in relation to that child if

(a) the application is made in accordance with that section; and

(b) the Commissioner is satisfied that the liable parent is a victim of a sex offence; and

(c) the Commissioner is satisfied that either

(i) another person has been convicted of that sex offence; or

(ii) another person has been proved to have committed that sex offence before a Youth Court; and

(d) in the opinion of the Commissioner, it is likely that the child was conceived as a result of that sex offence.

(2) If the Commissioner grants an exemption under subsection (1), the period of exemption commences on the day on which the Commissioner received the application for the exemption.

(3) However, the period of exemption commences on the day on which the Commissioner accepts an application for formula assessment of child support under section 17(1) in relation to the child if

- (a) that application for formula assessment was made on or after the day on which the person referred to in subsection (1)(c) was convicted of the sex offence or was proved to have committed the sex offence before a Youth Court; and
- (b) the liable parent made the application for the exemption under this subpart within 28 days after the date on which notice of the decision under section 17(1) was given by the Commissioner to the liable parent.
- (4) The Commissioner may, for the purpose of determining whether a person is eligible for an exemption under this section, obtain information from the Ministry of Justice, the New Zealand Police, or both in accordance with section 85K of the Tax Administration Act 1994.

The section provides a full exemption from the duty to furnish child support where the Commissioner is satisfied that the requirements have been met, and is of the opinion that the child is a product of the sexual offence in question. Clearly the purpose of this provision is to prevent the enforcement of child support against persons who have been foisted into parenthood as a result of a sexual offence. The imposition of maintenance liability would constitute secondary victimisation and force the involuntary parent to retain ongoing association with the perpetrator. The provision thus recognises that a genetic relationship can be separated from the legal obligations of parenthood in limited instances.

#### **The suggested amendment**

Section 15 of the Maintenance Act, reproduced below, gives legislative effect to the common law duty of support owed by parents to their children:

##### 15 Duty of parents to support their children

- (1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

(2) The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

(3) (a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration ó

- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.

(4) As from the commencement of this Act, no provision of any law to the effect that any obligation incurred by a parent in respect of a child of a first marriage shall have priority over any obligation incurred by that parent in respect of any other child shall be of any force and effect.

The provision clarifies that the duty to render maintenance jointly rests with both parents in accordance with each party's means. In fact, the requirement under section 15(3)(a)(ii) that a court must consider the financial circumstances of both parents when issuing a maintenance order is the only reference to partially exempting a biological parent from paying child support. The Act fails to consider that the legal obligation to furnish maintenance may be the consequence of a sexual offence which resulted in pregnancy. It is therefore suggested that the Act be amended to include an exemption clause modelled on sections 89Y and 89Z of New Zealand's Child Support Act. This recommendation is outlined below as section 15A.

*15A Exemption to child maintenance on the grounds relating to a sexual offence*<sup>396</sup>

- (1) A biological parent may apply for an exemption from the payment of child maintenance in relation to a particular child if
  - (a) the other parent has been convicted of a sexual offence in terms of the Sexual Offences and Related Matters Amendment Act 32 of 2007;
  - (b) the parent applying for an exemption is the victim of that sexual offence; and
  - (c) he or she believes that the child was conceived as a consequence of that sexual offence.
- (2) A court hearing the application may grant an exemption if it is satisfied that
  - (a) the applicant is a victim of a sexual offence;
  - (b) the other parent has been convicted of a sexual offence;
  - (c) the child in question was conceived as a result of that sexual offence; and
  - (d) the granting of an exemption is just and equitable having regard to the facts of the case and the financial circumstances of all involved parties.
- (3) Where the sexual offence which resulted in a conviction was either statutory rape or statutory sexual assault, the court has discretion to make an order it deems just and equitable taking into account all relevant considerations.

**An explanation of section 15A**

Section 15A is strictly-worded and will only apply where the court is satisfied that the child in question was conceived as a result of a sexual offence committed by one parent against another. In addition, the sexual offence in question must have been the subject of a conviction. Accordingly, if the conviction has been set aside the provision will cease to apply. The sternness of such an approach is two-fold; firstly, it would be too far-reaching to include instances of involuntary fatherhood not limited to sexual offences, and secondly, the provision has significant implications in application. An exemption from child support liability under section 15A effectively releases a biological parent from a lifetime of maintenance payments. To this end, it is suggested that an application for exemption should only be granted where the court is satisfied that it is just and equitable to do so having regard to the facts of the

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<sup>396</sup> Section 15A reproduces large chunks of sections 89Y and 89Z of the New Zealand Child Support Act.

case and the financial circumstances of all involved parties. It is only logical that absolving one parent from paying maintenance will place greater strain on the other parent to sufficiently provide for the child.<sup>397</sup> Indeed the fear is that an exemption will expose the child to undue economic hardship. Hence the requirement that the exemption be just and equitable serves to protect the best interests of the child.

#### *Defining the sexual offence*

The meaning of 'sexual offence' must be given content through reference to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOMA). Under the Act, 'sexual assault' is defined as the instance where one person 'unlawfully and intentionally sexually violates' another person without the latter's consent.<sup>398</sup> According to section 1(1), 'sexual violation' may refer to any physical act which directly or indirectly causes contact between one person's mouth and hands and another's genitals which could generate 'sexual arousal and stimulation'. In this regard, instances of involuntary parenthood which may be grounds for an exemption in terms of section 15A might include forcing a man into a sexual act, such as manual stimulation, and harvesting his sperm without his consent. This may occur through administering drugs to the man in question rendering him incapable of furnishing consent or tying him up which would render him physically incapable of resisting.<sup>399</sup>

Section 3 of SOMA defines 'rape' as the unlawful and intentional sexual penetration of one person by another without his or her consent. The section is gender-neutral which means that it is possible for a woman to rape a man. This is confirmed by the definition of 'sexual penetration' as any act which results in the penetration of one person's genital organs into another person's genital organs, anus or mouth. Accordingly, male rape would include non-consensual vaginal intercourse and forced oral sex. Provided of course that a conviction results from a sexual offence described herein, and a court is satisfied that granting an exemption is just and equitable, section 15A will fully absolve an involuntary father from furnishing child support.

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<sup>397</sup> In fact, a woman who has fallen pregnant as a result of rape will find it difficult to succeed with an application for exemption for the simple reason that the child will be left destitute.

<sup>398</sup> Sexual Offences Act, section 4.

<sup>399</sup> It is perhaps important to reiterate that the act of ejaculation is involuntary. Ergo a man who is being raped can still ejaculate despite his resistance.

*Recognising statutory offences*

The proposed provision recognises statutory rape and statutory sexual assault as sexual offences which warrant an exemption from maintenance liability. Section 15(1) of SOMA criminalises an act of sexual penetration with a child notwithstanding the child's consent. Section 16(1) of the Act similarly criminalises the act of sexual violation with a child irrespective of whether the child has consented. According to section 1(1), a child under the age of 16 cannot legally furnish consent to intercourse. In this regard, any sexual activity involving a child younger than 16 constitutes a criminal offence.

It is important to mention that the Constitutional Court recently invalidated sections 15 and 16 of SOMA in *The Teddy Bear Clinic*.<sup>400</sup> Khampepe J clarified that the provisions are only unconstitutional to the extent that they impose criminal liability on children under the age of 16 years.<sup>401</sup> Thus the provisions are invalid insofar as they criminalise consensual sexual conduct between adolescents that is children between 12 and 16-years-old.<sup>402</sup> Accordingly, sections 15 and 16 still apply where the sexual act in question involves a party who is older than 16 years of age.

Section 15A gives a court the discretion to consider all the factual circumstances relevant to an application for exemption where the sexual offence which led to a conviction was statutory rape or statutory sexual assault. The reasoning behind this suggestion is that it would prove unfair to exempt a 15-year-old from child support liability where the party who was convicted was 16 years of age at the time the offence occurred. To this end, the court has the discretion to make an order that it deems just and fair having regard to the respective ages and financial means of the parties. Accordingly, a court may decide to fully exempt the parent who was a victim of the sexual offence in question. Alternatively, it may elect to exempt the party until such time as he or she becomes self-sufficient.

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<sup>400</sup> *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and National Director of Public Prosecutions* 2013 (12) BCLR 1429 (CC).

<sup>401</sup> At para 117.

<sup>402</sup> At para 114.

*A gender-neutral exemption*

Crucially, the wording of section 15A is gender-neutral. The statutory obligation to contribute to maintaining one's child is jointly-shared by both parents. In addition, both men and women can be victims of a sexual offence. In this regard, it would prove unfair to include an exemption clause which only applies to men. The intention behind this proposed legislative amendment is to provide greater protection to men who have been sexually forced into fatherhood through sexual assault or rape. A woman who is raped may elect to take the 'morning-after-pill' to prevent pregnancy, she could opt for an abortion during pregnancy or she may place the child up for adoption following the birth. These options, however religiously, ideologically or morally problematic, are not available to men who have been sexually assaulted or raped. For this reason, it is necessary to introduce measures to shield victimised men from the consequences of sexual violation.

Ironically, the exemption clause might prove more useful to women who have been forced into parenthood in consequence of a sexual offence than men in a similar position. This is primarily attributed to the difficulty men may experience in proving that they have been sexually assaulted or raped. The injuries a woman sustains during rape are physically evident upon medical examination.<sup>403</sup> This is not the case for men. In a society riddled with an unforgivingly high rate of gender violence, sexual victimisation, particularly rape is predominantly perceived as a crime against women.<sup>404</sup> Given the very private circumstances in which acts of this nature occur, it is unlikely that most men who have been subjected to these crimes will receive justice through a conviction. Unfortunately for men in this position, the absence of a conviction reduces the application of section 15A to a nullity.

A legislative amendment of this nature gives effect to the need to separate genetic parenthood from legal paternity in certain circumstances. The proposed recommendation, however, only applies where involuntary parenthood is imposed through sexual assault, rape or statutory rape. In this regard, the provision may have minimal effect in practice because of the difficulty in securing a conviction in cases

<sup>403</sup> Provided of course that she knows she must be medically examined following the rape and before bathing.

<sup>404</sup> G Kraak & G Simpson 'The Illusions of sanctuary and the weight of the past: Notes on violence and gender in South Africa' (1998) 2 *Development Update* 1 at 2-3.

involving sexual offences perpetrated by women. Nevertheless it would constitute an important step toward the development of the law pertaining to paternity and child maintenance. After all, the intention is not to grant men more rights than women but rather to underline the problem with using genetic parenthood to ground legal parenthood in all instances in which child support liability is contested.

### **Adoption of flexible guidelines**

In practice, the nature of claims involving involuntary parenthood ideally necessitates a deeper consideration of the circumstances surrounding a particular child's conception balanced against the best interests of that child to receive financial support from both parents. Therefore, it is suggested that if a South African court is faced with adjudicating a claim for maintenance involving non-consensual paternity, the involuntary father should be allowed to rely on an absence of consent to defend the duty to pay child support. It follows that the introduction of a set of guidelines, which permits the defence of non-consent, in cases involving involuntary parenthood will assist the courts in reaching fair and equitable decisions.

The use of guidelines will permit a flexible approach enabling judges to use their discretion in order to achieve a fair and just outcome. It is therefore proposed that where the presumption of paternity under section 36 of the Children's Act has been established by the child's mother on a balance of probabilities and a DNA test conclusively establishes paternity, the disgruntled father should be given the opportunity to introduce a defence. As the biological father, he cannot factually contest paternity but he can avoid a claim for child support or at least be permitted to pay less. It follows that once paternity is established, the presumption that the conception was both natural<sup>405</sup> and consensual must operate. The onus will then lie with the father to introduce evidence proving that he never engaged in consensual vaginal intercourse with the child's mother.

Considering that the presumption in section 36 operates when proof of sexual intercourse is established on a balance of probabilities, it would prove nonsensical to require the father to produce evidence that discharges the same burden of proof. Given the potentially life-changing implications of a maintenance order and the

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<sup>405</sup> Natural in the sense that the child was conceived through vaginal intercourse not self-insemination.

problematic nature of a strict liability approach, the introduction of a defence should appropriately be coupled with a higher burden of proof. In addition, the very personal nature of any act leading to conception and the unlikelihood of corroborating witnesses necessarily facilitates a raised burden of proof. In this regard, the father must provide evidence that the child's conception was not natural and consensual to the extent that it is substantially more likely to be true than not.<sup>406</sup>

*The defence of non-consent*

Against the social backdrop of high levels of father absenteeism and an increasing reliance on state grants, the defence is open to abuse by so-called deadbeat dads wishing to relieve themselves of paying maintenance.<sup>407</sup> Accordingly, a father may only raise the defence in one of two instances that is where intercourse was non-consensual or where his sperm was utilised for reproductive purposes without his consent.<sup>408</sup> In the first instance, the defence will apply where he did not consent to the sexual act that led to the child's conception. In other words, if he was raped, sexually assaulted or a victim of statutory rape, he could not have consented to the act which produced the child.

In the second instance the defence may be relied upon by a man whose sperm was misappropriated and later used without his knowledge or consent. Therefore, a man who engaged in a voluntary sexual act not including vaginal intercourse may raise an absence of consent where the woman retained his sperm and inseminated herself. It would not, however, extend to cover men who donate their sperm to women who resort to self-insemination instead of using a physician. As it stands, the law relating to artificial fertilisation, outlined in Chapter Four, offers sufficient protection. It follows that where the factual circumstances of a case fall into at least one of the two categories, a father may rebut the presumption that the child's conception was both natural and consensual provided he introduces evidence which establishes his version as considerably more likely to be true than the mother's version.

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<sup>406</sup> To this end, "substantially more likely to be true than not" falls between the halfway mark of probable and beyond reasonable doubt.

<sup>407</sup> Richter & Morrell *Baba: Men and Fatherhood in South Africa* at 46.

<sup>408</sup> In other words, the defence is available for two categories of involuntary fatherhood, i.e. sexual assault and non-consensual use of sperm.

*A balancing of interests*

In order to achieve a measure of equity, it is necessary to consider the impact on the child before an involuntary father may be absolved of maintenance liability. Accordingly, if the father rebuts the presumption what should follow is a full consideration of the factual circumstances of the case coupled with an assessment of the financial position of each party. In essence, it should be left to the discretion of the court to decide whether to completely absolve the father from the duty to contribute maintenance or to order him to pay a reduced amount. Cases involving male sexual assault or pilfered sperm are factually bizarre and necessarily require a departure from the usual. It would follow that an abatement of the amount to be paid which absent the peculiar facts of the case would have ordinarily been awarded, is an appropriate solution.

Section 28(2) of the Constitution asserts that a child's best interests must remain of paramount importance in all matters that involve the child. Irrespective of the conditions surrounding conception, the minor remains an innocent party who has the statutory and common law right to parental care which necessarily includes financial support. Accordingly, any order which fully or partially absolves an involuntary father from paying child maintenance should not result in unjust consequences for the child. To this end, the court must have regard to the financial means of both parties, the current living standards of the child as compared to the father's and the respective earning capacities of the parties. In addition, it is elementary to consider the nature of the relationship between the parties, their geographical proximity to each other, their respective ages, the financial capacity of the child's maternal relatives and any other relevant factor.

The approach outlined above is essentially a two-stage enquiry which ultimately considers whether the circumstances surrounding a particular child's conception outweighs the child's interest in receiving maintenance from both parents. It is the fairest approach because it balances the best interests of the child against the rights and interests of the unwilling father who did not actively bring about a pregnancy. To this end, it would prove unfair to exempt an involuntary father, who is financially secure, from furnishing maintenance where the child's

mother is struggling economically and has no support structures.<sup>409</sup> Conversely, where the mother is of sufficient means and can ably support her child, the involuntary father should escape child support liability.

### **Conclusion**

The current approach to the assignment of legal parenthood is intrinsically based on the establishment of a biological link between a particular man and child. The problem with this method is that it discounts the element of causal agency in producing a child. Accordingly, men who have been sexually assaulted or conned into parenthood through the misappropriation of their sperm remain liable for child maintenance. A departure from this established approach, in limited instances, is necessary to avoid unfair and inequitable results in the adjudication of child support matters.

It is suggested that the Maintenance Act be amended to include a provision which exempts biological parents from child support liability where the child in question was conceived through a sexual offence for which the other parent was convicted. An amendment of this nature constitutes a progressive step toward protecting victims of sex crimes from the unwanted consequences of their victimisation. The exemption clause, however, restrictively applies to sexual acts involving an absence of consent. Accordingly, an additional legal mechanism should operate to assist men whose sperm has been used for reproductive purposes without their consent or knowledge. To this end, it is proposed that the courts adopt a flexible set of guidelines in the adjudication of child maintenance claims implicating involuntary parenthood. A flexible, discretionary approach will permit an involuntary father to introduce the absence of consent to paternity as a defence to avoid maintenance payments. The defence, however, will only operate where the child's mother has sufficient resources to maintain the child. In this light, a biological relationship should only be separated from legal paternity if the result is fair and just.

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<sup>409</sup> It is worth clarifying that an involuntary father who is still required to pay child support despite his sexual victimisation is not being made to pay simply because he is wealthy. He retains the obligation to furnish maintenance because the mother cannot afford to support the child. It is a consequence of balancing the rights and interests of the parties.

## CHAPTER SIX

### DELICTUAL LIABILITY: IS A SEXUALLY DEVIIOUS MOTHER WRONGFUL?

*'The mother's alleged fault or wrongful conduct is irrelevant.... The primary purpose of a paternity proceeding is to protect the welfare of the illegitimate child.'*<sup>410</sup>

South African courts have recognised instances of involuntary parenthood resulting from medical negligence as delictually wrongful.<sup>411</sup> At the centre of these cases is the infringement of a parent's right to make reproductive choices and the accompanying financial and emotional costs which arise from an intrusion upon one's reproductive autonomy.<sup>412</sup> The awarding of damages in respect of child maintenance is consistent with the recognition of the right to reproductive autonomy under section 12(2)(a) of the Constitution relieving parents of solely shouldering the financial burden of raising a child.

It is difficult to predict whether a South African court may absolve an involuntary father of the legal obligation to pay child maintenance as discussed in Chapter Five. For this reason, it is important to provide non-consenting fathers with alternative legal routes to avoid or at least minimise child support payments. A route possibly open to an involuntary father is to bring a separate claim in delict against the child's mother. The parental duty to contribute to the maintenance of a child is a natural obligation which operates by virtue of a blood relationship between a father and his child.<sup>413</sup> In this regard, it may be argued that the best interests of the child standard will always militate against absolving an involuntary father of the duty to economically support his offspring. However, if the deceitful mother is of sufficient means, the duty to furnish maintenance could possibly be offset by damages awarded in delict.

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<sup>410</sup> Justice Titone in *Weinberg v. Omar E.*, 106 A.D.2d 448 (N.Y. App. Div. 1984) at 448.

<sup>411</sup> See *Mukheiber v Raath and Others* (262/97) [1999] ZASCA 39;

<sup>412</sup> Adjin-Tetty -Claims of Involuntary Parenthood at 86.

<sup>413</sup> Boberg *Boberg's Principles* at 243.

### **The requirements for delictual liability**

A delict is committed where the defendant's act or omission negligently or intentionally causes the plaintiff to suffer harm which is wrongful. In order to establish a cause of action, the complaining party must prove all of the elements of a delict on a balance of probabilities. What follows is a brief description of these elements accompanied by an application to the instance where a man is sexually deceived into fatherhood.

#### *Conduct*

The first element simply requires the defendant to have caused the plaintiff loss through her conduct.<sup>414</sup> Conduct may be described as 'a voluntary human act or omission'.<sup>415</sup> The requirement of voluntariness provides that the defendant's conduct must have been controlled by her conscious will.<sup>416</sup> Therefore she must have been in the position to exercise control over her bodily movements. Hence a woman who pricks holes in her partner's condoms or retains and uses his sperm without his knowledge or consent acts voluntarily. Conduct comprises both words and deeds which means that a woman who lies about her fertility or use of birth control may be liable for fraudulent misrepresentation.

#### *Causation*

For the defendant to be delictually liable for the consequences of her conduct, there must be a causal nexus between her act or omission and the harm suffered by the plaintiff.<sup>417</sup> Whether or not there is a link between the defendant's conduct and the resultant harm is a question of fact which must be determined in light of all existing evidence.<sup>418</sup> Causation traditionally consists of two components namely factual and legal causation.<sup>419</sup> Factual causation refers to whether a factual connection links the act or omission of the defendant with the subsequent harm.<sup>420</sup>

The courts apply the general 'but-for' test which asks whether the harm would have occurred if it were not for the conduct of the defendant, that is whether

<sup>414</sup> J Burchell *Principles of Delict* (1993) at 37.

<sup>415</sup> *Ibid.*

<sup>416</sup> At 36.

<sup>417</sup> J Neethling, JM Potgieter & PJ Visser (eds) *Law of Delict* 5ed (2006) at 175.

<sup>418</sup> At 159.

<sup>419</sup> Burchell *Principles of Delict* at 32.

<sup>420</sup> *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A).

the defendant's conduct was a *causa sine qua non*<sup>421</sup> of the harmful consequence.<sup>422</sup> The test involves a notional elimination of the defendant's conduct followed by an assessment as to whether the harm would have still occurred.<sup>423</sup> However, it is insufficient that the defendant's conduct is a factual cause of the harm. Her conduct must also be a legal cause of the damage. For delictual liability to arise, the defendant's wrongful conduct must be closely-linked and not remotely-connected to the loss.<sup>424</sup> Legal causation thus serves the practical purpose of limiting the bounds of liability.<sup>425</sup>

It is unlikely that a non-consenting father will face any difficulties in establishing both factual and legal causation. Where a woman sexually victimises a man and a pregnancy results, the financial impediment and emotional damage the involuntary father suffers as a result of having to pay child support is factually and legally linked to the mother's conduct.

### *Harm*

The primary principle upon which the law of delict rests is that a person must bear any loss he sustains.<sup>426</sup> This loss may be patrimonial in nature in that it results in a reduction of a person's monetary wealth.<sup>427</sup> Alternatively, loss may be non-patrimonial that is illiquid general damages which includes damages for pain and suffering, infringement of a personality right and loss of amenities of life.<sup>428</sup> There are, however, a number of instances in which the burden of loss shifts to the party who caused the damage complained of.<sup>429</sup> In this regard, the party who caused the loss has a legal obligation to compensate the harmed party. Accordingly, a man who is sexually forced into parenthood and made to financially support the child who is born as a result of this deception arguably suffers both patrimonial and non-patrimonial harm.

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<sup>421</sup> In other words, the activity was the inevitable cause of the harm.

<sup>422</sup> J Neethling, JM Potgieter & PJ Visser (eds) *Law of Delict* 6ed (2010) at 178.

<sup>423</sup> *Ibid.*

<sup>424</sup> *Minister of Police v Skosana* 1977 1 SA 31 (A) at 44.

<sup>425</sup> *Smit v Abrahams* 1992 3 SA 158 (C) at 162.

<sup>426</sup> *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA) at 468.

<sup>427</sup> Neethling et al. *Principles of Delict* 6ed at 218.

<sup>428</sup> At 241-2.

<sup>429</sup> At 3.

### *Fault*

Fault may be in the form of intention or negligence. Intention consists of two requirements namely the direction of one's will and knowledge of wrongfulness.<sup>430</sup> The former refers to the instance where the defendant directed her will to achieving a particular result or, at the very least, foresaw the possibility that her actions would lead to a particular result and reconciled herself to this fact.<sup>431</sup> Knowledge of wrongfulness, on the other hand, requires that the defendant must have realised that her conduct was wrongful or, at the very least, foresaw the possibility that it was wrongful.<sup>432</sup>

A woman who positively acts to conceive a child with a particular man, by having non-consensual sex with him whilst he is passed out or sneakily keeping his sperm post-oral sex, necessarily acts with intention. She directed her will to falling pregnant and appreciated the fact that the unwilling father would be responsible for financially maintaining the child after birth. Even if she did not initially intend to claim child support and simply wanted a genetic child with a particular man, she at least foresaw the possibility that he would suffer harm<sup>433</sup> upon discovering that he unwillingly fathered a child.

From the above discussion, it is clear that an involuntary father will not encounter too many problems in establishing the first four elements of a delict, namely conduct, causation, harm and fault. However, a court will only recognise the claim of an involuntary father where it is proved that the actions of the child's mother were wrongful. Under South African law, a man has never instituted legal proceedings against his child's mother for damages arising from her sexually forcing him into parenthood. In this regard, the nature of the claim is uncharted territory in the law of delict. Therefore the question as to whether a woman who sexually deceives a man into parenthood is liable under delict depends on whether she acted wrongfully in the eyes of the law. From a moral stance, her actions are

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<sup>430</sup> At 126.

<sup>431</sup> At 127.

<sup>432</sup> At 128-9.

<sup>433</sup> Here harm may be emotional, psychological or financial. If he is required to pay child maintenance, his bank account will suffer. He may not want to form a relationship with a child he does not want and this will psychologically affect him and possibly impact upon his future relationships with women.

unconscionable. However, this does not necessarily mean that she acted unlawfully. It is thus necessary to examine the requirement of wrongfulness in order to ascertain whether the law of delict should be developed to include involuntary parenthood as a cause of action.

### Examining wrongfulness

Under the law of delict, the primary criterion employed in evaluating whether the defendant's conduct is wrongful is the *boni mores* that is the legal convictions of the community.<sup>434</sup> *Boni mores* may be loosely-referred to as 'good morals' and is used interchangeably with the 'legal convictions of the community'. The *boni mores*, however, is not simply a moral norm or principle and comprises a strong juridical element.<sup>435</sup> In this regard, the legal convictions of the community constitute 'society's notions of what justice demands' and therefore serves as the benchmark in determining whether the community deems particular conduct unlawful.<sup>436</sup> The concept of *boni mores* is intimately-linked to *boni fides* that is good faith which indicates that the legal convictions of the community encompass good faith in social relations.<sup>437</sup> In this light, the *boni mores* is inseparable from notions of equity, reasonableness and justice which are intrinsically linked to community relations underlining the necessity of the application of public policy.<sup>438</sup> Accordingly, the fundamental question to be asked is whether, in light of all the relevant circumstances, the legal convictions of the community dictate that the plaintiff's interests were unreasonably infringed by the defendant.<sup>439</sup> The test is thus general and open-ended, and depends primarily on the criterion of objective reasonableness which encompasses the prevailing legal convictions of the community.<sup>440</sup>

In applying the *boni mores* standard, the court must weigh the defendant's interests which were supported by her conduct against those of the plaintiff which were infringed by the defendant's act or omission.<sup>441</sup> This balancing of interests

<sup>434</sup> Neethling et al. *Law of Delict* 6ed at 36.

<sup>435</sup> Ibid.

<sup>436</sup> *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 318-9.

<sup>437</sup> *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) at 528-9.

<sup>438</sup> At 529.

<sup>439</sup> *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) at 380.

<sup>440</sup> *Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A) at 498.

<sup>441</sup> *Burchell Principles of Delict* at 38.

reflects the law's purpose of protecting one particular interest from interference by another, and further mirrors prevailing societal notions of what constitutes reasonable conduct.<sup>442</sup> The court is tasked with balancing and evaluating these conflicting interests in view of the applicable circumstances and with due regard to any relevant factors in order to resolve whether the infringement of the plaintiff's interests was reasonable.<sup>443</sup> The factors which are commonly applied include the nature and extent of the harm, foreseeability of the harm, the nature of the damage, the cost of preventing the damage, the relationship between the parties, the legal position in other jurisdictions, the defendant's motive, the financial consequences to the plaintiff, the social utility of the damage-causing conduct and the risk of opening the floodgates to similar claims.<sup>444</sup> The court will have to cumulatively assess these aforementioned factors to objectively ascertain whether the conduct of the defendant was reasonable or not in the given circumstances.<sup>445</sup>

#### *Guidance from the courts*

If a South African court were to adjudicate the delictual claim of an involuntary father, the judge would likely seek guidance from previous decisions involving claims of a similar, or related, nature. Thus the prospect of a court recognising a claim of that nature as actionable under delict largely depends on whether the principles enunciated in the wrongful pregnancy<sup>446</sup> and wrongful birth<sup>447</sup> cases may be extended to allow a father to sue his child's mother for wrongful conception. These cases provide invaluable guidance and offer insight as to the possibility of a South African court expanding the wrongfulness test to include this new factual scenario.

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<sup>442</sup> *Ibid.*

<sup>443</sup> Neethling et al. *Law of Delict* 6ed at 37.

In *RH v DE* (594/2013) [2014] ZASCA 133, the Supreme Court of Appeal recently stated that the question as to whether a defendant should be legally liable for delictual damages is assuming a dominant position in the assessment of wrongfulness. See para 18.

See also *Roux v Hattingh* 2012 (6) SA 428 (SCA) at para 33.

<sup>444</sup> Neethling et al. *Law of Delict* 6ed at 38.

<sup>445</sup> *Natal Fresh Produce Growers' Association v Agrosolve (Pty) Ltd* 1990 4 SA 749 (N) at 753-4.

<sup>446</sup> Those claims by parents against a hospital or medical practitioner for failure to properly perform an abortion or sterilisation procedure resulting in the birth of a healthy, unwanted child. See *Mukheiber v Raath and Others* (262/97) [1999] ZASCA 39 at para 1.

<sup>447</sup> Those actions brought by the parents of a child born with abnormalities against a medical practitioner or hospital who claim they would have terminated the pregnancy had they been properly informed of the risk of congenital defects. See *Mukheiber* at para 1.

An action for wrongful pregnancy was judicially recognised in the seminal case of *Administrator, Natal v Edouard*.<sup>448</sup> In this case, the Appellate Division allowed a claim for damages based on the non-performance of a sterilisation procedure. The respondent's wife concluded an agreement with the Administrator to perform a sterilisation procedure at the time of the birth of her third child.<sup>449</sup> The Administration failed to perform the operation in breach of its obligation and the respondent's wife consequently fell pregnant with her fourth child.<sup>450</sup> The respondents claimed that child-rearing expenses were a direct result of the breach of contract and demanded damages for the cost of raising the child.<sup>451</sup> The court considered whether, for policy reasons, the birth of a normal and healthy child should not give rise to a claim for damages.<sup>452</sup> In this regard, the court held that the birth of a healthy, but unwanted, child does not constitute a wrong. Instead the wrong consists of a breach of contract which resulted in the child's birth and subsequent financial loss.<sup>453</sup> The court affirmed that the recovery of damages did not relieve the respondents of their parental obligations but rather permitted them to fulfil the duty to financially maintain their child.<sup>454</sup> The court, however, refused to award non-patrimonial damages for a contractual breach and intimated that damages for pain and suffering are recoverable under delict.<sup>455</sup>

Although *Edouard* was decided on the grounds of breach of contract as opposed to delict, the relevant policy issues equally apply to claims in delict.<sup>456</sup> The court intimated that it is inconsequential whether it was a contractual breach or an instance of neglect which led to an unintended pregnancy.<sup>457</sup> To this end, a contract concluded between a medical practitioner and his patient imposes a duty on the

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<sup>448</sup> 1990 (3) SA 581 (A).

<sup>449</sup> At 584.

<sup>450</sup> *Ibid.*

<sup>451</sup> At 584-5.

<sup>452</sup> At 589.

<sup>453</sup> At 590.

<sup>454</sup> At 589.

<sup>455</sup> At 594. The court, however, distinguished between the action for pain and suffering and the action available for breach of contract. The actions are separate but may be instituted together in legal proceedings.

<sup>456</sup> Burchell *Principles of Delict* at 26.

<sup>457</sup> *Edouard* at 585.

medical practitioner to exercise skill and care.<sup>458</sup> However, this duty continues irrespective of the existence or absence of a contract.<sup>459</sup>

*Edouard* was decided prior to the enactment of the Choice on Termination of Pregnancy Act 92 of 1996 which legalised abortion and outlines the requirements for terminating at all three stages of pregnancy. This piece of legislation makes it easier to recognise an action for wrongful pregnancy because Parliament has statutorily protected a woman's right to make reproductive choices. Immediately after the enactment of the statute, the High Court in *Friedman v Glicksman*<sup>460</sup> recognised an action for wrongful birth. In this case, the applicant gave birth to a disabled child and subsequently sought damages from her gynaecologist on the basis that he had breached the duty of care he owed her by negligently advising her that her pregnancy carried no unusual risk.<sup>461</sup> The court held that where a patient has a higher risk of giving birth to a disabled child, she reasonably requires the correct information to make an informed decision as to the termination of pregnancy.<sup>462</sup> Accordingly, where a medical practitioner improperly advises his patient, he deprives her of the right to make informed reproductive choices.<sup>463</sup> Therefore the defendant was held delictually liable for medical expenses and the cost of maintaining the disabled child as a result of his negligence.<sup>464</sup>

In *Mukheiber v Raath*,<sup>465</sup> the Supreme Court of Appeal allowed an action to recover damages sustained in reliance on the negligent misrepresentation by a medical practitioner that the respondent's wife was sterile which resulted in the birth of an unplanned child. The respondent's wife had informed the appellant that she did not wish to bear more children.<sup>466</sup> The appellant assured the respondent and his wife that he had performed the sterilisation procedure and that the couple could dispense with contraceptive use.<sup>467</sup> The court held that the representation made by the

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<sup>458</sup> *Lillicrap* supra at 499.

<sup>459</sup> *Ibid.*

<sup>460</sup> 1996 (1) SA 1134 (W).

<sup>461</sup> At 1136. The fault element of the delict is to be found in the foreseeability of harm which the doctor / patient relationship gives to the doctor.

<sup>462</sup> At 1138-9.

<sup>463</sup> At 1139.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Mukheiber v Raath and Others* (262/97) [1999] ZASCA 39.

<sup>466</sup> At para 11.

<sup>467</sup> At para 13.

appellant was objectively material as it persuaded the respondents to forego contraception during sexual intercourse.<sup>468</sup> Olivier AJ stated that the appellant was under a legal duty to take reasonable steps in ensuring that the representation as to sterility was correct before he improperly advised the couple.<sup>469</sup> Accordingly, the appellant was liable for the unwanted financial consequences of his negligent misstatement.

Olivier JA intimated that the element of unlawfulness is present in the infringement of the rights of the respondents who suffered loss as a result of the misrepresentation.<sup>470</sup> Accordingly, the wrong does not consist of the birth of a healthy, unwanted child but rather the resultant financial loss that flows from a breach of duty.<sup>471</sup> The court therefore extended the ambit of the *actio legis Aquiliae*<sup>472</sup> on the basis that it found no policy considerations that militated against holding a medical practitioner liable for his negligent misstatement.<sup>473</sup> In this regard, the court affirmed that the test employed in determining wrongfulness is general and open-ended and depends on the criterion of objective reasonableness which encompasses the prevailing legal convictions of a community.<sup>474</sup>

### **Distinguishing the case law from the new factual scenarios**

The facts of these landmark cases are clearly distinguishable. However, striking similarities emerge upon a rudimentary analysis of each case. All three cases involve a contractual breach or negligence on the part of a medical practitioner whose act or omission resulted in an unplanned pregnancy. Similarly, the plaintiffs were all awarded damages on the basis that the breach of contract or negligent conduct of their respective doctors was wrongful because it deprived the plaintiffs of their reproductive decision-making. As a consequence, the plaintiffs were burdened with the financial and emotional implications of an unplanned pregnancy. Under the

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<sup>468</sup> At para 28.

<sup>469</sup> At para 27.

<sup>470</sup> At paras 25-9.

<sup>471</sup> *Ibid.*

<sup>472</sup> Generally referred to as the Aquilian action. A fault-based delictual action to recover patrimonial loss. A delict will have been committed where the defendant's conduct or omission negligently or intentionally caused the plaintiff to suffer harm which was wrongful. See Du Bois *Wille's Principles* fn 15 at 1091.

<sup>473</sup> *Mukheiber supra* at para 46.

<sup>474</sup> At para 26. See also *Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A) at 498.

law of delict, negligent, harm-causing conduct is not *prima facie* wrongful.<sup>475</sup> It follows that an application of the *boni mores* test is necessary to determine whether the defendant's negligent conduct is wrongful according to the community's prevailing legal convictions. The question for determination, however, is whether the intentional, harm-causing conduct<sup>476</sup> of a woman who sexually forces a man into parenthood should be recognised as a delict. The fact that intentional, harm-causing conduct is regarded as *prima facie* wrongful makes the task of establishing a cause of action less onerous for the plaintiff.

Conduct is wrongful if it infringes the plaintiff's legally-recognised right or consists in the breach of a legal duty owed by the defendant to the plaintiff.<sup>477</sup> In *Mukheiber* and *Friedman*, wrongfulness consisted in the breach of a legal duty by a medical practitioner. In *Edouard*, wrongfulness comprised of a prior breach of contract which resulted from a doctor's failure to perform his duties. A medical practitioner, unlike an ordinary person, is under a higher standard of care to take additional steps to prevent harm.<sup>478</sup> In the aforementioned cases, the respective medical practitioners were under a legal duty to exercise skill and care. Consequently, a breach of this duty is wrongful as determined with reference to the *boni mores*. A recalcitrant mother who falls pregnant by sexually assaulting her child's father or furtively self-inseminating his sperm is unlikely to be a medical practitioner or performing these acts within a clinical environment. It follows that her conduct cannot constitute breach of a legal duty. Therefore, it would be in an involuntary father's interest to allege that his rights were infringed in an unlawful manner.

### **Wrongfulness as an infringement of a subjective right**

The doctrine of subjective rights provides a juridical avenue for deciding whether an infringement of interests is wrongful. The doctrine posits that each human being is a legal subject who holds subjective rights.<sup>479</sup> The doctrine entitles the holder of a subjective right to utilise, enjoy or dispose of the object of the right

<sup>475</sup> *Brooks v Minister of Safety and Security* [2009] 2 All SA 17 (SCA) at 17.

<sup>476</sup> At least where the recalcitrant mother sexually assaulted the child's father or furtively kept his sperm and later inserted it into her vagina without his knowledge or consent.

<sup>477</sup> *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) at 387.

<sup>478</sup> *Mukheiber* at para 32.

<sup>479</sup> Neethling et al. *Law of Delict* 6ed at 50.

without interference.<sup>480</sup> It follows that the holder may legally enforce the object of his right against others. Thus the basis of the doctrine is to afford protection to individual interests where those interests are wrongfully infringed. The content and scope of the powers conferred by the doctrine are regulated by legal norms and rules.<sup>481</sup> Subjective rights are categorised according to the nature of the legal object to which the particular right pertains.<sup>482</sup> This dissertation warrants a discussion of one specific category, namely personality rights. As mentioned, the idea of sexually foisting a man into parenthood through sexual assault, covertly using his sperm without his consent to fall pregnant or making false representations as to birth control clearly infringes aspects of his personality, namely his privacy, dignity and bodily integrity.<sup>483</sup>

The law protects individual interests against infringement where two conditions are satisfied. Firstly, the interest should be of value to the right holder in order to warrant protection. A man has an interest in not being sexually foisted into parenthood. Secondly, the interest should have a degree of independence and definiteness in that it may be freely enjoyed and disposed of.<sup>484</sup> An involuntary father would encounter little difficulty in satisfying the aforementioned conditions. A person's rights to dignity, privacy, reproductive autonomy and physical integrity are of great personal value and are intrinsically-linked to one's identity. In this regard, a person's body belongs to him alone and the idea that his body or bodily substances may be used as a vehicle for reproduction without his consent not only deprives him of the rights to physical integrity and reproductive autonomy but burdens him with the financial costs of child maintenance. Accordingly, the infringement of an involuntary father's subjective rights would occur where the defendant directly or indirectly interferes with his power to use and enjoy the object of his right. However, a violation of the subject-object relationship is insufficient to establish

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<sup>480</sup> Ibid.

<sup>481</sup> Ibid.

<sup>482</sup> *Tommie Meyer Films* supra at 382.

<sup>483</sup> Here the appropriate action for harm to a personality interest is the *actio iniuriarum*. It is available where a defendant has intentionally and wrongfully infringed the plaintiff's dignity, privacy or physical integrity. Crucially, the defendant must have acted with intention. Thus the plaintiff will not succeed where the child's mother was negligent. See Du Bois *Wille's Principles* at 1166.

To this end, the plaintiff may sue for patrimonial damages (using the Aquilian action) and for non-patrimonial damages (using the *actio iniuriarum*) for injury to his bodily integrity, for example. The focus of this Chapter, however, is the recovery of patrimonial losses.

<sup>484</sup> Neethling et al. *Law of Delict* 6ed at 52.

wrongfulness.<sup>485</sup> A subjective right must be infringed in an unlawful manner to attract delictual liability which is ascertained with reference to the *boni mores*.<sup>486</sup>

#### *Application of the test*

In practice, a court would apply the general reasonableness criterion having regard to the conflicting concerns and interests of both parties that is the non-consenting father and the insidious mother. On the one hand, it is in the mother's interest that she is able to support her offspring and herself without having to compensate her child's father. In this regard, the court will have to consider the circular effect of recognising a claim in delict. The father may be under a legal obligation to pay child maintenance because the duty is based on a blood relationship and is owed to the child irrespective of the court's finding on the mother's alleged delictual liability. Therefore, the patrimonial damages he receives under delict will offset his child support payments creating a financial burden for the child's mother. To this end, the court must consider the respective financial means of the parties and should only award damages where the wrongful mother is of sufficient means. On the other hand, a non-consenting father should not be economically burdened with child support payments without legal recourse. In fact, it is in the public interest that men are not tricked into fatherhood and forced to pay child maintenance when they did not consent to becoming fathers. Having regard to the conflicting interests of both parties and the wide array of factors described in the preceding paragraphs, the court must reach a decision that best reflects the community's prevailing legal convictions.

#### *Sexual assault*

Where the defendant's conduct constitutes a factual infringement which affects physical integrity, the commission is regarded as *prima facie* wrongful.<sup>487</sup> Accordingly, the simple fact that harm was caused creates the presumption that the defendant's conduct was wrongful. Under the law of delict, positive harm-causing conduct that results in physical injury is deemed *prima facie* wrongful.<sup>488</sup> Indeed the legal convictions of the community dictate that a person who physically injures another person acts in a legally unacceptable manner unless she can forward a lawful

<sup>485</sup> *Marais v Richard* 1981 1 SA 1157 (A) at 1168.

<sup>486</sup> *Ibid.*

<sup>487</sup> Neethling et al. *Law of Delict* 6ed at 44-5.

<sup>488</sup> A Fagan "Rethinking Wrongfulness in the Law of Delict" (2005) 122 *SALJ* 90 at 90.

defence. Indeed it would not prove difficult to argue that the actions of a woman who sexually assaults a man, falls pregnant with his child and later claims maintenance amounts to intentional, harm-causing conduct. She foresaw the possibility that her conduct could result in a pregnancy and that the biological father would be liable for maintenance once the child is born. As such, the defendant's conduct would be presumed wrongful, and the onus would fall on her to rebut that presumption by forwarding a legally-recognised defence.<sup>489</sup>

The objective reasonableness standard is particularly useful in unusual circumstances and novel situations.<sup>490</sup> In this regard, the test for wrongfulness is generally applied where the defendant's conduct does not clearly infringe a legal norm or in those instances in which a ground of justification is not clearly applicable.<sup>491</sup> The courts are, however, reluctant to extend the scope of delictual liability to new factual scenarios unless 'positive policy considerations' favour such an extension.<sup>492</sup> Fortunately, where case law is silent on the wrongfulness of certain conduct, the general criterion must be applied.<sup>493</sup> A delictual action instituted by a man against the mother of his child for conscripting him into parenthood as a result of her sexually assaulting him is clearly a novel situation not covered by case law.

It would hardly be misplaced to extend the scope of Aquilian liability by recognising that the conduct of a woman who sexually assaults a man for the purpose of falling pregnant is wrongful. Following the reasoning in *Mukheiber*, courts may express a reluctance to award damages where the child is born without congenital defects because it implies that the existence of a healthy child is a harm worthy of compensation. This is an acceptable public policy consideration. However, the Appellate Division clearly intimated that it is not the birth of a child that is unlawful but rather the financial harm which arises from the breach of a legal duty.<sup>494</sup>

Indeed it would be contrary to public policy if the victim of sexual assault was prohibited from seeking restitution that would help to counterbalance his parental duty to support the child born as a result of his sexual victimisation. The

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<sup>489</sup> Du Bois Wille's *Principles* at 1137.

<sup>490</sup> JC van der Walt & JR Midgley *Principles of Delict* (2005) at 71.

<sup>491</sup> Neethling et al. *Law of Delict* 6ed at 47.

<sup>492</sup> *Natal Fresh Produce* supra at 756.

<sup>493</sup> *Tommie Meyer Films* supra at 383.

<sup>494</sup> *Mukheiber* supra at para 46.

legal convictions of the community dictate that any form of sexual assault is condemnable and punishable. A man who is drugged or heavily intoxicated and used as a vehicle for reproduction is deprived of his constitutionally-enshrined rights to bodily integrity, privacy and human dignity. Crucially, he was divested of the right to make reproductive decisions because at no point was he able to exercise consent. He could not consent to the act which led to conception or to the risk that a pregnancy may materialise.<sup>495</sup> It follows that an extension of the Aquilian action in this particular instance of involuntary fatherhood would likely give effect to, not hinder, public policy considerations.

### **The hurdle of consent**

For the man who was conned into parenthood through sexual assault, the road to establishing wrongfulness is made easier because of a complete absence of consent to any sexual activity on his part. However, the situation is not as clear-cut for those men who consented to some form of sexual activity but did not consent to the use of their sperm for reproductive purposes. The possibility of successfully suing in delict is even less clear for the man who consensually engaged in sexual intercourse after his partner convinced him that she could not fall pregnant. The following discussion thus considers whether the child's mother may rely on the defence of consent as a justification excluding wrongfulness in those instances where she fell pregnant by inseminating herself with the plaintiff's sperm or misrepresenting that she was infertile or using birth control.

*Prima facie* wrongful conduct is not conclusively wrongful and upon closer inspection, harm-causing conduct may be legally justified in exceptional circumstances.<sup>496</sup> Informed consent is a ground of justification which has the effect of negating wrongfulness because a legal norm is not infringed where consent is freely furnished.<sup>497</sup> Where the plaintiff consents, he unilaterally limits his rights and interests to the extent that the defendant's conduct is legally permissible absolving her of delictual liability.<sup>498</sup>

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<sup>495</sup> In the same way that mentally disabled persons and victims of statutory rape lack the capacity to furnish legal consent.

<sup>496</sup> Neethling et al. *Law of Delict* 6ed at 45.

<sup>497</sup> At 82, 103.

<sup>498</sup> *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) at 720.

*Volenti not fit iniuria*

The core of the defence of consent is neatly captured in the Roman law maxim *volenti not fit iniuria* which posits that a voluntary participant consents to harm.<sup>499</sup> In this regard, the defendant's infringement of the plaintiff's rights is legally justified. Given that consent limits an injured party's rights, it must be evident to constitute a legal act.<sup>500</sup> It must be supplied prior to the prejudicial conduct and may be furnished expressly or tacitly.<sup>501</sup> The presence of consent is a question of fact, and the burden rests with the defendant to establish, on a balance of probabilities, that the plaintiff consented to sexual intercourse.<sup>502</sup>

For consent to be legally valid, a number of requirements must be satisfied which demonstrates that the law applies the defence of consent with caution.<sup>503</sup> Consent must be given voluntarily<sup>504</sup> and the person furnishing consent must be capable of consenting in that he should have the requisite mental capacity to appreciate the consequences of his acts and should not suffer from mental illness or be under the influence of drugs.<sup>505</sup> The consenting party must have full knowledge of the nature and extent of the risk or the possibility of harm in order to consent to it.<sup>506</sup> In addition to having full knowledge of the risk or possible harm, the party providing consent must also understand and fully appreciate the nature and extent of that risk.<sup>507</sup> Simple knowledge is insufficient and must be accompanied by a full appreciation of the implications that flow from furnishing consent.<sup>508</sup> Lastly, the consenting party must in fact subjectively consent to the act, the evidence of which may be inferred by the court from the confirmed facts.<sup>509</sup>

The question as to whether the requirements for consent are met depends on the factual circumstances surrounding the act which led to a child's conception. What follows is an application of the aforementioned requirements to the scenarios

<sup>499</sup> Neethling et al. *Law of Delict* 6ed at 103. Loosely translated, means "a willing participant is not wronged; he who consents cannot be injured."

<sup>500</sup> At 105.

<sup>501</sup> *Ibid.*

<sup>502</sup> At 106.

<sup>503</sup> *Ibid.*

<sup>504</sup> Van der Walt & Midgley *Principles of Delict* at 142-3.

<sup>505</sup> Neethling et al. *Law of Delict* 6ed at 106.

<sup>506</sup> *Louwrens v Oldwage* [2006] 1 All SA 197 (SCA) at 208.

<sup>507</sup> *Ibid.*

<sup>508</sup> *Waring and Gillow Ltd v Sherborne* 1904 TS at 344-5.

<sup>509</sup> Neethling et al. *Law of Delict* 6ed at 107. See fn 532 a 107.

involving non-consensual use of sperm and natural conception through deceit, respectively.

*Non-consensual use of sperm*

Conception, in the ordinary sense of the word, refers to the instance where a child is conceived following sexual intercourse. However, it does not mean to say that a child cannot be conceived in other less ordinary ways. This is all too clear for those men who were persuaded into oral sex or manual stimulation and later became fathers after their sexual partners surreptitiously kept their ejaculated sperm for self-insemination. A man in this position would likely feel that he has been completely duped into parenthood and the concomitant obligations of child support. In this light, he would argue that he was a victim of sexual trickery and should have a delictual claim against the child's mother to counterbalance or reduce his maintenance payments. However, unlike the gentleman who is foisted into fatherhood as a result of sexual assault, a man whose sperm is secretly harvested at least consented to some form of sexual activity. Accordingly, the child's mother may have acted lawfully if she can justify her conduct on the grounds of consent.

There are two forms of consent, that is consent to injury and consent to the risk or possibility of injury.<sup>510</sup> Consent to injury refers to the instance where a party consents to a specified harm.<sup>511</sup> Consent to the risk of injury, on the other hand, refers to the instance where a party consents to the risk of any harm which may arise as a consequence of the defendant's conduct.<sup>512</sup> The scenario in which a pregnancy results from the non-consensual use of sperm is, if it can be proved on a balance of probabilities, an example of consent to the risk of injury. On the one hand, the father did not engage in sexual intercourse nor did he consent to the use of his sperm for self-impregnation. On the other hand, the child's mother could possibly raise the defence of *volenti non fit iniuria* because he willingly participated in a sexual act.

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<sup>510</sup> Neethling et al. *Law of Delict* 6ed at 103.

<sup>511</sup> *Ibid.*

For example, A engages in a wrestling match with B. Thus B is indemnified against any resultant injuries by virtue of the fact that A consented to participation.

<sup>512</sup> For example, X consents to the risk of injury that may arise as a result of undergoing a surgical procedure performed by Y. Should the risk materialise, Y will not be liable as X consented to the surgical procedure.

The courts have interpreted the defence as consisting of three components, namely knowledge of the risk involved, an appreciation of that risk and a voluntary undertaking of that risk.<sup>513</sup> In this regard, he must have knowledge of, and appreciate, the nature and extent of the particular risk.<sup>514</sup> Therefore, he must have foreseen the risk of a pregnancy resulting from oral sex or manual stimulation. Unless he was heavily intoxicated, under the influence of drugs or mentally incapable of appreciating the consequences of sexual activity, it is possible to argue that he assumed the risk of pregnancy by participating in consensual oral sex. He willingly engaged in a sexual act when he could have abstained. However, for the father to have voluntarily assumed the risk of pregnancy, it must be reasonable.<sup>515</sup> In this light, it is perhaps unreasonable to suggest that participation in a non-procreative act could lead to conception. Under normal circumstances, oral sex and manual stimulation do not result in pregnancy. If it can be shown that he voluntarily assumed the risk of conceiving a child by participating in a sexual act, he would forfeit the right to receive compensation where the risk materialised to cause him harm.<sup>516</sup>

The onus rests with the child's mother to prove that the father consented to the risk of pregnancy. Considering the bizarre circumstances surrounding the child's conception, the court may have a difficult time believing that the child was not born as a result of consensual sexual intercourse. The very private nature of the acts which lead to a child's conception suggests that it is unlikely that there would be any eye witnesses present, and a paternity test would positively establish paternity. Unless the father can produce compelling evidence, it would appear that the child's mother need not even rely on the defence of consent.

#### *Natural conception through deceit*

The number of children born as a result of unprotected sex or ineffective contraception cannot be accurately estimated. However, given the sporadic nature of sexual intercourse, the incidence of unplanned pregnancies must be relatively high.

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<sup>513</sup> *Waring* supra at 344-5.

<sup>514</sup> See *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) at 781: In other words, "where claimant foresaw the risk of injury to himself, it will ordinarily suffice to establish consent provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk."

<sup>515</sup> Burchell *Principles of Delict* at 72.

<sup>516</sup> This obviously excludes a man who had zero sexual contact and the woman simply fished a used condom from the garbage.

When consenting adults engage in unprotected sexual intercourse, the risk of pregnancy is a strong possibility. In this instance, a man should not have any legal recourse against involuntary parenthood where he consensually participates in unprotected sex. But consider the instance where his partner convinces him that she is using birth control, when she is not, or assures him that she is infertile, when she is not. In other words, does a man who consents to sex in which he is deceived to believe that conception is not possible still consent to the risk of pregnancy?

Men are obligated to exercise their reproductive rights before conception by abstaining from sex or using contraceptive measures. By contrast, women endure the physical burdens of pregnancy and may exercise their sexual rights in the bedroom, at an abortion facility or through an adoption agency. Therefore when a man engages in sexual intercourse, he has knowledge of and appreciates the risk that a pregnancy may materialise, and that he will have little say as to whether the mother elects to terminate the pregnancy. In this light, consenting adults assume the reproductive risks of the failure of contraception and its consequences. Contraception is not 100% effective; condoms may break and birth control may prove unsuccessful. Accordingly, it would not prove difficult to argue that in consenting to sexual intercourse, the child's father voluntarily assumed the risk of pregnancy irrespective of whether contraception was used. However, the involuntary father could possibly argue that consenting to non-procreative sexual intercourse is distinguishable from consenting to sexual intercourse which entails a greater risk of conception. In this regard, he would contend that had he known of the true circumstances, he would have abstained from sex.

### **Should the law recognise involuntary fatherhood as wrongful?**

The law must develop in line with changing social values and evolving public policy. As much as there are valid considerations which militate against extending the wrongful pregnancy action to include involuntary parenthood as actionable under delict, there is a plethora of reasons which justify its recognition. What follows is an examination of the contrasting policy considerations which favour or oppose a development of the law through a broader application of the wrongfulness test.

*The influence of the Constitution*

In the seminal case of *Carmichele*,<sup>517</sup> the Constitutional Court asserted that the common law must be interpreted through the normative framework of the Constitution which requires that the test for wrongfulness be informed by the values contained in the Constitution.<sup>518</sup> The Bill of Rights applies vertically and horizontally, and directly and indirectly, to all law which includes the *boni mores* test for wrongfulness.<sup>519</sup> The legal convictions of the community are inclusive of the norms and values embodied within the Constitution and particularly those articulated within the Bill of Rights.<sup>520</sup> Section 39(2) of the Constitution provides that where a court develops the common law, it must do so in light of the spirit, purport and objects of the Bills of Rights. Accordingly, the *boni mores* test must be broadly-interpreted to better safeguard the values encompassed in the Bill of Rights and further developed to pass constitutional muster.<sup>521</sup> In this light, the Constitution requires the courts to cast the net of delictual liability wider by expanding the application of the wrongfulness test.<sup>522</sup> To this end, the recognition of involuntary parenthood as delictually wrongful gives effect to the rights and values embodied in the Bill of Rights.

The impact of the Constitution on the law of delict remains a relatively new development.<sup>523</sup> It must be stated that the Constitution does not solely embody all of the legal convictions of the community.<sup>524</sup> Rather, it contains a value system that enhances and expands the wrongfulness test in accordance with the values underpinning an open and democratic society based on human dignity, equality and freedom.<sup>525</sup> Since the *boni mores* test expresses the community's prevailing legal convictions, it is a flexible criterion which allows the judiciary to develop the law of delict in line with existing legal values. Therefore, the test for wrongfulness, as a

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<sup>517</sup> *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC).

<sup>518</sup> At para 56.

<sup>519</sup> Neethling et al. *Law of Delict* 6ed at 39.

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*

<sup>522</sup> *Carmichele* supra at para 57.

<sup>523</sup> Neethling et al. *Law of Delict* 6ed at 40.

<sup>524</sup> *Ibid.*

<sup>525</sup> Constitution, section 36(1); Neethling et al. *Law of Delict* 6ed at 40.

juridical benchmark, must remain flexible and develop in order to accommodate society's evolving needs and changing values.<sup>526</sup>

*Equal application of the law*

The law has recognised that forced parenthood is actionable under delict by awarding damages to parents who were burdened with the responsibilities of parenthood as a result of physician negligence.<sup>527</sup> In the same way that parents who are forced into parenthood due to medical negligence, involuntary fathers should be compensated for being deprived of their rights to reproductive decision-making and for the costs associated with maintaining the child. It may be argued that the gaping distinction between a hospital, which has the available financial resources to provide compensation, and a woman desperate enough to con a man into fatherhood militates against recognising involuntary parenthood as actionable under delict. The proposition that an institution has greater resources than the average individual may be true but it is easily nullified, too. As previously highlighted, a court should only award damages to an involuntary father to offset his maintenance payments where the child's mother is of adequate means.<sup>528</sup> In fact, that argument loses credibility when one considers that the wide-ranging consequences of involuntary parenthood necessitates treating claims of this nature more seriously than medical-related misconduct. The long-term psychological, social and financial implications of involuntary parenthood are experienced long after the unexpected father is compensated. For a hospital or clinic, the payment of damages is a once-off financial impediment.

The advancements in reproductive medicine and the availability of various contraceptive devices have made it possible for a person to plan when and how he has a family. The growing incidence of late-life marriages, test tube babies and contraceptive use is a direct consequence of the convenience of medical technology.<sup>529</sup> In the developed world, falling birth rates and smaller families are

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<sup>526</sup> *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 All SA 421 (SCA) at para 23.

<sup>527</sup> Referring specifically to the action for wrongful pregnancy as discussed earlier in the Chapter.

<sup>528</sup> In other words, she should be able to sufficiently support her child despite having to compensate the child's father.

<sup>529</sup> Adjin-Tettey -Claims of Involuntary Parenthood- at 92.

indicative of an increasing reliance on contraception.<sup>530</sup> In South Africa, the same trend is experienced in middle to upper-income households.<sup>531</sup> Therefore, a person may legitimately expect to not be forced into parenthood so that he may design his life without the burdens of parental responsibility.

In fact, the Constitution guarantees that every person has the right to make reproductive choices under section 12(2)(a). The constitutional entrenchment of reproductive autonomy means that a violation of this right impinges on an individual's right to determine if and when he wishes to reproduce.<sup>532</sup> A plethora of consequences flow from this violation, including the imposition of unwanted financial obligations and the psychological impact of involuntarily fathering a child he may not want a relationship with. In addition, the consequent emotional damage may deter him from having children later in life or from properly fulfilling his parental duties when he decides to start a family. It follows that if the law provides a remedy to those who are forced into parenthood as a result of medical malpractice, it should equally recognise involuntary fatherhood as actionable under delict if only to mitigate the resultant harm of sexually-conscripted paternity.

*The misconstruction of a compensatable harm*

It may be contended, as it was in *Mukheiber and Edouard*, that the birth of a healthy child cannot constitute a legal wrong. This argument is immaterial for it is not the child itself who comprises the wrong. Instead it is the conduct which results in the birth of an unplanned child and the consequent financial strain of maintaining that child which is considered wrongful. Critics may further opine that the result of the mother's wrongful conduct is a child which is not a compensatable harm. This view is tenuous for a multitude of reasons. Firstly, it postulates a limited understanding of reproductive autonomy as it means a remedy is only available where tangible harm is suffered.<sup>533</sup> Secondly, it undermines an individual's right to make reproductive decisions because the net result being a child is deemed beneficial regardless of the wrongful circumstances surrounding the child's conception.<sup>534</sup>

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<sup>530</sup> At 100.

<sup>531</sup> S Belay *Marriage markets and fertility in South Africa with comparisons to Britain and Sweden* (2007) 63-5.

<sup>532</sup> Adjin-Tettey *Claims of Involuntary Parenthood* at 99.

<sup>533</sup> *Ibid.*

<sup>534</sup> *Ibid.*

Thirdly, by failing to cogitate the conditions which led to the child's conception, the view neglects to consider an individual's right to dignity, privacy and physical integrity.<sup>535</sup> Finally, the adoption of this view is worryingly regressive for it ignores the causation of harm and thus deters the reduction of harm.<sup>536</sup>

The possibility of recognising involuntary parenthood may be opposed on the basis that it essentially commodifies children. Where a father claims to have been sexually finagled into becoming a parent, his concomitant rejection of fatherhood and subsequent recovery of damages may appear contrary to public policy which views reproduction and parenthood as socially valuable and comprising of intangible benefits.<sup>537</sup> In this regard, the evaluation of the benefits of a child's conception weighed against the infringement of the father's right to avoid procreation coupled with an assessment of the damages in relation to the birth of the child may have the unwanted effect of commodifying that child.<sup>538</sup>

Indeed the fear of commodification is a natural consequence of the distinction created between the private domain and the public sphere. The divide between the private and public arenas exists to separate personal relations from commercial transactions.<sup>539</sup> According to this distinction, the private domain of the family and home is the appropriate realm for the interests and values which pertain to biological reproduction, familial relations and child rearing.<sup>540</sup> It would follow that these interests and values are jeopardised where damages are awarded for the birth of an unplanned child.<sup>541</sup> As such, a judicial acceptance of these claims would necessitate a mixing of the intimacy of the family setting and the commercial sphere.

The commodification argument, however, loses steam when one considers that human relationships, social practices or cultural activities cannot be conveniently categorised into one specific domain.<sup>542</sup> Individuals partake in a plethora of diverse

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<sup>535</sup> Ibid.

<sup>536</sup> Ibid.

<sup>537</sup> At 103.

<sup>538</sup> At 104.

<sup>539</sup> JC Williams & V Zelizer 'To Commodify or Not to Commodify: That is *Not* the Question' in MM Ertman and JC Williams (eds) *Rethinking Commodification: Cases and Readings in Law and Culture* (2005) at 364.

<sup>540</sup> Ibid.

<sup>541</sup> Ibid.

<sup>542</sup> At 365.

social networks which interlink the personal and commercial spheres of life.<sup>543</sup> Accordingly, the recovery of damages for the economic and emotional implications of involuntary fatherhood cannot be seen as commodifying human life. Instead, it is a natural consequence of the reality of the intermingling of family life and economic forces. Indeed the law awards damages for pain and suffering<sup>544</sup> and loss of enjoyment of life,<sup>545</sup> and grants compensation for wrongful death.<sup>546</sup> Yet these claims are not barred on the basis that they commodify human life. The evaluative assessment of damages in the law of delict recognises a plaintiff's right to compensation to remedy the ramifications of the defendant's misconduct.<sup>547</sup> It follows that the value of human life is not lessened by recognising involuntary parenthood as delictually wrongful as claims of this nature are not related to the value of the unplanned child's life but to the costs incurred in maintaining that child as a result of an interference with an individual's reproductive autonomy.

#### *The question of privacy*

The most pressing argument against recognising involuntary parenthood as actionable under delict is the contention that the private nature of the acts which result in pregnancy are beyond a court's jurisdiction. Despite the unanticipated manner in which the pregnancy arises, a South African court may be reluctant to extend Aquilian liability for fear of intruding into the very personal domain of sexual relationships. The constitutionally-protected right to privacy is constitutive of the right not to have the state interfere in private matters. Indeed, a claim based on involuntary fatherhood would necessarily involve an enquiry into the intimate, private arrangements of the parties. The courts in the United States have adopted this view and have accordingly dismissed claims brought by non-consenting fathers under tort law.<sup>548</sup>

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<sup>543</sup> At 366.

<sup>544</sup> *Peter v South African Rail Commuter Corporation and another* [2014] JOL 32415 (GSJ).

<sup>545</sup> *Jansen & another v RAF* [2010] JOL 26116 (ECP).

<sup>546</sup> *Paixão and another v Road Accident Fund* [2012] 4 All SA 262 (SCA).

<sup>547</sup> Adjin-Tetty 'Claims of Involuntary Parenthood' at 108.

<sup>548</sup> *Wallis v. Smith* 22 P.3d 682 (N.M. Ct. App. 2001); *Welzenbach v. Powers* 139 N.H. 688 A.2d 1133 (1995).

A tort is essentially the US version of a delict. The elements which must be satisfied for tortious liability to arise are duty, breach, causation and damages.

In *Stephen K. v. Roni L.*,<sup>549</sup> an involuntary father alleged that he only engaged in sexual intercourse because his partner falsely represented that she was using birth control.<sup>550</sup> In formulating its decision, the California Court of Appeals held that the private, carnal nature of the matter precludes a court from adjudicating the claim.<sup>551</sup> In this regard, the court stated that the right to privacy prevents the judiciary from recognising an action based on misrepresentation as to contraceptive use.<sup>552</sup> It follows that the rights to privacy and sexual choice are two-fold; the right to make reproductive decisions without restriction means that the courts should not be permitted to regulate the intimate arrangements between sexual partners.

It is not disputed that every individual is afforded the constitutional right to privacy. It also uncontested that a court's interference in the sexual arrangements between consenting adults possibly undermines the right to privacy. However, this is not to say that the claim of involuntary parenthood should not be recognised as wrongful under delict. In fact, a court's denial of such a claim reflects an unwillingness to appreciate the gravity of the harm resulting from sexual victimisation. Where a man is sexually assaulted and forced to pay maintenance in respect of the child conceived as a result of his assault, the rejection of his delictual claim on the grounds of privacy is hardly fair. It cannot be said that a court should absolve itself from interfering in the private, sexual affairs of individuals where one party did not consent to any form of sexual activity. Indeed a court does not dismiss a rape charge on the basis that the activity complained of involved discrete, sexual conduct. It would be equally unfair for a court to reject the claim of an involuntary father who argues that his sperm was misappropriated and used without his consent for fear of intruding into the personal domain of sexual relationships. The important factor in the aforementioned examples is that sexual intercourse was either absent or non-consensual.

Conversely, a man who alleges his partner forced him into fatherhood by falsely representing that she was infertile or using birth control still conceived a child through consensual intercourse. Unlike the other men in the preceding examples, he

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<sup>549</sup> 105 Cal. App 3d 640 (1980).

<sup>550</sup> Id. at 645.

<sup>551</sup> Id. at 644-5.

<sup>552</sup> Id. At 645.

could have taken additional precautionary steps or abstained from sex altogether. Accordingly, it would appear that a court has more reason to dismiss a claim based on birth control fraud on the grounds that it is against public policy to enforce the private agreements regarding contraceptive use between sexual partners. Furthermore, by extending the wrongful pregnancy action to cover men who engaged in consensual vaginal intercourse, the courts risk opening up the floodgates to voluntary fathers seeking to avoid maintenance claims.

### **Conclusion**

The recognition of involuntary fatherhood as actionable under delict hinges on whether the conduct of the child's mother is wrongful in the eyes of the law. The wrongful pregnancy and wrongful birth cases provide much insight as actionable instances of unplanned parenthood. These cases, however, may be distinguished from the factual scenario of deceitfully imposing paternity. The former involves the negligent conduct or omission of a medical practitioner whereas the latter implicates the conduct of a woman who surreptitiously conceives a child with a particular man in a non-clinical environment. In this regard, establishing wrongfulness may be limited to certain instances in which men are sexually foisted into fatherhood.

An analysis of the relevant policy considerations reveals that recognising certain claims of involuntary fatherhood as actionable under delict is an appropriate solution. The awarding of damages for involuntary parenthood does not equate a child's birth to a compensatable wrong. Instead it is the actions which lead to the child's conception that constitutes an actionable wrong. Similarly, the determination of damages should be enlightened by practical considerations and not abstract fears of commercialising human life. To this end, the private and public spheres of human existence are so interconnected that a court cannot refuse to adjudicate a claim of this nature simply because it involved private, sexual conduct.

Practically, where a child is conceived as a result of sexual assault, public policy favours an extension of Aquilian liability. The *boni mores* militates against burdening a victim of a sex crime with the parental obligations of his victimisation. The defence of *volenti non fit iniuria*, however, reduces the likelihood of success for those men whose sperm were harvested and used without their consent after agreeing

to oral sex or manual stimulation. A father who alleges that his partner tricked him into parenthood by lying about being infertile or using birth control is also unlikely to prove successful in establishing wrongfulness as he consensually engaged in sexual intercourse. In this light, it appears as if a complete absence of consent to any sexual act resulting in pregnancy is likely to justify an order of compensation under the law of delict.

## CHAPTER SEVEN

### WHOSE SPERM IS IT, ANYWAY? AN ARGUMENT FOR THE RECOGNITION OF GAMETIC MATERIAL AS PROPERTY

*'Man cannot dispose over himself, because he is not a thing.'*<sup>553</sup>

The very concept of 'stolen sperm' suggests that a person may be illegally deprived of something which belongs to him. This view, however, is not entirely supported by the law. In fact, the South African legal system does not recognise property rights in one's body parts or bodily products. Accordingly, there exists a lacuna in the law in relation to the legal status and ownership of excised gametic material.<sup>554</sup> Predictably, this presents a hindrance to those men who were entrapped into the legal obligations of parenthood through the non-consensual use of their sperm. It is therefore proposed that the recognition of property rights in bodily materials, and gametes in particular, will provide persons with an enforceable legal remedy against the non-consensual use of their bodily substances.

#### **The law of property**

Property law may be described as a theoretical legal discipline regulating commercial activity which rests on a foundation of traditional rules and principles, but which frequently adapts in line with changing social, economic and political values.<sup>555</sup> Property, in the broadest sense of the word, refers to an extensive range of patrimonial assets that belong to a natural or juristic person.<sup>556</sup> Accordingly, the primary function of property law is to protect individual property rights and interests. To this end, it serves to regulate and harmonise the legal relationship between persons in respect of things<sup>557</sup> and the consequent rights and obligations generated by this relationship.<sup>558</sup>

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<sup>553</sup> I Kant *Lectures on Ethics* (1997) at 157.

<sup>554</sup> M Slabbert 'This is my kidney, I can do what I want with it - property rights and ownership of human organs' (2009) 30 *Obiter* 499 at 500.

<sup>555</sup> H Mostert & A Pope (eds) *The Principles of The Law of Property in South Africa* (2010) at 3.

<sup>556</sup> Du Bois *Wille's Principles* at 408-9.

<sup>557</sup> As a measure of clarification it must be noted that 'things' refers to tangible and corporeal objects. Property, on the other hand, broadly encompasses incorporeal and intangible objects. See *Wille's* at 409.

<sup>558</sup> Mostert *Principles of The Law of Property* at 6.

Ownership is classified as a real right and constitutes the largest parcel of property rights and interests.<sup>559</sup> It is delineated on the basis of a variety of entitlements which permits the owner to exercise his real rights in the legal object of the right.<sup>560</sup> These entitlements include the right to freely use, control, encumber, vindicate and alienate the object of the right without interference.<sup>561</sup> In this regard, ownership is characterised by the entitlements it affords. However, it is not necessary that an owner enjoys all of the aforementioned entitlements for ownership to be present.<sup>562</sup> For example, the owner of a piece of land who grants a servitude holder right of way cannot further encumber the property. Similarly, the owner of immovable property cannot use or occupy the house he rents out to a third party. By parity of reasoning, it could be said that gametic material need not possess all of the attributes of ownership for it to be owned by the person from whom it originates. It is accepted that a person cannot grant limited real rights in respect of his sperm. However, sperm is under the control of the man from whom it is produced until such time as he chooses to use it for reproductive purposes. In addition, it can be donated to a sperm bank or stored with a fertility clinic and vindicated at the election of the deposittee.

This argument, however, is likely to be met with the criticism that the human body is not subject to self-ownership. The basis of this criticism lies in the traditional classification of the body within the property law framework. Under the common law, body parts are regarded as *res extra commercium*, that is things which cannot be privately or commercially-owned.<sup>563</sup> The classification of the components of the human body as non-negotiable is grounded on the nature of the body itself. A thing or *res* is defined as an impersonal, corporeal article that is legally independent, subject to human control and is useful or valuable.<sup>564</sup> In this regard, the human body cannot legally be defined as property because its parts do not exist independently and are not external in nature.<sup>565</sup> It follows that bodily products are beyond the commercial sphere insofar as they are attached to a person. However, sperm, once

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<sup>559</sup> RN Nwabueze *Biotechnology and the Challenge of Property* (2007) at 76.

<sup>560</sup> *Ibid.*

<sup>561</sup> Mostert *Principles of the Law of Property* at 20-21.

<sup>562</sup> Nwabueze *Biotechnology* at 77.

<sup>563</sup> S Mahomed "The legal position on the classification of human tissue in South Africa: Can tissues be owned?" (2013) 6 *SAJBL* 16 at 16.

<sup>564</sup> Mostert *Principles of the Law of Property* at 20.

<sup>565</sup> *At* 23.

ejaculated, is essentially a tangible object which exists independently, is external to the human body and may be appropriated and used for reproductive purposes. To this end, excised bodily materials are traditionally seen as *res nullius* that is things that are not owned or have been abandoned.<sup>566</sup> Thus the prohibition on the ownership of human body parts does not apply to bodily products.

*The problem with res nullius*

Under the common law, a person may acquire ownership in *res nullius* through *occupatio*.<sup>567</sup> *Occupatio* or occupation is a form of original acquisition of ownership. It takes place where a person independently acquires possession of unowned or abandoned property, the most common example of which is the capturing of wild animals.<sup>568</sup> A thing will be deemed to have been successfully appropriated where both elements of possession have been met, namely *corpus* and *animus domini*.<sup>569</sup> *Corpus* is present where the thing in question is under a person's sufficient and effective physical control.<sup>570</sup> The nature of the thing in question determines the extent to which it must be physically controlled. *Animus domini*, on the other hand, is present where the person who has taken control of the thing possesses the requisite mental intention to own the object.<sup>571</sup> In this regard, gametic material may be owned upon detachment provided only that the person who obtains sufficient physical control over a sample of gametic material intends to own it.<sup>572</sup> It follows that a person may acquire ownership in another's abandoned sperm despite the fact that bodily materials cannot be legally owned.<sup>573</sup>

The classification of bodily products as *res nullius* highlights a striking lacuna in the law. As the law stands, a man who has consented to oral sex or manual stimulation only to have his sperm pilfered for reproductive objectives cannot assert a property right in his gametic material. By contrast, the woman who intentionally purloined his sperm acquires the exclusive use of and control over his discharged bodily material. In this light, the physical act of detachment converts a bodily

<sup>566</sup> Slabbert "This is my kidney, I can do what I want with it" at 502.

<sup>567</sup> Du Bois *Wille's Principles* at 488.

<sup>568</sup> Mostert *Principles of the Law of Property* at 163-4.

<sup>569</sup> At 163.

<sup>570</sup> *Ibid.*

<sup>571</sup> *Ibid.*

<sup>572</sup> The sample of gametic material refers specifically to ejaculated semen.

<sup>573</sup> It is important to note that this section deals with the common law position regarding bodily products. The National Health Act, however, statutorily regulates the removal and use of bodily fluids, including gametes. This is discussed in detail below.

product ordinarily shielded by the non-negotiable nature of the human body open to ownership by the first person who takes possession of it. Accordingly, men who are forced into the obligations of fatherhood through the non-consensual use of their sperm cannot legitimately argue that their sperm were stolen. Indeed women who conceive children in this manner will escape criminal liability insofar as the crime of theft is concerned. To this end, a property right in one's bodily materials is sorely needed to provide involuntary fathers and others with sufficient legal protection.

### **Protection under statute**

Under the law, the complete human body remains beyond the sphere of commercial transactions. However, the technological advances in health science such as organ transplants, *in vitro* fertilisation and stem cell research have reshaped the perception of the human body as outside the framework of property law.<sup>574</sup> Accordingly, the law is in tension with the pace at which medical technology is expanding. This has forced Parliament to introduce various pieces of health legislation to regulate the transaction of renewable bodily substances.<sup>575</sup>

#### *Informed consent*

Chapter 8 of the National Health Act, in conjunction with its accompanying Regulations, governs the removal, donation and use of blood, tissue and gametic material. Given the law's unwillingness to view persons within the realm of property law, the principle of informed consent, which is founded on the medical pillar of autonomy, is used to protect the basic human rights and interests of potential patients.<sup>576</sup> In this regard, the requirement of informed consent gives effect to the constitutional right to have security in, and control over, one's body.<sup>577</sup> To this end, section 55(a) of the Act provides that the blood, tissue or gametic material of a living person may not be removed or withdrawn without his written consent. The Regulations clarify that where the donor is a minor, written consent must be granted by his parents or guardians.<sup>578</sup> Section 56(1) of the Act postulates that a donor's removed blood, tissue or gametic material may only be used for a prescribed medical or dental purpose. Section 56(2)(a)(i) further provides that blood, gametes or tissue

<sup>574</sup> Mahomed "Can tissues be owned?" at 16.

<sup>575</sup> Du Bois *Wille's Principles* at 414.

<sup>576</sup> D Dickenson *Property in the Body: Feminist Perspectives* (2007) at 18.

<sup>577</sup> As encapsulated under section 12(2)(b) of the Constitution.

<sup>578</sup> Reg 2(b) of the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes GNR 180 of GG 35099 of 2 March 2012.

cannot be withdrawn or removed from persons who suffer from a mental illness. In addition, the withdrawal or removal of gametic material<sup>579</sup> or non-renewable tissue from minors is also prohibited.<sup>580</sup> The requirement of written consent thus overrides the perception that excised bodily materials are simply waste.<sup>581</sup>

According to the Regulations Relating to the Use of Biological Material,<sup>582</sup> only a trained health professional has the authority to remove biological material for research, testing or remedial objectives.<sup>583</sup> Further to this, biological material may only be removed within the confines of an authorised<sup>584</sup> or prescribed institution,<sup>585</sup> in addition to research establishments demarcated in terms of an Act of Parliament.<sup>586</sup> The National Health Act and its accompanying Regulations do not specifically define what constitutes an authorised or prescribed institution. However, section 54 of the Act stipulates that an authorised institution, designated as such by the Minister of Health,<sup>587</sup> has the power to procure and use any tissue that was lawfully removed or withdrawn from the living or deceased for listed medical purposes.<sup>588</sup> To this end, it is insufficient that the removal or withdrawal of biological material is subject to the requirement of informed consent. In addition, the very use of certain biological materials, including gametes, is restricted to health research, genetic testing and healing purposes.<sup>589</sup> This plainly demonstrates that persons who agree to the removal or withdrawal of their gametic material within a clinical setting are statutorily protected from the unauthorised use of their bodily products.

The provisions in the National Health Act, along with the statutory regulations which govern the use and removal of bodily materials, are carefully-worded to ensure that blood, tissue and gametic material do not fall within the framework of property law. Under section 63 of the Act, persons may donate their

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<sup>579</sup> Section 56(2)(a)(iii) of the National Health Act 61 of 2003.

<sup>580</sup> Section 56(2)(a)(ii).

<sup>581</sup> Dickenson *Property in the Body: Feminist Perspectives* at 19.

<sup>582</sup> GNR 177 GG 35099 of 2 March 2012.

<sup>583</sup> Reg 2(a)

<sup>584</sup> Reg 2(b)(i).

<sup>585</sup> Reg 2(b)(ii).

<sup>586</sup> Reg 2(b)(iii).

<sup>587</sup> Section 54(1) of the National Health Act.

<sup>588</sup> Section 54(2)(b).

Without any evidence to the contrary, 'prescribed' is assumed to have a similar meaning to authorised institution, and refers to those listed establishments, namely, tissue banks, hospitals and universities.

<sup>589</sup> Regulations Re Use of Biological Materials, reg 5.

blood, tissue and gametic material to a prescribed institution for medical purposes,<sup>590</sup> training, research or therapeutic objectives.<sup>591</sup> In this regard, the donation as opposed to the sale of bodily materials, which is prohibited under the Act,<sup>592</sup> preserves the border between commercial and non-negotiable transactions.<sup>593</sup> Under section 60(1) of the Act, only hospitals and authorised institutions may receive payment from the procurement, supply, importation or exportation of blood, tissue and gametic materials.<sup>594</sup> The provision further specifies that compensation for the donation of bodily products only covers the reasonable costs incurred, such as travel expenses or medical bills.<sup>595</sup> In fact, it is a criminal offence for a donor to receive financial remuneration beyond the reasonable costs incurred in the provision of his donation.<sup>596</sup>

The legal prohibition on the sale of bodily materials is commensurate with section 4(1)(j) of the Prevention and Combating of Trafficking Act 7 of 2013. The provision criminalises the selling of a person through the direct or indirect payment, reward or compensation to that person or anyone else who has a close relationship with him for the purpose of exploitation. Under section 1 of the Act, 'exploitation' is defined as 'the removal of body parts' which is further described as including bodily products such as gametic material. To this end, the underlying purpose of these legislative provisions is to prevent persons from profiting from the misappropriation of theirs or others' bodily products.

### **An uncomfortable paradox**

Despite the prohibition on the sale and trade of bodily materials, the concept of ownership is paradoxically incorporated in particular pieces of legislation. Under the Regulations Regarding the Use of Human DNA, RNA, Cultured Cells, Stem Cells, Blastomeres, Polar Bodies, Embryos, Embryonic Tissue and Small Tissue Biopsies for Diagnostic Testing, Health Research and Therapeutics,<sup>597</sup> the ownership of certain biological materials vests with the donor, parent and State. The

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<sup>590</sup> Section 56(1) of the National Health Act.

<sup>591</sup> Section 64(1)(a)-(e).

<sup>592</sup> Section 60(4)(b).

<sup>593</sup> Mostert *Principles of the Law of Property* at 23.

<sup>594</sup> Section 60(1)(a)-(b).

<sup>595</sup> Section 60(2).

<sup>596</sup> Section 60(4)(a).

<sup>597</sup> GNR 7 GG 29526 of 5 January 2007.

Regulations provide that prior to the harvesting of stem cells, the ownership of umbilical cord blood for research vests with the donor<sup>598</sup> while the ownership of umbilical cord blood used to benefit the child, or his siblings, vests with the parents of the child.<sup>599</sup> On the other hand, after consent is furnished for the harvesting of the stem cells, the ownership of umbilical cord blood used in research vests with the State.<sup>600</sup> The ownership of umbilical cord blood used for the benefit of the child or his siblings remains with the parents after consent has been provided.<sup>601</sup> The explicit use of "ownership" in the Regulations quite clearly places biological materials, specifically umbilical cord blood, within the framework of property law. By parity of reasoning, the misappropriation of this bodily product by another person would generate a legal claim from the donor, parent or State in whom ownership vests.

The Regulations Relating to the Artificial Fertilisation of Persons<sup>602</sup> specifically contain a provision relating to the ownership of gametic material. Regulation 18(1) postulates that prior to artificial fertilisation, the ownership of sperm samples which are donated for use in artificial fertilisation, vests in the authorised institution which withdraw or removed the gametic material.<sup>603</sup> After the receipt of the sperm by the authorised institution which intends to perform the procedure, ownership will vest in that institution.<sup>604</sup> On the other hand, the ownership of the sperm donated for the artificial fertilisation of the donor's spouse vests in the donor before the procedure is performed.<sup>605</sup> Once artificial fertilisation is effected, the ownership of the resulting zygote or embryo vests in the recipient of the donated gametic material.<sup>606</sup>

It is possible that ownership is simply assigned for practical purposes in order to distinguish the stages of the fertility procedure. Be that as it may, this anomaly certainly generates confusion. Given that abandoned bodily fluids are legally classified as *res nullius* and that the use of excised gametic materials is

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<sup>598</sup> Reg 9(b).

<sup>599</sup> Reg 9(c).

<sup>600</sup> Reg 10(b).

<sup>601</sup> Reg 10(c).

<sup>602</sup> GNR 175 of GG 35099 of 2 March 2012.

<sup>603</sup> Reg 18(1)(a)(i).

<sup>604</sup> Reg 18(1)(a)(ii).

Prior to artificial fertilisation taking place, the ownership of a female gamete vests in the donor as per reg 18(1)(c).

<sup>605</sup> Reg 18(1)(b).

<sup>606</sup> Reg 18(2). This applies to the donors of both female and male gametes.

strictly regulated under statute, it is unfair to treat particular bodily products in a property framework under certain Regulations.

One might argue that men have the right to not be forced to submit to the removal of their testicular tissue. In this light, one may similarly contest that a man has the right to not have his sperm harvested and used without his consent. Section 55 of the National Health Act read in conjunction with section 56(1) prohibits the withdrawal or removal of gametic material without the donor's informed consent and the use of gametic material for non-medical purposes. The Act, however, makes no mention of abandoned bodily materials thus excluding from its ambit men whose ejaculated sperm has been kept and used after oral sex.<sup>607</sup> In fact, the statutorily-embodied principle of informed consent is of no assistance in protecting men against the non-consensual use of their sperm for reproductive purposes. In a non-medical setting, semen is nothing less than abandoned material.

The widely-publicised American case of *Phillips v. Irons*<sup>608</sup> provides a perfect example of the appropriation and subsequent use of gametic material. In this case, the plaintiff brought an action for conversion of property against his former partner who he alleged had intentionally kept his sperm after oral sex in order to fall pregnant through self-insemination.<sup>609</sup> The tort of conversion of property is defined as the wrongful exertion over a person's property in derogation, or to the exclusion, of his title or rights to the property.<sup>610</sup> The plaintiff therefore alleged that his sperm constituted property. Accordingly, he had to prove, on a balance of probabilities, that he held a right in the sperm he produced, a right to the immediate and absolute control of his sperm, that the defendant wrongfully took possession and assumed ownership of his sperm and that he demanded she relinquish possession.<sup>611</sup> The defendant, on the other hand, pleaded that the plaintiff voluntarily transferred his sperm to her as an unconditional gift.<sup>612</sup> To this end, the defendant's argument implicitly accepted that sperm constitutes property.

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<sup>607</sup> Or manual stimulation.

<sup>608</sup> No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005).

<sup>609</sup> *Id.* at 1.

<sup>610</sup> E Waintraub 'Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell' (2007) 11 *Quinnipiac Health Law* 1 at 13.

It should be noted that the tort of conversion is not available under South African law. Instead an owner of a thing may recover his property using the *rei vindicatio*.

<sup>611</sup> *Id.* at 1.

<sup>612</sup> *Id.* at 5.

The court, however, held that the elements of conversion could not be established.<sup>613</sup> The court reasoned that the plaintiff was not entitled to the immediate, absolute and unconditional possession of the sperm because he intended for the defendant to dispose of it upon ejaculation.<sup>614</sup> In other words, the plaintiff deposited his sperm with the defendant without the intention of it being returned. Crucially, by solely rejecting the conversion claim, the court did not question whether excised gametic material could possibly be classified as property.

### **Transfer of ownership**

If a South African court were to hear a matter involving the same factual scenario described in *Phillips*, it would likely reach a similar conclusion. However, it would employ the principles of Roman-Dutch law which differ markedly from the Anglo-American property law principles. As the law stands, excised bodily material withdrawn or used outside of the clinical setting is classified as *res nullius*. Where a man ejaculates semen following a sexual act, it becomes detached from his body and is simply a discarded bodily product. Thus a woman who surreptitiously salvages the semen from a sexual encounter for personal reproductive purposes would only need to store it with the intention to own it or use it. However, if the law were to recognise gametic material as property, the depositing of sperm during oral sex or manual stimulation would not permit a person to unilaterally acquire ownership through *occupatio*.

Under South African law, two conditions must be satisfied before a person can transfer ownership in his property to another party.<sup>615</sup> Firstly, there must be a real agreement between the parties whereby the transferor must intend to transfer ownership and the transferee must intend to acquire ownership.<sup>616</sup> Secondly, transfer of possession must take place via delivery.<sup>617</sup> To this end, the post-coital delivery of semen cannot be conceived as a transfer of ownership if the person from whom the sperm originates does not intend to transfer it.<sup>618</sup> The fact that a man may have

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<sup>613</sup> Id. at 5-6.

<sup>614</sup> Id. at 6.

<sup>615</sup> Du Bois *Wille's Principles* at 520.

<sup>616</sup> At 520-1.

The intention to transfer ownership is referred to as *animus transferendi dominii*. The intention to acquire ownership is referred to as *animus accipiendi dominii*. See further *Wille's Principles* at 521.

<sup>617</sup> At 525.

<sup>618</sup> D Hubin *Human Reproductive Interests: Puzzles at the Periphery of the Property Paradigm* (2012) 29 *Social Philosophy and Policy* 106 at 123.

voluntarily surrendered his semen during sexual activity is not sufficient to conclude a transfer of ownership.<sup>619</sup> Accordingly, a man in this position would not intend for the woman from he received oral sex to own his sperm and use it to conceive a child he does not wish to father.

### **Possible legal remedies**

Realistically, it would prove difficult to argue that a man's discarded sperm has any economic value. In this regard, a woman who furtively keeps a man's semen post-oral sex does not cause him patrimonial loss. Instead the loss arises when a child is born and the involuntary father is legally obligated to support the child. To this end, the cause of the harm is in using the sperm to conceive a child without the knowledge or consent of the person from whom the sperm originates. Thus his interest lies in recuperating the financial damages he will suffer as a result of furnishing child maintenance.

Under the law of delict, he may rely on the Aquilian action to recover patrimonial loss. He would simply need to prove, on a balance of probabilities, that the defendant kept his sperm, acted culpably and caused him financial harm.<sup>620</sup> It is uncertain whether wrongfulness will be presumed in a case of this nature. Generally, positive conduct which results in physical injury to a person or his property is deemed *prima facie* wrongful.<sup>621</sup> If that is not the case in this particular instance, the plaintiff will have to prove, on a balance of probabilities, that the actions of the defendant in salvaging and using his sperm to conceive a child were wrongful in accordance with the legal convictions of the community. If the plaintiff succeeds in establishing all the elements of a delict, the patrimonial damages he receives will offset his child support payments.<sup>622</sup>

Alternatively, he could file criminal charges against the child's mother for the theft of his gametic material. Criminal liability will depend on whether the State can prove, beyond a reasonable doubt, that the defendant stole the complainant's

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<sup>619</sup> At 117-8.

<sup>620</sup> The elements of a delict were discussed in detail in Chapter Six. Refer to pages 83-5 for a refresher.

<sup>621</sup> Fagan 'Rethinking Wrongfulness in the Law of Delict' at 90.

<sup>622</sup> Technically, the plaintiff could also rely on the *actio iniuriarum* for non-patrimonial damages to his physical integrity, privacy and dignity. However, it will be difficult to prove that he has suffered an injury to his bodily integrity considering that he surrendered his sperm voluntarily. To this end, it will be easier to use the Aquilian action.

semen.<sup>623</sup> Ultimately, a higher burden of proof coupled with the difficulty of proving that the child was not conceived naturally reduces the possibility that the mother will be held criminally liable. Nevertheless, it remains an alternative legal route.

### **Limited recognition**

The medical advancements in reproductive technology have inevitably necessitated a re-examination of society's perception of the rights and relationships which flow from the use of gametic material in a clinical environment.<sup>624</sup> In fact, other jurisdictions have recognised sperm as property in limited instances. In the English case of *Yearworth v North Bristol NHS Trust*,<sup>625</sup> six men, who were diagnosed with cancer, were advised to store their sperm with the hospital at which they received their courses in chemotherapy.<sup>626</sup> The men agreed to store their sperm with the hospital for future use in artificial fertilisation.<sup>627</sup> After receipt of the sperm samples, the laboratory at the hospital neglected to properly maintain the equipment used to ensure the sperm remained frozen.<sup>628</sup> As a result, the sperm thawed. The men claimed damages on the basis that the destruction of their sperm established a personal injury for which they were entitled to compensation.<sup>629</sup> In addition, the men claimed that their sperm constituted property and that they had a right to claim patrimonial damages flowing from the loss of their sperm.<sup>630</sup> The court rejected the personal injury claim on the grounds that an excised bodily product does not remain an integral part of the body.<sup>631</sup>

Despite the common law position that body parts and bodily products are not capable of self-ownership, the court accepted that the men's sperm samples were property for the purpose of their claims under tort law. The court held that the advances in medical science necessitate a reconsideration of the common law's

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<sup>623</sup> CJ van der Merwe *Introduction to the Law of South Africa* (2004) at 485-6.

In the unlikely event that the sperm has not yet been used, the owner may recover his sperm using the *rei vindicatio* from the person who is in possession of the sperm.

<sup>624</sup> W Boulter "Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts" (1995) 23 *Hofstra Law Review* 693 at 694.

<sup>625</sup> [2009] EWCA Civ 37.

<sup>626</sup> At paras 4-5.

<sup>627</sup> At para 5.

<sup>628</sup> At paras 7-8.

<sup>629</sup> At paras 10-1.

The men claimed that they had endured nervous shock or "mental distress." Five of the six men alleged that in addition to the mental distress, they suffered psychiatric injury.

<sup>630</sup> At para 19.

<sup>631</sup> At paras 21-3.

treatment of bodily materials.<sup>632</sup> In reaching this decision, the court considered that the primary feature of ownership is the right to freely use one's property.<sup>633</sup> In this regard, the men produced and ejaculated the sperm through their bodies, the sole purpose of which was to deposit the sperm with the laboratory for future use.<sup>634</sup> It followed that the destruction of the sperm eroded the men's right to use their property without interference.<sup>635</sup>

In the Canadian case of *J.C.M. v. A.N.A.*,<sup>636</sup> a lesbian couple, who purchased thirteen frozen sperm straws, both conceived a child using the same donor sperm.<sup>637</sup> Upon separation, the parties divided their property in terms of a separation agreement.<sup>638</sup> However, they could not agree to the disposition of the remaining straws and legal proceedings were instituted to ascertain the status of the straws.<sup>639</sup> The plaintiff desired to keep the sperm so that her new partner could use it to conceive a child who would be biologically-related to the children conceived during her previous relationship.<sup>640</sup> To this end, the plaintiff argued that sperm constituted property and must be divided in line with the separation agreement. The defendant, however, contested that the donor sperm should be eliminated.<sup>641</sup> The court was therefore tasked with establishing whether the sperm samples constituted property. In formulating its decision, the court intimated that the common law prohibition on the ownership of the human body and its components should be re-examined in light of the advances in medical science.<sup>642</sup> Indeed the court held that the frozen sperm straws were property because the parties purchased the sperm and used it to their benefit.<sup>643</sup> It follows that the parties had an ownership interest in the sperm and the court ordered the equal division of remaining straws.<sup>644</sup>

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<sup>632</sup> At para 45.

<sup>633</sup> *Ibid.*

<sup>634</sup> *Ibid.*

<sup>635</sup> *Ibid.*

<sup>636</sup> 2012 BCSC 584 (CanLII).

<sup>637</sup> At para 3.

<sup>638</sup> At para 4.

<sup>639</sup> At para 12, 17.

<sup>640</sup> At para 11.

<sup>641</sup> At para 12.

<sup>642</sup> At para 58.

<sup>643</sup> At para 69.

<sup>644</sup> At para 96.

In the United States, pre-embryonic material has been judicially-recognised as occupying an intermediate group between persons and property.<sup>645</sup> The legal status of a pre-embryo was expressed in the seminal case of *Davis v. Davis*.<sup>646</sup> In that case, a couple donated their gametic material for *in vitro* fertilisation and cytogenetically froze the residual fertilised ova.<sup>647</sup> The couple, however, did not make any provision for the disposal of the preserved products and upon divorce, disagreed as to their disposal.<sup>648</sup> In court proceedings, Mr Davis argued that the pre-embryos should be destroyed while Mrs Davis wanted to donate them. The court postulated that it is necessary to scientifically identify the products in order to establish the legal position of the couple vis-à-vis the frozen articles.<sup>649</sup> To this end, the frozen entities were preserved at the four-to-eight cell stage which is characterised by an absence of both cellular variation and singular development.<sup>650</sup> In this regard, the frozen products were classified as pre-embryos and not embryos.<sup>651</sup>

The trial court argued that pre-embryos and embryos should not be differentiated on the basis that human life commences at the time of conception.<sup>652</sup> Consequently, the court held that the frozen entities were children waiting to be born and the destruction of the products would pejoratively interfere with the interest of the children to be born.<sup>653</sup> The court on appeal, however, disagreed. The classification of the frozen entities as persons would require the court to ensure that the implantation of the pre-embryos takes place and prohibit action which may inhibit or harm this process.<sup>654</sup> The court reasoned that a pre-embryo falls short of being classified as a person or property and instead falls within an intermediate category.<sup>655</sup> This categorisation is based on the cellular products' potential for human life and confers upon the parties the right to make decisions pertaining to the disposal

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<sup>645</sup> It must be emphasised that the Anglo-American and Roman-Dutch legal systems are fundamentally different. As such, the American cases may not be of useful application in the South African setting. Nevertheless, these cases provide a measure of guidance by illustrating that medical advances and the growing commercialisation of the human body necessitates a re-examination of property law principles.

<sup>646</sup> 842 S.W.2d 588 (Tenn.1992).

<sup>647</sup> Id. 592.

<sup>648</sup> Id. 589.

<sup>649</sup> Id. 592-3.

<sup>650</sup> Id. 594.

<sup>651</sup> Id. 593.

<sup>652</sup> Id. 594.

<sup>653</sup> Id. 595.

<sup>654</sup> Id. 596.

<sup>655</sup> Id. 597.

and use of the pre-embryos.<sup>656</sup> The court held that this right equated to a property interest and in the event of conflict as to the disposition of the cellular entities, regard must be had to any prior agreements.<sup>657</sup> Given the absence of a prior agreement, the court reasoned that the conflicting interests of the parties in donating or destroying the pre-embryos must be considered.<sup>658</sup> To this end, the court concluded that the donation of the pre-embryos could possibly burden Mr Davis with the financial and emotional obligations of fatherhood, and ordered the frozen entities to be destroyed.<sup>659</sup>

The principles espoused in *Davis* were usefully applied in the case of *Hecht v. Superior Court of Los Angeles County*<sup>660</sup> which specifically involved male gametic material. In *Hecht*, the plaintiff's former partner committed suicide not too long after storing fifteen vials of his sperm with a fertility clinic.<sup>661</sup> The plaintiff argued that her former partner had intended for her to fall pregnant using his deposited sperm.<sup>662</sup> This, she argued, was inferred from three separate pieces of evidence. Firstly, her partner had signed a deposit agreement which provided for his sperm samples to be released to his estate's executor or the plaintiff upon his death.<sup>663</sup> Secondly, he had created a will and bequeathed his rights and interests in the sperm samples to the plaintiff.<sup>664</sup> Thirdly, he wrote a letter to his children from a previous relationship conveying that he would like the plaintiff to produce children with his stored sperm.<sup>665</sup> To this end, the plaintiff concluded an agreement with the deceased's children to divide the deceased's residual assets.<sup>666</sup> The sperm bank, however, declined to release the sperm samples to the plaintiff.<sup>667</sup> The children of the deceased and the executor of the deceased's estate petitioned to have the sperm samples

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<sup>656</sup> *Ibid.*

<sup>657</sup> *Id.* 603.

<sup>658</sup> *Id.* 603-4.

<sup>659</sup> *Ibid.*

<sup>660</sup> 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

<sup>661</sup> *Id.* 276.

<sup>662</sup> *Ibid.*

<sup>663</sup> *Id.* 277.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

<sup>666</sup> *Id.* 277-8. The agreement between the plaintiff and the deceased's children gives 40% of the estate's residual assets to each child and 20% to the plaintiff.

<sup>667</sup> *Id.* 278-9.

destroyed.<sup>668</sup> The probate court consequently ordered the sperm samples be destroyed.<sup>669</sup>

The appellate court, however, relied on the principles established in *Davis* and concluded that sperm, like pre-embryonic material, falls within an intermediary category located between persons and property.<sup>670</sup> In this regard, gametic material warrants more respect than tissue because it is essential to reproduction.<sup>671</sup> Accordingly, the deceased had an ownership interest in the deposited sperm which entitled him to decide how the sperm was used and to whom it was gifted.<sup>672</sup> The court reversed the decision of the probate court on the grounds that the settlement agreement did not support the destruction of the sperm samples.<sup>673</sup>

The matter was reheard by the probate court which held that the disposition of the gametic material was governed by the agreement between the parties.<sup>674</sup> To this end, the vials of sperm were subject to division as per the agreement entitling the plaintiff to 20% of the vials.<sup>675</sup> Unhappy with this decision, the plaintiff again appealed. The appellate court elucidated that the intentions of the sperm donor as per the deposit agreement with the sperm bank determine the disposition and control of the sperm samples.<sup>676</sup> Accordingly, the disposition of the sperm was not subject to the settlement agreement.<sup>677</sup> Therefore the court ordered that all the outstanding vials of sperm be handed over to the plaintiff who could only use, and not dispose of the sperm, in accordance with the intentions of the deceased.<sup>678</sup>

### **Sperm as property**

The decision of these courts to recognise property rights in male gametes in limited instances is commensurate with the biological status of sperm. To this end, a sperm cell constitutes a living entity and not a person.<sup>679</sup> The development of a singular sperm cell is characterised by changes that improve its capacity to fertilise

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<sup>668</sup> Ibid.

<sup>669</sup> Id. 280.

<sup>670</sup> Id. 281.

<sup>671</sup> Id. 283.

<sup>672</sup> Ibid.

<sup>673</sup> Id. 284.

<sup>674</sup> *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996) at 225.

<sup>675</sup> Ibid.

<sup>676</sup> Id. 226.

<sup>677</sup> Id. 224.

<sup>678</sup> Id. 223-4.

<sup>679</sup> Waintraub 'Are Sperm Cells a Form of Property?' at 10.

an egg.<sup>680</sup> Upon fertilisation, the cell develops into an archetypal human cell containing twenty three pairs of chromosomes.<sup>681</sup> At that stage, the cell starts to produce vital proteins to aid its continued development via cellular division.<sup>682</sup> In this light, the value placed on male gametes is based on its potential to create human life through fertilisation.<sup>683</sup> Therefore sperm is distinguished from other human tissue because of its important role in reproduction. Indeed the value that seeks protection under the law is not sperm itself but rather the producer's attachment to the possibility that his sperm may contribute to creating human life.<sup>684</sup>

In light of the principles espoused in *Davis* and *Hecht*, it is proposed that the legal recognition of gametic material as property is commensurate with expanding medical technology and the plethora of issues it generates. The law of property offers a measure of flexibility which permits adaptability to shifting reproductive technologies.<sup>685</sup> In addition, property law will provide uniformity in disputes involving the misappropriation of bodily materials to be decided casuistically.<sup>686</sup> Where a person has property rights in his reproductive material, he is afforded an enforceable legal remedy to protect the purloinment of his gametes.<sup>687</sup>

The interest a person has in his bodily components reflects the notion that he has a right to use his body in whichever manner he wishes. To this end, the primary argument postulated in favour of the recognition of property rights in bodily materials is that of autonomy. The basis of respect for the human body originates from respect for the person who is represented by that body.<sup>688</sup> In this light, it may be argued that to prohibit property rights in one's bodily products, particularly reproductive materials which have the potential to create human life, undercuts personal autonomy. A person's interest in his gametes is directly linked to his reproductive right to procreate without coercion or interference from a third party.<sup>689</sup> As such, a man has an interest in avoiding the imposition of parenthood especially under circumstances in which his sperm is acquired through sexual acts, not

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<sup>680</sup> Ibid.

<sup>681</sup> At 11.

<sup>682</sup> Ibid.

<sup>683</sup> Ibid.

<sup>684</sup> Nwabueze *Biotechnology* at 95.

<sup>685</sup> Boulter "Sperm, Spleens, and Other Valuables" at 722.

<sup>686</sup> Ibid.

<sup>687</sup> Waintraub "Are Sperm Cells a Form of Property?" at 12.

<sup>688</sup> Boulter "Sperm, Spleens, and Other Valuables" at 718.

<sup>689</sup> Hubin "Human Reproductive Interests" at 122.

including vaginal intercourse,<sup>690</sup> and used for reproductive purposes without his knowledge or consent. The recognition of gametes as property will comprehensively protect the rights and interests of individuals to avoid the use of their bodily products for others' ulterior purposes.

### **Moral opposition to recognition**

The possibility of recognising property rights in one's gametic material unsurprisingly faces moral opposition. The basis of this criticism is the potential commodification of the human body and the fear of commercialising reproduction.

#### *Commodification*

The objection to recognising biological materials as property stems from the broad opposition to viewing body parts and bodily products as subject to ownership.<sup>691</sup> This argument is based on the moral and legal prohibition of slavery which treats human beings as objects wholly subject to the will of a slave master.<sup>692</sup> To this end, slavery constitutes a complete deprivation of human dignity and basic human rights.<sup>693</sup> Accordingly, the recognition of human body parts as property may be interpreted as analogous to slavery in that a person may legally own the bodily components of another. In this regard, the fear is that the commodification of bodily materials will inherently lead to persons exercising physical control over others.<sup>694</sup> The problem with this reasoning, however, is that it does not distinguish the ownership of persons from the ownership of bodily components, specifically bodily substances. In fact, the commodification of the human body does not inherently result in the infringement of human dignity.<sup>695</sup>

Instead, it is the instances involving exploitation, compulsion and maltreatment which result in the violation of one's bodily integrity and human dignity. Selling one's eggs for financial remuneration, for example, is not necessarily demeaning to one's dignity provided there is an absence of coercion or threat. In addition, the procedure to surgically remove the eggs would not infringe one's bodily integrity where informed consent is furnished. As such, the suggestion that the law

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<sup>690</sup> As explained in previous chapters, a person who engages in consensual sexual intercourse accepts the risk of pregnancy.

<sup>691</sup> JA Robertson 'Posthumous Reproduction' (1994) 69 *Ind. L.J.* 1027 at 1038.

<sup>692</sup> B Steinbock 'Sperm as property' (1995) 6 *Stanford Law & Policy Review* 57 at 65.

<sup>693</sup> *Ibid.*

<sup>694</sup> Boulvier 'Sperm, Spleens, and Other Valuables' at 717.

<sup>695</sup> Steinbock 'Sperm as property' at 65.

should avoid classifying reproductive material as property simply because of the potential for exploitation lacks credence.<sup>696</sup> To this end, it is not reasonable to deny the recognition of property rights in gametes considering that coercion and exploitation can be prevented through regulatory measures. Indeed, the absence of property rights has not prevented the flourishing global trade in organs.<sup>697</sup> Despite the fact that most countries have criminalised the sale of human organs, there remains a demand for working transplantable organs, particularly kidneys.<sup>698</sup> In this regard, the recognition of gametic material as personal property won't entirely prevent the misappropriation and unauthorised use thereof. However, it will act as a deterrent. Crucially, women who steal men's sperm in order to conceive a child will not be able to institute maintenance claims.

### *Commercialisation*

A second criticism focuses on the problematic nature of commercialising aspects of reproduction.<sup>699</sup> The concern is that the recognition of property rights in gametic material will not only commodify the body's products but treat bodily materials as tradable goods.<sup>700</sup> As explained, the body's components are traditionally classified as falling outside the sphere of commercial dealings and can only be donated in accordance with legislation and statutory regulations. In this regard, it could be contended that the attachment of monetary value to gametic material would place sperm within the market place.<sup>701</sup> However, this argument is not always applicable. For example, sperm samples bequeathed in terms of a will are not assigned a market value. Similarly, sperm which is appropriated and used by a woman for her own reproductive objectives without the knowledge or consent of the man who produced the sperm during a sexual act is not the subject of a commercial transaction. Instead, a scenario of that nature chiefly concerns the undesirable imposition of parenthood and the consequences thereof. To this end, the appropriation of bodily materials is not always linked to the market place.

Critics may further opine that recognising reproductive material as property could possibly commodify all the elements of reproduction. In this light, assisted

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<sup>696</sup> Slabbert -This is my kidney, I can do what I want with it at 516.

<sup>697</sup> Ibid.

<sup>698</sup> Ibid.

<sup>699</sup> Steinbock -Sperm as property at 65.

<sup>700</sup> Nwabueze *Biotechnology* at 91.

<sup>701</sup> Steinbock -Sperm as property at 64.

reproduction, and surrogacy in particular, could proliferate. This reasoning, however, neglects to consider that fertility procedures, the donation of gametic materials and surrogacy arrangements are subject to statutory regulation. In fact, surrogates agree to be gestational carriers, men and women are reasonably compensated for the donation of their gametes and many couples rely on fertility treatments to conceive. Indeed the many ways in which sperm can be used, stored, misappropriated and donated suggests that the male gamete is a commodity. Accordingly, commercial interests in the reproductive capacity of the body already exist. To this end, property law will offer a measure of protection in the wake of advances in medical science.<sup>702</sup>

### Conclusion

The law protects donors from the unauthorised use, withdrawal and removal of their bodily materials through the principle of informed consent. To this end, a person is shielded from the misappropriation and non-consensual use of his bodily products within the medical setting. This position is glaringly at odds with the traditional classification of abandoned bodily products as *res nullius*, open to appropriation by the first individual who takes possession of the fluid as if it were her own. It follows that men whose sperm is purloined and self-inseminated for reproductive objectives have no legal rights to the sperm they personally produce. For this reason, it is suggested that bodily substances and gametic material, in particular, should be classified as property. The recognition of bodily products as property would legally protect persons from the misappropriation of their bodily materials under the law of property, delict and criminal law.

Given the advancements in health science and the plethora of Regulations enacted to govern the removal and use of bodily materials, the idea of property rights in one's gametes is a fair and logical suggestion. Furthermore, foreign case law has recognised gametic material as property in limited instances. The principles highlighted in these cases demonstrate that the law must consistently adapt to technological advances and changing social and economic circumstances. To this end, the moral arguments against recognising property rights in bodily materials, although worthy, are increasingly less valid. The fear that developing the principles of property law will result in the commodification and commercialisation of bodily

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<sup>702</sup> Boulter "Sperm, Spleens, and Other Valuables" at 719.

products is relatively tenuous when one considers that the body's products are increasingly commodified and frequently commercialised as a result of expanding medical technology.

## CHAPTER EIGHT

### CONCLUSION

*The law is inadequate to deal with the special circumstances created in the context of child support and male sexual victimization.*<sup>703</sup>

This dissertation considered whether an involuntary father, who was sexually finagled into parenthood through sexual assault, the non-consensual use of his sperm or his partner's misrepresentations as to birth control or fertility, may escape the legal obligation to support his offspring.

A rudimentary analysis of the law pertaining to child maintenance and the determination of paternity reveals that a genetic relationship is the basis upon which parental rights and duties are assigned. To this end, the legal obligation to furnish child maintenance flows from the blood relationship between a parent and his child. The question of consent to paternity, however, is not addressed under the common law or statute. To this end, the law has failed to contemplate the possibility that men may be sexually foisted into fatherhood and legally obligated to support children they did not agree to father.

The courts in the United States have obstinately rejected the defence of non-consent in adjudicating child support claims involving involuntary parenthood. In doing so, they have asserted the need to place the interest a child has in receiving financial support from both parents before other considerations, namely the devious circumstances surrounding the child's conception. However honourable the underlying policy intention, the rigid approach of the courts has generated the result that 13-year-old boys and men who were drugged and sexually assaulted are required to make child support payments notwithstanding the wrongful conduct of the mother. To this end, the approach has trivialised male sexual victimisation, wholly ignored men's reproductive autonomy and has glazed over the right to not be sexually entrapped into the obligations of parenthood.

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<sup>703</sup> Johnson *Child Support Obligations* at 538.

In South Africa, claims of involuntary parenthood implicating instances of pilfered semen, male rape and self-insemination are almost unheard of. In fact, it is uncertain as to what a South African court may decide if presented with a matter of this nature. The Constitutional Court has consistently asserted the need to adopt a contextualised approach when applying the best interests of the child principle. In saying that, the underlying purpose of the strict liability approach that is to ensure minors are sufficiently maintained by both parents is, in principle, no different from the best interests of the child standard encapsulated under section 28(2) of the Constitution.

The incongruence of rejecting the absence of consent as an exception to child support liability is in tension with the policy of absolving sperm donors from the obligations of legal parenthood. Under South African law, the legal consequences of artificial fertilisation are statutorily regulated under section 40 of the Children's Act. Section 40(3), in particular, extinguishes the legal relationship between a child born as a result of artificial fertilisation and his genetic father. This aptly demonstrates the extent to which sperm donors are statutorily protected from the legal obligations of parenthood where insemination takes place in a clinical environment. Men who are sexually foisted into parenthood, on the other hand, are afforded no such protection.

It has been shown that the strict liability approach generates bizarre and inequitable results. Generally, the use of a genetic relationship to ground legal parenthood is a fair and logical method. Its use in cases involving an absence of consent to the act which resulted in pregnancy, however, is illogical and inherently unfair to the party who was sexually victimised. It is in no way denied that a minor child is entitled to financial support from his or her parents. The fundamental problem is that maintenance liability is imposed on a genetic father simply because he is biologically related to the child in question. Fatherhood is a splintered concept consisting of genetic and causal elements which should both be present to establish legal parenthood. Indeed the law has failed to consider the possibility that biology and legal parenthood are conceptually severable.

It is not suggested that men should have greater rights than women in relation to reproductive decision-making. Instead the point is that men should have legal remedies to avoid the imposition of child maintenance liability where they lacked

causal agency in fathering the child. To this end, men who become fathers because their partners lied about using birth control or being infertile cannot rely on an absence of consent to paternity to avoid maintenance payments. A person who engages in consensual sexual intercourse assumes the risk of pregnancy and should not be absolved of his or her parental obligations. The same cannot be said for men who have been sexually finagled into fatherhood through rape or the non-consensual use of their sperm. It is thus suggested that South African courts should adopt a flexible set of guidelines which permit an involuntary father to introduce the defence of non-consent in legal proceedings to reduce or terminate child support payments. To avoid abuse, the defence should only be available to fathers who did not consent to the act which led to the child's conception or to the use of their sperm for reproductive objectives.

It is further proposed that involuntary fathers (and mothers) should be permitted to apply for an exemption from paying child maintenance. The Maintenance Act should be amended to include a provision which exempts persons from furnishing child maintenance where the child in question was conceived through a sexual offence which resulted in a conviction. To ensure a measure of fairness, an exemption will not be granted where it is not just and equitable to do so having regard to the child's best interests, the interests of the involuntary parent and the parties' means.

It is accepted that an involuntary father may not be absolved of the civil obligation to support his offspring. In that event, he may possibly institute a separate claim in delict against the child's mother to offset his maintenance payments. There is no reason to suggest that the principles espoused in the 'wrongful pregnancy' cases should not be extended to cover instances in which men have been sexually finagled into fatherhood. At the heart of any case involving unwanted pregnancy is the deprivation of reproductive autonomy and decision-making. To this end, public policy favours an extension of Aquilian liability in limited circumstances, namely sexual assault and possibly instances involving non-consensual use of sperm.

Finally, the principles of property law should be revised to include self-ownership in one's bodily materials. The recognition of property rights in bodily products would offer protection to men whose semen is surreptitiously retained post-

oral sex and used without their consent for reproductive purposes. After all, the law protects donors from the unauthorised use, withdrawal and removal of their bodily materials. Outside of the clinical environment, discarded semen is effectively *res nullius* and is open to appropriation by the first keen individual who takes possession of it as if it were her own. If the law were to recognise bodily substances as property, the person from whom the gametic material originates would have to intend for ownership to pass. Given the advancements in health science and medical technology coupled with the increasing commodification and commercialisation of the human body and its parts, the extension of property rights to bodily materials is a fair suggestion.

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