Hogan Lovells

Life goes on

30 June 2014

When practicing, professionals often expose themselves to professional indemnity claims. In an effort to protect oneself against these claims, it is essential to understand from where they can originate.

Therefore, it is exceptionally important for medical practitioners in particular, to be aware that they can be sued for the birth of an unwanted child. The birth of an unwanted child could result in a claim for wrongful birth, wrongful pregnancy, or the controversial topic of wrongful life. The South African courts have been exposed to limited cases regarding wrongful life claims. The most recent case handed down in the Western Cape High Court of *H v The Kingsbury Foetal Assessment Centre*, has again brought wrongful life claims to the fore. When examining the claims that result in the birth of an unwanted child, it is easier to examine wrongful pregnancy, wrongful birth and wrongful life together.

Knowing the difference

In the 1996 case of *Friedman v Glicksman*, Judge Goldblatt provided definitions for wrongful pregnancy, wrongful birth and wrongful life.

Wrongful pregnancy claims result where parents sue a medical practitioner on their own behalf for damages due to a failed sterilisation or abortion procedure that resulted in the birth of an unwanted, healthy child. The damages claimed would be that in relation to the pregnancy only, that is the costs associated with the pregnancy and the non-patrimonial damages associated with it, for example the pain and the emotional trauma experienced.

Wrongful birth is where the parents sue the medical practitioner on their own behalf for damages as a result of the medical practitioner failing to properly diagnose the defects or advise the parents of the potential birth defects of a child, resulting in the birth of an unwanted, disabled child. The parents allege that had they been properly informed they would have terminated the pregnancy. The medical practitioner is then sued for damages relating to the maintenance of the child.

Wrongful life claims are similar to those of wrongful birth, however, in wrongful life suits the parents of the disabled child sue the medical practitioner on behalf of the disabled child for damages as a result of the disabled child’s birth. The child becomes the plaintiff, as opposed to his or her

parents. The child argues that had it not been for the insufficient advice provided by the medical practitioner, the child would not have had to endure the pain and suffering related to his or her disability, as the mother would have terminated the pregnancy.

Currently, South African law only recognises actions for wrongful pregnancy and wrongful birth suits. Wrongful life is not a recognised claim and is seen to be a controversial point for our courts still to decide upon.

Development of cases

The first instance where the matter of wrongful pregnancy was decided on was in 1990, in the Appellate Division case of *Administrator of Natal v Edouard*. Mr Edouard sued the Administrator of Natal for breach of contract. Mr and Mrs Edouard had entered into a contract whereby the doctor would sterilise Mrs Edouard by way of tubal ligation in order to prevent the couple from falling pregnant with a fourth child they could not afford. The procedure was not performed correctly and Mrs Edouard gave birth a year later. Mr Edouard sued for both the cost of maintaining his fourth child until the age of 18, and for the pain and discomfort experienced by his wife during the fourth pregnancy. While the court did not allow the claim for general damages (for pain and suffering), it found in favour of Mr Edouard and ordered the Administrator to pay the costs of maintaining the child.

The first case involving wrongful birth and wrongful life that was heard by a South African court was in 1996 in the matter of *Friedman v Glicksman*. Mrs Friedman consulted Dr Glicksman, a specialist gynaecologist, when she was pregnant to determine whether her child had any risk of congenital defects. Dr Glicksman advised that her risk was no higher than normal. Mrs Friedman carried to full term and gave birth to a severely disabled child. Mrs Friedman sued Dr Glicksman in her personal capacity stating that had she been advised properly, she would have terminated the pregnancy. Mrs Friedman sued Dr Glicksman in her personal capacity for wrongful birth for damages resulting from the future medical expenses, the cost of maintaining and supporting her child, and all other special expenses related to her child's disability. Mrs Friedman also claimed in her representative capacity for her child for general damages (relating to pain and suffering experienced by the child) and loss of future earning capacity. Judge Goldblatt stated that "...it would be contrary to public policy for Court to have to hold that it would be better for a party not to have an unquantified blessing of life rather than to have such life albeit in a marred way." Furthermore the Judge stated that "The defendant was in no way responsible for the child's disabilities and yet he is being asked to compensate the child for such disabilities".

The court allowed the wrongful birth claim but denied the claim for wrongful life, indicating that there is no legal basis in South Africa for wrongful life claims to be recognised. Judge Goldblatt therefore allowed the claim for wrongful birth as claimed by Mrs Friedman, as Dr Glicksman breached his contractual duty towards Mrs Friedman by failing to properly advise her of her child's congenital deficits, thereby causing harm to Mrs Friedman's financial situation as she would now be responsible for more expenses and treatments relating to her child's disabilities. The judge then disallowed the claim for wrongful life, as claimed by Mrs Friedman on behalf of her child, as Judge Goldblatt recognised that for the child's claim, he would have to accept the child's

argument that had she (the child) not existed, she would have been in a better position as she would not have suffered as she currently does as a result of her birth. The judge was not willing to make this ruling.

The case of *Stewart and another v Botha and another*, which was decided in the Supreme Court of Appeal, set a precedent in South African law regarding wrongful life suits. Mrs Stewart consulted her general medical practitioner and gynaecologist while pregnant with her son. Both doctors failed to detect any deformities and Brian Stewart was born with spina bifida. Mrs Stewart claimed that had she been aware of the child's disabilities, she would have terminated the pregnancy. She therefore claimed in her personal capacity for damages arising out of Brian's disability including past and future medical expenses, the cost of special schooling and the cost of Brian's maintenance. Mr Stewart sued on behalf of the child for the same damages.

The Supreme Court of Appeal upheld the High Court's decision in finding that Brian's claim was based on a deeply existential question, as whether, from the child's perspective, his non-existence would be favoured over his existence with disabilities. Acting Judge of the Appeal Snyder stated that in order for the child's claim for wrongful life to succeed, the court would have to make a finding that his non-existence would have been the preferable option. It was held that in terms of South African law, the purpose of awarding an injured party damages is to put that injured person back in the position that they would have been had the negligence not have occurred. In this case, had the negligence not have occurred, the child would not have been born and how can this be quantified. Mrs Stewart's claim was granted whereas the child's claim was therefore dismissed.

The latest judgment, handed down in April 2014, in the matter of *H v The Kingsbury Foetal Assessment Centre (Pty) Ltd*, the court relied on the Friedman and Stewart cases and again found that no action exists for wrongful life suits in South Africa. This case was instituted by H, the mother of M, on M's behalf for damages. When H was pregnant, she went for an assessment to determine whether her foetus was at risk of any congenital defects. The medical practitioners attending to H failed to correctly interpret the results of her NT scan when the results clearly indicated that H's child was at high risk of Down Syndrome. M was born with Down Syndrome and permanent cardiac defects.

The negligent conduct of the medical practitioners resulted in M being born rather than aborted. The plaintiff's argument to the well-established cases of Friedman and Stewart was that South African public policy has developed and the convictions of the community have changed since those two judgments were handed down, to the extent that public policy considerations would allow for a claim for wrongful life to be granted. Judge Baartman disagreed and found that "...public opinion continues to be influenced by the remarkable resilience in overcoming enormous odds displayed by many disabled persons in all walks of life...".

The claim was dismissed. Judge Baartman, rightfully, relied largely on the Stewart case that was decided upon in the Supreme Court of Appeal. The public policy argument, as relayed by Acting Judge Snyder, was that the court is called upon in a delictual case, not to punish the wrongdoer (such as the medical practitioner who failed to advise the mother of the foetus' congenital

defects), but to award damages to the injured party to place that party in the position they would have been had the damage not occurred. Therefore, in a wrongful life claim, the court would have to award the child damages that would place the child back in the position that it would have been had the doctor not been negligent, and that position would be that the child would not have been born.

While the court in *H v The Kingsbury Foetal Assessment Centre* did not explain the public policy considerations that were taken into account, the court would be hesitant to take the standpoint that a disabled child should not have been born, purely based on the fact that the child has certain disabilities. The repercussions from the disabled community and society as a whole would be severe. The court would not want to be seen to be equating the life of a disabled child to that of a child who does not have disabilities, because how can the court state that one life is greater than another. Although South Africa is seen to be a progressive society, and public policy has changed over a number of years, it is unlikely that a court will decide in favour of a wrongful life claim, purely because public policy will not equate the lives of two children and find the one to be superior to the other.

Conclusion

Even though it would appear that based on public policy and other legal considerations, there is argument to be made in favour of wrongful life claims. In the Stewart case, Acting Judge Snyders commented on the fact that while counsel acting on behalf of the Stewarts had put forward an argument that the Constitution does recognise wrongful life claims, these arguments were not elaborated on.

Section 11 of the Constitution enshrines each South African’s right to dignity. This can be read in conjunction with section 28(2) of the Constitution, whereby the best interests of a minor child are paramount in every matter concerning the child. Therefore, where a disabled child is involved, not only must the child’s dignity be protected, but the court must ensure that the best interests of the minor are upheld. In addition to the Constitution, section 8(1) of the Children’s Act 38 of 2005 specifically states that the rights provided to a child under the Children’s Act should be used to supplement the rights provided to a child in terms of the Bill of Rights. The importance of taking a child’s disability into account when making decisions affecting a child with disabilities is clear in terms of section 6(2)(f) of the Children’s Act, as all proceedings must take into account the child’s disabilities and create an enabling environment. Furthermore, section 7(1)(i) indicates that a child’s disability is a factor to take into consideration when determining the best interests of the child. The court cannot ignore these factors when called upon to make a decision regarding a wrongful life claim, but an argument in this regard must be placed before the court.

The distinction between wrongful pregnancy, wrongful birth and wrongful life cases is clear. In South Africa, the current law, as decided upon by the Supreme Court of Appeal, is that South Africa does not recognise claims for wrongful life. In order to alter the position, this claim will have to be challenged in the Supreme Court of Appeal or in the Constitutional Court. This may become a possibility in the future.

Internationally, wrongful life suits are recognised in various jurisdictions such as Holland, Israel

and certain legal jurisdictions of the United States. Although South Africa does not currently recognise wrongful life suits, should a compelling argument be made to the correct court, there is a possibility that with a change in public policy incorporated with the legislation, the status of wrongful life claims could change.

While it is an unthinkable concept to many that a parent should have to argue that their child should never have been born, for those who are unable to afford the special treatment, schooling, medical and day-to-day expenses required by a disabled child, it may indeed be a necessary evil. Medical practitioners should be aware of the consequences of not properly diagnosing and informing a pregnant woman of the possible disabilities her child may have and should aim to keep proper checks in place to prevent resultant claims.

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