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# AN ANALYSIS OF WRONGFUL BIRTH AND WRONGFUL LIFE CLAIMS IN SOUTH AFRICA

by

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## Summary

Wrongful birth and wrongful life claims have always been contentious subjects, the latter more so than the former.

In our law, medical practitioners may incur liability if they do not properly exercise their legal duty towards a healthcare user and harm ensues.[1] This negligent conduct of the medical practitioner will give rise to delictual liability if all the elements of delict are met: harm, conduct, causation, fault and wrongfulness.[2] This dissertation intends to analyse the current legal position in South Africa regarding wrongful birth and wrongful life claims and specifically whether they constitute valid delictual claims, and will also look briefly at the global attitude towards such claims.

Wrongful life claims are particularly controversial and the topic sparks debate on the sanctity of life, human dignity and equality. These claims are said to involve questions too existential for a court to be expected to provide answers.[3] This dissertation aims to discuss the arguments both for and against allowing claims for wrongful life, within the context of the Constitution[4] and the ever-changing *boni mores*.

[1] Coetzee and Carstens "Medical Malpractice and Compensation in South Africa" 2011 86 *Chicago-Kent Law Review* 1263 1271.
[2] Loubser, Midgley, Mukheibir, Niesing and Perumal *The Law of Delict in South Africa* 2ed (2012) 15.
[3] *Stewart v Botha* 2008 (6) SA 310 (SCA) par 11-28; Mukheibir "Wrongful life – the SCA rules in *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 June 2008)" 2008 29 *Obiter* 515 517-518.
[4] The Constitution of the Republic of South Africa, 1996.

## Declaration of originality

I, Tara Tregoning, student number u15393683, declare as follows:

1. I understand what plagiarism is and am aware of the University's policy in this regard.

2. I declare that this mini-dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

**(Signed)**

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T Tregoning

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Supervisor: Prof PA Carstens

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# CHAPTER 1: INTRODUCTION

## 1 1 Introduction and background

Wrongful birth and wrongful life claims have always been contentious, the latter more so than the former.

In our law, medical practitioners may incur liability if they do not properly exercise their legal duty of care towards a healthcare user and harm ensues.[5] This negligent conduct of the medical practitioner will give rise to delictual liability if all the elements of delict are met: harm, conduct, causation, fault and wrongfulness.[6] The research intends to analyse the current legal position in South Africa regarding wrongful birth and wrongful life claims, and will also look briefly at the attitude towards such claims in certain foreign jurisdictions.

Wrongful life claims are particularly controversial and the topic sparks debate on the sanctity of life, human dignity and equality. These claims are said to involve questions too existential for a court to be expected to provide answers.[7] This research aims to discuss the arguments put forward both against, and in favour of, allowing claims for wrongful life, within the context of the Constitution[8] and the ever-changing *boni mores*.

[5] Coetzee and Carstens "Medical Malpractice and Compensation in South Africa" 2011 86 *Chicago-Kent Law Review* 1263 1271.
[6] Loubser, Midgley, Mukheibir, Niesing and Perumal *The Law of Delict in South Africa* 2ed (2012) 15.
[7] *Stewart v Botha* 2008 (6) SA 310 (SCA) 319; Mukheibir "Wrongful life – the SCA Rules in *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 June 2008)" 2008 29 *Obiter* 515 517-518.
[8] The Constitution of the Republic of South Africa, 1996.

## 1 2 Thesis statement and research questions

The South African law of delict is based upon a set of general principles. Therefore, in order to establish liability the elements of delictual liability, namely conduct, harm, causation, fault and wrongfulness, must be met.[9]

The research will show that while our courts have been willing to recognise certain claims, and in so develop the common law, it seems they have been unwilling to recognise similar claims arising from the same facts.[10] Specifically, up until now claims for 'wrongful pregnancy' or 'wrongful conception' and 'wrongful birth' have been accepted in South African law, having been found to fulfil the requirements for delictual liability.[11] On the other hand, 'wrongful life' claims have been rejected by our courts time and again[12] as being bad in law and *contra boni mores.*[13]

The aim of the research is therefore to assess the current stance on wrongful birth and wrongful life claims in South African law, and whether at this point in time the law of delict could, and should, allow for a claim for wrongful life, as well as whether the *boni mores* allow for the acceptance of such a claim.

## 1 3 Study objective

This research will address the concepts of wrongful birth and wrongful life claims, as well as touching on the concept of wrongful pregnancy or wrongful conception. The research will also examine the South African law of delict, specifically the elements

9 Loubser *et al The Law of Delict* 15.
10 Van Niekerk "Wrongful Life Claims: A Failure to Develop the Common Law?" 2012 23 *Stellenbosch Law Review* 527 527.
11 *Administrator, Natal v Edouard* 1990 3 SA 581 (A); *Friedman v Glicksman* 1996 1 SA 1134 (W); and *Mukheiber v Raath* 1999 3 SA 1065 (SCA).
12 *Friedman v Glicksman supra* and *Stewart v Botha* 2008 *supra*.
13 Mukheibir 2008 *Obiter* 515-516.

that must be met in order for a delictual claim to succeed and whether the above claims fulfil these elements.

With regard to wrongful life claims, the research will examine whether the common law should be developed in order to allow such claims and whether, in light of recent court judgments, the *boni mores* have progressed to a point where such a claim is acceptable. In order to do so, the research will outline the arguments both in favour of, and against, allowing this claim. In addition, the research will also briefly consider whether the *nasciturus* fiction could find application in wrongful life claims.

The main objective of the research is to assess the current position in South African law regarding wrongful birth and wrongful life claims, and whether the position is justifiable in a constitutional society such as ours.

## 1 4 Research methodology

The research follows a multi-layered approach, with both primary and secondary sources being examined and discussed on an integrative level.

In order to understand what is meant by the terms ‘wrongful birth’ and ‘wrongful life’ the research will look to the current literature as well as South African case law. The research will also examine case law dealing with the general elements of delict, and specifically those elements that are considered problematic in wrongful life claims. The case law will also shed light on the position taken by our courts towards these claims.

The research will examine the relevant legislation and guidelines dealing with, amongst other things, discrimination based on disability, the best interests of the child, and the doctor-patient relationship. Wrongful life claims are particularly controversial

and bring to the fore debates on the sanctity of life, dignity and equality, and this will be addressed with reference to the relevant constitutional provisions as well as other secondary sources.

The South African position regarding wrongful birth and wrongful life claims will be briefly compared to the position in other jurisdictions, including the United Kingdom, Australia and the Netherlands. In assessing the legal position in other countries, foreign case law and legislation will be referred to.

The views expressed by both local and international writers will be analysed and the arguments in favour of, and against, allowing wrongful life claims will also be discussed.

### 1 5 Limitations

The research will not address the medical science involved in prenatal testing and genetic screening. Furthermore, the research does not constitute an in-depth study of the law of delict, nor will it deal extensively with foreign law.

### 1 6 Structure

The introductory chapter sets out the framework used upon conducting the research, as well as the background to the study and the methodology followed. In addition, this chapter covers the problem statement and the objectives of the study.

Chapter 2 explains what is understood by the terms ‘wrongful pregnancy’ or ‘wrongful conception’, ‘wrongful birth’ and ‘wrongful life’, and highlights the differences between the terms. Furthermore, the criticisms surrounding the terms are discussed.

Chapter 3 covers the general principles of the South African law of delict, along with an analysis of how wrongful birth claims fulfil the delictual elements and whether a wrongful life claim could be said to constitute a valid delictual claim. Additionally, this chapter explores whether the *nasciturus* fiction has any application in such a claim.

Chapter 4 discusses the South African case law concerned with wrongful birth and wrongful life claims. The legal positions in Australia, England and the Netherlands are also briefly discussed in this chapter.

In chapter 5 , the most prominent arguments for and against the recognition of wrongful life claims will be assessed, with reference to relevant constitutional and legislative provisions as well as the *boni mores* of South African society and certain philosophical schools of thought. The chapter will include a consideration of the best interests of the child, certain policy considerations and a discussion on dignity and equality.

Chapter 6 is the concluding chapter in which the research findings are discussed and the arguments against, and in favour of, the recognition of wrongful life claims as valid causes of action will be weighed.

# CHAPTER 2: THE CLAIMS DEFINED

## 2 1 Introduction

Throughout this research the terms 'wrongful pregnancy' or 'wrongful conception' claim, 'wrongful birth' claim and 'wrongful life' claim are used and as such it is important that their meaning is clear and the differences between them are understood. What follows is an explanation of each of the claims, illustrating the differences between them, as well as some of the criticisms surrounding the terms.

## 2 2 Terminology

### 2 2 1 Wrongful conception/wrongful pregnancy claim

The terms 'wrongful pregnancy' or 'wrongful conception' are used in cases where a medical practitioner has failed to successfully perform a sterilisation, or has not performed a sterilisation at all when contracted to do so, resulting in an unplanned pregnancy and the subsequent birth of a healthy child.[14] The parents of the child bring this action against the medical practitioner and its purpose is to relieve the financial burden placed upon them by the conception and birth of an unplanned and 'unwanted', albeit healthy, child.[15]

The 'wrong' in these cases is not the birth of the child, but the breach of contract or negligence in the performance of the sterilisation that led to the birth and the ensuing financial burden on the parents of the child.[16]

[14] Mukheibir 2008 *Obiter* 515.
[15] Boezaart ""Wrongful life" – The Constitutional Court Paved the Way for Law Reform" 2015 26 *Stell LR* 399 401.
[16] *Administrator, Natal v Edouard supra* 590.

Mason argues that the term 'wrongful pregnancy' is preferable to 'wrongful conception' because conception itself is not an injury the woman, nor does it infringe her right to bodily integrity, until the embryo implants in the uterine wall. Only once it has implanted can it be considered as an injury or an infringement because prior to implantation the embryo is still separate to the woman. However, he also out that this reasoning implies that the term 'wrongful' means 'harmful' when it might actually only be intended to indicate that the conception was unwanted. Mason admits that there may be no real difference or relevance, and he only discusses the distinction in the interest of conformity.[17]

### 2 2 2 Wrongful birth claim

'Wrongful birth' claims are brought by the parents of a child in the case where the child is born with a severe disability.[18] The disability could be congenital or it could have been caused by negligence on the part of the medical practitioner. In the case of the former, there must be a failure to properly diagnose the disability, alternatively there could have been a proper diagnosis but a failure to inform the parents thereof. In these cases the parents[19] allege that had they been made aware of the disability they would have terminated the pregnancy, and as such they institute a claim against the medical practitioner to recover the costs of having to raise a disabled child who will require specific care.[20]

Boezaart submits that the use of the term 'wrongful birth' in these circumstances is inaccurate. The child in this situation may have been planned or unplanned and it is not the birth of the child that is wrongful, but rather the fact that the parents of the child were not afforded the opportunity to decide whether they wanted to continue with the

[17] Mason "Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology" 2002 6 *Edinburgh Law Review* 46 47.
[18] Mukheibir 2008 *Obiter* 515-516.
[19] The right to decide whether to terminate a pregnancy or not lies solely with the pregnant woman, however for the purposes of this research it will be assumed that the mother and father of the child share the same opinion on the matter and would have made the decision together.
[20] Boezaart 2015 *Stell LR* 401.

pregnancy or not. It is the denial of the parent's right to make their own reproductive decisions that is wrongful,[21] a right guaranteed by s12(2)(b) of the Constitution.

### 2 2 3 Wrongful life claim

A 'wrongful life' claim is similar to a wrongful birth claim in that it is based on the same negligence attributable to the medical practitioner, that is, a failure to properly diagnose a disability or to properly inform the parents of the diagnosis, where had the parents known of the disability they would have terminated the pregnancy. However, the difference between these claims is that wrongful life claims are instituted by or on behalf of the disabled child and not the parents in their personal capacities.[22]

In these cases the child's claim goes beyond the financial burden brought about by their disability, but rather, as Boezaart explains, the child is claiming on the basis that they have to "bear the burden of a life with disabilities". She explains further that it is not the life of the disabled child that is wrongful but the negligence on the part of the medical practitioner, and to use the term 'wrongful life' could be seen to degrade the value of human life and, as she believes, "distracts from the essence of the remedy",[23] a belief shared by the Constitutional Court.[24]

## 2 3 Conclusion

It is clear that each of the three claims described above are separate from the others. In wrongful conception or pregnancy claims the child was unplanned or "unwanted", but born healthy, and the parents seek to recover damages

[21] *Ibid*.
[22] Mukheibir 2008 *Obiter* 516.
[23] Boezaart 2015 *Stell LR* 401-402.
[24] *H v Fetal Assessment Centre* 2015 (2) BCLR 127 (CC) 134.

In wrongful birth claims the child could either be planned or unplanned and is born with a severe disability. Had the parents been aware of the disability, they would have terminated the pregnancy and so they seek damages to compensate the loss which they would not have incurred but for the negligence of the medical practitioner.

Wrongful life claims arise from the same facts as wrongful birth claims, with the difference lying in the fact that the plaintiff is the disabled child rather than the parents. The child alleges that the harm they have been caused is a life with severe disabilities and they seek compensation to redress this harm.

In *Friedman v Glicksman* Goldblatt J mentioned that the terms 'wrongful pregnancy', 'wrongful birth' and 'wrongful life' all contain "certain emotional and apparent value judgments which can detract from a proper judicial approach to the issues raised"[25] and there has been much criticism surrounding the terms. It is submitted that the criticisms discussed are indeed warranted and the use of the terms is unfortunate. However, exactly what terms would provide a better and more appropriate alternative is unknown, and in *lieu* of such alternative terms it would seem that the current terms will just have to make do.

[25] *Friedman v Glicksman supra* 1138.

# CHAPTER 3: THE GENERAL PRINCIPLES OF DELICT

## 3 1 Introduction

Firstly, this chapter will show that medical malpractice may give rise to both contractual and delictual liability. However, the focus will lie on delictual liability and the general principles of the South African law of delict will be covered. Additionally, the chapter will include an analysis of whether a wrongful life claim could be said to constitute a valid delictual claim, bearing in mind that each delictual element will have to be proven on the facts of the particular case. Lastly, this chapter briefly explores whether the *nasciturus* fiction has any application in a wrongful life claim.

## 3 2 Contract or delict?

Carstens and Pearmain explain that the term 'medical malpractice' encompasses not only professional negligence but all forms of professional medical misconduct.[26] The conduct of a medical practitioner which leads to a claim for wrongful birth or wrongful life may amount to professional negligence and are therefore a form of medical malpractice.

Medical malpractice cases usually arise from either a breach of contract or a delict, with the majority of claims being delictual.[27] An act or omission by a medical practitioner may constitute both a breach of contract and a delict and so may give rise to both contractual and delictual liability.[28] In these circumstances, the plaintiff may rely on both claims. If the plaintiff can prove both claims, they should be awarded damages on the basis of the claim which will be more advantageous to them. However, a plaintiff is only able to recover damages for the actual loss suffered. Furthermore, in

[26] Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 599.
[27] Dutton *The Practitioner's Guide to Medical Malpractice in South African Law* (2015) 7.
[28] Coetzee and Carstens 2011 *Chicago-Kent LR* 1273.

contract, only patrimonial damages may be recovered, while in delict a plaintiff may recover both patrimonial and non-patrimonial damages.[29]

Generally speaking, fault in the form of either intention or negligence is required in order for delictual liability to arise, while liability for a breach of contract does not require the presence of fault.[30] This makes proving a breach of contract a bit easier than proving a delict, however the size of a delictual claim has the potential to be a lot larger than a claim based on a breach of contract. Since *Administrator, Natal v Edouard,* all wrongful conception or wrongful pregnancy actions in South Africa have been based in delict rather than on a breach of contract.[31]

As previously mentioned, medical practitioners may incur liability if they do not properly exercise their legal duty of care towards a patient and harm ensues.[32] Delictual liability arises if all of the elements of delict are met, these elements being: conduct, fault, wrongfulness (unlawfulness), causation and harm (loss).[33] In wrongful life claims, it is the elements of causation, wrongfulness and harm, as well as the assessment of damages, that present the biggest problems for courts.[34]

The following is an examination of what the fulfilment of each element entails and whether wrongful birth and wrongful life claims meet these requirements.

[29] Coetzee and Carstens 2011 *Chicago-Kent LR* 1285.
[30] Loubser *et al The Law of Delict* 190.
[31] Van Niekerk 2012 *Stell LR* 531.
[32] Coetzee and Carstens 2011 *Chicago-Kent LR* 1271.
[33] Loubser *et al The Law of Delict* 15.
[34] Human and Mills "The Immeasurable Wrongfulness of Being: The Denial of the Claim for Wrongful Life" 2010 21 *Stell LR* 67 77.

## 3 3 Delictual elements

### 3 3 1 Conduct

The element of conduct requires a voluntary human action.[35] The conduct may take the form of either a positive act or an omission[36] and as Carstens and Pearmain note, a separation in time and space between the conduct and the subsequent consequences does not mean that "a delict arises in the absence of voluntary conduct".[37] Nor does such a separation between the act and the consequences mean that it cannot be said that a causal link exists between the two.

As previously stated, wrongful birth and wrongful life claims arise when a medical practitioner negligently fails to properly diagnose the child's disability prior to its birth, or when the medical practitioner did diagnose the disability but failed to inform, or incorrectly informs, the parents of the diagnosis. This failure of the medical practitioner constitutes the conduct required for a delictual action. If the medical practitioner makes an incorrect diagnosis, the conduct takes the form of a positive act. But if the medical practitioner failed to conduct the necessary pre-natal tests, or failed to inform the parents of the results, the conduct takes the form of an omission.[38]

### 3 3 2 Fault

As a starting point it is worth noting that there can be no fault if the wrongfulness of the conduct has not been established.[39] The inquiry into fault determines whether the defendant should be held accountable for their conduct. Fault may take the form of either intention or negligence.[40] However, as Carstens and Pearmain note, in a health

35 Carstens and Pearmain *Foundational Principles* 496.
36 Dutton *The Practitioner's Guide* 16.
37 Carstens and Pearmain *Foundational Principles* 496.
38 Boezaart 2015 *Stell LR* 410.
39 LAWSA VIII(1) *Delict* par 59.
40 Dutton *The Practitioner's Guide* 79-80.

service delivery context it is most likely that fault will be in the form of negligence.[41] Negligence will have to be proved by the plaintiff and its presence depends on the facts of the case.

The test for negligence, commonly known as the reasonable person test, was laid out in *Kruger v Coetzee*,[42] where the court stated as follows:

> "For the purposes of liability *culpa* arises if -
>
> *(a)* a *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> *(b)* the defendant failed to take such steps."[43]

The test for medical negligence was first enunciated in *Mitchell v Dixon*[44] where it was held that

> "A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not".[45]

In *Van Wyk v Lewis*[46] Innes CJ explained that when faced with the decision of what is reasonable, the court will consider "the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs".[47] That this test must be applied when deciding on the negligence of a medical practitioner in the performance of his duties was reaffirmed in *S v Kramer.*[48]

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41 Carstens and Pearmain *Foundational Principles* 522.
42 1966 (2) SA 428 (A).
43 *Kruger v Coetzee supra* 430.
44 1914 AD 519.
45 *Mitchell v Dixon supra* 525.
46 1924 AD 438.
47 *Van Wyk v Lewis supra* 444.
48 1987 (1) SA (W) 893.

In relation to wrongful birth and wrongful life claims, the question faced by a court would be whether the medical practitioner acted with reasonable care and skill when attending to the pregnant mother, and specifically when informing her of the risk of a congenitally disabled child being born, or when testing for any congenital disability in the foetus. To determine this, the court considers how the hypothetical reasonable medical practitioner, practicing in the same field of medicine, would have acted when faced with the same circumstances as the defendant-practitioner.

In *Friedman v Glicksman* the court found that fault in the form of negligence was present in the wrongful birth action before it. The court reasoned that the nature of the doctor-patient relationship allows the medical practitioner to foresee the possibility of their conduct causing harm in these circumstances.[49] In wrongful life claims, the courts appear to accept the presence of negligence.[50] However, with regard to both claims, negligence will have to be proved on the facts of the specific case and in accordance with the general principles.[51]

### 3 3 3 Wrongfulness

Whether or not the consequence of a person's conduct will be considered wrongful (unlawful) is a matter of public policy.[52] In determining whether the consequences of an act or omission are wrongful, the question to be asked is whether in the circumstances there was a "duty in law to act reasonably"[53] or whether the plaintiff's rights or interests have been breached,[54] taking into consideration the legal convictions of the community as informed by the norms and values of the Constitution.[55] Deciding upon the reasonableness of the act or omission requires the

[49] *Friedman v Glicksman supra* 1140.
[50] *Stewart v Botha* 2007 (6) SA 247 (C) 258; Human and Mills 2010 *Stell LR* 77.
[51] *H v Fetal Assessment Centre supra* 149.
[52] Carstens and Pearmain *Foundational Principles* 515; Dutton *The Practitioner's Guide* 31.
[53] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597 as quoted in Dutton *The Practitioner's Guide* 32.
[54] *H v Fetal Assessment Centre supra* 147.
[55] Dutton *The Practitioner's Guide* 34; Carstens and Pearmain *Foundational Principles* 515.

courts to weigh and balance the conflicting interests of the plaintiff and defendant. Once again, the *boni mores* of society must be considered.[56]

A contract in terms of which a pregnant woman wishes a medical practitioner to advise her as to the risk of her giving birth to a seriously disabled child, so that she may terminate the pregnancy should there be a higher than normal risk, has been found to be "sensible, moral and in accordance with modern medical practice".[57] The court in *Friedman* was of the opinion that wrongful birth claims are not *contra boni mores*[58] and found that our law recognises such a claim as a valid cause of action.[59]

Wrongful birth and wrongful life claims arise from the same wrong but as of yet the courts have not accepted the presence of wrongfulness in in the latter claim.[60] With regard to the element of wrongfulness in wrongful life claims, it has been reasoned that if life itself cannot be seen as a legal injury then there can be no legal duty to avoid it. Accordingly, a medical practitioner's conduct cannot be said to be wrongful.[61] This is the so called 'sanctity-of-life' argument.

However, it is submitted this reasoning misinterprets what is actually being claimed. Despite the suggestion implied by the term 'wrongful life', it is not life itself that is purported to be the wrongful harm suffered by the child, but rather life with disabilities and the corresponding financial burden imposed thereby. Furthermore, the sanctity-of-life argument has been eroded by numerous developments in our law,[62] and these will be discussed further on in chapter five.

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56 LAWSA VIII(1) par 60.
57 *Friedman v Glicksman supra* 1138.
58 *Ibid*.
59 *Friedman v Glicksman supra* 1140.
60 Van Niekerk 2012 *Stell LR* 529.
61 Van Niekerk 2012 *Stell LR* 536.
62 *Stewart v Botha* 2007 supra 255.

As the Constitutional Court has pointed out, children have the right to have their best interests considered of paramount importance in any matter concerning them.[63] If the parents of a child born disabled do not claim for the expenses associated with the disability, the loss will lie with the child. The Constitutional Court has held that in these circumstances, the best interests of the child may dictate that the loss should not fall to the child and that as a result there may be a legal duty to not cause the loss.[64]

### 3 3 4 Causation

According to Giesen, the majority of legal systems adopt a two-fold approach towards causation[65] and in South Africa this is most certainly the case. In order for a defendant to be held liable, it must be proven that there is a causal connection between the defendants conduct and the harm suffered by the plaintiff.[66] The test for causation consists of two parts. The first part of the inquiry looks at factual causation: did the defendants conduct cause, or materially contribute to, the plaintiffs harm? The second part of the inquiry looks at legal causation: is the defendants conduct and the plaintiffs harm sufficiently connected?[67] If the first part of the inquiry is answered in the negative then there can be no liability. However, if it is answered in the positive the court will proceed onto the inquiry into legal causation.[68]

In order to determine factual causation the courts, as a general rule, use the *conditio sine qua non* test, also known as the 'but-for' test.[69] What this inquiry requires is for the courts to determine whether, on the facts, the plaintiff would have suffered the harm but for the defendants conduct.[70]

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63 S28(2) of the Constitution.
64 *H v Fetal Assessment Centre supra* 147.
65 Giesen *International Malpractice Law: A Comparative Study of Civil Liability Arising from Medical Care* (1988) 165.
66 Loubser *et al The Law of Delict* 69.
67 Loubser *et al The Law of Delict* 70; *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC); LAWSA VIII (1) par 129.
68 Dutton *The Practitioner's Guide* 59-60; Carstens and Pearmain *Foundational Principles* 509.
69 LAWSA VIII (1) par 130.
70 Dutton *The Practitioner's Guide* 60.

Factual causation alone is not enough to impute liability, it must also be shown that there is legal causation. In other words, it must be determined whether there is "a sufficiently close connection" between the conduct and the subsequent consequences.[71] According to Carstens and Pearmain the question of legal causation is essentially a question of public policy, as informed by the Constitution.[72]

A wrongful birth claim is based on the fact that if it was not for the negligence of the medical practitioner the mother would have terminated her pregnancy. Accordingly, the doctor is responsible as the cause of the handicapped child's birth[73] and as a result he or she is also the cause of the harm suffered by the parents of the disabled child.[74] Mason submits there can be no question regarding causation in wrongful birth claims. The whole purpose of ante-natal care is to avoid the kind of situation that gives rise to wrongful birth claims and in Mason's view a wrongful birth claim is "as close to a recognisable plea of *res ipsa loquitur* as we can get."[75]

Human and Mills emphasise that in wrongful life actions the negligence of the medical practitioner is not said to be the cause of the child's disabilities, but rather the cause of the life with disabilities.[76] If it had not been for the negligence of the medical practitioner the disabled child would not have been born and factual causation may be established. However, due to the policy considerations that must be taken into account, legal causation is harder to show in these circumstances and whether there is a sufficiently close connection between the negligence of the medical practitioner and the harm suffered by the child will depend on the particular facts.[77]

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71 LAWSA VIII (1) par 132.
72 Carstens and Pearmain *Foundational Principles* 509.
73 Strauss "'Wrongful Conception', 'Wrongful Birth' and 'Wrongful Life': The First South African Cases" 1996 15 *Medicine and Law* 161 169.
74 *Friedman v Glicksman supra* 1140.
75 Mason 2002 *Edinburgh LR* 50.
76 Human and Mills 2010 *Stell LR* 78.
77 *H v Fetal Assessment Centre supra* 148.

### 3 3 5 Harm and damages

In order to hold a defendant liable in delict it must be shown that the plaintiff suffered some form of harm. This harm can be in the form of patrimonial loss, an infringement of the plaintiff's personality rights, or if they have experienced pain and suffering as a result of some bodily injury.

Patrimonial loss can be defined as "calculable pecuniary loss arising from the reduction in a person's patrimony" and includes prospective loss. Compensation for patrimonial loss is claimed using the Aquilian action.[78] Compensation for the infringement of a personality right can be claimed using the *actio iniuriarum*. Personality rights comprise the right over one's own body, dignity and reputation.[79] The Germanic action is used to claim for pain and suffering. The pain and suffering experienced by the plaintiff has to be connected to the personal injury of the plaintiff, except in relation to a claim for emotional shock.[80] The term 'pain and suffering' includes the plaintiff's actual physical pain, emotional shock, disfigurement, discomfort, inconvenience, loss of amenities of life, as well as loss of life expectancy.[81]

In wrongful conception cases it has been recognised that while the birth of a child may be a blessing, this does not negate the fact that the parents of the child now suffer a diminution of their patrimony as a result of the medical practitioner's negligence.[82] In *Friedman v Glicksman* the court found that wrongful birth claims fall within the ambit of the Aquilian action[83] and allowed the mothers claim for the cost of raising and maintaining her disabled daughter, as well as future medical and hospital treatment and other special expenses.[84]

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78 LAWSA VIII (1) par 36-37.
79 LAWSA VIII (1) par 36.
80 Boezaart 2015 *Stell LR* 413.
81 LAWSA VIII (1) par 36 and 39.
82 Strauss "Voluntary Sterilisation for Convenience: The Case of the Unwanted Child" 1990 3 *Consultus* 93 96.
83 *Friedman v Glicksman supra* 1140.
84 *Friedman v Glicksman supra* 1143; Van Niekerk 2012 *Stell LR* 531-532.

One of the main arguments against wrongful life claims is that the child has not suffered an identifiable harm and that it is impossible to calculate damages as the child was never not going to be born disabled. But as Chürr points out, the counter-argument to this is that it is the medical practitioner's negligence that leads to the birth of the child, and were it not for this negligence the child would not have been born and consequently would not have suffered the financial loss or pain and suffering which he or she now suffers. She further notes that wrongful birth claims also draw a comparison between non-existence and existence in a handicapped state and yet in those cases the courts are happy and able to calculate damages.[85] Furthermore, the Constitutional Court has confirmed that the loss for which compensation is sought refers to a life with disabilities and the costs incurred by reason of the disabilities,[86] and in the absence of a wrongful birth claim by the parents, the loss lies with the child.[87] The medical practitioner in these circumstances will be liable to the child only to the extent that they would have been liable to the parents.[88]

Shiffrin holds that wrongful life claims have some "theoretical advantages" over wrongful birth or wrongful pregnancy claims. For instance, the two latter claims are brought by the parents of the child and enable them to recover compensation for expenses incurred and to be incurred until they are no longer responsible for the child. On the other hand, a wrongful life claim could enable the child to receive compensation for the estimated expenses they will incur over their lifetime[89] if the parents do not bring a wrongful birth claim, but if they do, the child can only claim compensation "following the period where his parents are no longer obliged to maintain him by law".[90] Another distinction between the claims which could render a wrongful life claim more advantageous relates to the running of prescription.[91]

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85 Chürr "Wrongful Life Claims Under South African Law: An Overview of the Legal Framework" 2015 36 *Obiter* 745 753-754.
86 *H v Fetal Assessment Centre supra* 144-146.
87 *H v Fetal Assessment Centre supra* 147.
88 *Ibid.*
89 Shiffrin "Wrongful Life, Procreative Responsibility, and the Significance of Harm" 1999 5 *Legal Theory* 117 117 at fn 3.
90 Van Niekerk 2012 *Stell LR* 529.
91 *Ibid*.

In a situation giving rise to a wrongful birth claim, the parents of the child have three years in which to institute action against the medical practitioner for the recovery of damages.[92] Generally, prescription will start running when the debt becomes due[93] which in these cases is when all the delictual elements are present. However, in wrongful life claims the claim is brought by the child. Regarding minors, prescription will only be completed one year after the child attains majority,[94] thus giving minors an advantage in the form of an extended time frame within which they can institute action against the medical practitioner.

### 3 4 Possible application of the *nasciturus* fiction

In *Pinchin NO v Santam Insurance Co Ltd*[95] it was held that a child has an action for damages resulting from pre-natal injuries caused by the negligence of a motorist. The Court based this decision on the fact that our law inherited from Roman law the rule that an unborn child *in ventre matris* is considered to have all the rights of a living child if it will be to its advantage and if it is subsequently born alive.[96] This rule is known as the *nasciturus* fiction, or the *nasciturus* rule, and in effect it postpones the vesting of rights until the child is born alive. Prior to *Pinchin*, the rule had only been applied in situations regarding succession and status, and it was the first time it's application had been extended to the law of delict.[97]

Many criticised the application of the *nasciturus* fiction in *Pinchin*. Forty-two years later the court in *Road Accident Fund v Mtati*[98] was faced with the task of deciding whether,

92 S11(d) of the Prescription Act 68 of 1969.
93 S12(1) of Act 68 of 1969.
94 S13(1)(a) and (i) of Act 68 of 1969.
95 1963 (2) SA 254 (W).
96 *Pinchin v Santam supra* 260.
97 *Pinchin v Santam supra* 255.
98 2005 (6) SA 215 (SCA).

in an action brought for pre-natal injuries, a plaintiff must rely on the *nasciturus* fiction or whether they can rather rely on the ordinary principles of the law of delict.[99]

The court decided the matter on the basis of the general principles of delict and Mukheibir submits that this approach was correct.[100] As she points out, any wrongful and culpable harm-causing conduct should, in theory at least, be able to be covered by the law of delict.[101] The fact that there is a separation between the conduct and the harm is irrelevant, because as soon as the child is born all the delictual elements are present and the ordinary principles of delict can be relied upon – there is no need to use the *nasciturus* fiction.[102]

The court in *Mtati*, when explaining the decision to rely on the principles of delict rather than the *nasciturus* fiction, agreed with a submission by Lind.[103] Lind writes that because the *nasciturus* fiction only applies to a foetus *in ventre matris*, it is of no use in cases where a child suffers harm (in the form of a disability) as a result of harm inflicted upon either one of its parents prior to its conception. The child in this situation will have "no rights of its own against the wrongdoer".[104]

Therefore, it is submitted that in relation to wrongful life claims, the *nasciturus* fiction is not applicable, but, as Mukheibir submits, a child bringing such a claim has still suffered harm and so should be entitled to a remedy.[105]

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99 *RAF v Mtati supra* 224-225.
100 Mukheibir "The *Nasciturus* Fiction and Delictual Claims: *RAF v M obo M* [2005] 3 All SA 340 (SCA)" 2006 27 *Obiter* 188 194.
101 Mukheibir 2006 *Obiter* 193.
102 Mukheibir 2006 *Obiter* 194.
103 *RAF v Mtati supra* 226.
104 Lind "Wrongful-birth and Wrongful-life Actions" 1992 109 *South African Law Journal* 428 443.
105 Mukheibir 2006 *Obiter* 194.

## 3 5 Conclusion

While a complete survey of the South African law of delict falls outside the scope of this research the foregoing chapter briefly explains each of the delictual elements required in order for a delictual action to exist.

With regard to both wrongful birth and wrongful life claims, the failure to warn the parents of a higher than normal risk of a congenitally disabled child, or to diagnose, or correctly diagnose, the disability or to inform, or correctly inform, the parents of the diagnosis constitutes the conduct required for a delictual action. A successful delictual action also requires fault in the form of either intention or negligence on the part of the medical practitioner, but in reality fault in medical malpractice cases mostly takes the form of negligence. In order to determine whether the medical practitioner concerned has been negligent, the courts use the standard of the hypothetical reasonable practitioner practicing in the same field of medicine as the defendant, and will ask whether the actions of the defendant can be reconciled with how the hypothetical reasonable practitioner would have acted in the same situation.

Wrongfulness, causation and harm, including the assessment of damages, all pose particular problems in the determination of whether a wrongful life claim can be recognised in South Africa despite the fact that in wrongful birth claims they have all been found to be present. Wrongfulness requires the breach of a legal duty, a right or a valid interest, considered in light of society's *boni mores* as informed by constitutional norms and values. Our courts have consistently denied the existence of a legal duty on the medical practitioner towards the foetus to inform the parents of the risk of disability and the option to terminate the pregnancy. However, a medical practitioner does owe such a duty towards the parents so that they may decide whether to avoid the loss occasioned by the birth of a disabled child. In light of this duty, the Constitutional Court has held that in a situation where the parents are unable to claim for the loss caused by the breach of the duty owed to them, the loss will fall to the child. Considering the child's best interests, it could be found that the loss should not fall to them but rather the medical practitioner, in which case there may be a legal duty

to not cause the loss. The issues in determining wrongfulness in wrongful life claims are discussed further in chapter 5.

Determining causation involves an inquiry into factual causation and legal causation. While it is obvious that the medical practitioner did not cause the disability, their actions did cause the life with disability and factual causation may be established. Whether there is legal causation depends on constitutionally informed public policy considerations and will have to be determined in the factual context of each case.

For a delictual action to lie, the plaintiff must have suffered some sort of harm, either pecuniary or non-pecuniary. A situation which gives rise to a wrongful life claim will also give rise to a wrongful birth claim and, as mentioned earlier, the Constitutional Court has held that in cases where the parents have for some or other reason not brought an action for wrongful birth to recover their loss, that loss will ultimately lie with the child and that a medical practitioner will only be liable to the child in a wrongful life claim for that which they would have been liable to the parents in a wrongful birth claim. Whereas the courts have previously found that the child has not suffered actionable loss and that there is no way of assessing the damages in wrongful life claims, it is submitted that the judgment of the Constitutional Court in *H v Fetal Assessment Centre* can be seen to show that there is indeed harm caused to the child and that, at the least, the damages for which the medical practitioner could be held liable are the same as those he or she would have been liable to the parents for.

Lastly, as far as the *nasciturus* fiction is concerned it is apparent that there is no need to rely on it in either wrongful birth or wrongful life claims, and its application may have more of a limiting effect than anything else.

# CHAPTER 4: SOUTH AFRICAN CASE LAW AND THE POSITION IN AUSTRALIA, ENGLAND AND THE NETHERLANDS

## 4 1 Introduction

In this chapter, South African case law involving wrongful conception or pregnancy, wrongful birth, and wrongful life claims will be discussed in order to ascertain the current judicial attitude towards the claims. The opinions of our courts on the various considerations taken into account in determining whether to recognise wrongful life claims have, to some extent, already been discussed in the preceding chapters and so the aim of this chapter is to touch on the main points espoused by each judgment considered. In addition, the legal position in Australia, England and the Netherlands will be considered briefly.

## 4 2 *Administrator, Natal v Edouard*

In 1982 the respondent's wife, assisted by the respondent, entered into a contract with a provincial hospital in terms of which the attending medical practitioner was to perform a tubal ligation on the respondent's wife, rendering her sterile. The respondent's wife was pregnant at the time and it was agreed that the tubal ligation was to be performed during the course of her caesarean section. The respondent and his wife concluded the contract because they could not afford to support and maintain any more children as they already had three, and this reasoning was known to the hospital.[106]

However, the sterilisation was not performed, constituting a breach of the contract between the respondent's wife and the hospital. A year later the respondent's wife gave birth to another child, their fourth, and the respondent instituted an action for damages based on the breach of contract. He claimed damages for the cost of maintaining the child until she turned 18 years old and for the discomfort, pain and

[106] *Administrator, Natal v Edouard supra* 584-585.

suffering and loss of amenities of life experienced by his wife as a result of the pregnancy and birth of the child.[107]

With regard to wrongful conception claims based on a breach of contract, it does not matter whether the breach consists of a complete failure to perform the sterilisation or whether the sterilisation was not performed correctly and was therefore ineffective.[108]

Van Heerden JA stated that neither the terms 'wrongful birth', 'wrongful conception' nor 'wrongful pregnancy' are appropriate names for the claim being brought and chose rather to refer to claims for the expense of raising a child as a "pregnancy claim".[109]

The court noted that it was not the unplanned birth of the child that constitutes the 'wrong', but rather the breach of contract which subsequently led to the birth of the child and the resultant financial burden.[110] The appellant submitted that public policy does not allow for a wrongful conception claim because to saddle the appellant with the obligation of maintaining the child interferes with the "sanctity accorded by law to the relationship between parent and child".[111] Van Heerden JA rejected this argument and stated that on the contrary, allowing the claim enabled the parents of the child to fulfil their obligation to support and maintain the child.[112]

The court allowed the part of the claim that sought to recover the actual cost of supporting and maintaining the child but, just as the court *a quo* had done, refused to extend the scope of contractual liability to include damages for pain and suffering.[113]

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107 *Ibid*.
108 *Administrator, Natal v Edouard supra* 585.
109 *Administrator, Natal v Edouard supra* 585-586.
110 *Administrator, Natal v Edouard supra* 590.
111 *Administrator, Natal v Edouard supra* 592.
112 *Ibid*.
113 *Administrator, Natal v Edouard supra* 596.

### 4 3 *Mukheiber v Raath*

The respondents, a husband and wife, instituted action against the appellant based on an alleged negligent misrepresentation, a delict.[114] The respondents alleged that the appellant had negligently misrepresented that he had performed a sterilisation on the wife when in fact this was not the case. As a result of the misrepresentation, the respondents stopped taking contraceptive measures which led to the birth of another child. Therefore, they sought to claim compensation from the appellant for pure economic loss.

The court considered the decision in *Edouard* and stated that with regard to wrongfulness, whether the claim is based in delict or a breach of contract is irrelevant. Even in the absence of a contract, a medical practitioner owes his patient a legal duty of care.[115]

The court saw no reason to limit liability for wrongful conception to only those instances where the request for sterilisation was made for socio-economic reasons, as had been done in *Edouard*.[116] It was found that holding the medical practitioner liable for the damages claimed in these circumstances is not contrary to public policy[117] and the appeal was accordingly dismissed.

### 4 4 *Friedman v Glicksman*

The case involved both a wrongful birth and a wrongful life claim.[118] Chürr holds the opinion that the existence of wrongful birth claims is based on two realities: medical and legal realities. She explains that the medical realities pertain to the availability of modern medical technology which enable medical practitioner's to pick up and

[114] *Mukheiber v Raath supra* 1068.
[115] *Mukheiber v Raath supra* 1080.
[116] *Administrator, Natal v Edouard supra* 593; *Mukheiber v Raath supra* 1081.
[117] *Mukheiber v Raath supra* 1082.
[118] *Friedman v Glicksman supra* 1138.

diagnose any abnormalities in the foetus. On the other hand, the legal reality is that for a wrongful birth claim to exist, one must be able to lawfully terminate their pregnancy.[119]

Section 12(2)(a) of the Constitution endows everyone with the right to make decisions in respect of reproduction, s27(1)(a) of the Constitution grants everyone the right to have access to reproductive health care, and the Choice on Termination of Pregnancy Act[120] states in s2(1) that during the first 12 weeks of a pregnancy, a pregnancy can be terminated simply upon the request of a woman. After the first 12 weeks, the termination of a pregnancy becomes more complicated and carries more risk. Nevertheless, s2(1) allows a termination up to and including the 20th week if there is a "substantial risk" that the foetus may have a severe physical or mental disability. Even after the 20th week a termination is permissible if continuing with the pregnancy would result in the foetus being severely malformed.[121] Chürr explains that in light of these provisions it is clear that wrongful birth claims are possible where parents of a child born with congenital abnormalities were not given the opportunity to exercise their reproductive rights because of the negligent failure of the medical practitioner in identifying or diagnosing an abnormality in the foetus, or in informing the parents of the diagnosis.[122]

The court stated that there are times when it is in the interest of the parents and family, and perhaps even society in general, to terminate a pregnancy when the foetus will develop into what Goldblatt J called a "seriously defective person" and who will subsequently cause financial and emotional problems for those responsible for their care. This reality, as the court noted, is recognised not only by the Legislature but by most reasonable people as well.[123] This recognition by the Legislature refers to s3(1)(c) of the Abortion and Sterilisation Act[124] which provided as follows:

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119 Chürr 2015 *Obiter* 745.
120 92 of 1996.
121 S2(1)(a); s2(1)(b)(ii); and s(2)(1)(c)(ii) of Act 92 of 1996.
122 Chürr 2015 *Obiter* 745.
123 *Friedman v Glicksman supra* 1138.
124 2 of 1975.

> "(1) Abortion may be procured by a medical practitioner only, and then only –
>
> …
>
> (c) where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will be irreparably seriously handicapped, and two other medical practitioners have certified in writing that, in their opinion, there exists, on scientific grounds, such a risk…"

This Act has since been repealed and replaced by the Choice on Termination of Pregnancy Act, which gives the same recognition as its predecessor.

A wrongful birth claim is based on the fact that if it was not for the medical practitioner's negligence, the mother would have terminated the pregnancy and as such the medical practitioner is responsible and is considered to have caused the 'defective' child to be born.[125] The element of fault required in delictual actions is fulfilled in these cases by the foreseeability of harm from the perspective of the medical practitioner, which arises from the special nature of the relationship between doctor and patient.[126]

The court allowed the mothers claim based on wrongful birth but it rejected the claim on behalf of the child for wrongful life. Goldblatt J believed that allowing the claim would be *contra bonos mores* and against public policy because it called on the courts to hold that non-existence is preferable to life in a disabled state. This would also mean that the measure of damages would be the difference between existence in a disabled state and non-existence, which he held to be contrary to what is allowed for in delict. The plaintiff submitted that the calculation of damages awarded for wrongful life claims does not require a comparison between existence and non-existence. Instead, what should be measured is the "amount necessary to compensate the child for having to live in a disable state".[127] This submission was however not accepted.

[125] *Friedman v Glicksman supra* 1139.
[126] *Friedman v Glicksman supra* 1140.
[127] *Friedman v Glicksman supra* 1141.

Goldblatt J further rejected the claim on the basis that it would open the door for disabled children to sue their parents for not having terminated the pregnancy whilst knowing that the child would be born disabled in some way. Additionally, the court held that in such cases the medical practitioner would be held liable for a child's disabilities which he did not cause and is not responsible for.[128]

### 4 5 *Stewart v Botha*

The case involved a wrongful birth claim as well as a wrongful life claim. The Stewarts, had a son who was born with severe congenital defects and they subsequently instituted action against the medical practitioners who attended to Mrs Stewart while she was pregnant. Mrs Stewart brought a wrongful birth claim to recover damages flowing from the birth of her son including the cost of maintenance, special schooling and past and future medical expenses. Mr Stewart brought a wrongful life claim on his son's behalf in the alternative to his wife's claim and claimed damages under the same heads.[129] The case was heard in the Cape High Court and then went on appeal to the Supreme Court of Appeal, with both courts allowing Mrs Stewart's claim and both upholding the exception to the wrongful life claim.

#### 4 5 1 In the court *a quo*

In deciding the matter, the court *a quo* reviewed the three reasons given by the Court in *Friedman v Glicksman* for dismissing a wrongful life claim.

Firstly, the court addressed the so-called 'sanctity-of-life' argument which holds that it is against public policy for a court to find non-existence preferable to existence in an impaired state. Louw J noted that this argument has been eroded in South Africa due to, *inter alia*, the Choice on Termination of Pregnancy Act. He also held that there was

[128] *Friedman v Glicksman supra* 1143.
[129] Mukheibir 2008 *Obiter* 516.

no valid reason why in wrongful life claims the sanctity-of-life argument should be an "insurmountable obstacle to the claim" while the same argument does not impede wrongful conception and wrongful birth claims, which involve similar issues of public policy.[130]

The court then proceeded to deal with the argument that allowing a wrongful life claim would open the door for disabled children to sue their parents for not having terminated their pregnancy whilst knowing that the child was going to be born disabled, or that there was a high risk of the child being born so. The court rejected this argument on the basis that the decision not to terminate a pregnancy is the constitutional right of the parents to make their own decisions regarding reproduction[131] and that it is accordingly a completely separate matter from whether the child has a claim against the medical practitioner(s) concerned.[132]

The third and final basis of the decision in *Friedman* was then considered, namely that the measure of damage requires a comparison between existence in a disabled state and non-existence.[133] The court stated that in cases of wrongful life claims the difficulty does not lie in calculating damage, but instead the question is whether or not the child has in fact suffered any damage.[134]

The court's answer to this question was that "the only life ever possible to [the child] was a life in the handicapped state to which [the child] was born", and that but for the negligence of the medical practitioner the child would either have not been born at all or would have been born in the same disabled state they find themself in now. As such, it was found that the Stewart's Particulars of Claim did not disclose a cause of action and the exception was upheld[135]

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130 *Stewart v Botha* 2007 257.
131 This right is contained in s12(2)(a) of the Constitution.
132 *Stewart v Botha* 2007 259.
133 *Ibid*.
134 *Stewart v Botha supra* 2007 261.
135 *Stewart v Botha supra* 2007 262.

### 4 5 2 On appeal

As previously mentioned, the matter then went on appeal to the Supreme Court of Appeal. The court reaffirmed what had been decided by the court *a quo* and highlighted once again that in wrongful life cases a court is called upon to decide whether non-existence is preferable to existence in a disabled state, and to decide whether the child in question should have ever been born at all.

Snyders AJA dismissed the appeal stating that deciding whether a child should have been born at all is "a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law.[136]

### 4 6 *H v Fetal Assessment Centre*

This is most recent case involving a wrongful life claim before our courts. The applicant in this case had gone to the respondent while she was pregnant in order to ascertain the risk of the child being born with certain congenital defects. The applicant alleged that the respondent did not interpret the scan properly and so failed to warn her of the high risk that the child will be born with Down Syndrome, which the child was in fact born with. The applicant had stated that had she known about the risk she would have terminated the pregnancy.[137]

The respondent excepted to the claim as bad in law since it did not disclose a cause of action that is recognised in South African law. As such, the applicant sought for the common law to be developed to recognise a wrongful life claim.[138]

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136 *Stewart v Botha supra* 2008 319.
137 *H v Fetal Assessment Centre supra* Editor's Summary 128.
138 *H v Fetal Assessment Centre supra* 127-128.

The Constitutional Court agreed that the term 'wrongful life' is unsuitable. According to the court, the legal issue in these cases is whether a child should be entitled to claim compensation for a life with disabilities, and the use of the term 'wrongful life' avoids dealing with this issue.[139]

The court went on to explain that using the term 'wrongful life' avoids the actual legal issue by presenting it as a paradox that cannot be answered in law and as such it hides a value choice that judges need to make.

In the unanimous decision, Froneman J acknowledged that the Supreme Court of Appeal in *Stewart v Botha* did not properly consider the normative structure of the Constitution when considering the possible validity of the claim.[140] The court stated that when deciding whether to develop the common law so as to recognise a wrongful life claim, the rights to equality, dignity and the child's right to have their best interests considered of paramount importance in all matters concerning them, along with other constitutional rights, must be carefully considered.[141]

The Constitutional Court acknowledged that a claim for wrongful life may exist in our law, but left the determination thereof to the High Court.[142]

Chürr submits that the Constitutional Court's acknowledgment in *H v Fetal Assessment Centre* of the fact that the child in a wrongful life claim suffers financial loss, and so fulfils the delictual requirement of harm, indicates a probability that a wrongful life claim could be recognised when taking into consideration the best interests of the child.[143]

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139 *H v Fetal Assessment Centre supra* 134.
140 *H v Fetal Assessment Centre supra* 135.
141 *H v Fetal Assessment Centre supra* 141-142.
142 *H v Fetal Assessment Centre supra* 150.
143 Chürr 2015 *Obiter* 751; *H v Fetal Assessment Centre supra 145*.

## 4 7 The position in certain foreign jurisdictions

### 4 7 1 Australia

Wrongful birth claims have received recognition in Australia where the High Court held that both the costs relating to the pregnancy as well as the costs of raising and maintaining the child are recoverable.[144] However, since this decision, legislation has been passed in some states barring the recovery of the costs incurred in raising and maintaining the child.[145]

Whether or not to allow wrongful life was decided by the High Court of Australia in *Harriton v Stephens*[146] and *Waller v James; Waller v Hoolahan*.[147] The cases were appeals from the decision of the New South Wales Court of Appeal and were heard consecutively, with the principle judgment dismissing the appeals given by Crennan J[148] . The reasons for dismissing the appeals as laid out in the *Harriton* judgment were also applicable in *Waller.* However, it was not a unanimous decision and Kirby J provided what has been described as an "eloquent" and "convincing"[149] dissenting judgment in which he held that the appeal should be allowed.[150]

The court dismissed the appeals for a number of reasons including the inability of the appellants to prove that they have suffered damage[151] and the impossibility of assessing damages.[152] Furthermore, the court reasoned that allowing the claim will

144 Stretton "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" 2005 10 *Deakin Law Review* 319 322-323; *Cattanach v Melchior* (2003) 199 ALR 131 181.
145 Giesen "Of Wrongful Birth, Wrongful Life, Comparative Law and the Politics of Tort Law Systems" 2009 72 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 257 262; see for example also Part 11 of New South Wales' Civil Liability Act 2002 no 22.
146 [2006] HCA 15.
147 [2006] HCA 16.
148 Queensland Parliamentary Library "'Wrongful Life': The High Court Decisions in *Harriton v Stephens* and *Waller v James; Waller v Hoolahan*" (February 2007) http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2007/RBR200705.pdf (accessed on 26-07-2016) 13.
149 Giesen 2009 *THRHR* 264 fn 43.
150 *Harriton v Stephens supra* par 156.
151 *Harriton v Stephens supra* par 253.
152 *Harriton v Stephens supra* par 276.

require the imposition of a duty of care towards the foetus which may be in conflict with the duty of care already owed by a medical practitioner towards the mother.[153]

Naturally, the court also took into account certain policy considerations. Crennan J felt that wrongful life claims devalue the lives of disabled people because they imply that their lives are not worth living due to their disability[154] and that the claims are incompatible with other areas of the law.[155]

### 4 7 2 England

In England, wrongful birth claims are recognised,[156] although there have been varied decisions on what damages are recoverable.[157] Wrongful life claims, on the other hand, have been rejected by the judiciary and have also been prohibited in terms of legislation by way of the Congenital Disabilities (Civil Liability) Act 1976.[158] The Act states:

> "(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.
>
> (2) An occurrence to which this section applies is one which—
>
> (a) affected either parent of the child in his or her ability to have a normal, healthy child; or
>
> (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present."

153 *Harriton v Stephens supra* par 248-250.
154 *Harriton v Stephens supra* par 258-260.
155 *Harriton v Stephens supra* par 262-263.
156 Stretton 2005 *Deakin LR* 322-323.
157 See further Mason 2002 *Edinburgh LR* 46; Stretton 2005 *Deakin LR* 322-323.
158 Available at https://www.health-ni.gov.uk/articles/congenital-disabilities-civil-liability-act-1976.

The Act effectively prohibits a child born after 22 July 1976[159] from having a right of action for wrongful life against a medical practitioner or health authority.

In *McKay v Essex Area Health Authority*[160] the Court of Appeal was, for the first time, faced with a wrongful life claim. While the claim was brought after the promulgation of the Congenital Disabilities (Civil Liability) Act, the child was born in 1975 and was therefore not excluded from bringing the claim in terms of the Act.

The court came to the unanimous decision that a wrongful life claim does not disclose a cause of action.[161] The Lords Justices based this decision on the finding that to hold the medical practitioner and the health authority liable would require a duty towards a congenitally disabled foetus to terminate the pregnancy, and there is no such duty in English law.[162] To find that this duty does exist would lead to the conclusion that the life of a disabled person has such little worth that it is not worth preserving.[163]

Furthermore, the court reasoned that to allow the claim would open medical practitioners up to liability towards children born with a "trivial abnormality" and would also open mothers up to liability towards their child for not having terminated the pregnancy.[164] Additionally, the court felt that assessing damages in wrongful life claims is impossible because it requires a comparison between the value of existence in a disabled state with the value of non-existence.[165]

159 The date on which the Act received royal assent.
160 [1982] 2 All ER 771.
161 *McKay v Essex Area Health Authority supra* 774.
162 *McKay v Essex Area Health Authority supra* 781 per Stephenson LJ; 787 per Ackner LJ; and 790 per Griffiths LJ.
163 *McKay v Essex Area Health Authority supra* 781.
164 *Ibid*.
165 *McKay v Essex Area Health Authority supra* 781-782 per Stephenson LJ; 787 per Ackner LJ; and 790 per Griffiths LJ.

### 4 7 3 The Netherlands

In the Netherlands, both wrongful birth and wrongful life claims are recognised. This was confirmed by the Dutch *Hoge Raad* in the well-known *Kelly* case.[166]

With regard to wrongful birth claims, the *Hoge Raad* held, *inter alia*, that an omission on the part of a medical practitioner which denies a woman the right to decide to terminate a pregnancy when the child will be born with a severe disability is an infringement of her right to self-determination. The court allowed the claim for patrimonial and non-patrimonial damages.[167]

In allowing the claim for wrongful life, the court rejected the argument that allowing the claim will open the door to a disabled child having a claim against its mother for not terminating the pregnancy. The decision whether to terminate a pregnancy or not is an exercise of a woman's right to self-determination and its exercise does not violate a legal duty owed by her towards the child.[168] Mukheibir explains that the court found it was unnecessary to compare existence with disabilities to non-existence when it comes to determining damages.[169] Instead, the court relied on article 6:97 of the Dutch Civil Code[170] which states that:

> "The court estimates the extent of the damage in the way which is most consistent with the nature of the damage caused. Where the extent of the damage cannot be assessed exactly, it shall be estimated."

The court rejected the argument that there is not a sufficient causal link between the negligence of the medical practitioner and the harm suffered by the child.[171] While the medical practitioner did not cause the disability, their negligence caused the parents

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166 *Leids Universitair Medisch Centrum v Molenaar* C03/206HR JMH/RM (hereinafter referred to as the *Kelly case*) available at http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2005:AR5213.
167 The *Kelly case* par 33-41.
168 The *Kelly case* par 47.
169 Mukheibir "Wrongful Life Claims in the Netherlands – The *Hoge Raad* Decides: C03/206 HR JHM/RM" 2005 26 *Obiter* 753 756; The *Kelly case* par 50-53.
170 Available at http://www.dutchcivillaw.com/civilcodebook066.htm (accessed 30-09-2016).
171 The *Kelly case* par 49.

to not terminate the pregnancy, and this "indirectly contributed to [Kelly's] damage" and this was enough to satisfy the causal connection required by Article 6:98 of the Dutch Civil Code.[172]

## 4 8 Conclusion

The case law reveals that the claims for wrongful conception or pregnancy and wrongful birth are still very new additions to our law.

What is also evident is that wrongful conception or pregnancy and wrongful birth claims are recognised by our courts as falling within the scope of delictual liability and neither claim is considered *contra boni mores*. Wrongful life claims, on the other hand, have consistently been rejected, with the exception of the ruling in *H v Fetal Assessment Centre* where the Constitutional Court left the question of whether the claim is a valid cause of action open.

The legal position in Australia, England and the Netherlands were briefly considered. It is apparent that all three jurisdictions recognise claims for wrongful conception or pregnancy and wrongful birth, although in Australia wrongful birth claims have been barred by legislation in some states. In both Australia and England, wrongful life claims have been rejected by the courts and in England, legislation has been enacted which prohibits an action based on wrongful life. The Netherlands, however, found ways around the problems posed by wrongful life claims and there such claims are recognised.

[172] Mukheibir 2005 *Obiter* 756; Article 6:98 states: "Only damage that is connected in such a way to the event that made the debtor liable, that it, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation".

# CHAPTER 5: ARGUMENTS FOR AND AGAINST WRONGFUL LIFE CLAIMS

## 5 1 Introduction

In this chapter, the most prominent arguments for and against the recognition of wrongful life claims will be assessed, with reference to relevant constitutional and legislative provisions as well as the *boni mores* of South African society and certain philosophical schools of thought.

The chapter will begin with a consideration of the best interest of the child and will then move onto certain policy considerations which have consistently been used to deny the recognition of a claim for wrongful life. Following this, but still connected to policy considerations, will be a discussion on dignity and equality.

## 5 2 The best interests of the child

The Constitution provides that in all matters concerning a child, that child's best interests are of paramount importance.[173] The Children's Act[174] both reiterates[175] and gives substance to this provision by providing factors to be considered whenever the best interests of the child standard is to be applied. Among the factors to be considered are the ability of the parents or care-giver to provide for the child's needs, including their emotional and intellectual needs, as well as any disability or chronic illness the child may have. [176]

[173] S28(2) of the Constitution.
[174] 38 of 2005.
[175] S9 of Act 38 of 2005 states as follows: "In 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."
[176] S7(1)(c); s7(1)(i); and s7(1)(j) of Act 38 of 2005 respectively.

Section 6(2) of the Children's Act states:

> "(2) All proceedings, actions or decisions in a matter concerning a child must-
>
> (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
>
> (b) respect the child's inherent dignity;
>
> (c) treat the child fairly and equitably;
>
> (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
>
> (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
>
> (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has."

The Act also makes provision for matters specifically concerning children with disabilities or chronic illnesses. Of particular relevance are the sections that provide that in matters concerning a child with a disability or chronic illness due consideration must be given to providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.[177]

Van Niekerk submits that it is logical to deny a wrongful life claim in circumstances where the parents of the disabled child have successfully instituted action on the basis of a wrongful birth claim and have received compensation. However, what happens if the parents have died without instituting action, or where their claim has prescribed? In these circumstances, she is of the opinion that should the child bring a claim for wrongful life the courts may have to find a way to recognise the claim.[178]

The importance of s39(2)[179] of the Constitution was highlighted by the court in *H v Fetal Assessment Centre*[180] but despite the duty contained in the section the courts

[177] S11(1)(c) and s11(2)(b) of Act 38 of 2005 respectively.
[178] Van Niekerk 2012 *Stell LR* 538.
[179] S39(2) of the Constitution charges courts with the duty of promoting the spirit, purport and objects of the Bill of Rights when, *inter alia*, developing the common law.
[180] Chürr 2015 *Obiter* 749.

are reluctant to bring new situations with the ambit of delictual liability.[181] The court in *H v Fetal Assessment Centre* emphasised that the decision whether to recognised a wrongful life claim must be guided by the normative framework of the Constitution, the Bill of Rights and the "particular prominence given to the best interests of children within that framework".[182]

Furthermore, a general trend in judgments relating to wrongful life claims was noticed. Froneman J observed that those judgments which reject the recognition of the claim do not place much emphasis on the interests of children, while the judgments which do recognise the claim as one valid in law generally tend to place the greatest emphasis on children's rights.[183]

As discussed earlier, if the parents of the child do not bring a claim for wrongful birth, the loss falls to the child and it may well be that this situation could be considered untenable, having due consideration to the best interests of the child. In such a case, Froneman J has stated that it is quite possible that a medical practitioner could be found to be liable to the child to the same extent that they would have been liable to the parents of the child.[184]

It is submitted that if the best interests of the child in a wrongful life claim are truly considered, it becomes apparent that there is a need to recognise the claim, or to find another suitable remedy, especially in those cases where the parents can no longer bring a wrongful birth claim. A severely disabled child has very specific needs and require specialised care and education, and the fulfilment of their needs most often comes at a substantial expense.

[181] LAWSA VIII (1) par 60.
[182] *H v Fetal Assessment Centre supra* 139-140.
[183] *H v Fetal Assessment Centre supra* 140.
[184] *H v Fetal Assessment Centre supra* 145.

## 5 3 Policy considerations

### 5 3 1 Life – benefit or harm?

The sanctity-of-life argument holds that life can never be a harm and as such there cannot be a legal duty towards a foetus to facilitate their termination. The argument is based on the belief that life, regardless of disability, is always more valuable than non-existence, and that anything suggesting otherwise is against public policy. However, it is argued that this approach is too inflexible and that there are situations where non-life can be preferable to life.[185] Human and Mills argue that in light of the fact that it is now recognised that in wrongful birth cases the medical practitioner owed the parents of the disabled child a legal duty and a breach thereof leads to liability, coupled with the development of medical technology, it is now time for the recognition of a legal duty in wrongful life claims.[186]

The argument has also been eroded by a number of developments in our law,[187] including the promulgation of the Choice on Termination of Pregnancy Act, the permissibility of withdrawing life-sustaining treatment from those in a permanently vegetative state,[188] the recognition of wrongful conception or pregnancy claims as well as the recognition of wrongful birth claims. In wrongful birth claims, the sanctity-of-life argument is given little consideration while in wrongful life cases it is regarded as being "of cardinal importance", and this distinction is unreasonable and unjustifiable.[189]

The most recent decision which goes a long way in eroding the sanctity-of-life argument is judgment in *Stransham-Ford v Minister of Justice and Correctional Services*[190] where the court allowed an application for physician-assisted suicide. The court reiterated that the "sacredness of the quality of life" should be focussed on more

185 Chürr 2015 *Obiter* 754.
186 Human and Mills 2010 *Stell LR* 83.
187 *Stewart v Botha* 2007 *supra* 225.
188 *Clarke v Hurst NO* 1992 (4) SA 630 (D).
189 Chürr 2015 *Obiter* 754-755; Human and Mills 2010 *Stell LR* 85.
190 2015 (4) SA 50 (GP).

so than the "sacredness of life *per se*" and emphasised that public opinion and values should be informed by constitutional norms and not by "sectional, moral or religious convictions".[191] Lind observes that the "philosophical obstacle" presented by wrongful life claims, and indeed by the use of the term 'wrongful life', is that non-existence appears to be favoured over life with a disability. However, as he submits, the jurisprudence regarding euthanasia and the 'right to die' is based on the same value judgment.[192]

## I Life as harm and moral philosophy

Manulula argues that:

> "Once children have been given a life which does not meet the minimum expectations of an acceptable life on earth, it is reasonable to assume that the deprivation they suffer will result in their suffering some injury."[193]

Manulula argues this is in the context of parents who have a child regardless of the life it is being born into, and in doing so the parents cause the child to suffer harm. However, in wrongful life cases the parents allege that had they known of the risk of disability, they would have terminated the pregnancy, thus avoiding the harm suffered by the child. In these cases, the medical practitioner's negligence deprives them of the chance to make an informed decision to terminate.

Shiffrin asks her readers to consider a child born with a severe, debilitating and painful congenital condition. Despite the condition, the child's life is worth living and overall their life is a benefit to them. Shiffrin then goes on to ask whether this child should be excluded from seeking redress for the pain and suffering, and the financial cost that follows it, that form part and parcel of the overall benefit of the child's life.[194] For Shiffrin, morally there is a big difference between causing harm to a person in order to

191 *Stransham-Ford v Minister of Justice and Correctional Services supra* 61.
192 Lind 1992 *SAJL* 444.
193 Munalula "Rethinking the Right to Procreate: An African Imperative" 2012 13 *Theoretical Inquiries in Law* 303 312.
194 Shiffrin 1999 *Legal Theory* 120.

save that person from and even greater harm and causing harm to a person in order to "bestow pure benefits",[195] a pure benefit being only a good and not also the removal or prevention of harm.[196] She if of the opinion that the causing of harm in the former instance is permissible and in certain situations could even be obligatory, while the causing of harm in the latter instance seems wrong and will be much harder to justify.[197]

While there are situations where being created can be a benefit to the person created, there are also situations where being created can be a harm, and because, as far as we know and can prove, before conception human beings do not exist in another form, Shiffrin is of the opinion that not being born cannot be seen as a harm to a non-existent child.[198]

Metz discusses the anti-natalist views of moral philosopher David Benetar. Anti-natalism can be described as an anti-utilitarian value theory and is, in Metz's words, "the view that procreation is invariably wrong to some degree and is often all things considered impermissible.[199]

David Benetar is currently the most influential anti-natalist writer. He bases his views on two arguments – an 'extreme' rationale and a 'moderate' rationale. According to the former rationale, procreation is a wrong committed against the person created if and because it is expected that they will suffer pain, even if it is merely the slightest of pain. This argument postulates that the amount of good that the created person will experience is irrelevant, the smallest amount of pain even if experienced only once, will outweigh all the possible good. According to the 'moderate' argument, the expected amount of pain a person will suffer will always be more than the expected

195 Shiffrin 1999 *Legal Theory* 126.
196 Shiffrin 1999 *Legal Theory* 124.
197 Shiffrin 1999 *Legal Theory* 127.
198 Shiffrin 1999 *Legal Theory* 119-120.
199 Metz "Contemporary Anti-Natalism, Featuring Benetar's *Better Never to Have Been*" 2012 31 *South African Journal of Philosophy* 1 1.

amount good they will experience. There is, according to this rationale, simply not enough good compared to bad to justify the decision to procreate.[200]

According to Benetar "no pain in non-existence is better than pain in existence" and he is of the opinion that the pleasures experienced by a person when alive are not a "real advantage" over not experiencing pleasures due to non-existence.[201]

While the ideas put forward in moral philosophical arguments can often lean to the extreme, it is submitted that the basic tenet underlying the views of Manulula and Shiffrin at least, is that there are times when life can, and should, be seen as a harm.

### 5 3 2 A slippery slope

Those against the recognition of a wrongful life claim have argued that allowing the claim will open the door to claims by disabled children against their mother's for not terminating their pregnancy when they knew the child would be born with a disability. Furthermore, they submit that a recognition of the claim will lead to a rise in the practice of defensive medicine.

The former argument has been rejected by our courts. In deciding not to terminate a pregnancy, a woman is merely exercising the right guaranteed her by s12(2)(a) of the Constitution.[202] A child wishing to bring a claim against his parents would have to show that it was wrongful and negligent for the mother not to terminate the pregnancy whilst knowing of the disability, but in light of the mothers right referred to above it seems that this may prove extremely difficult.[203]

200 Metz 2012 *SA Journal of Philosophy* 2.
201 Metz 2012 *SA Journal of Philosophy* 3-4.
202 *Stewart v Botha* 2007 *supra* 259.
203 *H v Fetal Assessment Centre supra* 148.

Dr Lou Pistorius notes that the rise in medico-legal claims across the world is matched by a rise in the practice of defensive medicine by medical practitioners.[204] He writes that when it comes to avoiding medico-legal consequences it makes sense, in the short term at least, to advise parents to terminate a pregnancy and face the possibility of a claim for wrongful termination rather than take the risk of a possible claim for wrongful birth or wrongful life. A wrongful termination claim would be relatively small when compared to how big a claim for wrongful birth or wrongful life could potentially be. But, as he explains, when looked at in the long term this approach is a "self-defeating policy" and to view each patient as a potential claimant might end up being a "self-fulfilling prophesy".[205]

Furthermore, for a wrongful life claim to succeed, it has to be shown that there was negligence on the part of the medical practitioner. In order to avoid a wrongful life claim a medical practitioner merely has to exercise reasonable care and skill when attending to his patients, nothing extraordinary is being expected of him or her. Additionally, recognising the claim would serve as a deterrent to what Kirby J called "professional carelessness or even professional irresponsibility".[206]

## 5 4 Dignity and equality

The Constitution guarantees every person's rights to equality and dignity.[207]

### 5 4 1 Dignity

S 8(1) of the National Health Act[208] gives every patient the right to participate in any decision pertaining to his or her health or treatment. In terms of Rule 27A of the Ethical

[204] Pistorius "Foetal Medicine in a Perfect Medicolegal Storm" 2015 March *Medical Chronicle* 23 23.
[205] Pistorius 2015 *Medical Chronicle* 23.
[206] *Harriton v Stephens supra* par 153.
[207] S9 and s10 of the Constitution,
[208] 61 of 2003.

Rules of Conduct for Practitioners Registered Under the Health Professions Act,[209] which is said to be the "most important national medico-ethical code of conduct" in South Africa,[210] a practitioner has a number of main responsibilities. Included in these responsibilities is the duty to: always act in the best interests of their patients; to respect the patient's choices as well as their dignity; to provide the patient with adequate information about, *inter alia*, their diagnosis and treatment options thereby enabling the patient to make an informed decisions regarding their health; and to obtain the patients informed consent, other than in an emergency. If a medical practitioner fails to adhere to this rule, as well as others, he or she opens themselves up to both disciplinary proceedings before the Health Professions Council of South Africa and litigation.

Autonomy forms one of the four principles of medical ethics, and has been recognised in South Africa as long ago as 1923 in *Stoffberg v Elliot*.[211] To act autonomously means that a person acts freely according to a self-chosen plan, they are not interfered with by others.[212] Previously, medical paternalism outweighed patient autonomy. This was mostly because it was believed that doctors act in the best interests of their patients and that "doctors know best". However, recently the focus has shifted onto patient autonomy.[213] Patient autonomy should be favoured over medical paternalism. This is because it is more in line with notions of human rights and freedoms, as well as a "modern professionalised and consumer-orientated society" than medical paternalism which stems from a "bygone era marked by presently outmoded patriarchal attitudes".[214] By putting the decision in the hands of the patient, it allows them to exercise their fundamental right to self-determination.[215]

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209 Published under Proc R717 in *GG* 29079 of 04-08-2006.
210 Coetzee and Carstens 2011 *Chicago-Kent LR* 1267.
211 1923 CPD 148, as cited in Carstens and Pearmain *Foundational Principles* 879.
212 Beauchamp and Childress *Principles of Biomedical Ethics* 6ed (2009) 99.
213 Moodley "Beneficence" in Moodley (ed) *Medical Ethics, Law and Human Rights: A South African Perspective* (2013) 59.
214 Van Oosten *The Doctrine of Informed Consent in Medical Law* (unpublished doctoral thesis, University of South Africa) 1989 414 as quoted in *Castell v de Greef* 1994 (4) SA 408 (C) 422-423.
215 *Castell v de Greef supra* 420.

It is apparent how the above supports the recognition of a wrongful birth claim. By allowing a person to act autonomously we are acknowledging their dignity and their right to have control over their bodies. But how can it be seen to support the recognition of a wrongful life claim? It is submitted that the above does in fact support the acceptance of wrongful life claims if the legal duty towards the parents to advise them on the risk of the child being born with a disability, or of the certainty thereof, is extended to the foetus, as the court in *Stewart v Botha* found it to be.[216]

According to Human and Mills, wrongful life claims have among their objectives the purpose of compensating the child for the infringement of their right to dignity and bodily integrity. They submit that the principles of justice and fairness demand compensation for the injury suffered by the child.[217] Wood submits that dignity precedes life and that "helpless and hopeless suffering", as well as disability, are degrading to humanity.[218] He makes this submission in the context of a person choosing to end their life in order to protect their dignity, but it is submitted that the same reasoning could be used to argue for the recognition of a wrongful life claim. Allowing the claim would enable a disabled child with no other remedies available to them to live in a more dignified state.

The recent case of *Stransham-Ford v Minister of Justice and Correctional Services* dealt with euthanasia but involved questions on dignity and the sanctity of life. The applicant, Stransham-Ford, was terminally ill and experienced great suffering. In his application he had said that it is not death that he was afraid of, it was dying while suffering that scared him.[219] The court granted him an order to allow a willing medical practitioner to help him end his life by either supplying or administering a lethal substance without it being considered unlawful and opening the practitioner up to criminal prosecution.[220]

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216 *Stewart v Botha* 2007 258.
217 Human and Mills 2010 *Stell LR* 81.
218 Wood "Human Dignity, Right and the Realm of Ends" 2008 *Acta Juridica* 47 52-53.
219 *Stransham-Ford v Minister of Justice and Correctional Services* 56.
220 *Stransham-Ford v Minister of Justice and Correctional Services* 71.

One of the arguments for disallowing the application was that the applicant's view of dignity was completely subjective while constitutional values had to be considered and determined objectively. The court responded to this by stating that when someone alleges that their constitutional rights have been affected, the courts must consider their subjective views.[221]

The court in *Stransham-Ford* quoted the dictum of O'Regan J in *S v Makwanyane*[222] who said that:

> "It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity…The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished."

Fabricius J agreed that the emphasis should rather be placed on the sanctity of the quality of life rather than on the sanctity of life *per se*, pointing out that although there is a right to life, this right can be waived – there is no *duty* to live.[223]

According to Kantian ethics a human being, or humanity in a person, is an end in itself and not an end to be produced.[224] Wood submits that as ends in themselves human beings should never be made to feel degraded or humiliated, and they should not "be treated as inferior in status to others, or made subject to the arbitrary will of others, or be deprived of control over their own lives, or excluded from participation in the collective life of the human society to which they belong."[225]

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221 *Stransham-Ford v Minister of Justice and Correctional Services supra* 58.
222 1995 (3) SA 391 (CC) 506.
223 *Stransham-Ford v Minister of Justice and Correctional Service supra* 56.
224 Wood 2008 *Acta Juridica* 51-52.
225 Wood 2008 *Acta Juridica* 52.

### 5 4 2 Equality

Section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act[226] prohibits the State and all persons, natural and juristic, from unfairly discriminating against a person on the basis of disability. For the purposes of this section unfair discrimination includes the failure "to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to reasonably accommodate the needs of such persons". [227]

One of the arguments against wrongful life claims is that their recognition could be seen to suggest that the life of a disabled person is less valuable than that of a 'normal' person. One of the concerns raised by wrongful life claims is the possible negative impact their recognition may have on society's attitude toward people with disabilities. Lind notes that there are those who contend that the recognition of a wrongful life claim could lead to persons with disabilities being perceived as inferior to 'normal' people by society.[228]

However, Mills and Human reject this argument and suggest that on the contrary, recognition of the claim actually confirms, protects and promotes the dignity of the disabled person.[229] They draw the following comparison to illustrate their point:

> "Where a special wheelchair entrance is built in any public building, society is not saying that the lives of disabled persons have less value and that such persons must consequently use a different entrance to those that able persons use, but rather that the inequality must be recognised and understood."[230]

Or as Teff puts it:

> "Permitting a remedy does not imply a cynical disregard for the preciousness of human existence. It is precisely the recognition of the value of life and the laudable

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226 4 of 2000.
227 S(9)(c) of Act 4 of 2000.
228 Lind 1992 *SALJl* 437-438.
229 Human and Mills 2010 *Stell LR* 85-86.
230 Human and Mills 2010 *Stell LR* 86.

reluctance to stigmatise it when impaired that should enable 'wrongful life' litigation to be kept within socially acceptable limits."[231]

## 5 5 Conclusion

The *boni mores* are not a static concept, and over time they change according to the changing views and values of society. For instance, in the not so distant past, sterilisation for convenience was frowned upon. However, over time both juristic and societal attitudes have changed to the point where now sterilisation for convenience is accepted as normal practice, not only in South Africa but in many jurisdictions across the globe.[232]

Human and Mills are of the opinion that courts appear to be willing to "engage with changing value systems, having due regard to developments in medical science and the impact thereof on pre-natal care".[233] Our courts have demonstrated their willingness to develop and reform the law in order to uphold and realise the values and rights entrenched in the Constitution. Van Niekerk uses the examples of the judgments in *S v Makwanyane*, *Minister of Home Affairs v Fourie*[234] and the promulgation of the Choice on Termination of Pregnancy Act to illustrate this point. However, as she notes, there are certain exceptions to this. One of these exceptions is in respect of wrongful life claims. Until now, our courts have been unwilling to recognise these claims, despite the fact that similar claims have been recognised.[235]

In any matter concerning a child, the child's best interests must be considered of paramount importance. The judgment of the Constitutional Court in *H v Fetal Assessment Centre* emphasised specifically that in deciding whether to recognise a wrongful life claim, the courts need to pay this right specific attention. In light of this, it is submitted that it would be in the best interests of the disabled child bringing a

231 Teff "The Action for Wrongful Life" 1985 34 *International and Comparative Law Quarterly* 440-441 as quoted by Human and Mills 2010 *Stell LR* 82 fn 110.
232 Strauss 1990 *Consultus* 93.
233 Human and Mills 2010 *Stell LR* 67.
234 2006 1 SA 524 (CC).
235 Van Niekerk 2012 *Stell LR* 527.

wrongful life claim for the claim to be recognised, especially in circumstances where it the parents have not brought, or cannot bring, a claim for wrongful birth. In these circumstances, without a wrongful life claim the child will be left with no other remedies to redress the loss they suffer or to improve their living conditions.

The sanctity-of-life argument is based on the idea that life can never be seen as a 'harm', but it is submitted that due to developments in our law, and the changing *boni mores* they represent, this argument is unconvincing. Specifically, the recent judgment in *Stransham-Ford* shows that there are certain situations in which the courts are willing to recognise that non-existence may be preferable to an existence characterised by severe pain and suffering. Viewed from the perspective of certain moral philosophical schools of thought, then it can be seen that the sanctity-of-life argument cannot stand.

The arguments that a recognition of wrongful life claims could open the door to children suing their mothers for not terminating the pregnancy when they were aware the child was going to be born with a disability has been rejected by our courts, and rightly so. The mother decision was an exercise of her constitutional right, and cannot be said to have violated a legal duty owed to her foetus. As far as wrongful life claims leading to a rise in defensive medicine, it is submitted this is not a valid reason for denying the claim. Firstly, this could be said of any and all professional negligence claims. Secondly, a medical practitioner does not need to practice defensive medicine in order to avoid a wrongful life claim, they merely need to exercise reasonable care and skill.

Wrongful birth claims are accepted on the basis that medical practitioners owe parents a legal duty to provide them with adequate information so as to enable them to make informed decisions regarding reproduction. This falls within the principle of autonomy which forms one of the four principles underlying modern biomedical ethics. If the legal duty is extended to the foetus so that it can be said that the medical practitioner owed the child a duty to properly advise its parents, then the parent's right to make their own

informed decisions regarding reproduction may support the recognition of wrongful life claims.

Dignity and equality are no just rights, but they are two values which underlie the entire Constitution and their importance cannot be overstated. It is submitted that denying the recognition of wrongful life claims may be seen as an infringement of the right to not be unfairly discriminated against under s9 of the Promotion of Equality and Prevention of Unfair Discrimination Act. This is especially so when the parents of the child cannot bring a wrongful birth claim and as a result the child not only lives with severe pain and suffering but also has no means of relieving their pain and suffering and improving their living conditions in order to lead a more dignified existence.

# CHAPTER 6: CONCLUSION

## 6 1 General

Wrongful birth and wrongful life claims have both generated their fair share of controversy, the latter more so than the former. The use of the terms 'wrongful pregnancy' or 'wrongful conception', 'wrongful birth', and 'wrongful life' has been criticised with good reason. They all provoke an emotional response and detract from the judicial issues they raise.[236] Despite their unfortunate use, the terms have been used globally and there is no indication that this position will change.

The South African law of delict is based on a general set of principles, and for a delictual claim to be successful it must be shown that the elements of delict, namely conduct, fault, wrongfulness, causation and harm, are all present. The presence of all the elements will naturally depend on the facts of the particular case. Our courts have found that both wrongful pregnancy and wrongful birth claims constitute valid causes of action,[237] however, our courts and those of many other jurisdictions have found that wrongful life claims fail to disclose a cause of action and so cannot be recognised as valid claims.[238] However, a wrongful life claim came before the Constitutional Court recently and the court left the question as to whether the claim can be recognised in our law open.[239]

There are many reasons given for the rejection of wrongful life claims, but it appears that the main reasons relate to the inquiry into wrongfulness, and the policy considerations within that inquiry, and the assessment of damages. Our courts have held that the child in a wrongful life claim has not suffered an identifiable harm caused

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236 *Friedman v Glicksman* 1138.
237 See *Administrator, Natal v Edouard; Mukheiber v Raath; Friedman v Glicksman;* and *Stewart v Botha* 2007 in chapter 4 above.
238 See *Stewart v Botha* 2007; *Stewart v Botha* 2008; *Harriton v Stephens and Waller v James; Waller v Hoolahan* (Australia); and *McKay v Essex Area Health Authority* (England) in chapter 4 above.
239 See *H v Fetal Assessment Centre* in chapter 4 above.

by the medical practitioner, whose conduct can therefore not be considered wrongful, and that assessing damages in these situations is impossible as it requires a comparison between existence and non-existence.

In order for the conduct of the medical practitioner to be considered wrongful, there must be a breach of a legal duty and in wrongful life claims it has been held that there is no legal duty owed to the foetus. However, this reasoning has been challenged in both *Stewart v Botha*[240] and *H v Fetal Assessment Centre*[241] where both courts were of the opinion that there may be a legal duty owed to the foetus to advise the parents adequately, thus enabling the parents to avoid the harm incurred by them and consequently the child. The policy considerations that have up until now been relied on to advocate against the recognition of the claim have also, through the two above judgments as well as the opinions of many writers, been shown to be somewhat unconvincing, especially when measured against constitutional norms and values and the perpetually evolving *boni mores*.

As for the argument that the assessment of damages is impossible because it entails a comparison between existence and non-existence, it is submitted that in light of the fact that wrongful birth claims require the same comparison and yet are nevertheless recognised, this should not deter the court from the task. Furthermore, as far as patrimonial damages are concerned, a medical practitioner will only be liable to the child in a wrongful life claim to the extent that the practitioner would have been liable to the parents in a wrongful birth claim.[242]

### 6 2 Conclusion and recommendation

The decision of the Constitutional Court in *H v Fetal Assessment Centre* has opened the door to a possible recognition of wrongful life claims in our law. While there are

[240] *Stewart v Botha* 2007 *supra* 288.
[241] *H v Fetal Assessment Centre* 147.
[242] *Ibid*.

those who hold that the solution to the problems in recognising wrongful life claims does not lie in the law of delict, and that the most plausible solution would be for the legislature to pass legislation providing for a remedy for children in wrongful life cases,[243] it is submitted that our common law, and our law of delict in particular, can, and should, be extended to recognise the claim as a valid cause of action.

[243] Van Niekerk 2012 *Stell LR* 538.

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