

# Legal research and writing opinions

By Anton Kok

## 8.1 Introduction

You would have realised by now that “the law” is an extremely wide-ranging and complex field. It is unlikely that you will in all cases be able to advise a client immediately and sometimes you will have to undertake substantial research to reach a satisfactory answer. You will need to develop the ability to do effective research. Most often, you will have to come up with an answer in a short space of time. It is likely that your supervisor in the law clinic will request you to set out the results of your research in a written office memorandum. It may be that your supervisor will query one or more of the recommendations and you may be asked to supplement the research. Eventually, the office memorandum may serve as the basis of a letter to the client, setting out the results of the research, the recommendations, and substantiation of the recommendations.

*You will need to develop the ability to do effective research.*

## 8.2 Legal research in a law clinic

Legal research in a law clinic differs from academic research. Academics can usually afford the luxury of spending weeks or months researching a particular topic. Practitioners face pressure from their clients and their opponents, once a summons has been issued to settle a matter or to push it to trial. During the consultation, you need to form a clear picture of what it is that the client desires. You then need to undertake research to ascertain whether the law provides a remedy. The client will eventually want a relatively “clean” answer. From a plaintiff’s perspective, this would refer to the possible cause(s) of action and the prospects of success; from a defendant’s perspective, this would refer to the possible defences to the plaintiff’s claim; and from an accused’s perspective, this would refer to the possible defences to the charges brought. Your research consequently needs to be highly focused. Academic research sometimes has the explicit purpose of advocating legal reform. In a law clinic, the main aim is to find the existing law and solve the client’s immediate problem.

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### 8.3 Suggested research method<sup>1</sup>

#### 8.3.1 Identifying the subject area(s)

Review the chapter on interviewing skills before studying this section. During the interview, you must establish what it is that the client wants by identifying the relevant facts. During the interview with the client, you must also identify the area(s) of law that may play a role in solving the client's problem. Remember that the South African national law may be divided into substantive law and adjective law.<sup>2</sup> Adjective law consists of law of criminal procedure, law of civil procedure, law of evidence and interpretation of statutes. Substantive law may be divided into private law and public law. Public law consists of constitutional law (including human rights law), administrative law and criminal law. Private law may be divided into law of patrimony, law of persons, family law, law of personality and indigenous law. Law of patrimony may be further subdivided into property law, law of succession, law of obligations (delict and contract) and law of intellectual property. Commercial law subjects are sometimes applied to private law, for example third-party compensation law, and sometimes have a public law character, for example tax law. You need to identify the relevant subject areas to assist in your research (for example books in the university library will be sorted according to the *Dewey Decimal Classification* system, and the various subject areas have been accorded a particular call number; for example, "343" would be public law, "346" private law and "347" civil procedure). The university library will contain a list of the further subdivisions.

This, however, is only a start. It should be relatively easy to identify the broad subject area. You now have to focus on the particular issue(s) affecting the client. For example, five minutes into your consultation with the client may make it clear that the law of delict is the relevant subject area. The client may, for example, have been sued as a result of a motor collision he was involved in. You should then keep asking questions and collating information. You should also try to narrow down the research task by formulating crisp, to-the-point legal questions that arise from the consultation. A number of issues may arise, for example: the plaintiff's *locus standi* (civil procedure); the client's alleged negligence (delict); the amount being claimed; and the calculation of the amount (law of damages). Perhaps the client admitted liability immediately after the collision and promised to pay the plaintiff's excess insurance payment (law of contract). Perhaps he paid the excess to the plaintiff a week later. You should then establish the effect of such payment on the insurance company's right to sue the defendant (insurance law).

*Identify the area(s) of law that may play a role in solving the client's problem.*

<sup>1</sup> See Kleyn and Viljoen (2002) *Beginner's Guide for Law Students* at 330–342; Kok, Nienaber and Viljoen (2002) *Skills Workbook for Law Students* at 41–70; Campbell, Fox and Kewley (1998) at 1–15; Maisel and Greenbaum (2001) *Introduction to Law and Legal Skills* at 97–102.

<sup>2</sup> See Kleyn and Viljoen (2002) at 96–110.

### 8.3.2 A convenient starting point: The Law of South Africa (LAWSA)

The *Law of South Africa* (LAWSA) is a 35-volume legal encyclopedia and should be available in most university libraries.<sup>3</sup> It is a convenient starting point for research as LAWSA contains concise summaries of particular subject areas. The footnotes contain helpful references to other sources. Your research would start with the index volume (volume 34). Identify possible appropriate keywords in the index and find the relevant volume. LAWSA also has a "Current Law" issue that consists of a "review" and a looseleaf section. "Current Law" is issued every four weeks and aims at updating LAWSA insofar as it is not already updated by the LAWSA "annual cumulative supplement". It is important to remember that LAWSA, as is the case with all secondary sources, is at best persuasive authority in a court of law.

Assuming you do not know the answer to the last question posed under 8.3.1: "What is the effect on the insurance company's right to sue a defendant if the defendant had paid the plaintiff's excess payment?", you have to find volume 34 of LAWSA in the university library, and page to the index entry "Insurance". It will look somewhat as follows:

**INSURANCE**  
*Comprehensively 12: see detailed index in volume*  
**Additional references:**  
 arbitration clause in 1r 419  
 aviation insurance:  
   common law principles 1r 595  
   domestic air services 1r 589  
   international air services 1r 582  
   interpretation of warranty 1r 595  
 business see INSURANCE COMPANIES  
 conflict of laws on domestic policies 2r 472 fn 10  
 contracts:  
   generally see POLICIES  
 by minor 20(1)r 371(a)  
 ...

The index refers you to volume 12 of LAWSA. A comprehensive index appears at the back of this volume. Think of keywords that may assist in finding the relevant information. An insurance company's right to sue in the name of the insured is known as "subrogation". Find the index entry:

Stamp duty  
 on cession of policy 436  
 payable on policies 136

*continued*

<sup>3</sup> See Kleyn and Viljoen at 334–335.

Subrogation  
 doctrine 373  
 basis for 377  
 cession distinguished 378  
 constructive trust created 375  
 origin 374  
 purpose 376  
 salvage distinguished 379  
 duty of insurer:  
 preservation of insured's claim 394  
 to bear costs of proceedings 395  
 effect on third parties:  
 defences available 396  
 settlement and release 397  
 provisions in contracts:.....  
 adding to rights of insurer 398  
 denying subrogation: legality 399  
 reforms proposed:  
 independent right of insurer 402  
 shortcomings of doctrine 400  
 transfer of rights by operation of law 401

The entry "effect on third parties" seems promising. References in *LAWSA* are to paragraph numbers, not pages. Paragraphs 396 and 397 (highlighted in the relevant passages) in volume 12 read as follows:

**396 Defences available to third party** Since the action against the third party is for the enforcement of the insured's rights against him, the third party may, irrespective of who is bringing the action, raise any defence which would have been available to him had subrogation not taken place.<sup>1</sup> For example, the third party may rely on the fact that the insured has released him from liability,<sup>2</sup> that the insured has no remedy against him because of the provisions of an agreement between him and the insured,<sup>3</sup> that the insured is guilty of contributory negligence, that a splitting of claims is not permissible, that the matter has already been decided (*res iudicata*), or that the claim has been settled. However, the third party cannot put forward the argument that the insured has suffered no loss because he has been indemnified by his insurer,<sup>5</sup> unless it can be proved that the insurer intended to discharge the debt of the third party by paying the insured.<sup>6</sup> . . .

1 *Commercial Union Assurance Co of SA Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd* [1997] 3 All SA 165 (B) 172; 1998 2 SA 718 (B).

2 *Cf Phoenix Assurance Co v Spooner* [1995] 2 KB 753 (CA).

3 *Cf Commercial Union Assurance Co of SA Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd* supra where the court took the view that if a contract of lease required the lessor to insure the object of the lease the contract prima facie excluded an action by the lessor against the lessee for loss or damage to the object of the lease since the insurance would be intended to insure the interests of both parties. This does not mean that the lessee must be a co-insured (179). An important pointer would be that the lessee was made responsible for payment of the premiums. The same would apply if the costs of the premiums were incorporated in the rent. It was not considered whether such an arrangement in the contract of lease must be disclosed to the insurer. See also par 382 ante as to rights against the co-insured.

continued

4 *Avex Air (Pty) Ltd v Bomagbono (Pty) Ltd* 1973 1 SA 617 (A) 625H.

5 *Weber v Africander Gold Mining Co* (1898) 5 OR 251; *Ackerman v Loubser* 1918 OPD 31 35; *Millward v Glaser* 1949 4 SA 931 (A); *Teper v McGees Motors (Pty) Ltd* 1956 1 SA 738 (C) 742; *Van Dyk v Cordier* 1965 3 SA 723 (O) 725A. *Cf Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 2 SA 1 (A) 8-9; *Standard General Insurance Co Ltd v Dugmore* [1996] 4 All SA 415 (A); 1997 1 SA 33 (A).

**397 Settlement and release of claim by insured or insurer** As the insured's claim against a third party in respect of a loss remains vested in the insured, he is in the position to effect a valid settlement with the third party. Similarly, the insured may validly release the third party from any liability. The position is the same whether the settlement or release is effected before or after payment by the insurer. However, if the insured acts unreasonably, such conduct will constitute breach of contract towards the insurer.<sup>3</sup> . . .

See par 379 ante.

2 *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 6 (CA); *Phoenix Assurance Co v Spooner* [1995] 2 KB 753 (CA).

3 *Phoenix Assurance Co v Spooner* supra. See par 391 ante.

4 See Clarke *The Law of Insurance Contracts* par 31-6C1.

5 On the doctrine of notice, see *Cussons v Kroon* [2002] 1 All SA 361 (SCA); 2001 4 SA 833 (SCA).

6 This question must be answered by applying the principles of agency.

The footnotes contain references to other sources, primarily case law and textbooks. Find these sources and read them as well.

### 8.3.3 Textbooks

Textbooks are another convenient starting point for research.<sup>4</sup> It is also a secondary source of law and does not constitute binding authority in a court. As is the case with *LAWSA*, good textbooks contain very helpful references to other sources in the footnotes and in the bibliography. Most, if not all, university libraries use a computer-based catalogue system. (It may be that older textbooks are accessed with a card catalogue system.) Access your university's search tool on a computer and select the "keyword" or "title" option and type in the word(s) that may facilitate the search. You should then find the book and use the table of contents and index to narrow the search. For example, you could type in the keywords "insurance" and "law" on the university's electronic-search catalogue. It may be that some of the following titles appear on the computer screen:

Dobbyn JF *Insurance in a nutshell* St Paul West Pub Co 1989 (call number 346.860973)

Gordon G (Davis DM) *South African law of insurance* (Gordon and Getz on the South African law of Insurance) Cape Town Juta 1983 (call number 346.860968)

Lowry JP *Insurance law: doctrines and principles* Oxford Hart 1999 (call number 346.860941)

Reinecke MFB *General principles of insurance law* Durban LexisNexis Butterworths 2002 (call number 346.860968)

4 Kleyn and Viljoen (2002) at 335; Kok, Nienaber and Viljoen (2002) at 54-59.

Print the references or make a note of the necessary details and find the books in the library. You may decide to start with *Reinecke*. As you page through this textbook, you will note that it is a replica of volume 12 of *LAWSA*. Then continue with the search in the other sources. Focus on South African sources, remembering that you are not undertaking academic research. In principle, South African courts rely on South African authorities.

You may decide to consult the *Gordon* textbook. It may appear as follows:

**THE  
SOUTH AFRICAN  
LAW OF INSURANCE**  
SECOND EDITION

By  
**GERALD GORDON**  
QC, BA, LLB (CAPE)  
*Advocate of the Supreme Court of South Africa;  
Of the Middle Temple, Barrister-at-Law  
Co-Author of The Law of Compulsory Motor Vehicle Insurance in South Africa*

Assisted by  
**WS GETZ**  
BA, LLB (CAPE), BA (OXON)  
*Of Gray's Inn, Barrister-at-Law  
Advocate of the Supreme Court of South Africa*

**JUTA & CO, LIMITED**  
CAPE TOWN WYNBERG JOHANNESBURG  
1969

It is clear from the title that this book relates to South Africa. The publisher is also based in South Africa. This particular source, however, is very dated as it was published in 1969. Take note of what is mentioned in this textbook but follow up on other leads to ascertain whether the book still sets out the current South African position. The table of contents and index are helpful search tools:

	CONTENTS
PREFACE .....	v
KEY TO AUTHORITIES .....	xi
TABLE OF STATUTES .....	xv
TABLE OF CASES .....	xxiii
<b>PART I: SOURCES</b>	
1 Sources of South African and Rhodesian Insurance Law .....	1
<b>PART II: INSURERS AND INSURANCE BUSINESS</b>	
2 Control of Insurers and Insurance Business .....	9
3 Judicial Management and Winding-Up of Insurers .....	47

*continued*

PART III: GENERAL PRINCIPLES OF INSURANCE LAW	
4 The Nature of the Contract .....	75
5 Insurable Interest .....	86
6 The Duty of Good Faith .....	104
7 Formation of the Contract .....	117
8 Agents .....	133
9 Duration of the Contract .....	147
10 The Risk .....	159
11 The Premium .....	172
12 Terms of the Contract .....	181
13 Warranties .....	192
14 Interpretation .....	213
15 Measure and Effect of the Indemnity .....	221
16 Reinstatement .....	227
17 Subrogation .....	230
18 Rights and Duties of Third Persons under the Contract .....	239
19 Reinsurance .....	256
20 Over-insurance and Under-insurance .....	259

**STOCK-IN-TRADE**

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**STOPPAGE IN TRANSITU**

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contractual claims, in, 232  
defences of third party on, 235  
delictual claims, in, 232  
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essentials of, 230  
funeral insurance, in, 346  
general average, in, 373

Page to the indicated page in the textbook and start reading:

CH. 17	SUBROGATION	235
7.	DEFENCES AVAILABLE TO THIRD PARTY	
	In the action between the insurer and the third party, the latter may raise any defence which would have been available against the insured himself had he sued. <sup>36</sup>	
	It is not a defence available to the third party that the insured has suffered no loss because he has been indemnified by the insurer. <sup>37</sup> Thus in <i>Weber and Others</i> . . .	
...		
236	GENERAL PRINCIPLES	PT. III
8.	INSURED MUST NOT PREJUDICE INSURER	
	The insured must not prejudice the insurer's right of subrogation. <sup>43</sup> He may not renounce or compromise any right of action he has against a third party by the exercise of which he can diminish his loss. If he does he will render himself liable to his insurer. <sup>44</sup>	
	In <i>Phoenix Assurance Co v Spooner</i> . . .	
...		
CH. 17	SUBROGATION	237
	B. PAYMENT BY THIRD PARTY	
1.	INSURED CANNOT RECOVER MORE THAN HIS LOSS	
...		
2.	PAYMENT BY THIRD PARTY AFTER PAYMENT UNDER POLICY	
...		
238	GENERAL PRINCIPLES	PT. III
3.	PAYMENT BY THIRD PARTY BEFORE PAYMENT UNDER POLICY	
	If, before payment under the policy, the third party pays the insured, the latter's loss is <i>pro tanto</i> diminished, and he can no longer recover a full indemnity under the policy. The amount the insured received from the third party must be taken into account, and, depending on the amount received, the insurer's liability will be diminished or entirely extinguished . . .	
	Before the amount paid by the third party can be taken into account, however, it must be clear that it was paid in reduction of the loss . . .	
36	<i>London Assurance Co v Sainsbury</i> (1783) 3 Doug K.B. 245. He may also raise the defence that the policy was invalid and so gave no right of subrogation: <i>John Edwards and Co v Motor Union Insurance Co</i> [1922] 2 K.B. 249; Ivamy, <i>General Principles</i> , p 406–8.	
37	Halsbury, par 517; <i>Mason v Sainsbury</i> (1782) 3 Doug K.B. 61; <i>Darrell v Tibblits</i> (1880) 5 Q.B.D. 560 (C.A.); <i>Ackerman v Loubser</i> 1918 OPD 31 at 35 36; <i>Millward v Glaser</i> 1949 (4) SA 931 (A) at 940; <i>Teper v McGee's Motors (Pty) Ltd</i> 1956 (1) SA 738 (C) at 742.	
...		
43	<i>West of England Fire Insurance Co v Isaacs</i> [1897] 1 Q.B. 226 (C.A.); cf. the insured's duty to minimise his loss, above, p 225.	
44	<i>Horse, Carriage and General Insurance Co Ltd v Patch</i> (1916) 33 T.L.R. 131. Cf. below p 247, under "Motor Insurance".	
...		

Follow the same process with all the other available textbooks. Different authors on the same topic may not necessarily agree. To be safe, find as many books on the topic as possible and compare the authors' views. Find and read the other sources referred to in the footnotes of the different textbooks.

### 8.3.4 Law journals

Sometimes law journals contain useful articles on a particular topic.<sup>5</sup> If it is a well-researched article, the article will contain numerous references to other sources as well. Follow up those references.

ISAP (Index to South African Periodicals) may be accessed at <http://www.sabinet.co.za/>. Click on "Academic and Library Division Website", then type in the institution's User ID and password. Select the "ISAP" database. Proceed by typing in keywords that will narrow down the research to a sufficient degree. If you type in "insurance", you will likely get a very long list of "hits". (When the authors attempted this on 29 May 2006, the search listed 5 212 articles!) If you type in "subrogation" a more manageable list will appear. (The authors' search turned up 28 articles.) From this list, select the articles that seem to provide an answer to the problem:

Atkins NG "Subrogation" 1991 (21) *Businessman's law* 7

Van der Linde K "Right to cession or subrogation prejudiced" 1994 *De Rebus* 205

Visser C "Insurance law: general principles" 1994 *Annual survey of South African law* 435

(Also see paragraph 8.3.7 "Use of computers and the internet" below.)

A more laborious method would be to find (hard copy) index volumes to particular law journals. These indexes usually sort articles according to author and/or topic.<sup>6</sup>

### 8.3.5 Case law<sup>7</sup>

*One should ask if the existing cases are comparable or distinguishable from the client's situation.*

Hopefully, the searches in the secondary sources discussed above have turned up a number of references to South African court cases. Find and read these cases. Comparing the facts of these cases to the client's situation is absolutely necessary. One should

ask if the existing cases are comparable or distinguishable from the client's situation.<sup>8</sup> Consider the following example:

The client owns a small house. A small fishpond is situated in the front garden. His neighbour's child somehow gained access to the garden and drowned in the pond. The client is now being sued for emotional shock and the State is considering a charge of culpable homicide. Assume that you find the following three cases:

- "A" owned a large country mansion. He invited about 40 friends to a party. Most guests consumed huge amounts of alcohol. At about one o'clock in the morning, one of the guests slipped and fell into the large swimming pool and drowned. "A" was held liable.

5 Kleyn and Viljoen (2002) at 335–336; Kok, Nienaber and Viljoen (2002) at 57–59.

6 Kok, Nienaber and Viljoen (2002) at 58.

7 See in general Kleyn and Viljoen (2002) at 60–82; Kok, Nienaber and Viljoen (2002) at 46–50, 82–94; Maisel and Greenbaum (2001) at 59–66, 80–88.

8 Kok, Nienaber and Viljoen (2002) at 49–50; Maisel and Greenbaum (2001) at 83–84.

- "B" owned a double-storey flat. His neighbour's child came to visit. The child slipped and fell on the very slippery flight of stairs on his way to the toilet on the second floor. "B" was held liable.
- "C" owned a unit in a townhouse complex. One evening a burglar gained entry into the unit. The burglar slipped and fell into the jacuzzi in the large entertainment area. The burglar drowned. "C" was held liable.

Decide if "A", "B" and "C" are distinguishable or comparable to your client's situation and substantiate your answer.

If a case is distinguishable, the judgment case will not form part of the body of precedent. If a case is comparable, it will form part of the body of precedent to be considered by the court. Whether a particular case is distinguishable or comparable depends to a large degree on the argument presented in court and the view that the presiding officer eventually takes on the respective cases. On a narrower approach, the above examples are distinguishable from the client's facts. For instance: "A" owned a large pool whereas the client owns a small fish pond, and "A" invited the guests whereas the client did not invite the child to his house. "B's" case involved a slippery flight of stairs whereas an unguarded fishpond featured in the client's case. Likewise, as in the case of "C", "C" was faced with an (uninvited) burglar falling into a jacuzzi in the unit whereas the client's case involves a child falling into a pond in the garden. In the wider sense, the decisions may all be comparable. For example, the defendant owns an (unguarded) potentially dangerous object and the object caused harm to a third party.

Perhaps your searches in secondary sources of law did not contain useful references to court decisions. You may then want to use the (hard copy) indexes. Butterworths and Juta publish a number of indexes to facilitate searches:

- Index to the South African Law Reports 1828-1946, and Noter-up;*
- Butterworths' Consolidated Index and Noter-up to the All South African Law Reports;* and
- Index and Annotations to the South African Law Reports.*

A particularly helpful index is the subject index:

<p>INSURANCE (continued)                      Repudiation - (continued)                      Insurance company not stating grounds of repudiation -                      Effect: <b>Amod v Moolla</b>, 1952 (1) SA 754 (N)                      Insurer alleging debit order dishonoured for lack of funds -                      Onus of proof on insurer. <b>Penderis v Gutman NNO v Liquidators, Short-Term Business, AA Mutual Ins Assocn Ltd</b>, 1992 (4) SA 836 (A)</p> <p>...</p> <p>SUBROGATION -                      Action by insurance company in name of insured -                      Claim for portion of loss only -                      Balance of loss to be recovered by insured -                      Plurality of claims. <b>Avex Air (Pty) Ltd v Borough of Vryheid</b>, 1973 (1) SA 617 (A)</p>
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continued

<p>Breach of warranty endorsement -                      Liability of insured for negligence. <b>Aviation Ins Co v Bates and Lloyd Aviation (Pty) Ltd; Bates and Lloyd Aviation (Pty) Ltd v Aviation Ins Co Ltd</b>, 1982 (4) SA 838 (T)</p> <p>Damages claimed by insured -                      Payment of damages by insurance company -                      Effect on insured's claim against person causing damage. <b>Teper v McGees Motors (Pty) Ltd</b>, 1956 (1) SA 738 (C)</p> <p>Leased premises -                      Lease obliging landlord to insure premises against fire -                      Negligence of tenant causing fire. <b>Commercial Union Assurance Co of SA Ltd v Golden Era Printers and Stationers (Pty) Ltd</b>, [1997] 3 All SA 165</p> <p>Prejudice of rights of subrogation by insured -                      No prejudice where third party pays damages not covered by policy. <b>Visser v Inc General Insurances Ltd</b>, 1994 (4) SA 472 (T)</p> <p>"Suicide" clause                      Whether onus on company. <b>Nieuwenhuizen, Ep</b>, 1950 (3) SA 125 (SWA)</p> <p>...</p>
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Other helpful indexes include "case annotations", "legislation considered", "cases reported", "words and phrases" and "table of statutes".<sup>9</sup>

Jutastat, a CD-Rom-based electronic database, offers another option in searching for relevant court cases. (Consult the information provided under paragraph 8.3.7.)

### 8.3.6 Legislation<sup>10</sup>

Butterworths publishes a looseleaf compilation of South African legislation that is continuously updated. Juta publishes a compilation that is updated annually. Both publishers also offer indexes to these compilations.

If you know the title of the particular Act that you are looking for, use the "alphabetical table of statutes". This table lists the Acts alphabetically according to short titles.<sup>11</sup>

Short title of Act	No	Year	Subgroup
L			
...			
Local Loans Act	19	1926	-
Local Stock (Registration) Act	19	1916	-
Long-term Insurance Act	52	1998	INSURANCE(2)
Lord's Day Act (Natal) Amendment Act	8	1917	-

continued

<sup>9</sup> Kok, Nienaber and Viljoen (2002) at 46-49.

<sup>10</sup> See in general Kleyn and Viljoen (2002) at 44-59; Bosman, Parker and Williams (2003) at 45-74.

<sup>11</sup> Kok, Nienaber and Viljoen (2002) at 43.

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A particularly helpful index is the subject index:

<p>INSURANCE (continued)                  Repudiation - (continued)                  Insurance company not stating grounds of repudiation -                  Effect: <b>Amod v Moolla</b>, 1952 (1) SA 754 (N)                  Insurer alleging debit order dishonoured for lack of funds -                  Onus of proof on insurer. <b>Penderis v Gutman NNO v Liquidators, Short-Term Business, AA Mutual Ins Assocn Ltd</b>, 1992 (4) SA 836 (A)</p> <p>....</p> <p>SUBROGATION -                  Action by insurance company in name of insured -                  Claim for portion of loss only -                  Balance of loss to be recovered by insured -                  Plurality of claims. <b>Avex Air (Pty) Ltd v Borough of Vryheid</b>, 1973 (1) SA 617 (A)</p>
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continued

<p>Breach of warranty endorsement -                  Liability of insured for negligence. <b>Aviation Ins Co v Bates and Lloyd Aviation (Pty) Ltd; Bates and Lloyd Aviation (Pty) Ltd v Aviation Ins Co Ltd</b>, 1982 (4) SA 838 (T)</p> <p>Damages claimed by insured -                  Payment of damages by insurance company -                  Effect on insured's claim against person causing damage. <b>Teper v McGees Motors (Pty) Ltd</b>, 1956 (1) SA 738 (C)</p> <p>Leased premises -                  Lease obliging landlord to insure premises against fire -                  Negligence of tenant causing fire. <b>Commercial Union Assurance Co of SA Ltd v Golden Era Printers and Stationers (Pty) Ltd</b>, [1997] 3 All SA 165</p> <p>Prejudicing of rights of subrogation by insured                  No prejudice where third party pays damages not covered by policy. <b>Visser v Inc General Insurances Ltd</b>, 1994 (1) SA 472 (T)</p> <p>"Suicide" clause                  Whether onus on company. <b>Nieuwenhuizen, Ep</b>, 1950 (3) SA 125 (SWA)</p> <p>....</p>
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Other helpful indexes include "case annotations", "legislation considered", "cases reported", "words and phrases" and "table of statutes".<sup>9</sup>

Jutastat, a CD-Rom-based electronic database, offers another option in searching for relevant court cases. (Consult the information provided under paragraph 8.3.7.)

### 8.3.6 Legislation<sup>10</sup>

Butterworths publishes a looseleaf compilation of South African legislation that is continuously updated. Juta publishes a compilation that is updated annually. Both publishers also offer indexes to these compilations.

If you know the title of the particular Act that you are looking for, use the "alphabetical table of statutes". This table lists the Acts alphabetically according to short titles:<sup>11</sup>

Short title of Act	No	Year	Subgroup
L			
....			
Local Loans Act	19	1926	-
Local Stock (Registration) Act	19	1916	-
Longform Insurance Act	52	1998	INSURANCE (2)
Lord's Day Act (Natal) Amendment Act	8	1917	-

continued

<sup>9</sup> Kok, Nienaber and Viljoen (2002) at 46-49.

<sup>10</sup> See in general Kleyn and Viljoen (2002) at 44-59; Bosman, Parker and Williams (2003) at 45-74.

<sup>11</sup> Kok, Nienaber and Viljoen (2002) at 43.

Lotteries Act	57	1997	TRADE AND INDUSTRY (2)
...			
<b>S</b>			
...			
Ship Registration Act	58	1998	SHIPPING (4)
Shipping Board Act	20	1929	-
Short Process Courts and Mediation In Certain Civil Cases Act	103	1991	COURTS (1)
Short-term Insurance Act	53	1998	INSURANCE (2)
Silicosis Act	47	1946	-
...			

If you know when an Act was published, use the "chronological table of statutes". This index lists Acts according to the number and year the Act was published in the *Government Gazette*.<sup>12</sup>

Year	Short title of Act	Subgroup	Repealed by Act
No		(Vol no in brackets)	No Year
...			
<b>1998</b>			
...			
49	Insurance Amendment Act	INSURANCE (2)	
50	Demutualisation Levy Act	REVENUE (3)	
51	Insurance Second Amendment Act	INSURANCE (2)	
52	Long-term Insurance Act	INSURANCE (2)	
53	Short-term Insurance Act	INSURANCE (2)	
54	Inherited Debt Relief Act	DEBTOR AND CREDITOR (2)	
55	Employment Equity Act	EMPLOYMENT AND LABOUR (4)	
...			
<b>1999</b>			
...			

If you know when an Act was published, use the "chronological table of statutes". This index lists Acts according to the number and year the Act was published in the *Government Gazette*.<sup>13</sup>

12 Kok, Nienaber and Viljoen (2002) at 44.

13 Kok, Nienaber and Viljoen (2002) at 44.

Year	Short title of Act	Subgroup	Repealed by Act
No		(Vol no in brackets)	No Year
...			
<b>1998</b>			
...			
49	Insurance Amendment Act	INSURANCE (2)	
50	Demutualisation Levy Act	REVENUE (3)	
51	Insurance Second Amendment Act	INSURANCE (2)	
52	Long-term Insurance Act	INSURANCE (2)	
53	Short-term Insurance Act	INSURANCE (2)	
54	Inherited Debt Relief Act	DEBTOR AND CREDITOR (2)	
55	Employment Equity Act	EMPLOYMENT AND LABOUR (4)	
...			
<b>1999</b>			
...			

If you are looking for a list of Acts that deal with a particular subject, use the "alphabetical index to the groups and subgroups" (Juta) index.<sup>14</sup>

INSPECTION OF FINANCIAL INSTITUTIONS: see COMMERCIAL LAW and then BANKING AND CURRENCY (2)
INSTITUTE FOR DRUG-FREE SPORT, SOUTH AFRICAN: see HEALTH and then MEDICINE AND MEDICAL PROFESSIONS (1)
INSURANCE, COMMERCIAL LAW and then INSURANCE (2)
INSURANCE, LONG-TERM: see COMMERCIAL LAW and then INSURANCE (2)
INSURANCE, MOTOR VEHICLES: see TRANSPORT and then MOTOR VEHICLES (4)
INSURANCE, SHORT-TERM: see COMMERCIAL LAW and then INSURANCE (2)

One should find volume two as indicated in the index entry. Volume two lists the following sub-entries under the main group "Commercial Law":

Banking and Currency	1-3
Companies	1-127
Contracts	1-315
Co-Operative Societies	1-319
Debtor and Creditor	1-377
Financial Institutions Amendment Acts	1-415
Insolvency	1-445
Insurance	1-504
Negotiable Instruments	1-595
Purchase and Sale	1-615
Stock Exchange	1-645

14 Kok, Nienaber and Viljoen (2002) at 44.



Page to the subgroup "Insurance". Juta's 2005/6 index lists the following Acts under this heading:

AVBOB Mutual Assurance Society Incorporation (Private) Act 7 of 1951	1-571
South African National Life Assurance Company Incorporation (Private) Act 3 of 1954	1-575
South African Mutual Life Assurance Society (Private) Act 52 of 1966	1-584
War Damage Insurance and Compensation Act 85 of 1976	1-594
South African Mutual Life Assurance Society (Private) Amendment Act 53 of 1980	1-593
Insurance Second Amendment Act 51 of 1998	1-596
Long term Insurance Act 52 of 1998	1-597
Short term Insurance Act 53 of 1998	1-622
Conversion of SASRIA Act 134 of 1998	1-650
Insurance Amendment Act 17 of 2003	1-651

Alternatively, you could use the Butterworths volume that contains the index entry "Insurance". A list of Acts reproduced in the volume appears in the front of the volume.

Once you have identified the relevant Act(s), use the "legislation considered" index in Juta's *Index and Annotations to the South African Law Reports* to ascertain whether a particular section in a particular Act has been given meaning in court decisions:

Act 83 of 1988	s 1(h).....	1994 (1) SA 162 (A)
	s 6.....	1993 (4) SA 621 (A)
Act 9 of 1989	.....	1993 (3) SA 482 (SE)
	.....	1995 (3) SA 538 (A)
Act 27 of 1989	s 2.....	1993 (1) SA 571 (T)
	s 2.....	1997 (4) SA 1176 (CC)
	s 7(1)(c).....	1997 (1) SA 273 (N)
...		
Act 32 of 1998	s 9.....	1999 (4) SA 1201 (C)
	s 10.....	1999 (4) SA 1201 (C)
	s 12.....	1999 (4) SA 1201 (C)
...		
Act 36 of 1998	s 35.....	2001 (2) SA 815 (SCA)
	s 163.....	2001 (2) SA 806 (SCA)
	s 163(1).....	2001 (2) SA 815 (SCA)
...		
Act 73 of 1998	.....	1999 (3) SA 191 (CC)
	.....	1999 (3) SA 254 (CC)
	s 6(1).....	1999 (3) SA 1 (CC)
...		

Butterworths' *Consolidated Indexes and Noter-up to the All South African Law Reports and the South African Law Reports* offer similar assistance under the heading "Table of Statutes":

Act 36 of 1998, National Water Act	
s 3.....	[2001] 1 All SA 167 (C)
s 4.....	[2001] 1 All SA 167 (C)
...	
s 129.....	[2000] 4 All SA 95 2000 (4) SA 822 (T)
s 129(1).....	[2000] 4 All SA 95 2000 (4) SA 822 (T)
...	
s 163.....	2001 (2) SA 806 (SCA)
s 163(1).....	[2001] 2 All SA 521 (A)
.....	2001 (2) SA 815 (SCA)
...	
Act 52 of 1998, Long Term Insurance Act generally	[1999] 3 All SA 290 (1999) (4) SA 532 (T)
	[2001] 3 All SA 531 (A) [2001] (3) SA 1 (SCA)
s 26.....	[2000] 2 All SA 245 (A)
	2000 (2) SA 797 (SCA)
s 59(1).....	2001 (2) SA 322 (W)
s 76.....	[1999] 3 All SA 405 (A)
	[1999] (3) SA 924 (SCA)
...	

Jutastat offers alternative research options. (See below.)

### 8.3.7 Use of computers and the internet

#### □ Jutastat

Your university library is likely to have Jutastat available. Jutastat databases contain the full text of certain Juta Law publications and include the South African Law Reports, a Constitutional Library, a Labour Law Library, Appellate Division Reports, Criminal Law Reports and a Tax Library. It also contains the South African Statutes, *Government Gazettes* and certain provinces' Provincial Legislation.

We suggest that you register for an orientation course at your university library to get to know Jutastat's powerful search options. Some of the basic functions are presented below.<sup>15</sup>

A very helpful search tool in the South African Statutes database is the "legislation judicially considered" option. Open the database and click on the plus sign next to "legislation judicially considered". Then click on the plus sign next to "statutes judicially considered" and then click on the plus sign next to the jurisdiction that you wish to access. It is likely that most of the searches will be in national legislation, in which case you should click on the plus sign next to "Republic of South Africa". A list of years will open. Choose the year of the Act that you are

<sup>15</sup> See also Palmer, Crocker and Kidd (2003) at 201-225.

looking for. A list of Acts from that year will appear. Then click on the specific Act you wish to research. A list of sections from that Act that has been considered by courts will appear, as well as the citations to the court cases where the Act had been considered.

A relatively easy and efficient way to find court cases that deal with a particular topic is to click on the "search" button at the top of the screen. A scroll-down menu will appear. Click on "search in flynotes only". A dialogue box will open. Type in the keywords that will assist in limiting your search. Jutastat will indicate how many times it picked up the keyword(s) in flynotes of cases. Then click on "OK". Jutastat will highlight the keyword as it appears in the flynotes of a particular case. Use the arrow keys at the bottom of the screen to scroll through the "hits".

A number of "advanced query" options exist. To utilise these options, you may either use the drop-down menu under "search" or you may type "F2" (it will open the advanced query dialogue box):

- "AND" (or the symbol &): If you, for example, type the words "substantive AND equality", Jutastat will search for cases that contain both these words.
- "OR": If you divide the keywords with "OR", Jutastat will search for cases that contain either one of the keywords or all of them.
- "NOT": Use "NOT" to exclude certain words from the search. If you type "equality NOT discrimination", Jutastat will search for all cases where the word "equality" appears but will exclude from this list all cases that also contain the word "discrimination".
- "XOR": This option tells Jutastat to find cases that contain either of the keywords (not both, as the "OR" option exercises this).
- "?": If you replace one letter in the keyword with the symbol "?", Jutastat will replace the symbol with every letter of the alphabet and search for all possible combinations. For example, if you type "b?y", Jutastat will find "boy" and "buy", amongst others. Use this option to search for the singular and plural form. For example, when querying "wom?n", Jutastat will find "woman" and "women" this way.
- "\*": Use the symbol "\*" to replace any number of letters. ("?" is used to replace a single letter.) For example, if you type "gun\*", Jutastat will find "guns", "gunmen" and "gunshot", amongst others.
- Ordered proximity query: If you type "gunshot wound"/10, Jutastat will search for these words wherever they appear in not more than 10 words apart and in the order you typed them into the dialogue box.
- Unordered proximity query: If you type "gunshot wound"@20, Jutastat will search for these words wherever they appear in not more than 20 words apart, and in any order.

#### Sabinet Online

Your university library is very likely a subscriber to Sabinet, an online information provider.<sup>16</sup> You may access the website at <http://www.sabinet.co.za>. Ask the

<sup>16</sup> See Palmer, Crocker and Kidd (2003) at 225–245 for detailed information.

information specialist in the library to gain access to the search engine after the "academic and library division" option has been clicked, you may be asked to enter a "user ID" and "password". Then click on "GO".

You may then either select a particular database or a particular topic. If you select a topic, you may conduct searches across a number of databases. The databases that may be of use in a law clinic consist of the following:

- Book Data*: This database consists of records supplied by subscribing publishers. These are mainly UK and European, although USA, Australian and South African publishers may be found. Book Data offers full bibliographic information on forthcoming, new and in-print titles; and also includes short descriptions of titles.
- ISAP (The Index to South African Periodicals)*: This database covers indexed articles from more than 900 South African periodicals. Specialist periodicals are indexed fully, whereas general and popular periodicals are indexed selectively. This database is compiled under the ownership of the National Library of South Africa.
- Parliamentary Bills*: This database provides access to the South African Bills, as introduced to the National Assembly from 1998 onwards.
- Provincial Gazettes*: This database provides access to the full text of the South African *Provincial Gazettes* from 1995 onwards.
- South African Gazettes*: This provides access to the full South African *Government Gazette* and the *Weekly Government Gazette* index texts. The database includes Acts, Bills, draft bills, green papers, white papers, and regulations published in the *Government Gazette*. Also included are general notices, government notices, press releases, board notices, legal notices and proclamations.
- South African Legislation*.

Once you have selected the appropriate database, the "database search" window will open. You may then choose to either undertake a "basic search" or "advanced search". Use the drop-down menus to refine your search; then click the "search" button.

Sabinet also allows you to use search operators. The search operators are as follows:

To conduct a search for a keyword and its plural form, add a "+" at the end of the last word (for example "airplane+" will search for airplane and airplanes).

You may truncate a keyword by adding "\*" at the end. Type at least three letters before using the "\*" option. For example, typing "inf\*" will locate words such as informal, informer and information, amongst others.

If you type "?" after a root word, Sabinet will search for all words beginning with that root word.

You may also use "AND", "OR" and "NOT" in the same way as you would in Jutastat.

**The Butterworths website**

If your university library is a subscriber to the Butterworths website, you will have access to databases containing the full text of certain Butterworths publications that include:

- All South African Law Reports;*
- Arbitration Awards;*
- Constitutional Reports;*
- Judgements On Line;*
- Labour Law Reports;* and
- Statutes of South Africa.*

The website may be accessed at <http://www.lexisnexis.co.za>.

**The internet**

Be careful when utilising the internet for legal research as it is sometimes very difficult to verify the authenticity of particular websites. Information that you obtain from websites of reputable universities is likely to be reliable.

Helpful internet websites include the following:

- Acts Online at <http://www.acts.co.za/> contains certain basic South African statutes, available in full-text.
- <http://www.pollity.org.za> is a very useful website for finding South African Acts, Bills, green papers, regulations and government documents from 1994 onwards.
- The Constitutional Court of South Africa is available at <http://www.constitutional.court.org.za/site/home.htm>. It contains full text of judgments, the Constitution, documents for forthcoming hearings, and information about, and rules of, the Court.
- The Supreme Court of Appeal of South Africa is available at <http://wwwserver.law.wits.ac.za/sca/index.php>. It contains full text of judgments by the Court from 1999 onwards.
- The Land Claims Court of South Africa is available at <http://wwwserver.law.wits.ac.za/lcc/>. It contains full text judgments of the Land Claims Court, and information about, and rules of, the Court.
- South African Government Online is available at <http://www.gov.za/>. It contains information about the South African Government, the country itself, Parliament, and publications including Bills and Acts from 1994 onwards.
- To find South African attorneys and law firms as well as regional associations, use <http://www.attorneys.co.za>.
- The Law Society of the Northern Provinces may be accessed at <http://www.northernlaw.co.za/>. This website contains information about the Society as well as links to other law societies, Australian and North American websites, and law search-engines.
- The Kwazulu-Natal Law Society may be accessed at <http://www.lawsoc.co.za/> and it contains information on the Society, links to South African law associations and links of legal interest.

- The KwaZulu-Natal Law Society Library at <http://www.lawlibrary.co.za/> contains very useful links to websites of legal interest and South African legislation.
- The website of the law section of the Ferdinand Postma Library at the North-West University (Potchefstroom campus) may be accessed at [http://www.puk.ac.za/biblioteek/subjects/law\\_e.htm](http://www.puk.ac.za/biblioteek/subjects/law_e.htm) and includes a search-engine for THRHR (*The Journal for Contemporary Roman-Dutch Law* or *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*).
- The Faculty of Law at the University of Johannesburg (previously Rand Afrikaans University) may be accessed at <http://general.rau.ac.za/law/>.
- The Rhodes University Library website <http://www.rhodes.ac.za/library/> contains useful links to other South African and foreign libraries (one should click on "other academic institutions").
- The UNISA College of Law may be accessed at <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=15672>.
- The University of Cape Town's Faculty of Law is available at <http://www.uct.ac.za>. (Click on "faculties" and then "law".)
- The website of the University of the Free State's Faculty of Law is available at <http://www.uovs.ac.za/faculties/index.php?FCODE=03>, and it includes an index to the *Journal for Juridical Science* and a link to the Supreme Court of Appeal.
- The University of Kwazulu-Natal's Faculty of Law may be accessed at <http://www.nu.ac.za/law/>.
- The Faculty of Law at the Nelson Mandela Metropolitan University (previously the University of Port Elizabeth) is available at <http://www.nmmu.ac.za/default.asp?id=135&bhccp=1>.
- The University of Pretoria's Oliver R Tambo Law Library may be accessed at <http://www.up.ac.za/asservices/ais/law/law.htm> and includes a number of useful links.
- The University of Stellenbosch Faculty of Law may be accessed at <http://law.sun.ac.za/> and includes a link to Cape High Court judgments.
- The Wits Law School is available at <http://www.law.wits.ac.za/> and includes links to prominent courts in South Africa, research institutions and the Wits library.
- The South African Law Reform Commission's website may be accessed at <http://www.doi.gov.za/salrc/index.htm> and, amongst others, contains reports and papers of the Commission.

**8.4 Drafting an opinion**

Written opinions may feature in different contexts. For example, if you are a student at a law clinic or an article clerk at a law firm, you may be required to draft an opinion in the form of an "inter-office memorandum" along the lines discussed below. If the opinion is intended for a client, a different format may be more appropriate. Advocates, for example, often present their opinions under a heading similar to one found in pleadings, with the word "Opinion" printed between the parallel lines below the heading. We suggest that the framework set out below is a logical means of providing a written opinion.

Once you have collated and read all the sources, you need to set out your opinion in an accessible, easy-to-read fashion. We suggest that you draft the opinion along the following lines:<sup>17</sup>

TO:
FROM:
DATE:
RE:
FACTS
LEGAL QUESTION(S)
SHORT ANSWER
APPLICABLE LEGAL PRINCIPLES
APPLICATION
SUMMARY AND RECOMMENDATION

#### 8.4.1 The office memorandum<sup>18</sup>

The office memorandum is a typical format used by law students in clinical courses and by junior attorneys when reporting to their superiors. When you report on your research to a superior, the message needs to be concise and to-the-point. The aim is to inform and to recommend a course of action. Use plain legal language. Be as objective as possible: analyse the facts, analyse the law, and present a truthful, objective, balanced answer.

- The facts:* Your superior may be fully conversant with the facts of the matter, in which case you can afford to state the most important facts. If you had to collate the facts, report back in detail. The easiest format to follow is to sort the facts chronologically by using paragraphs. Present the information in an easy-to-read format. Do not "hide" sensitive information. The office memorandum is a privileged document and will not be made available to the other side, should litigation ensue.
- The legal question and short answer:* Present the legal question and answer in a few short lines. Your superior may, for the moment, only be interested in the final answer. These two headings allow for a very brief summary of your views on the matter. It may be that more than one issue had to be investigated. In that case, break down the legal question into its constituent parts and answer each of the questions separately.

<sup>17</sup> Also see Kok, Nienaber and Viljoen (2002) at 140–144.

<sup>18</sup> See in general Kok, Nienaber and Viljoen (2002) at 140–143.

- The applicable legal principles:* You are likely reporting to a senior practitioner with many years' experience and you may, therefore, assume that he/she has an extensive knowledge of the law. You therefore need not state trite principles of law (for example, the five elements of a delict, or the definition of murder). It is, however, important to discuss the relevant legal principles exhaustively. State the principle and the authority for the principle. You may also wish to briefly refer to the facts of decided cases. Where necessary, compare or distinguish previous decisions from the client's case. Discuss supporting authority as well as cases that point to a different conclusion as it is important to aim at presenting an objective analysis of the law.
- Applying the law to the facts:* Apply each of the principles discussed under the previous heading to the facts of your client's case. Discuss the strengths and weaknesses of the case. This is due to the fact that, at this stage, you are not presenting an argument to be addressed to a court. You must analyse the facts from the perspective of a "neutral" bystander and you should predict (as best you can) what the likely outcome of the matter will be. This section and the previous section will probably be the lengthiest (and most difficult) to draft.
- Conclusion and recommendation:* Set out your conclusion, recommendation and reasons for your recommendation relatively briefly in this final section. This section proves to be more than an accurate summary of the previous two sections. Your supervisor will not necessarily have the time to read the entire memorandum, especially if it is very long, and he/she may then want to only focus on the summary of the case.

#### 8.4.2 An example

Consider the following example:

*You act on behalf of "Happy Hippos", a holiday resort in die bushveld. The resort manager, Colossus Labuschagne, telephoned you six months ago in a shocked state. A guest who has often visited the resort, Bessie Blaker, went for a walk with her 87 year old father, Ben Blaker, next to the river. An angry hippopotamus charged out of the reeds on the other side of the river and started to trample Ben. Other visitors to the resort managed to chase the hippopotamus with their wild screams. Ben was urgently taken to hospital and spent about two weeks recuperating. Shortly thereafter, he instructed his attorneys to sue the resort for the damage he suffered. In his summons and particulars of claim, he alleged that the resort was negligent in not warning him that hippopotami are also dangerous during daytime and that the resort should have fenced the river off to ensure that the hippopotami are kept away from visitors.*

*You obtained the following witness statements:*

*Bessie Blaker. "I will never forget that day. I have often gone for walks along the river during my stays at the resort. The hippos are always around with only their ears and noses above the water. I have always understood from the resort personnel that the hippos wander around at night and that one has to be careful then. My father and I went for a walk next to the river on that day when the hippo charged. I thought it was my last day on earth and I screamed at the top of my*

lungs. After what felt like an eternity, the hippo stopped trampling my father and returned to the water. The resort personnel were very helpful after the attack. The resort manager told me that if one gets between a hippo and her calf she will do whatever she has to do to protect her calf and that is probably why she charged my father. But if that is the case, they should have warned us not to walk next to the river."

**Ben Blaker:** "I thought I would die when the hippo started to trample me. My daughter has often visited the resort and has always returned with numerous photos of the hippos in the water. When we booked into the resort the clerk at the counter explained how to operate the electronic cardkey. While walking to our unit, he came running after us and said he forgot to warn us about hippos wandering between the units at night and that we should be careful. We went for a walk next to the river the following day without incident. Young children play on the sandy area next to the river every day. On the last day of our visit, we went for a walk and that's when the hippo charged and trampled me. I had a lot of pain; the hippo cracked four of my ribs. It's a blessing from above that no children were on that sandy area on the day of the attack."

**Colossus Labuschagne:** "None of the resorts in our vicinity fence off areas. This was only the second incident of its kind during the resort's existence. Nine years ago a woman was killed when she got between a hippo and her calf. We warn guests constantly to be very careful. We do not approve of children playing on that sandy area but when we approach guests and tell them to be careful they accuse us of spoiling their fun. Walk around the resort, you will see a lot of notices warning guests."

**Mees Malan:** "I am the clerk at the counter where guests book into the resort. Our rule is that guests must book in prior to two o'clock on Friday afternoons. I cannot remember the Blakers, but I always follow the same procedure when guests book in. I explain how the electronic cardkey works with which they lock and unlock their unit and I hand them the cardkey. They must sign that they received the cardkey. The document contains sections where they fill in their particulars so that we can send their account to them and they sign to acknowledge that there are wild animals in the resort and that they must be wary of hippos walking around at night. I was not present on the day of the attack; I heard afterwards of the poor man's serious injuries. From that day, I warn guests not to get close to the river. I'm perhaps overcautious now but I would rather scare off guests than having another incident like that."

You have also undertaken an inspection of the resort. At the area where the attack occurred, a warning sign in the shape of a triangle with a picture of a hippopotamus inside the triangle has been erected. At the main entrance to the resort, a notice board appears with the words: "WARNING: WILD ANIMALS – This resort houses dangerous animals; be careful of hippos grazing at night".

The document that Bessie Blaker signed when she acknowledged receipt of the cardkey reads as follows: "I, ..... (space to fill in full names and surname) acknowledge receipt of the electronic cardkey to unit (space to fill in unit number). I am aware that wild animals are housed in the resort. Happy Hippos resort may not be held liable for any damages of whatsoever

nature during a guest's stay at the resort. I indemnify Happy Hippos against any claim that may arise as a result of the resort's negligence or any other cause".

The newsletter that Bessie received when they booked into the resort contained an item headed: "Hippos: Our resident hippo family has been extremely active during the last few weeks and has acquired a new member to the family. Please be careful as these are wild animals that are extremely dangerous and they must be treated with respect at all times. Also take note that the hippos wander around the resort at night. Therefore, if you are taking a walk, be sure to remain in well-lit areas."

Write a legal opinion in which you set out the merits of the case and your recommendation.

The area of law that you should research is law of delict – specifically, possible defences to a claim based on delict.

The angle of approach is influenced by the brief or instruction. In this matter, you act on behalf of the resort and therefore the memorandum should focus on possible defences to the claim.

A possible approach could be:

<b>TO:</b>	(The principal's name)
<b>FROM:</b>	(The legal practitioner's name)
<b>DATE:</b>	
<b>RE:</b>	(The file reference and a brief explanation, for example: "Opinion on merits – Happy Hippos/Blaker")
<b>FACTS</b>	
(Relate the facts of the case. You may attach the witnesses' statements as annexures to the memorandum.)	
<b>LEGAL QUESTION(S)</b>	
Will the defendant be held liable for the plaintiffs' injuries?	
<b>SHORT ANSWER</b>	
Probably not. (But there are a number of weaknesses in the case.)	
<b>APPLICABLE LEGAL PRINCIPLES</b>	
A number of possible defences exist against the Blakers' claim:	
<i>Disclaimer notice in registration card</i>	
In <i>Booyesen v Sun International (Bophuthatswana) Ltd</i> 96/3261 (WLD) the plaintiff instituted action against the defendant after she slipped, fell and injured herself while she was a guest at one of the defendant's resorts. The defendant relied on a disclaimer clause contained in their registration card which they alleged regulated the plaintiff's conditions of attendance at the resort, and in terms whereof she discharged the defendant from any liability arising from her injuries on their premises. The card was handed to the plaintiff for signature without further explanation. The card contained the heading "conditions of residence" in which the disclaimer clause was contained. The court held that the plaintiff should reasonably have expected conditions of residence to exist and apply to her and that the heading "conditions of residence" should have alerted her to this fact.	

continued

The court rejected the plaintiff's argument that she could not have reasonably expected to find an exemption clause contained in the conditions of residence. The court referred to *George v Fairmead (Pty) Ltd* 1958 (2) 465 (A) at 472H ("But she knew she was assenting to something, and indeed to something in addition to the terms she had herself filled in. If she chose not to read what that additional something was, she was, with her open eyes, taking the risk of being bound by it. She cannot then be heard to say that her ignorance of what was in it was a *justus error*") and dismissed the plaintiff's claim with costs.

In *Afrox Healthcare Beperk v Christiaan George Strydom* 2002 (6) SA 21 (SCA) the respondent argued that he was not bound by the disclaimer contained in the registration document as, at signature, he was not aware of its existence and that the appellant had a legal duty to inform him of its existence, as one would not expect such a clause in a contract with a hospital – as a hospital is supposed to provide a service in a professional manner, one would not expect a hospital excluding liability for the negligence of its staff. The Court rejected this argument. The Court held that the respondent's subjective expectations about what the contract would have contained, plays no role in determining whether the admissions clerk had a duty to inform the respondent about the disclaimer. The Court held that the question is what would *reasonably* have been expected to be contained in the contract. The Court held that disclaimers are the rule rather than the exception in standard contracts.

#### Warning signs and "volenti non fit iniuria"

In *Central South African Railways v James* 1908 TS 221 at 226 it was held that had a patron seen a notice and realised that it contained terms relating to the contract but did not bother to read it, there would have been actual consensus on the basis that the patron would have agreed to be bound to those terms, whatever they might have been.

In *Kings Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 643 (N) the court held that a person seeking to prove a contract should show that he did what would objectively be regarded as reasonably sufficient to bring the conditions to the notice of the other party to the contract.

In *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) the plaintiff contended that she had been aware of notices on the premises, but alleged that she did not read the wording on the notices on the evening of the incident, or any other time. The appellant (defendant) had to establish that the plaintiff was bound by the terms of the disclaimer contained in the notice, based on *quasi*-mutual assent. To establish *quasi*-mutual assent it must be shown that the defendant was reasonably entitled to assume from the patron's conduct in parking and attending at the premises, that she assented to the terms of the disclaimer or was prepared to be bound by them without reading them. The court held that the answer to this query depends on whether, in all the given circumstances, the defendant did what was reasonably sufficient to give notice to patrons of the disclaimer clause.

*Volenti non fit iniuria* conveys a notion that a person who willingly encounters a known and appreciated danger forfeits any right to compensation if the risk materialises and harm eventuates. The defendant bears the onus of showing that the plaintiff acknowledged the danger, appreciated the nature and extent of the danger, voluntarily elected to encounter the danger and consented to take the risk upon herself. Neethling, Potgieter and Visser *Deliktereg* 2 ed (1992) 90–97.

#### APPLICATION OF LAW TO THE FACTS

Applying the principles set out above to the facts of this specific case, I am of the following view:

##### Disclaimer

The defendant would be able to prove that the admission of the plaintiffs to the defendant's resort was at their own risk and subject to the disclaimer of liability if it can be proven that the

continued

plaintiffs signed the registration form and the plaintiffs were not misled into signing the registration form. From the facts it appears that Ms Blaker signed the registration card. The card read ". . . Happy Hippos resort may not be held liable for any damages of whatsoever nature during a guest's stay at the resort. I indemnify Happy Hippos against any claim that may arise as a result of the resort's negligence or any other cause." By signing the document, Ms Blaker signified her assent to these terms.

In *Minister of Education and Culture (House of Delegates) v Azel and Another* 1995 (1) SA 30 (A) a similar clause had to be interpreted:

"I fully understand and accept that all tours and excursions shall be undertaken at my child's own risk and I undertake, on behalf of myself, my executors and my child aforesaid to *indemnify*, hold harmless and absolve the Department, the principal and his staff against and from any or all claims whatsoever that may arise in connection with any loss of or damage to the property or injury to the person of my child aforesaid in the course of any such tour or excursion, in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child."

The then Appellate Division held that "the exemption unambiguously absolves the appellant from liability in the circumstances of this case" (at 33D; the defence ultimately failed, however, because of the qualification attached to the disclaimer).

#### Warning signs and "volenti non fit iniuria"

It could be argued that the plaintiffs knew of the presence of hippos in the resort, were aware of the danger the wild animals posed to their safety, were aware of the risk in proceeding onto the sandbank, and despite their knowledge and appreciating the risk of injury, climbed onto the sandbank and therefore consented to the risk of injury.

On the plaintiffs' own version they were aware that hippopotami were dangerous and she confirmed receipt of a newsletter containing a warning to be aware of these animals. The warning signs, however, specifically warned visitors to beware of hippopotami at night. The fact that the attack occurred in the afternoon coupled with the fact that other visitors walked on the sandbank where the attack took place suggest that the plaintiffs did not appreciate the danger the hippopotami posed at the time of the incident. I am therefore of the opinion that the defendant will *not* succeed with a defence based on the voluntary assumption of risk.

#### RECOMMENDATION

The matter could probably be successfully defended, based on the disclaimer notice in the registration card. In the absence of a settlement proposal from the plaintiff, the matter should be pushed to trial.

#### 8.5 Conclusion

In a law clinic your research is likely to focus on issues that affect the poor and the vulnerable, for example access to basic services (clean water, electricity, education), access to housing, and domestic violence. These issues are often deceptively complex from a legal perspective, particularly when it comes to socio-economic rights. Finding an effective remedy for your client's problems will often require in-depth research and a creative application of the law. It is a small miracle that these clients found their way to a law clinic: The legal system suffers from a serious legitimacy crisis and most people

*Finding an effective remedy for your client's problems will often require in-depth research and a creative application of the law.*

faced with a problem will attempt to solve it without recourse to a legal practitioner. Most people will argue that their hard-earned income is better spent on providing for themselves or their families than employing legal services. This makes it all the more important to provide effective relief to poor claimants who do decide to approach a law clinic. Effective and time-efficient research is part of the process of providing effective relief. Poor clients' time and money are extremely limited. To be told that another appointment must be scheduled because you have not completed your research may well be the reason why your client simply gives up the fight. Budget your time and plan well in advance: your client's livelihood may depend on it.<sup>19</sup>

<sup>19</sup> If a particular problem proves to be of such complex nature that an expert in the field must be consulted, consider briefing an advocate. (Law clinics may be able to secure an advocate on a *pro bono* basis.) Independent research services exist that will, for a fee, provide an opinion on any legal issue, eg [http://www.lawsure.co.za/htdocs/1\\_Home/](http://www.lawsure.co.za/htdocs/1_Home/).

## Drafting letters

By Danny Wimpey

### 9.1 Introduction

Communication is the core of the practice of law. A practitioner who cannot communicate effectively cannot practice effectively. Without letters of some sort, even in the changing environment of electronic communication, practitioners would be hard pressed to communicate. In South Africa, the diversity of our society presents additional challenges which all practitioners should bear in mind when communicating in any form, whether in a letter, in a consultation, telephonically or otherwise.

*A practitioner who cannot communicate effectively cannot practice effectively.*

Your first attempt to write a legal letter, whether as a student in a law clinic or as a candidate attorney, will probably take more time than you believed possible, drafting and redrafting only to have your clinic supervisor or principal either draw a red line through it or tear it up! It is important to remember that, as with so many things in law and in life, experience and practice will make what seemed impossible at the start, simple and commonplace. The habits which you as a practitioner develop early in your career will probably be the habits that you will have forever. Start as you wish to continue – by writing letters that do exactly what they should do – communicate effectively.

At the beginning, use rules that can be easily applied to help you. This will develop your confidence and understanding of the skill. After a while you will find that you have developed your own style and can use it almost, but never completely, without thinking.

Letters written by legal practitioners can have many purposes. They can persuade, inform, record facts, make demand, enrage or calm the reader, all depending on the skill of the writer and the intention in writing the letter. Some letters merely have formal purposes, for example to confirm an arrangement or notify an opponent of a trial date. Other letters may be of such significance that an error in the drafting may cause the client to lose the case. All legal letters should, in the 21st century, be written in clear, concise language and be easy for the intended reader to understand. This is still something that most of us still struggle with.