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***Research Topic: Wrongful Life: An Analysis of Recent Legal Developments.***

DEDICATION

I dedicate my dissertation to my anchor, my confidant, my heart and my biggest fan.

Your support and enthusiasm awakens my soul, you are what most pray for and I am honoured to be your daughter.

This is only the beginning of greater things to come.

This is for mama, my love for you knows no bounds.

We are only as great as our dreams.

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#### ABSTRACT

The wrongful life cause of action has been an issue of international debate in the legal fraternity for decades and was ultimately decided by the Constitutional Court in 2014 in the South African law perspective. The court had to pronounce on the existence of the cause of action in South African law and concluded that the claim had a potential existence in our law. Various arguments by different jurisdictions are addressed and are analysed in this paper. The paper offers a thorough analysis of the judgment and offers a South African perspective to the cause of action. It also provides an analysis and distinction between a dissatisfied life cause of action which is an umbrella term for the various causes of action relevant to wrongful life and the wrongful life cause of action as an independent action.

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## CHAPTER ONE

### UNDERSTANDING WRONGFUL LIFE CAUSE OF ACTION

#### I INTRODUCTION

The debate around the recognition of a wrongful life cause of action has received criticisms and approval for decades with the first case heard in the United States of America in 1963<sup>1</sup> and in South Africa in 1996.<sup>2</sup> The cause of action raises issues that range from the mother's reproductive rights, the rights of a potential child and the duties of a medical practitioner towards the potential child. A landmark judgement<sup>3</sup> was delivered by the Constitutional Court in 2014 which put an end to the long debated issue as to whether or not wrongful life constitutes a 'valid' cause of action<sup>4</sup> in South African law. The cause of action is one that challenges academic thinking, legal notions, moral standing as well as ethical and religious beliefs.<sup>5</sup> The court concluded in *H v Fetal Assessment Centre* that the wrongful life cause of action has the potential of existence which must be determined by the High Court as the upper guardian in all matters concerning children. Therefore, the recognition by the Constitutional Court will have an impact on the medical and legal fraternity when taking into account the rapid advances in genetic technology. For the purpose of understanding the cause of action, it has become essential to note that there is a distinction between a foetus, a child, a potential child and a future child. The wrongful life cause of action solely focuses on a potential child.

The objective of this chapter is to clearly outline the basis of the cause of action, to provide a general and legal understanding of the cause of action and to evaluate the legal basis that led up to the Constitutional Court's landmark decision. As an introductory chapter, chapter one serves to introduce the cause of action by providing the meaning of wrongful life, the origins of the cause of action as well as its semantic history.

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<sup>1</sup> *Zepeda v Zepeda* 41111.App.2d 240 (1963).

<sup>2</sup> *Friedman v Glicksman* 1996 1 SA 1134 (W).

<sup>3</sup> *H v fetal Assessment Centre* [2014] ZACC 34.

<sup>4</sup> *Evins v Shield Insurance CO Ltd* 1980 (2) SA 814 (A) at 838F-G as 'The proper legal meaning of the expression "cause of action" is entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'

<sup>5</sup> I Giesen, 'The Use and Influence of Comparative Law in Wrongful Life Cases' (2012) Volume 8 *Utrecht Law Review* Issue 2 at 36.

## II THE DIFFERENCE BETWEEN A POTENTIAL CHILD, A FUTURE CHILD AND A FOETUS.

The word potential is defined by the Oxford Dictionary<sup>6</sup> as ‘having the capacity to develop into something in the future’ and the word future defined as ‘the time that is still yet to come’. A *potential child* is a foetus that could develop into a child in the future. A *future child* on the other hand cannot qualify as a foetus nor as a potential child because it is a child that is yet to come. Therefore, in order to illustrate the difference and understand the distinction, one should view it from the perspective that a *potential child* can be an embryo<sup>7</sup> that is already existing in the womb which has not yet developed into a *foetus* but has the potential to develop into one and later into a child. A *future child* however is one that, for example, is within the future plans of the future parent(s) that at a certain point in time the future parent(s) will decide to conceive.

Jeff McMahan<sup>8</sup> opines that we were never embryos,<sup>9</sup> and particularly suggests that embryos are not humans.<sup>10</sup> He furthermore informs of the idea that souls are not present at six days after conception.<sup>11</sup> What the McMahan opine is what general morality, especially that which is influenced by religion, generally regard as untrue. Catholic philosophers George and Gomez-Lobo<sup>12</sup> state that at the early stages an embryo does indeed possess ‘basic natural capacity although the capacity is deferred to a later stage’. Jeffery<sup>13</sup> states that we have a duty towards future people. This author, however, holds a different opinion regarding the existence of such duty. The idea is that a duty may not exist since if such a duty existed, then, a liability which now ensues in wrongful life on a medical practitioner would also be imputed on the parent(s) as wrongdoers and therefore rendering a chain of causation that is arguably

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<sup>6</sup> Oxford South African Concise Dictionary 2 ed: Oxford University Press Southern Africa, (2010).

<sup>7</sup> The Oxford dictionary defines an embryo as an ‘unborn or unhatched offspring in the process of development, especially an unborn human in the first eight weeks from conception’.

<sup>8</sup> McMahan J ‘Killing Embryos For Stem Cell Research’ (2007) 38 *Metaphilosophy* LLC and Blackwell Publishing 170-188.

<sup>9</sup> Ibid at 172.

<sup>10</sup> McMahan at 181.

<sup>11</sup> Ibid at 183.

<sup>12</sup> George Robert P & Alfonso Gomez-Lobo ‘In Human Cloning & Human Dignity: An Ethical Inquiry Report by the President’s Council on Bioethics,(2002) 258-266 available at [http://www.bioethics.gov/topics/cloning\\_index.html](http://www.bioethics.gov/topics/cloning_index.html)( accessed on 15 May 2018)

<sup>13</sup> Jeffery Reiman ‘Being Fair to Future People: The Non-Identity Problem in the Original Position’ (2007) 35(1) *Philosophy and Public Affairs* 69-92

impractical and never ending. Because non-existence is the alternative to the people negatively affected by the choices made prior to their existence, they are therefore not affected at all by such choices.<sup>14</sup> The potential child eventually receives life worth living which is always better than non-existence.<sup>15</sup> It is based on the implication of this statement that the author assumes that life, in whatever, manner or form, is preferred over non-existence. It should, however, be borne in mind that in wrongful life we argue in the opposite direction, which is that it would be better not to have been born than to be born to suffer. In essence, non-existence is preferred over a lifetime of suffering. To abort an embryo or a foetus is to prevent a potential and not a future child from coming into existence. The potential child is argued not to be one of a high moral status because the embryo only has the ‘potential to give rise to a person who would be an individual numerically distinct from the embryo’.<sup>16</sup> This study focuses on a *potential child* and not a *future child*.

### III WRONGFUL LIFE

For the purpose of understanding the nature of a wrongful life cause of action, it is vital that definitions are provided for other causes of action that are either brought together with wrongful life claims or those that coincide with the cause of action. Ryan<sup>17</sup> describes these causes of action as ‘*wrongful formation*’. The author is of the opinion that the term ‘covers cases which concern an individual’s right to prevent conception or terminate gestation, as well as those cases that involve in-uterine treatment of the unborn’.<sup>18</sup>

A ‘*wrongful birth*’ claim is a medical malpractice in which the parent(s) of an impaired child allege that their physician negligently failed to provide them with information that would have helped them avoid the conception or the birth of a child with genetic defects.<sup>19</sup> This action is brought about by the parent(s) in their own interest for the costs of maintaining and raising such child. ‘*Wrongful pregnancy*’ or ‘*wrongful conception*’ actions are those that arise where the parent(s) took preventative measures to guard against having children or a

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<sup>14</sup> Ibid at 72.

<sup>15</sup> Ibid.

<sup>16</sup> McMahan op cit note 8 at 187.

<sup>17</sup> Ryan SA ‘Wrongful Birth: False Representations of Women’s Reproductive Lives’ (1994) 78 *Minnesota Law Review* 857-909.

<sup>18</sup> Ibid.

<sup>19</sup> Ryan op cit note 17 at 859.

particular child, but due to an error on the part of the medical practitioner, conceived and gave birth to a child. The child in this cause of action suffers no genetic or congenital defects.

There seems to be an absence of precise or universally accepted definition of what a wrongful life cause of action is. However, certain academic literature as well as case law provide definitions that share a variety of identical and essential features of the claim. Invariably, a '*wrongful life*' claim is defined as 'an action brought by or on behalf of an infant who suffers from a genetic or other congenital defect(s), alleging that the physician, in negligently failing to accurately advise, counsel, and test the plaintiff's parent(s) concerning genetic or teratogenic risks to potential offspring suggested by maternal age, family history, or other circumstances, has breached the applicable standard of medical care and precluded an informed parental decision to avoid the plaintiff's conception or birth'.<sup>20</sup>

A wrongful life claim is 'filed by a child or the parent(s) of the child in their representative capacity on behalf of the child on the basis that he or she was born handicapped as a result of the negligent behaviour of a physician, who prevented the parent(s) from having the option of having an abortion for eugenic reasons'.<sup>21</sup> The child argues that but for the inadequate advice, he or she would not have been born to experience the pain and suffering attributable to the disability.<sup>22</sup>

The negligent behaviour is attributed to a physician, medical laboratory, genetic counsellor or a laboratory technician. The disabled child therefore owes his or her very existence to medical negligence but for this negligence, the child would not have been born.<sup>23</sup> The negligent failure of the defendant was either to diagnose and inform the parent(s) about the risks involved before conception or to make a timely diagnosis and inform the parents after conception of a genetic disease or condition that the child might have and thus deprived the parent(s) of electing whether or not to have an abortion for eugenic reasons.<sup>24</sup> As the disability is required to be genetic or hereditary, it makes it an essential feature of the cause of action.

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<sup>20</sup> Rodgers TD 'Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing' (1982) 33 *South Carolina Law Review* 713-757 at 715.

<sup>21</sup> Ruda op cit note 21 at 204.

<sup>22</sup> *Friedman v Glicksman* supra at 1138C.

<sup>23</sup> Dean Stretton *Harriton v Stephen; Waller v James* 'Wrongful Life and the Logic of Non-Existence' (2006) 30 *Melbourne University Law Review* 973-1001.

<sup>24</sup> Ruda op cit note 21 at 204.,

‘The features of a wrongful life claim are that, had proper diagnosis, advice, sterilisation or abortion been made available to parents who did not want a child, or at least not a disabled child, the parent(s) would have prevented or terminated the pregnancy, and the disabled child would not have been born’.<sup>25</sup> The theoretical bases of this action, according to Rodgers<sup>26</sup> arises from a failure to accurately advise, counsel and test the mother concerning the particular foetal risk at issue.<sup>27</sup> It should, however, be noted that some wrongful life cases are not premised on failure to counsel or test but on an inaccurate performance of screening tests, an incorrect analysis of a screening test<sup>28</sup> or misdiagnosis of afflictions present in previous children.<sup>29</sup>

‘The fundamental premise of the cause of action is that, but for the physician’s negligent failure to advise the parent(s) concerning the foreseeable foetal risks and available testing procedures or failure to accurately administer those tests, the parent(s) would have reached an informed decision in order to avoid the conception or birth of the plaintiff, and as a result, a lifetime of suffering inflicted on the child by his or her condition would have been prevented’.<sup>30</sup>

Although it has become common knowledge that most wrongful life claims are premised on post-conception negligence, however, the cause of action may arise on the basis of pre-conception negligence.<sup>31</sup> A wrongful life cause of action can only be conceived in a system where abortion is either permitted by the legal system or not punishable by law.<sup>32</sup> As a matter of principle, abortion needs to be allowed on eugenic<sup>33</sup> or embryopathic<sup>34</sup> grounds for the cause of action to succeed.<sup>35</sup> In South African law, the Choice on Termination of

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<sup>25</sup> Stretton op cit note 23 at 348.

<sup>26</sup> Rodgers op cit note 20 at 713.

<sup>27</sup> Ibid.

<sup>28</sup> *F v Kingsbury Foetal Assessment Centre* (4872/2013) [2014] ZAWHC 61; *Sonny & Another v Premier of KwaZulu-Natal & Another* [2010] 1 ALL SA 169(KZP).

<sup>29</sup> *Leids Universitair Medisch Centrum v Molenaar* LJN AR 5213 Hoge Raad C03/206HR.

<sup>30</sup> Rodgers op cit note 20 3at 716.

<sup>31</sup> *Curlender v Bio-Science Laboratories* 106 Cal. App. 3d 815 (1980).

<sup>32</sup> Ruda op cit note 21 at 207.

<sup>33</sup> Eugenics is defined as ‘the science of using controlled breeding to increase the occurrence of desirable heritable characteristics’, Oxford South African Concise Dictionary 2<sup>nd</sup> Edition 2002 , or ‘the improvement of the race by scientific controls, based on study of hereditary factors’ Ballentine’s Law Dictionary 3<sup>rd</sup> Edition 1969.

<sup>34</sup> Embryopathy ‘is a development abnormality of an embryo or fetus especially when caused by a disease in the mother’ <https://www.merriam-webster.com/medical/embryopathy> accessed on 6 July 2017.

<sup>35</sup> Ruda op cit note 21 at 207.

Pregnancy Act<sup>36</sup> (CTOP) in section 2 lists circumstances in which a pregnancy may be terminated: section 2(b)(ii) if ‘a substantial risk that the foetus would suffer from a severe physical or mental abnormality’ exists or is established and (c)(i) if the birth of the child or continued pregnancy ‘would result in a severe malformation of the foetus’.

It can therefore be reasonable to argue that based on the grounds listed in section 2, in South Africa, abortion for eugenic and embryopathic reasons is permissible. Furthering Ruda’s point, it is the argument of this paper that since the CTOP allows abortion on the two grounds as mentioned above, the legislature, through the Act, recognises the rights of a mother to abort a deformed foetus while the CTOP enforces the right to reproduction as envisaged by section 27(1)(a)<sup>37</sup> of the Constitution of the Republic of South Africa, 1996. Although, its availability for therapeutic or ethical reasons related to the mother only would not suffice,<sup>38</sup> however, the CTOP also lists therapeutic and economic reasons as grounds for an abortion.

#### IV NATURE OF THE CLAIM

The wrongful life cause of action often arises through the law of delict<sup>39</sup> but can also arise in the law of contract.<sup>40</sup> For a successful delictual claim in South African law, the practice is that all delictual elements should be satisfied. In a wrongful life cause of action the plaintiff alleges and is required to prove that the respondent failed to diagnose or warn the plaintiff’s parent(s) that the plaintiff would be born with a genetic impairment or disability, besides the fact that the defendant negligently failed to perform appropriate tests or advise the plaintiff’s parent(s) of the likelihood that a risk was present that would result in a genetic impairment and as a result the plaintiff was born with the genetic impairment or disability. It must be alleged that had the parent(s) known they would not have conceived the plaintiff or carried the plaintiff to term. Therefore, the respondent’s negligence was a substantial factor in causing the plaintiff’s parent(s) to have to pay extraordinary expenses for the maintenance of plaintiff.<sup>41</sup>

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<sup>36</sup> Act 92 of 1996.

<sup>37</sup> ‘Everyone has the right to have access to health care services, including reproductive health care’

<sup>38</sup> Ruda op cit note 21 at 207.

<sup>39</sup> *Zepeda v Zepeda* 41 111.App.2d 240 (1963).; *H v Fetal Assessment Centre* [2014] ZACC 34; *Stewart v Botha* (2008) 6 SA 310 (SCA).

<sup>40</sup> *Zepeda* supra ; *Friedman ; Administrator, Natal v Edouard* 1990 (3) SA (AD).

<sup>41</sup> Graziano TK ‘Limits of Liability: The Case of “Wrongful Conception”, “Wrongful Life” and “Wrongful Birth” A Legal , Ethical, or Philosophical issue, and how to solve it?’ *University of Geneva* 24 May 2016.

It must be stated, herein, that the final requirement as set out by Graziano<sup>42</sup> is however at issue. It is the opinion of the author of this paper that such requirement should entail the suffering of the child and not the financial burden placed upon the parent(s). The financial burden can, however, be claimed by parent(s) through wrongful birth. In a wrongful life cause of action, the damages are not awarded to the parent(s) by reason of the child causing a financial burden but to the child for the suffering he or she has to endure as a result of his or her disability. Although, the cause of action is an application by the plaintiff's child, the child makes no claim on behalf of the parent(s) as that would result in a wrongful birth claim. The child claims for general and special damages when relying on the law of delict. Since a contract is an obligatory agreement, the requirements of a valid contract in South African law are that parties must intend to create an obligation, must have contractual capacity, as well as a performance that must be possible with a contract that must be legal.<sup>43</sup>

The basic rule for determining contractual damages is that the sufferer may claim so as to be put in the economic position he would have occupied if the contract had been properly performed.<sup>44</sup> The aim of damages in contract is to compensate the innocent party for his pecuniary loss.<sup>45</sup> In *Administrator, Natal v Edouard*<sup>46</sup> the court disallowed a claim for pain and suffering and loss of amenities of life that Mrs Edouard experienced as a result of the birth of the child. The court rejected the claim, holding that damages for non-pecuniary losses cannot be recovered in an action based on a breach of contract.

#### V SEMANTIC HISTORY

Public policy considerations generally undercut the recognition of wrongful life claims in almost all jurisdictions and have served as a hindrance to the child's claim. Legal scholars are of the opinion that the phrase wrongful life distracts from the complaint of the plaintiff and has implications on the acceptance of the cause of action by many jurisdictions. The proposed change in terminology will be explored in detail in chapter two. The history of the phrase is that it is understood to imply that there is something 'wrong' about the existence of the child.

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<sup>42</sup> Ibid.

<sup>43</sup> Van der Merwe at el *Contract General Principles 3 ed* (2007) at page 8.

<sup>44</sup> Robert Sharrock *Business Transaction Law 5 ed* (1999) at page 464.

<sup>45</sup> Ibid.

<sup>46</sup> *Administrator, Natal v Edourd* 1990 (3) SA 581 (D).

The phrase is often interpreted to suggest that the child is challenging his or her birth and is alleging that it is better to not have been born than to have been born in an impaired state.<sup>47</sup>

The first US case to address this cause of action and subsequently coined the phrase wrongful life was *Zepeda v Zepeda*.<sup>48</sup> Ryan,<sup>49</sup> accordingly, argues that this case in point was premised on what he terms a '*dissatisfied life*' cause of action and not wrongful life. In *Zepeda*, the claimant was a child who was born out of wedlock. He sued his father both in delict and contract for the suffering he endured as a bastard child. The father who was married at the time of his conception had allegedly misrepresented to his mother that he had the intention of marrying her. Justice Dempsey delivering the opinion of the court dismissed the contractual claim and held that the action was sound in tort. Immediately the court recognised that illegitimate children have suffered an injury (by virtue of their illegitimacy) and that if legitimacy does not take place, the injury is continuous and irreparable.<sup>50</sup>

The contractual reliance was dismissed on the basis that in order for the action to succeed the complainant had to be regarded as a third party beneficiary of the agreement between his mother and father.<sup>51</sup> The court in also rejecting the delictual cause of action reasoned that the recognition of the plaintiff's claim meant a creation of a new tort namely wrongful life. The legal implications of such a tort are vast and the court's opinion is that the social impact could be staggering. If the new litigation were confined just to illegitimates, it would be formidable.<sup>52</sup> It was not the suits of illegitimates which gave the court concern but the nature of the new action and the related action which would be encouraged by the recognition of the claim.

The encouragement would, according to the Illinois Appeal Court, 'extend to all others born into the world under conditions they might regard as adverse'.<sup>53</sup> These conditions, in the court's opinion, could arise in situations where 'one might seek damages for being born of a certain colour and race, with a hereditary disease or for inheriting unfortunate family

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<sup>47</sup> Ruda op cit note 21 at 203.

<sup>48</sup> *Zepeda* supra.

<sup>49</sup> Ryan op cit note 17.

<sup>50</sup> *Zepeda* supra at 38.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid at 38.

<sup>53</sup> Ibid at 38.

characteristics.<sup>54</sup> Others could have a claim for being born into a large and destitute family or because a parent has an unsavoury reputation.<sup>55</sup>

When assessing the judgement, it is rather safe to argue that the court in *Zepeda* did not exactly restrict the words ‘wrongful life’ to any class of persons. In the words of the court, ‘persons born into the world under conditions they might regard as adverse’ are claimants in wrongful life. This means that a wrongful life cause of action can be brought to a court on subjective adversity, of course with a legal wrong to provide a legal basis for the cause of action. *Zepeda* was an illegitimate child and the term wrongful life was coined in that judgement. The phrase has since developed and is now accepted and restricted to a cause of action by a deformed or disabled child as a result of the negligence of a medical practitioner.

Five years after *Zepeda* the New Jersey Supreme Court decided a wrongful life case that would eventually become the most cited US case. In the case *Gleitman v Cosgrove*,<sup>56</sup> the trial judge dismissed the wrongful life claim on motion for failure to show that the defendant’s acts were the approximate cause of Jeffrey’s condition. Jeffrey Gleitman suffered from sight, speech and hearing defects. Proctor J held that ‘in a wrongful life claim, the plaintiff is not required to say that he should not have been born with defects but that he should not have been born at all’. The infant plaintiff’s action requires the court to measure the difference between his life with defects against the utter void of nonexistence, and such determination was impossible for a court to make. Jeffrey Gleitman’s action was concluded by the court not to be actionable in law, the reason in the words of Proctor J was that the conduct complained of, even if true, did not give rise to damages cognizable in law.

Francis J concurring based his dismissal of the cause of action by classifying wrongful life as a claim for a eugenic abortion which was found by the learned judge not to be authorised by any American statute. Weintraub J expressed the opinion that to recognize a right not to be born is to enter an area in which no one could find his way. Jacobs J in his dissent found that a duty was owed by the obstetricians to the parents. If the duty had been discharged, Mrs Gleitman could have safely and lawfully aborted and would have been free

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid at 260.

<sup>56</sup> *Gleitman v Cosgrove* 49 N.J 22 (1967) [227. A.2d 689].

to conceive again and give birth to a normal child, opined the learned judge. In declining to compensate the aggrieved child, the law permits a wrong with serious consequential injury to go wholly unredressed. Further, the failure by court to recognize such duty provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of tort law. 'While logical objection may be advanced to the child's standing and injury, logic is not the determinative factor and should not be permitted to obscure that he has to bear the frightful weight of his abnormality throughout life. Further, that compensation received from the defendants or either of them should be dedicated primarily to his care and the lessening of his difficulties'.<sup>57</sup> A rejection based on public policy cannot be accepted as there is no public policy favouring the breach of duty or its immunization, he concluded.

In South Africa, the concept of a wrongful life cause of action was first argued in *Friedman v Glicksman*<sup>58</sup> and the cause of action was rejected outright by the court. Mrs Glicksman, whilst pregnant, consulted a specialist gynaecologist to advise her on whether or not she might have been pregnant with a potentially abnormal or disabled foetus. Friedman advised her that it was safe for her to proceed with the pregnancy to full term and on 5 March 1991 Alexander was born disabled. Mrs Glicksman alleged that had she received proper advice she would have enforced her rights in terms of section 3(c) of the Abortion and Sterilisation Act 2 of 1975 to terminate her pregnancy if there was a serious risk that the child might be seriously disabled. In her representative capacity, she brought a claim for wrongful life, claiming for general damages and for future loss of income.

She also brought a wrongful birth cause of action in her own capacity and claimed for expenses for maintaining and rearing of the child, all future hospital and medical expenses and other special expenses. The action was brought to court in both contract and delict. She alleged that the defendant's negligence was a breach of his duty of care as well as a breach of the agreement. Goldblatt J recognised that the phrases used to describe the two causes of action contained certain 'emotional and apparent value judgments which can detract from a proper judicial approach' of the issues raised.<sup>59</sup> Dismissing the contractual action, the court reasoned that it was trite law that an agent could not act on behalf of a non-existent principal,

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<sup>57</sup> Ibid.

<sup>58</sup> *Glicksman supra*.

<sup>59</sup> *Glicksman* at 1138E.

noting that legal personality commences at birth and this could not be a contract for the benefit of a third party as such party could only accept the benefit (the termination of pregnancy) when it was no longer possible.<sup>60</sup>

The court saw it unnecessary to invoke the nasciturus fiction because Alexander's action did not arise when the pregnancy was not terminated but when she was born.<sup>61</sup> The plaintiff argued that if a mother is able to prove fault and causation and successfully sue, there is no reason in law why the child should not be entitled to sue. Goldblatt J, in his dismissal of the delictual claim opined that 'it would be against public policy for courts to hold that it would be better for a party not to have the unquantifiable blessing of life rather than have life in a marred way'.<sup>62</sup> The words of Goldblatt J were used to dismiss the cause of action in subsequent cases and are the most cited in the entire judgement.

The court, in further dismissing the action, reasoned along the lines of Dempsey J in *Zepeda*, holding that the recognition would open doors to disabled children who would be entitled to have a claim against their parent(s) and that the measure of damages were completely inconsistent with the measures allowed for in the law of delict.<sup>63</sup> The court found the proposition illogical and contrary to their legal system that a defendant who was in no way responsible for the child's disabilities should compensate the child for such disabilities.<sup>64</sup> The only measure of damages, according to the court could only be the difference between existence and non-existence which was contrary to the measures of damages allowed in the law of delict.

## XI CONCLUSION

This chapter has outlined the cause of action as well as attempted to provide an understanding of the action in delict and in the law of contract. In its attempt to describe the action, it is worth noting that although there is no universally accepted definition, wrongful life is an action that shares the same inherent characteristics worldwide. The foundation of the essential characteristics, therefore, flows from the foetus that is a potential child and completely disregards the future child. Although, as a landmark decision, *Foetal Assessment*

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<sup>60</sup> *Glicksman* supra at 1140F-H.

<sup>61</sup> *Glicksman* supra at 1140H-I.

<sup>62</sup> *Glicksman* supra at 1142I-J.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Glicksman* supra at note 39 1143A-B.

*Centre* has settled the legal position of the cause of action in South African law, however, in its judgment, the Constitutional Court did not provide a definition for the cause of action. Kirby J, citing *Curlender*<sup>65</sup> in *Harriton v Stephens*,<sup>66</sup> expressed that the nature of the claim regardless of the perspective is the reality that the plaintiff both suffers and exists due to the negligence of others.

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<sup>65</sup> *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 (1980) (CA).

<sup>66</sup> *Harriton v Stephens* [2006] HCA 15.

## CHAPTER TWO

### LITERATURE REVIEW

#### I INTRODUCTION

The expansion of knowledge in prenatal existence has posed a major impact on the law of torts.<sup>67</sup> A prenatal tort occurs when a child born alive is harmed before or during birth but after conception due to the wrongful post conception conduct of someone other than its parent(s).

Wrongful life is defined as a claim by a child which is always a disabled child or parent(s) issued in their representative capacity against the health practitioner for having to live a life full of suffering because the handicapped child was not supposed to have been born at all but was born anyway because of a negligent act by the medical practitioner.<sup>68</sup> Another definition which rightfully defines wrongful life is that it is a claim where a disabled plaintiff born as a result of medical negligence sues the negligent doctor for pain and suffering and financial cost of life with disabilities.<sup>69</sup> Wrongful life claims that although it is not always that cases are brought to a court of law with wrongful birth. A wrongful birth claim is a cause of action brought by parent(s) alleging that their procreative rights have been denied by the wrongful conduct of a medical practitioner.<sup>70</sup>

#### II ANALYSIS OF LITERATURE

The claim for wrongful life has previously been rejected by various jurisdictions, including South Africa, for a variety of reasons that will be evident through the analysis of this literature review. In *Speck v Finegold* 408 A 2d 496, the court responded to the claim by avoiding the issue at hand and stating that ‘whether or not it is better to have never been born at all 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’.<sup>71</sup> And, further, that ‘the law

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<sup>67</sup> Collins Elizabeth F ‘An Overview and Analysis; Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death and Wrongful Birth: Time for a New Framework’ (1984) 22 *Journal of Family Law* 677-711 at 683.

<sup>68</sup> I Giesen ‘The Use and Influence of Comparative Law in Wrongful Life Cases’ (2012) Volume 8 *Utrecht Law Review* Issue 2 at 37.

<sup>69</sup> Dean Stretton *Harrington v Stephen; Waller v James* ‘Wrongful life and the logic of non-existence’ (2006) 30 *Melbourne University Law Review* 973-1001.

<sup>70</sup> Collins op cit note 67 at 678.

<sup>71</sup> *Speck v Finegold* 408 A 2d 496 at 508.

cannot assert a knowledge which can resolve this inscrutable and enigmatic issue'.<sup>72</sup> Spaeth J dismissed the action further by stating that a court cannot give an answer susceptible to reasoned or objective valuation of the issue at hand.

The claim was first rejected by a South African Court in 1996 in the case *Friedman v Glicksman*.<sup>73</sup> Mrs Friedman instituted a wrongful life and wrongful birth claims against the defendant after the birth of her disabled daughter, Alexandra, in both the law of contract and delict. She claimed for general damages on behalf of her daughter together with damages for future loss of earnings and maintenance, future medical expenses and other special expenses. The court acknowledged a wrongful birth action as not contra bonos mores and falling under the Aquilian action. In the alternative, the court held that the contract was sensible, moral and in accordance with medical practice. Wrongful life was rejected by the court outright in the law of delict and contract. Goldbatt J opined that the claim was contra bonos mores and against public policy. The court stated that the issue at the core was what was preferable from the child's perspective and identified the preference as one in which the child preferred not to have been born at all.<sup>74</sup> The court identified the absence of a legal duty between the defendant and the foetus and the impossibility of calculating damages<sup>75</sup> as obstacles to the claim. Besides, the court found that it would be against public policy for courts to have to decide that 'it would be better for a party not to have the unqualified blessing of life rather than to have such life in a marred way'.<sup>76</sup>

In 2013, the Western Cape High Court was faced with a claim for wrongful birth and wrongful life in the case of *H v Kingsbury Fetal Assessment Centre (Pty)Ltd*.<sup>77</sup> M was born with Down Syndrome after his mother had consulted Kingsbury Foetal Assessment centre for a prenatal scan. The scan was interpreted wrongly by a staff member of the clinic, but the

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<sup>72</sup> *Speck supra* at 512.

<sup>73</sup> *Friedman supra*.

<sup>74</sup> *Stewart v Botha* 2008 (6) SA 310 (SCA).

<sup>75</sup> In *Gleitman v Cosgrove* 49. N.J 22, A.2d 689 (1967) the court also used the argument of the impossibility of computing damages as a reason to bar the cause of action. The court held that 'damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence' Further that the infant plaintiff would have the court measure the difference between his life with defects against the utter void of nonexistence and therefore rendering such determination impossible. The court reasoned further that it could not weigh the value of life with impairments against the nonexistence of the plaintiff's life. 'By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies' *supra*, 227 A.2d 689,692.

<sup>76</sup> *Gleitman supra* at 1143.

<sup>77</sup> *H v Kingsbury Fetal Assessment Centre (Pty)Ltd* Case No 4872/2013.

scan however showed clearly a very large abnormal nuchal translucency which measured between 4mm-5,3 mm and which was indicative of a high risk of Down Syndrome in a foetus. The defendant measured the nuchal translucency at 1.9 mm. The child claimed for special damages for past and future medical expenses and general damages for disability and loss of amenities of life. The Fetal Assessment Centre raised an exception and argued that the claim is bad in law and failed to disclose a cause of action. Baartman J, after considering both foreign and local jurisprudence in wrongful life cases, particularly *Stewart v Botha*,<sup>78</sup> concluded that ‘public opinion continues to be influenced by the remarkable resilience in overcoming enormous odds displayed by many disabled persons in all walks of life, refuting those who treat their lives as inferior to non-existence’. Although, the wrongful birth claim was successful, however, wrongful life was not. The *Kingsbury Fetal Assessment Centre’s* decision was taken on appeal to the constitutional court and resulted in *H v Fetal Assessment centre*.<sup>79</sup> The court ultimately concluded that the child’s claim may be found to potentially exist in South African law.

Britz and Slabbert<sup>80</sup> suggest that the wrong through the lances of the court related to the very fact that the child was born. The term is said to be misleading and this can be linked to the dismissal of such cases in most jurisdictions. The wrongfulness however lies in the negligence of a medical practitioner and the harm is the effect the birth has on the plaintiff child. This author offers a critique to the case of *Kingsbury Fetal Assessment Centre*, arguing that the High Court failed to decide the case within the ambit of the Bill of Rights and Children’s Act. Further that the failure to develop common law in accordance with the Constitution and thus considered such failure as a ‘lost opportunity’. The authors opined in their critic of the judgment that the High Court erred in misinterpreting the Supreme Court of Appeal’s (herein SCA) rejection of the claim in *Stewart*. The view is that the SCA did not develop common law because no suggestion was made by either parties that required common law principles to be developed. The SCA’s approach that a court cannot be called upon to determine whether a child should have been born at all is untenable as this denies the very essence of the law and the functions of the courts. In conclusion the suggestion put forward is that the court should shift its focus from the wronged individual to the wrongdoing

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<sup>78</sup> *Stewart supra*.

<sup>79</sup> [2014] ZACC 34.

<sup>80</sup> TG Britz and M Slabbert ‘Wrongful Suffering: A life that should never have been’ (2015) 78 *THRHR* 577-588 at 578.

and analyse the claim from a different context through the lances of the Bill of Rights and the Children's Act.<sup>81</sup>

According to Collins, for a successful preconception claim, courts must recognise the child's right to be born as a whole functioning human being.<sup>82</sup> Courts err in overlooking the option of giving a child the right to 'free injury formation'. This right, however, would not be applicable in situations where the child is born with a natural defect free from medical negligence. With the right to free injury formation the child would have to prove that while it was a prospective existing life, another's conduct changed the natural cause of the child's formation. Wrongful formation is used to describe wrongful pregnancy, wrongful conception and wrongful birth. In wrongful formation, the basis of granting relief to the parent(s) would be based on their right to have control over their reproduction and determine the form of the child whom they want to give birth to.

Courts generally deny a wrongful life action based on the following grounds; 1) the sanctity of life;<sup>83</sup> 2) the inability to calculate damages; 3) a failure to establish causation;<sup>84</sup> 4) the legislature is responsible for the recognition of such claims; 5) an infant has no right to be born free from defects;<sup>85</sup> 6) the excessive economic burden on the medical profession that will be brought by the recognition of such claims;<sup>86</sup> 7) promotion of eugenics;<sup>87</sup> 8) discrimination and the perpetuation of the stereotypes against the disabled community;<sup>88</sup> and 9) the risk of fraudulent claims. Other grounds include the opinion by courts that the value of human life makes existence in any manner preferable.<sup>89</sup> In order for a child to have a successful claim, it is suggested that a new born must be provided with certain rights; the right to develop (abortion as an exception), to be born free from defects and to injury free formation.<sup>90</sup> Once a child is awarded with the right to be born free of treatable prenatal defects, actions for wrongful formation and wrongful alterations can be dealt with under one

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<sup>81</sup> Britz and Slabbert op cit note 80 at 588.

<sup>82</sup> Collins op cit note 67 at 707.

<sup>83</sup> *Glietman v Cosgrove* 49. N.J 22, A.2d 689 (1967).

<sup>84</sup> *Stewart supra* at 17.

<sup>85</sup> *Becker v. Schwartz* (1978) 46 N.Y.2d 40.

<sup>86</sup> Stoll 'Preconception Torts- The Need for a Limitation' (1979) 44 *Mo.L.Rev* 143.

<sup>87</sup> Ruda op cit note 21 at 207.

<sup>88</sup> Sagit Mor 'The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel; A Disability Critique' (2014) 63 *Studies in Law, Politics and Society* 113-146 at 116.

<sup>89</sup> *Stewart supra*.

<sup>90</sup> For the purposes of the article injury is defined as 'the harm that results when the wrongful conduct of another alters the natural cause of the child's formation' and formation refers to either natural or artificial fertilization or foetal development until live birth, Collins supra at 684.

cause of action namely 'wrongful impairment'. The article concludes by suggesting that the courts should recognise wrongful impairment (based on the right to be born free from negligently inflicted injuries/ reasonably treatable defects/ born as a whole functional human being) and wrongful formation causes of action which would include in-uterine treatment cases as well as wrongful pregnancy, wrongful conception and wrongful birth. These actions, therefore, introduces new terminology in pre-natal torts.

The first Australian case on wrongful life was *Harriton v Stephens; Waller v James*<sup>91</sup> in casu the Australian High Court rejected the cause of action on the basis that the recognition of this cause of action is impossible as the calculation of the damages requires one to compare existence with non-existence which is impossible and contrary to sound legal policy. Crennan J held that the doctor's alleged duty of care to the child should not be recognised because the duty could be incompatible with the doctors existing duty of care to the mother and concluded that disabilities, like life, are not actionable and therefore the claim should fail. Stretton<sup>92</sup> argues that the failure of the court to recognise the claim constituted an injustice.

Kirby J opined in his dissent that a wrongful life claim can succeed on ordinary principles of negligence law. He identifies the first problem in this cause of action to lie in the terminology. His opinion is that the term is 'uninstructive', 'unhelpful', 'ill-chosen' and should be avoided.<sup>93</sup>The medical practitioner owes an unborn child a duty to take reasonable care to avoid conduct that might foreseeably cause-prenatal injury. Once the child is born, the damages accrue in law and the child is able to maintain an action for damages,<sup>94</sup> and the denial of the duty amounts in effect to the provision of an 'exceptional immunity' to healthcare providers which common law resists.<sup>95</sup>Further, general and special damages are in his learned opinion recoverable. These special damages are recoverable because but for the negligence, the plaintiff would not have any economic needs<sup>96</sup> since the reasons for the denial of the damages is founded on policy considerations and not the law. The awarding of such damages, however, would ensure that the plaintiff lives a dignified life. The ultimate question

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<sup>91</sup> 2006 [HCA ]15.

<sup>92</sup> Stretton op cit note 23.

<sup>93</sup> *Harriton v Stephens; Waller v James supra* at 8.

<sup>94</sup> *Harriton v Stephens; Waller v James supra* at 67.

<sup>95</sup> *Harriton v Stephens; Waller v James supra* 72.

<sup>96</sup> *Harriton v Stephens; Waller v James supra* at 87.

that courts are required to answer according to Kirby J is ‘who should pay for the suffering, loss and damage that flows from the respondent’s carelessness’?<sup>97</sup>

In response to the *Harriton- Waller* decision, Stretton<sup>98</sup> argued that the conclusions of the court were unjustified. The impossibility of comparison argument ignored the comparisons between existence and non-existence routinely made in other contexts while the policy concerns prove groundless on a critical examination. The article argues that by depriving wrongful life the court had inflicted an injustice. The author points out that although a foetus has no legal rights until birth, doctors treating pregnant women have a duty to avoid causing damage to the foetus since such damage may cause damage to the legal person whom the foetus will become. Further, that prenatal negligence would ordinarily be held to be a legally recognised damage and thus the same principles should apply in wrongful life claims.

The comparison between existence and non-existence is logically and legally possible according to the author. This is so because first-hand experience is not needed in order to compare existence with non-existence. Since no one has ever experienced non-existence, courts often make comparisons of situations without first-hand experience and thus, this should be considered as one of those situations. Collins concludes by suggesting that if one were to argue the damage as simply the disability rather than life with disabilities, the plaintiff would not need to show that his or her life as a whole is worse than non-existence. Rather, he or she would be required to show that the disability is worse than the alternative of non-existence and therefore the defendant would be proven to be the legal cause of the harm. The recognition of the claim is argued to be a source of subordination for the disabled community and severely influences structural inequality.<sup>99</sup> The cause of action conveys a negative message according to Sagit.<sup>100</sup> When the courts do recognise the cause of action, it does so by awarding extraordinary expenses that are attributable to the defects.<sup>101</sup>

When a claim for wrongful life is recognised, courts rely on one of the following grounds: 1) the child seeks damages for its existence in a deformed state rather than its

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<sup>97</sup> *Harriton v Stephens; Waller v James* supra at 155.

<sup>98</sup> Stretton op cit note 23 at 1001.

<sup>99</sup> Sagit op cit note 88 at 116.

<sup>100</sup> Ibid.

<sup>101</sup> *Curlender supra, Turpin, Harbeson v Parke-Davies inc* 98.Wn.2d 460 (1983) and *Fetal Assessment Centre supra*.

birth;<sup>102</sup> 2) to enable the child to have access to resources;<sup>103</sup> and 3) to deter medical negligence.

### III CONCLUSION

The issue of wrongful life has been at the centre of debate amongst scholars and courts. In Collins's opinion, all courts agree that 'a child cannot state a cause of action based on its status at birth, but courts do not agree on whether a child can sue because it has rights in its existence and form'.<sup>104</sup> Different jurisdictions considered the issue to be one that a court could not engage in for reasons illustrated in the review, whilst other jurisdictions acknowledged the cause of action but was selective in the type of damages that a plaintiff child could claim

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<sup>102</sup> *Curlender supra* at 830-31, *Harbeson supra*.

<sup>103</sup> *Fetal Assessment Centre*.

<sup>104</sup> Collins *op cit* note 67 at 704.

## CHAPTER THREE

### ISSUES OF TERMINOLOGIES AND NOMECLATURE

#### I INTRODUCTION

The term ‘wrongful life’ has to date served as an umbrella for causes of action based upon many distinguishable factual situations which has led to some confusion in its use’.<sup>105</sup> Scholars are of the view that there should be a change in terminology. They suggest that the cause of action be termed or referred to as ‘wrongful suffering’ and not ‘wrongful life’.<sup>106</sup> Ruda, on the other hand, regards the object of analysis of the term wrongful life as unfortunate.<sup>107</sup> The Constitutional Court in *Foetal Assessment Centre* also held that ‘characterising the issue as one of wrongful life avoids direct engagement with the substantive issue’.<sup>108</sup> Whether or not the proposed change can or might add a meaningful contribution towards the recognition of the cause of action in many jurisdictions will be explored in this chapter. The meaning of the word suffering will also be investigated and restricted to the suffering identified in case law.

#### II PROPOSING CHANGES IN TERMINOLOGY

The debate surrounding the change in terminology is based on the fact that courts disregard the cause of action merely due to the fact that the life or the birth of a child is challenged and is alleged to be ‘wrongful’. Due to the terminology, courts reject the claim with the view that life can never be wrongful and the basis for such is the sanctity of life principle. Further, the courts are of the view that life is always preferred over non-existence.<sup>109</sup> Although the court in *Gleitman v Cosgrove*<sup>110</sup> did not explicitly state their view on whether or not life is

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<sup>105</sup> *Curlender* supra at 818.

<sup>106</sup> Ruda op cit note 2 1 at 205; Britz TG & Slabbert M op cit note 80 at 578.

<sup>107</sup> Ruda op cit note 21 at 205.

<sup>108</sup> *Fetal Assessment Centre* supra at 20.

<sup>109</sup> ‘In order to recognise the claim, one would have to evaluate the existence of the child against his or her non-existence and found that the latter was preferable’ Snyders AJA in paragraph 11 of *Stewart* the Supreme court of appeal’s decision. *McKay* at 1170 held that it would be contrary to the sanctity of human life to recognise such claim because in the eyes of the law a disabled life is better than no life. Any decision negating the value of life directly or by implication was opined by the majority in *Gleitman* at 629 as an impermissible expression of public policy. In *Berman v. Allan* (1979) 80 N.J. 421 [404 A.2d 8] at 12- 13 expressed that ‘one of the most deeply held beliefs of our society is that life whether experienced with or without a major physical handicap is more precious than non-life... Sharon, by virtue of her birth, will be able to experience happiness and pleasure, emotions which are truly the essence of life and which are far more valuable than the suffering she may endure’.

<sup>110</sup> *Gleitman* supra at para 25.

preferred over non-existence, the court held that whether or not it is better to have been born is a mystery that is beyond their understanding and ability to solve. It is the opinion of the author that a child's life can never be wrongful but rather the life of the child is not as it should be. In reality and in the legal sense, the wrongfulness, therefore, lies in the negligent conduct of the defendant who failed to allow the parent(s) to decide on whether or not to have an abortion for eugenic or embryopathic reasons. Therefore, the use of the term 'wrongful life' is suggested to be loose and inappropriate.<sup>111</sup> It is further argued that the label discourages dispassionate legal analysis.<sup>112</sup> This label is an entrenched and convenient shorthand that seems to mislead.<sup>113</sup>

The term wrongful life was coined in *Zepeda v Zepeda*<sup>114</sup> by the Illinois Appellant Division. Life cannot be wrongful and the term is an oversimplification of the conflicts of interest which are at stake.<sup>115</sup> In *Zepeda*, the cause of action was rejected on the basis that a wrongful life claim would be filed by everyone born under conditions which they regarded as 'adverse'. It is the opinion of Tedeschi<sup>116</sup> that the subjective judgment of a plaintiff who finds life unsatisfactory cannot be a decisive factor in tort law. The reasoning of the court is criticized as being flawed and defective. Kirby J in *Harrinton v Stephens*<sup>117</sup> suggested that the use of the phrase be avoided. He reasoned that because the expression was borrowed from another context, particularly one which was based on claims brought by healthy but illegitimate children against their fathers seeking damages for the disadvantages caused by reason of their illegitimacy.<sup>118</sup> Modern wrongful life claims are different because, amongst other things, the alleged wrong is not in any meaningful sense the cause of the plaintiff's existence rather the negligence of the defendant that has directly resulted in present suffering.<sup>119</sup> By lumping all such cases under one description portends a danger that important factual distinctions will be overlooked or obscured.<sup>120</sup> The link or the various causes of action coined under the slogan 'wrongful life' no longer qualify as part of the modern wrongful life claims.

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<sup>111</sup> JS Kashi 'The Case of the Unwanted Blessing: Wrongful Life' (1977) 31 *University of Miami Law Review* 1409-1432 at 1432.

<sup>112</sup> *Harrinton* supra at 13.

<sup>113</sup> Stretton op cite note 23 at 344.

<sup>114</sup> *Zepeda* supra.

<sup>115</sup> Ruda op cit note 21 at 205.

<sup>116</sup> Tedeschi G 'Tort Liability for Wrongful Life' (1967) 7 *Journal of Family Law* 465-495.

<sup>117</sup> *Harrinton* supra.

<sup>118</sup> *Harrinton* supra at 6.

<sup>119</sup> *Harrinton* supra at 9.

<sup>120</sup> *Curlender v Bio-Science Laboratories* 106 Cal. App. 3d 815 (1980).

The mislabelling of the word was submitted to be ‘propaganda designed to destroy the cause of action and a pejorative tag which is demeaning of the disabilities suffered by applicants in the cause of action’.<sup>121</sup> It is essential that the availability of actions such as the present be determined by reference to accepted methods of judicial reasoning rather than by invoking emotive slogans and the contestable religious or moral postulates that they provoke.<sup>122</sup>

The notion that a person’s life could be wrongful is counterintuitive and renders the plaintiff’s claim suspect from the outset.<sup>123</sup> The courts are ready to accept that the child is alleging that his or her life is wrongful and that he or she would have preferred to not have been born. To this effect, the term wrongful life may hold a haunting sense of reality notions such as the sanctity of all human life and makes it preferable to think of the damages as being denied solely because of its ill-chosen label.<sup>124</sup> Unfortunately, such terminology may have contributed to making these claims so problematic, since the implication is that the claimant is challenging life itself, therefore, making the courts and the legislature reluctant in allowing such claims.<sup>125</sup> What is wrongful is the negligence of the medical practitioner and not the child’s life. It is precisely by focusing on the plaintiff’s life as a whole, rather than on negligent causation of physical damage, that courts have been led to misapply ordinary principles and thus deny recovery of damages.<sup>126</sup> In *Zepeda*, the court recognised a wrong but, because of the ranging consequences of the cause of action, found it better to leave the action to the legislature. The outcomes of the decision led to the conclusion that the law has already taken a positive stand on the question and by denying the action amounts to denying the wrong.<sup>127</sup> Britz and Slabbert<sup>128</sup> argue that the main reason why the cause of action was rejected in *Zepeda* was because of the label used to describe the cause of action. The term wrongful life implicitly denigrates the value of human existence arguably because of the law’s respect for human life.<sup>129</sup> The proposed change is meaningful as the cause of action may be seen as the opposite of wrongful birth, although, the two causes of action are

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<sup>121</sup> Fetal Assessment Centre Applicants Heads of Arguments at page 5 para 5.

<sup>122</sup> *Stewart* supra at 15.

<sup>123</sup> Stretton op cit note 23 at 322

<sup>124</sup> Kashi op cit note 111 at 1432.

<sup>125</sup> Ruda op cit note 21 at 205.

<sup>126</sup> Stretton op cit note 23 at 349.

<sup>127</sup> Tedeschi op cit note 116 at 473.

<sup>128</sup> Britz and Slabbert op cit note 80 at 578.

<sup>129</sup> *Wilson v The Queen* (1992) 174 CLR 313 at 341.

dissimilar in various aspects. Kirby J in *Harriton* opines that unless the similarities and differences are properly acknowledged, considerations favouring parental claims might be disregarded claims brought by or for the child.<sup>130</sup> This study argues that although the term has negative connotations, adopting what Kirby J calls ‘a more fitting description’ of the cause of action risks confusion.

It is however imperative that the courts approach the claim with full awareness of the shortcomings of such label as ‘wrongful life’. Some jurisdictions have however demonstrated an understanding of the cause of action but the cause of action is however still denied in those jurisdictions. Policy considerations play an overwhelming role in the denial of the cause of action regardless of the clear understanding of what the action entails.

### III WHAT CONSTITUTES SUFFERING?

The birth of an impaired child does not only cause pecuniary loss but untold anguish on the parts of those involved.<sup>131</sup> In essence, wrongful life is construed as a ‘cause of action by the defective child and the right of such child 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’.<sup>132</sup>

The California Court in *Curlender* regarded Tay-Sachs disease which is medically referred to as Amaurotic Familial Idiocy to constitute suffering. Shauna Curlender suffered from mental retardation, susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with her eyes, inability to take an interest in her surroundings, loss of motor reactions, inability to sit up or hold her head up, loss of weight, muscle atrophy, blindness, pseudobulbar palsy, inability to feed orally, decerebrate rigidity and gross physical deformity.

In *Turpin v Sortini*<sup>133</sup>, the total deafness of Hope and Joy Turpin was deemed to constitute suffering. The court alluded to the fact that sometimes non-existence is preferred over life. It is worth noting that in California it is presumed that infants experience pain and suffering when injury is established even if such infant is unable to describe such pain and

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<sup>130</sup> *Harriton* supra at 12.

<sup>131</sup> *Harriton* supra at 826.

<sup>132</sup> *Harriton* supra at 83.

<sup>133</sup> *Turpin v Sortini* 31 Cal.3d.221 (1982).

suffering. The Hoge Raad, at the Dutch Supreme Court<sup>134</sup> concluded that Kelly Molenaar's physical and mental handicap warranted non-patrimonial damages as it did in fact constitute suffering. Nicholas Perruche was born with severe handicap he could not speak, hear and was virtually blind to the French Cour de Cassation the severe handicap constituted suffering.<sup>135</sup> The Israeli Supreme Court<sup>136</sup>, in its first judgment accepting wrongful suffering, considered Hunter Syndrome to constitute suffering. The South African Constitutional Court followed and saw it fit to qualify the affliction of Down Syndrome as suffering in *Foetal Assessment Centre*. The list is not exhaustive.<sup>137</sup> For an affliction to constitute suffering within the context of wrongful suffering, it should be genetic and should have been preceded by negligent medical advice or procedure. In *Mckay*, although the cause of action was denied, her disability as a result of the mother contracting rubella during the pregnancy falls within the realm of what may constitute suffering in wrongful life. The suffering in wrongful suffering exists regardless of how it is coined or termed.

#### IV CONCLUSION

There are no clearly defined boundaries as to what can in fact constitute suffering within the meaning of the term 'wrongful suffering'. It is of paramount importance that courts, in applying its discretion in the assessment of such actions, be wary of plaintiffs who are bringing a 'dissatisfied life' cause of action as opposed to a pure 'wrongful life claim'. A change in terminology will, in the opinion of this paper, not add a meaningful contribution to the recognition of a claim. It is also the author's opinion that regardless of the change in terminology emotions will be added to the judicial analysis of the action regardless of whether or not the essential issues of the cause of action are properly understood. Hobbes<sup>138</sup> in *Leviathan* stated that an ideal judge is one who is 'divested of all fear, anger, hatred, love and compassion'.<sup>139</sup> Anleu and Mack<sup>140</sup> view judicial works as 'seeing absolute misery passing in front of you, day in and day out, month in and month out, year in and year out'.<sup>141</sup> This is however not the case. In causes of action of this nature, emotions will always be

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<sup>134</sup> *Leids Universitair Medisch Centrum v Molenaar* LJN AR 5213 Hoge Raad C03/206HR.

<sup>135</sup> *Perruche* Nov 17, 2000, JCP II, 10438.

<sup>136</sup> *Zeitsov v Katz* CA 512/81 [1986] isrSC 40(2)85.

<sup>137</sup> *Fetal Hydantoin Syndrome constituted suffering in Harbeson v. Parke-Davis, Inc* 98 Wn.2d 460 (1983).

<sup>138</sup> Hobbes T (1651) *Leviathan*. A.R Waller ed, *Cambridge University Press*. 1904.

<sup>139</sup> Hobbes op cit note 138 at 203.

<sup>140</sup> Anleu SR and Mack K 'Magistrates Everyday Work and Emotional Labour' (2005) 32(4) *Journal of Law and Society* 590-614.

<sup>141</sup> Anleu op cit note 140 at 611.

applied and weighed against the law. It was articulated in *Harrington* that a dispassionate legal analysis is deterred by the phrase.

## CHAPTER FOUR

### SOUTH AFRICAN LAW AND WRONGFUL LIFE CAUSE OF ACTION

#### I INTRODUCTION

The Constitutional Court's judgment of *H v Fetal Assessment Centre 2014 ZACC 34* emanates from a direct appeal from the Western Cape High Court bench on the issue of wrongful life. The applicant was H, a child born in 2008 with Down Syndrome as well as all the medical sequelae and complications associated with it, based on the alleged wrongful and negligent failure of the Centre to warn the mother of the high risk of H being born with Down Syndrome. The child claimed special damages for past and future medical expenses and general damages for disability as well as the loss of amenities of life. It is of importance to outline that this chapter will refer to the rights of a foetus and duties owed to a foetus. This is an abstract and non-existent idea used merely for the articulation of the court's perspective and to allude to the arguments as presented to the court more accurately. As a point of repetition this paper focuses on the potential child.

#### II DID THE COURT ADDRESS ALL ARGUMENTS?

The appellants laid a foundation by first proposing a change in terminology and thereafter submitted that the term 'wrongful life' should be changed to 'wrongful suffering' due to the fact that the existence of the child is not wrongful but the wrong alleged is the negligence of defendant that resulted in the present suffering. The submission by the appellants was that 'wrongful suffering' accurately describes the cause of action. Froneman J, writing for the majority, agreed that the term was unfortunate and wrong.<sup>142</sup> The term is said to avoid the direct engagement with the substantive issues which results in the logical paradox of comparing life with non-existence, and thereby, creating insurmountable problems at the various stages of the enquiry into the elements of delict.<sup>143</sup>

Secondly, the principal issue was argued to be whether an admittedly negligent health care practitioner and or geneticist should absorb the cost of the long term consequences of the negligence. The court concluded that the costs, however preferring to use the words harm and loss, should be borne by the medical expert in situations where the parent(s), for some reason,

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<sup>142</sup> *Fetal Assessment Centre* supra at 19.

<sup>143</sup> *Fetal Assessment Centre* supra 19 and 20.

failed to institute a claim of their own.<sup>144</sup> This instinctively prompts one to ask if a wrongful life cause of action only can be instituted when a wrongful birth cause of action is not instituted. The court portrayed an analysis that the child's claim is not necessarily inconceivable in our law when the harm-causing conduct is not challenged by the parent(s) but it is later challenged in wrongful life.<sup>145</sup> Alternatively, the follow up argument was whether the burden should be borne by the public through taxation or private individual or philanthropic interest. This argument was not addressed and it is stated clearly in the judgement that the negligent medical practitioner should, as the claim is against a single wrongdoer who in this case is the medical practitioner. The appellants relied on sections 7(2), 27, 28(2), 12(1)(c) & (e), 12(2)(a), 9(1), 10, 11 and 39(2) of the Constitution and sections 6(1)(b), 6(2)(a)(b)(c), 7(1)(i)(h)(j), 11(1)(2) and 9 of the Children's Act,<sup>146</sup> and argued that there was a legal duty that existed that was owed to the child which was to properly advise the mother. The respondents put forward the argument that there is no duty owed to an unborn foetus. The respondents reasoned that the duty of care owed to the mother was an accurate analysis to determine the degree of risk of Down syndrome and that did not extend to the foetus. The mother, therefore, has a right of recourse through wrongful birth. Consequently, in establishing wrongfulness, a legal duty must exist. The court held that a legal duty not to cause loss to the child 'may' exist and, therefore, the failure to do so 'might' breach that duty and infringe upon the right under section 28(2) of the Constitution.<sup>147</sup> The use of the words 'might' and 'may' appears to create an atmosphere of uncertainty as to whether or not a legal duty does indeed exist.

In *Stewart*,<sup>148</sup> the court reasoned that, although, the sanctity of life argument in wrongful birth does not prevent a cause of action, it is, however, an insurmountable obstacle in wrongful life. The courts approach is criticised for having failed to pronounce whether the Choice on Termination of Pregnancy Act<sup>149</sup> had eroded the sanctity of life argument. This argument was not addressed by the court in this instance. The principles of medical ethics such as beneficence and maleficence were not addressed by the court. These are essential principles and deserve attention by the court since it possesses the ultimate decision of determining a duty by a medical practitioner. Louw J once more in *Stewart*, held that the

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<sup>144</sup> *Fetal Assessment Centre* supra at I65.

<sup>145</sup> *Ibid.*

<sup>146</sup> Act 25 of 2005.

<sup>147</sup> *Fetal Assessment Centre* at 69.

<sup>148</sup> *Stewart v Botha* 2008 6 SA 310 (SCA).

<sup>149</sup> Act 92 of 1996

difficulty was not the assessment of damages but whether the child had actually suffered damages. The exception<sup>150</sup> raised was that *Friedman*<sup>151</sup> and *Stewart* occurred prior to constitutional dispensation and thus were not looked at in the context of the Children's Act or the Constitution which is distinguishable in casu. The argument is, therefore, that the court a quo was misdirected because M was born in 2008 and therefore constitutional values and principles apply. The appellants submitted that the court a quo erred in overlooking and not applying the child focused jurisprudence of the Constitutional Court and normative values of the Constitution and therefore in application of these principles a duty of care that is owed to the foetus should be created. The appellants put forward their reliance on international law by stating jurisdictions that recognise legal duty to the foetus, such as USA, Canada, Australia and the United Kingdom. The court held that foreign law is not an obligation in terms of section 39(1) of the Constitution. Cognisance must be held to both the historical context of which the constitution was born and our present social, political and economic context.<sup>152</sup> It was submitted that the court recognised a legal duty not to cause harm to a child in utero in *Mtati*.<sup>153</sup> The present case is, although, distinguishable, however, it is argued that the duty of care owed is for the medical practitioner to avoid conducts that might foreseeably cause prenatal injury. Such duty of care is mediated through the mother to the foetus. The recognition of the claim is not entirely based on deterring negligence per se but also to deter doctors from making decisions about genetic testing and disclosure based on personal philosophy.

The appellants argued that the recognition of the claim will assist in giving the child a right of recourse if parent(s) claim prescribes or if parent(s) failed to claim. Upon reaching age of majority, the child will be able to maintain herself. Respondents differed in opinion by stating that there is no justification for common law to be developed to compensate for the negligent failure on the part of the parent(s) to exercise their rights timeously, and that the handicapped child has a right to be taken care of by parent(s) and society. In addressing the argument, it was stated that in allowing the claim, it should be conceived simply as 'helping a child to cope with the condition of the life she was born with and making it possible for that

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<sup>150</sup> An exception is a legal mechanism used "to weed out cases with no legal merit", *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73 at 3.

<sup>151</sup> *Friedman v Glicksman* 1996 1 SA 1134 (W).

<sup>152</sup> *Fetal Assessment Centre* supra at 28.

<sup>153</sup> *RAF v Mtati* 2005 (6) SA 215 (SCA)

child to live as comfortably as possible in such circumstance'.<sup>154</sup>The court went further to state that wrongful birth and wrongful life causes of action are not cumulative<sup>155</sup> but they are rather co-extensive.<sup>156</sup> The wrong-doer burdens both parent(s) and the child and if the parent(s) do not claim then, possibly, the child can.

Since the termination of pregnancy is legal and undermines the sanctity of life, the appellants argued that logic and consistency dictates that sanctity of life argument cannot bar wrongful life whilst allowing wrongful birth. Although, Court a quo is said to have erred in finding that the legal convictions have not changed since *Stewart*, public policy has to be decided with reference to rights guaranteed while the courts develop common law, as the focus shifts from the wronged individual to the wrongdoing. The court did not allude to this argument and simply developed common law within the normative framework of the constitutional values and fundamental rights by considering the potential existence of the cause of action in South African law.

In awarding damages, the appellants argued that the court is not endorsing a claim that the child would be better off not having been born but that such disabled individual would be better off with access to resources. Furthermore, the measure is not about the novel comparator of non-existence but a measurement of the dominium of the *patrimonium* of M as a consequence of being born with Down syndrome. The respondents' counter argument was that it is neither possible nor competent for any court to determine damages arguably because the calculations involve the difference between existence in a disabled condition and non-existence and that is said not only to be impossible but also contrary to public policy. Damages for maintenance (special damages) are as those of the parent(s) in wrongful birth.<sup>157</sup>A court is said to assess the damages to be awarded in a manner that is most appropriate to damage suffered. The court concluded that whilst determining the case on wider grounds that the child may have a claim for patrimonial damages in the event that the parents do not exercise their claim for patrimonial damages. The issue of comparing life with non-existence was not addressed by the court. This was possibly because the claim is seen through the lenses of wrongful birth and not in those of wrongful life. Damages for pain and suffering are *sui generis* and as such, do not fall within the ambit of the Aquilian Action and

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<sup>154</sup> *Fetal Assessment Centre* supra at 72.

<sup>155</sup> *Fetal Assessment Centre* supra at 65.

<sup>156</sup> *Fetal Assessment Centre* supra at 76.

<sup>157</sup> *Ibid.*

are completely excluded in wrongful birth due to the infliction of bodily injury on the claimant requirement. It is the author's opinion that if wrongful life was not seen in the lances of wrongful birth and not perceived as an alternative cause of action to the parent(s) claim, then a child should be able to claim for compensation for general damages.

The respondents argued that there is no need to grant appeal as the status of the current South African legal system is that wrongful life is not recognised. The heads of arguments went further to argue that the entertainment of wrongful life claims are far-reaching and raise profound jurisprudential questions regarding life itself and has considerable implications for the duties of health practitioners and rights of the patient as well as the foetus.

The respondents opined that, notwithstanding provisions of the Children's Act and the Constitution, there is no indication that the common law has changed since the *Stewart* decision. The development of common law would require a quantum leap that would entail ethical, moral, philosophical and other considerations that reach far beyond anything that could possibly be countenanced at this time. The court viewed the constitutional issue here as one which 'a common law rule is changed altogether or a new rule is introduced and such is said to likely have normative implication'.<sup>158</sup> In developing the common law, it is important to understand that although the birth of a child is a cause for celebration, the birth of one born with disabilities should not be ignored in law.<sup>159</sup> Consequently, one opines in this paper that medical experts are trained to properly assist their patients, and the principles of beneficence dictates such. Counter arguing the constitutional consideration argument, the respondent argued that the Supreme Court of Appeal in *Stewart* considered the constitution but decided not to develop common law.

Lastly, the respondents submitted that the appellant's arguments that the claim is based on allowing the plaintiff to have access to resources left essential questions unanswered. Questions such as the nexus between the negligent act and the general damages; how thinking away the negligent act would affect quantification and how M would be better off if damages were awarded.

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<sup>158</sup> *Fetal Assessment Centre* supra at 14.

<sup>159</sup> *Fetal Assessment Centre* supra at 19.

### III THE CONSTITUTIONAL COURT'S REASONING

In analysing whether the child's claim can be conceived in our law, a further step is required as opined by Froneman J and the majority.<sup>160</sup> It is worth mentioning that the parents' claim was first recognised in 1996 and decided on pre-constitutional values and the Children's Act. A wrongful birth cause of action was recognised post the constitution by the SCA in the *Stewart* 2008 judgement. The learned judges viewed the further step to be one which does not make the problem metaphysical but one that remains a practical legal issue. The further step is 'what is the position if, for some reason, the parent(s) fail to make the claim against the negligent medical practitioner? And 'who should bear the loss or harm: the child or the medical expert?'<sup>161</sup> 'Given that the Constitution stipulates that the best interests of the child are of paramount importance and the fact that the medical expert will not be liable for anything more than he would be liable to the parents, it is quite conceivable that a court may, when all the facts are known to it after the trial, conclude that medical expert be liable for the same loss which he would have been liable to the parents'<sup>162</sup> A well understood principle espoused by Farlam JA concerning pre-natal injuries is that 'the right of a child to sue for pre-natal injuries is based on the right of action only becoming complete when the child was born alive'.<sup>163</sup> The court distinguished *Mtati* from the case in casu and held that, despite the differences, there was no need to deviate from this approach. The existing common law which is the one in *Stewart* is said to have failed to recognise that the recognition of the child's claim would be in the best interest of the child or to take account of the dictates of the Bill of Rights.<sup>164</sup> The court referred to the dictates of the best interests of the child and aligned them with the accepted delictual elements. The principle of the best interest of the child is said to fly in the face of those elements.<sup>165</sup> Our Constitution makes it possible for the claim of the child not to be deemed inconceivable.

Harm in delict is assessed between two parties: the one causing the harm and the other suffering the harm. The paradox in determining harm in wrongful life is the absence of physical harm to the person or property<sup>166</sup> which are the original Aquilian liability requirements. The absence is present in wrongful birth and therefore how such was done in

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<sup>160</sup> *Fetal Assessment Centre* supra at 62

<sup>161</sup> *Fetal Assessment Centre* supra at 62 and 63.

<sup>162</sup> Ibid.

<sup>163</sup> Quoted at 49; *Mtati* at para 39.

<sup>164</sup> *Fetal Assessment Centre* supra at 52.

<sup>165</sup> Ibid.

<sup>166</sup> *Fetal Assessment Centre* supra at 55.

those causes of action should be instructive in the present action.<sup>167</sup>In *Mukheiber*<sup>168</sup> and *Eduourd*,<sup>169</sup> financial burden was of significance since it demonstrated a legal loss. The harm was said to be the misdiagnosis with its consequences manifesting upon the child. This is said to be able to provide a solution and inherent limitation to the nature and extent of that liability.<sup>170</sup> The approach to wrongfulness is a normative one, as it allows courts to question the reasonableness of imposing liability on assumption that all other delictual elements have been met on the grounds rooted in the constitution, policy and the legal convictions of the community.<sup>171</sup>The court used the ‘but for’ test to establish legal causation, holding that but for the prenatal misdiagnosis, the mother would have undergone an abortion and the birth would not have occurred. In this wise, factual causation was not addressed and the reasoning behind was that it was a factual issue which could only be established at trial after the assessment of evidence.<sup>172</sup> The court failed to pronounce on damages, on whether or not the child may have a claim beyond patrimonial damages. It found it unnecessary to do so. This is interesting considering the fact that throughout the entire judgement, wrongful life was seen through the lenses of the parent(s’) claim. In concluding the judgment, it was said by the court that the determination of the potential existence of the cause of action was on wider grounds and the judgment was referred back to the High Court.

#### IV ARE THE REASONS CONVINCING, COHERENT AND ALIGNED WITH THE CONSTITUTIONAL JURISPRUDENCE?

According to the court, the purpose was not to determine whether or not the child had a claim but whether or not the common law could be possibly developed to recognise such claim.<sup>173</sup> The Fetal Assessment Centre argued that the claim was impossible and no amount of evidence could ‘cure the impossibility of the claim’.<sup>174</sup> The values that were stated to be at the forefront of this debate were equality, dignity and the rights of the children to have their best interest considered in every matter concerning the child.<sup>175</sup> The court did not pronounce on whether or not the child had a claim. Rather it expressed the potential existence of the claim, which is the principle that the interests of the child are of paramount importance in

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<sup>167</sup> *Fetal Assessment Centre* supra at 56.

<sup>168</sup> *Mukheiber v Raath and Another* [1999] ZASCA 39.

<sup>169</sup> *Administrator, Natal v Edouard* [1990] ZASCA 60.

<sup>170</sup> *Fetal Assessment Centre* supra at para 29.

<sup>171</sup> *Fetal Assessment Centre* supra at 67.

<sup>172</sup> *Fetal Assessment Centre* supra at 74.

<sup>173</sup> *Fetal Assessment Centre* supra at 48.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Fetal Assessment Centre* supra at 49.

any matter concerning the child. Although this was continuously repeated, yet the interests at stake in casu were not described or alluded to. It is therefore up for scrutiny whether such interests do, in actual fact, exist when they were interpreted.

Section 28(2) states that ‘a child’s best interests are of paramount importance in every matter concerning the child’.<sup>176</sup> This principle was established in South African law in *Fletcher v Fletcher 1948 (1) SA 130 (A)*. Section 28(2) is not only a principle that assists in the interpretation of other rights but also a right in itself that strengthens other rights.<sup>177</sup> The self-standing right must also be examined on an individual basis and not in abstract.<sup>178</sup> Sachs J in *S v M*<sup>179</sup> held that the expansiveness of the paramountcy principle seems to promise everything but delivers very little.<sup>180</sup> The learned judge went further to state that the right is contextual in nature, inherently flexible and not absolute.<sup>181</sup> Therefore the principle according to the jurisprudence should be assessed on an individual basis and not rigidly. A truly centred-child approach engages on the needs and rights of a particular child in those circumstances.<sup>182</sup> The court stated that the best interest principle dictated that the issue be addressed. In *Fetal Assessment Centre*, the court seems to have interpreted the best interest against the principle that the disabled child would be able to live a dignified life if damages were awarded by the negligent medical practitioner. The uncertainty lies in the fact that the cause of action is wholly dependent on whether or not the parent(s) were able to sue for wrongful birth and as a consequence of the fact that in the court’s view the cause of action warrants only special damages.

It seems rather, from an analysis of the judgment, that the viability of the claim is derived from the ability or inability of the parent(s) to claim. The two causes of action can indeed arise together simultaneously and succeed provided that the wrongdoer is not paying for the same wrong twice. The wrongful birth cause of action is, therefore, not cumulative as the court had clarified. As pronounced in the previous chapter, California entrenched a principle that a child is deemed to have experienced pain and suffering even though they

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<sup>176</sup> The Constitution of the Republic of South Africa 1996.

<sup>177</sup> Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed (2016) 618.

<sup>178</sup> *AD v DW* 2008 (3) SA 183 (CC).

<sup>179</sup> 2008 (3) SA 232 (CC).

<sup>180</sup> *S v M* supra at 23.

<sup>181</sup> *S v M* supra at 25 and 26.

<sup>182</sup> Currie & De Waal op cite 177.

cannot express it. Would it not be in the best interests of the child to use foreign law (California) to interpret the right and principle in the South African context so as to enable the child to have a claim for special damages? The court did not address this matter and wrongful birth jurisprudence in South Africa has demonstrated that parent(s) cannot claim for pain and suffering. The parent(s) are said to not suffer any constitutionally protected loss of personal choice but the best interest of the child requires protection of the rights of the child.<sup>183</sup> But then, what are the rights espoused in the best interest principle? Are those of any significance? The court partially recognised a legal duty in the judgement as a right owed by the medical practitioner by using the words ‘may’ when establishing whether or not a legal duty does in fact exist and ‘might’ when determining whether in fact a legal duty could have been breached. There is a general objection that has hindered most claims. This objection is based on the misconception that if a child is allowed to have a claim against the medical practitioner, then surely the child can have a claim against the parent(s). To cure this misconception, the judgement makes it clear that the cause of action is determinate and not cumulative<sup>184</sup> and that the child has a single claim against the wrongdoer and may not be dependent against any type of wrongdoing by the parent(s). The child would need to prove that it was wrongful and negligent for the mother to have carried him or her to term while aware of the afflictions before giving birth.<sup>185</sup> In the words of the court, this might be ‘difficult to prove’ considering the right of the mother(s) to free and informed choice regarding reproduction.<sup>186</sup> The child has no right to be born able nor does the child have a right to be aborted if congenital deformities are identified prenatally. It is without doubt that the child would be faced with an insurmountable obstacle and therefore rendering the claim inconceivable from the outset.

The court in this instance did not elaborate on the rights of a child nor those of a disabled child. The paramountcy principle was considered in the judgment however there was failure to determine what the principle in fact contains in a child-focused jurisprudence that the South African judiciary has continuously strengthened. In a constitutional democracy where the rights of patients are protected through various legislation and medical law principles of non-maleficence and beneficence, the court did not elaborate on those principles and rights. Instead, the judgment illustrates that the best interest of a child

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<sup>183</sup> *Fetal Assessment Centre* supra at 61.

<sup>184</sup> *Fetal Assessment Centre* supra at 70.

<sup>185</sup> *Fetal Assessment Centre* supra at 71.

<sup>186</sup> *Ibid.*

principle in a wrongful suffering claim is only considered if the parent(s) failed to institute a wrongful birth cause of action.

#### V A COMPARATIVE ANALYSIS OF THE JUDGMENT.

As a starting point, it should be borne in mind that according to section 39(1)(b) and (c) of the Constitution, the courts must consider international law but are not obligated to consider foreign law. The interpretation of the law must conform to the values of the Constitution and the development of the law must be such that the spirit, purport and the objects of the bill of rights pave a way for any legal enquiry. In doing so, the problems are looked at in the contexts in which they have arisen and their similarities and differences to the South African context.<sup>187</sup> Through research and observation, the jurisdictions which recognised a parent(s) claim are those that recognise the mother's right to choose and those that recognised the child's claim are those that give weight to the rights of children. As observed by the Constitutional Court, the weight given to the various arguments presented in court is invariably determined by the legal culture<sup>188</sup> of the respective jurisdictions.<sup>189</sup>

In South Africa, the right of a mother to choose is illustrated by the CTOP Act and the constitutionally protected reproductive rights. The recognition of a parent's claims should be instructive, according to Froneman J, in recognising a child's claim. In the United States of America the Dietrich rule<sup>190</sup> which was later rejected stated that a foetus is not separate from its mother and consequently, cannot be regarded as a separate, distinct and individual entity. In *Christian Lawyers*<sup>191</sup> the court held that a foetus is not a person and only became a person after being separated from its mother. These were the principles that largely prevented prenatal claims in various jurisdictions. However, public policy appears to have since changed. In *Mtati, for instance*, the court recognised a foetus in delictual claim. In the Nicholas Perruche<sup>192</sup> case, the French court recognised the existence of a legal duty and it was held that when such a duty exists and the breach results in a child being born with defects rather than being aborted, the child can sue for damages. Although, this author expresses a different point of view, the purpose of abstract is to illustrate that the existence of a legal duty ultimately creates a judgment that is in favour of the disabled child. The court in

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<sup>187</sup> *Fetal Assessment Centre supra* at 32.

<sup>188</sup> A legal culture entails the constitutional, political and social contexts.

<sup>189</sup> *Fetal Assessment Centre supra* at 42.

<sup>190</sup> The principle was developed in *Dietrich v Inhabitants of Northampton* 138 Mass.14 (1884).

<sup>191</sup> 1998 (4) SA 1113 (T).

<sup>192</sup> *Perruche* Nov 17, 2000, JCP II, at 1027.

*Foetal Assessment Centre* also recognised the existence of a legal duty that was owed to the foetus in order for the claim to succeed in favour of the child. The English Court in *Mckay* opined that doctors are under no legal obligation towards the foetus to terminate its life or its right to die. This is also illustrated by the Congenital Disabilities Act 1976, which was passed as a result of the England Law Commission's intention to preclude wrongful life claims in England.

The existence of a legal duty in South Africa is dictated by public policy and the boni mores of society. The appellants argued that public policy is not static nor does it dictate that a child should not have a claim. The reason for the different views as to whether or not a legal duty is owed to the foetus is a result of the public policies in different jurisdictions. It is worth mentioning again that most states that recognised the existence of the cause of action are those that recognise a mother's right to reproduction. Stolker<sup>193</sup> opines that doctors are likely to engage in defensive medicine<sup>194</sup> if such a duty is recognised. This opinion however, seems to pay minimum regard the development of science and medical technology. In *Bonbrest v Kotz*,<sup>195</sup> the court expressed that the law is presumed to keep pace with science and therefore ultimately recognised the cause of action. This form of reasoning is also in line with the contention that public morals are not static. In *Harrinton*, Kirby J in his dissenting judgment agrees with the creation of such duty. Reproductive counselling involves predictive diagnosis based upon risk factors and a failure to conduct compressive genetic counselling and foetal testing in such pregnancies breaches the standard of care that is expected.<sup>196</sup> On the issue of damages, the court in *Fetal Assessment Centre* concluded that only general damages could be awarded to the child. It is this author's opinion that there was no direct engagement with reasons why special damages could not be awarded. The New Jersey Supreme Court in *Berman v Allan*<sup>197</sup> held that 'if a claim is legally cognizable, mere difficulty in the ascertainment of damages should be insufficient to preclude the action'. It is Rodgers'<sup>198</sup> opinion which is shared by this author that from a theoretical point that mere

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<sup>193</sup> CJJ Stolker 'Wrongful Life: The Limits of Liability and Beyond' (1994) 4 *International and Comparative Law Quarterly* 521-356 at 524.

<sup>194</sup> 'Defensive medicine is a practice of diagnostic or therapeutic measures that are conducted primarily as a safeguard against possible malpractice liability, rather than to ensure the health of the patient', G A Ogunbanjo & D K van Bogaert 'Ethics in Health Care: The Practice of Defensive Medicine' (2014) 5 (1) *South African Family Practice* s6-s7 at s6.

<sup>195</sup> 65 F. Supp. 138 (D.D.C.1946).

<sup>196</sup> Rodgers op cit note 47 at 732.

<sup>197</sup> 80 N.J at 428, 404 A.2d at 12.

<sup>198</sup> Rodgers op cit 20 at 735.

difficulty in the quantification of damages does not preclude the assertion of wrongful life claim. The *Fetal Assessment Centre's* decision is a reflection of all other decisions which allowed for the cause of action. Judgments in different jurisdictions focus on different arguments, but in casu the decision, primarily, relied on the development of common law to create a legal duty in order to consider the potential existence of the cause of action.

#### VI CONCLUSION

The court's ultimate decision on the issue was that a wrongful life cause of action had potential existence in South African law. The court missed an opportunity to pronounce on certain issues concerning the cause of action. The arguments by both the appellants and respondents were not all addressed and therefore left questions unanswered. The court however recognised that the child deserves redress but as it stands the decision does not directly establish a precedent regarding the cause of action. What it does, rather, is acknowledge that such claim may exist in our law.

## CHAPTER FIVE

### DEFINITION AND EVOLUTION OF CONGENITAL DEFORMITY

#### I INTRODUCTION

The court in *Zepeda* as an objection for the cause of action reasoned that the recognition of the claim would open doors to causes of actions of everyone ‘born into the world under conditions they might regard as adverse’.<sup>199</sup> One might seek damages for being born of a ‘certain colour or race; or for being born with a hereditary disease. Yet another damage may be sought for inheriting unfortunate family characteristics or for being born into a large and destitute family, while another because a parent has an unsavory reputation’. These were the categories that the court reiterated. It is without doubt that medical technology had not developed in 1963 for the court to have anticipated medical errors such as a mix up by a sperm bank when performing artificial insemination. The circumstances stated by the court were categorised as the dissatisfied life cause of action rather than wrongful life by Ryan.<sup>200</sup> It is of importance to repeat the fact that the cause of action in its entirety has developed from one brought by an illegitimate child to one by a child who suffers a congenital deformity.

#### II FOETAL ALCOHOL SPECTRUM DISORDER

Foetal alcohol spectrum disorder (FASD) is an umbrella term that encompasses various clinical diagnoses that occur to a child who is exposed to alcohol prenatally.<sup>201</sup> If a pregnant woman drinks excessively during pregnancy the unborn child is likely to suffer from FASD. Inclusive in the FASD umbrella is Foetal Alcohol Syndrome (FAS), Alcohol-Related Neurological Defects (ARND) and Alcohol-Related Birth Defects (ARBD). Effects of alcohol consumption during pregnancy includes spontaneous abortions, foetal growth retardation, premature delivery, abruption placentae and breach presentations.<sup>202</sup> Worldwide, alcohol consumption during pregnancy is said to be the leading common preventable cause of mental disability and birth defects.<sup>203</sup> There is no cure for FASD and therefore the child is left to suffer permanent problems throughout their lives. In South Africa, drinking during pregnancy is not an illegal act because the Liquor Act 59 of 2003 does not prohibit nor

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<sup>199</sup> *Zepeda* supra [41 Ill. App.2d 259]

<sup>200</sup> Ryan SA ‘Wrongful Birth: False Representations of Women’s Reproductive Lives’ (1994) 78 *Minnesota Law Review* 857-909.

<sup>201</sup> JB Gardner ‘Should Drinking During Pregnancy be Criminalised to prevent Fetal Alcohol Spectrum Disorder?’ (2016) 9(1) *SAJBL* 26-30.

<sup>202</sup> DeVille KA & Kopelman LM ‘Moral and Social Issues Regarding Pregnant Women who Use and Abuse Drugs’ (1998) 2(1) *Obstet Gynecol Clin North Am* 237-254.

<sup>203</sup> Gardner op cit note 201.

regulate the sale of alcohol to pregnant women. With this said, a pregnant woman is free to purchase and consume alcohol with no legal implication. Moral or social implications may be present but those are not within the scope of this paper.

In the UK, the court of appeal in *CP v Criminal Injuries Compensation Authority*<sup>204</sup> was faced with the contentious question of whether excessive drinking during pregnancy amounted to a criminal offence within the meaning of section 23 of the Offences Against Persons Act of 1861. The appellants argued that the mother was guilty of a criminal offence within section 23 as she had ‘maliciously administered poison so as to endanger a life or inflict grievous bodily harm to another’. CP was born in June 2007 to a young mother with an alcohol addiction. The Upper Tribunal found that CP was not a person whilst her mother was engaging in the alcohol consumption. She was not ‘another person’ for the purposes of section 23 and therefore her mother could not have committed an offence. Treacy LJ on appeal accepted the argument that the foetus was a unique organism and not ‘another person’<sup>205</sup> and therefore could not be a victim to a crime of violence.<sup>206</sup> It was concluded that the reality is that the harm is done to a foetus whilst in utero but the fact that the child has to live with the consequences of the consumption of a noxious substance does not mean that the child is a victim of a criminal offence nor has the child sustained damage.

The legal system does not recognise the foetus as a legal person who can be a bearer of rights. In the above judgment, a foetus was not recognised to have suffered any damages nor was there a criminal offence committed towards it. This is likely to be the result if a case with the same facts were to be heard in South Africa. As far as South African jurisprudence is concerned, a foetus has been recognised as a bearer of rights in two areas of law on exceptional circumstances in the law of succession<sup>207</sup> and the law of delict.<sup>208</sup> Therefore it would firstly be an infringement on the mother’s right to bodily integrity and privacy if the mother was to be held criminally liable for consuming alcohol while pregnant or for damages after the birth of the child. FASD should be distinguished from wrongful life claims for the

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<sup>204</sup> [2014] ALL ER 48 (Dec).

<sup>205</sup> *CP* supra at 37.

<sup>206</sup> *CP* supra at 38.

<sup>207</sup> *Ex Parte Boedel Steenkamp 1962 (3) 954 (O)* where the court held that a child in *Ventre matris* had to be presumed alive whenever it is a question of their advantage.

<sup>208</sup> *RAF v Mtati 2005 (6) SA 215 (SCA)* where the court held that the assertion that the insured driver did not owe Z a legal duty because she was a fetus when the accident occurred could not be accepted. In *Pinchin Insurance v Santam Insurance Co Ltd 1963 (2) SA 254* the court allowed the action of a child to recover damages for injury done to whilst in utero.

following reasons: although it may be arguable that there is a casual link between the consumption of alcohol and the FASD, there is no wrongfulness that was committed because there is no legal duty on the mother to protect the foetus. This is seen by the fact that the ultimate decision of whether or not to terminate a pregnancy lies solely with the mother. The English court had to determine whether a father (husband) had the power to prevent his wife from having an abortion in *Paton v British Pregnancy Advisory Services Trustees and Another*.<sup>209</sup> The Queen's Bench held that the husband had no right in law to stop his wife from having an abortion nor a medical practitioner from performing one.

Lastly, there is no harm that is committed towards the foetus as a result of the fact that a foetus is not a bearer rights in law. FASD is different from wrongful life. In wrongful life, there is negligence by a health practitioner who owed a legal duty to the foetus which is mediated through the mother. It is of importance to understand that pregnant women have the right to make decisions concerning their bodies and reproduction.

### III A SPERM MIXUP BY A SPERM BANK

Artificial insemination is regulated by the National Health Act 61 of 2003 which has repealed and replaced the Human Tissue Act (Tissue Act) 65 of 1983 together with the Children's Act 38 of 2005. The objectives of the Tissue Act were to protect individuals from harmful and unethical practices while giving effect to the individual's right to self-determination and autonomy as this relates to the use of that particular person's stem cells.<sup>210</sup>

Artificial insemination is defined by the Children's Act as 'an introduction by means other than natural means of a male gamete into the reproductive organs of a female person for the purposes of reproduction, including (a) the bringing together of a male and female gamete outside the human body with the view of placing the product of a union of such gamete in the womb of a female person (b) the placing of the product of a male and female gametes which have been brought together outside the human body, in the womb of a female person'. Section 40 of the Act regulates the rights of a child conceived by artificial insemination and section 41 grants a child conceived by artificial insemination the right to have access to

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<sup>209</sup> [1979] QB 276.

<sup>210</sup> S Pepper and M Nothling Slabbert "Human Tissue Legislation in South Africa: Focus on Stem Cell Research and Therapy" (2015) 8 (2) *SAJBL* 1-10 at page 1.

biographical and medical information concerning the genetic parents. In section 19(c) the Tissue Act regulates the use of a gamete<sup>211</sup> for the artificial fertilization of another.

In South Africa, there are four sperm banks, Aevitas, Androcryos, Cape Cryo and MedFem. The respective sperm banks cater for individuals or couples who want to conceive children but for a variety of reasons cannot on their own. Aevitas receives donations from men between the ages of 19 and 33, has a limitation of three live births and the compensation for the sperm donation is R 700. The sperm bank has a database of donors and the donees are provided with a list of preference to choose from. Such preferences include race, hair colour, blood type, eye colour etcetera. The donor profiles include, above many things, qualifications, interests, ethnic origin, weight and height. Pictures of the donors as toddlers are also made available. According to the Medfem website,<sup>212</sup> donors go through screening which includes semen screening and screening for sexually transmitted diseases as well as hereditary diseases. South African law allows a sperm donor to have twelve babies before they are withdrawn from the donor list or donor bank. The compensation is not regarded as a payment because such would be illegal in terms of chapter 8 of the NHA which prohibits donors from selling organs and tissue. Section 60(2) allows payment which is reasonably required to cover the costs involved in the acquisition.

A white lesbian mom in the US once sued a sperm bank for wrongful birth. The sperm sample which she had chosen that was from a white donor was mixed up and she was inseminated with that from a black donor.<sup>213</sup> She argued that race matters as she and her partner had no cultural competency to help their child who had African American features. Donor services respond to consumer preferences and mix ups are prevented so that parent(s) do not find themselves in situations they might regard as unfortunate.<sup>214</sup> The ultimate question is whether a child can claim damages for wrongful life from a sperm bank that mixed up sperm samples and therefore resulting in the child not being of the same race as his or her parent(s). As it stands, the answer is no, it is not possible for such a child to claim such damages. The New York court observed in *Williams* that ‘being born under one set of

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<sup>211</sup> Gamete is defined in the Human Tissue Act as either of the two generative cells essential for human reproduction.

<sup>212</sup> Medfem.co.za accessed 19 February 2018.

<sup>213</sup> Dov Fox ‘Reproducing Race’ (2016) 17 *University of San Diego* 264.

<sup>214</sup> Fox op cit note 213.

circumstances rather than another or to one pair of parent(s) rather than another is not a suable wrong that is cognizable in court'.<sup>215</sup>

The child would have to prove that had the parent(s) known they would have aborted him or her and the child would not have been born to a life of suffering. The greatest hurdle to overcome would be for the child to prove that his or her skin colour equates to 'suffering' within the context of wrongful life. A duty of care is a general duty to avoid physical or financial harm.<sup>216</sup> When applied to the *Mtati* principle, one would arrive at the conclusion that a duty of care does exist between the potential child and the sperm bank, and such duty is mediated through the mother. That duty, however, can be said to not have been breached. It is not this author's opinion that being born of a different race does not constitute suffering nor does it equate to a severity of physical deformity or disability. South Africa prides herself as a non-racist and non-sexist country. If the case above were to be heard in South Africa, it is fair to presume that the mother's right to decisions concerning reproduction would be limited by section 36 (limitations clause) of the Constitution. The child would not suffer any prejudice and the environment the child is brought up in will ultimately influence their culture. Eric Parslow once said that 'race was a lazy mind's tool for identifying culture'. A wrongful life claim in such circumstances would be a locus classicus of what Ryan<sup>217</sup> dubbed a dissatisfied life cause of action and not wrongful life. As defined in the first chapter of this paper, a wrongful life cause of action is 'an action brought by or on behalf of an infant who suffers from a genetic or other congenital defect(s), alleging that the physician, in negligently failing to accurately advise, counsel, and test the plaintiff's parent(s) concerning genetic or teratogenic risks to potential offspring suggested by maternal age, family history, or other circumstances, has breached the applicable standard of medical care and precluded an informed parental decision to avoid the plaintiff's conception or birth'.<sup>218</sup> Therefore a sperm mix-up by a sperm bank does not fall within the ambit of the definition of what constitutes a wrongful life cause of action. The essential characteristics are not present in a case where a sperm bank negligently mixes up a sperm sample. The mix up does in fact constitute a delict but such delict cannot be a wrongful life cause of action. The delict is committed against the parent(s) and not the child. This due to the fact that some parent(s) want to hide the fact that they could not

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<sup>215</sup>Williams v State (1966) 18 N.Y.2d 481 at 887.

<sup>216</sup>Stretton op cite note 23 at 980.

<sup>217</sup>Ryan op cit note 17.

<sup>218</sup>Rodgers TD op cit note 20 at 715.

conceive a child on their own while others want their child to share their genetic background.<sup>219</sup> Fox argues that racial preferences in assisted reproduction should not be condemned nor should the people who are victims of fertility clinic's negligence.<sup>220</sup> However, he further argues that to classify their recourse as a wrongful birth should make us reconsider the racial preferences we accept without question.<sup>221</sup> Allowing a child's cause of action would lead to eventually allowing a child to sue a sperm bank if the child is not born with the same nose shape as that of the donor. Common sense dictates that parent(s) want a child who possess the same genes as them, for instance, a child of the same race or a child with similar features. Although, a sperm mix-up does not constitute a wrong against the potential child, a wrong is committed against the parent(s) giving an enforcement of their rights to reproductive choices.

#### IV CONCLUSION

It is without doubt that what constitutes wrongful life has evolved from the first case of *Zepeda* to *Foetal Assessment Centre* case. The current definition of a wrongful life cause of action to involve a child with a congenital deformity is likely to evolve further. But whether or not the evolution will accommodate FASD and a sperm mix up is unlikely. This is due to the fact that the cause of action has essential features that are present regardless of the jurisdiction where such cases are heard and those inherent features of the cause of action are not present in FASD or in a sperm bank mix up. It is safe to assume, therefore, that there might not be a right of recourse for a child born with FASD nor one born with a different race from that of his or her parent(s).

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<sup>219</sup> Fox op cit note 213.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

## CHAPTER SIX

### STRENGTHENING THE RIGHTS OF DISABLED COMMUNITY

#### I INTRODUCTION

The term ‘wrongful life’ has previously served as an umbrella for causes of action based upon many distinguishable factual situations leading to some confusions in its use. It is safe to put forward the opinion that *Zepeda* did not restrict the meaning of what actually constitutes a wrongful life cause of action and thus opened a can of worms. The cause of action can arguably arise in situations of subjective adversity because there is no universally accepted definition. In the previous years, the cause of action has however primarily focused on an action by a severely impaired child. A child born with severe impairment presents an entirely different situation from that of illegitimacy. This is due to the fact that the element of injury which is present in the former is absent in the latter. It should be understood that wrongful life is a medical negligence cause of action and, therefore, the injury that is afflicted is purely based on the negligent conduct of a health practitioner. It is this author’s opinion that illegitimacy is a dissatisfied life cause of action and not wrongful life and the evolution of the wrongful life cause of action validates this opinion. The injury here is that the defendant has inflicted a lifetime of suffering on the plaintiff that could have been prevented<sup>222</sup> by proper or adequate medical advice. The cause of action raises issues of reproductive rights of the parent(s) together with those of the potential child. An action of this nature can only be conceived in a legal system where abortion is recognised<sup>223</sup> particularly for embryopathic and eugenic reasons as is the case in South Africa according to section 2 of the CTOP.

#### II MEDICAL TECHNOLOGY AND THE RECOGNITION OF THE CAUSE OF ACTION

The predictability of genetic impairment is no longer a mystery in the medical sphere with the advancement in medical technology. Additionally, ‘a reverent appreciation of life compels recognition that the plaintiff, however impaired he or she may be, has come into existence as a living person with certain rights’.<sup>224</sup> The Constitutional Court embraced a different view from what the Supreme Court of Appeal had initially pronounced on the issue of wrongful life in South African jurisprudence. The recognition of the ‘potential existence’ of the cause of action by the court will have massive impact on the medical as well as the

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<sup>222</sup> Rodgers op cit note 20 at 713.

<sup>223</sup> Ruda op cit note 21 at 207.

<sup>224</sup> *Curlender* supra at [106. Cal. App. 3d 826].

legal fraternity when taking into cognisance the advances in the medical and genetic technology. Arguments have been documented throughout the paper for and against wrongful life and its recognition. One argument that deserves to be revisited is that wrongful life encourages eugenics. The term has been defined in the preceding chapters and it will once more be defined. Eugenics is a term that refers to improving the race by the bearing of healthy offspring.<sup>225</sup> The history of eugenics traces back to the eugenic sterilization laws in the United States in the 19<sup>th</sup> century and by 1931, 30 states were practising involuntary sterilization measures to convicted rapists, the feeble-minded, idiots, imbeciles and the insane.<sup>226</sup> The Germans followed with the euthanasia movement against the severely retarded and deformed children in the late 1930's.<sup>227</sup> These types of practices are what I will coin *bad eugenics* and are commonly associated with genocide. These are the types of eugenic practices erroneously associated with wrongful life which are regarded by most to be wrong and immoral. This paper articulates a different stance. This type of eugenics, if any in the case of wrongful life, should be seen as *good or acceptable eugenics*, and these are neither wrong nor immoral. The latter, unlike the former, are not forced on citizens by the state but are a result of personal choices. These are personal choices that only affect the prospective parent(s) and no one else. These choices are influenced by the rights women have over their bodies and the rights concerning reproductive decisions as enshrined in the Constitution of the Republic<sup>228</sup> and legislation.<sup>229</sup> Then the question that arises is, why is good or acceptable eugenics condemned when it is merely an enforcement of one's constitutionally protected rights? This is a personal choice exercised privately, without public influence, violence, coercion, and with no consequence to the public or other persons.

### III THE IMPACT ON THE PROPOSED CHANGE IN TERMINOLOGY

The phrase 'wrongful life' implies that the child is challenging his or her life and therefore scholars have proposed that there be a change in the terminology and that the action be referred to 'wrongful suffering' as opposed to 'wrongful life'. The term wrongful life has been argued to be loose and inappropriate.<sup>230</sup> This paper holds true Kashi's argument. However, this author opines that although the term wrongful suffering accurately describes

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<sup>225</sup> Kenneth L. Garver at el 'Eugenics: Past, Present, and the Future' (1991) *Department of Medical Genetics, Western Pennsylvania Hospital* 1109-1114.

<sup>226</sup> Kenneth at el supra at 1111.

<sup>227</sup> Ibid.

<sup>228</sup> Section 12(2).

<sup>229</sup> The Choice on Termination of Pregnancy Act and the National Health Act.

<sup>230</sup> Kashi op cit note 111 at 1432.

the cause of action, the proposed change in terminology will not have an influence on the judicial acceptance of the claim and risks confusion.

#### IV THE ESSENTIAL ISSUE IN THE CAUSE OF ACTION

The ultimate issue that needs to be addressed in the cause of action is what ‘remedy, if any, is available in this state to a severely genetically impaired child born as the result of a medical practitioner’s negligence in conducting certain genetic tests of the parents which, if properly done, would have disclosed the high probability that the actual, catastrophic result would occur’?<sup>231</sup> The quality of the child’s form is at issue and not the sanctity of life.<sup>232</sup>

The test for negligence in our law as it stands was stated in *Kruger v Coetzee*<sup>233</sup> and remains the test to be applied in delictual claims. The issue of determining whether indeed the medical practitioner was negligent and owed a duty to the potential child is an important and complex issue in the legal sphere at the moment. The complaint in *Curlender* was that Shauna suffered ‘pain, physical and emotional distress, fear, anxiety, despair, loss of enjoyment of life as well as frustration’.<sup>234</sup> Then the question that follows is, how then does the child who suffers such pain and anguish receive redress if the child is denied a claim in law? Under the principles of delict, only a breach of a duty of care, which encompasses a legally recognised injury will provide an injured party to claim for compensation. South African law addresses the termination of pregnancy in section 2 of the CTOP Act only if there is a substantial risk that the foetus will suffer from a deformity or that there will be a malformation of the foetus. The wording of the Act suggests that even minor defects can qualify for a termination of pregnancy. Amos<sup>235</sup> makes an assumption by stating that it would not be unreasonable to assume that most people would choose not to conceive or terminate an already existing pregnancy if forewarned that the child would be afflicted with a terrible

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<sup>231</sup> *Curlender* Supra [106 Cal. App. 3d 815].

<sup>232</sup> Collins op cit note 67 at 705.

<sup>233</sup> 1966 (2) SA 428 (A) at p430, the court held that culpa arises if ‘(a) a diligens paterfamilias in the position of the defendant-(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and.(ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps’.

<sup>234</sup> Supra [106 Cal. App. 3d 816].

<sup>235</sup> Amos Shapira ‘Wrongful Life Lawsuits for Faulty Genetic Counselling: Should the Impaired Newborn be entitled to Sue?’ (1998) 24 *Journal For Medical Ethics* 369-375 at 372.

disease.<sup>236</sup> A negligent genetic counsellor has therefore deprived the parent(s) of their legally permissible right to abort the deformed foetus and by so doing the impaired infant is forced into existence and deserves redress.<sup>237</sup> In Israel, the wrongful life cause of action was recognised for years until ultimately denied in the *Hammer* case.<sup>238</sup> As it stands, Israeli law does not recognise a wrongful life cause of action but offers redress through wrongful birth which now allows the parent(s) to sue for the life-long disability. The change of stance in the opinion of this author is primarily for the purpose of denying the negative connotations to the cause of action but at the same time realising that a wrong has been committed and deserves redress.

#### V THE POTENTIAL CHILD

As reiterated in the first chapter, the issue at hand in this cause of action involves only the potential child. In wrongful life, we need not engage in mysteries of the future child but focus on the existence of a potential child who would have been better not have been born than born into a life of suffering.

#### VI WRONGFUL LIFE AGAINST WRONGFUL BIRTH

The vast majority of jurisdictions have denied the wrongful life cause of action for reasons articulated in the preceding chapters. Although there is a strong stance against wrongful life, wrongful birth has proven not to be an issue in many jurisdictions.<sup>239</sup> It appears from the information attained when researching the child's claim that courts are ready to accept the parent(s) claim as opposed to that of the child. Although the following cases were concerned with wrongful birth claims, it is suggested that the ultimate stance in wrongful life should be looked at from this perspective.

In the New York case of *Howard*, the New York Courts of Appeal found it 'not unreasonable, given the present state of medical knowledge concerning genetically caused birth deformities and the procedures available for avoiding such, for the law to require an

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<sup>236</sup> Amos Shapira 'Wrongful Life Lawsuits for Faulty Genetic Counselling: Should the Impaired Newborn be entitled to Sue?' (1998) 24 *Journal For Medical Ethics* 369-375 at 372.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Hammer at el v Amit at el* CA1326/07

<sup>239</sup> South Africa accepted wrongful birth in for the first time in *Edouard* and has not proven to be an issue thereafter. In Australia and Germany the parent(s) can only claim for costs of maintenance associated with the disability, *Harriton*); In England *Salih v Enfield Health Authority* [1991] 3 *ALL ER* 400 serves as authority. In the Netherlands the *Kelly Molenaar* case serves as authority for the acceptance and in the United States different jurisdictions accept the cause of action for different reasons however the reasons are focused on the rights articulated to in *Roe v Wade* 410 *US* 113 (1973).

attending physician to take a genealogical history, to perform any available appropriate tests indicated by such history, and inform the parent(s) of any potential dangers so that they would be able to make an informed decision concerning continuation of pregnancy'.<sup>240</sup> In *Gildiner v. Thomas Jefferson Univ. Hospital*,<sup>241</sup> it was held that society had an interest in insuring that genetic testing was properly performed and interpreted by medical practitioners.<sup>242</sup> It is therefore advisable that the law should perceive wrongful life as a redress to the pain and anguish suffered or experienced by the child as a result of medical negligence. The affected people in the birth of a genetically impaired child are not only the parent(s) but the child who is forced into a life of pain, misery and inevitable suffering. In a dissenting opinion in *Gleitman*, it was expressed that the majority, by denying the child's claim, 'permitted a wrong with serious consequential injury to go wholly unredressed and provided no deterrence to professional irresponsibility and was held to be neither just nor compatible with expanding principles of liability in the field of torts'.<sup>243</sup> In *Berman*, the dissenting opinion urged complete rejection of the majority view on the ground that the child was owed directly, during its gestation, a duty of reasonable care from the same physicians who undertook to care for its mother, to render complete and competent medical advice, and therefore failure to do such meant that the duty was seriously breached'.<sup>244</sup> The dissent perceived 'a duty on the part of medical practitioners to ensure that, under certain circumstances, parent(s)-to-be had the opportunity to decide the future of their child which was either its existence or non-existence and to have been denied the opportunity as well as the right to apply one's own moral values in reaching that decision, is a serious, irreversible, wrong'.<sup>245</sup> In *Park v. Chessin*,<sup>246</sup> an intermediate New York appellate court held that decisional law must keep pace with expanding technological, economic and social change. 'Public policy consideration which gives potential parent(s) the right, within certain statutory and case law limitations, not to have a child extends to instances in which it can be determined with reasonable medical certainty that the child would be born impaired'.<sup>247</sup> The breach of this right may also be said to be tortious to the fundamental right of a child to be

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<sup>240</sup> [397 N.Y.S.2d 363, 366 N.E.2d 64]

<sup>241</sup> (1978) 451 F. Supp. 692, in the court of the Eastern District of Pennsylvania.

<sup>242</sup> *Gildiner* supra 451 F. Supp. 692, 696.

<sup>243</sup> *Gleitman*, supra 227 A.2d 689, 703.

<sup>244</sup> *Berman v. Allan* (1979) 80 N.J. 421,15 (dis. opinion).

<sup>245</sup> *Berman* supra at 18.

<sup>246</sup> (1977) 60 App.Div.2d 80 [400 N.Y.S.2d 110].

<sup>247</sup> *Park* supra cited in *Curlender* supra at at 106 Cal. App. 3d 822.

born as a whole, functional human being'.<sup>248</sup> This author's opinion is that the idea that a child should expect to be born as a whole functional human being is flawed and has no legal basis. This idea would possibly open doors to the causes of actions dubbed as the 'dissatisfied life' causes of action and have no room in the law of tort nor will such pass muster in a wrongful life cause of action. This idea was also rejected and overruled in *Becker v. Schwartz* (1978) 46 N.Y.2d 401. The view expressed in *Zeitzhoff v Katz*<sup>249</sup> by the Supreme Court of Israel was that there are instances where a reasonable man would conclude that a person would be better served not being born than being born into 'a life that is short and seriously impaired filled with unremitting suffering'.<sup>250</sup> According to Amos<sup>251</sup> the protagonists of this view failed to offer any classification of the degrees of disability. Although, the opinion is that the degree of disability need not be classified in order to determine whether or not the infant deserves redress, however, it is suggested that a slippery slope should be avoided. A cause of action in which a child is born under situations that they subjectively regard as adverse, such as being born of a different race than that of their parent(s), is a dissatisfied life cause of action and should not be recognised as a wrongful life cause of action to avoid the snowball effect.

## VII CONCLUSION

A compensation claim against a genetic counsellor for negligent conduct is firmly rooted in the law of delict.<sup>252</sup> In a wrongful life cause of action, redress does not mean placing the victim in the position they were once in (which would be a hypothetical healthy life or non-existence). Redress is to ensure that a wrong does not wholly go unaddressed. It is to deter professional negligence and effectively compensate a deserving victim. In achieving such redress the term 'wrongful life' does contain emotional value judgments that can detract from a proper judicial analysis of the issues raised.<sup>253</sup> As illustrated in chapter one, wrongful life claim only arises when the child is subsequently born alive, and in no way does it involve a future child. The future child may, therefore, have no claim due to reasons expressed above. The recent development in South African law concerning the wrongful life cause of action is in line with the child-centred approach that the courts have adopted in past years. It is also

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<sup>248</sup> *Park* supra 400 N.Y.S.2d 110, 114.

<sup>249</sup> [1986] 40(2) PD 85.

<sup>250</sup> *Zeitzhoff* supra at 373.

<sup>251</sup> *Shapira* op cit note 235 at 373.

<sup>252</sup> *Shapira* op cit note 235 at 374.

<sup>253</sup> This point was alluded to by Goldblatt J in *Friedman* supra at para 1138, however it is of great importance that in pronouncing the cause of action and making a judgment on such emotions be separated from the issues before the court. That a value judgment based on the constitution as the supreme law of the land and the Children's Act which governs the rights of the plaintiff child be considered of absolute importance.

aligned with the constitutional values, particularly reproductive rights and the right to dignity. The boni mores of the community are not static and as medical technology advances, medical practitioners are at a greater advantage to ensure that genetic tests or examinations are properly executed. It is without saying that the whole purpose of the potential recognition by the constitutional court is not to disempower the disabled communities and promote eugenics but rather to strengthen the rights of such communities. In the words of Froneman J and the majority; the purpose is to ensure that the child has access to resources. Although not articulated in the judgment, the word resources include all the necessities needed by the disabled child to live a life of comfort and fulfilment. The ultimate conclusion serves as a landmark decision in law and particularly in the field of medical malpractice law.

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