THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case number : 340/07

In the matter between :

ELIZABETH GEORGINA ELZONA STEWART	**FIRST APPELLANT**
BRIAN STEWART	**SECOND APPELLANT**
and	
DR M BOTHA	**FIRST RESPONDENT**
DR S SMAL	**SECOND RESPONDENT**

CORAM : **STREICHER, NUGENT, HEHER, CACHALIA JJA *et* SNYDERS AJA**
DATE : **21 MAY 2008**
DELIVERED : **3 JUNE 2008**

Summary: Delict – liability of medical practitioner to a child born with congenital defects – failure to inform mother who would have terminated pregnancy – wrongfulness – legal policy.

Neutral citation: *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 JUNE 2008)

SNYDERS AJA/

SNYDERS AJA:

[1] The appellant and his wife have a son, Brian, who was born on 4 August 1993 with severe congenital defects. These included a defect of the lower spine which adversely affects the nerve supply to the bowel, bladder and lower limbs[1] as well as a defect of the brain[2]. The appellant's wife, as first plaintiff, instituted an action in the Cape High Court against the respondents, respectively the general medical practitioner and specialist obstetrician and gynaecologist whom she consulted during her pregnancy, for her special damages relating to the maintenance, special schooling, past and future medical expenses consequent upon her son's condition. The appellant, as second plaintiff, on behalf of his minor son, instituted a delictual claim in the alternative to that of the first plaintiff for the same damages. It is acknowledged that the main claim would be good in law, if it is still enforceable, and thus the same damages now claimed would be recoverable by the child's parents. The respondents excepted to the appellant's claim, which was upheld by Louw J, who dismissed the appellant's claim with costs. With the leave of that court the matter came on appeal to this court.

[2] In the particulars of claim it is alleged that the respondents, whilst treating the first plaintiff during her pregnancy, were under a duty to detect any abnormalities in the foetus, to advise the first plaintiff thereof, who would have undergone a termination of pregnancy and consequently that Brian would not have been born and would not have suffered from the severe physical handicaps that he does.

[3] The first respondent excepted to the appellant's claim on the basis that it does not disclose a cause of action, particularly as there is no duty on the first respondent to ensure that Brian was not born and that a claim that recognises such a duty would be *contra bonos mores*. The second respondent alleged in his exception that the appellant's claim is 'bad in law, *contra bonos mores* and against public policy'.

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[1] In medical terms known as lumbo-sacral myelomeningocele, commonly referred to as spina bifida.
[2] In medical terms known as hydrocephalus.

[4] It is for the excipient to satisfy the court that the conclusion of law pleaded by the appellant cannot be supported by any reasonable interpretation of the particulars of claim.[3] For this purpose the facts pleaded in the particulars of claim are accepted as correct.[4] There was no dispute between the parties that this approach was correct or that exception was not the appropriate stage at which to decide this matter.[5]

[5] The exceptions dispute the wrongfulness of the failure by the respondents to have detected and informed the first plaintiff of congenital defects in the foetus she was carrying. As there has been a considerable amount of recent debate[6] on the subject and to provide focus in the current enquiry, it is necessary to revert back to the starting point in our law of delict when wrongfulness is to be decided. In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 468 the following is stated:

'[12] 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. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.

'[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not *prima facie* wrongful ("unlawful" is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless it is a case of *prima facie* wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff.) In other words, conduct is wrongful if public policy

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[3] *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318D-E; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965 para 6.

[4] *Marney v Watson* 1978 (4) SA 140 (C) at 144F-G; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 143I-J.

[5] See further *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465G-466A on the suitability of this approach in certain circumstances.

[6] Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90; J Neethling 'The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?' (2006) 123 *SALJ* 204; R W Nugent 'Yes, it is always a bad thing for the law: A reply to Professor Neethling' (2006) 123 *SALJ* 557.

considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.'

[6] The enquiry as to negligence and wrongfulness is separate and distinct and should not be confused as to terminology or substance.[7]

[7] 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.'[8]

[8] The application of criteria of public and legal policy has created precedent for the imposition of liability that caused pure economic loss.[9] When there exists no precedent, as in the present case, the process involves '. . . policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (*per* M M Corbett in a lecture reported *sub num* "Aspects of the Role of Policy in the Evolution of the Common Law" in (1987) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interest of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands.'[10] This approach, since the advent of the Constitution, is to be supplemented and enriched by the imperatives embodied in the Constitution.[11]

[9] Claims arising from a similar context, although distinctly different, have received legal recognition on accepted principles and norms in our courts and many

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[7] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 144 para 11; *Telematrix* at 469B-E; R W Nugent at 558.
[8] *Trustees, Two Oceans Aquarium Trust* at 144B-C.
[9] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (AD); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA).
[10] *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A) at 318E-H.
[11] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) at 1257D-F.

international jurisdictions. In *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) the action of a child to recover damages for an injury done to it whilst *in utero* was recognised. The claim by parents, against a hospital that agreed and failed to perform a surgical tubal ligation in order to render the mother sterile, for the cost of maintaining and supporting a child that was born afterwards,[12] was granted in *Administrator, Natal v Edouard* 1990 (3) SA 581 (A). The claim of a mother against a medical practitioner for not having detected and informed her of the congenital defects in her foetus which she would have aborted[13] had she known was recognised in *Friedman v Glicksman* 1996 (1) SA 1134 (W) and survived the exception taken against it. In the same case a claim of the child, the same as is presently under consideration, received the attention of a South African court for the first time and was refused on public policy considerations.

[10] In these cases the claim that arose and was awarded was that of the parents who sought to recover the additional financial burden they had to bear in consequence of the negligence. There is no question in those cases of the essential dilemma that arises in the case before us, as it is not questioned in those cases whether the child would have been better off not to have been born. Those cases commence with an acceptance of the fact that the birth has occurred and seeks to address the consequences of the birth.

[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.

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[12] Claims of this nature have been referred to as 'wrongful birth', 'wrongful pregnancy' and 'wrongful conception' claims in contrast to the 'wrongful life' claims which is the one involved in the present case. Although the use of this terminology is unfortunate and has been widely criticised for that reason, it is persistently used as a convenient reference. For the criticism of the use of these terms see the minority judgment of Kirby J in *Harriton v Stephens* (2006) 226 CLR 52. I consciously refrain from using it in this judgment.

[13] This claim is also referred to in literature and judgments as 'wrongful birth' claims.

[12] There are courts that have embarked on this enquiry. By far the majority of jurisdictions worldwide have refused claims of this nature.[14] The leading case in England, *McKay v Essex Area Health Authority* [1982] QB 1166 (CA) did so on an analysis of the common law and also interpreted the *Congenital Disabilities (Civil Liability) Act* 1976 (UK) to be prohibitive of such claims. Common law jurisdictions in Canada, Australia[15] and Singapore have refused claims of this nature, but in Israel, in the matter *Zeitsov v Katz* (1986) 40 (2) PD 85 (Isr) the child's claim was granted.

[13] In continental jurisdictions[16] the trend is similar, but Holland in the matter *Leids Universitair Medisch Centrum v Molenaar* no. C03/206, RvdW 2005, 42 provided the exception. Interestingly, during the period 1996 until 2001 French courts allowed such claims. This resulted in political pressure from groups representing disabled people, who advocated the view that the courts in these decisions treated their lives as inferior to non-existence, and groups representing gynaecologists, obstetricians and ultra-sonographers. The political pressure ultimately resulted in legislative reaction when on 4 March 2002 an act was passed that placed France in line with the majority of jurisdictions in the world.

[14] In the United States of America the refusal of the claim in the matter *Gleitman v Cosgrove* 49 NJ 22 (1967) represented the conventional view for many years until the Appellate Division of 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 whilst at the same time refusing a claim for general damages. Thereafter the Supreme Courts of California,[17] Washington[18] and New Jersey[19] followed suit.

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[14] For a very helpful summary of worldwide decisions in claims of this nature, see Ronen Perry 'It's a Wonderful Life' *Cornell Law Review* 93 (2008) 329.
See further *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 444 para 16 on the relevance and role of decisions in foreign jurisdictions on the consideration of public policy in a case.

[15] The most recent and much discussed decision in Australia being that of *Harriton v Stephens* (2006) 226 CLR 52 which was decided 6:1 in favour of refusing the claim.

[16] A thorough discussion on the relevant issues involved pertaining to a decision by the Bundesgerichtshof (sixth Civil Division) appears in B S Markesinis *The German Law of Torts* 3 ed p142.

[17] *Turpin v Sortini* 31 Cal 3d 220 (1982).

[18] *Harbeson v Parke Davis Inc* 98 Wash 2d 460 (1983).

[19] *Procanik v Cillo* 97 NJ 339 (1984).

[15] The nature and extent of the debate that has been raging is apparent from the cases and articles referred to and many more.[20] The debate illustrates that for every argument there has been a counter argument and vice versa and there are hardly novel contentions being raised. Like Omar Khayam I have heard 'Great Argument About it and about: but evermore Came out by the same Door as in I went.' In view of the conclusion that I have arrived at I do not think it necessary to evaluate all the arguments. I intend to refer to the most significant issues in the debate only to demonstrate the kind of difficult questions that arise.

[16] Whilst bearing in mind that the negligence of the medical practitioners did not cause the congenital defects, the starting point of the enquiry was aptly stated in the matter *Speck v Finegold* 408 A 2d 496 at 508 para 7 and 512:

'Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve. The law cannot assert a knowledge which can resolve this inscrutable and enigmatic issue.' (per Cercone J)

'If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be. . . We cannot give an answer susceptible to reasoned or objective valuation.' (per Spaeth J)

[17] The critics of this argument refer to the function often performed by courts of law to assess damages in difficult cases like pain, suffering and loss of amenities of life. This counter argument does not address the real challenge, namely that it is impossible to assess the harm caused, not merely difficult, because it is essential to such a decision that the court finds that non-existence is preferable to life.

[18] As a further development to that argument it is often stated that delictual damages seek not so much to punish the wrongdoer, but to compensate the plaintiff by seeking to place him or her in the position he or she would have been in if the negligence did not occur. If the negligence did not occur the child would not have been born, which brings one back to the questionable assessment.

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[20] Evelyn Ellis and Brenda McGivern 'The wrongfulness or rightfulness of actions for wrongful life' (2007) 15 *Tort L Rev* 135 provides a recent collation of authorities; See also Ronan Perry supra.

[19] It has often been argued that allowing the claim 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 inconceivable that a mother's choice not to avail herself of her right under certain circumstances to terminate the pregnancy[21] would be regarded as unlawful. Furthermore, allowing a claim against one category of defendants could not offer a principled basis on which to allow or refuse a claim against another category of defendants.

[20] In opposition to the claim it has been argued that to allow it would cause medical practitioners to be overly cautious and advise termination of pregnancy in order to avoid the likelihood of liability. This argument has been said to lose sight of the protection the law offers for behaviour that meets the standard of a reasonable person and that if the recommendation of a 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, hence the likelihood of liability is not avoided.

[21] Caution has been expressed that allowing the claim could encourage claims for minor defects. It has been recognised that this cause of action should only be allowed in instances of grave defects.[22] A measure of gravity can only ever be subjectively applied and is so relative that it is completely uncertain and undesirable. It could also be that the more serious the disability the less possible it may be to appreciate the suffering or lack thereof.

[22] Counsel for the appellant submitted that an application of ss 11, 12(2)(a), 27, 28(1)(d) and 28(2) of the Constitution would lead to a conclusion that the claim should be awarded. No suggestion was made which common law principle or principles are to be developed or how the application of those sections would result in an award of the claim. It was further broadly submitted that advances in medical technology, the need for professionals not to act negligently, progressive

[21] In our law in terms of *The Choice of Termination of Pregnancy Act* 92 of 1996.
[22] In *Zeitsov v Katz* 40(2) P.D. 85 (S.Ct. 1986) this problem was stated but not resolved.

reproductive legislation and less than supportive social security services indicate that the 'time is right' for claims of this nature.

[23] Section 11 of the Constitution gives '[e]veryone . . . the right to life'. If anything, a consideration of the sanctity of life would lead to a conclusion to refuse the claim as a decision to award it would entail, of necessity, an acceptance that Brian's life is worse than non-existence and therefore a violation of that very principle.

[24] Section 12(2)(a) of the Constitution[23] in the context of this case relates to the first plaintiff's rights and would be relevant to any duty owed to her, which is not presently under consideration. It's only other relevance is to causation as accepted in this case, that the first plaintiff would have had the right to and would have terminated her pregnancy if she was informed of the congenital defects of her foetus.

[25] Sections 27[24], 28(1)(d)[25] and 28(2)[26] of the Constitution is relevant to the evaluation of considerations of public policy but in giving content to those rights the question where liability in the present context should rest, is not answered. Nobody would deny that Brian's best interest would be served if he had access to all possible medical provision for his condition, but the question remains who should be liable.

[26] It is clear that the debate is wide ranging, diverse and complex even before religious, theological or philosophical arguments are considered.

[27] In those jurisdictions where these claims have been allowed the debate has not been resolved, but an answer has simply been favoured on selected policy

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[23] Section 12(2)(a): 'Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.'
[24] Section 27of the Constitution provides for the right of everyone to health care services, sufficient food and water, social security, social assistance and emergency medical treatment and the obligation of the state to take reasonable legislative measures, within its resources, to achieve the realisation of these rights.
[25] Section 28(1)(d): 'Every child has the right to be protected from maltreatment, neglect, abuse or degradation.'
[26] Section 28(2): 'A child's best interests are of paramount importance in every matter concerning the child.'

considerations without striking a balance that takes all the relevant norms and demands of justice into account and without resolving the impossible comparison between life with disabilities and non-existence. When one considers the content of the duty owed to the child by the medical practitioners, the corresponding right, wrongfulness, harm or damages, the choice between life with disabilities on the one hand and non-existence on the other, is unavoidable. Making that choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child,[27] but involves an arbitrary, subjective preference for some policy considerations and the denial of others.

[28] 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[28] 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.

[29] For these reasons I conclude that the court below correctly refused the claim on exception.

[30] The appeal is dismissed with costs.

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S SNYDERS
ACTING JUDGE OF APPEAL

Concur:
STREICHER
NUGENT
HEHER
CACHALIA JJA

[27] Sections 10 and 11 of the Constitution 1996.
[28] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12 E-F.