

## MEDICINE AND THE LAW

# A child's potential claim for negligent misdiagnosis: The case of H v. Fetal Assessment Centre

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South African law recognises a financial claim against a health provider for negligently failing to advise an expectant mother that she might give birth to a child suffering from a severe health condition or congenital disability. In December 2014, the Constitutional Court handed down a judgment that could lead to financial claims by the child, who was subsequently born with a severe health condition or disability. This judgment thus creates a framework to legally recognise a claim by a child whose current health condition was negligently misdiagnosed before birth. The contents and effects of the judgment are discussed in this article.

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## Case report

A health provider who fails to advise a pregnant woman that her child could be born with a severe health condition or congenital disability could face financial liability in terms of South African (SA) law.<sup>[1,2]</sup> In the case of *H v Fetal Assessment Centre*,<sup>[3]</sup> a mother gave birth to a boy suffering from Down syndrome. She initiated a financial claim on behalf of the child against the Fetal Assessment Centre (FAC) in the High Court (HC) for failing to advise her of the risk that the child she was carrying could be born with this disorder. This is the so-called 'wrongful life' claim. The Supreme Court of Appeal (SCA) has defined a 'wrongful life' claim as 'an action brought by a deformed child, who was born as a result of negligent diagnosis or other act by a doctor' (in para 1).<sup>[4]</sup> The HC (in the FAC case) rejected the claim off-hand on the grounds that SA law does not recognise it. In terms of our current law, parents can claim for their financial loss suffered in these cases as a result of the additional costs of now caring for a child who has serious health challenges or disability. SA law thus limits the claim for monetary relief to the parent and does not extend the claim to the child once born. This legal position was confirmed and ultimately dead-ended by the SCA in the *Stewart*<sup>[5]</sup> case. The High Court in the FAC case was therefore bound by the SCA decision, which is why it rejected the child's claim. The matter was appealed to the Constitutional Court (CC).

## Findings and outcome

The CC found that the current approach to these cases was too narrow and paid little attention to constitutional values (para 23). It found that the issue in this type of case was 'whether our constitutional values and rights should allow the child, in the circumstances of this case, to claim compensation for a life with disability' (para 24). The court accepted that it was possible that upon further judicial investigation, such a claim might not be allowed in terms of our law but felt that the possibility of recognising the claim could not simply be regarded as a closed issue (para 24). It was further accepted that should the child's claim be recognised, it would only come into existence once the child is born alive (para 50), similar to the approach for a claim in a case of prenatal physical injury.<sup>[6]</sup> The child claimant would also still have to show negligence on the part of the health provider (para 75).

The CC considered how other countries responded to a child's claim in such cases and looked at whether or not our law could accommodate the claim. It found that the child's claim could exist in

our law. The CC did not consider questions on the extent of expenses the child could claim for (para 77). The HC now has to reconsider the child's potential claim following the CC's decision (para 66). The CC found that all decisions in relation to this type of claim by a child will have to be done in accordance with constitutional principles and having regard to children's rights, particularly the right to have their best interests considered as of paramount importance in these cases (paras 42, 49 and 69). The appeal was therefore successful to the extent that the CC decision gives the child a window of opportunity to raise a claim.

## Discussion

Several times in the judgment, the CC made it clear that if the child's claim was allowed it could be limited to the extent that the health provider was liable against either the parent or the child and not to both (para 70). The loss or harm suffered by the child relates to the fact that currently the child has no recognised claim if the parents for some reason failed to claim against the health provider. The child's loss is rooted in the fact that in the absence of a claim by the parents, the health provider could avoid liability for medical misdiagnosis. What could be problematic with this approach is that the child's claim depends on the parents. The child is thus not viewed as an independent being. This appears contrary to what the CC held in *S v. M*,<sup>[7]</sup> where it said that:

'Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilical destined to sink or swim with them.' (para 18)

The CC's approach in the FAC case appears to be narrow. What would happen if the parents did claim but the claim was unsuccessful on technical grounds? Would it mean that the child would have to suffer under that loss and have no ability to reapproach the court to consider the substance of the claim against the health provider?

The decision by the CC reopens the door to consider claims by a child in cases of prenatal misdiagnosis, which was basically a closed matter after the *Stewart* case. However, the CC could not make the final decision regarding the development of our common

law to allow for the child's claim owing to a lack of evidence and therefore sent the case back to the HC (para 48). Despite this, the CC judgment gives guidance on how future courts should approach this matter. The CC judgment emphasised that courts faced with this issue must make their findings based on constitutional principles such as the best interests of the child. If we compare our constitutional principles and national laws against some of the countries noted in the CC judgment that recognise such claims (such as The Netherlands) (paras 44 and 45), it is clear that our legal system is more aligned with countries that do recognise the child's claim given that our Constitution protects the rights of the child explicitly in section 28. It is therefore perhaps more likely than not that the ultimate decision in these cases will be to recognise the existence of the child's separate claim in cases of medical misdiagnosis. The extent of the claim, the requirements for a successful claim and the potential remedies associated with the claim are matters that the courts will determine on a case-by-case basis. Any judicial inconsistencies arising from such cases could then again end before the CC for legal certainty on those issues.

### Conclusion

Although the CC's consideration of the viability of a child's claim was mostly theoretical in nature, it could come to the same conclusions should the issue find its way back to the CC in the future and the necessary evidence be produced. Therefore, courts such as the HC cannot simply ignore the CC's analysis. These courts will find particular assistance from the CC's judgment on how to limit the child's claim if recognised. The child's potential separate claim will ensure that health providers who negligently failed to advise parents of the possibility of giving birth to a child

with serious health challenges or disability will not escape liability if parents failed to pursue a claim against the health provider. However, given the narrow approach of the CC to merge the child's claim with that of the parent, the deterring effect of recognising the child's claim might not be that significant because the health provider would still only be liable against a single claim. This is not very different to the current law.

The significance of this judgment for health providers is thus twofold. In the first instance, currently the child's claim is not recognised in our law so the health provider could escape liability if parents do not claim. This CC judgment does open the door to potential claims by a child in the event of a parent being unable to claim. Secondly, even if following the CC judgment the child's claim is recognised, it might not be recognised as a separate claim from that of parents, and the health provider would be likely to be held liable for a single claim in the case of medical misdiagnosis. This case could thus spell the start of new developments in recognising a child's claim in wrongful life cases. Health providers will have to wait and see how the law on this matter develops over time.

1. Friedman v. Glicksman 1996 (1) SA 1134 (W).
2. McQuid-Mason D, Dada M. The A - Z of Medical Law. 1st ed. Cape Town: Juta & Company Ltd., 2011:282; 339-340.
3. H v Fetal Assessment Centre (CCT 74/14) [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) (11 December 2014).
4. Mukheiber v. Raath and Others (262/97) [1999] ZASCA 39; [1999] 3 All SA 490 (A) (28 May 1999).
5. Stewart and Another v. Botha and Another (340/07) [2008] ZASCA 84; 2008 (6) SA 310 (SCA); [2009] 4 All SA 487 (SCA) (3 June 2008).
6. Road Accident Fund v. Mtati (332/2004) [2005] ZASCA 65; [2005] 3 All SA 340 (SCA) (1 June 2005).
7. S v. M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007).

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