CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 74/14

In the matter between:

H Applicant

and

FETAL ASSESSMENT CENTRE Respondent

Neutral citation: *H v Fetal Assessment Centre* [2014] ZACC 34

Coram: Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J and Van der Westhuizen J

Heard on: 28 August 2014

Decided on: 11 December 2014

Summary: Section 28(2) of the Constitution — child's best interests must be considered in determining whether to allow the child to claim compensation for a life with disability in "wrongful life" cases

Section 39(1) of the Constitution — may consider foreign law in interpreting the Bill of Rights

Section 39(2) of the Constitution — development of the common law — High Court incorrectly dismissed claim on the basis of the exception

Complex factual and legal considerations — inappropriate to make a final determination on the viability of the child's claim on the record — High Court must make the determination after considering the elements of the law of delict

ORDER

On appeal from the Western Cape Division of the High Court, Cape Town (Baartman J):

1. Leave to appeal is granted.

2. The appeal succeeds with costs, including the costs of two counsel.

3. The order of the High Court is set aside and replaced with:

   "The plaintiff is granted leave to amend the particulars of claim within 14 days."

JUDGMENT

FRONEMAN J (Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J and Van der Westhuizen J concurring):

Introduction

[1] Prospective parents, who are fortunate enough to have access to that kind of medical care, often obtain medical advice during pregnancy to ascertain whether their child will be born in good health. If they are told that the child will probably suffer from a serious medical condition or congenital disability, the mother may choose not

to give birth to the child. That choice is given to her under South African law.[1] Our law also recognises a claim by the parents for patrimonial damages in circumstances where that kind of medical advice should have been given to them, but was negligently not provided.[2]

[2] Until now, however, our law has denied the child any claim in those circumstances.[3] The question for decision here is whether that should change.

[3] The applicant is a boy who was born with Down syndrome in 2008. His mother instituted a claim on his behalf (child's claim) in the Western Cape Division of the High Court, Cape Town (High Court) for damages against the respondent, the Fetal Assessment Centre (Centre). The claim is based on the alleged wrongful and negligent failure of the Centre to warn the mother that there was a high risk of the child being born with Down syndrome. It is alleged that had she been warned she would have chosen to undergo an abortion. The child claimed special damages for past and future medical expenses and general damages for disability and loss of amenities of life. The Centre excepted to the claim as being bad in law, in not disclosing a cause of action recognised by our law.

[1] Section 12(2)(a) of the Constitution and the Choice on Termination of Pregnancy Act 92 of 1996. The Act prescribes the conditions under which the choice may be made.

[2] *Mukheiber v Raath and Another* [1999] ZASCA 39; 1999 (3) SA 1065 (SCA) (*Mukheiber*); *Administrator, Natal v Edouard* [1990] ZASCA 60; 1990 (3) SA 581 (A) (*Edouard*); and *Friedman v Glicksman* 1996 (1) SA 1134 (W) (*Friedman*). *Edouard* was decided in contract, but the reasoning in the judgment also considered the delictual dimensions of a claim.

[3] *Stewart and Another v Botha and Another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA) (*Stewart*) and *Friedman* id.

[4] The particulars of claim on behalf of the child are not a model of clarity. They are framed in terms of a "duty of care" owed to the child's mother, albeit in her representative capacity as the child's mother and natural guardian, and allege a failure on the part of the Centre in a number of respects "[i]n breach of [that] duty of care, and *therefore* negligently".[4] Those are terms more appropriate to the tort of negligence in English law and do not assist in determining the proper bounds of liability in terms of the wrongfulness requirement of our law of delict. The exception, in turn, is also based on the assumption that the common law of delict currently does not recognise that kind of a claim.

[5] The High Court upheld the exception and dismissed the claim with costs. It did so in reliance on the Supreme Court of Appeal's decision in *Stewart*.[5]

[6] The approach in *Stewart* was that recognising a child's claim would be to make a pronouncement on a question that "should not even be asked of the law".[6] The Supreme Court of Appeal distinguished the parents' claim from that of a child:

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

[4] Emphasis added.

[5] Above n 3. This matter was also decided on exception.

[6] Id at para 28.

> acceptance of the fact that the birth has occurred and seeks to address the consequences of the birth."[7]

This was, however, to be distinguished from the child's claim:

> "At the core of cases of the kind that is now before us is a different and deeply existential question: was it preferable – from the perspective of the child – not to have been born at all? If the claim of the child is to succeed it will require a court to evaluate the existence of the child against his or her non-existence and find that the latter was preferable."[8]

And, finally:

> "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 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."[9] (Emphasis added and footnote omitted.)

[7] The child seeks leave to appeal directly to this Court against the High Court's decision. He contends that in the particular circumstances it is reasonable and in the interests of justice to do so, given that an appeal to the Supreme Court of Appeal is likely to be futile in light of its relatively recent decision in *Stewart*.

[7] Id at para 10.

[8] Id at para 11.

[9] Id at para 28.

Issues

[8] The following issues arise:

(a) Should leave to appeal be granted?

(b) If leave is granted, was the exception procedure appropriate?

(c) The merits of the appeal.

(d) Order and costs.

Leave to appeal

[9] Leave to appeal must be granted. The applicant seeks the development of the common law to allow for the recognition of the child's claim. That is an issue of major legal and constitutional importance. Prospects of success exist. The Supreme Court of Appeal has already given a decision setting its face against recognition of the child's claim. This is not a decisive consideration because the possibility is always there that it could be persuaded to change course. But, again, it may not. Usually this Court will be deferent in allowing the common law to be developed in the High Court and the Supreme Court of Appeal. But here, as will be seen, the outcome of this appeal will allow the High Court and, if necessary, later the Supreme Court of Appeal to play a significant role in the further development of the common law, within the guidelines of this judgment.

Was the exception procedure appropriate?

[10] In the High Court the matter was decided on exception. Exceptions provide a useful mechanism "to weed out cases without legal merit", as Harms JA said in

Telematrix.[10] The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.[11]

[11] This Court has decided appeals in matters where exceptions were upheld.[12] On other occasions it considered that the question of the development of the common law would be better served after hearing all the evidence. In *Carmichele*[13] this Court held that, as in some cases on exception, it was also better not to decide issues about the development of the common law by an order granting absolution from the instance at the end of a plaintiff's case in a trial:[14]

> "There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. *But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution.* If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the

[10] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) (*Telematrix*) at para 3.

[11] *Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) at para 36.

[12] See generally *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC); *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC); *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC); *Dudley v City of Cape Town and Another* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC); *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (*Fose*); and *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) (*Du Plessis*).

[13] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (1) BCLR 995 (CC) (*Carmichele*).

[14] Relying on *Minister of Law and Order v Kadir* [1994] ZASCA 138; 1995 (1) SA 303 (A).

> circumstances of the case, with due regard to all relevant factors."[15] (Emphasis added.)

[12] There is no general rule that issues relating to the development of the common law cannot be decided on exception, but where the "factual situation is complex and the legal position uncertain" it will normally be better not to do so.[16] Are the facts and legal norms applicable here complex and uncertain?

[13] Section 39(2) of the Constitution requires that courts must, when developing the common law, promote the "spirit, purport and objects of the Bill of Rights". Development of the common law may take place in more than one manner. In *K*,[17] O'Regan J, relying on the judgment of Moseneke J in *Thebus*,[18] explained this:

> "It is necessary to consider the difficult question of what constitutes 'development' of the common law for the purposes of section 39(2). . . .
>
> The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the

[15] *Carmichele* above n 13 at para 80.

[16] This is recognised elsewhere too. In the Australian case of *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52; (2006) 226 ALR 391 (*Harriton*), Kirby J in dissent noted at para 35:

> "Especially in novel claims asserting new legal obligations, the applicable common law tends to grow out of a full understanding of the facts. To decide the present appeal on abbreviated agreed facts risks inflicting an injustice on the appellant because the colour and content of the obligations relied on may not be proved with sufficient force because of the brevity of the factual premises upon which the claim must be built. Where the law is grappling with a new problem, or is in a state of transition, the facts will often 'help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff'. Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common law may not be indifferent." (Footnotes omitted.)

[17] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (*K*).

[18] *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (*Thebus*).

> common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."[19]

[14] Our common law at present does not recognise a child's delictual claim for damages arising from a negligent pre-natal misdiagnosis in relation to congenital medical conditions or disabilities. The facts pleaded in the child's particulars of claim are not "new" facts that will bring into play only incremental development of the common law. The development of the common law at stake here is of the kind where "a common-law rule is changed altogether, or a new rule is introduced".[20] In the former kind of case a final decision on whether the common law should be developed may in appropriate circumstances be capable of being decided on exception, but in the latter situation it will normally be better to make a final decision only "after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors".[21]

[15] In *K* this Court warned against sterilising the common law from normative, social or economic considerations by clothing its vicarious liability principles in factual garb only:

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[19] *K* above n 17 at paras 16-7.

[20] Id at para 16.

[21] *Carmichele* above n 13 at para 80.

> "Denying that the principles bear such normative implications will only bedevil the exercise by rendering inarticulate premises that in a democracy committed to openness, responsiveness and accountability should be articulated."[22]

[16] The development of the law of delict to allow a child's claim is likely to have important normative implications. At first blush it would thus appear that a final decision on the viability of the child's claim should not have been made on exception.

[17] Not so, argued the Centre. It contends that this is not a case where normative considerations are hidden by the current state of the common law or where the factual situation is complex. It is simply a case where no change of a common law rule, or development of a new rule, can be made to accommodate the child's claim, because it is legally impossible to do so, no matter what the particular facts may be.

[18] If that contention is correct, the appeal must be decided on the exception and it must fail. But it is not correct.

[19] For most people the birth of a child and life itself are causes for celebration. But that does not mean that the reality of being born into a life with disability should be ignored by the law. The child's claim has been dubbed here and internationally as one for "wrongful life". It has been pointed out that this term is unfortunate and

[22] Above n 17 at para 23.

wrong.[23] And indeed it is. The legal issue is not the "wrongful life" of the child, but whether the law should allow a child to claim compensation for a life with disability.

[20] Characterising the issue as one of "wrongful life" avoids direct engagement with this substantive issue. By so framing it, the issue is presented as one of a logical paradox, said to be impossible for the law to answer. The paradox is this. The medical condition or congenital disability is not one caused by the health practitioner's negligence. If the negligent conduct did not occur, the mother would have been told of the risk and the pregnancy would have been terminated. This is said to result in having to compare life with non-existence, something that creates insurmountable problems at various stages of the enquiry into the elements or requirements of our law of delict – wrongfulness, causation, foreseeability in negligence and in the quantification of damages.

[21] This was, in the end, also the approach of the Supreme Court of Appeal in *Stewart*. It found that for a child's claim to succeed it would require a court to evaluate the existence of children against their non-existence, an exercise "that goes so deeply to the heart of what it is to be human that it should not even be asked of the law".[24]

[23] Compare, for example, *Edouard* above n 2 at 585J-586A and the remarks of Kirby J in *Harriton* above n 16 at paras 8-14.

[24] See *Stewart* above n 3 at para 28.

[22] It is as well to acknowledge the logic of this paradox right at the outset. But more important is to recognise that framing the question in this manner might inadvertently disguise a value choice. If one says that no harm has been done to the child by the medical expert's negligence, why do we say so? The answer given in our law and in many other jurisdictions is that we can establish harm only by comparing existence with non-existence. But this risks hiding a value choice. And it is a choice that judges under our Constitution need to acknowledge openly and defend squarely when they make it.

[23] Not to do so says that there are areas of life and law where the values of the Constitution may be ignored. That is not the kind of choice that our Constitution allows judges to make. They must ensure that the values of the Constitution underlie all law, not that some part of the law can exist beyond the reach of constitutional values.[25]

[24] So acknowledging the paradox is not necessarily dispositive of the real issue, namely whether our constitutional values and rights should allow the child, in the circumstances of this case, to claim compensation for a life with disability. It may well be that the conclusion should be drawn that they do not so allow, but it is not a decision that lies outside the law.

[25] See *K* above n 17 at paras 16-7 and 22-3. See also *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at paras 26-7; *Thebus* above n 18 at para 27; and *Carmichele* above n 13 at paras 54-6.

[25] We thus need to go further. If, despite this clarification that the proper approach involves an inevitably evaluative legal choice in accordance with the Constitution, we nevertheless conclude that the claim cannot be sustained at all, no matter what the facts of a particular case may be, the appeal must still fail on the basis of the exception.

[26] We cannot do that, however, on the basis of the exception before us if the "factual situation is complex and the legal position uncertain".[26] For if we reach the conclusion here that it is not impossible to recognise the claim, depending on the facts that might emerge at the trial, the appeal must succeed. The High Court may then consider all the relevant facts and circumstances in order to decide whether the child's claim falls within this scope, or even some broader version of it.

Substantive merits of the appeal

[27] Having established that the approach of the Supreme Court of Appeal in *Stewart*[27] appears not to have given sufficient recognition to the need to place the viability of the child's claim within the normative framework of the Constitution, it may be helpful to consider how this kind of problem has been dealt with in other jurisdictions.

[26] *Carmichele* id at para 80.

[27] Above n 3. See also the High Court judgment in that case, reported as 2007 (6) SA 247 (C), and *Friedman* above n 2.

Comparative law

[28] Foreign law may be used as a tool in assisting this Court in coming to decisions on the issues before it. The Constitution provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law".[28] Thus, unlike in the case of international law,[29] this Court may have recourse to comparative law but is not obliged to consider it.

[29] This Court has on a number of occasions referred to foreign law in its decisions and the rationale behind considering it.[30] In *Makwanyane*, Chaskalson P explained its use under the interim Constitution:

> "In dealing with comparative law we must bear in mind that we are required to construe the South African [interim] Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own [interim] Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."[31] (Footnote omitted.)

[30] Although similar caution has been expressed in relation to the final Constitution, that has not prevented this Court from seeking guidance from other legal

[28] Section 39(1)(c).

[29] Section 39(1)(b) of the Constitution provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law".

[30] See, for example, *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC); *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*). In Ackermann "Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke" (2006) 80 *Tulane Law Review* 169 at 187-90 a former justice of this Court, Laurie Ackermann, sets out 26 instances where foreign law has been helpful to this Court.

[31] *Makwanyane* id at para 39.

systems. Particularly apposite to this case, a matter involving the law of delict, are the remarks in *K*:

> "Counsel . . . submitted that the conceptual nature of our law of delict, based as it is on general principles of liability, is different from the casuistic character of the law of torts in common-law countries. These differences, he submitted, render reliance on such law dangerous. Counsel is correct in drawing our attention to the different conceptual bases of our law and other legal systems. As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable. Yet in my view, the approach of other legal systems remains of relevance to us.
>
> It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. . . . The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the Courts and our law will benefit. If it is not, the Courts will say so, and no harm will be done."[32] (Footnote omitted.)

[31] Foreign law has been used by this Court both in the interpretation of legislation[33] and in the development of the common law.[34] Without attempting to be comprehensive, its use may be summarised thus:

(a) Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.

[32] Above n 17 at paras 34-5.

[33] See, for example, *Justice Alliance of South Africa v President of the Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) at paras 72-3; *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 45-6; and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 72-8.

[34] *K* above n 17 at paras 34-5.

(b) In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context.

(c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.

(d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.

[32] The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination, it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context.

[33] It is impracticable to attempt to provide a comprehensive overview of foreign law in the body of this judgment.[35] What follows is necessarily selective.

[34] A number of countries recognise the claim of parents for damages arising from negligently caused unwanted pregnancies. The grounds for recognition vary. In some cases it is grounded in the mother's right of choice to have an abortion[36] or right to self-determination,[37] in others by the impact on the parents' patrimonial interests[38] and, in some cases, the issue is regulated by legislation.[39] Where the claim has not been recognised, it appears that the fact that abortions are not allowed may play a decisive role.[40]

[35] Recognition of a child's claim has been less forthcoming. A useful example of a jurisdiction where this claim has been recognised is the Netherlands. The Dutch

[35] The methodology used in obtaining information includes an enquiry directed to the members of the Venice Commission. The Venice Commission (formally known as the European Commission for Democracy through Law) is an organisation of 68 member states – including those considered observers, associate members and of a special status (such as South Africa) – and acts as the Council of Europe's advisory body on constitutional matters. It is composed of constitutional and international law experts, Supreme or Constitutional Court judges and members of national parliaments. Member states may submit constitutional law enquiries to the Venice Commission in order to solicit responses from other member states. The responding member states then set out the position in the law of that country.

This Court received responses from Austria, Chile, Croatia, Czech Republic, Estonia, Germany, Ireland, Netherlands, Norway, Poland, Sweden and Switzerland. Also helpful were numerous articles, especially Giesen "The Use and Influence of Comparative Law in 'Wrongful Life' Cases" (2012) 8 *Utrecht Law Review* 35. The results of this exercise are tabulated in Table A, dealing with the constitutional provisions of the countries and whether a "wrongful life" claim is recognised. Table B summarises the rationale for the recognition or otherwise of both "wrongful birth" and "wrongful life" cases in selected countries. Both tables can be found at the end of this judgment.

[36] In the state of Texas in the United States, for example: *Jacobs v Theimer* 519 S W 2d 846 (Tex 1975) (*Theimer*) at 848.

[37] In the Netherlands: HR 18 March 2005, *Nederlandse Jurisprudentie* 2006, 606 (*Kelly*).

[38] In Germany: (1983) BGHZ 86, 240. See also *Edouard* above n 2 at 587G-588A and 590F.

[39] For example, in Australia, France and the state of Maine in the United States.

[40] For example, in Chile and Ireland.

Hoge Raad (Supreme Court) reasoned that a claim for damages exists, as one must compare the cost of raising the child now, given the fact that the child has been born as she is, with the hypothetical situation that would have ensued if no wrong had been committed – that would be a situation in which these costs would not have been incurred.[41]

[36] The Court also rejected the argument that allowing "wrongful life" claims would permit claims by children born with disabilities against their mothers. The Court reasoned that abortion is a right of the mother if requirements posed by law are fulfilled and thus it cannot be a right of the child on which a claim can be granted, as there can be no duty to the child to terminate the pregnancy.[42] The Court found, however, that a child still needs a claim in addition to the parents' "wrongful birth" claim because otherwise the child would become too dependent on the parents.[43] The Court also found that allowing a claim would help children with disabilities to grow up as comfortably as possible because their unique needs can then be fulfilled.[44]

[37] Conversely, the High Court of Australia has declined to recognise "wrongful life" claims for almost opposite reasons. The majority judgment in *Harriton* reasoned that a "duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the

[41] *Kelly* above n 37.

[42] Id at para 4.13.

[43] Id at para 4.20.

[44] Id at para 4.15.

essential ingredient in the tort of negligence".[45] Crennan J found that allowing a claim would or might lead to the risk of a parent being sued for not having an abortion. This issue, however, was presented as a "further consideration" and thus does not seem to have been of vital importance.[46]

[38] In a lone dissent, Kirby J disagreed:

> "Denying the existence of wrongful life actions erects an immunity around health care providers whose negligence results in a child who would not otherwise have existed, being born into a life of suffering. Here, that suffering is profound, substantial and apparently lifelong. The immunity would be accorded regardless of the gravity of the acts and omissions of negligence that could be proved. The law should not approve a course which would afford such an immunity and which would offer no legal deterrent to professional carelessness or even professional irresponsibility."[47] (Footnote omitted.)

[39] The majority judgment of the Court in *Harriton* is based on the application of the paradox of comparing life with non-life, in relation to a duty of care, establishing harm or damage and the computation of damages. The same reasoning is found in the Court of Appeal's decision in England in *McKay*,[48] where it was found that there are no damages as the "non-existence" or "not-being" of a child cannot be materialised in monetary terms, so no true comparison of "non-existence", on the one hand, and life with certain disabilities, on the other, is possible.[49]

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[45] *Harriton* above n 16 at para 276.

[46] Id at para 250.

[47] Id at para 153.

[48] *McKay and Another v Essex Area Health Authority and Another* [1982] QB 1166 (CA) (*McKay*).

[49] Id at 1181 and 1189.

[40] In Germany the Bundesgerichtshof (Federal Court of Justice) reasoned that there is no direct duty to prevent the birth of a child with a foreseeable disability because human life might appear valueless if one was to accept such a duty.[50]

[41] Is there any conclusion to be drawn from this comparative survey other than the rather melancholy one that similar kinds of arguments are made in different countries to arrive at different outcomes?[51] Yes, there is, and it is one that we should not be surprised to arrive at, given the caution and approach to the use of foreign law that this Court has expressed in past judgments.

[42] The weight given to different arguments in a country is often, if not invariably, determined by the constitutional, political and social context within which the law of that country is determined. For convenience we may call it the "legal culture" of each country.[52] It is from within the perspective of our own legal culture, where all law

[50] See BGHZ 86, 240 (Lipstein translation) above n 38:

> "A direct duty, enforceable by an action in tort, to prevent the birth of a child on the ground that in all probability it will be affected by an infirmity which makes its life appear 'valueless' in the eyes of society or in its own presumed opinion (for which naturally no evidence can be produced) would be alien to the duties sanctioned by the law of tort which are normally centred on the protection of personal integrity."

[51] Compare Giesen above n 35 at 54:

> "What can be concluded from all this? Arguments and insights drawn from comparative law are being used in a wide variety of legal systems, in one way or another, but since the arguments are basically the same everywhere while the solutions are not, it is obvious that these insights are of influence but not decisive in the end."

[52] See Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146. See also Giesen id at 53:

> "This outcome would suggest that comparative law is – and this would indeed be my view, at least in relation to wrongful life claims – in most cases (or better: legal systems) not able to provide the answer to the question of which arguments are valid and (most) convincing, and thus comparative law is neither able to answer, once and for all and for people everywhere, the

must be grounded in constitutional values and where considered respect must be given to the fundamental rights set out in the Bill of Rights, that we must assess the various arguments for and against the recognition of the child's claim here. In this regard the general normative framework of the Constitution and the Bill of Rights, the particular prominence given to the best interests of children within that framework, and the openly normative character of our approach to the issue of wrongfulness in our law of delict, must give guidance in the determination of whether the claim should be recognised.

[43] Contextual factors that stand out in whether a country recognises a claim for "wrongful life" include the country's stance on abortion, the relative emphasis (or lack thereof) that is placed on the rights of children in the judgments on the issue and the type of legal system in place.

[44] As a general trend, countries where abortion is prohibited or limited to circumstances where it may save the life of the mother do not entertain "wrongful life" or "wrongful birth" claims.[53] Countries that significantly restrict a woman's

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> question whether wrongful life claims should be allowed or not. That, of course, is not a surprising conclusion. It has to do with the fact that although the arguments for and against all possible solutions are as such the same everywhere, it is the legal culture in a certain place and at a certain time that determines in the end how a legal system interprets, weighs, rates and values those arguments and thus decides the debate on the topic at hand . . . .
>
> My basic and simple point is thus that legal culture – or more neutral maybe – the legal politics within a (tort) law system decides how the answer to the moral questions involved will sound. Comparative law can provide the basic arguments for and against certain solutions (and thus the basis for justifying the solution reached) and it is extremely useful at that, but it can do no more. The final decision is always one of a 'political' nature."

[53] For example, in Chile abortion is prohibited in all instances and in Ireland abortion is only allowed to save the life of the mother. The courts in both of these countries have never recognised either a "wrongful birth" or "wrongful life" claim.

right to choose also do not recognise the claims.[54] Conversely, the jurisdictions that recognise a claim for "wrongful life" are among those that place the least restrictions on a woman's right to choose.[55]

[45] While the judgments that do not find for a "wrongful life" claim often do not emphasise the interests of children,[56] the judgments that place the greatest emphasis on the rights of children tend to be the ones that find that such a claim exists.[57] For instance, the California Supreme Court placed great emphasis on the best interests of the child in recognising a "wrongful life" claim:

> "Although in deciding whether or not to bear such a child parents may properly, and undoubtedly do, take into account their own interests, parents also presumptively consider the interests of their future child. Thus, when a defendant negligently fails to diagnose an hereditary ailment, he harms the potential child as well as the parents by depriving the parents of information which may be necessary to determine

[54] In 2012, the European Court of Human Rights found for the third time that Poland had violated its obligation to ensure effective access to abortion services because the country lacked a comprehensive legal framework for implementing its abortion law. *P and S v Poland*, no 57375/08, ECHR 2008. See also *RR v Poland*, no 27617/04, ECHR 2011 at para 267 and *Tysiac v Poland*, no 5410/03, ECHR 2007-I. Poland does not recognise a claim for "wrongful life".

[55] The jurisdictions that currently recognise "wrongful life" claims, i.e. Austria, Italy, Netherlands and the states of California, Maine, New Jersey and Washington in the United States, all permit abortion without restriction as to reason, for at least a certain period of time. California, Maine, New Jersey and Washington are among the states in the United States that place the least restrictions on abortions. All four do not require mandatory waiting periods, mandatory ultrasounds or mandatory counselling. California, New Jersey and Washington are also among the 17 states that offer or require health programmes to cover abortions. California and Washington are the only two states that received A+ grades by the NARAL Pro-Choice America Foundation. NARAL is a non-profit organisation in the United States that engages in political action to oppose restrictions on abortion and expand access to abortion.

[56] See, for example, Switzerland and, in Germany, BGHZ 86, 240 (Lipstein translation) above n 38:

> "This Division is not oblivious of the fact that as a result seriously handicapped children remain without financial protection, once the duty of the parents to maintain them comes to an end – as for instance when they die. This must be accepted".

[57] See the Netherlands: *Kelly* above n 37 at para 4.15; California: *Turpin v Sortini* 31 Cal 3d 220; 643 P 2d 954 (Cal 1982) (*Turpin*) at 233-4; and Washington: *Harbeson v Parke-Davis, Inc* 98 Wash 2d 460; 656 P 2d 483 (Wash 1983) (*Harbeson*) at 478-9.

> whether it is in the child's own interests to be born with defects or not to be born at all."[58]

[46] Our Constitution explicitly protects the interests of children.[59]

[47] Finally, the kind of legal reasoning allowed in the legal culture or tradition of a country or legal system may also play a role in determining whether, or to what extent, a child's claim will be countenanced. Our Constitution requires all law, including our common law, to reflect, or be in accordance with, constitutional values and rights. In Germany the Bundesverfassungsgericht (Federal Constitutional Court) has developed the concept of *Drittwirkung* (third party effect), in terms of which constitutional norms have an "irradiating effect" on other areas of the law,[60] and which has influenced our application of constitutional values and rights to private law.[61] In countries where this normative influence of constitutional values is absent or less obvious, practical legal reasoning based on precedent and analogy may be the only method to develop the law to cope with new circumstances. This may perhaps be a more difficult and laborious process.[62]

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[58] *Turpin* id at 233-4. That Court recognised a claim for special damages only.

[59] Section 28.

[60] (1958) BverfGE 7, 198 (*Lüth*).

[61] See *Du Plessis* above n 12 at para 41:

> "The purpose of this perhaps overlong account of constitutional adjudication elsewhere is to see what guidance it might provide in the interpretation of the South African Constitution. In my opinion there is at least one positive lesson to be learnt from the Canadian and German approaches to the problem before us. Both Canada and Germany have developed a strong culture of individual human rights, which finds expression in the decisions of their courts. Yet, after long debate, both judicial and academic, in those countries, the highest courts have rejected the doctrine of direct horizontal application of their Bills of Rights. On this issue, as on the retrospectivity issue, the example of these countries seriously undermines the defendants' contention that anything other that a direct horizontal application of Chapter 3 must result in absurdity and injustice."

[62] *Harriton* above n 16 at paras 58-9. See also para 7:

Potential viability of the child's claim in our law

[48] At this stage it is necessary to remind ourselves that the purpose of this discussion is not to determine finally whether the child here has a claim, but to decide whether our common law may possibly be developed to recognise it. I have already stated that the material on record is insufficient for us to make that final determination, but the Centre's argument, that no amount of further evidence will cure the impossibility of any claim of this kind, necessitates this further enquiry.

[49] That our law, including our common law, must conform to the values of the Constitution and that its development must promote the "spirit, purport and objects of the Bill of Rights" is the given starting point for determining the viability of the child's claim in the circumstances of this case. The particular values[63] and rights that are at the forefront are those of equality,[64] dignity[65] and the right of children to have their best interests considered of paramount importance in every matter concerning them.[66]

> "There is no legislation and no settled judicial authority in Australia to resolve the content of the law. It is therefore the duty of this Court to do so in the usual way. It must proceed by analogous reasoning from past decisions, drawing upon any relevant considerations of legal authority, principle and policy." (Footnote omitted.)

[63] Section 1(a) of the Constitution states that "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" are part of the foundational values of our state.

[64] Section 9(1) provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 9(2) reads, in relevant part: "Equality includes the full and equal enjoyment of all rights and freedoms."

[65] Section 10 provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[66] Section 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child." This right has been recognised as an independent right by this Court in a number of instances, including *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) at

[50] It is as well to clarify at this early stage that when I refer to the right of a child the reference is, for the purpose of determining the contested issue here, to the child at the time of birth. This was the approach adopted by the Supreme Court of Appeal in *Mtati*,[67] a case dealing with the infliction of pre-natal injuries, where Farlam JA held that "the right of a child to sue for pre-natal injuries recognised in this judgment is expressly based on the holding that the right of action only became complete when the child was born alive".[68] Although this is not a case of the infliction of a pre-natal physical injury to the child, there is no reason to deviate from this approach. If the child was not born there would have been no claim.

[51] Our pre-constitutional law of delict is not couched in terms of a duty to protect fundamental rights.[69] It is clear, however, that many of the interests and rights protected under the common law quite easily translate into what we now recognise as fundamental rights under the Constitution. In *Law Society*,[70] this Court held that the abolition by the legislature of the common law claim to sue a driver of a motor vehicle for negligent injury implicated the right enshrined in section 12(1)(c) of the

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para 29 and *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

[67] *Road Accident Fund v Mtati* [2005] ZASCA 65; 2005 (6) SA 215 (SCA) (*Mtati*).

[68] Id at para 39.

[69] In *Mukheiber* above n 2 at para 25 the Supreme Court of Appeal recognised, in principle, that the invasion of a person's right is part of the wrongfulness enquiry:

> "Further, common to all approaches is that unlawfulness, in the relevant sense, is to be found in the violation of the rights of the person suffering damage as a consequence of the act complained of and that whether or not there was a violation of a right of the claimant (or the converse, a dereliction of a duty by the defendant) depends on a number of considerations, including in the final instance, public policy".

[70] *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society*).

Constitution and had to pass muster under the limitations provision of the Bill of Rights.

[52] The existing common law as espoused by the Supreme Court of Appeal in *Stewart* did not consider whether recognition of the child's claim would be in the best interests of the child or take into account the dictates of other rights in the Bill of Rights. It seems possible that, given our Constitution, the child's claim may not be inconceivable. At first blush it might seem that the best interests of the child should be considered in the enquiry, but this direct engagement with the right of children to expect that their best interests will be considered paramount in any matter that concerns them is said to fly in the face of the generally accepted requirements of our law of delict. That contention needs to be examined carefully in relation to each of those requirements.

Harm or loss

[53] In the recent case of *Country Cloud*[71] this Court stated:

> "Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.
>
> Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to

[71] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28 (*Country Cloud*).

> decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this Court in *Loureiro* recently articulated that the wrongfulness enquiry focuses on—
>
> > '*the [harm-causing] conduct* and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'
>
> The statement that *harm-causing conduct* is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: 'that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages', notwithstanding his or her fault."[72] (Emphasis added and footnotes omitted.)

[54] From this it is apparent that "harm-causing conduct" is a prerequisite for the further enquiry into the other elements of delict, namely wrongfulness and fault. Without harm-causing conduct there is no conduct which can be found to be wrongful or committed with the requisite degree of fault.

[55] Harm-causing conduct is normally assessed between two persons, the one causing the harm and the other suffering the harm. Originally, Aquilian liability required that harm to lie only in physical injury to the person or property of someone.[73] The initial problem for the child's claim here – and the paradox – is the absence of physical harm to his person or property.

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[72] Id at paras 20-1.

[73] Fagan "Aquilian Liability for Negligently Caused Pure Economic Loss – Its History and Doctrinal Accommodation" (2014) 131 *SALJ* 288 calls this the "central case of Aquilian liability". Developments beyond this have been referred to as the "extended *actio legis Aquiliae*". See *Mukheiber* above n 2 at para 4.

[56] There is also an absence of physical injury to person or property in the case of the parents' claim. But that problem has been overcome in their case by our law and also, as we have seen, in other countries. How it was done in our law is instructive.

[57] In *Edouard*, Van Heerden JA dealt with the objection, in relation to what he termed a pregnancy claim,[74] that the birth of a child without disabilities cannot be treated as a wrong against his parents:

> "In my view the concise answer to it is that the 'wrong' consists not of the unwanted birth as such, but of the prior breach of contract (or delict) which led to the birth of the child and the consequent financial loss. Put somewhat differently, the Bundesgerichtshof has succinctly said that, although an unwanted birth cannot as such constitute a 'legal loss' (i.e. a loss recognised by law), the burden of the parents' obligation to maintain the child is indeed a legal loss for which damages may be recovered."[75]

[58] The Supreme Court of Appeal explicitly endorsed this approach for delictual claims in *Mukheiber*.[76] It went further and held that the claim in delict was not limited to claims based on socio-economic reasons as the underlying reason for potential choice to terminate the pregnancy:

> "In the present case the Raaths did not wish to have any more children for socio-economic and other family reasons. These are socially acceptable reasons, and it does not lie in the mouth of Dr Mukheiber to say that he is not liable because the Raath's reasons for not wanting a child were not legitimate or *contra bonos mores*".[77]

[74] He objected to calling it a "wrongful birth" claim.

[75] *Edouard* above n 2 at 590E-F. This argument is valid, perhaps even more strongly, where the child is born with a disability.

[76] Above n 2 at para 46.

[77] Id at para 49.

[59] The significance of *Edouard* and *Mukheiber* for present purposes is that they recognised that the legal harm lay not in the physical injury to the person or property of the parents, but in the additional financial burden that the parents had to carry as a result of the birth of the child. This recognition was attained under the common law Aquilian action without any reliance on constitutional values or rights. Today, having regard to the fundamental right of everyone to make decisions concerning reproduction[78] and to security in and control over one's body,[79] the harm may simply be seen as an infringement of the right of the parents to exercise a free and informed choice in relation to these interests.[80] But the additional financial burden relied upon in *Edouard* and *Mukheiber* as the "legal loss" remains.

[60] That the harm in the misdiagnosis was initially directed at the mother or parents, and that its consequences manifested in relation to the child only upon birth, might provide both a solution to the problem of "harm-causing conduct" as a pre-requisite for delictual liability towards the child, as well as an inherent limitation to the nature and extent of that liability.

[61] The harm to the parents, on the authority of *Edouard* and *Mukheiber*, manifested itself only when the children were born and the unwanted financial burden to the parents became apparent, apart from the loss of personal choice that is now

[78] Section 12(2)(a) of the Constitution.

[79] Section 12(2)(b) of the Constitution.

[80] Compare Roederer "Wrongly Conceiving Wrongful Conception: Distributive vs Corrective Justice" (2001) 118 *SALJ* 347 at 363 and Fagan above n 73 at 308.

evident under the Constitution. Similarly, the harm or loss, in the sense of the burden to the child, may exist and become apparent only if the parents are unable to pursue their own claim. Children, unlike parents, suffer no constitutionally protected loss of personal choice. But the Constitution explicitly requires that their best interests are of paramount importance in every matter concerning them.

[62] When a medical expert negligently fails to inform the mother that her child will be born with a congenital disability, this deprives the mother of the opportunity to make an informed choice to terminate the pregnancy. If the child is then born with a congenital disability and the parents suffer patrimonial loss in the form of an unwanted financial burden in maintaining the child, our law recognises that the mother or parents have a claim in delict against the medical expert. Recognising a child's claim asks us to take a step further. What is the position if, for some reason, the mother or parents fail to make that claim against the negligent medical practitioner?

[63] The further step does not suddenly make the problem metaphysical.[81] It remains a practical legal issue. Who should bear the harm or loss now, the child or the medical expert? Given that the Constitution stipulates that the best interests of the child are of paramount importance and the fact that the medical expert will not be liable for anything more than he would have been liable to the mother or parents, it is quite conceivable that a court may, when all the facts are known to it after a trial,

[81] As intimated in *Stewart* above n 3 at para 11.

conclude that the medical expert should be liable to the child for the same loss for which she would have been liable to the parents.

[64] In South Africa, in addition to section 28(2) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interests of the child in all matters involving the child. As upper guardian of all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children.[82] Notably, in *Mpofu*[83] this Court endorsed the approach in *Kotze v Kotze*:[84]

> "[T]he High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties."[85]

[65] This disposes of the prior objection that there cannot conceivably be harm-causing conduct in relation to the child's claim. The misdiagnosis could arguably cause harm in the sense of a burden on the child in circumstances where the parents, who have their own claim, are unable to pursue it against the medical expert. That may have an impact on what is of paramount importance in determining the best interests of the child. Recognition of this kind of harm may not sit comfortably with

[82] See, for example, *AD and Another v DW and Others* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 59 and fn 65 and *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708J-709A.

[83] *Mpofu v Minister for Justice and Constitutional Development and Others* [2013] ZACC 15; 2013 (9) BCLR 1072 (CC) (*Mpofu*).

[84] 2003 (3) SA 628 (T).

[85] Id at 630G and endorsed by this Court in *Mpofu* above n 83 at para 21 and fn 20.

existing notions of harm in our law of delict. One way of dealing with this difficulty may lie in viewing this burden on the parents and the child as a single one, in the sense that it is not cumulative. The medical expert may then be obliged, if wrongfulness and fault are established in relation to the harm or loss, to pay damages for only this harm or loss. If the parents pursue the claim in their own names it need only pay damages to them. If they do not, then it may be liable to the child for no more than it would have been liable to the parents.[86] The importance of this lies in distinguishing this kind of case from instances of joint wrongdoers or contributory negligence. There is only one wrongdoer, the person who made the culpable misdiagnosis, and the loss or harm lies in the burden imposed on the parents and, if they do not claim, then possibly on the child.

[66] Even if the conclusion is reached that the limits of our law of delict will be stretched beyond recognition for harm of this kind to be recognised within its niche, our Constitution gives our courts the liberty to develop motivated exceptions to common law rules or even recognise new remedies for infringement of rights.[87] For

[86] Some commentators claim that the law of delict (or torts) is, or should be, based on corrective, not distributive, justice. The distinction comes from Aristotle. Corrective justice must be understood on an "arithmetic" model of addition and subtraction between two holders. One has gained and the other has lost. The question is whether and how the transaction should be reversed or corrected between them. Distributive justice must be understood on the "geometric" model of division. There are several holders involved and the question is how to divide gains or losses among them. The distribution is not done on the basis of subtraction and addition, but according to the needs of each holder. See, for example, Weinrib *Corrective Justice* (OUP, Oxford 2012) and Gardner "What is Tort Law for? Part 1. The Place of Corrective Justice" (2011) 30 *Law and Philosophy* 1. Fagan above n 73 at 313 also argues that our law of delict is grounded in corrective justice. I am not aware that the distinction has been drawn in explicit terms in our case law and I am not sure that it should. It might add an unnecessary layer to the general principles of Aquilian liability, which on their own terms already require that only patrimonial damages may be claimed for a wrong done by one to another. The claim for intangible, non-patrimonial loss for pain and suffering and loss of amenities of life under our law is historically *sui generis* and limited in its scope and application. See [77].

[87] See, in relation to the possibility of developing the common law to include constitutional damages, *Fose* above n 12 at paras 58-61.

present purposes the point remains the same: the child's claim is not necessarily inconceivable under our law.

Wrongfulness

[67] In addition to the general normative framework of constitutional values and fundamental rights, our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the reasonableness of imposing liability, even on an assumption that all the other elements of delictual liability – harm, causative negligence and damages – have been met, on grounds rooted in the Constitution, policy and legal convictions of the community.[88] As it was put by Khampepe J in *Country Cloud*:

> "[T]he element of wrongfulness provides the necessary check on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated."[89]

[68] For the purposes of determining, in general terms, the possibility of a claim for damages by a child where a pre-natal misdiagnosis has been made regarding the potential existence of a medical condition or congenital disability manifesting after birth, it is necessary to consider those particular policy and legal factors that could be relevant to the wrongfulness enquiry that are said to make this kind of claim impossible. I have already dealt with the impossible paradox argument, as well as

[88] See *Country Cloud* above n 71 at paras 20-1, quoted at [53].

[89] Id at para 25.

with the question of the factual existence of harm or loss, and will say nothing further about them.

[69] Part of the established wrongfulness enquiry is to determine whether there has been a breach of a legal duty not to harm the claimant, or whether there has been a breach of the claimant's rights or interests.[90] Under the Constitution children have the right to have their best interests be given paramount importance in every matter concerning them. That includes a pre-natal medical expert misdiagnosis that results in the child being born with a disability. When parents do not claim for the medical expenses in those circumstances, as they are entitled to, the choice is to let the loss lie with the child or to burden the medical experts with the loss that they would have been legally liable for to the parents anyway. A conceivable option is that the best interests of the child may require that the loss should not in those circumstances lie with the child. Translated into legal terms, that would mean that there may be a legal duty not to cause that loss. Failure to do so might breach that duty and infringe the child's right under section 28(2) of the Constitution.

[70] A further general objection is that of the possibility of indeterminate liability. That is a bogey often raised when the law needs to cater for new circumstances and one that almost always fails to materialise in the wake of innovation. The answer here

[90] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 53; *Hirschowitz Flionis v Bartlett and Another* [2006] ZASCA 23; 2006 (3) SA 575 (SCA) at paras 27-8; and *Mukheiber* above n 2 at para 25.

may be that the liability is determinate: either the parents or the child may claim, not both, or cumulatively.

[71] May this open the floodgates for persons with disabilities to sue their parents? Not on the basis of the limited liability that is at issue here. It would be a claim against a single other wrongdoer by either the parents or, if they fail to exercise it, by the child. Recognition of the child's claim against the single wrongdoer may not be dependent on any kind of wrongdoing against the child by the parents. In addition, the claim is predicated on the assumption – which needs to be proved in due course at the trial – that the mother would have chosen an abortion had she been given the proper diagnosis of potential disability before birth. For a separate claim against the parents or mother, the child would have to show that it was wrongful and negligent for the mother not to have an abortion while being aware of the disability before giving birth. This might prove difficult having regard to the parents' (particularly the mother's) right to a free and informed choice in relation to reproduction.

[72] Lastly, for present purposes, is the argument that recognition of the child's claim would somehow infringe upon his dignity because recognising a claim for damages would imply that life with a disability is worth less than life without one. This is not necessarily the case. Allowing this claim might be conceived of as simply helping a child to cope with a condition of life she was born with and making it possible for that child to live as comfortably as possible in the circumstances. It might

be argued that this is no different from allowing claims for damages where physical injury has caused subsequent disability, an everyday occurrence in our courts.

[73] There is no general or absolute ground for concluding that, in accordance with our law's test for wrongfulness, it would be so unreasonable to impose liability in respect of the child in the circumstances outlined here as to make that possibility inconceivable.

Causation

[74] The pre-natal misdiagnosis of a medical condition or congenital disability is not the cause of the condition or disability itself. But if the mother would have chosen to undergo an abortion had she been aware of the correct diagnosis, then birth would not have ensued. But for the wrong diagnosis, the birth would not have occurred. Factual causation, in the sense of the misdiagnosis being part of the chain of events that led to the birth, may then be established.[91] Policy considerations may then still prevent establishing legal causation, but that is also an issue that can only properly be determined when all the facts are established at a trial.

Negligence

[75] Negligence will still have to be proved in accordance with general principles. Recognition of a child's claim does not have any impact on the normal application of those principles to the facts of each case.

[91] See *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 38 for our law's double test for causation: factual and legal.

Damages

[76] Our law already recognises the parents' claim for the recovery of patrimonial damages in the form of actual and anticipated expenses for the maintenance of the child.[92] As indicated in this judgment, the child's claim may in that regard be co-extensive with that of the parents. There may, however, be reasons why what is good for the parents may not also be good for the child.

[77] For the limited purposes of this judgment, namely determining only the bare bones or parameters of a child's potential claim, it is not necessary to go further and determine whether the child may have a claim that goes beyond patrimonial damages in the form of actual expenses. Compensation for intangible loss does not fall within the general principles of Aquilian liability. A claim for pain and suffering and loss of amenities of life is recognised in our law as a claim of a special kind (*actio sui generis*) and a requirement of this action is the infliction of a bodily injury on the claimant.[93] It is not necessary to determine whether our common law is in need of further development to allow a child also to claim compensation for that kind of intangible loss. Nor is it necessary for us to determine the extent or limit of actual patrimonial expenses that may be sought in a child's claim. All that should be left, if needed, for determination by the High Court.

[92] See *Mukheiber* above n 2 at paras 51-2; *Edouard* above n 2 at 590E-G; and *Friedman* above n 2 at 1140B-C.

[93] See *Edouard* id at 595H.

Conclusion and remedy

[78] The particulars of claim and the exception based on it do not traverse an essential part of determining whether a child's claim may exist, namely the constitutional injunction that a child's best interests are of paramount importance in any matter concerning the child. Determining that involves both factual and legal considerations, matters not capable of being decided appropriately on exception.[94] This was not the proper procedure to determine the important factual, legal and policy issues that may have a decisive bearing on whether the common law should be developed to allow the child's claim to be accommodated on the particular circumstances of this case.

[79] In upholding the exception, the High Court also ordered the dismissal of the claim. This was unwarranted. The upholding of an exception does not inevitably carry with it the dismissal of the action.[95] Leave to amend the particulars of claim should have been granted.

[80] That might have been a sufficient but limited ground for upholding the appeal and allowing an amendment of the particulars of claim. But in the end the case is being determined on wider grounds, namely that a child may have a claim for patrimonial damages against a medical expert in circumstances where a pre-natal misdiagnosis of a medical condition or congenital disability deprived the child's

[94] Compare *Minister of Police v Mboweni* [2014] ZASCA 107 at para 10.

[95] *Constantaras v BCE Foodservice Equipment (Pty) Ltd* [2007] ZASCA 86; 2007 (6) SA 338 (SCA) at paras 30-1; *Trope and Others v South African Reserve Bank* [1993] ZASCA 54; 1993 (3) SA 264 (A) at 269G-I; and *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* [1993] ZASCA 4; 1993 (2) SA 593 (A) at 602C-D.

mother of the informed choice to abort and in the event that the child's parents do not exercise their own claim for those patrimonial damages. The narrow point of the exception has, as it were, been rendered irrelevant. Our order will reflect this.

[81] It must be emphasised that all this judgment determines is that a child's claim may potentially be found to exist. Whether it does so exist and in what form, needs to be decided by the High Court. The High Court must still determine, if the claim is properly reformulated in delict, whether harm, wrongfulness, negligence, causation and damages have been established. All this judgment lays down is that this must be done within our constitutional imperative that the decision must accord with constitutional rights and values, which must include considering the best interests of the child. This also applies to any other manner in which the claim may be reformulated.

Costs

[82] The applicant has been substantially successful in the appeal and that success should carry the costs on appeal. I do not, however, consider that the applicant should be awarded the costs in the High Court. The exception is partly explained and justified by the manner in which the child's claim was formulated and the existing state of the law at the time. Each party should bear its own costs in the High Court, a result that will be achieved by making no order as to costs in the High Court.

Order

[83] The following order is made:

1. Leave to appeal is granted.

2. The appeal succeeds with costs, including the costs of two counsel.

3. The order of the High Court is set aside and replaced with:

"The plaintiff is granted leave to amend the particulars of claim within 14 days."

Table A		
Country	**"Wrongful life" claim recognised?**	**Relevant constitutional provisions**
Australia	No	The Australian Constitution has no bill of rights.
Austria	Yes	Article 7(1): "No one shall be discriminated against because of his disability. The Republic . . . commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life."*
Belgium	No	Article 22 determines that everyone has the right to respect for his or her private life and for his or her family life. Article 22 *bis* stipulates that every child has the right to respect for his or her "moral, physical, mental and sexual integrity."* Article 23 protects the right to lead a life in conformity with human dignity.
Canada	No	The Canadian Charter of Rights and Freedoms part I section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
Czech Republic	Undecided	The preamble states: "We, the citizens of the Czech Republic . . . [are] resolute to build, protect and develop the Czech Republic in the spirit of the inalienable values of human dignity".*
Chile	No	Article 1: "Persons are born free and equal in dignity and rights. The family is the basic core of society. . . . It is the duty of the State to safeguard national security, to provide protection to the people and the family, to promote the strengthening of this". Article 19: "The Constitution guarantees to all persons . . . [t]he right to life and to the physical and psychological integrity of the person . . . [and] [t]he law protects the life of those about to be born."*
Croatia	No	Article 21: "Each human being has the right to life." Article 35: "Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed." Article 63: "The state shall protect maternity, children and youth, and shall create social, cultural, educational, material and other conditions promoting the achievement of the right to a suitable life." Article 64: "Parents shall bear responsibility for the upbringing, welfare and education of their children, and they shall have the right and freedom to make independent decisions concerning the upbringing of their children. Parents shall be responsible for ensuring the right of their children to the full and harmonious development of their personalities. Physically and mentally disabled and socially neglected children shall be entitled to special care, education and welfare. Children shall be obliged to take care of their elderly and infirm parents." Article 65: "Everyone shall have the duty to protect children and infirm persons." Article 70: "Everyone shall have the right to a healthy life."*
England	No	England has no single constitutional document. English constitutional law is instead within statutes, court judgments, works of authority and treaties. Section 1(2) of the Congenital Disabilities (Civil Liability) Act 1976 denies children born after its passing a cause of action in "wrongful life". The Law Commission's comment is as follows: "Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action of damages, is, we think, a real one." See Law Commission Report on Injuries to Unborn Children, No 60, Cmnd 5709 (1974) at para 89. See also paras 46-7.
Estonia	Undecided	Article 10: "The rights, freedoms and duties set out in this chapter do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law." Article 16: "Everyone has the right to life. The right to life is protected by the law. No one may be arbitrarily deprived of his or her life."*
France	No	For social rights, the current Constitution refers to the preamble to the 1789 Declaration of the Rights of Man and the Citizen and the preamble to the 1946 Constitution.
Germany	No	Article 1(1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Article 2(2): "Every person shall have the right to life and physical integrity." Article 6(2): "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty." Article 6(4): "Every mother shall be entitled to the protection and care of the community."*
Greece	No	Article 2(1): "Respect and protection of the value of the human being constitute the primary obligations of the State." Article 5(5): "All persons have the right to the protection of their health and of their genetic identity. Matters relating to the protection of every person against biomedical interventions shall be specified by law." Article 21: "Families with many children, disabled war and peace-time veterans, war victims, widows and orphans, as well as persons suffering from incurable bodily or mental ailments are entitled to the special care of the State. . . . The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy." Article 21(6): "People with disabilities have the right to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the Country."*
Hungary	No	Article II: "Human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception." Article III: "It shall be prohibited to perform medical or scientific experiment on human beings without their informed and voluntary consent. . . . Practices aimed at eugenics, the use of the human body or its parts for financial gain, as well as human cloning shall be prohibited." Article VI(1): "Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected." Article XV(5): "By means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities." Article XVI(1): "Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development."*
Ireland	No	Article 40(3)(3): "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."
Israel	No	Israel's Basic Law: Human Dignity and Liberty declares fundamental human and civil rights, which are based on human value, sanctity of life and freedom.
Italy	Yes	Article 30: "It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock. In case of incapacity of the parents, the law shall provide for the fulfilment of their duties. The law shall ensure to children born out of wedlock every form of legal and social protection, that is compatible with the rights of the members of the legitimate family. The law shall lay down the rules and limitations for the determination of paternity." Article 32: "The Republic shall safeguard health as a fundamental right of the individual and as a collective interest and shall guarantee free medical care to the indigent. No one may be forcefully submitted to medical treatment unless provided for by law. In no case may the law violate the limits imposed by respect for the human being."*

Table A		
Country	**"Wrongful life" claim recognised?**	**Relevant constitutional provisions**
Netherlands	Yes	Article 11 provides for a right of the inviolability of the body. This right is a subspecies of the general right to personal integrity in Article 10. Article 11 protects against violations like forced medical experiments, corporal punishment, torture and mutilation. It does not end with death and thus demands a legal basis for organ donation.
Poland	No	Article 30: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable." Article 38: "The Republic of Poland shall ensure the legal protection of the life of every human being." Article 47: "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life." Article 68: "Everyone shall have the right to have his health protected. . . . Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age." Article 69: "Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication."*
Portugal	No	Article 1: "Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society." Article 24(1): "Human life shall be inviolable". Article 64: "Everyone shall possess the right to health protection and the duty to defend and promote health. . . . The right to health protection shall be fulfilled . . . [b]y creating economic, social, cultural and environmental conditions that particularly guarantee the protection of childhood, youth and old age". Article 67(2): "In order to protect the family, the state shall particularly be charged with . . . respect for individual freedom, guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organising such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned . . . [and] [r]egulating assisted procreation in such a way as to safeguard the dignity of the human person". Article 69(1): "With a view to their integral development, children shall possess the right to protection by society and the state, especially from all forms of abandonment, discrimination and oppression and from the abusive exercise of authority in the family or any other institution." Article 71: "Citizens with physical or mental disabilities shall fully enjoy the rights and shall be subject to the duties enshrined in this Constitution, save for the exercise or fulfilment of those for which their condition renders them unfit. . . . The state shall undertake a national policy for the prevention of disability and the treatment, rehabilitation and integration of disabled citizens and the provision of support to their families, shall educate society and make it aware of the duties of respect and solidarity towards such citizens, and shall ensure that they effectively enjoy their rights, without prejudice to the rights and duties of their parents or guardians."*
Singapore	No	Article 9(1): "No person shall be deprived of his life or personal liberty save in accordance with law."*
South Korea	No	Article 10: "All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." Article 17: "All citizens shall enjoy inviolable right to privacy of life." Article 34: "All citizens shall be entitled to a life worthy of human beings. . . . Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act." Article 36: "The State shall endeavor to protect mothers. . . . The health of all citizens shall be protected by the State."*
Switzerland	No	Article 7: "Human dignity must be respected and protected." Article 8(4): "The law shall provide for the elimination of inequalities that affect persons with disabilities." Article 10(1): "Every person has the right to life." Article 11: "Children and young people have the right to the special protection of their integrity and to the encouragement of their development. . . . They may personally exercise their rights to the extent that their power of judgment allows." Article 12: "Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living." Article 119: "Human beings shall be protected against the misuse of reproductive medicine and gene technology. . . . The Confederation shall legislate on the use of human reproductive and genetic material. In doing so, it shall ensure the protection of human dignity, privacy and the family and shall adhere in particular to the following principles: . . . the procedure for medically-assisted reproduction may be used only if the infertility or the risk of transmitting a serious illness cannot otherwise be overcome, but not in order to conceive a child with specific characteristics or to further research. . . . [T]he genetic material of a person may be analysed, registered or made public only with the consent of the person concerned or if the law so provides." Article 120(1): "Human beings and their environment shall be protected against the misuse of gene technology."*
United States	Yes, but only in California, Maine, New Jersey and Washington	The Fourteenth Amendment of the United States Constitution contains the Due Process Clause, which prohibits the states from "depriv[ing] any person of life, liberty, or property, without due process of law".
*Non-authoritative translations		

Table B				
Country	**"Wrongful birth" claim recognised?**	**Rationale in "wrongful birth" cases**	**"Wrongful life" claim recognised?**	**Rationale in "wrongful life" cases**
Australia	Yes	Parents are limited in the amounts they may claim for "wrongful birth". Parents may only claim for recovery of additional costs associated with rearing or maintaining a child with a disability that arise by reason of the disability. See, for example, the Civil Liability Act 2002 (NSW), sections 70-1.	No	The Australian High Court reasoned that, "[a] duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence." *Harriton* above n 16 at para 277. Crennan J, for the majority, found that allowing a claim would or might lead to the risk of a parent being sued for not having an abortion. This issue is, however, presented as a "further consideration" and thus does not seem to have been of vital importance. Id at para 250.
Czech Republic	Yes	The Regional Court in Brno (judgment file No 24 Co 66/2001) recognised the action and ordered a hospital to pay damages for the non-pecuniary loss to a mother who gave birth to a healthy child despite her wish to have an abortion. Stressing the right of a mother to decide about her unborn child, the High Court in Olomouc upheld the Regional Court decision in its decision No 1 Co 192/2008.	Undecided	According to the Venice Commission response, no court has ever adjudicated such a claim.
Chile	No	See "wrongful life" rationale.	No	In Chilean legislation a "wrongful life" claim is not admissible since abortions, in all cases, are forbidden by law.
England	Yes	In upholding a "wrongful birth" claim, the Court of Appeal found that maintenance costs were offset by the claimants' savings of the costs of maintaining other children that they had decided, in consequence of their disabled child's birth, not to have. According to Mann LJ, reaching the same conclusion as the majority, the defendants' negligence was not causative of the maintenance costs. Had the defendants not been negligent, the pregnancy would have been terminated and the mother would have tried to get pregnant again and would have probably succeeded. *Salih v Enfield Health Authority* [1991] 3 All ER 400.	No	The Court reasoned that there are no damages as the "non-existence" or "not-being" of a child cannot be materialised in monetary terms, so no true comparison of "non-existence", on the one hand, and life with certain disabilities, on the other, is possible. *McKay* above n 48.
Estonia	Undecided	It is debatable and highly uncertain that the Law of Obligations Act recognises "wrongful birth" claims. According to article 127(2), damage shall not be compensated for to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose. One could argue that the aim of a contract for the provision of health-care services, is, first and foremost, the monitoring and securing of the health of the mother and, second, the health of the embryo or baby, not the possible genetic deficiencies of an unborn child.	Undecided	The Estonian Law of Obligations Act does not recognise any ground for claiming damages for "wrongful life". See chapter 53 ("Unlawful causing of damage"), in particular, for example, article 1045 ("Unlawfulness of causing of damage"). The Act does not see a life with disability as either unlawful damage or damage caused in the frames of a contract for provision of health care services.
Germany	Yes	In Germany, the general view is that in a pregnancy action, the cost of maintenance of an unwanted child may be recovered, regardless of whether the child is healthy or not.	No	The Bundesgerichtshof (Federal Court of Justice) reasoned that there is no direct duty to prevent the birth of a child with a foreseeable disability because human life might appear valueless if one was to accept such a duty. See BGHZ 86, 240 above n 38.

Table B				
Country	**"Wrongful birth" claim recognised?**	**Rationale in "wrongful birth" cases**	**"Wrongful life" claim recognised?**	**Rationale in "wrongful life" cases**
Netherlands	Yes	The Dutch Hoge Raad (Supreme Court) reasoned that the right of the mother to decide to end her pregnancy is derived from her right to self-determination. When the mother is prevented from effectuating the right to decide to end her pregnancy of a child with a severe disability as the result of an omission of an obstetrician, this is an infringement of the right to self-determination. Such a severe infringement of a fundamental right is considered a violation of the person giving rise to compensation of non-pecuniary loss. The same holds true for the father. Further, the omission is a breach of contract in relation to the mother and it is also unlawful towards the father because of his involvement in the family. The fact that this omission caused the loss indirectly does not mean that the loss cannot be attributed to the obstetrician as a consequence of his fault. See *Kelly* above n 37.	Yes	The Dutch Hoge Raad (Supreme Court) reasoned there is loss as one can and must compare the cost of raising the child now, given that the child has been born as is, with the hypothetical situation that would have ensued if no wrong had been committed. That would be a situation in which these costs would not have been caused. *Kelly* above n 37 at para 4.15. The Court rejected the argument that allowing "wrongful life" claims permits claims by children with disabilities against their mothers. The Court reasoned that abortion is a right for the mother if requirements posed by law are fulfilled and thus it cannot be a right for the child on which a claim can be granted as there can be no duty to the child to abort. Id at para 4.13. The Court found that a child needs a claim in addition to the parents' "wrongful birth" claim because otherwise the child would become too dependent on the parents. Id at para 4.20. The Court also found that allowing a claim would help these children with disabilities to grow up as comfortably as possible. Id at para 4.15.
United States	Yes (majority)	The first case that held a "wrongful birth" action was a well-founded claim was *Theimer* above n 36 in Texas. Since that decision, numerous "wrongful birth" claims have been allowed in the United States. The Due Process Clause of the United States Constitution has been interpreted to include a substantive component, from which certain fundamental, individual rights may be recognised. These include the right to privacy, on which the decisions in *Roe v Wade* 410 US 113 (1973) (*Roe*) and *Planned Parenthood v Casey* 505 US 833 (1992) are predicated. Those decisions recognise a woman's right to terminate a pregnancy within a certain time period. No state had recognised a "wrongful birth" claim before *Roe*.	Yes, but only in California, Maine, New Jersey and Washington	California, New Jersey and Washington courts have recognised "wrongful life" claims based upon public policy grounds. *Turpin* above n 57; *Procanik v Cillo* 97 NJ 339; 478 A2d 755 (NJ 1984) (*Procanik*); and *Harbeson* above n 57. Maine has provided for "wrongful life" claims through legislation. Section 2931 of the Maine Health Security Act, Title 24 of 2013. New Jersey, although it initially refused to recognise a claim for "wrongful life", eventually recognised this claim (in certain circumstances) in *Procanik*, in part based on a woman's right to choose as recognised in *Roe*. Likewise, the first California case to recognise a "wrongful life" claim was based in part upon *Roe*. *Curlender v Bio-Science Laboratories* 106 Cal App 3d 811 (Cal Ct App 1980).

For the Applicant:	R P Hoffman SC and N C Lawrenson instructed by A Batchelor & Associates.
For the Respondent:	S Burger SC and G van der Spuy instructed by Bowman Gilfillan Inc.