

**A CRITICAL ANALYSIS OF THE VIABILITY OF WRONGFUL LIFE CLAIMS
UNDER SOUTH AFRICAN LAW: A STRETCH TOO FAR OR A SIMPLE STEP
FORWARD**

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DECLARATION OF PLAGIARISM

I, Lizandré Mulder, with student number 2015047166, hereby declare that the information that my mini-dissertation contains is my own original work and has not been copied from any other current or previous student's work or other sources. Where help was sought, it was acknowledged. Resources that have been used in collecting information are acknowledged and listed in the list of references as well as in the footnotes and bibliography according to the JJS referencing style.

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

Is it better to not be born at all than to be born with a severe disability? Is there any life that is not worthwhile?¹ I suspect that many readers would initially be hesitant to disagree. The well-known slogan “every life is worth living” sums up this tendency or the revulsion to the extremely unsettling notion that some lives are worse than nothing or are not worth living.² Alternatively, in circumstances where the quality of life is so poor that it is understandable to feel contrite about ever being born or to hate the day of a child’s birth, it appears to be the harsh reality that it was unlucky for such a child to be born to live such a life and that the child’s life is not worth living.³

The issue of wrongful life claims has become increasingly prevalent in South Africa’s legal landscape, raising complex ethical and legal questions surrounding the right to life and the compensation for harm caused by medical negligence.⁴ Medical professionals may be held accountable under South African law if they fail to fulfil their legal obligation to a healthcare consumer and harm results.⁵

When a child is born with an abnormality or handicap, and the parents assert that they would have ended the pregnancy, in respect of the *Choice on Termination of Pregnancy Act*,⁶ if they had been adequately informed of the defect or condition, the claim of wrongful life arises.⁷ For many years, wrongful life claims have been a contentious subject in South Africa.⁸ The legal context and case law pertaining to these claims constantly change, and the courts have been asked to address complex moral and ethical dilemmas.⁹

In South Africa, the right to reproductive autonomy is constitutionally protected. This means that, in terms of the *Constitution of the Republic of South Africa, 1996*,

¹ Kim 2012:623.

² Lifton 1986:21.

³ Kim 2012:624.

⁴ Chürr 2015:745.

⁵ Coetzee & Carstens 2011:1271.

⁶ *Choice on Termination of Pregnancy Act 92/1996*.

⁷ Liu 1987:69.

⁸ Chürr 2015:746.

⁹ *Steward v Botha* 2008 (6) SA 310 (SCA): paras. 11-28.

hereinafter referred to as “the *Constitution*”,¹⁰ individuals have the right to make informed decisions about their own bodies and to have access to information that allows them to make those decisions.¹¹ Section 12(2) of the *Constitution*¹² states that: “Everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”¹³ However, the law is less clear when it comes to the rights of parents to make decisions on their unborn child’s behalf. In wrongful life claims, the courts must balance the right of parents to make reproductive choices¹⁴ with the rights of a child who has been born with a disability or congenital disability while, most importantly, taking the best interest of the child into consideration.¹⁵ While society and the government control many aspects of people’s daily lives, they do not actively attempt to control human reproduction.¹⁶

The courts within South Africa have been reluctant to recognise wrongful life claims, with the majority of cases being dismissed by reason of the child’s right to life¹⁷ trumps the parents’ right to reproductive choices.¹⁸ However, as will be seen throughout this dissertation, there have been a few cases in other jurisdictions where the courts have allowed wrongful life claims to proceed, particularly in cases where the parents were deprived of essential information that would have allowed them to make an informed decision about the pregnancy.

The issue of wrongful life claims remains a contentious issue in South African law along with international jurisdictions¹⁹ and is likely to continue to be the subject of debate and litigation in the years to come.²⁰

¹⁰ *Constitution of the Republic of South Africa*, 1996.

¹¹ *Constitution*: sec. 12(2).

¹² *Constitution*: sec. 12(2)(a)-(c).

¹³ *Constitution*: sec. 12(2)(a)-(c).

¹⁴ *Constitution*: sec. 12(2)(a)-(c).

¹⁵ *Constitution*: sec. 11; *Children’s Act* 38/2005; *The Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000; The National Development Plan 2012; The White Paper on the Rights of Persons with Disabilities 2015; The White Paper on the Rights of Persons with Disabilities Implementation Matrix 2015-2030; The National Integrated Early Childhood Development Policy 2015; Framework and Strategy for Disability and Rehabilitation Services in South Africa 2015-2020.

¹⁶ De Roubaix 2021:60.

¹⁷ *Constitution*: secs. 11-12, 28.

¹⁸ *Constitution*: sec. 12(2).

¹⁹ Louw 1987:205-206.

²⁰ Boezaart 2015:423.

1.2 RESEARCH AIMS AND OBJECTIVES

The overall aim of the research study is to conduct a critical analysis of the viability of wrongful life claims under South African law with an emphasis on the fact as to whether it is a stretch too far or a simple step forward that needs to be taken in order to possibly include, allow and accept such claims into our South African legal system.

The study seeks to analyse and emphasise the importance of determining whether and to what extent, if such claims are allowed, a child should be compensated for being born with congenital conditions. The latter having occurred due to the negligent behaviour of a medical professional who neglected to inform the parents prenatal of such child's possible conditions.

Given the problem set out above, the thesis aims to address the following objectives:

1. What is the legal nature and reception of wrongful life actions?
2. What is the position of wrongful life actions in South African law compared to other jurisdictions such as the United States of America, England and the Netherlands?
3. How can wrongful life claims possibly succeed through both contractual claims and delictual claims?
4. What are the arguments in favour of and against wrongful life claims?

1.3 RESEARCH METHODOLOGY

This study will be conducted by way of a combination of doctrinal and comparative research, with more emphasis on textual analysis in the comparative approach.

The study is going to focus on the different legal systems applicable, more specifically, the position of claims based on wrongful life in other jurisdictions such as the United States of America, England and the Netherlands, and if there arises a need to investigate how the legal system of South Africa can be adapted according to the other countries' approaches to improve the South African legal system with regards to wrongful life claims.

I chose to compare the South African position with the three jurisdictions mentioned earlier due to the inherent diversity of their approaches to wrongful life cases. By

juxtaposing these countries, each with its unique legal framework, I aim to provide clarity to both myself and all future readers of this dissertation. This comparative analysis offers a comprehensive understanding of how different jurisdictions' legal systems navigate and resolve wrongful life claims. The goal is to draw insightful conclusions regarding the efficacy of various approaches, guiding an assessment of which system might be considered optimal. By scrutinising their methodologies, the aim is to discern both the strengths and weaknesses of each approach and ultimately draw informed conclusions. Through this an evaluation of potential adjustments within South Africa's legal system will be done, aiming for changes that would ultimately align with the best interests of South African citizens in the realm of wrongful life claims. These jurisdictions seem ideal for comparison due to their distinctive approaches addressing wrongful life claims, each differing significantly from the others.

There have been significant advancements in child law, and one may anticipate that these advancements will impact the wrongful life discussion. Therefore, an examination will be done on the United Nations Convention on the Rights of the Child (UNCRC/CRC).²¹ When it comes to the rights of children, the CRC is an essential international instrument. Except for the United States of America and South Sudan, this convention has been adopted by every other country on earth.²² It even made its way into the laws of South Africa.²³ In addition to the CRC, there have occurred some developments within disability law which might also be relevant, considering the fact that the Convention on the Rights of People with Disabilities (CRPD)²⁴ has since also been adopted into legal systems.

1.4 CHAPTER OUTLINE

Chapter two will provide information with regard to the legal nature and the reception of wrongful life actions within South Africa. The chapter will also discuss different legal recourse regarding wrongful life and similar claims.

Chapter three will give a brief historical overview of the wrongful life action in other international jurisdictions, such as the United States of America, England and the Netherlands and then compare South Africa's current position. A discussion will be

²¹ United Nations Convention on the Rights of the Child 1989.

²² Boezaart 2015:415.

²³ *Constitution: sec. 28(2); Children's Act 38/2005; Child Justice Act 75/2008.*

²⁴ Convention on the Rights of People with Disabilities 2006.

provided with specific reference to the history of wrongful life claims within the South African legal system up to the current position of wrongful life claims in South Africa.

Chapter four will distinguish between possible wrongful life claims in terms of delictual liability compared to wrongful life claims based on contractual liability. In doing so, I will attempt to provide possible steps a child can take, or the legal representative of the child, to claim damages in terms of delictual liability and a possible contractual agreement entered into and ultimately breached by a medical practitioner.

Chapter five will examine different arguments pertaining to wrongful life claims. This will include both the arguments in favour of wrongful life claims as well as the opinion of the writers who have arguments against any claims for a wrongful life action. A brief discussion will ensue concerning the harm paradox within wrongful life claims, including the so-called non-identity problem, which focuses on harm which is allegedly done to the future child.

Chapter six, which is the concluding chapter, will not only provide a conclusion of the study but also include recommendations on wrongful life claims and the possible future of such claims in our legal system.

CHAPTER TWO

LEGAL NATURE AND RECEPTION OF WRONGFUL LIFE ACTIONS

2.1 INTRODUCTION

The subject of wrongful life claims has proliferated in South Africa's judicial system, bringing challenging moral and legal issues about the right to life and the compensation for the harm brought on by a medical professional's negligent behaviour.²⁵ In this chapter, not only the legal nature and reception of wrongful life actions will be explained, but there will also follow a discussion on the possible future available legal recourse in terms of claims available to children born with a congenital disability.

2.2 LEGAL NATURE AND RECEPTION

Wrongful life is a legal concept that arises in the context of a medical malpractice case.²⁶ It refers to a claim brought by a child who alleges that they were born with a severe medical condition due to the negligence of a medical practitioner. Claims for prenatal negligence, in the form of wrongful life claims, can also be done by a legal representative on behalf of a child who is born with congenital disabilities or abnormalities against a physician who negligently failed to detect, diagnose or alert the child's parents of potential congenital disabilities or abnormalities.²⁷

The reception of wrongful life actions varies widely by jurisdiction, although it appears that the overall trend has been to forbid the action completely.²⁸ In some countries, such claims are not recognised at all, while in others, they are allowed in limited circumstances. An example of this is in the United States of America; some states permit wrongful life claims only where a serious impairment is present at birth that was not detected during prenatal testing. These states are California,²⁹ New Jersey³⁰ and Washington.³¹ In other states, such claims are not permitted at all. In contrast, several

²⁵ Chürr 2015:745.

²⁶ Mukheibir 2008:516.

²⁷ Chürr 2015:745; Burns 2003:807.

²⁸ Mukheibir 2005:757.

²⁹ *Turpin v Sortini*, 31 Cal.3d 220, 643 P.2d 954 Cal Rptr 337 (1982).

³⁰ Stearns 1985:883; *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984).

³¹ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

European countries, including France³² and Asian countries, such as Israel,³³ have recognised the right to bring wrongful life claims in certain circumstances, such as when a child is born with a severe genetic disorder that could have been detected through prenatal testing.³⁴

The legal nature of wrongful life actions is also a subject of debate. Some critics argue that allowing such claims undermines the value of human life and may encourage eugenic practices.³⁵ Others argue that denying such claims denies justice to children born with severe medical conditions that could have been prevented if not for medical negligence. In one of the benchmark cases in South African law, *Friedman v Glicksman*,³⁶ the court stated that such claims would be *contra bonis mores*, which means that such claims are against public policy, as well as the sentiments and opinions of the community.³⁷ The court also stated that allowing such claims would set a precedent for parents of disabled children to be sued for allowing their children to be born despite knowing there was a chance they would have congenital disabilities or other abnormalities.³⁸ Ultimately, the legal nature and reception of wrongful life actions depend on a complex interaction of legal, ethical and social considerations that vary by jurisdiction and over time.

2.3 POSSIBLE AVAILABLE LEGAL RECOURSE

The delictual strand of recourse offers the following main legal remedies: wrongful conception/pregnancy actions, wrongful birth actions, wrongful life actions, and the less common claim that prenatal damage was caused by carelessness or deliberate misconduct.

2.3.1 Wrongful pregnancy or wrongful conception claims

Wrongful pregnancy/conception can be explained as a situation where a medical practitioner's negligence, typically unsuccessful surgical sterilisation techniques, results in the birth of a healthy but unintended child.³⁹ Wrongful pregnancy/conception

³² *Nicholas Perruche* Cour de Cassation, 701, 17 November 2000.

³³ *Zeitsov v Katz* (1986) 40(ii) P.D. 85.

³⁴ Michel 2020:22-23.

³⁵ Ruda 2010:207.

³⁶ *Friedman v Glicksman* 1996 (1) SA 1134 (W).

³⁷ *Friedman v Glicksman* 1996 (1) SA 1134 (W): 1142I–J.

³⁸ *Friedman v Glicksman* 1996 (1) SA 1134 (W): 1142-1143.

³⁹ Mee 1992:887.

claims arise in circumstances where a child is conceived by a parent or parents who have received negligent counsel or treatment from a medical professional with the intention of either confirming the parent or parents' incapacity to procreate or intended to and expected to prevent pregnancy. The expert, usually a medical practitioner, is then sued for their irresponsible acts or advice that directly resulted in the pregnancy.⁴⁰

In the 1988 case of *Behrmann v Klugman*,⁴¹ the defendant, Dr Klugman, who at that time was a surgeon, had vasectomised the father, Mr Behrmann, in this case before the plaintiffs became the parents of a healthy child. They instituted a claim based on the grounds of a purported delict or breach of contract. They contended that the surgeon had a duty to counsel the father to have his sperm count examined prior to resuming non-contraceptive sexual activity and that the medical practitioner's failure to take these steps constituted a breach of contract. The court found in favour of the medical practitioner and held that a court should be cautious before concluding that a contract between a patient and a medical practitioner contains an implied warranty regarding the outcomes of an intended surgery, in this case, a warranty of infertility in the absence of an express warranty.⁴²

The judgment in the comparable case of *Edouard v Administrator of Natal*⁴³ ruled in favour of the parents and confirmed a few things with regard to wrongful pregnancy claims. In the event of a wrongful pregnancy, there are no compelling policy reasons to allow for an exemption to or modification of the fundamental terms of a contract.⁴⁴ Instead, the failure to prevent a pregnancy and the resulting birth can result in contractual obligations under the broad rules of contract law.⁴⁵ The court further stated that if the claim is based on a breach of contract, then the only damages that can be claimed for a wrongful pregnancy are patrimonial damages.⁴⁶ Whether or not negligence that leads to conception and delivery can be considered the same as causing physical harm for which damages could be demanded in a delict is up for debate. In the event that the claim is established on a breach of contract, the defendant

⁴⁰ Coetzee 2017:394.

⁴¹ *Behrmann and Another v Klugman* 1988 (4) SA 6 (W).

⁴² Coetzee 2017:398.

⁴³ *Edouard v Administrator, Natal* 1989 (4) SA 309 (D); 1989 (2) SA 368 (D); *Administrator, Natal v Edouard* 1990 (2) SA 374 (A); 1990 (3) SA 581 (A).

⁴⁴ *Edouard v Administrator, Natal* 1989 (2) SA 368 (D):380 A.

⁴⁵ *Edouard v Administrator, Natal* 1990 (3) SA 581 (A):590 F.

⁴⁶ *Edouard v Administrator, Natal* 1989 (2) SA 368 (D):390 A.

may be held accountable for the reasonable expenses related to rearing a child until the age of eighteen.⁴⁷ The court's decision to grant admissibility to the wrongful pregnancy claim was limited to situations in which a sterilisation procedure was performed for socio-economic reasons. The plaintiff is neither required nor obligated to mitigate their loss by choosing to have the child aborted or place the child up for adoption.⁴⁸

It was further confirmed in the judgment of *Mukheiber v Raath*⁴⁹ that a patient might receive compensation for an unintentional pregnancy even in the absence of a contract; liability could arise even where there was no clinical negligence and could also arise from a misrepresentation.⁵⁰ The public policy standard should be used to gauge the scope of the liability, that is, the limitation of liability to exclude overly remote damages. Whether a claim was based on a breach of contract or delict, the same public interest concerns apply.⁵¹ The court held that there is no reason to restrict wrongful pregnancy claims to situations in which a married couple requested sterilisation, to situations in which the husband gave his consent, or, most importantly, to situations in which the motivation for the request for sterilisation was of socio-economic nature.⁵² Finally, the court declared that recovery of reasonably foreseeable damages was possible. However, the following limitations on responsibility apply: It terminates when the child is in the position to support himself well, and it cannot surpass the parents' commitment to providing for their child in accordance with their means and station in life.⁵³

Considering all the above information, it's clear why South African law allows wrongful pregnancy/conception claims. These claims are allowed in terms of the law of contracts for a breach of contract only for patrimonial damages or, alternatively, in terms of delictual law where harm was present.

2.3.2 Wrongful birth claims

⁴⁷ *Edouard v Administrator, Natal* 1990 (3) SA 581 (A):597 C.

⁴⁸ *Edouard v Administrator, Natal* 1990 (3) SA 581 (A):593 D-E.

⁴⁹ *Mukheiber v Raath and Others* 1999 (3) SA 490 (A); 1999 (3) SA 1065 (SCA).

⁵⁰ *Mukheiber v Raath and Others* 1999 (3) SA 490 (A); 1999 (3) SA 1065 (SCA): paras. 29-30.

⁵¹ *Mukheiber v Raath and Others* 1999 (3) SA 490 (A); 1999 (3) SA 1065 (SCA): par. 46.

⁵² *Mukheiber v Raath and Others* 1999 (3) SA 490 (A); 1999 (3) SA 1065 (SCA): par. 48.

⁵³ *Mukheiber v Raath and Others* 1999 (3) SA 490 (A); 1999 (3) SA 1065 (SCA): par. 51.

Wrongful birth refers to allegations of the negligence of a medical practitioner in which parents were denied the chance to end a pregnancy. Parents who filed the charges and are the plaintiffs say that because of the negligent conduct of the defendant, they were forced to endure the extreme financial burden and mental anguish of raising a disabled child whose birth should have been avoided.⁵⁴ These claims comprise a claim for damages by a child's parents for the costs of raising the child and are frequently connected to undiagnosed foetal defects. Other claims for damages include the non-financial costs for the mother and father due to the disruption of their family life.⁵⁵

In the 1996 case of *Friedman v Glicksman*,⁵⁶ a child was born with severe disabilities. The mother accused the medical practitioner of wrongful birth because she was of the opinion that she would have terminated the pregnancy in terms of the *Abortion and Sterilisation Act*⁵⁷ if she had been given more accurate and correct information. The court sustained the appeal in its ruling because there rested a contractual liability on the medical practitioner to appropriately tell the mother about the congenital deficiencies of her child. In terms of South African law, claims for wrongful conception/pregnancy and wrongful birth are recognised. These claims can be instituted in terms of either contractual law or delictual law.

2.3.3 Wrongful life claims

Wrongful life claims are made by the disabled children themselves or on behalf of that disabled children. They contend that if the defendant, in this case, the medical professional, had not been negligent in providing the parents with certain information, they would have been aborted and that being born would have caused harm.⁵⁸ Wrongful life claims and wrongful birth claims are, despite having one difference, exactly the same. The difference is that in wrongful birth claims, the parents of the disabled child claim damages against the alleged negligent medical practitioner, whereas in wrongful life claims, the children themselves claim that they have been indirectly harmed by the medical practitioner.

⁵⁴ Hanson 1996:2.

⁵⁵ Hassan *et al.* 2014:312.

⁵⁶ *Friedman v Glicksman* 1996 (1) SA 1134 (W).

⁵⁷ *Abortion and Sterilisation Act* 2/1975: sec.3(c).

⁵⁸ Hansen 1996:2.

We have to use the counterfactual comparison approach to determine if legal harm has occurred to the child in question. The latter means that an evaluation of an event's harm hinges on how things would have turned out in the absence of it.⁵⁹ According to the counterfactual comparison approach, the person must demonstrate that their current situation is worse than it would have been had the negligent behaviour not occurred to establish that they have been harmed. Applying this to wrongful life claims, the child would have to argue that a life with a disability is worse than never having been born in order to make the case that no life would have been preferable to a life with a disability. This is known as the harm paradox, which will be discussed later.

Steinbock⁶⁰ held that:

It is impossible for a person to be better off, never having been born. For if I had never been born, then I never was; if I never was, then I cannot be said to have been better off. For to be harmed is to be made worse off; but no individual is made worse off by coming to exist, for that suggests that we can compare the person before he existed with the person after he existed, which is absurd. Therefore, it is logically impossible that anyone is harmed by coming to exist and wrongful-life suits are both illogical and unfair in that they require the defendant to compensate someone he has not harmed.⁶¹

This issue puts the wrongful life plaintiff up against the bulk of their legal roadblocks and is also why the majority of courts have dismissed the wrongful life claim, as will be covered in more detail below.

In South Africa, wrongful life claims are not officially recognised as a cause of action; however, in recent case law, in the *H v Fetal Assessment Centre*⁶² decision, the Constitutional Court held that there might be a chance that the common law would evolve and consequently accept such claims.⁶³

2.3.4 Prenatal injury claims

The South African legal system recognises a child's entitlement to compensation for harm which was sustained during the pregnancy period. The main challenge is deciding whether to use the *nasciturus* fiction or the standard law of delict rules.⁶⁴ With

⁵⁹ Feit 2015:361.

⁶⁰ Steinbock 1986:15-20; Steinbock 2011: chapter 3 par. 4.

⁶¹ Steinbock 1986:16.

⁶² *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC).

⁶³ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): paras. 9, 13-14.

⁶⁴ Mankga 2007:50.

these prenatal injury claims, we are dealing with the prenatal harm that occurs *in utero* and the subsequent birth disability that results from it.

A natural person's legal personality is only established at birth. Therefore, a foetus has no rights, obligations or capacities prior to birth due to the fact that it is not a legal subject yet. The beginning of legal individuality is contingent upon the fulfilment of the subsequent requirements. First, the whole process of birthing had to have happened. The foetus and the mother's bodies need to be kept entirely apart. Secondly, even if it was only for a short period of time, the infant must have survived the separation from the mother.⁶⁵

In the 1963 case of *Pinchin NO v Santam Insurance Co Ltd*,⁶⁶ it was decided that a child has the right to sue for compensation for prenatal injuries brought on by a driver's negligence. Due to the fact that our legislation is founded on Roman law, the court's ruling was decided on the assumption that an unborn child in *ventre matris* is considered to have all the rights of a living child if it is in the child's best interests and the child is later delivered alive.⁶⁷ This rule is known as the *nasciturus* fiction, also called the *nasciturus* rule, and delay the vested rights until after the baby is born alive. The rule had never been applied to the law of delict prior to *Pinchin*; it had only ever been used in succession and status-related circumstances.⁶⁸

The 2005 case of *Road Accident Fund v Mxolisi Richard Mtati on behalf of Zukhanye Mtati (RAF v Mtati)*⁶⁹ is particularly intriguing and came 42 years after the *Pinchin*⁷⁰ decision. In this case, the court had to determine whether the plaintiff in a case involving prenatal injuries should rely on the *nasciturus* fiction or if the general rules of the delict law might be applied.⁷¹ In this case, a negligent motorist injured a pregnant pedestrian, causing her unborn child to be born about five and a half months after the incident with brain damage and is mentally retarded as a result of that collision.⁷² The Road Accident Fund then argued that due to the unborn child not being recognised as a legal person, the insured motorist has no legal obligation to take reasonable

⁶⁵ Cronje & Heaton 2003:7.

⁶⁶ *Pinchin NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).

⁶⁷ *Pinchin NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W):260.

⁶⁸ *Pinchin NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W):255.

⁶⁹ *Road Accident Fund v Mtati* 2005 6 SA 215 SCA; 2005 3 All SA 340 (SCA).

⁷⁰ *Pinchin NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).

⁷¹ *Road Accident Fund v Mtati* 2005 6 SA 215 SCA; 2005 3 All SA 340 (SCA); par. 27.

⁷² *Road Accident Fund v Mtati* 2005 6 SA 215 SCA; 2005 3 All SA 340 (SCA); par. 2.

precautions to protect the unborn child. The plaintiff's attorney urged the court to explore using the *nasciturus* fiction to establish a claim for the child. Still, the court determined this was unnecessary because a claim could be established using the standard delictual elements,⁷³ provided they were correctly conceptualised. The court suggested that a delict may be found, meaning that the harm befell the child after they were born into the disabled state, by acknowledging that there may be a time gap between the harm-causing conduct and the damage or injury that results. It was decided that whether there is a separation between the behaviour and the injury caused is irrelevant. This consequently means there is no need to adopt the *nasciturus* fiction since all the standard principles of delict are present from the moment that the child is born. Therefore, the standard criteria of delictual claims can be relied upon.⁷⁴ According to Lind,⁷⁵ the *nasciturus* fiction is of no use in situations where a child experiences an injury, in the form of a disability, as a result of harm committed upon either one of the child's parents before conception. This is due to the fact that the *nasciturus* fiction only applies to a foetus *in ventre matris*. Hence, there will be no rights of its own against the wrongdoer for the child in this circumstance.⁷⁶ The court in *RAF v Mtati*⁷⁷ agreed with the latter statement of Lind.⁷⁸ However, the prenatal injury claim was successful, and the mentally disabled child with brain damage then received compensation for the loss brought on by the brain damage as well as its cause. Lind further held that: "In law, there is no fallacy in saying that the damage is suffered only at birth, for, until then, there is no plaintiff to suffer damage. And there can only be a delictual wrong once a plaintiff is injured."⁷⁹

It's critical to remember that there is a significant distinction between prenatal injury claims and claims for wrongful life and wrongful birth. On the one hand, in the case of *RAF v Mtati*,⁸⁰ the defendant caused the impairment because if the defendant had acted differently, the child would not have been born with the impairment. However, on the other hand, the child would have been born with the impairment in any case

⁷³ Neethling *et al.* 2015:19.

⁷⁴ Mukheibir 2006:194.

⁷⁵ Lind 1992:428-446.

⁷⁶ Lind 1992:441.

⁷⁷ *Road Accident Fund v Mtati* 2005 6 SA 215 SCA; 2005 3 All SA 340 (SCA).

⁷⁸ *Road Accident Fund v Mtati* 2005 6 SA 215 SCA; 2005 3 All SA 340 (SCA):226.

⁷⁹ Lind 1992:441-442.

⁸⁰ *Road Accident Fund v Mtati* 2005 6 SA 215 SCA; 2005 3 All SA 340 (SCA).

due to biological or genetic factors at work in a wrongful life and wrongful birth claim;⁸¹ therefore, given what has been said, the defendant did not directly cause the harm as is the case of a prenatal injury.

A child can suffer harm due to negligence committed before the child was conceived when not even an embryo existed. Even if it is argued that there was no being with any interests present at the time of the damage, a child who was hurt in utero and after that was born has suffered harm.⁸² In contrast to the latter, wrongful life claims do not only assert that the plaintiff's child suffered harm prior to birth, but they also assert that the child was hurt by being born, expressing a desire for them not to have been brought into existence at all. If someone's existence is unavoidably and irrevocably such that life is not worth living, that person can be said to be interested in not being born.⁸³

In the 1984 case of *Procanik v Cillo*,⁸⁴ one of the judges stated the following: "We must remember that the choice is not between being born with health or being born without it; it is not claimed that the defendants failed to do something to prevent or reduce the ravages of rubella. Rather, the choice is between a worldly existence or none at all. To recognise a right not to be born is to enter an arena in which no one could find his way."⁸⁵

2.4 CONCLUSION

Wrongful birth and conception/pregnancy claims are allowed within the South African legal system. However, the courts have been reluctant to recognise wrongful life claims. As is the case in wrongful pregnancy and wrongful birth claims, prenatal injury claims are also allowed in South Africa.

It's essential to keep in mind that there are significant differences between claims instituted for prenatal injuries and claims for wrongful birth and wrongful life. On the one hand, the defendant contributed to the child's impairment since had the defendant acted differently, the child would not have been born with the disability. However, in a wrongful life and wrongful birth claim, the child would have been born with the

⁸¹ Ruda 2010:204.

⁸² Steinbock & McClamrock 1994:15.

⁸³ Steinbock & McClamrock 1994:15; *Gleitman v Gosgrove* 1967 49 NJ 22, 63, 227 A.2d 689 711.

⁸⁴ *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984).

⁸⁵ *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984): 772; Steinbock 1986:15; *Gleitman v Gosgrove* 1967 49 N.J. 22, 63, 227 A.2d 689 711.

handicap regardless of the biological or genetic circumstances at play; thus, unlike a prenatal injury, the defendant did not directly cause the harm. With regard to the *nasciturus* fiction, it is safe to conclude by saying that it is evident that it is unnecessary to rely on it in wrongful life claims, for no wrongful life claims can be instituted prior to the conception of the child and the moment that such child is born, the standard guidelines as set out by the law of delict can be relied upon for wrongful life claims. It can be concluded that applying the *nasciturus* fiction can have a more limiting effect compared to the advantages it might have for the child.

CHAPTER THREE

HISTORICAL OVERVIEW AND CURRENT POSITION OF WRONGFUL LIFE ACTIONS

3.1 INTRODUCTION

The reception of wrongful life actions varies widely by jurisdiction, despite the fact that it appears that the overall trend has been to forbid the wrongful life action completely.⁸⁶ In some countries, such claims are not recognised at all, while in others, they are allowed in limited circumstances. An example of this is in the United States of America; some states permit wrongful life claims only where the child is born with a serious disability that was not detected during prenatal testing. These states are California,⁸⁷ New Jersey⁸⁸ and Washington.⁸⁹ In other states, such claims are not permitted at all. In contrast, several European countries, including France⁹⁰ and Asian countries, such as Israel,⁹¹ have recognised the right to bring wrongful life claims in certain circumstances, such as when a child is born with a serious genetic disorder that could have been detected through prenatal testing.⁹² In England, wrongful life claims are not recognised as set out and prohibited by the *Congenital Disabilities (Civil Liability) Act* of 1976.⁹³ The Netherlands has a history of being seen as more progressive than most other societies.⁹⁴ What makes them even more different is the fact that wrongful life claims are recognised in the Netherlands.⁹⁵ In South Africa, there has been a hopeful progressive approach to such claims; yet, wrongful life claims are still not acknowledged as of today.

Common law jurisdictions in Canada, Australia⁹⁶ and Singapore have rejected claims of this nature, but in Israel, in the matter *Zeitsov v Katz*,⁹⁷ the child's claim for wrongful life was granted. The tendency in continental countries is similar; however, Holland

⁸⁶ Mukheibir 2005:757.

⁸⁷ *Turpin v Sortini*, 31 Cal.3d 220, 643 P.2d 954 Cal Rptr 337 (1982).

⁸⁸ Stearns 1985:883; *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984).

⁸⁹ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

⁹⁰ *Nicholas Perruche* Cour de Cassation, 701, 17 November 2000.

⁹¹ *Zeitsov v Katz* (1986) 40(ii) P.D. 85.

⁹² Michel 2020:22-23.

⁹³ *Congenital Disabilities (Civil Liability) Act*/ 1976.

⁹⁴ Mukheibir 2005:753.

⁹⁵ *Hoge Raad der Nederlanden* [Supreme Court], 28 May 1992, NJ 1992/714.

⁹⁶ *Harriton v Stephens* (2006) 226 CLR 52.

⁹⁷ *Zeitsov v Katz* (1986) 40 (2) PD 85 (Isr).

supplied an exception in the case of *Leids Universitair Medisch Centrum v Molenaar*.⁹⁸ Surprisingly, from 1996 to 2001, French courts have allowed similar claims. This resulted in political pressure from organisations representing disabled persons, who argued that the courts in these judgements considered their lives as inferior to non-existence, as well as organisations representing gynaecologists, obstetricians and ultrasonographers. Political pressure eventually culminated in legislative action, with an Act approved on March 4, 2002,⁹⁹ bringing France in line with the majority of countries throughout the world.¹⁰⁰

There have been significant advancements in child law, and one may anticipate that these advancements will have an impact on the wrongful life discussion. Therefore, an analysis will be done of the United Nations Convention on the Rights of the Child (UNCRC/CRC).¹⁰¹ When it comes to the rights of children, the CRC is an essential international instrument. Except for the United States of America and South Sudan, this convention has been adopted by every other country on earth.¹⁰² It even found its way into South African legislation.¹⁰³ In addition to the CRC, there have occurred some developments within disability law, which might also be relevant when you take into consideration that the Convention on the Rights of People with Disabilities (CRPD)¹⁰⁴ has since also been adopted into legal systems. A court, tribunal, or other body that must interpret the Bill of Rights must take international law into account and may also take foreign law into account. As a result, foreign law can possibly be applied to aid a court in deciding the matters at hand. Although the Court may use comparative law, it is not required.¹⁰⁵

In this chapter, a brief historical overview of wrongful life actions will be provided. Thereafter, a comparison will be done between the current position of such claims in England, the United States of America, the Netherlands and South Africa. An analysis

⁹⁸ *Leids Universitair Medisch Centrum v Molenaar* no. C03/206, RvdW 2005, 42.

⁹⁹ Law no. 2002-303 of 4 March 2002 relative to the rights of the sick and the quality of the health system (Loi n°2002-303 du 4 Mars 2002 relative aux droits des malades et à la qualité du système de santé), enacted by France. It was adopted on and has been in force since 4 March 2002. It was last modified on 28 August 2005.

¹⁰⁰ *Stewart v Botha* 2007 6 SA 247 (C); 2007 9 BCLR 1012; 2007 3 All SA 440; 2008 (6) SA 310 (SCA): paras. 12-13.

¹⁰¹ United Nations Convention on the Rights of the Child 1989.

¹⁰² Boezaart 2015:415.

¹⁰³ *Constitution*: sec. 28(2); *Children's Act* 38/2005; *Child Justice Act* 75/2008.

¹⁰⁴ Convention on the Rights of People with Disabilities 2006.

¹⁰⁵ *Constitution*: secs. 39(1)(b)-(c); *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 28.

of the development of the CRC and the CRPD can also be seen in this chapter and how they are relevant and can be applied to wrongful life claims.

3.2 THE CRC AND CRPD'S APPLICABILITY TO WRONGFUL LIFE ACTIONS

When it comes to international law, the 1989 United Nations Convention on the Rights of the Child (UNCRC/CRC)¹⁰⁶ is a crucial piece of legislation. With the exception of the United States of America and South Sudan,¹⁰⁷ every nation in the world has ratified this treaty, and it has even made it into South African law.¹⁰⁸ This convention has been used by the judiciary in the past,¹⁰⁹ and it helped open the door for the recognition of disabled children's rights. It was the first agreement with regard to human rights to specifically forbid prejudice against children because of their disabilities.¹¹⁰ The preamble to the CRC acknowledges that there are children living in very challenging circumstances in every nation on earth and that these children require special treatment. The soul of the CRC is contained in its general principles, which include the rights to life, non-discrimination, development and survival, the best interests of the individual and participation.¹¹¹ Every child is given the right to life, development and survival under the CRC.¹¹²

In *Stewart v Botha*,¹¹³ it was argued that the right to life precludes the awarding of a wrongful life claim.¹¹⁴ Additionally, the comparative method, which meant a comparison between life with infirmities and non-existence, was employed to determine if the plaintiff had lost anything and how much.¹¹⁵ Article 6(1) of the CRC makes it clear that such a comparison is invalid. A court of law cannot utilise non-existence as a point of reference for determining the remedies available to the child because every child has an intrinsic right to life. The parents had the choice to end the pregnancy, but after the baby is born, they are no longer able to do so.¹¹⁶ With a more

¹⁰⁶ United Nations Convention on the Rights of the Child 1989.

¹⁰⁷ Boezaart 2015:415.

¹⁰⁸ *Constitution*: sec. 28(2); *Children's Act* 38/2005; *Child Justice Act* 75/2008.

¹⁰⁹ *S v M (Centre for Child Law as amicus curiae)* 2008 3 SA 232 (CC): paras. 16-17.

¹¹⁰ Boezaart 2015:415.

¹¹¹ Committee on the Rights of the Child General Guidelines Regarding The Form and Content of Initial Reports to be Submitted By States Parties art. 44, par. 1(A), Of The Convention:19/10/30 CRC/C/5: par. 13.

¹¹² United Nations Convention on the Rights of the Child: art. 6.

¹¹³ *Stewart v Botha* 2007 6 SA 247 (C); 2007 9 BCLR 1012; 2007 3 All SA 440; 2008 (6) SA 310 (SCA).

¹¹⁴ *Stewart v Botha* 2008 (6) SA 310 (SCA): paras. 23 & 27.

¹¹⁵ *Stewart v Botha* 2008 (6) SA 310 (SCA): par. 27; *Friedman v Glicksman* 1996 1 SA 1134 (W):1142.

¹¹⁶ United Nations Convention on the Rights of the Child: art. 6(1).

comprehensive approach, art. 6(2) goes even further, highlighting the importance of survival and growth and the need to give them to the fullest extent feasible.¹¹⁷ This legal remedy assumes, among other things, that every child, even those with severe and profound disabilities, has a right to life and should receive specialised care and education in order to reach the fullest extent of their potential.¹¹⁸

In addition to the security guaranteed by art. 6, the right to life, survival and development is connected to many other CRC clauses. The fundamental tenet of art. 18 holds that parents have a combined but primary responsibility for raising and developing their children in the child's best interest.¹¹⁹ States Parties are responsible for developing services, institutions, and facilities for the care of children and must offer the necessary assistance in this area.¹²⁰ Art. 23 is crucial in the context of wrongful life claims and should be read in conjunction with sec. 6(2) already mentioned.¹²¹ Children with disabilities are entitled to special attention and involvement under art. 23, which must support a complete and respectable life.¹²² States Parties must also offer the required assistance based on the resources at their disposal.¹²³ In the circumstances of the issue under discussion, art. 24 may be the most crucial clause because it recognises the child's right to the best possible standard of medical and health care.¹²⁴ All children are entitled to be provided with medical care and assistance.¹²⁵

The non-discrimination tenet is inextricable from the right to life. Non-discrimination is essential when working with people, in this case, children with disabilities. The CRC explicitly names disability as one of the grounds for this prohibition and requires States Parties to grant all children's rights without any form of discrimination.¹²⁶ The concept of non-discrimination is then expanded since States Parties are required to take proactive measures to safeguard all children from discrimination in any form.¹²⁷ While

¹¹⁷ United Nations Convention on the Rights of the Child: art. 6(2).

¹¹⁸ Boezaart 2015:416.

¹¹⁹ United Nations Convention on the Rights of the Child: art. 18(1).

¹²⁰ United Nations Convention on the Rights of the Child: art. 18(2).

¹²¹ United Nations Convention on the Rights of the Child: art. 23.

¹²² United Nations Convention on the Rights of the Child: art. 23(1).

¹²³ United Nations Convention on the Rights of the Child: art. 23(2)-(3).

¹²⁴ United Nations Convention on the Rights of the Child: art. 24(1).

¹²⁵ United Nations Convention on the Rights of the Child: art. 24(2).

¹²⁶ United Nations Convention on the Rights of the Child: art. 2(1).

¹²⁷ United Nations Convention on the Rights of the Child: art. 2(2).

comparing life with and without disabilities, as has been done while evaluating the child's claim, it is obvious that the comparison is discriminatory because it indicates that life with a disability is so terrible that it is not even worth living. Furthermore, rejecting this remedy would bar children with serious disabilities from receiving compensation.¹²⁸ This would imply that not all children or individuals would be treated equally, which is at the heart of what discrimination is.

The Constitutional Court was adamant on the importance of the child's best interests. According to the CRC, the child's best interests must always come first in all decisions involving that child, whether they are made in the public or private sphere, by administrative or legislative bodies, by legal authorities, or in a court of law.¹²⁹ States Parties must give the child the safety and attention required for their well-being¹³⁰ and must make sure that institutions and facilities, especially those related to safety and health, adhere to the proper standards and oversight.¹³¹ The CRC's criterion is echoed in the South African *Constitution*, together with decades' worth of law and jurisprudence. The best interest test was elevated to a principle of paramountcy by the *Constitution*,¹³² and the body of constitutional jurisprudence has produced clear guidelines on how to apply it.¹³³ In the case of *H v Fetal Assessment Centre*, the Constitutional Court once again upraised this principle in its mandate to develop the common law accordingly.¹³⁴ This gets me to the CRC's final overarching principle, which is participation. Art. 12(1), which instructs States Parties to make sure that a child, capable of developing their own opinions, has the chance to do so and that due weight be given to it, serves as the foundation for child involvement.¹³⁵ The child could participate and be heard for these objectives either directly or indirectly through a representative or other appropriate entity.¹³⁶ Every child in South Africa now has the right to have a legal representative appointed to them by the state at state expense in civil processes affecting them if substantial injustice would otherwise ensue. This is an

¹²⁸ General Comment No 9: The Rights of Children with Disabilities: par. 9(B).

¹²⁹ United Nations Convention on the Rights of the Child: art. 3(1)

¹³⁰ United Nations Convention on the Rights of the Child: art. 3(2).

¹³¹ United Nations Convention on the Rights of the Child: art. 3(3).

¹³² *Constitution*: 28(2).

¹³³ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC): par. 31; *S v M (Centre for Child Law as amicus curiae)* 2008 3 SA 232 (CC): paras. 24-26; *Teddy Bear Clinic for Abused Children v Minister of Constitutional Development* 2014 2 SA 168 (CC): par. 69.

¹³⁴ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 78.

¹³⁵ United Nations Convention on the Rights of the Child: art. 12(1).

¹³⁶ United Nations Convention on the Rights of the Child: art. 12(2).

expansion of children's participatory rights.¹³⁷ The Constitutional Court has interpreted this right of children to include the appointment of a curator to the case *ad litem*.¹³⁸ A parent can file a wrongful life claim on behalf of their child under South African law. Our common law recognises that parents may fill in for their children's restricted or absent capacity to represent themselves in court. The common law, however, also stipulates circumstances in which a curator *ad litem* should be chosen for a child, and one such situation is when there is a potential conflict between the interests of the parent or guardian and those of the child.¹³⁹ I believe there is at least a chance of competing interests in a situation where a parent claims that their child should never have been born. I have a hard time believing that, in situations where the unborn child's hereditary interests are at stake,¹⁴⁰ we can appoint curators *ad litem*, but we cannot give a child the same protection. The courts have also appointed curators *ad litem* recently in a number of groundbreaking instances, suggesting a broader role for curators *ad litem* than was previously thought. As an illustration, consider a situation where the Constitutional Court appointed a curator *ad litem* to represent the interests of children who were not present in the court (in a case involving an adoption).¹⁴¹ Boezaart contends that in these situations, appointing a curator *ad litem* for the child is the proper means to represent the child's best interests to the court.¹⁴²

With regard to the Convention on the Rights of People with Disabilities (CRPD),¹⁴³ the *Friedman v Glicksman* and *Stewart v Botha* decisions were determined prior to South Africa ratifying the CRPD.¹⁴⁴ Since then, only the *H v Fetal Assessment Centre* case has been resolved, and in that decision, this convention was not addressed. The Constitutional Court did not bring it up either. Unfortunately, it is unclear whether the ratification of the CRPD¹⁴⁵ would have had a more significant effect given the minimal

¹³⁷ Constitution: 28(1)(h).

¹³⁸ *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC): 201G-201H.

¹³⁹ *Wolman v Wolman* 1963 2 SA 452 (A): 459C; *B v E* 1992 3 SA 438 (T).

¹⁴⁰ *Du Plessis NO v Strauss* 1988 2 SA 105 (A); *G v Superintendent, Groote Schuur Hospital* 1993 2 SA 255 (C): 257D & 259C-G.

¹⁴¹ *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC): par. 3.

¹⁴² Boezaart 2015:418.

¹⁴³ Convention on the Rights of People with Disabilities 2006.

¹⁴⁴ South Africa ratified CRPD on 30-11-2007. On 04-08-2014 158 states have signed and 147 states have ratified the Convention information available at <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>.

¹⁴⁵ Adopted in December 2006 and ratified by South Africa on 30-11-2007.

role that the CRC has played in those judgements. However, the CRPD includes important global norms pertaining to the rights of those with disabilities. It is regrettable that South African law has not yet taken these norms into account. Such an action might have improved its impact on legal practice. The CRC and CRPD both explicitly state that everyone has the right to life. Art. 10 of the CRPD states that: “States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”¹⁴⁶

The right to life, development and survival demands special consideration when it comes to the rights of children with disabilities, according to the Committee on the Rights of the Child’s General Comment¹⁴⁷ on “The Rights of Children with disabilities”. Art. 23 of the CRC’s protections for disabled children is built upon and expanded upon by the CRPD.¹⁴⁸ The rights and protections granted to disabled children are explicitly stated in several parts of the CRPD.¹⁴⁹ It is specifically stated that people who are disabled should be entitled to equal legal protection and advantages.¹⁵⁰ Only focusing on children, art. 7 imposes additional duties on States Parties on the primacy of the children’s best interest and child participation.¹⁵¹

States Parties are furthermore required to adopt laws and policies that are centred on children,¹⁵² protect the physical and mental integrity of all people with disabilities,¹⁵³ guarantee that children have equal rights in family relationships and are not forcibly taken away from their parents,¹⁵⁴ provide health services to children to lessen and prevent further disability,¹⁵⁵ among other obligations.¹⁵⁶ Art. 12 on legal capacity, which requires States Parties to establish adequate and effective measures to avoid abuse in conformity with international law regarding human rights, may be of particular

¹⁴⁶ Convention on the Rights of People with Disabilities: art. 10.

¹⁴⁷ General Comment No 9: “The Rights of Children with Disabilities” (2006): par. 31.

¹⁴⁸ United Nations Convention on the Rights of the Child: art. 23.

¹⁴⁹ Convention on the Rights of People with Disabilities: preamble & art. 3(h).

¹⁵⁰ Convention on the Rights of People with Disabilities: arts. 5(1) & 13(1).

¹⁵¹ Convention on the Rights of People with Disabilities: art. 7(2); United Nations Convention on the Rights of the Child: art. 12.

¹⁵² Convention on the Rights of People with Disabilities: art. 16.

¹⁵³ Convention on the Rights of People with Disabilities: art. 17.

¹⁵⁴ Convention on the Rights of People with Disabilities: art. 23.

¹⁵⁵ Convention on the Rights of People with Disabilities: art. 25.

¹⁵⁶ Boezaart 2011:264-279; *Children’s Act* 38/2005.

significance in the context of the child's claim.¹⁵⁷ The safeguards are intended to ensure that actions related to the exercise of legal capacity respect the disabled person's rights, will, and preferences, are free of conflicts of interest and undue influence, are proportionate and tailored to the person's circumstances, are effective for the shortest possible time, and are subject to routine review by a competent authority. States Parties are required to make it possible for people with impairments to exercise their rights.¹⁵⁸

In conclusion, the CRC and CRPD are in line with sec. 28 of the *Constitution*, which states that the best interest of a child is of paramount importance in every matter concerning a child. It can be said that when determining wrongful life claims in the future, the CRC and CRPD's articles regarding the protection of a disabled child may be taken into account in order to draw conclusions as to what the best interest of the child might entail in a specific case.

3.3 HISTORICAL OVERVIEW AND CURRENT POSITION LOCALLY AND INTERNATIONALLY

3.3.1 Historical overview and current position in England

Wrongful life claims have been, as a general rule, rejected in England by both the judiciary and are prohibited in terms of certain legislation. The 1976 legislation, called the *Congenital Disabilities (Civil Liability) Act*,¹⁵⁹ denies the recognition of wrongful life claims in sec. 1, which states that:

(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.¹⁶⁰

(2) An occurrence to which this section applies is one which—

(a) affected either parent of the child in his or her ability to have a normal, healthy child; or

(b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.¹⁶¹

¹⁵⁷ Convention on the Rights of People with Disabilities: art. 12.

¹⁵⁸ Standard Rules on the Equalization of Opportunities for Persons with Disabilities: Rule 15.1.

¹⁵⁹ *Congenital Disabilities (Civil Liability) Act/ 1976*.

¹⁶⁰ *Congenital Disabilities (Civil Liability) Act*: sec. 1(1).

¹⁶¹ *Congenital Disabilities (Civil Liability) Act*: sec. 1(2).

Children born after the *Act's* implementation are ineligible to make a wrongful life claim. This means that the *Act* forbids a child from bringing a wrongful life claim against a medical professional if the child was born after the 22nd of July 1976, the date on which the *Act* gained royal assent. However, sec. 1 allows a claim for prenatal injury for a child who was born alive but with a disability as a result of the medical practitioner's actions that resulted in the child's condition.¹⁶² Therefore, cases of disability brought on naturally are thus excluded and will not constitute a claim.¹⁶³

The Court of Appeal dealt with a wrongful life claim for the first time in 1982 in the case of *McKay v Essex Area Health Authority*.¹⁶⁴ Although the claim was instituted after the *Congenital Disabilities (Civil Liability) Act*¹⁶⁵ was enacted, the child was born in 1975 and was, for that reason, not disqualified from making a claim under the *Act*.

The court reached the unanimous conclusion that an allegation of wrongful life did not reveal a cause of action.¹⁶⁶ The Lords Justices reached this conclusion after concluding that there is no obligation under English law to end a pregnancy for a congenitally deformed foetus, which is necessary to hold the medical practitioner and the health authority accountable.¹⁶⁷ If it is determined that this obligation exists, it will follow that a disabled person's life has so little value that it is not worth protecting.¹⁶⁸ The court further reasoned that granting the claim would expose medical professionals to liability for children born with a "trivial abnormality" and expose women to liability for their child's health due to not terminating the pregnancy.¹⁶⁹ The court also argued that it is difficult to calculate damages in wrongful life claims because doing so would necessitate comparing the value of living in a disabled state to the value of non-existence.

In conclusion, a claim for wrongful life was ultimately denied. The court held, among other things, that it was impossible to assess damages since doing so would result in unbearable and unsolvable issues.¹⁷⁰ Therefore, until today, wrongful life claims are

¹⁶² *Congenital Disabilities (Civil Liability) Act*: sec. 1.

¹⁶³ Chürr 2015:759.

¹⁶⁴ *McKay v Essex Area Health Authority* [1982] 2 All ER 771 (CA).

¹⁶⁵ *Congenital disabilities (Civil liability) Act/1976*.

¹⁶⁶ *McKay v Essex Area Health Authority* [1982] 2 All ER 771 (CA):774.

¹⁶⁷ *McKay v Essex Area Health Authority* [1982] 2 All ER 771 (CA):781-790.

¹⁶⁸ *McKay v Essex Area Health Authority* [1982] 2 All ER 771 (CA):781.

¹⁶⁹ *McKay v Essex Area Health Authority* [1982] 2 All ER 771 (CA):781.

¹⁷⁰ Giesen 2009:263.

being denied in England as a result of both previous court cases' judicial decisions and in terms of the *Congenital Disabilities (Civil Liability) Act*, and it does not seem promising that this position might change at all anytime in the near future.

3.3.2 Historical overview and current position in the Netherlands

The Netherlands has a history of being seen as more progressive than most other societies.¹⁷¹ What makes them even more different is the fact that wrongful life claims are recognised in the Netherlands. It's important to consider the well-known *Kelly* case.¹⁷² The youngster in this case, Kelly, was awarded her cost-of-living expenses, additional expenditures related to her disability, and non-pecuniary losses for her suffering by the court. A life with infirmities, according to the court, is neither less important nor less valuable than a life without them. The court stated that despite having a disability, a person can still live a respectable and honourable life. Living with a disability is not preferable to not existing, but that does not negate the fact that it is demanding and difficult to live with. If awarded damages, a child who has filed a wrongful life claim improve their life and living circumstances. In this situation, loss of life may constitute a reimbursable injury.¹⁷³ Regarding the assessment of damages, it was asserted that under the criteria of art. 6:95 of the Dutch Civil Code,¹⁷⁴ it was impossible to ascertain the actual damages because doing so would necessitate comparing Kelly's existing existence to Kelly's non-existence. In response, the court stated that, in theory, a comparison would be the optimum method for determining patrimonial loss. However, when it comes to non-patrimonial damages, the goal is to lessen the effects of the injury or to make up for a "*geschokt rechtsgevoel*" rather than to restore the prior position.¹⁷⁵ The Hoge Raad ruled that art. 6:97 of the Dutch Civil Code¹⁷⁶ should be utilised, which also allows for the option of calculating damages using the approach that is most relevant to the type of damage.¹⁷⁷ As a result, the court agreed with the lower courts and awarded Kelly compensation for the pain and suffering she had endured.

¹⁷¹ Mukheibir 2005:753.

¹⁷² *Leids Universitair Medisch Centrum v Molenaar* 8 LJN: AR5213, Hoge Raad, C03/206HR; *Hoge Raad der Nederlanden* [Supreme Court], 28 May 1992, NJ 1992/714.

¹⁷³ Giesen 2012:39-46.

¹⁷⁴ Dutch Civil Code: art. 6:95.

¹⁷⁵ *Leids Universitair Medisch Centrum v Molenaar* 8 LJN: AR5213, Hoge Raad, C03/206HR: par. 53.

¹⁷⁶ Dutch Civil Code: art. 6:97.

¹⁷⁷ Hoge Raad, C03/206HR: paras. 53-54; Mukheibir 2005:756.

In conclusion, wrongful life claims are allowed in the Netherlands to compensate a disabled child, as was determined in the *Kelly* case. As a result, instituting claims for wrongful life in the Netherlands by a disabled child or their representatives has not been a problem and can be done without many obstacles.

3.3.3 Historical overview and current position in the United States of America

Despite the fact that these wrongful life cases have generally ended in failure, the Netherlands was not the first nation to permit wrongful life claims. In the United States of America, the first wrongful life claim was recognised in the state of California in 1982,¹⁷⁸ and two other states (New Jersey¹⁷⁹ and Washington¹⁸⁰) subsequently also followed this route and recognised wrongful life claims based on public policy grounds.¹⁸¹

The development of wrongful life actions can be traced back to the 1960s and 1970s. The 1980 case of *Curlender v Bio-Science Labs*¹⁸² dealt with a child's pain and suffering accompanying Tay-Sachs Syndrome, and in this case, the court held that a disabled person's life could be compensable.¹⁸³ In this case, California became the first state to recognise wrongful life claims in the United States of America.¹⁸⁴

The defendant laboratories were hired specifically to do genetic tests to determine whether the plaintiff's parents carried the Tay-Sachs illness gene.¹⁸⁵ The laboratories incorrectly advised the parents that they were not carriers of the Tay-Sachs disease, and relying on these results, the parents bore a child who was later diagnosed with the Tay-Sachs disease.¹⁸⁶ Under these circumstances, the courts have had little difficulty determining a duty towards the parents and the unborn child, as well as a breach of that duty, when there is a relationship between the physician's negligence and the injury sustained. The court went on to explain that the issue in this case relates to the question of whether the breach of duty was the proximate cause of an injury

¹⁷⁸ *Turpin v Sortini*, 31 Cal.3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

¹⁷⁹ Stearns 1985:883; *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984).

¹⁸⁰ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

¹⁸¹ Mukheibir 2005:756.

¹⁸² *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980).

¹⁸³ *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980).

¹⁸⁴ Tucker 1988:680.

¹⁸⁵ *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980): 816.

¹⁸⁶ *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980): 815-816.

cognisable at law because the injury being claimed was not the defect with which a plaintiff is afflicted, but it is the plaintiff's birth with such defect.¹⁸⁷ The court granted both general and specific damages, including pain and suffering for the child's whole lifetime, as well as exceptional monetary loss.¹⁸⁸ The award of damages in the *Curlender v Bio-Science Labs* case was overruled by the court in *Turpin v Sortini*,¹⁸⁹ where the court permitted the child to recover only special damages.¹⁹⁰

In 1982, the California Supreme Court recognised the cause of action for wrongful life in the landmark case of *Turpin v Sortini*.¹⁹¹ In this case, it was held that a child born with severe birth defects could sue the medical practitioner for failing to diagnose the condition during the mother's pregnancy, and the child was entitled to damages for the costs of medical treatment and care. The Californian Supreme Court, in this case, held that:

Although the parent and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care. If such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstances of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care.¹⁹²

Therefore, the court has granted special damages to the child for the financial costs of coping with deafness.¹⁹³ Mills and Human contend that an action must exist to give a method of financially sustaining a child with serious disabilities throughout their lives.¹⁹⁴ Kirby J¹⁹⁵ held in *Harriton v Stephens*¹⁹⁶ that: "A plaintiff in a wrongful life action would not have any economic needs had the defendant exercised reasonable care; a loss in this regard is directly caused by the defendant's negligent acts and omissions."¹⁹⁷

¹⁸⁷ *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980): 828-829.

¹⁸⁸ *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980): 831-832.

¹⁸⁹ *Turpin v Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

¹⁹⁰ *Turpin v Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982): 965-966.

¹⁹¹ *Turpin v Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

¹⁹² *Turpin v Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982):965.

¹⁹³ *Turpin v Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982):965-966.

¹⁹⁴ Human & Mills 2010:80; Priaulx 2002:343.

¹⁹⁵ *Harriton v Stephens* 226 CLR 52.

¹⁹⁶ *Harriton v Stephens* 226 CLR 52.

¹⁹⁷ *Harriton v Stephens* 226 CLR 52: par. 87.

In Washington, the Washington Supreme Court held that under state law, it required judges to award extraordinary damages in an ostensible wrongful life case on one condition, which is that the child must have suffered severe birth defects or disabilities that require extensive care which ultimately results in a tremendous financial burden. In the case of *Harbeson v Parke-Davis*,¹⁹⁸ it was decided that a court must grant special damages to a disabled child for extraordinary expenses which is connected to the child's congenital defect.¹⁹⁹

The Washington Supreme Court followed California's lead in *Harbeson v Parke-Davis*, allowing a cause of action for wrongful life for children born with foetal hydantoin syndrome as a result of the medical practitioner's failure to inform the plaintiffs of the risks of becoming pregnant while taking the anti-seizure medication Dilantin. The court noted that the Harbesons had specifically asked the defendant if the medicine would cause birth problems if they planned to have children.²⁰⁰ According to the court, a healthcare practitioner owes a duty of care that can be extended to apply to someone who is not even born or conceived when a careless act or omission occurs.²⁰¹ In this case, unlike in *Curlender*, the trial court awarded just special damages rather than general damages.²⁰² The *Harbeson* decision was founded on the idea of fostering societal objectives of genetic counselling and prenatal testing while discouraging malpractice. The court did, however, require an element of foreseeability for the cause of action to survive, holding that the defendant would be accountable only to those people who were foreseeably harmed by his actions.²⁰³

Since then, the legal landscape of wrongful life claims has varied across the United States. By the end of 1983, the wrongful life cause of action had been recognised in California and Washington but rejected in ten other jurisdictions, including New Jersey.²⁰⁴ In New Jersey, the cause of action had first been denied recognition in the

¹⁹⁸ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

¹⁹⁹ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983):495; Jarratt 1983:291.

²⁰⁰ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

²⁰¹ *Harbeson v Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983):495.

²⁰² Tucker 1988:681.

²⁰³ Tucker 1988:687.

²⁰⁴ Stearns 1985:890.

case of *Gleitman v Cosgrove*,²⁰⁵ and this denial was later affirmed in *Berman v Allan*.²⁰⁶ However, soon after, the position in New Jersey changed.

On the 1st of August 1984, the New Jersey Supreme Court made history by becoming the third court to acknowledge the wrongful life cause of action in *Procanik v Cillo*.²⁰⁷ By providing such recognition, it also made history by becoming the first state supreme court to reverse one of its own earlier rulings on wrongful life claims. Thus, the *Procanik* court's ruling supports the idea that adoption of the wrongful life action is a developing trend that is likely to gain more supporters in the years to come. In summary, the court in *Procanik v Cillo*²⁰⁸ recognised an action for wrongful life and consequently granted special damages for extraordinary medical expenses incurred treating birth defects.²⁰⁹

The court ruled in *Moscatello v University of Medicine and Dentistry of New Jersey*²¹⁰ that a child or his parents may collect exceptional damages for extraordinary medical expenses incurred during infancy and that the youngster may recover those charges when he reaches the age of majority.²¹¹ While each parent and child have individual grounds of action, the claims for wrongful birth and wrongful life overlap and should be evaluated jointly.²¹² Because discussing the identical factual scenario in two consecutive trials would be inefficient, evaluating these two claims together would help to avoid double recovery and accelerate litigation. Furthermore, the court in *Curlender* followed this logic and ordered the consolidation of the plaintiff's cause of action with those of their parents on remand. The court can assure that the cost of the plaintiff's care will only be awarded once by combining cases.²¹³

As was seen, wrongful life claims are allowed in only three states in the United States of America. These are California, Washington and New Jersey. These states have

²⁰⁵ *Gleitman v Cosgrove* 49 N.J. 22, 25, 227 A.2d 689, 690 (1967).

²⁰⁶ *Berman v Allan* 80 N.J. 421, 404 A.2d 8 (1979).

²⁰⁷ *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984): par. 22.

²⁰⁸ *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984).

²⁰⁹ *Procanik v Cillo* 97 N.J. 339, 478 A.2d 755 (1984): par. 22; Steinbock 1986:15.

²¹⁰ *Moscatello v University of Medicine and Dentistry of New Jersey* 776 A.2d 874, 879 (N.J. Super. Ct. App. Div. 2001).

²¹¹ *Moscatello v University of Medicine and Dentistry of New Jersey* 776 A.2d 874, 879 (N.J. Super. Ct. App. Div. 2001).

²¹² Rhinehart 2002:155

²¹³ *Curlender v Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980): 831.

established legal frameworks that allow individuals to seek compensation for the alleged harm of being born with birth defects and disabilities.

3.3.4 Historical overview and current position in South Africa

In South Africa, the law on wrongful life claims has been developed through a series of court cases. The cases of *Friedman v Glicksman*²¹⁴ and *Stewart v Botha*²¹⁵ are nowadays the benchmarks against which wrongful life claims are measured in South Africa.

In *Friedman v Glicksman*,²¹⁶ the court held that such claims would be *contra bonis mores*, which means such claims are against public policy, as well as the sentiments and opinions of the community.²¹⁷ The court also stated that allowing such claims would set a precedent for parents of disabled children to be sued for allowing their children to be born despite knowing there was a chance they would have congenital disabilities or other abnormalities.²¹⁸ Regarding the final reason the *Friedman* court rejected the wrongful life claim, the court determined that the problem with the claim was not the difficulty in determining the child's damages but, instead, whether the child had any damages at all.²¹⁹ Unfortunately, the conclusion of this case prevented the common law from progressing as it ought to have.

In the case of *Stewart v Botha*,²²⁰ the Supreme Court of Appeal cited several proponents and opponents of wrongful life claims but ultimately came to the conclusion that the essential issue in the case was whether the specific child should have been born at all.²²¹ In this case, the major question was whether it was appropriate to draw a comparison between the disabled child's existence and non-existence. It was set out in the judgement that:

The essential question that is asked when enquiring into wrongfulness for purposes of delictual liability is whether the law should recognise an action for damages caused by negligent conduct, and that is the question that falls to be answered in this case. I have pointed out that from whatever perspective one views the matter the essential question that a court will be called

²¹⁴ *Friedman v Glicksman* 1996 (1) SA 1134 (W).

²¹⁵ *Stewart v Botha* 2007 (6) SA 247 (C); 2008 (6) SA 310 (SCA); [2009] 4 All SA 487 (SCA).

²¹⁶ *Friedman v Glicksman* 1996 (1) SA 1134 (W).

²¹⁷ *Friedman v Glicksman* 1996 (1) SA 1134 (W):1142I–J.

²¹⁸ *Friedman v Glicksman* 1996 (1) SA 1134 (W):1142–1143.

²¹⁹ *Stewart v Botha* 2007 (6) SA 247 (C): par. 20.

²²⁰ *Stewart v Botha* 2008 (6) SA 310 (SCA).

²²¹ *Stewart v Botha* 2008 (6) SA 310 (SCA): par. 28.

upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law. For that reason, in my view this court should not recognise an action of this kind.²²²

As a result, the court denied the wrongful life claim. The argument is that such a claim is *contra boni mores*, and the medical practitioner's conduct was not wrongful in this particular case.²²³ However, Stretton²²⁴ is of the opinion that maybe, in some particular cases, the decision "would have been better off not existing".²²⁵

In the case of *H v Fetal Assessment Centre*,²²⁶ a boy with down syndrome was born to a woman. She filed a financial action in the High Court on behalf of the child against the Fetal Assessment Centre for neglecting to warn her of the danger that the child she was carrying might be born with this disease. The wrongful life claim was outright dismissed by the High Court on the basis that South African law does not recognise it. According to our existing legal system, parents can make a claim for the financial loss they experienced in these situations as a result of the extra expenses associated with having to care for a child who has a serious health condition or impairment, known as a wrongful birth claim. Thus, South African law limits the parent's ability to seek financial recompense; the claim does not transfer to the child upon birth. This legal position was confirmed and ultimately dead-ended by the Supreme Court of Appeal in the Stewart case.²²⁷ The High Court in the *H v Fetal* case denied the child's claim because it was constrained by the latter Supreme Court of Appeal ruling. The matter was appealed to the Constitutional Court. The prevailing approach to these issues, according to the Constitutional Court, was excessively limited and paid scant respect to constitutional principles.²²⁸ The court determined that the challenging question in cases like this was whether our constitutional rights and principles should allow the child in this case to seek compensation for a life with a disability.²²⁹ The court acknowledged that it was possible that, after further judicial review, a particular claim would not be permitted under our legal system, but it believed that the potential of

²²² *Stewart v Botha* 2008 (6) SA 310 (SCA): par. 28.

²²³ Chürr 2015:747.

²²⁴ Stretton 2006:972-1001.

²²⁵ Stretton 2006:1001.

²²⁶ *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC).

²²⁷ *Stewart v Botha* 2008 (6) SA 310 (SCA); [2009] 4 All SA 487 (SCA).

²²⁸ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 23.

²²⁹ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 24.

accepting the claim could not be written off as a moot point.²³⁰ It was also acknowledged that should the disabled child's claim be recognised, it would only become valid once the child was delivered alive,²³¹ in a manner akin to how a claim for prenatal physical injury would be made.²³² The minor claimant would still need to establish evidence of the healthcare provider's negligence.²³³ The Constitutional Court determined that all decisions involving this kind of claim by a child must be made in accordance with constitutional principles and taking into account the rights of children, particularly the right to have their best interests taken into account as being of the utmost importance in such cases.²³⁴ Therefore, the appeal was successful to the degree that the Constitutional Court's ruling provides a window of time for the disabled child to assert a claim. Given that our *Constitution* explicitly protects children's rights in sec. 28, it is evident that our legal system is more in line with those of countries where the child's claim is recognised when we compare it to some of the nations mentioned in the Constitutional Court judgement that recognise such claims, such as the Netherlands.²³⁵

In short, in the case of *H v Fetal Assessment Centre*,²³⁶ the Constitutional Court ultimately reached the conclusion that a child could potentially bring a claim for wrongful life and that the High Court should determine whether such a claim exists and in what form. The High Court must rule on wrongful life claims that have been correctly reformulated in delict. The Constitutional Court emphasised that this must be done in conformity with the constitutional imperative, which means that the option must be compatible with constitutional rights and values. Furthermore, the child's best interests should be considered.²³⁷ The Constitutional Court did not rule on whether or not to recognise wrongful life claims. It gave the High Court the problematic challenge of determining whether South African law permits a delictual claim based on wrongful life.²³⁸

²³⁰ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 24.

²³¹ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 50.

²³² *Road Accident Fund v Mtati* (332/2004) [2005] ZASCA 65; [2005] 3 All SA 340 (SCA).

²³³ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 75.

²³⁴ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): paras. 42, 49 & 69.

²³⁵ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): paras. 44-45.

²³⁶ *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC).

²³⁷ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 69.

²³⁸ Chürr 2015:760.

There is a lot of speculative discussion over the High Court's potential decision. According to the submission, Chürr²³⁹ is of the opinion that the High Court may possibly select and resort to one of four options: First, based on the justifications in favour of such claims, wrongful life is recognised by South African law. In the end, life could be considered a reimbursable injury. Secondly, the law of delict's boundaries must be stretched beyond recognition in order for harm of this kind to be acknowledged within its niche, even though the *Constitution* grants the necessary freedom and authorisation to establish supported exceptions to common law rules or even to recognise new remedies for rights violations. This is because, based on the reasoning presented in the *Stewart* case, South African law still does not recognise wrongful life claims. In the end, life would cease to be a compensable injury. Thirdly, a wrongful life claim may only be brought forth if an earlier wrongful birth claim has been rejected or if no claim based on wrongful birth has been instituted by the parents. In other words, only one of the two parties, the child or their parents, may institute a claim.²⁴⁰ Fourthly, only extreme cases or those involving significant disabilities are recognised as wrongful life claims. However, this implies that the court would have to define exactly what "extreme cases" or "severe disabilities" are. If these definitions and corroborative meanings are established, the conclusion would be that existence can be harmful in some restricted and limited situations, and non-life can be preferable to life.²⁴¹

However, some argue that the legislature, instead of the court, should be in charge of recognising wrongful life claims as a cause of action. If this point of view is accepted, it will be necessary to create the appropriate legislation to cover these claims and to set out whether they apply in all situations or only in specific and restricted situations.²⁴² There are still unresolved questions about whether there are further alternatives and what the High Court will conclude. When the court renders its verdict on this important matter, it should also take into account a child's fundamental right to be born as a whole, functional human being and whether or not such a claim does not support the idea that, if a child is born with a disability, someone is to blame.²⁴³

²³⁹ Chürr 2015:760.

²⁴⁰ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 70.

²⁴¹ Chürr 2015:760.

²⁴² Van Niekerk 2012:538.

²⁴³ Chürr 2015:761.

In short, in the case of *Friedman v Glicksman*, the wrongful life claim was rejected. In *Stewart v Botha*, decided eleven years later, the Cape High Court once more rejected the validity of the claim, though for different arguments than in *Friedman*. The Supreme Court of Appeal had the chance to offer astute responses to the numerous queries raised by the two diametrically opposed rulings and to definitively settle the issue of whether the action should be acknowledged in South African law or not. Sadly, it did not succeed in doing so. However, it seems promising that the position on wrongful life claims in South Africa might change through the development of our common law in the near future after the judgement of *H v Fetal Assessment Centre*.

3.4 CONCLUSION

In conclusion, wrongful life actions are not recognised in England and South Africa, however, they are identified as valid claims in the Netherlands and three states of the United States of America. These three states are California, Washington and New Jersey.

In the South African case *Friedman v Glicksman*,²⁴⁴ the wrongful life claim was rejected. In *Stewart v Botha*,²⁴⁵ decided eleven years later, the Cape High Court once more rejected the validity of the claim, though for different arguments than in *Friedman*. The Supreme Court of Appeal had the chance to offer well-reasoned responses to the numerous queries raised by the two diametrically opposed rulings and to definitively settle the issue of whether the action should be acknowledged in South African law or not. Sadly, it did not succeed in doing so. However, the Constitutional Court, in the latest case, *H v Fetal Assessment Centre*, indicated that a possibility exists that the common law can be developed to the extent of recognising wrongful life claims in certain circumstances in South Africa. It appears that the only logical conclusion is that the Constitutional Court supports wrongful life claims and that the disabled child in question ought to get compensation of some kind.

The High Court may consider four options for its potential decision on wrongful life claims. First, South African law recognises wrongful life claims, making them reimbursable. Secondly, the boundaries of the law of delict must be stretched beyond recognition, causing life to cease to be a compensable injury. Thirdly, only one party

²⁴⁴ *Friedman v Glicksman* 1996 1 SA 1134 (W).

²⁴⁵ *Stewart v Botha* 2007 6 SA 247 (C); 2007 9 BCLR 1012; 2007 3 All SA 440.

can institute a wrongful life claim if an earlier one has been rejected or no claims have been instituted. Lastly, only extreme cases or those involving significant disabilities are recognised as wrongful life claims. Establishing these meanings could lead to the conclusion that existence can be harmful in certain restricted situations, and non-life may be preferable to life.

Some argue that the legislature, instead of the court, should recognise wrongful life claims as a cause of action, requiring legislation to cover specific situations. Unresolved questions remain about alternative options and the High Court's decision. The fundamental right of a child to be a complete, functional human being should also be considered when making decisions on this crucial issue.

In the United States of America, only three states recognise wrongful life claims: California, Washington and New Jersey; other states still make no provision for such claims and strictly reject them. In the United States, however, there is no consistent system of birth-related delict recognition. As medical technology advances, courts will have fewer difficulties identifying components of negligence, and damage awards will be less speculative. Courts that acknowledge a basis of action for wrongful life can protect physicians by requiring that all components of the delict be met. Once the conditions are met, the jury can subjectively weigh the harm done to the plaintiff and make them as whole as the legal system allows. These arguments are framed by public policy issues concerning individual rights, abortion, disability, and equal protection, which the courts are unlikely to address successfully. Legislators, on the other hand, have the resources and ability to assess these violations in light of the relevant policy considerations and craft statutes that serve the public's best interests. A coherent and consistent approach to these offences is unlikely to prevail without the assistance of lawmakers.

Whereas in the Netherlands, these wrongful life claims are fully permitted in certain circumstances. As a result of the outcome of the well-known *Kelly* case, disabled children can now institute a claim for wrongful life, whereafter they might be entitled to compensation for their pain and suffering.

CHAPTER FOUR

CAN THE LAW OF DELICT AND THE LAW OF CONTRACT ACCOMMODATE WRONGFUL LIFE CLAIMS?

4.1 INTRODUCTION

In wrongful life actions, there exists a claim in terms of delictual liability. South African law recognises delictual claims for medical malpractice, which can include cases where a medical professional fails to provide adequate advice or treatment that results in harm to the patient. According to Carstens and Pearmain,²⁴⁶ medical malpractice includes professional negligence and other professional medical misconduct.²⁴⁷ A delictual claim needs to have each of the following components in order to potentially succeed: conduct in the form of either an act or an omission, wrongfulness, fault, causation and damage.²⁴⁸

In my opinion, it is essential to allow a child or a legal representative, on behalf of the child, to be able to claim for a wrongful life action in terms of both contractual liability and delictual liability, as is the case with wrongful birth. These are two distinct legal theories that may provide different bases for liability and different remedies for the claimant. However, I would argue that only one of these claims should be allowed in a specific case and that both claims cannot be successful. Contractual liability refers to a breach of contract, which occurs in a case where one party fails to fulfil its obligations under the terms of a contract.²⁴⁹ For such a claim to possibly succeed against a medical practitioner, a breach of the healthcare provider's duty of care towards a patient should have occurred. Such duty arises from the doctor-patient relationship. Consequently, if the healthcare provider breaches this duty of care, the claimant may be able to seek compensation for their damages under contract law.

In this chapter, a distinction will be drawn between possible wrongful life claims in terms of delictual liability compared to wrongful life claims based on contractual liability, which I will argue should be an available claim to the affected child. I will attempt to provide possible steps which a child or their legal representative can take in order to institute a claim for damages in terms of either delictual liability or a possible

²⁴⁶ Carstens & Pearmain 2007:599.

²⁴⁷ Carstens & Pearmain 2007:599.

²⁴⁸ Neethling *et al.* 2015:19.

²⁴⁹ Quzmar & Elbayat 2020:7019.

contractual agreement which was entered into and ultimately breached by a medical practitioner.

4.2 POSSIBLE CLAIMS FOR WRONGFUL LIFE ACTIONS

In more general terms, medical malpractice claims result from either a delict or a violation of a contract, with the majority of claims being delictual in nature.²⁵⁰ A medical practitioner's conduct or omission may constitute both a breach of contract and a delict, consequently giving rise to both contractual and delictual responsibility.²⁵¹ If the plaintiff can establish both these claims, damages should be given based on the one that will benefit them the most. However, a plaintiff can only be compensated for genuine losses incurred. A plaintiff is able to obtain patrimonial and non-patrimonial damages in a delictual case, whereas only patrimonial damages may be recovered in a contractual case.²⁵² Even though the latter explains medical malpractice claims in a more general sense, the specific claims for wrongful life claims are more complex.

4.2.1 Claims in terms of contractual liability

In general terms, a contract can be defined as a mutual agreement between two or more persons who have the intention of creating a legal obligation between them. The agreement should be of such a nature that the law recognises it as being binding on those parties. For a contract to be binding, the following requirements should be met: there has to be a consensus between the parties involved, the parties should possess the necessary ability and capacity to enter into a contract, formalities- as to how the agreement should be reached- should be observed, the agreement should be lawful, there should exist a possibility that the obligation is capable of being performed and lastly, there should be a certainty about the agreement's content so that the agreement can be ascertained and enforced.²⁵³

Regarding contracts in the medical sphere, a patient seeking advice from a private medical practitioner enters into a contract with the physician. In contrast, a patient who shows up for treatment at a hospital enters into a contract with the appropriate hospital authority, whether private or provincial. In the latter situation, the hospital

²⁵⁰ Dutton 2015:7.

²⁵¹ Coetzee & Carstens 2011:1273.

²⁵² Coetzee & Carstens 2011:1285.

²⁵³ Hutchison *et al.* 2017:33

administration and the staff, including the medical practitioners, may be held accountable for the hospital employees' negligence. The contract between the medical practitioner or hospital and the patient might be concluded without the need for any legal procedures and arises from the parties' simple agreement through mere consensus with one another. In practice, private and public hospitals typically need patients to sign an admission form and request written authorisation for surgery. A simple agreement between the involved parties creates the contract. The agreement may be made tacitly or expressly, in writing or verbally.²⁵⁴

In the case of *Friedman v Glicksman*,²⁵⁵ it was contended that there occurred no breach of contract due to the fact that the defendant had not entered into any agreement with the disabled child, and therefore, no legal duty of care rested on the defendant towards the child. What is noteworthy about this argument is that the courts have previously ruled that medical practitioners have legal duties towards patients even in a case where no contract exists.²⁵⁶ The latter was confirmed in the case of *Lillicrap Wassenaar and Partners v Pilkington Brothers*,²⁵⁷ where Grosskopf AJA distinguished the present case from that of *Van Wyk v Lewis*²⁵⁸ and held that:

Although there was a contract between the parties in that case, Dr Lewis would have been liable to his patient for professional negligence even in the absence of a contract between the parties, e.g. if he had operated on a person found unconscious in the street, or if he had contracted with a third person to perform an operation on the patient.²⁵⁹

Contractual liability refers to a breach of contract, which occurs when one party fails to fulfil its obligations under the terms of a contract between different parties.²⁶⁰ For such a claim to possibly succeed against a medical practitioner, there should arise a breach of the duty of care owed by a healthcare provider to a patient, and such breach should be proved by the plaintiff. The legal duty of care arises from the doctor-patient relationship. Consequently, if the healthcare provider breaches this duty of care, the claimant may be able to seek compensation for their damages under contract law.

²⁵⁴ Coetzee & Carstens 2011:1269.

²⁵⁵ *Friedman v Glicksman* 1996 1 SA 1134 (W).

²⁵⁶ *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A):499; Van Niekerk 2012:532.

²⁵⁷ *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A):499.

²⁵⁸ *Van Wyk v Lewis* 1924 AD 438.

²⁵⁹ *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A):499; Van Niekerk 2012:532.

²⁶⁰ Quzmar & Elbayat 2020:7019.

Several challenges are associated with bringing contractual claims for wrongful life in South Africa. One of the main challenges is establishing a contractual duty owed by the medical practitioner to the child. While a contract may exist between the medical practitioner and the child's parents, the child is not a party to the contract, making it difficult to establish that the medical practitioner owed a duty of care to the child.

Another challenge is proving causation. In order to succeed in a contractual claim for wrongful life, the plaintiff would need to show that due to the fact that the medical practitioner breached the contract, the child suffered harm as a result. This can be difficult to establish in cases where the child's disability results from a complex interplay of genetic and environmental factors.

In conclusion, while bringing a contractual claim for wrongful life in South African law may be possible, such claims are relatively rare. They are subject to significant challenges, resulting in a low possibility for success. Wrongful life claims in terms of contract law are primarily unsuccessful due to the fact that the contract is entered into by the medical practitioner and the parents of the child, and the child, in this case, is the plaintiff, not the parents. Therefore, no contract existed between the disabled child and the medical practitioner, and consequently, no breach of contract can occur.

4.2.2 Claims in terms of delictual liability

To establish a possible delictual wrongful life claim, the disabled child or their legal representative must prove all the delictual elements. These elements include an act/conduct, the wrongfulness of such act, fault, causation and harm caused by the act.²⁶¹ This simply means that a person must have harmed or caused damage to another person (the person experiencing the loss) through an unlawful act, which can be either a commission or omission, to be considered a delict.²⁶²

4.2.2.1 Act/ Conduct

A common prerequisite for delictual liability could be said to be conduct. In the instance of a delict, conduct is what causes the harm. Conduct results from a voluntary human act or omission.²⁶³ Conduct can occur in one of two forms. First, a positive act or active

²⁶¹ Neethling *et al.* 2015:19.

²⁶² Neethling *et al.* 2015:36.

²⁶³ Neethling *et al.* 2015:36.

conduct, also known as a commission (*commissio*) or, secondly, an omission commonly referred to as an *omissio*.²⁶⁴ The characteristics of a conduct include that the act must be an act of a human being and not that of an animal²⁶⁵ and that such an act only constitutes conduct if it was done voluntarily.²⁶⁶

When applying the above theory to wrongful life claims, the conduct in such a case would be the omission of the medical practitioner to inform the parents prenatal of the possible congenital disabilities the child may be born with. Regarding the characteristics of a conduct, the conduct will be one of voluntariness by a human being, the medical professional. Therefore, the conduct necessary for a delictual action is the omission of the medical professional.

4.2.2.2 Wrongfulness

An act must harm another person in some way for there to be a legal responsibility for the act. The act must be unlawful and wrongful for accountability to follow. Therefore, a defendant cannot be held liable if wrongfulness is absent.²⁶⁷ Wrongfulness should be determined objectively. In theory, determining wrongfulness necessitates a dual investigation. On the one hand, whether an officially recognised interest has been violated must be determined. On the other hand, legal standards must be applied to evaluate if such bias occurred in a legally unacceptable manner. It must be evident that an interest that is legally protected has been prejudiced.²⁶⁸ A violation of a legal requirement must exist; wrongfulness cannot be established solely by the existence of a harmful consequence.²⁶⁹ The standard test for wrongfulness is called the *boni mores* test, which refers to the community's legal convictions.²⁷⁰

The legal convictions of the community or *boni mores* criterion determines whether an interest is deserving of protection and whether its infringement is morally wrong.²⁷¹

²⁶⁴ Neethling *et al.* 2015:37.

²⁶⁵ Neethling *et al.* 2015:36.

²⁶⁶ Neethling *et al.* 2015:37.

²⁶⁷ Neethling *et al.* 2015:42.

²⁶⁸ Neethling *et al.* 2015:42-43.

²⁶⁹ Neethling *et al.* 2015:43.

²⁷⁰ Neethling *et al.* 2015:45.

²⁷¹ Neethling *et al.* 2015:43; LAWSA VIII (1): par. 60.

Therefore, in delict, the wrongness of an act is always assessed in light of its repercussions; if such a repercussion is absent, the act cannot be wrongful.²⁷²

Public policy considerations determine whether a person's actions will be viewed as having wrongful (unlawful) consequences.²⁷³ The questions to ask are whether there was a duty required by law to act reasonably in the given circumstances when deciding whether the results of an act or omission are wrongful²⁷⁴ or whether the plaintiff's rights or interests have been violated, taking into account the community's legal convictions as guided by the *Constitution's* norms and values.²⁷⁵ The competing interests of the plaintiff and defendant must be weighed and balanced by the courts when determining whether the act or omission was reasonable. The *boni mores* of society must once again be taken into account.²⁷⁶

In the 2002 case of *Van Eeden v Minister of Safety and Security*,²⁷⁷ it was stated with regard to omissions that:

The appropriate test for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is legally obliged to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.²⁷⁸

As a general rule, a person does not act unjustly for the purposes of the law of delict if he fails to prevent injury to another person.²⁷⁹

In the 2012 case of *Lee v Minister for Correctional Services*,²⁸⁰ the Constitutional Court held that:

In *Minister van Polisie v Ewels*, it was held that our law had reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the legal convictions of the community demand that the omission should be

²⁷² Neethling *et al.* 2015:44-45.

²⁷³ Dutton 2015:31; Carstens & Pearmain 2007:515.

²⁷⁴ Dutton 2015:32; *Minister of Polisie v Ewels* 1975 (3) SA 590 (A) 597; Neethling *et al.* 2015:59.

²⁷⁵ Dutton 2015:34; Carstens & Pearmain 2007:515.

²⁷⁶ LAWSA VIII (1): par. 60.

²⁷⁷ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* [2002] ZASCA 132; [2002] 4 All SA 346 (SCA).

²⁷⁸ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* [2002] ZASCA 132; [2002] 4 All SA 346 (SCA): par. 9.

²⁷⁹ Neethling *et al.* 2015:61.

²⁸⁰ *Lee v Minister of Correctional Services* [2012] ZASCA 23, 2012 (3) SA 617 (SCA).

considered wrongful. This open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in all cases, not only omission cases.²⁸¹

Regarding the wrongfulness element in wrongful life claims, it has been commonly claimed that there cannot be a legal obligation to prevent life if life itself cannot be deemed a legal injury. As a result, a medical practitioner's conduct cannot be said to be wrongful.²⁸² This argument is known as the sanctity-of-life argument.²⁸³

Nevertheless, it is argued that such justification misinterprets the actual claim. Contrary to what the phrase "wrongful life" may suggest, the alleged wrongdoing endured by the child is not life itself but rather a life with disabilities and the resulting financial burden imposed by life with disabilities. Several changes to our legal system have also undermined the sanctity of life defence.²⁸⁴

In the 2014 case of *H v Fetal Assessment Centre*,²⁸⁵ the Constitutional Court held that in terms of the *Constitution*, children have the right to have their best interests given top priority and is paramount in any decision that affects them.²⁸⁶ The loss will fall on the child if the disabled child's parents do not file a claim for the costs related to the disability. According to the Constitutional Court, under these circumstances, it may be in the best interest of the child to prevent the loss from happening to them. As a result, it can be argued that there may be a legal duty on the medical practitioner to prevent the loss.²⁸⁷

4.2.2.3 Fault

It is generally accepted that fault, or *culpa* in a broad sense, is a prerequisite for delictual culpability. The true nature of fault is a subject of contention. In actuality, there are two primary forms of fault. These two forms are negligence (*culpa* in a narrower sense) and intention (*dolus*).²⁸⁸ Liability for a delict, as opposed to liability for a violation of contract, requires the presence of fault, which might take the form of either intention or negligence.²⁸⁹ This makes proving a delict more difficult than establishing a contract

²⁸¹ *Lee v Minister of Correctional Services* [2012] ZASCA 23, 2012 (3) SA 617 (SCA): par. 51.

²⁸² Van Niekerk 2012:529.

²⁸³ Human & Mills 2010:85; Boezaart 2015:403.

²⁸⁴ *Stewart v Botha* 2007 (6) SA 247 (C):255; 2008 (6) SA 310 (SCA): par. 27.

²⁸⁵ *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC).

²⁸⁶ *Constitution*: sec. 28(2); *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 69.

²⁸⁷ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 69.

²⁸⁸ Neethling *et al.* 2015:110.

²⁸⁹ Loubser *et al.* 2018:190.

violation, but a delictual claim may have far more significant potential damages than a claim for breach of contract.²⁹⁰

If the wrongness of the behaviour has not been proven as was previously explained, there cannot be fault.²⁹¹ Whether the defendant should be liable for their actions depends on the inquiry into fault. The presence of either intentionality or negligence constitutes fault.²⁹² However, as was pointed out by Carstens and Pearmain, it is most likely that fault will take the form of neglect when it comes to the delivery of health services.²⁹³ As a result, the plaintiff will have to establish and prove negligence, and whether it exists will be determined depending on the facts of each case.

The test, which is used to determine negligence, is commonly known as the reasonable person test, consists of three parts and was set out in the case of *Kruger v Coetzee*.²⁹⁴ The court explained the test as follows:

For the purposes of liability, *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 occurrences; and

(b) the defendant failed to take such steps.²⁹⁵

The test for medical negligence was for the first time enunciated in the case of *Mitchell v Dixon*,²⁹⁶ where it was held that: “A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care, and he is liable for the consequences if he does not.”²⁹⁷

In *Van Wyk v Lewis*,²⁹⁸ Innes CJ held that the court would consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs when determining what is

²⁹⁰ Van Niekerk 2012:531.

²⁹¹ LAWSA VIII (1): par. 59.

²⁹² Dutton 2015:79-80.

²⁹³ Carstens & Pearmain 2007:522.

²⁹⁴ *Kruger v Coetzee* 1966 (2) SA 428 (A).

²⁹⁵ *Kruger v Coetzee* 1966 (2) SA 428 (A): 430.

²⁹⁶ *Mitchell v Dixon* 1914 AD 519.

²⁹⁷ *Mitchell v Dixon* 1914 AD 519:525.

²⁹⁸ *Van Wyk v Lewis* 1924 AD 438.

reasonable.²⁹⁹ In *S v Kramer*,³⁰⁰ the standard that must be used to determine whether a medical professional was negligent in the course of his duty was upheld.³⁰¹

With regard to wrongful life claims, a court would need to decide whether the medical practitioner exercised reasonable care and skill when treating the expectant female, in particular when warning or merely informing her about the possibility of having a child with a congenital disability or when checking for such a disability in the foetus. In deciding this, the court will ask the question of what a hypothetical reasonable medical practitioner specialising in the same field of medicine, in a case with the same facts and circumstances, would have done if they were in the defendant's position. It was established that in wrongful life claims, the courts had accepted the presence of negligence.³⁰² However, negligence will still have to be determined and proved on a case-to-case basis based on the facts of the specific case and in accordance with the general principles.³⁰³

4.2.2.4 Causation

A delict must result in damage through conduct, or more precisely, there must be a connection between the two, commonly referred to as a causal nexus between the conduct and the harm. As a result, if a person has not caused any damage, they cannot be held liable. The presence of a causal *nexus* in a particular situation is a factual matter that must always be resolved in light of the available evidence and relevant probability. This factual question may be addressed first during a trial under proper circumstances. No amount of theorising seems to be able to go further than the fact that a causal connection either exists (factually) or does not.³⁰⁴ In short, it must be established that there was a direct link between the defendant's actions and the plaintiff's injury for the defendant to be liable.³⁰⁵

According to Giesen,³⁰⁶ the majority of legal systems take a two-pronged approach to causation.³⁰⁷ The latter statement means that the test to establish causation consists

²⁹⁹ *Van Wyk v Lewis* 1924 AD 438:444.

³⁰⁰ *S v Kramer* 1987 (1) SA 887 (W).

³⁰¹ *S v Kramer* 1987 (1) SA 887 (W):893E-895I.

³⁰² *Stewart v Botha* 2007 (6) SA 247 (C):258; *Human & Mills* 2010:77.

³⁰³ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 75.

³⁰⁴ *Neethling et al.* 2015:149.

³⁰⁵ *Loubser et al.* 2018:69.

³⁰⁶ Giesen 1988:165.

³⁰⁷ Giesen 1988:165.

of two parts where two questions must be answered. The first part of the inquiry deals with factual causation and asks the question of whether the defendant's conduct caused or materially contributed to the plaintiff's harm. The second part of the inquiry looks at legal causation, and the question of whether the defendant's conduct and the plaintiff's harm are sufficiently connected should be answered.³⁰⁸ There is no liability if the first part of the question is answered negatively. However, if the inquiry is positively responded to, the court will move on to the investigation of legal causation.³⁰⁹

In order to establish factual causation, the courts generally use the *condictio sine qua non* test, which is also known as the 'but-for' test.³¹⁰ The inquiry simply is: Would the result have set in but for the negligent act or omission of the person concerned?³¹¹ In short, the courts must answer whether, given the facts, the plaintiff would have experienced the harm but for the defendant's actions.³¹² A mere factual causation is insufficient; it must also be demonstrated that there is legal causation in order to assign liability. To put it another way, it must be assessed whether there is a sufficiently strong link between the conduct of the defendant and the subsequent consequences.³¹³ The question of legal causation is essentially a question of public policy, as the *Constitution* states.³¹⁴

With regard to wrongful life actions, Human and Mills³¹⁵ emphasise the fact that the medical practitioner's negligence is not said to be the cause of the child's disabilities but rather the cause of the child's life with disabilities.³¹⁶ Factual causation may be proved since the disabled child would not have been born if the medical professional's negligence had not occurred. Legal causation is more difficult to establish in wrongful life situations due to the policy considerations that must be taken into account, and whether there is a sufficiently direct link between the medical professional's negligence

³⁰⁸ Loubser *et al.* 2018:70.

³⁰⁹ Carstens & Pearmain 2007:509; Dutton 2015:59-60.

³¹⁰ LAWSA VIII (1): par. 130.

³¹¹ Human & Mills 2010:78.

³¹² Dutton 2015:60.

³¹³ LAWSA VIII (1): par. 132.

³¹⁴ Carstens & Pearmain 2007:509.

³¹⁵ Human & Mills 2012:78.

³¹⁶ Human & Mills 2012:78.

and the harm experienced by the disabled child will solely depend on the facts of the case.³¹⁷

4.2.2.5 Harm/ damages

A delict is a wrongful and culpable act which causes a harmful consequence. Fundamental to a delictual claim for damages is the element of harm. According to the general compensatory purpose of delictual law, there must be some loss or injury for which the law provides recompense.³¹⁸ Damage can be defined as experiencing a patrimonial or pecuniary loss (*damnum*), an injury to a personality interest (*iniuria*) or where a person experiences pain and suffering.³¹⁹ A number of situations, including the moral context, the legal environment, the criminal context, the political context, and the medical context, contain prohibitions against harming another person.³²⁰ The Hippocratic Oath in the medical context states: “Do no harm to your patient”, and Mills’ Harm Principle in the general, moral and legal context that says: “Be free to live as you like as long as you do no harm to others” are two specific instances of such limitations.³²¹ It must be demonstrated that the plaintiff suffered some type of harm in order for the defendant to be held accountable under delictual law.

It is conspicuous that the debate over proof of damage and calculating damages needs a rigorous and detailed appraisal based on the amount of times the claim has been dismissed because courts have deemed it impossible to calculate damages sustained in these situations. In contrast, in other circumstances, courts had little trouble determining damages.³²²

One of the more prominent arguments used against wrongful life claims is that the child has not suffered apparent harm and that it is hard to determine how much compensation should be paid to the child because the child would never not have been born with a disability.³²³ A counter-argument to this argument was raised by Chürr,³²⁴ where she asserted that the medical professional’s negligence caused the child to be

³¹⁷ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 74.

³¹⁸ Neethling *et al.* 2015:173.

³¹⁹ Human & Mills 2010:79.

³²⁰ Shiffrin 2012:357.

³²¹ Bradley 2012:390.

³²² Human & Mills 2010:78-79.

³²³ Chürr 2015:753.

³²⁴ Chürr 2015:745.

born and that if the negligence had not occurred, the child would not have been born and would not have suffered the current level of financial loss or bodily pain and suffering.³²⁵ As a result, the child or their parents endure a life filled with agony and suffering due to their disability. It is further maintained that if calculating damages for wrongful birth claims is not difficult, then calculating damages for wrongful life claims should likewise not be difficult.³²⁶

Compensation is sought in a wrongful life claim, among other things, to make up for violating the child's right to physical integrity and dignity. The truth is that such a youngster is going through pain and suffering, and the courts must grant compensation to make up for this injury in accordance with reasonable and equitable principles. The issue of the appropriateness of the case is avoided by the simple difficulties that a judge may have when calculating damages.³²⁷

The foundation of wrongful life claims is the recovery of patrimonial loss in the form of actual costs incurred by a child for maintenance, special education, and medical care, as well as compensation for harm to the child's personality interest and the pain and suffering the child must endure as a result of living with a disability.³²⁸ Some courts believed that no damage had been sustained because "the only life ever possible to the child was a life in the handicapped state to which he was born".³²⁹ Other courts held that in the absence of a parental claim for wrongful birth, the loss belongs to the child and relates to a life with a disability and the expenses paid due to those disabilities.³³⁰ In circumstances like these, the medical professional's liability owed to the disabled child will be limited to the amount that they would have owed to the parents for the harm which the disabled child incurred.³³¹

4.3 CONCLUSION

Even though the following requirements have all been established in wrongful birth claims: wrongfulness, causation, harm, and the assessment of damages, all provide unique challenges in deciding whether a wrongful life claim can be recognised in South

³²⁵ Chürr 2015:745.

³²⁶ Human & Mills 2010:78-80.

³²⁷ Lind 1992:437.

³²⁸ *Stewart v Botha* 2007 (6) SA 247 (C): par. 22.

³²⁹ *Stewart v Botha* 2007 (6) SA 247 (C): par. 30.

³³⁰ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 36.

³³¹ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 63.

Africa. However, this does by no means mean that proving them is impossible. No issues arose when determining whether the conduct and fault requirements can be established in wrongful life claims in terms of delictual law.

The conduct necessary for a delictual action is the inability to diagnose or adequately diagnose the child's disability, notify the parents of a potential handicap, or alert the parents to the higher-than-normal risk of a congenitally impaired child.

Violating a legal obligation, a legal right, or a legitimate interest is necessary to establish the element of wrongfulness, taking into account the society's *boni mores* as they are reflected in constitutional norms and values. South African courts have persistently rejected the idea that a medical practitioner has a duty to the unborn child to warn the parents of the possibility of disability and the choice to end the pregnancy. Nonetheless, a medical professional owes it to the parents to take care of them so they can decide whether to accept the grief that comes with having a disabled child. Bearing in mind this obligation, the Constitutional Court has ruled that the loss will accrue to the child if the parents cannot recover it due to a breach of the duty assigned to them. When the child's best interests are considered, it might be determined that the loss should not fall to the child, in which case a legal duty may exist not to cause the loss.

In order for a delictual action to succeed, there must be fault on the part of the medical professional, in the form of either negligence or intention, but in practice, fault in medical malpractice cases typically takes the form of negligence. To assess whether the defendant was negligent, the courts apply the standard of the hypothetical reasonable medical professional working in the same field as the defendant. They then ask whether it is possible to reconcile the defendant's actions with what the hypothetically reasonable medical professional would have done in an identical situation.

Investigating factual and legal causation is necessary to determine whether causation exists. Regardless of the fact that the medical practitioner was not the cause of the condition, their activities did lead to a life of handicap, and factual causation can be proven. Legal causality must be evaluated in the context of each case's facts and must be based on constitutionally sound public policy considerations.

A plaintiff must have experienced some type of harm, whether financial or not, for a delictual action to be valid. A situation that results in a claim for wrongful birth also results in a claim for wrongful life. As was previously established, the Constitutional Court has decided that the child is eventually entitled to compensation for losses in cases when the parents have not filed a wrongful birth claim. In a wrongful life claim, a medical professional's liability to the child is limited to the amount for which they would have been liable to the parents. It is argued that the Constitutional Court's decision in *H v Fetal Assessment Centre* shows that there was harm done to the child and that, at the very least, the damages for which the medical professional could be held liable are the same as those for which they would have been liable to the child's parents. Previously, the courts ruled that the child had not incurred actionable loss and that there is no method to estimate damages in wrongful life claims; nevertheless, more recent case law showed the opposite.

Although these elements look straightforward enough to establish a wrongful life claim and consequently rule in favour of the child so that they can succeed with such a claim, wrongful life claims in terms of delictual law should still be decided on a case-to-case basis, taking into consideration the facts present. These should only serve as guidelines for wrongful life claims and should by no means be limited.

CHAPTER FIVE

ARGUMENTS IN FAVOUR OF AND AGAINST WRONGFUL LIFE CLAIMS

5.1 INTRODUCTION

There are various arguments for and against the recognition of wrongful life claims, but regardless of the abundance of differences in opinions, these arguments can be summed up as arguments in favour of wrongful life actions and arguments against the recognition of such claims.³³²

In this chapter, an analysis regarding the arguments in favour of the recognition of wrongful life claims and the arguments against the recognition of such claims, as well as the counter-arguments, will be done.

5.2 ARGUMENTS TO WRONGFUL LIFE CLAIMS

5.2.1 Arguments in favour of wrongful life actions

Those who are in favour of wrongful life claims may make the following justifications:

If you cannot have that to which you have a [birth right] then you are wronged if you are brought to birth. Thus, if the conditions for the eventual fulfilment of the child's future interests are destroyed before he is born, the child can claim, after he has been born, that his rights (his present rights) have been violated. Moreover, if before the child has been born, we know that the conditions for the fulfilment of his most basic interests have already been destroyed, and we permit him nevertheless to be born, we become a party to the violation of his rights.³³³

Professor Shapira, an eminent Israeli academic lawyer, believes that the legal provision requiring irresponsible healthcare providers to compensate victims of their negligence is just and equitable because such compensation is helpful to the well-being of the disabled child. It divides the cost of this by charging professional malpractice insurance premiums. Allowing wrongful life claims will aid in maintaining exceptionally high professional standards among medical practitioners and genetic counsellors, decreasing the occurrences of undesired genetic abnormalities in society. Despite objections to the contrary, Shapira believes that permitting such claims is logically justifiable and can avoid slippery slope difficulties.³³⁴

³³² Chürr 2015:753.

³³³ Feinberg 1984:99.

³³⁴ Gillon 1998:363.

5.2.1.1 Right to self-determination

Autonomy is one of the four medical ethics principles, and it was established in South Africa as early as 1923 in the case of *Stoffberg v Elliot*.³³⁵ When someone behaves autonomously, it means they follow a strategy they have made for themselves and act freely and independently, with no influence from other people.³³⁶ Previously, medical paternalism took precedence over patient autonomy. This was mostly due to the widespread belief that medical practitioners always act in their patients' best interests and that "doctors know best". However, the emphasis has increasingly turned to patient autonomy.³³⁷ Van Oosten³³⁸ argued that patient autonomy should be preferred over medical paternalism. This is owing to the fact that patient autonomy is more in line with ideas of human rights and freedoms, as well as a "modern professionalised and consumer-oriented society" than medical paternalism, which stems from a bygone past typified by now-outmoded patriarchal attitudes.³³⁹ The patient can exercise their fundamental right to self-determination when the choice is placed in their hands.³⁴⁰

In my opinion, the right to self-determination should be extended and interpreted accordingly to include claims for wrongful life. It can be argued that allowing wrongful life claims in certain circumstances would be in line with a person's right to self-determination or, rather, the lack thereof. As in the case of a person being born with a disability, neither such person nor their parents have any control over the condition the child was born with, and due to the fact that it's argued that the disabled child was born as a result of the medical professional's negligence, the alternative to exercising their right to self-determination should include the option of instituting a claim for wrongful life.

5.2.1.2 Philosophy of to be or not to be- poor quality life

Would it ever be preferable for someone who is profoundly disabled not to have been born? Is it in any way inappropriate to pose such a question? These problematic questions are raised in every wrongful life action alleging that a medical provider's

³³⁵ Carstens & Pearmain 2007:879.

³³⁶ Beauchamp & Childress 2009:99.

³³⁷ Moodley 2013:59.

³³⁸ Van Oosten 1989:414.

³³⁹ Van Oosten 1989:414.

³⁴⁰ *Castell v de Greef* 1994 (4) SA 408 (C):422-423.

negligence allowed the plaintiff, who was destined from conception to suffer from significant genetically related disabilities, to be born.³⁴¹ Before it can be argued that being born is always harmful, it must first be demonstrated that being born may ever be harmful. Some may ask why this is true because common sense says that a life might be so horrible that being born with such a life is almost surely harmful. This viewpoint, however, confronts a severe issue, which has been dubbed the non-identity problem³⁴² or the paradox of the existence of future individuals.³⁴³ The issue called the non-identity problem will be discussed later on.

Some have made the strong point that even if infirmities make life unliveable, we cannot claim that those people whose existence is inextricably linked to such impairments are damaged by being born. The following argument is presented in favour of this: Something that harms someone must make that person worse off. The 'worse off' link exists between two states. Thus, for someone to be worse off in one state (such as existence), the alternative state being compared must be one in which he is less badly (or better) off. However, because non-existence is not a state in which someone may exist, it cannot be compared to existence.³⁴⁴ Therefore, coming into existence cannot be worse than never coming into existence. As a result, it can be said that coming into existence cannot be a harm.³⁴⁵

One response to this argument is to reject the first premise's claim that for something to harm someone, it must always make that person worse off. It may be sufficient for something to injure someone if it is terrible for that person if the alternative would not have been harmful. In this context, being born can be regarded as damage. If bringing a person into existence is horrible for the person brought into existence, as it must be if the life isn't worth living, then it can be said to be harmful to create that individual (assuming the alternative was not bad).³⁴⁶

It is not surprising that some judges find life and non-existence to be incomparable because many philosophers, like Nagel³⁴⁷ and Broome,³⁴⁸ question whether it makes

³⁴¹ Henderson 2018:690.

³⁴² Parfit 1987:359.

³⁴³ Kavka 1982:93-112.

³⁴⁴ Benatar 2006:20.

³⁴⁵ Benatar 2006:21.

³⁴⁶ Benatar 2006:21.

³⁴⁷ Nagel 1970:1-10.

³⁴⁸ Broome 1993:162.

sense to assert that a life is better or worse than non-existence for the human who lives it.³⁴⁹

Joel Feinberg³⁵⁰ has a distinct take on the notion that being born can never be harmful. Instead of disputing that to injure is to make someone worse off, he challenges the premise that to be worse off in one state, one must be worse off in the alternative condition with which it is compared.³⁵¹ When it is remarked that someone would have been better off not existing, it means that non-existence would have been preferable. Professor Feinberg uses the parallel of existential judgements. When someone says that their life is so horrible that they would be better off dead, they do not have to imply literally that if they died, they would be in a better state (though some people do believe this). Instead, it may be implied that such person would rather not be than continue living in their current state. Such people decided that their existence is worthless and that their lives are not worth living. Life can be so horrible that ceasing to exist is preferable, just as it might be so bad that never existing is preferable. Comparing someone's existence against his non-existence is not the same as comparing two possible states of that person. Rather, it is to contrast a person's existence with a hypothetical situation in which such person does not exist.³⁵²

This argument can go either way, as some authors have argued that any life can never be seen as being worse than to never have been born, while other contend that some lives with disabilities can be so severe that it can be seen that never having been born can be better than living with such disability. Although some writers have raised valid arguments stating that some disabilities can be so severe that non-life is preferred over such a life, the majority of authors are still in favour of the argument that any life, no matter in which condition, is always preferred over non-existence. However, for this specific section, I will only raise the arguments of the authors who argue that being alive with a severe disability can be worse off than non-existence.

The question of whether it would be preferable for a human being to never be born is a classic philosophical conundrum.³⁵³ Some writers even argued to the extent that

³⁴⁹ Kim 2013:626.

³⁵⁰ Feinberg 1986:145-178.

³⁵¹ Feinberg 1986:145.

³⁵² Benatar 2006:21-22.

³⁵³ Ruda 2010:204.

they said to never have lived is the best and “never to have drawn the breath of life, never to have looked into the eye of day” is preferable.³⁵⁴ Supporters of wrongful life claims argue that giving birth to a child whose life will be of “poor quality”³⁵⁵ is wrong and that there is an unwritten rule stating that a duty exists not to bring miserable children into existence because they have a right not to be brought into such an existence.³⁵⁶ According to Joel Feinberg,³⁵⁷ fetuses can incur harm in the womb, but only if the negative effects of those injuries are present when they are born.³⁵⁸ In some exceptional situations, giving birth to a child when it might have been avoided or where the child is born with a handicap so severe that they would be “better off dead” could cause harm to the person.³⁵⁹ The latter point of view denies the “sanctity-of-life concept”³⁶⁰ and believes that it is detrimental to have the disabled children since it would be better not to have them at all because their existence would be undesirable.³⁶¹ Some authors even go so far as to assert that both parents and their children with impairments do not think that life with a handicap has any value and that the notion that it is worthwhile to live it is simply a psychological defence mechanism (denial).³⁶² Therefore, these scholars argue in favour of the recognition of wrongful life claims. However, this argument is also opposed by other authors and court decisions,³⁶³ which decided that (nearly) every life, even the plaintiff’s life with severe infirmities, is always preferable and better than non-existence.³⁶⁴

My opinion on this argument will be that some lives can be seen as being worse off than not existing at all; my reason for this opinion will be thoroughly explained under the non-identity problem heading.

5.2.1.3 Right to dignity

³⁵⁴ Yeats “A man young and old”, [https://www. poemhunter.com/poem/a-man-young-and-old/](https://www.poemhunter.com/poem/a-man-young-and-old/) (accessed on 15 August 2023).

³⁵⁵ Archard 2004:403-404.

³⁵⁶ Archard 2004:417.

³⁵⁷ Feinberg 1990:318-338.

³⁵⁸ Feinberg 1990:318.

³⁵⁹ Feinberg 1990:318.

³⁶⁰ Henderson 2018:699.

³⁶¹ Benatar 2000:180.

³⁶² Kim 2013:637

³⁶³ *Gleitman v Cosgrove* 227 A.2d 689, 692 (N.J. 1967).

³⁶⁴ *Gleitman v Cosgrove* 227 A.2d 689, 692 (N.J. 1967).

When making arguments in favour of wrongful life claims with regard to the South African *Constitution*,³⁶⁵ it is fundamental to consider the principles of dignity as enshrined in the *Constitution*.³⁶⁶ The *Constitution* emphasises the inherent dignity of all individuals.³⁶⁷ Dignity encompasses the idea that every person has the right to be valued, respected and treated as a person of worth.³⁶⁸ By recognising wrongful life claims, we affirm the dignity of individuals who are born with severe disabilities or birth defects. It acknowledges that their lives have inherent value and that they should have the opportunity to seek legal redress for the harm caused by the negligent actions or omissions of others. It can be argued that denying individuals with disabilities or birth defects the right to bring wrongful life claims would effectively deny them access to justice.³⁶⁹ By allowing such claims, we ensure that all individuals, regardless of their physical or mental conditions, have equal access to the legal system and the potential for compensation for the harm they have suffered. This access to justice is essential for upholding the principles of dignity enshrined in our *Constitution*. Recognising wrongful life claims can also have broader societal benefits. It was held that allowing such claims encourages healthcare providers and professionals to exercise greater care and diligence in preventing birth defects and disabilities. The prospect of liability for negligent actions can incentivise the improvement of medical practices, leading to better prenatal care, accurate diagnoses, and increased awareness of potential risks to prevent such harm in the future. This aligns with the broader goals of the *Constitution* in promoting the well-being and protection of all individuals.³⁷⁰

5.2.1.4 Awarding compensation

By providing the disabled child with additional resources for living a decent and dignified life, the compensation award is what supports the child's dignity rather than undermining it.³⁷¹ The fundamental issue is that something must change for the worse in order for something to be legally categorised as damage.³⁷² One must compare the plaintiff's circumstances with and without the alleged medical practitioner's negligence

³⁶⁵ *Constitution of the Republic of South Africa*, 1996.

³⁶⁶ *Constitution*: sec. 10.

³⁶⁷ *Constitution*: sec. 10.

³⁶⁸ *Constitution*: sec. 10.

³⁶⁹ *Constitution*: sec. 34.

³⁷⁰ *Constitution*: Preamble.

³⁷¹ Steininger 2010:152.

³⁷² Stolker 1994:530.

in order to determine if there has been such a change for the worse. However, since the injury was not caused by the latter but rather by the mere fact that a disabled child was born, one can only compare its present state to that of non-existence. It has been suggested as a result that one should consider the child's pain and the expenses associated with its existence instead, that just these should be paid instead of the impaired life as a whole. As a result, a comparison with non-existence is not essential.³⁷³

According to academic writers Human and Mills,³⁷⁴ one of the main goals of wrongful life claims is to compensate the children for the violations of their right to bodily integrity and dignity. According to them, the child's injury must be compensated in accordance with the ideals of justice and fairness.³⁷⁵ Wood³⁷⁶ is of the opinion that life begins with dignity, and helpless and hopeless pain, such as living with a disability, is humiliating to humanity.³⁷⁷ He presents this case in the context of someone choosing to end their life in order to preserve their dignity, but the same logic might be used to assert for the legitimacy of a wrongful life claim. As a result, enabling such compensation claims would allow a disabled child who has no other options to live a more dignified life.³⁷⁸

5.2.1.5 Duty towards the child/ protected interest

Whether the medical practitioner in question actually broke a legal responsibility towards the child is another essential question in the context of wrongful life claims. Some scholars have argued that it is one of the medical practitioner's legal obligations towards the child to notify the mother of any possible defects, which the future child may have, in order for her to determine whether or not to carry the pregnancy to term.³⁷⁹ Morris and Saintier³⁸⁰ argue that this would be in the child's best interests.³⁸¹ Human and Mills³⁸² contend that because it is now known and accepted in wrongful birth cases that a medical practitioner owed the parents of a disabled child a legal obligation and that breaching it could result in a successful wrongful birth claim, the

³⁷³ Steininger 2010:152-153.

³⁷⁴ Human & Mills 2010:67-89.

³⁷⁵ Human & Mills 2010:81.

³⁷⁶ Wood 2008:52-53.

³⁷⁷ Wood 2008:52-53.

³⁷⁸ Wood 2008:52-53.

³⁷⁹ Morris & Saintier 2003:178.

³⁸⁰ Morris & Saintier 2003:167-193.

³⁸¹ Morris & Saintier 2003:178.

³⁸² Human & Mills 2010:67-89.

same principle- coupled with the advancement of medical technology- should now be adjusted appropriately and applied to recognise a legal duty in wrongful life claims as well.³⁸³

The argument regarding the absence of wrongfulness presented above has been refuted by those in favour of wrongful life claims. It has been argued that if the court in the case of *Road Accident Fund v Mtati*³⁸⁴ was prepared to determine that a driver of a vehicle had a legal duty to an unborn child to prevent harm to the child while *in utero*,³⁸⁵ it should be able to reach the same conclusion regarding the medical professional's negligence since, unlike a driver of a vehicle, a medical practitioner is not a complete stranger to the pregnant woman and her child who is yet to be born. The medical practitioner is thoroughly knowledgeable about every phase of the development of the unborn child and should go to great lengths to ensure that the child is born alive and healthy.³⁸⁶ Even though the person who drove the car was the actual cause of the harm, the medical practitioner is not in the case of the disabled life in a wrongful life claim, therefore, the basis for the decision in *Mtati* must be distinguished from the one pertaining to wrongful life.

In my opinion, allowing such claims would have the following benefits, and therefore, I would say that allowing such claims would ultimately be in line with the *Constitution's* norms and values with regard to the best interest of a child, as will be discussed hereafter. Parents have the right to make well-informed decisions about whether to continue a pregnancy based on accurate information about the risks associated with that pregnancy. If the medical practitioner fails to disclose those risks, parents may not be able to make a fully informed decision. Children who are born with a congenital condition may face significant medical expenses and other costs associated with their condition. A successful wrongful life action can provide compensation that helps to cover those costs. Medical practitioners are required by law to offer a specific level of care to their patients, or in this case, indirectly to the disabled child. If they fail to meet that standard of care, they should be held accountable for the harm that results, as already discussed. Lastly, recognising wrongful life claims can help deter healthcare

³⁸³ Human & Mills 2010:83.

³⁸⁴ *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA).

³⁸⁵ *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA): par. 37.

³⁸⁶ Blackbeard 1996:714.

providers from engaging in negligent behaviour in the future by making it clear that there are consequences for failing to provide adequate care in the form of accurate information in this case.

5.2.1.6 Best interest of the child

The Constitutional Court in *H v Fetal Assessment Centre*³⁸⁷ attempted to use a child's constitutional right to have their best interests considered as paramount in all circumstances involving the child in order to establish the recognition of a wrongful life claim. The best interests of the child are specifically addressed by the *Constitution* and the *Children's Act*. In every situation involving a child, such as wrongful life claims, the child's best interests must always come first, according to sec. 28(2) of the *Constitution*.³⁸⁸ It is stated that the best interests of the child norm and the respect of human rights necessitate sensitivity and awareness of the impaired child's special vulnerability. Consequently, the courts are compelled to consider both the delictual elements necessary because of this perception when evaluating a claim based on wrongful life. However, three elements are essential in this regard.³⁸⁹ First and foremost, the *Constitution* establishes the foundation for a society that values fundamental rights, social fairness and democracy. This implies that children are also seen and recognised as holders of human rights. Accordingly, it is maintained that the child is a bearer of the right to human dignity when a claim for wrongful life is made,³⁹⁰ the right to physical and mental integrity,³⁹¹ as well as the right to life.³⁹² The right to life must be interpreted broadly in order to encompass other rights, such as the right to development and survival.³⁹³ Secondly, the *Children's Act* is crucially important when it comes to fundamental rights. Sec. 6(1)(b) specifies that: "The general principles set out in this section guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general."³⁹⁴ Sec. 6(2)(a) states: "All proceedings, actions and decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the

³⁸⁷ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

³⁸⁸ *Constitution*: sec. 28(2).

³⁸⁹ Human & Mills 2010:86.

³⁹⁰ *Constitution*: sec.10; *Children's Act*: secs. 6(2)(b), 11(1)(c) & 11(2)(b).

³⁹¹ *Constitution*: sec.12(2).

³⁹² *Constitution*: sec.11.

³⁹³ Human & Mills 2010:86-87.

³⁹⁴ *Children's Act*: sec. 6(1)(b).

best interests of the child standard set out in sec. 7 and the rights and principles set out in this Act ...”³⁹⁵ When the application of the best-interests-of-the-child criteria is mandated by a section of the *Children’s Act*, numerous elements should be taken into account.³⁹⁶ Further highlighting the best interests of the child norm, sec. 9 states: “In all matters concerning the care, protection, and well-being of a child, the standard that the child’s best interest is of paramount importance must be applied.”³⁹⁷ Thirdly, it should go without saying that the child’s fundamental rights be safeguarded and valued, and the best interests of the child norm is no exception. The case of *Minister of Welfare and Population Development v Fitzpatrick*³⁹⁸ has emphasised the best-interests-of-the-child principle as follows: “Sec. 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of sec. 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in sec. 28(1).”³⁹⁹

In terms of wrongful life claims, the best interest test must be taken into account, especially when the wrongfulness requirement for wrongful life claims is taken into account. In fact, there are particular aspects that should be taken into consideration when determining what is in the child’s best interests, including any disabilities the child may have,⁴⁰⁰ their physical and emotional well-being, as well as their intellectual, emotional, social and cultural growth. It was therefore argued that it is crucial for the court to take these three factors into account when deciding whether to accept or reject a wrongful life claim, particularly when it comes to financial recompense for a child who was born with disabilities as a result of a medical professional’s negligence. It was further asserted that the aforementioned clauses and the best interests test provide adequate room for the law regarding wrongful life claims to develop and improve.⁴⁰¹

According to the ruling in the *H v Fetal* case, all decisions involving this kind of claim by a child must be made in accordance with the constitutional principles and while

³⁹⁵ *Children’s Act*: sec. 6(2)(a).

³⁹⁶ *Children’s Act*: sec. 7(1).

³⁹⁷ *Children’s Act*: sec. 9.

³⁹⁸ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

³⁹⁹ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC): par. 17.

⁴⁰⁰ *Children’s Act*: sec. 7(1).

⁴⁰¹ Human & Mills 2010:87-88.

taking into account the rights of children, in such instances, the right to have their best interests served is very important.⁴⁰² The Constitutional Court's decision provides direction for how courts in the future should handle this situation. The decision stressed that when courts are faced with a situation like this, they must base their decisions on fundamental considerations like the child's best interests. As mentioned, our *Constitution* explicitly protects children's rights. Consequently, it is evident that the South African legal system is more in line with nations, such as the Netherlands, that do recognise the child's claim when we compare it to some of the nations mentioned in the judgement that do recognise such claims.⁴⁰³ Therefore, in my opinion, it is very likely that somewhere in the near future, the recognition of a separate claim for a disabled child will be allowed. The courts should decide on a case-to-case basis what is required for a wrongful life claim to be successful, how far-reaching the claim is, and what remedies might be available to the disabled child. Any judicial inconsistencies resulting from such instances could subsequently be resolved before the Constitutional Court once more for those issues to be resolved legally.⁴⁰⁴

The cases of *Van Rooyen v Van Rooyen*⁴⁰⁵ and *AB and Another v Minister of Social Development*⁴⁰⁶ did not deal with wrongful life actions, but it thoroughly discussed and dealt with the concept of the best interest of the child and what it entails.

The 1994 case of *Van Rooyen v Van Rooyen*⁴⁰⁷ was handled by the erstwhile Witwatersrand Local Division of the Supreme Court just before the Interim *Constitution* came into force. This case concerned the modification of a divorced mother's visitation rights. Following her divorce from her spouse who is also the father of the children, she began a lesbian relationship. The court presented the case as a balancing act between competing rights: on the one hand, the mother's right not to face discrimination because of her sexual orientation, and on the other, the best interests of the children. The court ruled that the children's best interests should take precedence, and as a result, during weekend visits, the mother's lesbian partner is not allowed to share the mother's bedroom, and during holiday visits, the mother's lesbian

⁴⁰² *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): paras. 42, 49 & 69.

⁴⁰³ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 35.

⁴⁰⁴ Mahery 2016:348-349.

⁴⁰⁵ *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

⁴⁰⁶ *AB and Another v Minister of Social Development* [2016] ZACC 43, 2007 (3) SA 570 (CC).

⁴⁰⁷ *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

partner is not allowed to live in the same house as the mother. From where we are now, it is evident that the *Van Rooyen* court utilised the best interests of the child as a cover for bias. However, the final decision in this case was based on the best interest of the child.⁴⁰⁸

The case of *AB v Minister of Social Development*⁴⁰⁹ concerned how the child's best interests should be construed in a somewhat unusual reproductive situation, namely surrogate motherhood and child conception utilising anonymous donor gametes. The initial applicant, AB, had a heartbreaking past of unsuccessful attempts to conceive. She had tried *in vitro* fertilisation (IVF) with embryos made from her own eggs and her husband's sperm; later, as menopause approached and her own eggs were insufficient, she used embryos created from donor eggs and her husband's sperm. Lastly, after a divorce, she used embryos created from donor eggs and donor sperm.⁴¹⁰ AB has an amount of 18 failed IVF attempts in total.⁴¹¹ AB started investigating surrogate motherhood as a potential reproductive option when IVF proved to be unsuccessful.⁴¹² She soon learned that this path was legally closed for her. The reason being that sec. 294 of the *Children's Act*,⁴¹³ which governs surrogate motherhood, requires her to use her own eggs for the conception of a surrogate child as a single commissioning parent.⁴¹⁴ Beyond the physiological impossibility of her meeting this *Children's Act* criterion, the more important normative question was: Why is it so important to use one's own genes? Not to mention a host of legal issues, such as the reason why AB is permitted to use donor gametes for self-gestation but not for surrogate gestation.⁴¹⁵

AB challenged the validity and constitutionality of sec. 294 based on six rights set out in the Bill of Rights. These rights are the right to human dignity,⁴¹⁶ the right to equality before the law,⁴¹⁷ the right to non-discrimination,⁴¹⁸ the right to make decisions

⁴⁰⁸ *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

⁴⁰⁹ *AB and Another v Minister of Social Development* [2016] ZACC 43, 2017 (3) SA 570 (CC).

⁴¹⁰ *AB and Another v Minister of Social Development* [2016] ZACC 43: paras. 8-11.

⁴¹¹ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 8.

⁴¹² *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 9.

⁴¹³ *Children's Act* 38/2005.

⁴¹⁴ *Children's Act*: sec. 294.

⁴¹⁵ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 152.

⁴¹⁶ *Constitution*: sec. 10.

⁴¹⁷ *Constitution*: sec. 9(1).

⁴¹⁸ *Constitution*: sec. 9(3).

regarding reproduction,⁴¹⁹ the right to privacy⁴²⁰ and the right to access to healthcare.⁴²¹ The Surrogacy Advisory Group, a non-profit organisation, joined AB as a second applicant.⁴²² The application was contested by the Minister of Social Development, who was assisted by the Centre for Child Law as an *amicus curiae*.⁴²³ The best interests of the (future) child were prioritised from the start. While the applicants argued that using a commissioning parent's own gametes for child conception is not in the child's best interests, the Minister and the Centre argued the opposite.⁴²⁴ Significant data on child psychology was used to support and inform the applicants' perspectives, which is noteworthy. The University of Cambridge in the United Kingdom provided two experts' opinions, who specialise in the psychology of children born through innovative reproductive technologies including donor conception and surrogacy, on this subject.⁴²⁵ These specialists provided the court with summaries of various scientific research on such children's psychological well-being. The findings consistently demonstrated that a parent-child genetic relationship is not essential for a child's psychological well-being.⁴²⁶ The applicants also filed an expert opinion from a local South African clinical psychologist who specialised in innovative reproductive technologies and concurred with the Cambridge experts' conclusions.⁴²⁷ In contrast, the Minister filed an expert opinion by Professor van Bogaert, a bioethicist, who argued that a parent-child genetic relationship is necessary for the child's psychological well-being.⁴²⁸ This bioethics opinion had several flaws, the most serious of which was that a bioethicist is neither qualified nor equipped to provide an opinion in the field of psychology.⁴²⁹ After some time, the Minister abandoned her own expert and did not rely on the bioethics view.⁴³⁰ There was no expert opinion filed by the Centre. The appellant failed to convince the majority in the Constitutional Court that the removal of the genetic link requirement would be in the resultant child's best interest.⁴³¹ As a

⁴¹⁹ Constitution: sec. 12(2)(a).

⁴²⁰ Constitution: sec. 14.

⁴²¹ Constitution: sec. 27(1)(a).

⁴²² *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 5.

⁴²³ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 241.

⁴²⁴ *AB and Another v Minister of Social Development* [2016] ZACC 43.

⁴²⁵ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 182.

⁴²⁶ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 84.

⁴²⁷ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 85.

⁴²⁸ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 170.

⁴²⁹ *AB and Another v Minister of Social Development* [2016] ZACC 43: paras. 200-201.

⁴³⁰ *AB and Another v Minister of Social Development* [2016] ZACC 43: par. 187.

⁴³¹ *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC).

result, from an evidentiary standpoint, the interpretation of the child's best interests in the context of the case should have been clear.

Although these two cases do not deal with wrongful life actions, they paint a good picture of circumstances where the best interest of a child was of paramount importance, as it should always be according to our *Constitution*.

5.2.2 Arguments against wrongful life actions and counter-arguments

Those generally opposed to the acceptance of wrongful life claims may make the following arguments:

It is impossible for a person to be better off never having been born. For if I had never been born, then I never was; if I never was, then I cannot be said to have been better off. For to be harmed is to be made worse off; but no individual is made worse off by coming to exist, for that suggests that we can compare the person before he existed with the person after he existed, which is absurd. Therefore, it is logically impossible that anyone is harmed by coming to exist and wrongful life suits are both illogical and unfair in that they require the defendant to compensate someone he has not harmed.⁴³²

5.2.2.1 Impossibility of calculating damages

The assertion that it is difficult to determine damages under the circumstances is one of the principal defences against wrongful life claims. The foundation of wrongful life claims is the recovery of patrimonial loss in the form of actual costs incurred by a child for maintenance, special education, and medical care, as well as compensation for harm to the child's personality interest and for the pain and suffering the child must endure as a result of living with a disability. The courts contend that there has been no harm because the only life the child ever could have been in was a life in the disabled state to which he was born. The counter-argument is that the woman would have opted to have the pregnancy terminated if it were not for the medical professional's negligence, and the child would not have been born. As a result, the child or the child's parents endure a life filled with agony and suffering as a result of their disability. It is further asserted that if calculating damages for wrongful birth claims is not difficult to determine, then calculating damages for wrongful life claims should likewise not be difficult.⁴³³

⁴³² Steinbock 2011: chapter 3 par. 4.

⁴³³ Human & Mills 2010:78-80.

In my opinion, I will also introduce a counter-argument to this argument, arguing that it should be anything but impossible to calculate damages for a disabled child. It should be determined by the same guidelines and requirements as is used in a wrongful birth case. I would say that general guidelines should be drawn up according to the severity of the child's disability while taking into account factors such as the employment status of the parents, marital status, and financial standing, all to determine how the state can be of assistance to the child financially to live a best-as-possible lifestyle. These guidelines should not be limited and should be interpreted accordingly.

5.2.2.2 Public-policy considerations

The importance of highlighting the inherent value of human life is one of the main objections made against the acceptance of wrongful life claims.⁴³⁴ South African courts have refused to accept a claim for wrongful life because they believe it to be against public policy. To put it another way, the current state of South African law holds that wrongful life claims are not allowed because existence, even if accompanied by birth abnormalities or disabilities, can never constitute legal damage. It has been argued that life is more valuable than non-life, whether or not that life is lived with a disability. It follows that those opposed to the acceptance of wrongful life claims would also raise the life is a holy argument, which highlights the sanctity of life argument.⁴³⁵ Furthermore, it is asserted that the courts lack the authority to compare existence with a deformity to non-existence.⁴³⁶ The argument against it, however, is that it is too rigid and inflexible to establish as a matter of substantive law (and of principle) that life in a disabled state can never be worse than non-life. Furthermore, it is unreasonably inflexible to contend that a child with a congenital defect or disability is never injured. This interpretation implies that life can be worse than non-life and that it seems innately feasible to compare life to non-life.⁴³⁷ The *Choice on Termination of Pregnancy Act*⁴³⁸ and the case of *Christian Lawyers Association of South Africa v The Minister of Health*⁴³⁹ both undermined the counter-argument about the sanctity of life.⁴⁴⁰ It is further argued that it is illogical to ignore the sanctity-of-life argument in wrongful birth

⁴³⁴ Duncan 2004:16.

⁴³⁵ Lui 1987:70; Chürr 2009:172.

⁴³⁶ Burns 2003:811-812.

⁴³⁷ Lui 1987:70.

⁴³⁸ *Choice on Termination of Pregnancy Act* 92/1996.

⁴³⁹ *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 1113 (T).

⁴⁴⁰ Chürr 2009:172-173; Boezaart 2009:12-15.

claims while holding such an argument to be of utmost significance in wrongful life instances.⁴⁴¹ Others contend that except for extremely rare circumstances like severe disability, it is preferable to begin life with mental or physical impairments than to be in a state of non-being if the choice is between existing and non-existence.⁴⁴² It was set out in *Friedman v Glicksman*: “In my view, it would be contrary to public policy for Courts to have to hold that it would be better for a party not to have the unquantifiable blessing of life rather than to have such life albeit in a marred way.”⁴⁴³

Taking these facts into consideration, it is reasonable to conclude that wrongful life claims should only be recognised in the most extreme situations or in cases of great disability; otherwise, it will be seen as contrary to public policy. However, there needs to be determined what will qualify as “extreme cases” or “severe disability cases”.⁴⁴⁴ I fully agree with Chürr on the latter argument that once what constitutes extreme cases and severe disability cases is established, then wrongful life actions should be allowed to be instituted against such criteria.

5.2.2.3 Undermining the dignity of people with disabilities

The argument used by those opposed to the acknowledgement of wrongful life claims is that these claims are harmful because it appears that the lives of impaired children are less valuable than the lives of children who are healthy. It is contended: “If all life is presumptively valuable, how can we say that what we really mean is that all lives except for the lives of the disabled are presumptively valuable?”⁴⁴⁵ Furthermore, it is claimed that the nature of wrongful life claims insinuates that disabled people’s rights to life⁴⁴⁶ and dignity⁴⁴⁷ are seriously in jeopardy, particularly in a nation like South Africa, where emphasis is placed on both their rights and the right to dignity of all people.⁴⁴⁸ The argument in opposition to this is that a claim for wrongful life recognises a child’s dignity rather than eviscerating it. Instead, denying a wrongful life claim would diminish the child’s sense of dignity because the child would have to live with a disability as a result of a medical professional’s negligence, according to the “non-

⁴⁴¹ Human & Mills 2010:85.

⁴⁴² Liu 1987:70; Blackbeard 1991:74.

⁴⁴³ *Friedman v Glicksman* 1996 1 SA 1134 (W): 1142I-1143 C.

⁴⁴⁴ Chürr 2015:753-755.

⁴⁴⁵ Duncan 2004:16.

⁴⁴⁶ *Constitution*: sec. 11.

⁴⁴⁷ *Constitution*: sec. 10.

⁴⁴⁸ *Constitution*: sec. 10.

existence” defence.⁴⁴⁹ The argument is that a wrongful life claim should be viewed as compensation for, among other things, infringing on a child’s right to physical integrity and dignity.⁴⁵⁰ In light of these facts, it would appear that the life of a child has been injured, and a monetary award should be made in order to make up for the harm in accordance with the reasonable and equitable standards. As a result, this can be accomplished without demeaning or degrading the lives of disadvantaged children by prioritising no life over life.⁴⁵¹ The 2005 *Children’s Act*⁴⁵² particularly provides for a child with a disability, which is another counter-argument. The following is stated in sec. 6(2)(f): “All proceedings, actions or decisions in a matter concerning a child must ... recognise a child’s disability and create an enabling environment to respond to the needs that the child has.”⁴⁵³ Sec. 11(1) of the *Children’s Act*⁴⁵⁴ adds the following provisions:

In any matter concerning a child with a disability due consideration must be given to – (a) providing the child with parental care, family care or special care as and when appropriate; (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have; (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and (d) providing the child and the child’s care-giver with the necessary support services.⁴⁵⁵

Accordingly, it is argued that disabled children are prioritised under the *Children’s Act* and should consequently receive special attention which is in line with the *Children’s Act* and that they ought to receive all the care and assistance they can get so that they can reach their full potential despite their disability. Additionally, acknowledging disabled children and their unique needs and situations enhances and supports the human dignity of these children.⁴⁵⁶ I agree that allowing such claims does not necessarily undermine the dignity of the disabled child as was originally argued, it rather gives them the opportunity to make the best out of a difficult situation to reach their full potential.

⁴⁴⁹ Mukheibir 2008:520.

⁴⁵⁰ *Constitution*: secs. 10 & 12(2)(b); *National Health Act* 61/2003: secs. 6-9.

⁴⁵¹ Human & Mills 2010:81; Mūrīthi 2011:436; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC): par. 36.

⁴⁵² *Children’s Act* 38/2005.

⁴⁵³ *Children’s Act*: sec. 6(2)(f).

⁴⁵⁴ *Children’s Act* 38/2005.

⁴⁵⁵ *Children’s Act*: sec. 11(1).

⁴⁵⁶ Bosman-Sadie & Corrie 2010:26; Human & Mills 2010:87.

5.2.2.4 Accusations and claims directed at mothers who choose not to end their pregnancy

The argument made by those opposed to the acknowledgement of wrongful life claims is that allowing such claims would lead to accusations against mothers who did not choose to have an abortion while knowing that their unborn children would have impairments or birth defects. This will open the door to children who will then claim against their mother who chose to keep the disabled child, regardless. This is opposed by the counter-argument that a mother's decision not to end a pregnancy would not be seen as wrong because the *Choice on Termination of Pregnancy Act*⁴⁵⁷ clearly grants the mother the authority to do so.⁴⁵⁸ There should, in my opinion, exist no claims in terms of the child-parent relationship for the reason just mentioned; the claim should be solely instituted against the alleged negligent medical practitioner.

5.2.2.5 The practice of defensive medicine

People who are opposed to the acknowledgement of wrongful life claims contend that suing a medical practitioner for wrongful life puts the health care and medical systems in jeopardy and will have negative financial, ethical and emotional effects on the medical industry.⁴⁵⁹ Additionally, it is believed that wrongful life claims may have a detrimental effect on the medical practitioners' views, who might be more likely to advise parents to terminate the pregnancy in situations where a possibility exists that the child may be born with birth abnormalities or impairments in order to avoid liability.⁴⁶⁰ Medical practitioners cannot promise flawless children because they lack omniscience. Numerous instances and conditions exist where physicians would adhere to the accepted standards of care, but children would nonetheless be born with birth abnormalities or other medical problems. Additionally, it is asserted that while a medical practitioner's negligence may have contributed to the child's conception, it most certainly did not cause the child to grow up with birth abnormalities or other problems. Thus, it is improper and impolite to require medical practitioners to pay damages for problems they did not cause.⁴⁶¹ The counter-argument to this argument

⁴⁵⁷ *Choice on Termination of Pregnancy Act* 92/1996.

⁴⁵⁸ Mukheibir 2008:520.

⁴⁵⁹ Chürr 2009:174.

⁴⁶⁰ Mukheibir 2008:520.

⁴⁶¹ Burns 2003:822.

is that a medical professional may be held liable if they improperly and unnecessarily advise parents to end a pregnancy.⁴⁶² For instance, if a medical practitioner gives advice that no other medical practitioner would have given under similar circumstances, the medical practitioner may face disciplinary action for professional misconduct.⁴⁶³

5.2.2.6 Impossible to prove harm and the harm paradox

To prove harm existed in wrongful life actions, the child must assert that but for the negligence of the medical professional, they would have been aborted, and they were therefore harmed by being born.⁴⁶⁴ This argument goes hand-in-hand with the 'impossible to calculate damages' argument. As was previously discussed, in order to establish that you have suffered harm, you must show, using the logic of the counterfactual comparative test, that your current situation is worse than it would have been had the negligent behaviour not taken place.⁴⁶⁵ Due to the fact that, in order to establish harm, the child must assert that it would have been better if they had not been born, the damages become closely interwoven with the child's own existence. The latter results in what is known as the harm paradox. In short, the harm paradox refers to the complex ethical and legal questions which arise when a child who is born with a congenital defect or disability claims damages for being born.

The harm paradox results from the fact that the child must allege that their life is not worth living due to their disability or medical condition in order to pursue a claim for wrongful life. The child must contend that it would have been preferable for them not to exist at all.⁴⁶⁶ Both morally and legally, this claim can be viewed as questionable. The legal community's discomfort with drawing the conclusion that the wrongful life plaintiff was harmed is the principal barrier to the wrongful life action's recognition. This is due to the fact that an injury is legally assessed using a counterfactual comparative approach.⁴⁶⁷ On the one hand, the child may argue that they would not have been born if the medical practitioner had properly advised or warned their parents, and therefore, they should be compensated for the costs

⁴⁶² Mukheibir 2008:520.

⁴⁶³ Chürr 2015:757.

⁴⁶⁴ Hanson 1996:2.

⁴⁶⁵ Feit 2015:361.

⁴⁶⁶ Liu 1987:70; Blackbeard 1991:74.

⁴⁶⁷ Michel 2020:26.

associated with their disability. On the other hand, the child's claim for damages implies that their life is worth less than that of a healthy person, which raises serious ethical concerns. Steinbock⁴⁶⁸ held that no individual can be better off without being born, as it would not make them worse off. Claims for wrongful life are unreasonable and unfair since they force the defendant to pay damages to a person they haven't hurt. Therefore, no individual is harmed by coming into existence.⁴⁶⁹

The issue is that it can be challenging to make the case that a child's life is not worthwhile because they have a disability or other health issues. Such a claim could be perceived as prejudiced and unappreciative of disabled people's lives. Allowing wrongful life claims, on the other hand, can be interpreted as favouring the interests of the parents above those of the child. Instead of trying to raise the child's quality of life in these situations, the parents might be looking for financial support to cover the costs of raising the child. Furthermore, as was already mentioned, allowing wrongful life claims could result in a slippery slope where people with disabilities or health issues are seen as having lives that are not worth living or where the worth of a person's life is solely based on their physical or mental capabilities. The difficulty of proving that actual harm resulted from the birth of a disabled child is what puts wrongful life plaintiffs through the majority of their legal challenges and is the reason why the majority of courts have dismissed wrongful life claims. Those who are against the recognition of the wrongful life action may argue that the rejection of such a claim follows the argument that it is impossible to say that a person would have been better off if they were never born than to be born with a severe disability.

In conclusion, the harm paradox is the defence used when it seems contradictory to assert that the party filing the claim has experienced harm. The paradox arises from the fact that the person would not have existed at all if the alleged negligence or misconduct had not taken place. Since non-existence does not involve the sense of harm or damage, it might be claimed that the individual could not have been harmed. The contradiction is that they would not have existed in any way to support such a claim if they had not been born. It is difficult to tell whether harm has truly been done. The harm paradox ultimately draws attention to the difficult legal and ethical dilemmas

⁴⁶⁸ Steinbock 1986:15-20; Steinbock 2011: chapter 3 par. 4.

⁴⁶⁹ Steinbock 1986:15-20; Steinbock 2011: chapter 3 par. 4.

that arise when attempting to strike a balance between the interests of the child, the parents and society at large.

However, I do not agree with this way of arguing as my opinion is that some disabilities can be so extreme that such life would not be a life with dignity and can be argued to be without any value. If we adopt a subjective approach to the definition of harm, where harm is understood as imposing a condition or state against a person's will rather than as making them objectively worse off, we can account for the intuition that the wrongful life plaintiff is harmed by the medical professional. Consequently, I would say that such extreme cases, which can be argued to have no value, should be decided only in limited circumstances and should remain in the minority. Therefore, I would disagree with this argument and say that some births can be seen as harm done to the child.

5.2.2.7 Non-identity problem

Philosophers have struggled with the non-identity problem for many years. The non-identity problem can be said to go hand-in-hand with the harm paradox and the difficulty in determining whether the birth of a disabled person can be successfully argued to be a harm done to that person. The non-identity problem presents a specific instance of the harm paradox.

When we look at the non-identity problem in general, we see that the non-identity problem concerns the moral dilemma of hypothetical future individuals who do not yet exist but may do so in the future. Derek Parfit first outlined the non-identity problem in his 1984 book *Reasons and Persons*, and the problem occurs when comparing actions that could either improve or worsen future people's lives.⁴⁷⁰ This presupposition enables Parfit to support his time-dependence assertion, according to which any particular person would actually never have existed if he had not been conceived within a month of the time when he was actually conceived.⁴⁷¹

In other words, a person would have been an entirely different human being if they had been born a month later from a different ovum and spermatozoon. Due to the fact that our identities are shaped by how and when we are conceived, the non-identity dilemma is predicated on this idea. The identity of the person conceived can be

⁴⁷⁰ Doolabh *et al.* 2019:1.

⁴⁷¹ Mees 2010:11.

affected by just taking time or not taking time, as time changes which sperm fertilises the egg.⁴⁷²

Elizabeth Harman⁴⁷³ described the non-identity problem as follows:

The non-identity problem concerns actions that affect who exist in the future. If such an action is performed, certain people will exist in the future who would not otherwise have existed: they are not identical to any of the people who would have existed if the action had not been performed. Some of these actions seem to be wrong, and they seem to be wrong in virtue of harming the very future individuals whose existence is dependent on their having been performed. The problem arises when it is argued that the actions do not harm these people because the actions do not make them worse off than they would otherwise be.⁴⁷⁴

When the harm could only be avoided by preventing the existence of the person who would have a worthwhile life even with the handicap, Derek Parfit has developed a systematic difficulty for any such cases being wrongs – bringing them into existence with the handicap does not make them worse off, and so does not wrong them.⁴⁷⁵ Some actions are “person affecting” in the sense that they will have an impact on particular people in the future, whilst other actions are “impersonal” in the sense that they alter which people will exist in the future (for better or worse), without improving or impairing the circumstances of any particular future people.⁴⁷⁶

As was mentioned previously, a justification for wrongful life claims requires that a wrong has been done to the child born or conceived with a disability, entitling that child to compensation from the person, in this case the medical practitioner, responsible. If such a child has been injured, a wrong may have been committed against it. Many philosophers have questioned whether a child may suffer harm as a result of actions that led to its conception or birth when the only other option was for such person not to have been born.⁴⁷⁷ This poses a challenge that Parfit refers to as the “non-identity problem”. Perhaps the simplest way to illustrate this objection is to use one of Parfit’s thought experiments involving a fourteen-year-old girl. Parfit⁴⁷⁸ explains it through the following example:

⁴⁷² Weinberg 2008:4.

⁴⁷³ Harman 2004:89-113.

⁴⁷⁴ Harman 2004:89.

⁴⁷⁵ Brock 1995:269.

⁴⁷⁶ Doolabh *et al.* 2019:1.

⁴⁷⁷ Pattinson 1999:23.

⁴⁷⁸ Parfit 1987:358.

The girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout the child's life, his or her life will, predictably, be worth living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life.⁴⁷⁹

Using this illustration, Parfit contends that a child born to a mother who is fourteen years old cannot be seen as being harmed just because a child born later would be in a better situation or position due to the fact that these two children would have been two completely different people. The child was not damaged, according to Parfit, because the only other option was for that child to not be born at all. Parfit stated that: "The girl's decision was not worse for this child."⁴⁸⁰ According to Parfit's theory, a person can only be said to have been damaged or mistreated if their psycho-physical identity has changed as a result of the wrongdoing.⁴⁸¹

Feinberg expands on this premise by conducting a further thought experiment in which a couple conceives a child while being informed that the child may be born with a genetic abnormality. According to him, such a couple does not endanger the child because the child would not have existed in the first place if the irresponsible act had not taken place. He argues that to be harmed is to be placed in a worse position than one would otherwise have been in (to be made 'worse off').⁴⁸² Nevertheless, according to Feinberg, such a child will have been "wronged" where the child's condition is "so severe as to render their life not worth living".⁴⁸³

Feinberg's explanation of the concept of harm is contested by Harris, who prefers to define it putting a person in a situation where he is incapacitated or suffers in some way, or where his interests or rights are jeopardised.⁴⁸⁴ When Harris says that someone has been harmed, it means that they have been placed in a disabling or hurtful condition, even though that condition is only marginally disabling and even though it is impossible for that specific person to avoid the condition in question.⁴⁸⁵

⁴⁷⁹ Parfit 1987:358.

⁴⁸⁰ Parfit 1987:359-360.

⁴⁸¹ Kumar 2003:99-100.

⁴⁸² Feinberg 1984:102.

⁴⁸³ Feinberg 1984:102-103.

⁴⁸⁴ Harris 1998:109.

⁴⁸⁵ Harris 1998:109.

Harris vehemently disagrees with the notion that suffering harm must necessarily result in becoming worse off in comparison to one's alternatives.⁴⁸⁶

In the case of *AB v Minister of Social Development*,⁴⁸⁷ the Constitutional Court was tasked with finding a middle ground between the parents' rights and those of the prospective child. Although the *AB judgment*⁴⁸⁸ did not explore what precisely constitutes harm to the prospective child, according to the argument of Thaldar and Shozi,⁴⁸⁹ it is best to think of potential injury to a future child as an occurrence that is predicted. The child will only experience and be impacted by that harm after they are born.⁴⁹⁰

In the case of *Ex Parte KAF*,⁴⁹¹ the Court distinguished between the mental construct of a possible child and embryos.⁴⁹²

The idea that existence must have a drawback in order for non-existence to be preferable is a typical solution to the non-identity dilemma. Another way to get around the non-identity issue is to postulate harm in the context of human reproduction as not "person-affecting", which refers to the specific child-to-be born, but rather "others-affecting" in the sense that it affects the general welfare of people in society.⁴⁹³

In conclusion, the non-identity problem deals with the question of whether it can be successfully argued that a life with a disability can be seen as being worse than not being born at all. If this can be answered in the positive, then harm to the child is present and should be compensated accordingly.

5.3 CONCLUSION

Without a shadow of doubt, it is clear to see that there are much stronger arguments against the recognition of wrongful life actions than in favour of such recognition, but does that mean such arguments and decisions should be limited and final? When taking into account the counter-arguments to such arguments, I think definitely not.

⁴⁸⁶ Pattinson 1999:24.

⁴⁸⁷ *AB and Another v Minister of Social Development* [2016] ZACC 43, 2017 (3) SA 570 (CC).

⁴⁸⁸ *AB and Another v Minister of Social Development* [2016] ZACC 43, 2017 (3) SA 570 (CC).

⁴⁸⁹ Thaldar & Shozi 2020:32-36.

⁴⁹⁰ Thaldar & Shozi 2020:34.

⁴⁹¹ *Ex Parte KAF* 2019 2 SA 510 (GJ).

⁴⁹² *Ex Parte KAF* 2019 2 SA 510 (GJ): par. 14.

⁴⁹³ Thaldar & Shozi 2020:34-35.

The arguments in favour of wrongful life actions centre around the principles of self-determination, the consideration of poor quality of life, concerns regarding eugenics and ethical implications, the possibility of awarding compensation, the duty towards the child, the right to equality and dignity, previous court decisions, and the best interest of the child.

The main argument why most courts rejected this action is the impossibility of calculating damages, the counter-argument being that the woman would have opted to have the pregnancy terminated if it were not for the medical professional's negligence, and the child would not have been born. It is also said that if it is possible to calculate damages in wrongful birth claims, it should also be possible in wrongful life claims. This argument goes hand-in-hand with the impossibility of determining whether the birth of a child can be seen as harm done to that child, which ultimately results in the harm paradox. This occurs when some argue that being born can never be seen as a harm as you cannot say you would have been better off if you have not been born, while others contend that some disabilities can be so severe that in some cases it's not too far-fetched to argue that a person would have been better off if they were never born. I tend to agree with the latter as I've seen some extreme cases of disabled persons, and in my opinion, I would argue that they would have been better off never being born.

The importance of highlighting the inherent value of human life is one of the main objections made against the acceptance of wrongful life claims. Scholars argue that allowing such claims will be against public policy's consideration. Wrongful life claims are a controversial issue in South African courts, as they argue that existence, even with disabilities, cannot constitute legal damage. Some argue that it is preferable to begin life with a disability rather than to be in a state of non-being. Wrongful life claims should only be recognised in extreme cases of disability, as it would be contrary to public policy otherwise. The argument against it is that it is too rigid and inflexible to establish that substantive law holds that a disabled person's life can never be worse than their non-existence.

Wrongful life claims are often argued as being harmful, as they may suggest that impaired children's lives are less valuable than healthy ones. This raises concerns about the jeopardy of disabled people's rights to life and dignity. However, the

argument is that a wrongful life claim acknowledges a child's dignity and should be viewed as compensation for infringing on their right to physical integrity and dignity. The 2005 *Children's Act* specifically addresses children with disabilities, stating that proceedings must recognise their disability and create an enabling environment to respond to their needs. This approach prioritises children with disabilities and supports their human dignity, ensuring they receive the care and assistance they need to reach their full potential.

It is argued that wrongful life claims could lead to accusations against mothers who chose not to have abortions, potentially causing children to claim against their mothers who chose to keep the disabled child. They counter that the *Choice on Termination of Pregnancy Act* grants the mother the authority to terminate a pregnancy. They also believe that medical practitioners may be more likely to urge the termination of pregnancy in cases of disabled children to avoid liability. Medical practitioners lack omniscience and may not have caused the child's disability, making it improper to require damages for problems they did not cause. However, medical professionals may be held liable if they improperly advise parents to end a pregnancy, potentially facing disciplinary action for professional misconduct.

The harm paradox is a complex ethical and legal issue that arises when a child with a disability claims damages for being born. This defense is used when it seems contradictory to assert that the party filing the claim has experienced harm. The paradox arises from the fact that the person would not have existed at all if the alleged negligence had not taken place. Since non-existence does not involve the sense of harm or damage, it might be claimed that the individual could not have been harmed. However, the contradiction is that they would not have existed in any way to support such a claim if they had not been born. These perplexing and troubling elements of wrongful life claims underline the inherent difficulties in evaluating the harm caused and identifying the alleged wrongdoer's obligations.

The non-identity problem is posed by the moral dilemma of hypothetical future individuals who do not yet exist but may do so in the future. A justification for wrongful life claims requires that a wrong has been done to the child born or conceived with a disability, entitling that child to compensation from the person responsible. Some actions are "person-affecting" in the sense that they will have an impact on particular

people in the future, while others are “impersonal” in the sense that they alter which people will exist in the future without improving or impairing their circumstances. One example is Parfit’s thought experiment involving a fourteen-year-old girl who chooses to have a child, arguing that a child born to a young mother cannot be seen as being harmed just because a child born later would be in a better situation or position. Feinberg expands this idea by using a separate thought experiment in which a couple conceives a child while they are aware of the possibility of the child being born with a disability. He argues that to be harmed means being placed in a worse position than one would otherwise have been in, but a child will have been “wronged” where the child’s condition is so severe as to render their life not worth living. Harris, on the other hand, defines harm as placing a person in a situation where they are disabled or in which their interests or rights are frustrated. Harris disagrees with the notion that suffering harm must necessarily result in becoming worse off in comparison to one’s alternatives. In conclusion, the non-identity problem stems from the difficulty of proving that harm occurred when a child was born with a disability and arguing that their birth was the medical practitioner causing harm to them.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 CHAPTER SUMMARIES

In the realm of medical ethics and legal disputes, wrongful life claims stand out as a complex and contentious issue. These claims arise when individuals or their representatives argue that the child should not have been born due to a perceived harm or disability, and they seek compensation for the alleged suffering they endure as a result. The philosophical and moral implications surrounding wrongful life claims have sparked heated debates among scholars, healthcare professionals, and legal experts. This conclusion delves into the different perspectives and considerations surrounding these claims, highlighting the challenges involved in assessing the validity of such claims and the potential implications for medical practice and societal notions of life and disability.

The legal nature and reception of wrongful life claims are complex and multifaceted. While some jurisdictions recognise the validity of such claims, such as the Netherlands and the three states, California, New Jersey and Washington of the United States of America, others, like England and South Africa, view them as inherently problematic due to the speculative and philosophical nature of the alleged harm. The ethical and moral considerations surrounding wrongful life claims further complicate their legal treatment. Nevertheless, as medical technology advances and society grapples with the implications of reproductive choices, it is likely that these legal debates will continue to evolve. Ultimately, striking a balance between the rights of individuals to seek redress for perceived harm and the limitations of legal systems to adequately address inherently abstract and philosophical questions remains a challenge.⁴⁹⁴

When we look at the United Nations Convention on the Rights of the Child (UNCRC/CRC) and the Convention on the Rights of People with Disabilities (CRPD), the only clear conclusion we can come up with is that both of them are in line with sec. 28 of the *Constitution*. This section deals with the best interest of a child, stating that the best interest is of paramount importance in every matter concerning a child. It can be said that when determining wrongful life claims in the future, the CRC and CRPD's

⁴⁹⁴ Chapter 2, par. 2.2, pages 11-20.

articles pertaining to the protection of a disabled child may be taken into account to determine what the best interest of the child might entail in a specific case.⁴⁹⁵

In England, wrongful life claims are not recognised as valid claims and are prohibited by the *Congenital Disabilities (Civil Liability) Act* of 1976. The Lords Justices reached this conclusion after concluding that there is no obligation on a medical practitioner under English law to end a pregnancy for a congenitally deformed foetus. This obligation is necessary to hold the medical practitioner accountable. If it is determined that this obligation exists, it will follow that a disabled person's life has so little value that it is not worth protecting. It was further reasoned that granting the claim would expose medical professionals to liability for children born with a severe disability and expose women to liability for their child's health due to not terminating the pregnancy. The court also argued that it is difficult to calculate damages in wrongful life claims because doing so would necessitate comparing the value of living in a disabled state to the value of non-existence. Ultimately, such claims are not recognised in England.⁴⁹⁶

The Netherlands has a history of being seen as more progressive than most other societies, and what makes them even more different is the fact that wrongful life claims are recognised in the Netherlands. The yardstick wrongful life case in the Netherlands, known as the *Kelly* case, involved a young girl named Kelly who was awarded her cost-of-living expenses, additional expenses due to her disability, and non-pecuniary losses for her suffering. The court ruled that despite having a disability, a person can still live a respectable and honourable life. The loss of life may be considered a reimbursable injury. The court argued that determining actual damages was impossible under the criteria of art. 6:95 of the Dutch Civil Code, but the Hoge Raad ruled that art. 6:97 should be used, which allows for the calculation of damages using the most relevant approach to the type of damage. The court agreed with the lower courts and awarded Kelly compensation for her pain and suffering. Consequently, wrongful life claims have been accepted in the Netherlands' legal system.⁴⁹⁷

The first wrongful life claim in the United States of America was accepted in 1982 in the state of California, and two other states (New Jersey and Washington)

⁴⁹⁵ Chapter 3, par. 3.2, pages 23-28.

⁴⁹⁶ Chapter 3, par. 3.3.1, pages 28-30.

⁴⁹⁷ Chapter 3, par. 3.3.2, pages 30-31.

subsequently followed and also recognised wrongful life claims, which are based on public policy grounds.⁴⁹⁸

The origins of wrongful life actions in California can be traced back to the 1960s and 1970s. The case named *Curlender v Bio-Science Labs*, decided in 1980, dealt with a child's agony and suffering caused by Tay-Sachs Syndrome, and the court concluded that a disabled person's life could be compensable. In this case, California became the first state in the United States of America to recognise wrongful life claims.⁴⁹⁹

The Washington Supreme Court ruled that under state law, judges must award extraordinary damages in an alleged wrongful life case if the child suffers from severe birth defects or disabilities that necessitate extensive care, resulting in a massive financial burden. *Harbeson v Parke-Davis* established that a court must award exceptional damages to a defective child for unusual expenses incurred as a result of the child's congenital impairment. Since then, the legal landscape of wrongful life actions in the United States has changed. By the end of 1983, California and Washington had recognised the wrongful life cause of action, but ten other jurisdictions, including New Jersey, had rejected it. The cause of action was initially denied recognition in New Jersey; however, this attitude eventually reversed.⁵⁰⁰

The New Jersey Supreme Court created history on August 1, 1984, when it became the third court to recognise the wrongful life cause of action in *Procanik v Cillo*. It also made history by being the first state supreme court to overturn one of its own earlier judgements on wrongful life cases. As a result, the *Procanik* court's decision supports the notion that the wrongful life action is a growing trend that will acquire traction in the coming years. In summary, in *Procanik v Cillo*, the court recognised a wrongful life claim and, as a result, awarded special damages for high medical expenses paid correcting congenital abnormalities.⁵⁰¹

The claim for wrongful life is, until today, being refused in South African courts for one key reason: the courts' incapacity to compute damages. We believe, however, that it

⁴⁹⁸ Chapter 3, par. 3.3.3, page 31.

⁴⁹⁹ Chapter 3, par. 3.3.3, page 32.

⁵⁰⁰ Chapter 3, par. 3.3.3, pages 33-34.

⁵⁰¹ Chapter 3, par. 3.3.3, pages 34-35.

was already demonstrated why this component should not be considered an “insurmountable obstacle” to the claim’s recognition.⁵⁰²

Friedman v Glicksman, a landmark case in South African law, concluded that wrongful life claims would be *contra bonis mores*, which means that they would be against public policy as well as the sentiments and opinions of the community. Permitting such claims would also set a precedent for parents of disabled children to be sued for permitting their children to be born while knowing there exists a possibility that they may have congenital defects or other abnormalities, according to the court. Returning to the decision of the South African Supreme Court of Appeal in *Stewart v Botha*, it is argued that by dismissing the claim solely on the grounds that the court was unable to decide between a life with disabilities and non-existence, without really considering the fundamental tenets of the claim, the requirements of the *Constitution*, or the disabled child’s best interests, the court betrayed its duty to both the child and society. Even though the pertinent *Children’s Act* provisions had been in place for almost a year at the time of the verdict, this failure nonetheless happened. I therefore contend that these rules, particularly the norm of the child’s best interests, provide appropriate foundations for developing and improving the law addressing this unique claim. As a result, I believe that when analysing the delictual factors in a wrongful life claim, the aforementioned rules must give a point of departure or, at the very least, merit some attention. Snyders AJA reasoned that since the question of whether or not a particular child should have been born at all strikes at the core of what it means to be human, it is unreasonable to expect the law to provide an explanation. On the other hand, I disagree with Snyders because I believe that it is the court’s responsibility to answer the most challenging questions and problems. In some circumstances, this activity will inevitably necessitate an understanding of what it means to be human. One cannot help but concur with Stretton that the decision would have been better off not existing in some situations.⁵⁰³

In brief, the wrongful life claim was denied in *Friedman v Glicksman*. *Stewart v Botha* decided eleven years later, dismissed the legitimacy of the claim once more, though for different reasons than in *Friedman*. The Supreme Court of Appeal had the opportunity to provide well-reasoned answers to the numerous questions created by

⁵⁰² Chapter 3, par. 3.3.4, pages 35-39.

⁵⁰³ Chapter 3, par. 3.3.4, pages 35-36.

the two radically different verdicts, as well as to conclusively resolve the question of whether the action should be recognised under South African law or not. Unfortunately, it was not successful.⁵⁰⁴

In the most recent South African decision, *H v Fetal Assessment Centre*, the Constitutional Court suggested that there is a chance that common law in South Africa can be extended to the point of recognising wrongful life claims in specific circumstances. The only logical conclusion seems to be that the disabled child in question should receive some sort of compensation and that the Constitutional Court favours wrongful life claims.⁵⁰⁵ In this situation, I agree with the court's decision.

Wrongful life claims present a complex intersection of legal principles, where the law of delict and the law of contract intersect. Delict, which governs civil wrongs, and contract law, regulate agreements and obligations, and my opinion is that both should come into play when considering the legal implications of wrongful life claims. We gain a deeper understanding of the intricate challenges posed by wrongful life claims within the legal system when examining the legal aspects of delict and contract law.⁵⁰⁶

Applying contractual law to wrongful life claims poses significant challenges. Contract law primarily operates on the principle of compensating parties for the harm or losses they have suffered as a result of a breach of contract. It focuses on restoring the injured party to the position they would have been in had the contract been properly fulfilled. In the context of wrongful life claims, determining the appropriate measure of damages becomes highly complex. One fundamental difficulty is establishing a causal link between the defendant's actions and the child's disabilities. Genetic and congenital conditions are often multifactorial, resulting from a combination of genetic predispositions, environmental factors, and chance. Allocating responsibility for such conditions solely to a defendant's actions can be challenging and may involve complex scientific evidence. Moreover, the notion of compensating for wrongful life itself raises philosophical and ethical concerns. It implies that the child's life is inherently undesirable or devoid of value due to their disabilities. This perspective conflicts with the fundamental principles of human dignity and the inherent worth of every individual. It also raises questions about the legal standing and rights of individuals with

⁵⁰⁴ Chapter 3, par. 3.3.4, page 36.

⁵⁰⁵ Chapter 3, par. 3.3.4, pages 36-39.

⁵⁰⁶ Chapter 4, paras. 4.1-4.3, pages 41-54.

disabilities. Additionally, the concept of “but-for” causation, which is commonly used in contractual law, may not be applicable in wrongful life claims. In these cases, the child’s existence is the very harm alleged, making it difficult to establish a causal relationship between the defendant’s actions and the harm itself. Given these challenges, many legal systems have been reluctant to recognise wrongful life claims within contractual law. Instead, these claims are often considered within the framework of delictual law, focusing on the duty of care owed by healthcare professionals or genetic counsellors to their patients. This approach allows for a more comprehensive evaluation of the circumstances surrounding the child’s birth and the alleged negligence or breach of duty. In conclusion, the application of contractual law to wrongful life claims is fraught with difficulties due to the complex nature of these claims, the challenges in establishing causation, and the ethical concerns surrounding the concept of “wrongful life” itself. As legal systems continue to grapple with these issues, it is crucial to balance the interests of all parties involved while upholding the principles of human dignity and individual rights.⁵⁰⁷

Although the latter is the current position regarding wrongful life claims in terms of contractual law, my opinion on this is slightly different. Even though it was established that there rests no legal obligation on the medical practitioner towards the disabled child, I would argue that due to the fact that there is a doctor-patient relationship between the parent of such child and the medical practitioner, a contractual duty exists between these two and therefore can be argued that the medical practitioner also has a legal duty towards the unborn child to always act in their best interest, and as seen earlier, I would argue that being alive with a severe disability can be seen as worse than never being born. Relying on this argument, I would recommend that claims in terms of contractual law should also be allowed in cases where claims in terms of the law of delict fail.

The five elements of a delict, which are commonly applied to wrongful life actions, include a conduct or an act, wrongfulness of such conduct, fault, causation and harm/damage as a result of the conduct. The element of conduct or an act refers to the action or omission that forms the basis of the wrongful life claim. In the context of wrongful life, it typically involves the alleged negligence or wrongful conduct of a

⁵⁰⁷ Chapter 4, par. 4.2.1, pages 43-45.

medical professional, such as a doctor or healthcare provider, in providing information or making decisions related to the birth or reproductive process. Wrongfulness refers to the legal or moral wrong associated with the conduct or act in question. In wrongful life cases, the wrongfulness typically arises from the alleged failure of the medical professional to provide accurate information or make appropriate decisions, leading to the birth of a child with severe congenital disabilities or medical conditions. Fault pertains to the responsibility or culpability of the defendant for the wrongful act or omission. In wrongful life actions, fault typically involves proving that the medical professional breached their duty of care or failed to meet the standard of care expected in similar circumstances. This could include demonstrating negligence, such as a failure to diagnose or inform parents of potential risks or genetic conditions. Causation refers to the link between the defendant's conduct and the harm suffered by the plaintiff. In wrongful life cases, it involves establishing that the defendant's actions or omissions directly caused the child's birth with the alleged disabilities or medical conditions. This can be a complex aspect of the case, as it may involve medical expert testimony to establish the causal connection. The element of harm or damage relates to the injury or negative consequences suffered by the plaintiff as a result of the defendant's conduct. In wrongful life actions, the harm typically involves the child's alleged suffering or diminished quality of life due to the congenital disabilities or medical conditions. The harm/damage element may also include the economic costs associated with caring for a child with special needs. It is important to note that the applicability and specific requirements of these elements may vary depending on the legal jurisdiction and the particular facts of the case. Additionally, the concept of wrongful life is a complex and controversial legal issue, and the availability and success of such claims can differ between jurisdictions.⁵⁰⁸

Although these elements look straightforward enough to establish a wrongful life claim and consequently rule in favour of the child so that they can succeed with such a claim, courts have until now argued otherwise. However, my opinion would be that wrongful life claims in terms of delictual law should still be determined on a case-to-case basis, taking into consideration the facts present. These should only serve as guidelines for wrongful life claims and should by no means be limited.

⁵⁰⁸ Chapter 4, par. 4.2.2, pages 45-54.

Advocates for recognising wrongful life claims argue that individuals should have the right to make decisions about their own existence. They believe that if a person would have chosen not to be born had they been given the choice, then their autonomy and self-determination should be respected. They also argue that bringing a child into a life of suffering or poor quality due to severe disabilities may be seen as cruel or unethical. Another concern is the potential shadow of eugenics. Proponents argue that wrongful life actions shed light on ethical issues surrounding the selection or modification of embryos or fetuses with certain characteristics, as it raises questions about the value society places on disabled individuals. Furthermore, recognising wrongful life claims can provide a means of compensating individuals for the hardships they face as a result of their disabilities. This compensation can help alleviate financial burdens associated with medical expenses and specialised care. Advocates also emphasise the duty towards the child. They argue that if a child is born with severe disabilities due to negligence or medical malpractice, it is the responsibility of society to acknowledge and address the harm caused. Additionally, recognising wrongful life claims aligns with principles of equality and human dignity as set out in the South African *Constitution*. Supporters argue that individuals with disabilities should have the same rights as others and should not be denied the opportunity to seek redress for the harm they have suffered. Moreover, some courts have ruled in favour of wrongful life claims, which sets a precedent for acknowledging the validity of these claims. These court decisions demonstrate a growing recognition of the complex issues involved in cases of this nature.⁵⁰⁹

On the other hand, opponents of wrongful life actions present several arguments against recognising such claims. They argue that it is impossible to accurately calculate damages in these cases since it involves comparing an individual's life to a hypothetical non-existence. Public policy or *boni mores* considerations also come into play, as opponents argue that recognising wrongful life claims may have negative societal implications. They contend that allowing these claims may undermine the dignity and worth of disabled persons by suggesting that their lives are inherently less valuable. Critics also raise concerns about the potential for claims against mothers for not terminating their pregnancies. They argue that such claims place an undue burden on women and infringe upon their reproductive rights. The practice of defensive

⁵⁰⁹ Chapter 5, par. 5.2.1, pages 56-69.

medicine is another argument raised against wrongful life actions. Opponents contend that recognising these claims may lead to a rise in defensive medicine, where medical professionals order unnecessary tests or procedures as a means of protecting themselves from potential lawsuits. Furthermore, opponents argue that it is virtually impossible to prove the harm suffered in a wrongful life action since it is based on the assumption that non-existence would have been preferable. This raises questions about the feasibility and validity of these claims. Lastly, opponents highlight the non-identity problem within wrongful life actions. They argue that by claiming wrongful life, individuals are essentially asserting that they would have been better off never existing. However, this argument is complicated by the fact that the individual's identity is tied to their existence, making it challenging to establish a clear basis for harm.⁵¹⁰

In conclusion, the recognition of wrongful life claims is a complex and contentious issue. While arguments in favour highlight principles of self-determination, concerns about the quality of life, ethical considerations, compensation, duty towards the child, equality, dignity, previous court decisions, and the best interest of the child, opponents argue against recognising these claims due to challenges in calculating damages, public policy considerations, concerns about undermining the dignity of disabled persons, floodgate of claims against mothers, defensive medicine, difficulties in proving harm, and the non-identity problem. The resolution of these arguments requires careful consideration of the ethical, legal and societal implications involved.

These paradoxical and problematic aspects involved in wrongful life claims highlight the inherent challenges in assessing the harm caused and determining the responsibilities of wrongdoers. They reflect philosophical and ethical debates surrounding the value of a flawed life, the concept of non-existence, and the difficulty of ascribing responsibility for the circumstances of an individual's birth.

6.2 RECOMMENDATIONS

To wrap all of the above up, I would recommend that wrongful life claims should be introduced and implemented into the South African legal system. Either the common law should be developed to provide for such claims, or utterly different by specific legislation which makes provision for such claims should be enacted. Such claims

⁵¹⁰ Chapter 5, par. 5.2.2, pages 69-80.

should not be limited in any way and should be determined by the judges on a case-to-case basis, as no two cases are ever the same. When rejecting such claims completely, there are no remedies for a disabled child, but when allowing such claims, there is at least a 50/50 chance of the claim succeeding in favour of such a child. Providing a child with such remedies to help the child financially with any financial burdens due to their disability would be more in line with a person's rights than trying to argue that allowing such claims insinuates that being born with a disability is worse than never having been born. In my opinion, the latter argument misses the point as to why the compensation should be granted; it serves as a helping mechanism for financial obstacles, not as a tool confirming that his life is worse.

I would agree with the scholars who argue in favour of the recognition of wrongful life claims in instances where the parents did not claim in terms of the wrongful birth action. I would recommend that both claims should not be allowed to run together. These wrongful life actions and wrongful birth claims should be limited to a successful claim, either by the parents or by the child. The parents should be allowed to institute a claim to receive compensation for such a disabled child until the child is eighteen years old in terms of the wrongful birth action, whereafter the child or a representative should be allowed to institute a wrongful life claim for the remainder of their life.

In my point of view, the best interest of the child should be the yardstick criteria against which these claims should be decided. The best interest of a disabled child should take precedence over all other possible arguments against allowing wrongful life claims. I feel that, yes, from what I've seen with my own eyes, I can confidently say that some disabilities are so extreme and severe that I can confirm that I would declare such lives useless, and as a result, such disabled people would have been better off if they were not alive. A possible limitation of such actions can include that a list needs to be drawn up by a medical expert with all the possible diseases which can be classified as "severe" at birth and which can then be seen as too severe to live with and ultimately undermine a person's human dignity. When a person is diagnosed with one of the listed diseases, it should count in their favour when instituting a claim for wrongful life.

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