

THE IMMEASURABLE WRONGFULNESS OF BEING: THE DENIAL OF THE CLAIM FOR WRONGFUL LIFE

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1 Introduction

In 1996 the Witwatersrand Local Division of the High Court upheld an exception to a so-called wrongful life claim in the decision of *Friedman v Glicksman*¹ (“*Friedman*”). In doing so, the court denied the disabled plaintiff child the opportunity to claim for damages based on the fact that, had it not been for the negligence of the defendant medical practitioners who failed to properly advise his parents, he would not have been born.² Eleven years later the Cape High Court once again denied the existence of the claim,³ albeit for different reasons than those used by the Court in *Friedman*. Against this background the Supreme Court of Appeal had the opportunity to provide its well-reasoned answers to the many questions resulting from the two conflicting decisions and to finally put to rest the matter of whether the action should be recognised in South African law or not. The manner in which the Supreme Court of Appeal dismissed the appeal⁴ calls for another review of the policy arguments underlying this action. This article aims to do so by discussing the fairly recent case law, both in South Africa and in other jurisdictions, and to identify and evaluate the problematic aspects which impede the recognition of the action against the backdrop of a new era in which not only children, but also their rights must be protected. Regardless of the fact of whether the foreign jurisdictions accept or reject this claim, the courts seem willing to engage with changing value systems, having due regard to developments in medical science and the impact thereof on pre-natal care. The argument advanced in this article is that, given the constitutional dispensation and the promulgation of the Children’s Act 38 of 2005,⁵ and in particular the entrenchment of the best interest of the child, the opportunity now exists to reconcile the principles

¹ 1996 1 SA 1134 (W)

² The court did, however, allow the parents of the child to claim special damages resulting from the same set of facts in their so-called wrongful birth claim. See especially 1139-1140 of the decision

³ In *Stewart v Botha* 2007 6 SA 247 (C); 2007 9 BCLR 1012; 2007 3 All SA 440

⁴ *Stewart v Botha* 2008 6 SA 310 (SCA) and also referred to as *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 June 2008))

⁵ Although only some of the provisions of this Act came into operation on 1 July 2007, all of the sections which are mentioned in this article are fully operational

of delict with the constitutionally enshrined rights of children. The underlying aim is therefore to raise awareness of the protection of children's rights in the context of the claim for wrongful life.

2 *Stewart v Botha*

2.1 The facts

The plaintiffs in this matter were the parents of a child born with severe physical disabilities. Their son was born in 1993 with congenital defects which included a defect of the lower spine which affects the nerve supply to his bowel, bladder and lower limbs, as well as a defect of the brain.⁶ The mother, in her personal capacity, claimed special damages in respect of past and future medical expenses resulting from their son's condition, the costs of his special schooling, and maintenance for the remainder of his life from the general medical practitioner and the specialist obstetrician and gynaecologist who treated her during her pregnancy.⁷ The son's father, in the alternative, in his representative capacity, claimed the same damages on behalf of their child but did not claim any compensation for loss of future income or for general damages for pain and suffering and loss of amenities of life.⁸ Both these actions were brought as it was averred that the defendants did not advise the mother of the high risk of the child being born with severe disabilities and had the plaintiffs been so informed, they would have terminated the pregnancy. The defendants took exception to the so-called wrongful life claim, brought on behalf of the child, contending, *inter alia*, that no such cause of action exists in South African law since the defendants did not owe the foetus or, for that matter, the child after his birth, any duty to inform his parents of the possibility of disabilities. They furthermore averred that the damages claimed were not claims which the child may bring as he had suffered no determinable loss himself. The second defendant also argued that the claim was "bad in law, *contra bonos mores* and against public policy".⁹

2.2 The High Court decision¹⁰

While examining the judgment of Goldblatt J in *Friedman v Glicksman*,¹¹ the only other South African ruling pertaining to the recognition of the claim, the Cape High Court accepted the distinctions which the Witwatersrand Local Division made between the different concepts of "wrongful pregnancy", "wrongful birth" and "wrongful life".¹² The Cape High Court evaluated the reasoning of Goldblatt J while also considering the decisions of various

⁶ Para 1 of the SCA decision

⁷ No exception was raised against this claim by the mother, the so-called wrongful birth claim – see para 6 of the Cape High Court decision

⁸ Para 3 of the Cape High Court decision

⁹ The exceptions taken by the defendants are summarized in para 11 of the Cape High Court judgment and also discussed at para 3 of the SCA judgment

¹⁰ *Stewart v Botha* 2007 6 SA 247 (C)

¹¹ 1996 1 SA 1134 (W)

¹² *Stewart v Botha* 2007 6 SA 247 (C) para 7

foreign jurisdictions, including that of the United States of America, England, Australia and Canada. The court found that it could not agree with the three grounds used by the court in *Friedman* in rejecting the claim. It firstly found that the public policy argument, claiming that it would be contrary to public policy to acknowledge that it would be better for a person not to be alive than to live with their disabilities,¹³ has been eroded in South Africa by the Choice on Termination of Pregnancy Act 92 of 1996.¹⁴ This Act, *inter alia*, specifically provides for an abortion in circumstances where “there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality”,¹⁵ therefore implicitly recognising the choice between non-life and life in an impaired state. Louw J found that the reality of a life with disabilities should be recognised and by allowing the claim, it is recognised that the child was now in existence in a disabled state in which it would not have been had it not been born.¹⁶ Similarly the court could not find any reason as to why, in the wrongful life claim, the sanctity of life argument would be “an insurmountable obstacle to the claim”, but not so in the recognition of the claim by the parents in both wrongful pregnancy and wrongful birth actions.¹⁷ The child could therefore not be barred from claiming for damages on the basis of the sanctity of life argument. Furthermore, as to the question of wrongfulness, the court held that the duty owed to the child was that of properly advising his mother and the fact that the only “treatment” presently available to prevent a life with disabilities, is that of an abortion, should not be used as the reason for denying the claim. In the future, advancements in medical science may render the treatment of congenital disorders of the foetus possible and the “negligent failure to diagnose or treat such disorders in accordance with procedures then available, resulting in the birth of a disabled child, will then clearly result in an action for the child.”¹⁸ The child should also be allowed a claim for medical expenses, special schooling and his maintenance as, in certain circumstances, it may be impossible for his parents to claim such costs.¹⁹

The second ground on which the claim was denied in *Friedman* was that it could open the door for disabled children to sue their parents because they, alive to the risks involved, allowed the child to be born. This, the court *in casu* found to be an unconvincing argument as it held that the parents would have been exercising their constitutional right to making decisions regarding reproduction. It would depend on the circumstances and views of the community set out in the Constitution of whether the child would be able to

¹³ *Friedman v Glicksman* 1996 1 SA 1134 (W) 1142I–J

¹⁴ *Stewart v Botha* 2007 6 SA 247 (C) paras 18–19

¹⁵ Section 2(1)(b)(ii)

¹⁶ *Stewart v Botha* 2007 6 SA 247 (C) para 18 The court also cited a passage from *Curlender v Bio-Science Laboratories* 106 Cal App 3d 811:

“The reality of the wrongful life concept is that such a plaintiff both exists and suffers due to the negligence of others”

¹⁷ *Stewart v Botha* 2007 6 SA 247 (C) paras 20–21

¹⁸ Para 22

¹⁹ Para 22

sue his parents and the fact that the child was able to sue the relevant doctor would not affect this claim.²⁰

As to the third ground for the rejection of the wrongful life claim in *Friedman* the court held that the objection to the claim did not lie in the difficulty in assessing the damages suffered by the child but rather in the question of whether the child suffered any damage at all.²¹ It found that the negligent conduct of the defendants were legally irrelevant to the state in which the child was born. The child could therefore, given the current state of medical science, not hold the medical practitioners liable as “the only life ever possible to him was a life in the handicapped state to which he was born.”²² If his mother had exercised an informed decision not to abort, he would still have been in exactly the same state as he was in now. It followed that the wrongful life claim did not disclose a cause of action²³ and the exception was accordingly upheld.²⁴

2 3 The Supreme Court of Appeal judgment²⁵

The Supreme Court of Appeal firstly paid attention to the recent debate on the subject of wrongfulness and negligence and emphasised that the inquiry as to wrongfulness relies on the existence of a legal duty not to act negligently. In determining whether or not conduct could be considered to be wrongful, a balance should be struck between the interests of the community, the interests of the parties and that which the court considers to be “society’s notions of what justice demands”,²⁶ having particular regard to the requirements set by the Constitution.²⁷ The court identified the existential question as to whether, from the child’s perspective, it had been preferable to “not have been born at all”, to be the core issue, and, in order to recognise the claim, one would have to evaluate the existence of the child against his or her non-existence and find that the latter was preferable.²⁸

The court then proceeded by referring to decisions of foreign jurisdictions, both rejecting and acknowledging the claim,²⁹ and concluded that, despite the ongoing debate regarding the matter, it was not necessary to evaluate all these arguments.³⁰ It also, rather tersely,³¹ dismissed the appellant’s broad submissions regarding the relevance of sections 11, 12(2)(a), 27, 28(1)(d) and 28(2) of the Constitution of the Republic of South Africa, 1996.³² *Snyders*

²⁰ Para 23

²¹ Paras 24–29

²² Para 30

²³ Para 31

²⁴ Para 32

²⁵ *Stewart v Botha* 2008 6 SA 310 (SCA)

²⁶ *Minister of Law & Order v Kadir* 1995 1 SA 303 (A) 318E–H as cited by the SCA at para 8 of the judgment

²⁷ *Stewart v Botha* 2008 6 SA 310 (SCA) para 7

²⁸ Para 11

²⁹ Paras 12–14

³⁰ Para 15 It appears that the court considered it sufficient to very briefly refer to some of the arguments and counter-arguments which have been raised regarding this controversial issue, see paras 16–21

³¹ In four short paragraphs, paras 22–25

³² “The Constitution”

AJA concluded that, regardless of the perspective one has regarding a claim of this kind, the “essential question that a court will be called upon to answer ... is whether the particular child should have been born at all”,³³ therefore opting for the latter in the impossible, yet unavoidable, choice between life with disabilities and non-existence.³⁴ This, the court held, “not only involves a disregard for the sanctity of life and the dignity of the child, but involves an arbitrary, subjective preference for some policy considerations and the denial of others.”³⁵ The appeal was accordingly dismissed with costs.³⁶

3 The position elsewhere

3 1 Dismissal of the claim in Australia

On 9 May 2006 the High Court of Australia held by a six to one majority that the claim based on a wrongful life does not constitute a valid cause of action.³⁷ In dismissing the appeals to the decisions of the Supreme Court of New South Wales³⁸ and the New South Wales Court of Appeals³⁹ the highest Australian court also found that the child plaintiffs in both the *Harriton* and *Waller* matters could not prove any damages since proof of such damages would require an impossible comparison between a life without disabilities and non-existence, ie the state in which the children would have been had the negligence not occurred.⁴⁰ The court did, however, in contradistinction to the South African Supreme Court of Appeal, provide extensive reasons for its decision, considering and evaluating the various arguments regarding the subject and explaining their assessment of public policy issues in detail.

3 1 1 *The agreed facts*

Alexia Harriton was born in 1981 with severe congenital disabilities, including blindness, deafness, mental retardation and spasticity. These disabilities were caused by the rubella virus with which her mother had been infected in the first trimester of her pregnancy. Her mother visited the defendant, Dr Paul Stephens, and his father, Dr Max Stephens, who both assured her, following some blood tests, that the fever and rash which she suspected might be rubella, was not in fact so. Alexia’s claim for damages included special damages for past and future medical and care costs and general damages for pain and suffering.⁴¹ On the day after his birth, Keedan Waller was in

³³ *Stewart v Botha* 2008 6 SA 310 (SCA) para 28

³⁴ Para 27

³⁵ Para 27 (footnotes omitted) The court, in the same paragraph, also regarded the recognition of this claim by certain jurisdictions to be a simple preference for certain policy considerations above others “without striking a balance that takes all the relevant norms and demands of justice into account”

³⁶ Para 30

³⁷ *Harriton v Stephens* 226 CLR 52 See also *Waller v James* 226 ALR 457; *Waller v Hoolahan* 226 CLR 136

³⁸ *Harriton v Stephens* (2004) 59 NSWLR 694

³⁹ *Harriton v Stephens* [2004] NSWCA 93

⁴⁰ See for example paras 251–257 of the majority judgment per Crennan J (Gleeson CJ, Gummow, Callinan, Heydon and Hayne JJ concurring) of *Harriton v Stephens*, *Waller v James* 226 CLR 52 as discussed below

⁴¹ See paras 15–20, 158–159, 186–192 and 210–212 of the *Harriton* decision

turn diagnosed as suffering from a cerebral thrombosis, having inherited his father's anti-thrombin 3 deficiency condition. In addition to suffering this condition, Keeden suffered from permanent brain damage, cerebral palsy and uncontrolled seizures. He was the result of IVF treatment which his parents received in November 1999 and despite a letter informing the first defendant of Mr Waller's deficiency, the potential for its transmission to his offspring was never tested. It was agreed that had Mr and Mrs Waller been properly advised by the defendants, being their obstetricians specialising in infertility, *in vitro* fertilization and ante-natal care, they would not have proceeded with the treatment or they would have terminated the pregnancy.⁴²

3 1 2 *The majority decision*⁴³

Writing for the majority of the court, Crennan J identified the main issues to be that of the existence of a duty of care, the proof and calculation of damages, as well as certain questions of policy such as the value of life and corrective justice.⁴⁴ The judge found that, in determining whether a doctor owes a duty of care to a foetus, it was important to bear in mind that it was only the mother who was entitled to a decision to terminate her pregnancy lawfully and that this decision does not necessarily encompass the foetus's best interests.⁴⁵ Although there can be no doubt that a doctor has a duty to advise a mother of problems which may arise during her pregnancy, and that this duty may be mediated through the mother to the foetus, it would be incompatible with the existing duty towards the mother to superimpose such a duty to a foetus. The court held that recognising a "duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the foetus not being born, which may or may not be compatible with the same doctor's duty of care to the mother in respect of her interests, has the capacity to introduce conflict, even incoherence, into the body of relevant legal principle."⁴⁶ The acceptance of such a duty may then also open the door to parents being sued by their children for their failure to terminate the pregnancy.⁴⁷ Hayne J, however, preferred to "leave aside any consideration of what [the lack of proof of damages suffered] might suggest about the duty of care."⁴⁸

⁴² See paras 9–16, 52–61 and 70–76 of *Waller v James* 226 ALR 457

⁴³ Since much which was said in the *Harriton* ruling also applies to the *Waller* cases, only the judgment of *Harriton v Stephens* 226 CLR 52 will be discussed in this note

⁴⁴ Paras 242–278 The court found that despite the fact that no duty of care existed and it was consequently unnecessary to determine any of the other matters referred to, consideration should still be given to these aspects See para 243

⁴⁵ Paras 246–247

⁴⁶ Para 249 The court also remarked that it would not be possible to establish to which "class of" disabled person such a duty would extend (para 261)

⁴⁷ Para 250

⁴⁸ Para 159

As to the question of damages Crennan J emphasised that to be successful in a claim, the plaintiff needs to prove actual damage or loss, a court must be able to calculate the damages and that all of the above implies that a plaintiff is left “worse off” as a result of the negligent conduct of the defendant.⁴⁹ To prove this in a wrongful life claim would require an impossible comparison between a life with disabilities and non-existence.⁵⁰ Since there is at present no field of human learning or discourse which would allow a person experiential pre-existence or afterlife, the court held that “[t]here is no practical possibility of a court ... ever apprehending or evaluating or receiving proof of, the actual loss or damage as claimed by the appellant.”⁵¹ As no damages can be established, no duty of care could also be alleged to have been breached.⁵² The court also dismissed the reliance on cases involving discontinuation of medical treatment since these cases rely on a comparison between continuing medical treatment which prolongs life and discontinuing such treatment which may hasten death. A court is therefore capable of undertaking a balancing exercise in respect of the two possible actions.⁵³

The court was also concerned about what the recognition of a claim for wrongful life might imply as to the value of a disabled person’s life. The court was of the opinion that, even though it does not deny that disabled persons experience a certain amount of pain, disabilities are only one dimension of such a person’s humanity and that it could not be contended that, *in casu*, Alexia Harriton, could not experience pleasure.⁵⁴ Crennan J also raised the question as to how one could allow a disabled person to claim his own non-existence as actionable damage when differential treatment of disabled people is prohibited by statute and no person guilty of manslaughter or murder is entitled to use the claim that the victim would have been “better off” as defence.⁵⁵

The appellants finally submitted that “corrective” or “practical” justice would permit the appellant to recover damages despite the inherent difficulties her claim posed.⁵⁶ The court acknowledged that Alexia Harriton’s circumstances were indeed tragic, but held that the “need for ‘corrective justice’ alone could never be determinative of a novel claim in negligence” and to recognise such a claim would extend the boundaries of liability when “the liability is precluded by ‘an array of other factors’.”⁵⁷

⁴⁹ Para 251

⁵⁰ Para 252

⁵¹ Para 253 All of the other judges, with the exception of Kirby J, seemed to agree with this reasoning as the primary rationale for the denial of the claim

⁵² Para 255 Hayne J, however, did not reach such a conclusion

⁵³ Para 256

⁵⁴ Paras 259–260

⁵⁵ Paras 262–263

⁵⁶ Para 271

⁵⁷ Para 275 (footnotes omitted) The court in any event doubted as to the need for “corrective justice” in a matter where a person was affected by rubella, for which no-one was responsible

3 1 3 *The dissenting judgment*

Kirby J, in delivering his reasons for dissent from the majority ruling, expressed his concern with regard to the fact that the action is described as a claim for wrongful life and suggested that the phrase should be avoided. Despite advancing some very compelling reasons⁵⁸ for refraining from use of this “unfortunate”, “misleading and decidedly unhelpful” label, the judge was still compelled to use the term as it was used throughout legal literature and by the other members of the court.⁵⁹

According to the dissenting judge the issues for determination were also that of establishing whether a duty of care existed, the quantification of damages and issues of public policy.⁶⁰ As to the issue of a duty of care, the judge confirmed that duties could not be owed to a foetus since legal personality only arises at birth, but that it is also accepted that health care practitioners “owe a duty to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury.”⁶¹ In the present case, the respondent accordingly owed the appellant a duty to take reasonable care to prevent pre-natal injuries.⁶² The appellant could therefore expect a standard of care from the medical practitioners advising her mother and should one deny this unremarkable duty of care, the result would be an exceptional and unacceptable immunity to health care providers.⁶³

Kirby J argued, as to the aspect of damages, that the “impossible comparison” argument “falls away entirely in so far as special damages are concerned.”⁶⁴

⁵⁸ Paras 9–13 These included the fact that the term was originally used in a different context to refer to claims brought by “healthy but ‘illegitimate’ children” (para 9) against their fathers; the fact that the plaintiff does not maintain that his existence is wrongful but rather that negligent conduct caused the present suffering and that use of the term may obscure and distort the differences between such actions and the so-called wrongful birth claims. The judge also found the phrase to “implicitly denigrate the value of human existence” as it “discourages dispassionate legal analysis” (para 13). It was important to adjudicate the availability of such claims “by reference to accepted methods of judicial reasoning rather than by invoking emotive slogans and the contestable religious or moral postulates that they provoke” (para 13).

⁵⁹ Para 14

⁶⁰ Para 41 Kirby J had no real difficulty in finding causation as it was clear that, were it not for the respondent’s negligence, the appellant would not have been born and would not have experienced the suffering, expenses and losses she now does. He referred to the reasoning of Mason P in the Court of Appeal (*Harriton v Stephens* (2004) 59 NSWLR 694) as confirmation of his argument:

“Doctors seldom cause their patients’ illnesses. But they may be liable in negligence for the pain and cost of treating an illness that would have been prevented or cured by reasonable medical intervention” (714)

As the suffering could have been prevented by the termination of the pregnancy and the respondent deprived the appellant’s parents of the opportunity to act on that preventative measure, the respondent caused the appellant’s damage, see para 41 of Kirby J’s judgment.

⁶¹ Para 66

⁶² Para 66

⁶³ Para 72 The judge also did not agree with the arguments that an impediment to the recognition of this duty would be that it would conflict with the duty owed to the respondent’s mother as the mere potential for conflict could never prevent a duty of care from arising. He also asked the question as to why the duty of care towards the mother should be given preference over that of the mother in every case. See paras 73–76.

⁶⁴ Para 87

The judge found support for his reasoning from Professor John Flemming⁶⁵ who argues that a comparison between non-existence and life “in a flawed condition” is not required with regard to “added (medical) expenses”, which in any event is recognised in claims by the parents, or the so-called wrongful birth claims.⁶⁶ This is so since the disabled child would not have had any economic needs had the defendant taken reasonable care. The assessment of the appellant’s damages consequently presents no peculiar problem.⁶⁷ The judge also recognised that, pertaining to the calculation of general damages, instances where the courts have declared lawful the withdrawal of life-sustaining medical treatment are distinguishable from the cases at hand as the latter are not concerned with assigning a monetary value to the difference between existence and non-existence. It is, however, important to realise that the above-mentioned conundrums also entail “a judicial comparison between existence and non-existence.”⁶⁸

More importantly though, the judge emphasised the fact that the “appellant has unarguably suffered, and continues to suffer, significant pain and discomfort which she would not have had to endure had the respondent acted with reasonable care.”⁶⁹ Principles of justice and fairness must prevail over practical problems in quantifying the damages to an exact amount and the courts have in the past indeed adopted a more flexible approach, even where a “supposedly impossible comparison was initially invoked to justify acceptance of a wrong without a remedy.”⁷⁰ Kirby J also acknowledged that “it is arguable that a life of severe and unremitting suffering is worse than non-existence.”⁷¹ He subsequently found that, *in casu*, general damages for proved pain and suffering and special damages for the additional medical and treatment costs should be recoverable by the child.⁷² The judge furthermore rejected several policy arguments since, in most cases they rely on “a misunderstanding of the tort of negligence” or “a distorted characterisation of wrongful life claims.”⁷³

⁶⁵ *The Law of Torts* 9 ed (1998) 184–185

⁶⁶ Para 87 Prof Flemming goes on to state that “symbolic awards are regularly made for pain and suffering, even for loss of expectation of life” *The Law of Torts* 184-185

⁶⁷ Para 87

⁶⁸ Para 95

⁶⁹ Para 96

⁷⁰ Kirby J referred to cases in the United Kingdom where pregnant women, dismissed from their employment due to their pregnancy, were entitled to relief under the Sex Discrimination Act 1975 (SDA) In some of these cases, the courts refused to follow a strict comparison since “holding that the dismissal of a pregnant woman was not contrary to the SDA because of the impossibility of making a comparison ‘would be so lacking in fairness and in what I regard as the proper balance to be struck ... that we should only [accede to the argument] if we are compelled by the wording of the [SDA] to do so” (*Webb v EMO Air Cargo (UK) Ltd* [1992] All ER 43 52)

⁷¹ Para 105

⁷² Para 109

⁷³ Paras 110–116 These statements were made in relation to arguments that wrongful life actions impose a duty to kill or that such actions would oblige doctors to urge women to have abortions even if there were just the slightest chance that the child would be born defective

3 2 Recognition of the claim in European jurisdictions

3 2 1 France: *The Nicholas Perruche case*

On 17 November 2000 the French *Cour de Cassation* recognised the validity of Nicholas Perruche's wrongful life claim.⁷⁴ The court acknowledged the boy's claim by recognising the causal link between the doctor's negligence, by withholding information regarding the possible impairment of the foetus, and the disability of the child.⁷⁵ It found that the deprivation of the option to consider an abortion was the cause of the birth of the disabled child, albeit indirectly,⁷⁶ and Nicholas was awarded damages to cover his maintenance costs for the rest of his life.⁷⁷

3 2 2 *The Netherlands: The Kelly Molenaar case*

The Dutch Ministries of Health and Justice were to a similar extent urged to respond to the decision of the highest court of the Netherlands in the matter of *Leids Universitair Medisch Centrum v Molenaar*.⁷⁸ In this controversial ruling, the *Hoge Raad* not only awarded damages to the parents of a handicapped child, but also ruled that the child herself was entitled to compensation due to the fact that she was born with severe physical and mental disabilities.⁷⁹ With regard to the calculation of damages, it was argued that in terms of section 6:95

⁷⁴ The court's decision is available at http://www.vie-publique.fr/documents-vp/courcass_9913701.pdf (accessed 31-03-2008). Nicholas was born in January 1983 with severe disabilities as it later emerged that he could not hear or speak, was virtually blind and could not walk. These disabilities were the result of his mother's exposure to rubella in the fourth week of gestation when Nicholas's four year old sister contracted the disease. His mother consulted her physician and two sets of tests were carried out. Despite the fact that the results from these tests were contradictory, the physician did not regard it necessary to pursue the matter any further. Nicholas's mother was apparently told, *inter alia*, that she was immune to the disease. For a detailed account of the facts see also para 31 of the Kelly Molenaar judgment (LJN: AR5213, Hoge Raad, C03/206HR), available at www.rechtspraak.nl (accessed 20-03-2008); Mukheibir "Wrongful Life Claims in the Netherlands – the Hoge Raad Decides" 2005 *Obiter* 753 757; Prialux "Conceptualising Harm in the Case of the 'Unwanted' Child" 2002 *EJHL* 337 339; Harrant "Compensation and Wrongful Life: A Positive Economic Perspective" 2006 *JLE* http://findarticles.com/p/articles/mi_qa5408/is_200604/ai_n21392068/print (accessed 28-03-2008) and Lysaught "Wrongful Life? The Strange Case of Nicholas Perruche" *HighBeam Encyclopedia* <http://www.encyclopedia.com/printable.aspx?id=1G1:84817539> (accessed 28-03-2008).

⁷⁵ Harrant 2006 *JLE*.

⁷⁶ Prialux 2002 *EJHL* 340.

⁷⁷ Mukheibir 2005 *Obiter* 757. The decision drew severe criticism and protests by gynaecologists and obstetricians as well as disabled people. The physicians refused to perform pre-natal ultrasounds on the grounds of potential lawsuits and increased malpractice insurance rates while persons with disabilities regarded the decision as demeaning and devaluing their lives. In response the French Government adopted legislation which now prohibits wrongful life claims. See also Prialux 2002 *EJHL* 340.

⁷⁸ LJN: AR5213, Hoge Raad, C03/206HR, available at www.rechtspraak.nl (accessed 20-03-2008).

⁷⁹ For the facts of this case see paras 1–2 of the *Conclusie* of the judgment (LJN: AR5213, Hoge Raad, C03/206HR), available at www.rechtspraak.nl, and also Mukheibir 2005 *Obiter* 756. Regarding the claim brought on behalf of Kelly, the court admitted that in terms of s 1:2 of the Dutch Civil Code an unborn may not be a party to an agreement. It should, however, be taken into account that the contract between the mother and the medical practitioner, *in casu* the midwife, was always concluded in the interests of the (unborn) child. Those interests included not having to experience a life with disabilities. This does not mean that the unborn child has the right to an abortion – this right to choose remains the decision of the mother – but due to the fact that the midwife violated the mother's right to make an informed decision, the court found that he also violated the interests of the child (para 46 of the *Conclusie*). See also Hendriks "Wrongful suits? Suing in the Name of Terri Schiavo and Kelly Molenaar" 2005 *EJHL* 97:

"[T]he duty to provide good care also seeks to protect the interests of persons who are not a party to a medical treatment contract, such as Kelly" (100)

of the Dutch Civil Code it was impossible to determine the actual damages as such a process would require the comparison between the current state of existence and that of the non-existence of Kelly. The court responded by noting that with regard to the calculation of patrimonial loss, a comparison would in principle be the best option. In so far as the award of non-patrimonial damages is concerned, however, the aim is not to achieve restoration of the previous position but rather to alleviate the effects of the harm or the reparation of a “geschokt rechtsgevoel.”⁸⁰ The *Hoge Raad* held that section 6:97 of the Code should be used whereby it is also possible to calculate damages in accordance with the method which is most appropriate to the nature of the damage.⁸¹ The court agreed with the lower courts and awarded Kelly compensation for the pain and suffering which she experienced.

4 Identifying the issues

From the discussion of the various decisions it becomes clear that the courts have been unable to give recognition to the action since it found that one or more elements required for establishing liability to be absent from these types of claims. In South Africa, a delictual claim, based on the *actio legis Aquiliae*, will only be successful if the plaintiff proves that the defendant due to his own fault committed a wrongful act or omission which caused the plaintiff to suffer damage.⁸² The elements of the delict are thus an act or an omission, fault, wrongfulness, causation and damage.⁸³ Courts confronted with a wrongful life action appear to have no problem in recognising the presence of an act or omission or even fault, in the form of negligence, but have found that the lack of causation, the existence of damage, the assessment of damages and the wrongfulness of the conduct to be obstacles to the recognition of the claim. As a result, the interpretation which the courts have given to each of these elements deserves to be further discussed and evaluated.

4 1 Causation

As was explained above, Louw J of the Cape High Court found at para 30 of his judgment in *Stewart v Botha*⁸⁴ that the “negligent conduct of the defendants [was] irrelevant to the state in which [the child] was born” since the “only life ever possible to him was a life in the handicapped state to which he was born.” He found that the “hypothetical state in which [the child] would have been in had there been no delict, ... or if, for instance, [the] mother had exercised an informed decision not to abort,” would have been the same as which he was in now after his birth.⁸⁵ The judge, however, viewed this matter to be a question of damage and phrased it to be a fundamental question as

⁸⁰ Para 53 of the *Conclusie*

⁸¹ Paras 52–53 of the *Conclusie*. See also Mukheibir 2005 *Obiter* 756

⁸² See also Van der Walt & Midgley *Principles of Delict* 3 ed (2005) 1 for a discussion of the general nature and principles of the South African law of delict

⁸³ Neethling, Visser & Potgieter *Deliktereg* 5 ed (2006) 4

⁸⁴ *Stewart v Botha* 2007 6 SA 247 (C)

⁸⁵ Para 30

to whether any damage had indeed been suffered.⁸⁶ There are, however, a number of flaws in this type of reasoning.

In order to prove factual causation the South African courts have adopted the *conditio sine qua non* test in which the “inquiry simply is: Would the result have set in but for the negligent act or omission of the person concerned?”⁸⁷ It must be remembered that the true basis for this claim is the negligent conduct of the medical practitioner, who failed to inform the parents of the possibility of a disabled child. The parents were never given the opportunity to make an informed decision to abort. The result is a child *living* with disabilities. It must be emphasised that the allegation is not that the negligence of the medical practitioners caused the disabilities, but rather the life with disabilities. The Cape High Court seemed to have been under the impression that there would have been a third option in this case, that of the child being born with disabilities were it not for the delict. However, this is not the case since the plaintiff in a wrongful life claim maintains that the parents would have terminated the pregnancy had they been informed of the true state of affairs. Consequently the answer to the inquiry simply is: a child was born, suffering from disabilities, due to the negligence of the defendant medical practitioner. The conduct of the physician was a *sine qua non* of the birth of the child and subsequently the element of factual causation can undeniably be established.⁸⁸

4 2 Damage and the assessment of damages

Judging by the number of times the action has been dismissed because courts found it impossible to calculate damages suffered in these circumstances,⁸⁹

⁸⁶ Para 29

⁸⁷ See *Minister van Polisie v Skosana* 1977 1 SA (A) 44 as cited by Blackbeard “Die Aksie vir ‘Wrongful Life’: ‘To be or not to be?’” 1991 *THRHR* 57 71

⁸⁸ It is also interesting to note that the court in *Friedman v Glicksman* 1996 1 SA 1134 (W) had no difficulty in dismissing the exception, against the “wrongful birth” claim, that the child’s condition “was not caused by any act or omission on the defendant’s part but was a congenital defect arising at the time of conception” The court held that the submission misconstrued the nature of the wrongful life claim and that the defendant was responsible and caused the child, with her disabilities, to be born (1139) The exception was apparently not raised against the wrongful life claim The question as to legal causation has never been raised with regard to the claim for wrongful life It is submitted that in establishing legal causation in the context of the wrongful life claim, there is a close enough relationship between the negligent omission of the practitioner and the harm resulting in the form of a life with disabilities See in general Neethling et al *Deliktereg* 178–18; *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A) 833 and *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 332 For an opposing view, however, see Mukheibir “Wrongful Life – the SCA Rules in *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 June 2008)” 2008 *Obiter* 515 522-523

⁸⁹ Therefore, for example, the objection by the English Court of Appeal in *McKay and Another v Essex Area Health Authority and Another* [1982] 2 All ER 771 has been used by various other jurisdictions as basis for their denial of the claim Griffiths LJ stated that:

“To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damages The basis of damages for personal injury is the comparison between the state of the plaintiff before he was injured and his condition after he was injured This is often hard enough in all conscience and it has an element of artificiality about it, for who can say that there is any sensible correlation between pain and money? Nevertheless, the courts have been able to produce a broad tariff that appears at the moment to be acceptable to society as doing rough justice But the whole exercise, difficult as it is, is anchored in the first place to the condition of the plaintiff before the injury which the court can comprehend and evaluate In a claim for wrongful life how does the court begin to make an assessment?” (790)

while in some other instances courts have had no difficulty in assessing the damages,⁹⁰ it is evident that the debate surrounding the proof of damage and the calculation of damages requires a critical and comprehensive evaluation.

Damage or harm in terms of the law of delict has been described as the suffering of patrimonial or pecuniary loss (*damnum*), or an injury to an interest of personality (*iniuria*) or the experience of pain and suffering.⁹¹ It can therefore also be said to be the injurious effect upon any patrimonial or pecuniary interest which the law regards to be worthy of protection.⁹² In the case of an action for wrongful life, as is the case with an action for wrongful birth, the plaintiff seeks to recover patrimonial loss in the form of the real expenses which she has incurred with regard to medical expenses, special schooling and maintenance, as well as compensation for the injury to her personality interest and pain and suffering she has to endure caused by a life with disabilities.

As was discussed at 4 1 above, the Cape High Court found that, with the facts before it, no damage had been suffered at all since the “only life ever possible to [the child] was a life in the handicapped state to which he was born.”⁹³ It must, however, be borne in mind that, had the expert medical practitioner not been negligent, the child would not have been born. The child or her parents are now, due to this negligent omission, suffering a loss of a pecuniary interest and experiencing a life of pain and suffering due to her life with disabilities. In the words of Goldblatt J in *Friedman*, albeit delivered with regard to the wrongful birth claim:

“The claim is based upon the fact that, but for the defendant’s negligent advice, the [mother] would have had her pregnancy terminated. The defendant is therefore responsible and caused the child, with her disabilities, to be born.”⁹⁴

The harm is a direct result of a failure on the part of the medical expert.

The purpose of the award of damages in our law was summarised by the Constitutional Court in *Van Der Merwe v Road Accident Fund and Another (Women’s Legal Centre Trust as Amicus Curiae)*.⁹⁵ At paragraph 37 of the decision the court stated the following:

So too, the New York Court of Appeals in *Becker v Schwartz* 386 NE 2d 807 (NY 1978) found this issue to raise questions which the law could not answer:

“Whether it is better to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. The law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implication of such proposition are staggering. Would claims be honoured, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standards or by whom would perfection be defined? Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the [child’s] choice of life in an impaired state and non-existence. This comparison the law is not equipped to make” (812)

⁹⁰ Cf for example the decision by the Dutch *Hoge Raad* in the *Molenaar* decision, as discussed above in 3 2 2

⁹¹ Van Der Walt & Midgeley *Principles of Delict* 43

⁹² Neethling et al *Deliktereg* 204

⁹³ Para 30

⁹⁴ *Friedman v Glicksman* 1996 1 SA 1134 (W) 1139

⁹⁵ 2006 4 SA 230 (CC)

“The notion of damages is best understood not by its nature but by its purpose. Damages are ‘a monetary equivalent’ of loss ‘awarded to a person with the object of eliminating as fully as possible [her or] his past as well as future damage’. The primary purpose of awarding damages is to place, to the fullest possible extent, the injured party in the same position she or he would have been in, but for the wrongful conduct. Damages also represent ‘the process through which an impaired interest may be restored through money’. To realise this purpose our law recognises patrimonial and non-patrimonial damages. Both seek to redress the diminution in the quality and usefulness of a legally protected interest.” (Footnotes omitted.)

With regard to special damages, the court confirmed that its aim is to redress,

“to the extent that money can, the actual or probable reduction of a person’s patrimony as a result of the delict or breach of contract. In this sense patrimonial damages are said to be a ‘true equivalent’ of the loss. Ordinarily they are calculable in money.”⁹⁶

In a wrongful birth action the claim for special damages is normally sought to redress the patrimonial loss caused by the medical expenses, the costs of special schooling and the maintenance of a child born with disabilities. In such a claim, “a comparison is made between the value and burden to the parents of having a child ... with the value and absence of a burden to the parents of not having a child.”⁹⁷ Put differently, in a wrongful birth claim a comparison is made between life with disabilities and non-existence and an amount of damages is calculated. It consequently seems rather peculiar that the courts allow the parents to claim these damages in a wrongful birth action but will deny the child from doing the same.⁹⁸ It is submitted that there can be no obstacle in the assessment of special damages in a wrongful life claim since the courts do not have any difficulty in calculating it when the parents claim such damages. Furthermore, should the parents of the child for some reason, such as the prescription of their claim, or in the event of their death,⁹⁹ or even where the parents abandoned their child, be unable to claim for such costs, it is unjustifiable to deny the child to claim such damages. So too, the Californian Court in *Turpin v Sortini* found this situation untenable:

“Although the parent and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child’s own medical care. If such a distinction were established, the afflicted child’s receipt of necessary medical expenses might well depend on the wholly fortuitous circumstances of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care.”¹⁰⁰

It is therefore our submission that an action must exist which will provide “a means of financially supporting a child with severe disabilities through his or her life.”¹⁰¹ As Kirby J in *Harriton v Stephens* indeed pointed out, “a plaintiff in a wrongful life action would not have any economic needs had the

⁹⁶ Para 38 (footnotes omitted)

⁹⁷ As per Louw J in *Stewart v Botha* 2007 6 SA 247 (C) para 20

⁹⁸ See also Prialux 2002 *EJHL* 343:

“Commonly, actions for wrongful life have been accompanied by claims for wrongful birth, *the main distinction between the two actions being the identity of the plaintiff.*” (Our emphasis)

⁹⁹ See also Van Den Heever “Prenatal Medical Negligence in South African Medical Law: Wrongful Life (the Right not to be Born) and the Non-existence Paradox” 2006 *THRHR* 188 192

¹⁰⁰ 643 P 2d 954 (Cal 1982) 965

¹⁰¹ Prialux 2002 *EJHL* 343

defendant exercised reasonable care, a loss in this regard is directly caused by the defendant's negligent acts and omissions."¹⁰²

General damages, in its turn, was described by Moseneke DCJ in *Van Der Merwe v Road Accident Fund* as being

"utilised to redress the deterioration of a highly personal legal interest that attaches to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include 'pain and suffering', 'disfigurement', and 'loss of amenities of life'. Besides bodily integrity, our law recognises and protects other personality interests such as dignity, mental integrity, bodily freedom, reputation, privacy, feeling, and identity. A wrongful reduction of the quality of these personality interests or rights entitles the victim to non-patrimonial damages. Yet, it is important to recognise that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. *Guided by the facts of each case and what is just and equitable, courts regularly assess and award to claimants general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to the successful claimant's patrimony. After all, the primary object of general damages too, in the non-patrimonial sense, is to make good the loss; to amend the injury.* Its aim too is to place the plaintiff in the same position she or he would have been but for the wrongdoing."¹⁰³

In a wrongful life claim, compensation is sought to remedy, *inter alia*, the infringement upon the child's right to dignity and bodily integrity. The reality is that such a child is enduring pain and suffering and for this injury the courts must make a monetary award to amend the injury, based upon principles of what is just and equitable. The mere difficulty which a court may face in the calculation of damages, avoids the issue of the appropriateness of the action.¹⁰⁴ Dean Stretton¹⁰⁵ convincingly maintains that there are numerous examples in everyday life in which we experience non-existence of certain things. Although we may never experience our own non-existence, there are instances in which we would prefer our own non-existence over a continued life of torture.¹⁰⁶ Just because we do not understand non-existence or will not be able to experience it, does not mean that comparisons with non-existence are impossible. Courts are also constantly asked to compare something which the presiding officer herself has never experienced, but this does not prevent them from making such a comparison. So, for example, a court, asked to award compensatory damages for the cause of a broken leg, will have to compare a hypothetical unbroken leg with a broken leg, despite the fact that the judge may have never experienced a broken leg herself. Similarly, Stretton argues, a judge cannot avoid a comparison between a plaintiff's negligently caused disabled existence and hypothetical non-existence, and awarding damages

¹⁰² 226 CLR 52 para 87

¹⁰³ 2006 4 SA 230 (CC) paras 39–41 (our emphasis, footnotes omitted) See n 104

¹⁰⁴ Lind "Wrongful-birth and Wrongful-life Actions" 1992 *SALJ* 428 437

¹⁰⁵ "Harriton v Stephens, Waller v James: Wrongful Life and the Logic of Non-existence (Australia)" 2006 *Melbourne University Law Review* 972

¹⁰⁶ He furthermore states at 989 that even though most of us would prefer our existence to never being born, "[g]iven a choice between being killed painlessly now, and being tortured to death over the next several hours, one would rationally choose the former: although in the torture case one lives for longer, the extra hours of existence are so bad, so excruciating, that the value of those extra hours is less than zero, worse than simply ceasing to exist"

based on that comparison, merely due to the fact she has never experienced her own non-existence.

Brownlie¹⁰⁷ in turn argues that our courts need to take a leap from the restraint which the “impossible comparison” element places on this action and supports the more pragmatic approach by the American court in *Curlender v Bio-Science Laboratories*.¹⁰⁸ He reasons as follows:

“Ignoring the preceding cases’ preoccupation with attempting (and failing) to compare life with non-existence and sidestepping the conceptually confusing philosophical problems associated therewith, the court in effect artificially constructed a measure of damages (in the vein of the Pearson report) by construing the wrongful life cause of action ‘as the right ... to recover damages for the pain and suffering to be endured during the limited life span available to such a child, and any special pecuniary loss resulting from the ‘impaired condition’.”

Therefore, what should be emphasised in this instance is a comparison between non-existence and a life *with disabilities* and not a comparison between life and non-existence. Denial of the claim of wrongful life is a dismissal of the reality of a life *with disabilities*. Pearson very aptly states that “[a]n actionable wrong cannot simply be dismissed for philosophical reasons.”¹⁰⁹ The fact is that courts, and in particular the South African Supreme Court of Appeal, appear to be incapable of appreciating the uniqueness of this claim. The plaintiff child in a wrongful life case has to endure a life with physical defects, a deformed existence which in many cases causes excruciating pain which she would not have had to suffer had it not been for the negligent omission of the defendant medical practitioner.¹¹⁰ Even if a child may not be

¹⁰⁷ “Wrongful Life: Is it a Viable Cause of Action in South Africa?” 1995 *Responsa Meridiana* 18 33

¹⁰⁸ 106 Cal App 3d 811, App 165 Cal Rptr 477 (2d Dist 1980)

¹⁰⁹ “Liability for So-called Wrongful Pregnancy, Wrongful Birth and Wrongful Life” 1997 *SALJ* 91 106

¹¹⁰ It may perhaps at this point be necessary to remind the reader of the disabilities which the plaintiffs in the cases discussed above have had to live with and to provide another example of a disabled life which may be regarded not to be preferable to non-existence. Van Den Heever 2006 *THRHR* 198 n 38 notes that a child suffering from Lesch-Nyan Syndrome, a recessive disorder that can be detected prenatally through amniocentesis, is not able to walk or sit unsupported, cannot be toilet trained, has such difficulty in swallowing that it is very difficult to feed her, frequently and dramatically vomits and finds it very difficult to communicate. The most horrific aspect of this syndrome, however, is that such a child will aggressively mutilate herself by biting her fingers and lips destructively. These children scream in pain while they bite themselves and may only stop once they have been physically restrained. See also Teff “The Action for Wrongful Life” 1985 *Int and Comp LQ* 440–441 (as quoted by Van Den Heever 2006 *THRHR* 196 n 31):

“As long as abortion or preventing conception remain [sic] the only effective ‘treatment’ for almost all genetic defects, it will be open to the courts to withhold a remedy on the basis of the presumed undesirability or impossibility of comparing life with non-existence. And several judgments convey the impression that fear of implicitly condoning abortion continues to be an underlying rationale of non-liability. But should medical technology eventually make possible *in utero* treatment of hereditary disorders, by means of genetic manipulation, a new situation would arise. Negligent failure to diagnose or treat a genetic defect, which precluded the birth of a healthy child, would then become just another instance of legally compensatable pre-natal injury. Pending any such developments, it is submitted that judges should resist the understandable temptation to view the whole controversy as a ‘mystery more properly to be left to the philosophers and the theologians’. Permitting a remedy does not imply a cynical disregard for the preciousness of human existence. It is precisely the recognition of the value of life and the laudable reluctance to stigmatise it when impaired that should enable ‘wrongful life’ litigation to be kept within socially acceptable limits. The injuries would rarely be deemed to outweigh the benefits. Biomedical advance has already added new layers of complexity to the principle of respect for human life. The process is bound to continue. It should not be beyond the capacity of the law to come to terms with such developments, while still allaying understandable fears of an *Orwellian* nightmare”

suffering the severest of disabilities, the reality of a life *with disabilities* is one which courts continue to deny by denying such a child the chance of improving her circumstances by means of compensation.

4 3 Wrongfulness

4 3 1 Breach of a legal duty

The traditional approach for the determination of wrongfulness in the case of an omission lies in the establishment of a breach of a legal duty which the defendant owed the plaintiff. The existence of such a legal duty depends on the *boni mores* or the legal convictions of society.¹¹¹ The mere fact that the claims based on wrongful pregnancy and wrongful birth are now acknowledged is proof of the reality that our courts are constantly required to extend the meaning of the term of wrongfulness and now recognise the existence of a legal duty where it had previously not been acknowledged. Therefore, in the case of the action for damages based on wrongful birth, it is now accepted that the medical practitioner owed a legal duty towards the parents of a child born with disabilities and due to the fact that he had not given the proper advice, and in this way breached such duty, he should be held liable for the damages arising from this birth. In the same way, while bearing in mind the development and innovation of medical technology,¹¹² it is submitted that the time has arrived for the acknowledgement of a legal duty in wrongful life claims.

The recognition of a legal duty has been described by the Appellate Division (as it then was) in *Knop v Johannesburg City Council* as

“the outcome of a value judgment, that the plaintiff’s invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.”¹¹³

So too, the House of Lords in *Anns and others v London Borough of Merton*¹¹⁴ found the enquiry into the existence of a duty of care to consist of two stages. It must first be established whether or not there is a “sufficient relationship of proximity or neighbourhood” between the alleged wrongdoer and the person who has suffered the damage so that the careless behaviour of the former may be likely to cause damage to the latter. Should this be the case, a duty of care arises and the next stage would be to ask whether or not there are any considerations “which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.” Although there has been

¹¹¹ See in general Neethling et al *Deliktereg* 54-55 and the authority cited in n 118

¹¹² Thus, for example, it is now possible for medical practitioners to perform surgery on a foetus while *in utero*.

¹¹³ 1995 2 SA 1 (A) 27G-I citing Flemming *The Law of Torts* 4 ed 136

¹¹⁴ [1977] 2 All ER 492 HL at 498g-h as quoted in *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) (2002 3 All SA 741) para 14

much criticism of the above methodology by the Australian courts,¹¹⁵ other common law jurisdictions such as Canada and New Zealand have endorsed this approach.¹¹⁶ The South African Supreme Court of Appeal emphasised in this regard that the

“question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied. ... What is ultimately required is an assessment, in accordance with the prevailing norms of this country, of the circumstances in which it should be unlawful to culpably cause loss. In applying the test that was formulated in *Minister van Polisie v Ewels* [1975 (3) SA 590 (A)] the ‘convictions of the community’ must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution.”¹¹⁷

From the above it is without a doubt clear that the South African courts are compelled to consider the community norms and values in a constitutional context and must continuously ask itself whether the society would regard it to be unacceptable to deny the existence of a legal duty. Therefore, for example, the Supreme Court of Appeal has, in the matter of *Road Accident Fund v Mtati*¹¹⁸ rejected the argument that the insured driver of a motor vehicle did not have a legal duty towards an unborn victim in a car accident, relying on the High Court of Ontario decision in *Duval v Seguin*¹¹⁹ in a passage cited with approval by Dillon LJ in *Burton v Islington Health Authority; De Martell v Merton and Sutton Health Authority* as follows:

“Ann’s mother [Ann was the child *en ventre sa mere* at the time of the collision] was plainly one of a class within the area of foreseeable risk and one to whom the defendants therefore owed a duty. Was Ann any the less so? I think not. Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the other users of the highway will be pregnant women and that a child *en ventre sa mere* may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.”¹²⁰

It consequently must be said that it appears to be somewhat illogical to impose a duty upon an ordinary driver of a car expecting him to have foreseen possible damage to an unborn passenger but to deny the existence of a duty of a medical expert towards the unborn to properly advise her parents. Consequently, in a doctor-patient relationship, patients must be able to rely on the correctness of the advice which they receive from their medical practitioner due to the specialist knowledge and expertise which this person purportedly has. Should the doctor give the incorrect advice and a child subsequently is born suffering from various disabilities, the specialist has breached his duty towards one of his patients, the unborn. This was also the view held by the Cape High Court in *Stewart v Botha*¹²¹ where, at para 22 of the decision, Louw J found that

¹¹⁵ See *Caparo Industries PLC v Dickman and Others* [1990] 1 All ER 568 (HL) ([1990] 2 AC 605) as quoted by the SCA in *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) (2002 3 All SA 741) para 14

¹¹⁶ See *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 15

¹¹⁷ Paras 16–17

¹¹⁸ 2005 6 SA 215 (SCA) paras 36, 37

¹¹⁹ (1972) 26 DLR (3d) 418

¹²⁰ [1992] 3 All ER 833 (CA) 842c–d

¹²¹ 2007 6 SA 247 (C).

“[t]he unlawfulness of the defendants’ negligent omissions *vis-à-vis* Brian is that it precluded the mother from making an informed decision on whether or not to abort the foetus. That is the duty owed to Brian ... The defendant owed the child a duty to properly advise the mother.”

4 3 2 Policy considerations

4 3 2 1 The sanctity of life

Various arguments in the name of public policy have also been used to deny the existence of a legal duty. One such an argument was used in *Friedman v Glicksman*¹²² where Goldblatt J found that “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.”¹²³ This argument of the sanctity of life, it can be safely said, can no longer be used to deny the recognition of the claim and Louw J in *Stewart* indeed stated that the argument has “been eroded in South Africa in a number of respects.”¹²⁴ This is so because the Choice on Termination of Pregnancy Act permits an abortion “up to and including the 20th week of the gestation period if ... there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality”.¹²⁵ An abortion “up to and including the 20th week of the gestation period” is even permitted in circumstances where “the continued pregnancy would significantly affect the social or economic circumstances of the woman.”¹²⁶ This Act, like so many of its counterparts in other jurisdictions in the world, therefore recognises the reality that certain classes of persons do not have to live. It is furthermore completely unjustifiable to disregard the sanctity of life argument when the parents claim for damages in a wrongful birth action but when the child is the plaintiff, the person who actually has to endure a life with disabilities, “the sanctity of life argument is an insurmountable obstacle to the claim.”¹²⁷

4 3 2 2 Undermining the dignity and value of disabled persons

A further argument which is based on issues of public policy is that, by allowing this claim, our courts will implicitly devalue the lives of disabled children. It is argued here, that by awarding damages, it would rather give recognition to the difficulties which such persons have to face on a daily

¹²² 1996 1 SA 1134 (W).

¹²³ 1142H–I

¹²⁴ *Stewart v Botha* 2007 6 SA 247 (C) para 18

¹²⁵ Section 2(1)(b)(ii)

¹²⁶ Section 2(1)(b)(iv)

¹²⁷ *Stewart v Botha* 2007 6 SA 247 (C) para 20 See also Mukheibir 2008 *Obiter* 521-522

basis.¹²⁸ Where a special wheelchair entrance is built in any public building, society is not saying that the lives of disabled persons have less value and that such persons must consequently use a different entrance to those that able persons use, but rather that the inequality must be recognised and understood. It is for this reason that we should endeavour to make disabled persons' lives easier and to promote their right to dignity. Similarly the child in the wrongful life action must be compensated because she lives with a disability, one which she would not have experienced, had it not been for the negligent behaviour of a medical practitioner who her parents had trusted. For this reason, it can be argued that the recognition of the claim is rather a confirmation of the dignity of such a child. By denying her claim society is in fact renouncing her right to dignity instead of protecting and promoting it. The argument that the child will be psychologically injured if she is subsequently informed of the litigation on her behalf also seems rather unconvincing. It is suggested that she may rather suffer feelings of rejection from "being deprived in fact of security and affection in [her] early years, a prospect as, if not more, likely in the absence of compensation."¹²⁹

4 3 2 3 The boni mores of a constitutional democracy

We are furthermore of the opinion that the constitutional dispensation, as well as the commencement of certain provisions of the Children's Act¹³⁰ provide a new dimension to the claim for wrongful life. The recognition of human rights, coupled with the principle of the best interest of the child,¹³¹ demand sensitivity for the particular vulnerability of the child born with disabilities and compel the courts to evaluate this claim for wrongful life and the delictual elements required from this perspective. Three considerations are of key importance in this regard.

The Constitution firstly provides the foundation for a society based on democratic values, social justice and fundamental rights, acknowledging the child within this context to be the bearer of human rights. The fact is that the child, who is the plaintiff in the action for wrongful life, is a person with a right to human dignity,¹³² the right to bodily and psychological integrity,¹³³ and the right to life.¹³⁴ Being a child in itself demands that the right to life must be

¹²⁸ Once again we find ourselves in agreement with Kirby J where in *Harriton v Stephens* 226 CLR 52 he states that:

"the epithet 'wrongful life' is seriously misleading. It misdescribes the essential nature of the complaint. The plaintiff in a wrongful life action does not maintain that his or her existence, as such, is wrongful. Nor does the plaintiff contend that his or her life should now be terminated. Rather, the 'wrong' alleged is the negligence of the defendant that has directly resulted in present suffering. Professor Peter Cane identified this distinction, stating '[t]he plaintiff in [wrongful life] cases is surely not complaining that he was born, simpliciter, but that because of the circumstances under which he was born his lot in life is a disadvantaged one'" (para 10)

¹²⁹ *Berman v Allen* 80 NJ 421 (1979) as quoted by Van Den Heever 2006 *THRHR* 199

¹³⁰ See n 5

¹³¹ Enshrined in s 28(2) of the Constitution and s 9 of the Children's Act

¹³² As enshrined by s 10 of the Constitution. See also s 6(2)(b), s 11(1)(c) and s 11(2)(b) of the Children's Act

¹³³ As enshrined by s 12(2) of the Constitution

¹³⁴ As enshrined by s 11 of the Constitution

interpreted on a multi-dimensional level in order to also include the right to survival and development.¹³⁵ The claim based on wrongful life can therefore not be assessed without consideration of these constitutional imperatives.

A second aspect, which is closely related to the concept of fundamental rights, is that of the provisions of the Children's Act. Section 6 of the Act, for example, contains a number of general principles which guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general. One of these guidelines consists of a peremptory provision that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights of the Constitution, the best interests of the child standard set out in section 7 of the Act and the other rights and principles contained in this Act.¹³⁶ The specific reference to and the inclusion of the rights contained in the Constitution must be emphasized as it reinforces the human rights perspective of the Act. This reference, coupled with the further requirements of respect for the child's inherent dignity¹³⁷ and fair and equitable treatment of the child,¹³⁸ not only represent the normative values of the CRC and the Constitution but also the realisation thereof.

Section 6(2)(f) of the Children's Act furthermore requires the court to "recognise a child's disability and create an enabling environment to respond to the special needs that the child has." This is further defined by section 11(1) of the Act which demands due consideration of the provision to the child with disabilities of parental care, family care or special care as and when appropriate. In any matter concerning the child with disabilities due consideration must be given to making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have¹³⁹ and providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.¹⁴⁰ The fact that recognition is given to the disabilities of the child and the special needs of such a child is therefore an advancement of the human dignity of such a child.

The third consideration is that of the best interests of the child, which has been enshrined as a fundamental right of the child.¹⁴¹ It is submitted that it is imperative that this particular right be considered when the question as to wrongfulness is considered in the wrongful life claim. This right is not only a

¹³⁵ See for example also Article 6 of the United Nations Convention on the Rights of the Child ("the CRC") which in Article 6 2 stipulates that "State Parties shall ensure to the maximum extent possible the survival and development of the child" S 6(2)(e) and (f) of the Children's Act in turn provides that in all proceedings, actions or decisions recognition of a child's need for development and to engage in play and other recreational activities appropriate to the child's age as well as recognition of a child's disability must take place and that an enabling environment to respond to the special needs that the child has, must be created

¹³⁶ S 6(2)(a) of the Children's Act

¹³⁷ S 6(2)(b)

¹³⁸ S 6(2)(c)

¹³⁹ S 11(1)(b)

¹⁴⁰ Section 11(1)(c) See also s 11(2) which provides for similar considerations with respect to the child suffering from chronic illness

¹⁴¹ S 6(2)(e)

legal requirement but also represents a policy consideration in a constitutional dispensation. In fact, certain factors which must be considered in determining the best interests of the child, afford specific recognition to the child with disabilities. Section 7(1)(i) of the Children's Act stipulates that, whenever a provision of this Act requires the best interests of the child standard to be applied, any disability a child may have must be taken into consideration. In terms of section 7(1)(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development, must furthermore be taken into account.¹⁴² In a wrongful life claim, when considering whether or not to award monetary compensation to a disabled child, born due to the negligence of a medical expert, it is crucial that the court heed the above considerations.

5 Conclusion

It is clear from the discussion above that, in essence, the claim for wrongful life is being denied in our courts based on only one consideration, that being the courts' inability to calculate damages. We are of the opinion, however, that we have shown why this aspect should not be such an "insurmountable obstacle"¹⁴³ to the recognition of the claim. Turning our attention back to the decision of the South African Supreme Court of Appeal in *Stewart v Botha*¹⁴⁴ it is submitted that the court, by dismissing the claim purely because it could not make a choice between life with disabilities and non-existence, without embarking on a true deliberation of the underlying principles of this claim, the constitutional imperatives, or the best interests of the disabled child, has failed in its duty towards this child and its duty to develop or enhance the law. This failure occurred despite the fact that the relevant provisions of the Children's Act had in fact, at the time of the judgment, already been in operation for almost a year. We argue that these provisions, and in particular the standard of the best interest of the child, provide sufficient grounds to develop and enhance the law regarding this unique claim. We are consequently of the opinion that when considering the delictual elements in the claim for wrongful life, the above-mentioned provisions must provide the point of departure or, at the very least, deserve some consideration. Snyders AJA reasoned that it should not be asked of the law to answer the question as to whether or not a "particular child should have been born at all" as this "goes so deeply to the heart of what it is to be human."¹⁴⁵ We, however, with the greatest respect, disagree, since we regard it to be the duty of the courts to answer the most difficult questions. In some cases this exercise inevitably requires an appreciation of what it means to be human.¹⁴⁶

¹⁴² See also s 7(1)(j) which provides that any chronic illness from which a child may suffer must also be considered

¹⁴³ Cf para 20 of *Stewart v Botha* 2007 6 SA 247 (C)

¹⁴⁴ *Stewart v Botha* 2008 6 SA 310 (SCA)

¹⁴⁵ Para 28

¹⁴⁶ One cannot help but agree with Stretton "Harrington v Stephens, Waller v James: Wrongful Life and the Logic of Non-existence (Australia)" (2006) *Melbourne University Law Review* 972 1001 that maybe, in this particular case, the decision "would have been better off not existing"

SUMMARY

In *Friedman v Glicksman* 1996 1 SA 1134 (W) the claim for wrongful life was denied. Eleven years later the Cape High Court again denied the existence of the claim in *Stewart v Botha* 2007 6 SA 247 (C); 2007 9 BCLR 1012; 2007 3 All SA 440 albeit for different reasons than those used by the Court in *Friedman*. The Supreme Court of Appeal had the opportunity to provide well-reasoned answers to the many questions resulting from the two conflicting decisions and to finally put to rest the matter of whether the action should be recognised in South African law or not. Unfortunately it failed to do so. This article discusses the recent South African and international case law which considered the action, placing emphasis on the policy issues underlying the claim. In light of the constitutional dispensation and the promulgation of the Children's Act 38 of 2005, it is argued that the opportunity now exists to reconcile the principles of delict with the constitutionally enshrined rights of the child to ensure that the best interests of the child are served.