CASES / VONNISSE

THE *NASCITURUS* FICTION AND DELICTUAL CLAIMS

RAF v M obo M [2005] 3 All SA 340 (SCA)

1 Introduction

The *nasciturus* fiction has been applied in South African law to claim delictual damages on behalf of a child born with a handicap resulting from an injury sustained *in ventre matris*. In the present case the court had to decide whether an unborn child had a claim for damages against the Road Accident Fund, and in particular whether the *nasciturus* fiction found application. In the end the court chose to decide the matter in accordance with the general principles of the law of delict.

This case is particularly interesting in the light of the wrongful life claims which have been instituted on behalf of children born with handicaps in Europe and elsewhere. Although this case is not an example of a wrongful life claim, after the decision in the case under discussion, one could easily conceive of such a claim being allowed in instances where a child is born severely handicapped as a result of negligence on the part of the obstetrician. After all, if the average motorist owes a legal duty to the generic unborn child (as was held in the present case), it is not too far-fetched to construe a similar legal duty on the part of the obstetrician who is caring for the pregnant mother of the unborn child.

2 The *nasciturus* fiction and the criticism raised against it

The *nasciturus* fiction originated in Roman law. According to Roman lawyers an unborn child *in ventre matris* was deemed to have been born and to have legal personality prior to the date of his birth if this would be to his advantage and provided the child was in fact born alive (Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 74). The fiction was also applied in Roman-Dutch law, when the maxim *nasciturus pro iam nato habitur quotiens de commodo eius agitur* was formulated (Van Zyl 74 fn 5). At common law the fiction was applied mostly in cases dealing with succession (Cronjé en Heaton *Die Suid-Afrikaanse Personereg* (2003) 12; Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* 2ed (1999); and Van Zyl 74).

The *nasciturus* fiction was applied for the first time in South African law in 1909 in *Chisholm v East Rand Proprietary Mines Ltd* (1909 TH 297). In this instance the father of an unborn child had been killed as a result of delictual conduct of another. The deceased was employed by a mining company and his death was the result of the negligence of a fellow employee. The widow claimed damages. The court per Mason J held that the child was entitled to claim loss of support even though it had not been born at the time of the delict (301):

> "One of the first questions which arises is whether the compensation to be awarded must include such a provision for the child as the father would have made for it. That depends, again, on the further question whether the child has an independent right of action apart from the mother against a person responsible for the death of the father. The case of *Jameson's Minors v CSAR* (1908 TS 575) answers that question affirmatively. The well-known principle that a posthumous child is to be considered as born at the death of the father, if such a fiction will be to its advantage (Voet, 1, 5, 5), places this infant in the same position as other children."

Subsequently the fiction has been applied mostly in cases dealing with succession (see, *eg*, *Ex parte Muller* 1946 OPD 117; *Ex parte Administrators Estate Asmal* 1954 1 PH (N); and *Ex parte Boedel Steenkamp* 1962 3 SA 954 (O)).

In 1963 the *nasciturus* fiction surfaced in *Pinchin NO v Santam Insurance Co Ltd* (1963 2 SA 254 (W)) in connection with a personal injury claim instituted on behalf of a child who was *in ventre matris* at the time of the delict. In this case the mother had been involved in an accident when she was six months pregnant. As a result of her injuries she lost a substantial amount of amniotic fluid. The baby was born without complications but when it was about four months old it became clear that it was suffering from cerebral palsy. The father alleged that the child's handicap was the result of the injuries sustained by the mother and caused by the negligence of the other driver. The defendant, who was the statutory insurer of the other vehicle, acknowledged that the driver had been negligent. The child's father sued the insurer in delict for medical costs and on behalf of the child he claimed satisfaction for non-patrimonial loss. Although on the facts it was found that there was no causal connection between the accident and the child's injuries, Hiemstra J held that in principle the *nasciturus* fiction, until now applied within the context of patrimonial rights, could be employed in the case of a personal injury claim as well. The case went on appeal to the then Appellate Division, but the court, per Rumpff JA, dismissed the appeal on the facts without deciding on the correctness of the point of law (*Pinchin NO v Santam Insurance Co Ltd* 1963 4 SA 666 (A)).

Several writers commenting on the case held that it was not necessary to resort to the fiction in the case of delictual claims (Joubert "*Pinchin & Ano NO v Santam Insurance Co Ltd 1963 2 SA 254 (W)*" 1963 *THRHR* 295; and see also Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) 32-33). According to Joubert the principles of the law of delict are sufficiently flexible to allow such a claim. The application of the fiction in such an instance

requires forcing it beyond the scope of its area of application and the application thereof is furthermore limited. Where the handicap of a child results from conduct which precedes the conception of a child (Joubert 1963 *THRHR* 296 cites the example of a mother who takes medication which results in the child being born with a handicap) the *nasciturus* fiction would not find application.

The fiction will also not be at the disposal of a child born with a handicap as a result of a doctor's failure to order pre-natal diagnostic tests under circumstances where the parents, had the pre-natal tests been performed and had they been aware of the handicap, would have chosen to have the foetus aborted (the "wrongful life" cases – see par 4 below).

3 *RAF v M obo M*

3 1 Facts

In the present case a Mr Mtati brought a claim of R1 365 580 on behalf of his minor daughter Zukhanye against the Road Accident Fund. The claim was based on article 40 of the Agreement set out in the schedule to the Multilateral Motor Vehicle Accidents Fund Act (93 of 1989).

Article 40 reads as follows:

> "The MMF or its appointed agent, as the case may be, shall subject to the provisions of this Agreement, be obliged to compensate any person whomsoever (in this Agreement called the third party) for any loss or damage which the third party has suffered as a result of –
>
> (a) any bodily injury to himself;
>
> (b) the death of or any bodily injury to any person,
>
> in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place within the area of jurisdiction of the Members of the MMF, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Agreement called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty." (Article 40 is the immediate predecessor of s 17(1) of the Road Accident Fund Act 56 of 1996.)

The plaintiff alleged that as a result of a collision which had taken place on 20 December 1989 between a motor vehicle which was negligently driven by one Dlalo, and the plaintiff's wife, who was a pedestrian and at the time of the accident pregnant with Zukhanye, the plaintiff's wife sustained serious bodily injuries. It is alleged in the particulars of claim that Zukhanye, born five months after the accident, sustained brain damage and was mentally retarded, and that this damage was the result of the bodily injuries suffered by her mother.

The Road Accident Fund raised a special plea against the claim of the plaintiff. This plea was based on the following two grounds:

(1) The child at the time of the accident was not yet a "person" for the purposes of article 40 of the agreement; and

(2) Because a foetus *in utero* is not a person, an insured person (the driver in this case) cannot be said to have owed a "duty of care" to Zukhanye.

3 2 The decision of the court a quo

The court *a quo*, applying the *nasciturus* fiction, dismissed the special plea. It was held that the decision in *Pinchin NO v Santam Insurance Co Ltd* (1963 2 SA 254 (W)) had been correct (quoted in par 11 of the Supreme Court of Appeal's judgment):

> "the Act and the common law must therefore be approached in the context of the qualified principle set out above, namely to regard, when appropriate, a *foetus* as a person when upon birth it is to his or her advantage. The real and difficult question is to determine when the circumstances are appropriate and when they are not".

Froneman J held that it was correct to apply the *nasciturus* fiction in the present case, because the legislation in question was social legislation which was "aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle" (par 13). He also held that a legal duty could be owed to a foetus (the court *a quo* actually used the phrase "duty of care", but Farlam JA held on appeal, correctly it is submitted, that "legal duty" is preferable).The argument raised on behalf of the Road Accident Fund, namely that the floodgates of litigation would be opened, was held to have no substance. It was also submitted by the appellant (relying on *Van Heerden v Joubert NO* 1994 4 SA 793 (A)) that the word "person" should be read as having its ordinary grammatical meaing, that is "'a human being' as distinguished, amongst other things, from a stillborn child, an unborn child or a foetus" (par 14). Froneman J rejected this submission on the basis that indeterminacy of meaning is recognised in our law on an increasing basis (par 15). In addition the decision in the *Van Heerden* case had also been made in the specific context of legislation (the Inquests Act 58 of 1959).

3 3 The decision of the Supreme Court of Appeal

The court per Farlam JA identified two questions which needed to be answered in the present case, namely:

(1) Did Zukhanye have a claim in terms of article 40 against the Road Accident Fund?

(2) If she had a claim; was this claim to be dealt with in terms of the *nasciturus* fiction, or in terms of the ordinary law of delict?

The court answered the first question in the affirmative. It held that the question of liability in terms of article 40 could not be separated from ordinary delictual liability. The remedy created by article 40 was "the

counterpart of and indeed the substitute for the common law actions relating to damages for bodily injury and loss of support caused by or arising from the negligent driving of motor vehicles" (par 23). For this reason it was necessary firstly to ascertain whether Zukhanye was entitled to an ordinary common law delictual remedy.

In this regard the court held that it would be intolerable for the child not have such an action at common law. Farlam JA referred to the decision of the Canadian Supreme Court in *Montreal Tramways Co v Léveillé* ((1933) 4 DLR 337 (SCC)), in which it was held that denying a child who is *in ventre matris* at the time of the damage-causing event such a remedy would amount to that child, once it is born, having to go through life with a handicap which is not its fault and for which it has no legal recourse. In the *Montreal Tramways Co*-case (*supra*) it was held to be "natural justice" that if the child is born alive and viable, it should maintain the action for its injuries. Because the child was entitled to an action at common law, it should in principle also be entitled to claim in terms of article 40.

The second question was regarded by Farlam JA as the more difficult question of the two. He held that, if the child had a claim, the claim would have to be dealt with in terms of the law of delict. In this instance he followed the approach of Joubert. Joubert was of the opinion that it is unnecessary to employ the *nasciturus* fiction in cases like this, because if one accepts the premise that an act and its consequences may be separated in time and space, one can apply the ordinary principles of the law of delict.

The *nasciturus* fiction was described by Farlam JA as not being very helpful in cases such as the German case of the mother who was negligently infected with syphilis before she conceived her child, who was subsequently born with congenital syphilis. According to Farlam JA "[s]uch a case also, in my view, cries out for a remedy and a theory which denies one should not be accepted" (par 33).

The applicant had averred in the special plea that the driver did not owe a "duty of care" to Zukhanye, but presented no argument on this matter before the court. Nevertheless, Farlam JA made some pertinent remarks on this point (par 36 and 37):

(1) The term "legal duty" is to be preferred to the term "duty of care" as the latter term can lead to confusion;

(2) For the element of wrongfulness to be present there has to be a breach of a legal duty; and

(3) Referring to a case of the High Court of Ontario (*Duval v Seguin* (1972) 26 DLR (3d) 418) he held that because procreation is a normal part of human existence, it is foreseeable that road users would include pregnant women and that the child *in ventre matris* could potentially be injured. A driver therefore also has a legal duty towards an unborn child and is required to "foresee and take reasonable care to avoid".

(While it is submitted that Farlam JA correctly chose the term "legal duty" instead of "duty of care", the usage of the term "legal duty" was not entirely

clear. The presence of a legal duty is usually required to establish wrongfulness in the case of an omission, and then this "legal duty" test is merely another formulation of the *boni mores* test (Neethling *et al* 49 and further; Van der Walt and Midgley *Principles of Delict* 3ed (2005) par 65). Although the court *in casu* mentions legal duty in connection with wrongfulness, it then refers to the concepts of foreseeability and preventability (par 37 in the quotation from *Burton v Islington Health Authority; de Martell v Merton and Sutton Health Authority* [1992] 3 All ER 833 (CA)), which are normally used in connection with negligence (*Kruger v Coetzee* 1966 2 SA 428 (A) 430; and see also Neethling *et al* 116 and further).)

The argument raised by the appellant, namely that allowing the claim would "open the floodgates of liability" was rejected. Farlam JA cited three reasons why the "floodgate" fear would not materialise (par 39):

(1) In order for the claim to be brought in the child's name, it is necessary for the child to be born alive; prior to that the right of action is not yet complete;

(2) The claim for the child will lapse if the child should die, unless *litis contestatio* has been reached (in the case of claims brought in terms of the *actio iniuriarum* and the action for pain and suffering); and

(3) A claim for loss of expectation of life will be regarded as part of the claim for loss of amenities and will lapse upon the death of the child; furthermore the child will have no claim for loss of income during the lost years.

4 Discussion

The South African law of delict purports to follow a generalising approach in terms of which delictual liability is established by means of application of general elements of liability (Neethling *et al* 5). Theoretically any instance of wrongful, culpable conduct giving rise to damage should be capable of being brought within the ambit of the law of delict. The same applies to a child born with injuries sustained as a result of a damage-causing event which occurred when the child was *in ventre matris*. Instead of having resort to a specific rule, such as the *nasciturus* fiction, the general elements of liability can be applied. It is trite law that there is a separation in time and space between the elements of wrongfulness and damage, and therefore all the elements will only be present once the child is born. At the same time the rules of legal causation should preclude the sluice-gates of liability from being opened and a resultant multiplicity of claims being instituted. It is therefore submitted that Joubert's approach is correct.

The Supreme Court of Appeal referred in its judgment *inter alia* to the position of Boberg (par 30). Boberg regarded Joubert's approach as fallacious, because it failed to explain by which process the conclusion is reached that the child only suffers the damage once it is born. According to Boberg delictual liability does not arise from damage alone; there also has to

be an invasion of legal rights, and prior to birth the foetus has no such rights. Boberg specifically referred to the example used by Joubert to illustrate the fact that wrongfulness and damage are separated in time and space to illustrate his point, namely the example of a timebomb which explodes only some time after it has been placed at the desired location. Boberg denounces this example on the basis that the perpetrator could have a change of heart and then move the bomb, in which case it will not explode, and no damage will ensue.

The court, per Farlam JA, did not find any merit in Boberg's argument (par 32):

> "What if the bomb had gone off, leaving a dangerous crater into which two people subsequently fell? Each person would have an action only when he or she fell and suffered damage, not before."

Lind ("Wrongful-birth and Wrongful-life Actions" 1992 *SALJ* 428 441-442) argues that Boberg's argument has the appeal of "factual logic", but at the same time, legally speaking, Joubert's argument is not fallacious:

> "In law there is no fallacy in saying that the damage is suffered only at birth, For, until then, there is no plaintiff to suffer damage. And there can only be a delictual wrong once a plaintiff is injured."

Another argument that can be raised against Boberg's criticism is the following: if the perpetrator removes the bomb and prevents it from exploding, there is no wrongful conduct to begin with. On that basis alone there is no delictual liability. Furthermore, there can be no delictual liability without damage, even if there is wrongful conduct. Wrongfulness in the law of delict presupposes damage, because the law of delict serves to compensate damage. Where someone exceeds the speed limit by 100km/h, there could be wrongful conduct as well as culpability, but the conduct will, in the absence of damage, not be wrongful for the purposes of the law of delict. By applying the general principles it is clear that once the child is born in a case such as the present, the elements of a delict will be present and there will be no need to resort to fictions and casuistry.

It is therefore submitted that the Supreme Court of Appeal decided correctly to apply the general principles of the law of delict.

In addition the use of general principles will also make provision for the case (referred to by the Supreme Court of Appeal) where the child is born with congenital syphilis as a result of his mother being infected prior to his conception (see above). Related to these cases are children born with handicaps as a result of the negligence of a medical practitioner. These cases do not fit within the confines of the *nasciturus* fiction, but the victims in these cases have also suffered damage at the hand of another person and should therefore not be denied a remedy.

The Dutch Supreme Court of Appeal or *Hoge Raad* in the *Kelly* case (Nr C03/206HR JMH/RM, www.rechtspraak.nl) has recognised the right of a plaintiff who suffers damage prior to being born and allowed a "wrongful life"

claim (see also the discussion by Mukheibir "Wrongful Life Claims in the Netherlands – The *Hoge Raad* Decides – C03/206 HR JHM/RM" 2005 *Obiter* 753). In the case of a "wrongful life" suit, a claim is instituted on behalf of a child born with a handicap under circumstances where the parents, had they been aware of the handicap, would have chosen to have the foetus aborted. The claim which is instituted on behalf of the child is based on the fact of its existence. In the *Kelly* case the child was born with a genetic disorder because the medical practitioner did not perform proper diagnostic procedures (such as an amniocentesis) even after being alerted by the family to the fact that there were other family members who either carried the gene, or were suffering from the same genetic disorder. The parents, had they been aware of the abnormality, would have had the foetus aborted. The Netherlands was not the first country to allow a wrongful life claim; in France a similar claim was successful in 2000 (the *Perruche* case; Arrêt nN 457 du 17 novembre 2000). The French legislature prohibited wrongful life claims after the *Perruche* case, and generally speaking these claims are not allowed in other jurisdictions (see Mukheibir 2005 *Obiter* 735 and further; see also Stolker *De Dag Verga Waarop ik Geboren Wordt* (2003) Dies Rede Universiteit van Leiden; and Uys and Dute, *JME Online* http://jme. bmjjournals.com/cgi/ content/full/30/4/393).

In the South African case of *Friedman v Glicksman* (1996 1 SA 1134 (W)) the court found the wrongful life claim to be against public policy and did not allow it. The court's reasoning was based *inter alia* on the fact that assessment of damages would entail a comparison between the existence and the non-existence of the child. The *Hoge Raad* in the *Kelly* case did not resort to this comparison; instead it made an estimate of the damage that Kelly had suffered in accordance with the discretion accorded to it in terms of article 6:97 of the Dutch Civil Code.

Although the Supreme Court of Appeal has not decided a wrongful life claim, it is submitted that a child born with handicaps in such an instance ought not to be without recourse merely because of the fact that it is almost impossible to assess the damage in terms of a comparative method. It is clear that in this instance damage has been suffered, and the court has to employ a suitable method by means of which it can assess the damage. In addition, it is not conceived that a child could sue its parents for not having aborted it, because a child would, as in Dutch law, not have a right to its own abortion.

5 Conclusion

In *RAF v Mtati* (*supra*) the Supreme Court of Appeal has chosen to solve the problem of the child born with a handicap as a result of injuries sustained *in ventre matris* with reference to general principles and therefore not to apply the *nasciturus* fiction. For the proponents of a general, abstract approach to the law of delict resembling the systems of continental Europe, this would be regarded as a move in the right direction and away from casuistry.

At the same time the application of the general principles, in particular the rules of legal causation, should prevent the "floodgates of liability" from opening and a deluge of lawsuits against mothers, fathers, doctors and others in the name of a child born with a handicap.

The decision in this case could also pave the way for wrongful life suits, as it would seem unfair to deny such a plaintiff a claim merely because it had not been conceived at the time the damage-causing event occurred.

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