

CASES / VONNISSE

WRONGFUL LIFE CLAIMS IN THE NETHERLANDS – THE *HOGE RAAD* DECIDES

C03/206 HR JHM/RM

1 Introduction

The Netherlands has always had a reputation for being more progressive than most societies. In addition to the booming prostitution trade and the ubiquitous coffee-shops where one may drop in for a whiff of cannabis without fearing prosecution, euthanasia was legalised in 2001 (after having been practised and tolerated (“gedoogd”) for many years prior to legalisation).

The *Hoge Raad* has done it again with its decision in the *Kelly* case, in which a child, Kelly Molenaar, was awarded damages for the fact that she had been born with a severe handicap (Nr. C03/206HR JMH/RM, www.rechtspraak.nl).

Ever since this case reached the lower courts, it has resulted in much publicity in both academic journals and the popular press. Awarding Kelly damages for being born with a handicap gave rise to several ethical problems, *inter alia* the fact that a child would in fact be claiming damages for the fact that it had not been aborted. Furthermore, one would invariably be faced with a comparison of the non-being of the child with its present state, something which is extremely problematic.

In South Africa only one wrongful life claim has served before the courts, and it was turned down on the basis that it was against public policy (see par 6 below). The courts in England, Germany, Australia and the majority of states in the United States of America have also refused wrongful life claims.

This note focuses on the *Kelly* case, and explores possible bases in South African law for a claim made on behalf of a handicapped child.

2 Terminology

Prior to discussing the case in question, the terminology as it was used in this case will be explained. The Dutch courts make use of the English terms “wrongful birth” and “wrongful life” to distinguish between claims brought on behalf of the parents and on behalf of the child. A “wrongful birth” claim refers to a claim instituted by parents in the event of a child being born with a severe handicap. This handicap can either 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, or the negligence of the obstetrician in connection with the circumstances surrounding the pregnancy or birth. A “wrongful life” claim is a claim 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 an abortion. In the case of a “wrongful conception” claim a doctor is sued for a failed sterilisation which results in a conception (South African law recognises the latter – see, *eg, Administrator, Natal v Edouard* 1990 3 SA 581 (A); and *Mukheiber v Raath* 1999 3 SA 1065 (SCA)).

3 The Kelly case

3.1 Facts

Kelly Molenaar was born in 1994. She was very seriously physically and mentally handicapped. Kelly’s mother had previously had two miscarriages before giving birth to a normal daughter. When she was pregnant with Kelly in 1993, she informed the obstetrician that one of her husband’s cousins was handicapped as a result of a chromosomal deficiency. She raised the possibility of an amniocentesis. The obstetrician took note of this information, but decided that it was not necessary to perform the procedure. At the same time another cousin of the husband was a carrier of this same chromosomal deficiency, and his wife, also pregnant and under treatment with the same obstetrician, was referred for an amniocentesis. It was a well-known fact that had Mrs Molenaar been aware of the fact that she expected a foetus thus afflicted, she would have opted for an abortion.

Kelly was born suffering from the same chromosomal deficiency as the cousin of Mr Molenaar. She was so severely handicapped that her parents decided to claim damages and in 1996 they sued the hospital (the then Leidsche Universitair Medisch Centrum or LUMC), as well as the obstetrician, in their own names (wrongful birth) as well as on behalf of Kelly (wrongful life), claiming damages for both patrimonial and non-patrimonial loss.

The following heads of damages were claimed:

- (1) costs of raising and educating the seriously handicapped Kelly;
- (2) costs for medical and other treatment;
- (3) costs incurred for the rest of the family as a result of the handicap of Kelly;
- (4) the costs of the psychiatric treatment of the mother as a result of her pain;
- (5) the non-patrimonial loss of the mother as a result of the confrontation of the pain of her child and the disruption of the family;
- (6) the non-patrimonial loss of the father as a result of the confrontation of the pain of his child and the disruption of the family;
- (7) legal costs; and

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- (8) the non-patrimonial loss of Kelly consisting of serious physical and mental suffering which she had suffered since birth, and which she would still suffer in the future.

32 *Decision of the Lower Courts*

The court of the first instance, the *Rechtbank 's-Gravenhage* (the Hague), ordered the hospital and the obstetrician to pay the following:

- (1) the cost of educating and raising Kelly;
- (2) extra costs for medical and other treatment arising from the handicap of Kelly;
- (3) extra costs incurred by the family as a result of the handicap;
- (4) the psychiatric costs of the mother; and
- (5) the non-patrimonial loss of the mother.

The wrongful life claim (Kelly's claim for both patrimonial and non-patrimonial loss) was not allowed, and neither was the father's claim for non-patrimonial loss.

Against this claim the hospital and the obstetrician appealed, while the plaintiffs entered a cross-appeal with regard to the claim on behalf of Kelly which had not succeeded.

In March 2003 the Court of Appeal of the Hague (*Gerechtshof 's-Gravenhage*) held that the damage suffered by Kelly and her parents was caused by the failure of the obstetrician to have the diagnostic procedure performed. The orders of the lower court were confirmed on appeal. In addition the cross-appeal by the parents was upheld and the hospital and obstetrician were ordered to compensate the non-patrimonial loss of Kelly, as well as her patrimonial loss, insofar as her parents were not compensated for this. The court also allowed the father's claim for non-patrimonial loss.

33 *Hoge Raad*

The case eventually went on appeal to the *Hoge Raad*, the Dutch Supreme Court of Appeal, and judgment was handed down on 18 March 2005.

The defendants argued that Kelly had no claim against them. They submitted the following:

- (1) Kelly was no party to the agreement between the hospital and the mother, and therefore had no contractual claim.
- (2) Kelly also could not claim on the basis of delict ("onrechtmatige daad"), because she had to take her life as it was given to her; that she had no right to her own non-existence, or the termination of her mother's pregnancy (this submission related to the assessment of damage, which would then entail a comparison between Kelly's existing condition and her non-existence).
- (3) There was no causal link between the conduct of the obstetrician and the damage suffered by Kelly, because Kelly's handicap was the result

of a chromosomal deviation, and not the failure of the obstetrician to have a prenatal diagnostic procedure performed.

Regarding the first submission, the *Hoge Raad* held that, although an expectant mother concludes a contract with a medical practitioner in her own name, insofar as the contract is not concluded for a termination of pregnancy, and insofar as it relates to the pregnancy, the object of this contract is the care of the unborn child. In this sense the medical practitioner also has a duty towards the unborn child to *inter alia* perform certain prenatal diagnostic tests and to consult with a genetics expert under certain circumstances. The mother has a right to make an informed decision as to whether or not she wishes to continue with the pregnancy. Only the mother has the right to make this decision; neither the medical practitioner nor the (at that stage unborn) child has a right to the termination of the pregnancy.

Regarding the computation of patrimonial loss; the defendants argued that a comparison would have to be made between the present circumstances and the hypothetical situation had Kelly not been born; therefore comparing the present situation with her non-existence. It was alleged that this was untenable, because a state of non-existence could not be held as being more favourable than an existing state.

The *Hoge Raad* also rejected this argument, because article 6:97 of the Dutch Civil Code provides that damage has to be assessed in accordance with the method which is most appropriate to the nature of the damage. In the present case this would entail that all costs incurred with regards to the education and maintenance and ameliorating the consequences of her handicaps would have to be compensated. It was therefore not necessary to resort to a comparison between "non-existence" and "existence" to assess the damage.

The *Hoge Raad* rejected the third submission on the basis that, although it is true that Kelly's handicap in itself was not caused by the failure to have the procedure performed, this failure led to the parents not exercising their choice to terminate the pregnancy, and this indirectly contributed to her damage. For the purposes of article 6:98 of the Dutch Civil Code this is sufficient to attribute damage ("toerekening van schade") to the defendant.

The *Hoge Raad* furthermore held that Kelly was in principle entitled to compensation for non-patrimonial loss in terms of article 6:106 of the Civil Code. She had indeed suffered loss in that there had been an infringement of her person as a result of her severe handicaps, which she could have been spared had the parents terminated the pregnancy.

4 Wrongful life cases in other jurisdictions

Although these claims have on the whole been unsuccessful, the Netherlands was not the first country in which a wrongful life claim was allowed. The first wrongful life claim was allowed in the state of California (*Turpin v Sortini*, 31 Cal.3d 220, 643 P.2d 954 Cal Rptr 337 (1982)) in the United States of America in 1982, and two other states (New Jersey and Washington) subsequently recognised these claims. A wrongful life claim was allowed in Israel in 1986 (CA 518/ 82 *Zeitshoff v Katz* 1986 40 2 PD 85 Supreme Court of Israel). One of the most well-known wrongful life claims is

that of Nicholas Perruche granted in 2002 by the French *Cour de Cassation* (the French Supreme Court of Appeal) (Arrêt n° 457 du 17 novembre 2000).

Nicholas Perruche was born in 1983 with severe handicaps. He could neither hear nor speak, and was virtually blind. He had a weak heart and never learnt to walk. Nicholas's handicaps resulted from the fact that his mother was exposed to German measles in the fourth week of gestation as a result of his sister having contracted the disease. When Nicholas was two, Mrs Perruche suffered a mental breakdown and required psychiatric care. His parents subsequently divorced. His mother went for tests during pregnancy, but the tests showed contradictory results. The physician did not regard it as necessary to pursue the matter any further. After Nicholas was born with severe handicaps, the parents instituted an action against the doctor and the laboratory, both in their own names (wrongful birth claim) and on behalf of Nicholas (wrongful life claim). The wrongful birth claim was successful, but in the case of Nicholas' claim he was awarded damages on four occasions, only to have the judgments reversed on appeal. Eventually the case went to the *Cour de Cassation* and Nicholas' claim was awarded. He was awarded damages to cover the costs of maintenance for the rest of his life.

The decision sparked an outcry in France. Disabled people regarded the decision as demeaning to them. In addition, gynaecologists and obstetricians went on strike, refusing to perform routine ultra-sound examinations. In the end the French Parliament, in an emergency sitting, tabled legislation which prevents plaintiffs from instituting actions for the fact that they had been born. (La loi No. 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé, JO 28/02/2002 au 12/03/2002.) In terms of this law wrongful life claims have been prohibited ("Nul ne peut se prévaloir d'un préjudice du seul fait de sa naissance").

As a general rule, however, these claims are rejected. Wrongful life claims have been refused in the majority of states in the United States of America (except for the three jurisdictions mentioned above), Australia and England (Stolker *De Dag Verga Waarop ik Geboren Wordt* (2003) Dies Rede Universiteit van Leiden; and Uys and Dute *JME Online* <http://jme.bmijournals.com/cgi/content/full/30/4/393>). In England such claims have been prohibited by law (Congenital Disabilities (Civil Liability) Act 1976). The German *Bundesgerichtshof* has also turned down wrongful life claims (BGH 18 januari 1983, *Juristenzeitung* 1983 450).

5 Discussion

The decision in the Kelly case is controversial and even before the *Hoge Raad* had made its decision there had been much commentary and an entire conference was devoted to the topic (eg, the Lustrum Congress held at the University of Nijmegen on 19 and 20 June 2003; see commentary on the Nijmegen Conference in *inter alia De Groene Amsterdammer* 28 June 2003; and see also the proceedings of the Nijmegen Conference which were published as Kortmann and Hamel (eds) *Wrongful Birth en Wrongful Life* (2004)). Where the wrongful life cases become particularly difficult is where the medical practitioner has failed to inform the parents of a congenital defect and the parents, had they known the truth, would have opted to abort

the child. In this case, according to the critics, the child's claim is based on its own non-existence. When the damage is assessed the present position of the child is compared with the position the child would have been in had it not been born. The problem is trying to assess damage with reference to a non-existent situation. In particular in the present case, the defendants objected to this comparison, but the *Hoge Raad* solved this problem by not using a comparative approach with the assessment of Kelly's claim (see par 4 above). Article 6:97 of the Dutch Civil Code 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.")

Another problem with wrongful life cases is that handicapped people regard these cases as demeaning to them, because of the fact that these claims seem to support the notion that living with a handicap is somehow a second rate existence (see, eg, the commentary on the *Kelly* case on the website of the Dutch Catholic newspaper *Katholiek Nieuwsblad* which may be found at <http://www.katholieknieuwsblad.nl/actueel22/kn2227c.htm>). The *Hoge Raad* held, however, that precisely because the judge makes use of his competence to assess the damage as he sees fit in the light of the circumstances, he therefore does not base this assessment on a comparison between Kelly's existence and non-existence. The idea that not being born is better than to be born with a handicap is then not the basis of a wrongful life claim, and instead of disregarding the dignity of the handicapped person, this claim rather acknowledges it, because the award of damages will enable the plaintiff to live a dignified life insofar as it can be done with the monetary award. It would detract from Kelly's dignity 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 the argument is based on her non-existence if her mother had exercised her right to an abortion.

A third problem which has been raised in connection with wrongful life claims is that handicapped children born under circumstances such as that of Kelly could also sue the parents, particularly the mother. The *Hoge Raad* however held that this would not happen. Children do not have a right to their own non-existence and neither do they have a right to termination of their mother's pregnancy. The only person who may decide to terminate the pregnancy is the mother. The wrongful life claim is based on a legal duty owed by the medical practitioner to the (at that stage) unborn child, not on the child's right to its own abortion.

Another argument which has been raised against wrongful life claims is that the availability of such claims will result in medical practitioners practising defensive medicine. The *Hoge Raad* also rejected this argument. The criterion which is used in these cases is simply whether the obstetrician has acted as one can expect a reasonably competent and reasonably acting obstetrician to have acted at the time of his conduct. In this particular case neither the hospital nor the obstetrician questioned the finding that the conduct of the obstetrician was below the expected standard.

6 South African case law

The only instance in South African law where a wrongful life claim has been instituted was in *Friedman v Glicksman* (1996 1 SA 1134 (W)). In this case the plaintiff had consulted with a specialist gynaecologist and asked him to advise her as to whether she was pregnant with a potentially disabled infant. It was commonly understood that the gynaecologist would inform the plaintiff if there was a greater than normal risk that the unborn child would be born with a disability or abnormality, so that the plaintiff would, in the eventuality of the foetus being abnormal, be in a position to terminate the pregnancy. The defendant undertook certain tests and advised the plaintiff that there was no greater than normal risk of having an abnormal or disabled child and advised her to carry the child to full term. When the child was born, she was disabled, and the plaintiff instituted an action for damages both in her personal capacity (wrongful birth claim) and a claim on behalf of the child ("wrongful life").

The defendant excepted to both the wrongful birth and wrongful life claims. With regard to the wrongful birth claim the defendant argued that it would be against public policy to enforce the contract entered into between the plaintiff and the gynaecologist because "it would encourage abortion and thus be inimical to the right to life enshrined in s 9 of the Constitution of the Republic of South Africa Act 200 of 1993 as well as to the generally recognised sanctity accorded by society to life and the process by which it is brought about" (1138 D-E). The court rejected this argument as having no substance and as "[flying] directly in the face of the Abortion and Sterilisation Act 2 of 1975" (1138E). In terms of section 3(c) of this act an abortion may be procured "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". For this reason the court upheld the wrongful birth claim as the contract entered into between the plaintiff and her gynaecologist was "sensible, moral and in accordance with modern medical practice" (1138H-I).

Regarding the wrongful life claim, the defendant raised the following exceptions (1140 D-E):

- 1 In so far as the plaintiff's claim is based on a breach of contract, the child had not been a party to the contract and could not have been affected by any such breach.
- 2 The defendant did not owe the child a duty of care (one presumes the court is in fact referring here to a legal duty) which would lead to the termination of her existence.
- 3 The defendant did not in law act wrongfully against the child.
- 4 There is no legal basis in South African law for the damages claimed on behalf of the child as this would entail an assessment of damages based on a comparison between the value of non-existence and the value of existence in a disabled state.
- 5 The action is *contra bonos mores* and against public policy.

The court held that the first submission was valid and that it was not possible for the child, who at the time that the contract was concluded had

not been conceived, to be a party to the contract, because “it is trite law that an agent cannot act on behalf of a non-existent principal” (1140G). Furthermore, the construction of a contract for the benefit of a third party would likewise not be used, because at the time when the so-called benefit, namely the termination of the pregnancy, could be accepted by the child, this “benefit” was no longer possible (1140H).

The question therefore arose as to whether the child had an action in delict (submissions 2-5). The court referred to foreign case law (American and English) and came to the conclusion that it could not allow such a claim. The reasoning was based for the most part on the fact that assessment of damage would be based on a comparison between the marred existence of the child, on the one hand, and the state of its non-existence on the other hand (1142I-1143C):

“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 court held that to allow such a cause of action would, in addition, make it possible for a disabled child to sue its parents because “they may have for a variety of reasons allowed such child to be born knowing of the risks inherent in such decision” which would give rise to an untenable burden being placed on the shoulders of parents.

In the final instance the court held that allowing damages to be claimed on the basis alleged by the plaintiff is “completely contrary to the measure of damage allowed for in the law of delict”, because it would involve a comparison between the child’s non-existence, and his existence in the handicapped state. The court held this to be “illogical and contrary to our legal system”.

It was noted above that the *Hoge Raad* was presented with and dealt with the same arguments raised by the court in the *Friedman* case, in particular the assessment of damage and the fact that a child could sue its own parents. Regarding the assessment of damage, our courts have traditionally applied the sum-formula approach which involves a comparison between the hypothetical situation if the delict had not been committed, with the plaintiff’s present position, although it has been said that in actual fact they pay lip-service to this approach (Visser and Potgieter *Law of Damages* 2ed (2003) 72). The concrete approach, which has been suggested by writers such as Reinecke and has ostensibly been applied in *Santam Versekering-maatskappy v Byleveldt* (1973 2 SA 146 (A)) also involves a comparison of the plaintiff’s position before and after the delict. In the case of a wrongful life claim it would not be possible to make such a comparison, because one would again have to compare an existing state with a state of non-existence. However, it was said with regard to claims for loss of earning capacity, which are very speculative and impossible to assess accurately, even with the help of actuarial calculations, that the court cannot, because it is difficult to assess damage, adopt a *non possumus* attitude and not assess the damage at all; the court can still make an award based on the evidence before it (*Southern Insurance Association Ltd v Bailey* NO 1984 1 SA (A) 114).

The fact that the Supreme Court of Appeal in *RAF v Mtati* (2005 JDR 0739 (SCA)) decided to allow a delictual claim of a child for damage suffered *in ventre matris* could also change the situation.

In that case a Mr Mtati brought a claim of R1 365 580 against the Road Accident Fund in terms of Article 40 of the Agreement set out in the schedule to the Multilateral Motor Vehicle Accidents Fund Act (93 of 1989; and the predecessor of the Road Accident Fund Act) on behalf of his minor daughter Zukhanye. He 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 his wife, who was a pedestrian and at the time of the accident pregnant with Zukhanye, his 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 court *a quo*, applying the so-called *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.

On appeal Farlam JA 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 was following the approach of Joubert (*Pinchin NO v Santam Insurance Co Ltd* 1963 2 SA 254 (W) *Nasciturus – Besering van – Eis na Geboorte? II* 1963 THRHR 295). 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).

This paves the way for a wrongful life claim in South African law – if a child who contracts syphilis before conception is allowed to sue the person who infected his mother, why should someone born with a congenital defect as a result of failure on the part of the medical practitioner to perform the appropriate diagnostic tests not be similarly allowed to sue the practitioner? After all, it is not the fault of the child that it is living with a handicap. Why should it be deprived of a remedy merely on the basis of arguments relating to the fact that one cannot comprehend the non-existence of the child?

7 Conclusion

It appears as if the *Hoge Raad* has circumvented many of the potential ethical and legal criticisms that have been levelled against a wrongful life claim. It remains to be seen whether the Dutch legislature will follow its French counterpart and rule that wrongful life claims cannot be instituted.

Although the South African courts have hitherto not recognised such a claim one wonders whether, in the light of the fact that the Supreme Court of

Appeal's recent decision not to make use of the *nasciturus* fiction, but to instead apply the ordinary principles of delict to the claims of a child injured *in ventre matris* (in *R v Mtati* 2005 JDR 0739 (SCA)), the ambit of these claims could be extended to cases where the injury or handicap with which a child is born is caused by wrongful conduct prior to the conception of such a child (as was the case in the *Kelly* case), unless our courts continue to regard these claims as against public policy.

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