WRONGFUL LIFE – THE SCA RULES IN

Stewart v Botha (340/2007) [2008] ZASCA 84 (3 June 2008)

1 Introduction

For many decades now abortion legislation has (even before the era of abortion on demand) allowed a mother the right to have a foetus aborted which could be born with a physical mental defect resulting in the child being seriously handicapped. In the future it will be possible, not only to have defective foetuses aborted, but also to order our babies according to our own specifications (See Lemonick, Bjerklie, Park and Thompson "Designer Babies" in the online version of *Time Magazine* of Monday 11 January 1999 (http://www.time.com/time/magazine/article/0,9171,989987-3,00.html).

In the present case the plaintiffs' child was born severely handicapped because the parents were not informed of the fact that the foetus was suffering from congenital defects. The mother would, had she known about the defects, have had the foetus aborted. The mother was, however, ignorant of any defects and the child was born with severe disabilities. Apart from the claim instituted by the mother in her own name, the father instituted a claim on behalf of the son. The Supreme Court of Appeal rejected this second claim as being against public policy. It is this second claim that forms the basis of this note.

2 Terminology

Delictual claims arising as a result of unwanted pregnancies are generally categorised into three groups. The terminology used in claims relating to failed sterilisations and children born with congenital birth defects is not always clear, however, in this case note the terminology will be used as explained below (see also Mukheibir "Wrongful life claims in the Netherlands – the Hoge Raad decides" 2005 *Obiter* 753):

(a) A wrongful conception or wrongful pregnancy claim is brought against a doctor in the case of a failed sterilisation which results in a conception and subsequently an unwanted pregnancy. These claims have been successful in South African law (see, *eg*, *Mukheiber v Raath* 1999 3 SA 1065 (SCA); and *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 312).

(b) A wrongful birth claim is instituted by parents in the event of a child being born with a severe handicap. This handicap can be the result of a congenital defect where the parents, had they known that the child

would be thus handicapped, would have chosen to have the foetus aborted. Such a claim can also arise as a result of the negligence of the obstetrician in connection with the circumstances surrounding the pregnancy or birth.

(c) A wrongful life claim is brought by or on behalf of a severely handicapped child born as a result of medical malpractice, mostly in the form of incorrect advice under circumstances where the mother, had she received the correct advice, would have chosen for an abortion.

3 *Stewart v Botha*

3 1 The facts, legal question and decision

The plaintiffs, a husband and wife, instituted delictual claims in the Cape High Court against a general practitioner and specialist obstetrician and gynaecologist that the wife had consulted during her pregnancy after their son had been born with severe congenital defects (*Stewart v Botha* 2007 JDR 0393 (C)). These included a defect of the lower spine which adversely affected the nerve supply to the bowel, bladder and lower limbs as well as a defect of the brain. The wife instituted a claim for compensation for her own special damage arising from the birth of the child, which included the maintenance, special schooling, past and future medical expenses which would be incurred as a result of her son's condition. In addition the husband instituted a claim on behalf of his son. This claim was instituted in the alternative to the wife's claim and claimed damages under the same heads.

The wife's claim, a "wrongful birth" claim, was found by both the Cape High Court and the Supreme Court of Appeal, to be good in law. Both defendants excepted to the second claim, a "wrongful life" claim. The first defendant excepted on the basis that the claim did not disclose a cause of action, in particular because there was no duty on him to ensure that the baby was not born. Furthermore, such a claim would be *contra bonos mores*. The second defendant excepted on the basis that the claim was "bad in law, *contra bonos mores* and against public policy". The exceptions were upheld both in the court *a quo* and on appeal.

3 2 The reasoning of the court

The question which had to be answered was whether the failure by the medical practitioners to detect and inform the mother of the congenital defects of the foetus she was carrying was wrongful. As a point of departure Snyders AJA referred to the judgment in *Telematrix (Pty) Ltd v Advertising Standards Authority* (*SA* 2006 1 SA 461 (SCA)), where the court restated the maxim *res perit domino*, namely that damage should as a general rule lie where it falls (par 12 of *Telematrix* quoted in par 5 of the present case):

> "The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans

> aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, *the act or omission of the defendant must have been wrongful and negligent and have caused the loss*" (own emphasis).

Snyders AJA then continued to explain the test for wrongfulness as follows (par 6 and 7):

> "The enquiry as to negligence and wrongfulness is separate and distinct and should not be confused as to terminology or substance. *Negligent conduct that causes physical damage to the person or property of another is prima facie wrongful*. However, '... the element of wrongfulness becomes less straightforward ... with reference to liability for negligent omissions and for negligently caused pure economic loss ... In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms'" (own emphasis).

Snyders AJA recognised the conceptual difference between wrongfulness and negligence, but, as has become practice, ignored the conceptual order, thus conceiving the notion of negligent conduct where such conduct has not yet been found to be wrongful (see, *eg*, the recent cases of *Gouda Boerdery Bk v Transnet* 2005 5 SA 490 (SCA); and *Local Transitional Council of Delmas and another v Boshoff* [2005] 4 All SA 175 (SCA), where the courts likewise ignored this order). This approach been has subject to academic criticism (see Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) 109, see also fn 6 on 109-110).

Snyders AJA noted that "claims arising from a similar context, although distinctly different", had been allowed by our courts. In this regard he cited instances of wrongful conception (*Administrator, Natal v Edouard* 1990 3 SA 581 (A)) and wrongful birth (*Friedman V Glicksman* 1996 1 SA 1134 (W)). He also made reference to the decision in *Pinchin v Santam Insurance Co Ltd* (1963 2 SA 254), in which an action of a child to recover damages for an injury suffered whilst *in utero* was recognised.

According to the Supreme Court of Appeal the difference between those cases and the present claim, is based on the fact that in the latter case the claim is instituted not by the parents, but by (or on behalf of) the child (par 11):

> "At the core of cases of the kind that is now before us is a different and deeply existential question: was it preferable – from the perspective of the child – not to have been born at all? If the claim of the child is to succeed it will require a court to evaluate the existence of the child against his or her non-existence and find that the latter was preferable."

Snyders AJA referred to the many international jurisdictions in which these cases had been considered and mostly rejected. Wrongful life claims succeeded in the decision of the *Hoge Raad* (Dutch Supreme Court) in the case of Kelly Molenaar (LJN: AR5213, Hoge Raad, C03/206HR), the French *Cour de Cassation* in the case of Nicolas Perruche (2002 by the French Cour de Cassation (Arrêt nN 457 du 17 novembre 2000) as did the Israeli case of *Zeitsov v Katz* 1986 402 PD 85 (Isr).

Snyders AJA referred to the arguments and counter-arguments which have characterised the debate in this regard (par 16-21; and see par 4 below) but ultimately the issue which formed the basis of the decision of the Supreme Court of Appeal in the present case was the issue of making a comparison between the present state of the claimant and the position had he not been born.

> "The essential question that is asked when enquiring into wrongfulness for purposes of delictual liability is whether the law should recognise an action for damages caused by negligent conduct and that is the question that falls to be answered in this case.
>
> I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That 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. For that reason in my view this court should not recognise an action of this kind."

In the end the court found the claim itself to be *contra bonos mores* and therefore could not hold that the conduct of the medical practitioners was wrongful.

4 The arguments for and against wrongful life claims

Both the High Court in *Friedman* and the Supreme Court of Appeal in *Stewart* dealt with a number of arguments for and against allowing a wrongful life claim. These arguments to a large extent were also dealt with at length by the *Hoge Raad* in the case of Kelly Molenaar; the *Hoge Raad*, however, rejected or circumvented the arguments against allowing the wrongful life claim (for a detailed discussion of the *Hoge Raad* decision refer to Mukheibir 2005 *Obiter* 753).

4 1 Assessment of damages based on non-existence

The fact that the enquiry is based on the "non-existence" of the claimant gives rise to metaphysical issues which fall outside the realm of our understanding. Counter-arguments, on the other hand, refer to the analogous situation of assessing damage in the case of non-patrimonial loss – although it is difficult, the court nevertheless perform this function.

Snyders AJA held this counter-argument to be untenable, because the purpose of the law of delict is not to punish, but to place the aggrieved party in the position he or she would have been in had the delict not been committed. If there had been no delict, the child would not have been born, and this "brings one back to the questionable assessment" (par 18).

The *Hoge Raad* circumvented the problem of the comparison between the claimant's present position, and the position that the child would have been in had it not been born, in order to allow a remedy for the claimant. In the final instance there was negligence and there was damage, and the *Hoge*

Raad wanted to award compensation to the claimant.

The argument relating to the claim being based on the claimant's own non-existence, in that an assessment of damage would involve a comparison between the child's present position and the "position" it would have been in had the child not been born, was dealt with in terms of the Dutch Law of Damages. The *Hoge Raad* countered this objection by applying Article 6:97 of the Dutch Civil Code which provides that the judge has to determine the damage in accordance with the method which corresponds most closely to the nature of the damage, and where damage cannot be assessed accurately, it may be estimated. (The original Dutch reads "De rechter begroot de schade op de wijze die het meest met de aard ervan in overeenstemming is. Kan de omvang van de schade niet nauwkeurig worden vastgesteld, dan wordt zij geschat.") It was therefore not necessary to adopt a comparative approach and refer to the claimant's non-existence to assess damage.

4 2 Wrongful life claims are against public policy

The South African courts have not allowed wrongful life claims on the basis that these are against public policy. The reason for this is because they are based on the non-existence of the claimant (see the discussion of *Stewart* above). The only other wrongful life claim that has been heard in South African law was *Friedman v Glicksman* (1996 1 SA 1134 (W)). The defendant excepted to the claim and the exception was upheld, *inter alia* because allowing such a claim would be against public policy (1142I - 1143 C):

> "In my view, it would be contrary to public policy for Courts to have to hold that it would be better for a party not to have the unquantifiable blessing of life rather than to have such life albeit in a marred way."

The question of public policy did not arise in the case of Kelly Molenaar, probably because of the fact that Dutch society has for the past number of decades been far more tolerant of conduct which in other countries is illegal. The Dutch coffee shops and brothels are well-known and annually frequented by many tourists. Euthanasia has been legal since April 2002 and prior to that it was tolerated. In a society where the aged can ask to be euthanized merely because they no longer wish to live, it is not surprising that a claimant suing for damages because she was not aborted could perhaps succeed (see the website of the de Nederlandse Vereniging voor een vrijwillig leevenseinde – Dutch Society for a Voluntary End of Life http://www.nvve.nl/nvve2/dossierdetail.asp?pagkey=71864&dossier=72069).

4 3 Wrongful life claims undermine the dignity of the disabled

After the *Perruche* decision and also the decisions of the lower courts in the case of Kelly Molenaar, there was an outcry on the part of disabled people who regarded the mere fact of allowing a wrongful life claim as demeaning to

them. Because in the case of Kelly Molenaar the assessment of damage did not involve a comparison between the present state and the state of non-existence, the idea that somehow, in the case of the wrongful life claimant, it is better not to have been born does not form the basis of the claim.

The *Hoge Raad*, however, argued that instead of the award becoming a detraction from the dignity of the child, the claim instead acknowledges it. What would detract from the dignity of the child would be if she were to be deprived of an award, in addition to spending her life with a handicap as a result of the fault of another, purely because of the argument that is based on the non-existence if her mother had exercised her right to an abortion.

4 4 Wrongful life claims could be instituted against mothers for failing to have had their child aborted

Both the *Stewart* case and the case of Kelly Molenaar dealt with the argument that, allowing such a claim, would give rise to a claim against a mother in instances where she was informed of a congenital defect but chose not to have had aborted the foetus. The counter-argument in this case is based on the premise that a mother's choice not to terminate a pregnancy will not be regarded as wrongful. In the case of Kelly Molenaar the *Hoge Raad* took this argument further by stating that an unborn child does not have a right to his or her own abortion, only the mother has a right to have the foetus aborted. The child's claim is instead based on the legal duty owed by the obstetrician to the (at that stage) unknown child.

In South Africa the right of a mother to choose to terminate a pregnancy is entrenched in the Constitution (s 12 (2)(a)):

> "Everyone has the right to bodily and psychological integrity, which includes the right... to make decisions concerning reproduction..."

Subsequently the Choice on Termination of Pregnancy Act (92 of 1996) was enacted which, according to the preamble "promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs." The right to termination is accorded to the mother, not the foetus, therefore the decision whether or not to abort is that of the mother. A child born handicapped cannot, therefore, sue the mother for failing to have had him or her aborted.

4 5 Wrongful life claims will give rise to defensive medicine being practised

Another argument raised against wrongful life claims was that allowing such claims would give rise to defensive medicine and that doctors would be overly cautious and advise parents to terminate pregnancies merely to avoid liability. The counter-argument in this case states that an unreasonable recommendation to parents to terminate a pregnancy could likewise result in liability.

The problem of wrongful life claims leading to defensive medicine likewise came up in the *Kelly* case. This submission was rejected by the *Hoge Raad* on the basis that ultimately the obstetrician would still be expected to act reasonably. In the *Kelly* case it was not disputed that the obstetrician in that case had not acted reasonably.

5 The right not to be born, wrongfulness and public policy

In the *Stewart* case the court considered the arguments discussed in paragraph 4 above, but ultimately the court based its decision not to allow the wrongful life claim on the fact that the omission of the medical practitioners was not wrongful, because the claim itself was against public policy.

The question of the wrongfulness of an omission has been a part of our law since the decision in 1912 of *Halliwell v Johannesburg Municipal Council* (1912 AD 659). Over the next decades the test for the wrongfulness of an omission was developed and formulated in terms of whether there was a legal duty on the defendant to prevent loss (Neethling, Potgieter and Visser 50).The court *in casu* formulated it differently, namely whether there was a legal duty not to act negligently (par 7). In this case the conceptual order between negligence and wrongfulness is again ignored and, it is submitted, this also impacts on the conceptual difference between the two concepts. To blame someone for conduct that conduct surely has to be wrongful (see Neethling, Potgieter and Visser 109). Whether or not such a duty in fact exists depends on the *boni mores* or the legal convictions of society.

The legal duty which determines the wrongfulness of an omission should not be formulated with reference to a plaintiff. This confuses the notion of legal duty with that of the doctrine of duty of care, which is not part of South African law (see generally the discussion in Neethling, Potgieter and Visser 137-138; and in terms of the doctrine of duty of care one has to establish whether the defendant had a duty of care *vis-à-vis* a particular plaintiff). The question should simply be whether there was a legal duty to prevent harm, which in this case there was. The legal duty was breached, harm ensued, so the conduct of the medical practitioners was wrongful.

In the present case the court found that the defendants had acted negligently (against the parents), but because the court found the claim to be *contra bonos mores*, it could not find wrongfulness on the part of the defendants in so far as the wrongful life claim was concerned. The lack of wrongfulness was presupposed on the fact of the claim being against public policy.

In the 1996 case of *Friedman v Glicksman* (*supra*) such a claim was encountered for the first time in South African law and was held to be against public policy. At that stage the Choice on Termination of Pregnancy Act (92 of 1996) was not in force; it only came into operation in 1997. Prior to 1975 the common law had prohibited abortion almost completely. The

Abortion and Sterilization Act (Act 2 of 1975) made provision for abortions on certain medical grounds, *inter alia* if the pregnancy constituted a threat to the life, physical or mental health of the woman and also if there existed a serious risk that the child would suffer from a physical or mental defect which would cause it to be seriously handicapped. (For the common law position and the 1975 Act see the Milton *South African Criminal Law and Procedure* 3ed (1996) 305). The 1996 Act legalised abortion beyond the medical grounds; it was now also possible to obtain an abortion purely to terminate an unwanted pregnancy.

The question now is whether with the changing *mores* one could infer that allowing a wrongful life claim would be against public policy, particularly if the mother in question would have exercised her right to have had the foetus aborted. Aborting a disabled foetus has been lawful for many years. Since the coming into operation of the Choice on Termination of Pregnancy Act a mother can have a foetus aborted in the first twelve weeks even if the continuation of the pregnancy poses no harm to either her or the child. Under these circumstances a wrongful life claim can hardly be said to be against public policy.

If one applies the sum formula to the wrongful birth claim (in this case the claim instituted by the mother for her own damage) this would also entail comparing the present state with the hypothetical position the mother would have been in had the child not been born. This is not regarded by our courts as being against public policy; however, this claim is also based on a comparison between a state of existence and a state of non-existence. If the child is capable of understanding the claim, it could make him or her feel unwanted and unworthy of having been born. This could infringe the child's sense of dignity and, it is submitted, could for that reason, also then be again public policy.

The reason for not allowing a claim should not, therefore, be public policy, particularly against the background of the availability of abortion on demand and furthermore the fact that the "wrongful birth" claim is also based on the non-existence of the child.

The Court in the *Stewart* case did not consider the element of legal causation. It is submitted that the only sound legal argument for rejecting such a claim would be the possible lack of causation in terms of the "flexible test" adopted by the then Appellate Division in *S v Mokgeti* (1990 1 SA 32 (A)) and then confirmed in *International Shipping Co (Pty) Ltd v Bentley* (1990 1 SA 680 (A)). The correct application of the test for legal causation could result in the obstetrician not being found liable because of the fact that the damage is too remote. Furthermore, this test would also solve the problem of limitless liability.

6 Conclusion

The only way in which a wrongful life claim can legally be rejected would be, it is submitted, on the basis of applying the principles of delict. In the present case it could have been argued that on the basis of lack of legal causation,

the medical practitioners could not be held liable. To argue, however, that such a claim would be against public policy would, in a country where abortion is available on demand for reasons as varied as the termination of an unwanted pregnancy, to preventing the birth of a physically or mentally disabled child, at the very least smack of hypocrisy.

The question which has to be answered in this case is not whether a wrongful life claim should be regarded as being against public policy or not. The question should simply be whether in the particular case the elements of delict have been satisfied.

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