

Liability of medical practitioners to children born with congenital defects – a discussion of *Stewart v. Botha*

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South African law recognises claims against medical practitioners by mothers whose children have been born with congenital defects, the so-called '*wrongful birth actions*'. The basis of such claims is that if the medical practitioner had detected and informed the mother of the fetus's congenital defects, she would have terminated the pregnancy and the child would not have been born and suffered from the defects and caused her additional expense. The Supreme Court of Appeal in *Stewart v. Botha* (340/2007) [2008] ZASCA 84 had to consider whether a child born with congenital defects can himself or herself sue the medical practitioner for allowing the child to be born, the so-called '*wrongful life actions*'.

The court held that wrongful life actions should not be recognised in our law because the core of such cases is to require the court to decide whether it is preferable, from the child's perspective, not to have been born at all.

The facts

Stewart's case was an action against various medical practitioners consulted by the mother during her pregnancy. The basis of the claim was failure of the medical practitioners to detect and inform the parents of the abnormalities that the child presented while still a fetus. The parents further alleged that had the medical practitioners informed them of these abnormalities, the mother would have terminated the pregnancy and the child would not have been born and suffered from these abnormalities.

The mother of the child sued in her personal capacity for damages relating to the maintenance, special schooling and past and future medical expenses of the child. The child, represented by his father, brought an alternative claim for the same damages. In essence, the parents sued for both wrongful birth and wrongful life. The medical practitioners argued that there was in law no duty on them to ensure that the child was not born. They further argued that any claim that recognises such a duty would be contrary to public policy and good morals.

The law

It is trite law that negligent conduct that causes physical damage to a person is on the face of it wrongful. However, the element of wrongfulness becomes less straightforward when dealing with cases of negligent omissions and negligently caused economic loss. The doctors did not cause physical harm to the child. In such instances, wrongfulness depends on the existence of a legal duty not to act negligently and 'the imposition of such a legal duty is a matter of judicial determination involving criteria of public or legal policy consistent with constitutional norms'. Put differently, where no precedent exists (as in this case), what is required is a weighing of a balance of the interests of the parties affected and the interests of the community in terms of what they perceive as the demands of justice.

The Court examined the general trend in international jurisdictions in wrongful life actions. The leading case in England, *McKay v. Essex Area Health Authority* [1982] QB 1166 (CA), rejected this claim on an analysis of their common law and also interpreted the Congenital Disabilities (Civil Liability) Act 1976 (UK) as prohibiting such claims. Common law jurisdictions such as Canada, Australia and Singapore have also refused claims of this nature. However, in Holland and Israel the child's claim was granted. The trend to refuse such claims is similar in continental jurisdictions. In the USA, the New York Supreme Court in *Park v. Chessin* 400 N.Y.S. 2d 110 (1977) allowed a claim of this nature for special damages while at the same time refusing a claim for general damages.

The judgment

In the present case, the court examined the various legal and moral arguments for and against wrongful life actions. One argument is that since the question is one of existentialism, it is beyond the realm of the law's understanding or ability to solve and is best left to philosophers and theologians. The critics of this argument argue that it is precisely the function of the court to assess damages in difficult cases such as pain, suffering and loss of amenities of life. It is, of course, not merely difficult but impossible to assess the harm caused because it is essential to such a decision that the court finds that non-existence is preferable to life.

It has also been argued that allowing a claim of this kind would open the door to claims by children against their mothers in circumstances where the mother has been informed of the congenital defects but chose not to terminate the pregnancy. The counter-argument is that it is unimaginable that a mother's choice not to avail herself of her right to terminate a pregnancy under certain circumstances would be unlawful. In opposition to the claim, it has also been argued that to allow such a claim would cause medical practitioners to be overly cautious and advise termination of pregnancy in order to avoid the likelihood of liability. In counter-argu-

ment, the general practitioner's behaviour must meet the standard of a reasonable person and if the recommendation of termination of pregnancy is followed and turns out to have been unreasonably advised, it could equally give rise to a claim by the parents against the medical practitioner. The likelihood of liability is therefore not altogether avoided. It has also been argued that allowing such claims could encourage claims for minor defects.

Having considered the various arguments, the court concluded that wrongful life actions should not be allowed because, from whatever perspective one views the matter, the essential question that the court will be called upon to answer is whether the particular child should have been born at all. The court said that 'this 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'.

Conclusion

The liability of medical practitioners to children born with congenital defects is limited to claims by parents for wrongful birth. The damages granted are based on the costs of maintaining the child which would not have been necessary had the child not been born defective.

Currently, South Africa law does not recognise wrongful life lawsuits on the basis of public policy considerations.

It is the essence of wrongful findings that the decision is based on legal convictions of the community that can change over time. However, wrongful life actions are unlikely to be allowed for the foreseeable future.