

“WRONGFUL LIFE” – THE CONSTITUTIONAL COURT PAVED THE WAY FOR LAW REFORM

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1 Introduction

The “wrongful life” action is a widely debated topic in South Africa and abroad.¹ In South Africa, academic discourse escalated after the *Stewart v Botha*² cases.³ The Western Cape Division of the High Court very recently⁴ had the opportunity to revisit the matter in *C J H v The Kingsbury Foetal Assessment Centre (Pty) Ltd* (“*C J H*”),⁵ but unfortunately made a ruling at the exception phase. The mother in the *Kingsbury* case has since lodged an application for leave to appeal in the Constitutional Court. Judgement was handed down in the Constitutional Court on 11 December 2014 paving the way for law reform.⁶

When analysing the body of scholarship on the issue internationally, matters are complicated by the difference in terminology used in the various jurisdictions. It is therefore necessary to conceptualise and critically evaluate the terminology that is used when the availability of this remedy has to be established. The unfortunate labels that have been used to identify the remedy will have to be addressed.

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¹ See PF Louw “Wrongful Life”: ’n Aksie Gebaseer op die Onregmatige Veroorsaking van Lewe” (1987) 2 *TSAR* 199 205-206; E de V Hugo *The Actions for Wrongful Life, Wrongful Birth and Wrongful Conception – A Comparative Study from a South African Perspective* LLD Thesis, University of Pretoria (1999) 410; SCJJ Kortmann “Geld Voor Leven Schadevergoeding Voor ‘Niet Beoogd’ Leven” in SCJJ Kortmann & BCJ Hamel (eds) *Wrongful Birth en Wrongful Life* (2004) 5 6; E Ellis & B McGivern “The Wrongfulness or Rightfulness of Actions for Wrongful Life” (2007) 15 *Tort L Rev* 1 2; R Perry “It’s a Wonderful Life” (2008) 93 *Cornell L Rev* 329 335; the entire issue of the 2010 *Journal of European Tort Law* was dedicated to “wrongful birth” and “wrongful life”; I Giesen “The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases” (2012) 8 *Utrecht L Rev* 35 36.

² First in 2007 6 SA 247 (C) and then in the SCA: 2008 6 SA 310 (SCA). The other South African cases on this issue are *Friedman v Glicksman* 1996 1 SA 1134 (W) and (now also) *H v Fetal Assessment Centre* 2015 2 SA 193 (CC).

³ A Mukheibir “Wrongful life – The SCA Rules in *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 June 2008)” (2008) 29 *Obiter* 515 516-518; C Chürr “A Delictual Claim Based on ‘Wrongful Life’: Is it Possible?” (2009) 72 *THRHR* 168 169-174; I Giesen “Of Wrongful Birth, Wrongful Life, Comparative Law and the Politics Of Tort Law Systems” (2009) 72 *THRHR* 257 258; S Human & L Mills “The Immeasurable Wrongfulness of Being: The Denial of the Claim for Wrongful Life” (2010) 1 *Stell LR* 67 68; C van Niekerk “Wrongful Life Claims: A Failure to Develop the Common Law?” (2012) 3 *Stell LR* 527 533.

⁴ The SCA was wrong (in *Stewart v Botha* 2008 6 SA 310 (SCA) para 15) when it stated that there “are hardly novel contentions” to be raised in this debate.

⁵ Referred to as *H v The Kingsbury Foetal Assessment Centre* WCC 24-04-2014 case number 4872/2013. ⁶ *H v Fetal Assessment Centre* 2015 2 SA 139 (CC).

Furthermore, the wrongful life debate may be described as a multifaceted one: it for instance concerns the elements of the delict in question, and much has been said about the definition of those elements and specifically of wrongfulness and the development of the common law (or the lack thereof)⁷ in this particular context. The most recent decision of the High Court in the *C J H* case⁸ was decided at the exception stage and was mainly based on the argument that the convictions of the community have not changed since the *Stewart v Botha* case.⁹ It has therefore to be assumed that Baartman J was of the opinion that the concept of wrongfulness had not undergone substantial changes during the past few years. However, this assumption could be wrong and therefore some developments regarding policy considerations will be briefly explored. Establishing the loss suffered has also enjoyed some attention in both case law¹⁰ and academic discourse¹¹ and will be referred to in passing.

The question that will be considered in some depth is whether the scope of the general principles underlying child law has been adequately discounted in both the local and the international debate on this topic. There have been enormous developments in child law and one could expect those developments to have influenced the debate. When viewed from this angle, the absence of the acknowledgement of the Convention on the Rights of the Child (“CRC”)¹² in the wrongful life debate becomes apparent and it is therefore imperative to establish whether it has a contribution to make. Likewise, developments in disability law might be relevant seeing that the Convention on the Rights of People with Disabilities (“CRPD”) has since been adopted. The Constitutional Court paved the way for developing the law of delict in line with the Constitution of the Republic of South Africa, 1996 (the “Constitution”) and the principles of our law of delict will have to be scrutinised.

2 Tussling with terminology

Different scenarios are sometimes wrapped up in and sometimes even clouded by similar sets of facts. In the first scenario, the parents decided not to have any/more children. They took control of their reproductive rights and the

⁷ Van Niekerk (2012) *Stell LR* 527.

⁸ Para 29.

⁹ The court referred to *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) para 56 to illustrate the link between policy considerations and wrongfulness in delict, para 28.

¹⁰ *Harriton v Stephens* (2006) 226 CLR 52 para 87; *Stewart v Botha* 2007 6 SA 247 (C) para 29.

¹¹ Kortmann “Geld Voor Leven Schadevergoeding Voor ‘Niet Beoogd’ Leven” in *Wrongful Birth en Wrongful Life* 16-17 explains the well-established “differenz” theory comparing the position that the child is in, with the position if the unlawful act or omission had not occurred in this particular context. The fact that this method to establish loss cannot be utilised in this case due to the fact that the child would not have been born at all if the doctor gave the advice as could have been expected of him or her, leads the author to conclude that the remedy should not be granted. (More on this comparison in para 8.1 below.) See how JM Potgieter, L Steynberg & T Floyd Visser & Potgieter: *Law of Damages* 3 ed (2012) 31 take pains in explaining that only loss to legally recognised interests qualifies as damage emphasising the fact that the *object* of the interests has to be legally recognised needs. This is why, according to them, a child cannot claim damages for being allowed to be born with disabilities. However, the same argument may in my view be used to argue that the child lives and suffers due to the physician’s unlawful act.

¹² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

woman/wife opted to be sterilised.¹³ However, a year later she gives birth to a (healthy) child. The parents institute an action to recover damages because they have to bear the financial burden of an “unplanned” child. In South Africa, we would label their claim as a “wrongful conception” or a “wrongful pregnancy”¹⁴ action. It is submitted that the term “wrongful pregnancy” is more appropriate than “wrongful conception” in this context.¹⁵ This remedy, which could be founded on either contract¹⁶ or delict,¹⁷ is allowed in South Africa, as appears from the *Administrator Natal v Edouard* case.¹⁸

The next scenario presents itself when congenital defects or chromosomal abnormalities or foetal deformities are not properly diagnosed,¹⁹ or if diagnosed, the parents were not informed accordingly and a child (planned or unplanned) is born with disabilities. The parents claim that they would have avoided conception or have terminated the pregnancy if properly informed, and they institute an action to recover damages because they have to bear the financial burden of raising a child with disabilities. In South Africa, we labelled²⁰ their claim as a “wrongful birth” action.²¹ In this instance, the terminology is not accurate because the parents may have planned to have this child. Their grudge against the medical practitioner is that he or she did not give them the opportunity to take lawful steps to exercise and control their reproductive rights to terminate the pregnancy. They wanted to be given the option not to have a child with disabilities. South African law affords plaintiffs a remedy.²²

The third scenario is the topic under discussion and it can be distinguished from the preceding cases on several grounds. The plaintiff in this instance is the child, and the child’s complaint is not confined to the financial burden. In this case, the child institutes an action because he or she has to bear the burden of a life with disabilities, whereas he or she would (apparently) have preferred

¹³ It is equally possible for the male partner to be sterilised or take steps to prevent conception, but a vasectomy without further precautionary measures will be insufficient.

¹⁴ As was done in *Stewart v Botha* 2007 6 SA 247 (C) para 7.

¹⁵ See also FL Pearson “Liability for So-Called Wrongful Pregnancy, Wrongful Birth and Wrongful Life” (1997) 114 *SALJ* 91-92. JK Mason “Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology” (2002) *Edinburgh Law Review* 1-47 argues persuasively that the woman suffers no invasion or injury to her bodily integrity and “wrongful” in the context actually means “unsolicited”. Using “wrongful pregnancy” in this instance leaves the door open to use the term “wrongful conception” in cases where no child was born due to the pregnancy being terminated or when a spontaneous abortion has occurred, see B Dickens “Wrongful Birth and Life, Wrongful Death before Birth, and Wrongful Law” in SAM McLean (ed) *Legal Issues in Human Reproduction* (1989) 80 and 82.

¹⁶ *Administrator Natal v Edouard* 1990 3 SA 581 (A).

¹⁷ *Mukheiber v Raath* 1999 3 SA 1065 (SCA).

¹⁸ As it is in many other jurisdictions for example *McFarlane v Tayside Health Board* [1999] 4 All ER 96 (HL).

¹⁹ By proper genetic screening.

²⁰ I argue that a specific name for this remedy is inappropriate and should be avoided. These remedies fit into the generalised framework for the law of delict in South Africa under the *actio ex lege Aquilia* and the action for pain and suffering. See para 7 below.

²¹ As was done in *Stewart v Botha* 2007 6 SA 247 (C) para 7.

²² *Friedman v Glicksman* 1996 1 SA 1134 (W) 1139-1140; *Stewart v Botha* 2007 6 SA 247 (C) para 6 and the same applies in many other jurisdictions eg *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419 and 431.

not to exist at all under these circumstances.²³ In South Africa, the child's claim was labelled a "wrongful life" action²⁴ and *stare decisis* substantiated the denial of the claim.²⁵ The term "wrongful life" has been a contentious one and could be described as a misnomer. Kirby J correctly criticised the label in the minority judgment of *Harriton v Stephens* ("Harriton").²⁶ It is not life (or birth or conception) that is wrongful, but instead, the physician's *omissio* or *commissio* that did not live up to the standard required by the legal convictions of the community.²⁷ The label "wrongful life" implies that life could be obtained "wrongfully" which degrades the value of human existence and distracts from the essence of the remedy.

Other terms have also been suggested. When applying to the Constitutional Court for leave to appeal in the *Kingsbury* case the mother averred that the claim was based on "wrongful suffering" instead of "wrongful life".²⁸ Kirby J also considered this term favourably in the minority judgment of *Harriton*.²⁹ The problem is that suffering has so many causes and is such a broad concept that it should better be discarded. Another suggestion is the term "wrongful impairment"³⁰ but the same objections are applicable. For the sake of convenience, the term "wrongful life" shall be used, but at a later stage, it will be indicated that the South African law of delict is generalised in nature and therefore the usual remedies and terminology apply. There is no need for a specific name in this instance. It is noteworthy that the Constitutional Court in *H v Fetal Assessment Centre*³¹ refrained from using the term and warned that it avoids engaging with the substantive issue.

3 "Wrongful life" in other jurisdictions

A bird's eye view of the availability of "wrongful life" actions in other jurisdictions could perhaps be summarised as follows. It seems that there is resistance against this remedy in Anglo-Saxon legal systems. England adopted legislation overruling the remedy in 1976.³² Even "wrongful birth" actions were met with firm resistance in that jurisdiction. The leading case is *McKay v Essex Area Health Authority* ("McKay"),³³ where the Court of Appeal decided

²³ Pearson (1997) *SALJ* 100 avers that the remedy is controversial because of the nature of the harm suffered. A "wrongful life" action is based on the premise that the mother would have aborted the child if given the opportunity. However, this argument is less persuasive in South Africa where a pregnancy can be terminated at any stage, see ss 2(1)(a), 2(1)(b) and 2(1)(c) of the Choice on Termination of Pregnancy Act 92 of 1996 and para 5 below.

²⁴ As was done in *Stewart v Botha* 2007 6 SA 247 (C) para 7.

²⁵ *Friedman v Glicksman* 1996 1 SA 1134 (W); *Stewart v Botha* 2008 6 SA 310 (SCA).

²⁶ (2006) 226 CLR 52 paras 8-13, where he indicated that the term was borrowed from a different context, that is when a child's claim was based on the fact that he or she was disadvantaged by his or her "illegitimate" status. Also see Kortmann "Geld Voor Leven Schadevergoeding Voor 'Niet Beoogd' Leven" in *Wrongful Birth en Wrongful Life* 7.

²⁷ See *Reed v Campagnolo* 332 Md 226 239 (1993) and para 7 below.

²⁸ AJ Narsee "Mother sues for son's suffering" 29 August 2014 *The Times*.

²⁹ (2006) 226 CLR 52 para 6.

³⁰ EF Collins "An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework" (1984) 22 *J Fam L* 677 677.

³¹ 2015 2 SA 139 (CC) para 20. Also see para 19.

³² S 1(2)(b) of the Congenital Disabilities (Civil Liability) Act 1976 (UK).

³³ [1982] QB 1166 (CA); [1982] 2 All ER 771 (CA).

that no cause of action existed under English law. The court adopted what is since known as the “sanctity of life” argument.³⁴ In Australia, the majority of the High Court in *Harriton*³⁵ held that Australian law does not allow for such an action.³⁶ In Canada, the Court of Appeal of Manitoba in *Lacroix (Guardian of) v Dominique*³⁷ followed the *McKay* decision and rejected the claim based on “wrongful life”. In the United States, only a few cases succeeded³⁸ but most actions based on “wrongful life” failed.³⁹ Some states have even adopted legislation barring such actions.⁴⁰

In some civil law countries, the position seems to be different. In the Netherlands where Roman Dutch law has its roots, a more favourable view is taken. In *Leids Universitair Medisch Centrum v Molenaar*⁴¹ the remedy was granted and included damages for pain and suffering.⁴² However, the *Hoge Raad* had the benefit of article 6:97 of the Dutch Civil Code, which bypasses some of the intricacies with which other courts struggled. The article states that a judge must determine the damage in a way that corresponds most closely to the nature of the damage; and where damage cannot be accurately assessed, appropriate compensation must be estimated.⁴³ Very interesting arguments have since been raised in Dutch legal literature concerning the duty to provide good care that also seeks to protect persons who are not party to the medical treatment contract.⁴⁴ Interestingly, French courts also allowed these claims⁴⁵

³⁴ 781e per Stephenson LJ and 787a per Ackner LJ.

³⁵ (2006) 226 CLR 52; (2006) 226 ALR 391; [2006] HCA 15.

³⁶ See also *Waller v James* 226 ALR 457. Singapore has also rejected “wrongful life” claims. See *Harriton v Stephens* (2006) 226 CLR 52 para 55; *Stewart v Botha* 2008 6 SA 310 (SCA) para 12.

³⁷ (2001) 202 DLR (4th) 121 [2001] MBCA 122) para 31.

³⁸ *Curlander v Bio-Science Laboratories* 106 Cal App 3d 811, 1980 Ct App 165 Cal Rptr 477; *Turpin v Sortini* 643 P 2d 954 Cal Rptr 337, 31 Cal 3d 220 (1982); *Harbeson v Parke-Davis Incorporated* Wash 659 P 2d 483, 98 Wash 2d 460 (1983) affirmed, 746 F 2d 517 (9th Cir (1984); *Procanik v Cillo* 478 A 2d 755, 97 NJ 339 (1984); *Continental Casualty Co Empire casualty Co* 713 P 2d 384 Colo App (1986).

³⁹ The first case was *Gleitman v Cosgrove* 49 NJ 22, 227 A 2d 689, 22 ALR 3d 1411 (1967) (Supreme Court of New Jersey) and much later in *Philips v United States* 508 F Supp 537 (1980). In *Bruggeman v Schimke* 718 P 2d 635 (Kan 1986) it was argued that granting a “wrongful life” action would be the same as acknowledging a legal right not to be born – very similar to the “sanctity of life” argument in English law. See also *Speck v Finegold* Pa 268 Super Crt 342 (1979); 408 A 2d 496 at 508.

⁴⁰ For example South Dakota in 1981 (*South Dakota Code Law* paras 21-55-1 to 21-55-4) and Minnesota in 1982 (*Minnesota Stat Ann* para 145.424(1)). See WC Duncan “Statutory Responses to ‘Wrongful Birth’ and ‘Wrongful Life’ Actions” (2005) 14 *University Faculty for Life* 3 3-26 for a survey of the statutes in Idaho, Indiana, Michigan, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota and Utah. He holds the view that these statutes promote public policy considerations such as decreasing medical costs, discouraging abortion, creating a barrier to eugenic campaigns and defending the sanctity of life. See further WF Hensel “The Disabling Impact of Wrongful Birth and Wrongful Life Actions” (2005) 40 *Harv CR-CLL Rev* 141 162.

⁴¹ *Hoge Raad* No C03/206HR RvdW 2005 42 (or HR 18 March 2005, NJ 2006, 606) (04-08-2014). For a case discussion, see A Mukheibir “Wrongful Life Claims in the Netherlands – The *Hoge Raad* decides” (2005) 26 *Obiter* 753 753-762. Note her very convincing argument based on *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) para 33 that the child should have a claim just as Farlam JA postulated that the child whose mother was negligently infected with syphilis before conception should have a remedy: 761.

⁴² Para 53 of the *Conclusie*.

⁴³ See Mukheibir (2008) *Obiter* 518-520 on this case.

⁴⁴ A Hendriks “Wrongful Suits? Suing in the Name of Terri Schiavo and Kelly Molenaar” (2005) 12 *Eur J Health Law* 97 100. See also Dickens “Wrongful Birth and Life, Wrongful Death before Birth, and Wrongful Law” in *Legal Issues in Human Reproduction* 81 that the foetus has acquired the status of a patient in medicine although this is not the case in common law.

⁴⁵ See Par la Cour de cassation *Vie Publique* <http://www.vie-publique.fr/documents-vp/courcass_9913701.pdf> (accessed 14-03-2014), where the *Cour de Cassation* granted the child’s (Nicolas Perruche’s) claim but denied the parents a “wrongful birth” action.

until 4 March 2002 when an act was passed to align the position in France with the majority of the other European jurisdictions.⁴⁶

4 The first landmark decision in South Africa: *Stewart v Botha*

The landmark decision on the so-called “wrongful life” action in South Africa was, and still is, *Stewart v Botha*. It was the decision of the Supreme Court of Appeal in this case that persuaded the mother to apply to the Constitutional Court for leave to appeal in the *Kingsbury* matter. It should therefore be considered briefly.

In *Stewart v Botha*, the child suffered from Lesch-Nyan syndrome, an X-link recessive chromosome disorder that can be detected prenatally through amniocentesis. The most striking feature of this syndrome is aggressive self-mutilation with the pain and screaming associated with it.⁴⁷ It should also be noted that if detected through an amniocentesis, the pregnancy may lawfully be terminated in terms of the Choice on the Termination of Pregnancy Act 92 of 1996 (“Choice on the Termination of Pregnancy Act”).⁴⁸ In spite of the above, the outcome of both the *Stewart v Botha* cases went against the wrongful life action.

A few brief remarks will suffice regarding the judgment of the court *a quo* in the above matter where the decision was made at the exception stage. The plaintiff instituted both a “wrongful birth” and a “wrongful life” action. The actions were brought as alternatives to avoid duplication regarding the damages in respect of past and future medical expenses, special schooling and maintenance.⁴⁹ The court correctly stated that the child should be able to claim for medical expenses, special schooling and maintenance, irrespective of whether the parents could recover the same. The reason for this decision was that the parents’ claim might be prescribed, they might be dead or disinterested, or they may for moral or other reasons decide not to claim.⁵⁰ What was never claimed or argued was the child’s compensation based on his non-patrimonial loss, the pain and suffering, disfigurement and loss of amenities of life.⁵¹ In my opinion, compensation for pain and suffering could be a very important component of the child’s action. In the case of a person suffering from Lesch-Nyan syndrome, severe pain, suffering, bodily disfigurement and loss of amenities of life seems to be inevitable. The Constitutional Court has already decided that the difference between patrimonial and non-patrimonial damage

⁴⁶ The Act (Loi no 2002-303 du 4 mars 2002) is frequently referred to as the “la Loi anti-Perruche” to indicate that it changed the position in previous cases. The child’s claim has also been successful in Israel, see *Zeitsov v Katz* (1986) 40 (ii) PD 85 (Isr), but not in Germany, see BGH 18 January 1983, *BGHZ* 86, 240, 1983 *Juristenzeitung* 447, also in BS Markesinis *A Comparative Introduction to the German Law of Torts* 3 ed (1997) 142. Also note the criticism of Stoll in H Stoll “A Doctor’s Liability for the Unwanted Birth of a Child” (1989) 22 *CILCA* 206 211.

⁴⁷ P van den Heever “Prenatal Medical Negligence in South African Medical Law: Wrongful Life (The Right not to be Born) and the Non-Existence Paradox” (2006) 69 *THRHR* 188 198 fn 38 describes the horrific symptoms and consequences of this syndrome.

⁴⁸ See ss 2(1)(a), 2(1)(b) and 2(1)(c) of the Choice on Termination of Pregnancy Act 92 of 1996.

⁴⁹ *Stewart v Botha* 2007 6 SA 247 (C) paras 2 and 3.

⁵⁰ Para 22.

⁵¹ The *Friedman* case may be distinguished on this point because in *Friedman* the child’s claim was one for general damages, pain and suffering and loss of amenities of life.

should not stand in the way of justice in the law of delict.⁵² I shall return to this argument at a later stage.⁵³

Another interesting fact is that the “wrongful life” claim was brought by the child’s father (parent) in his representative capacity as if no possibility of a conflict of interest could exist.⁵⁴ It is submitted that although perhaps not in this case, but conceivably so in others, there is in fact a real possibility of conflicting interests emerging and a curator *ad litem* should therefore have been appointed for the child.⁵⁵

The court finally found that the doctors’ negligent conduct was not legally relevant to the child being disabled. The court held that had there been no delict, he (the child) would either not have been born at all or, if the mother chose not to abort, he would have been in exactly the same position as that in which he now finds himself.⁵⁶ It boils down to a finding that there has been no loss and therefore no delict.

The judgment of the court of appeal in this matter distinguished between the claim of the parents and that of the child and confirmed that the parents do have a remedy but upheld the court *a quo*’s decision regarding the child’s claim. The court had a problem regarding wrongfulness. The Supreme Court of Appeal relied on the construction of wrongfulness as formulated in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*⁵⁷ that “conduct is wrongful if policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant”.⁵⁸ In cases like the one under the court’s scrutiny, where the conduct that caused the loss amounts to an omission, it is considered wrongful only if a defendant has a legal duty not to act negligently in the circumstances. The court pointed out that the existence of this legal duty depends on considerations of public policy consistent with constitutional norms. Unfortunately, the court declined the opportunity to explore the constitutional norms infusing wrongfulness. Furthermore, there is no attempt to explore the child’s best interests in this matter.⁵⁹ Instead, the court proposed that allowing the child’s action would acknowledge that the child should rather not have been born.⁶⁰ The court refrained from answering this “basic question”, namely whether a particular child should have been

⁵² *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as Amicus Curiae)* 2006 6 SA 230 (CC) paras 51-58 per Moseneke DCJ in a personal injury claim between spouses. The correctness of Perry’s view in *R Perry “It’s a Wrongful Life”* (2008) 93 *Cornell L Rev* 329 333 that the child can only claim damages following the period where his parents are no longer obliged to maintain him or her by law is questionable because it leaves a void in instances where the parents decide not to bring a wrongful birth action.

⁵³ See para 7 below.

⁵⁴ *Stewart v Botha* 2007 6 SA 247 (C) para 3.

⁵⁵ See paras 7 and 8.1 below on the appointment of a curator *ad litem* in these matters.

⁵⁶ Para 30.

⁵⁷ 2006 1 SA (SCA) para 13. See para 7 below.

⁵⁸ 2006 1 SA (SCA) para 5.

⁵⁹ The best interests standard is mentioned only once, in the following terms in para 25: “Nobody would deny that Brian’s best interest would be served if he had access to all possible medical provision for his condition, but the question remains who should be liable.” This statement comes very close to admitting that the child’s best interests have not been considered by this court.

⁶⁰ Para 11.

born at all.⁶¹ The court held the view that that question “goes so deeply to the heart of what it is to be human that it should not even be asked of the law”.⁶²

5 Another landmark – the Constitutional Court paves the way

In *H v Fetal Assessment Centre*⁶³ the applicant was a six year-old boy born with Down syndrome. The claim was based on the alleged wrongful and negligent failure of the fetal assessment centre to warn the mother of the high risk of the child being born with Down syndrome.⁶⁴ The mother would allegedly have chosen to terminate her pregnancy in these circumstances if she had been informed about the risk. The mother claimed both special and general damages in the High Court for and on behalf of her son but Baartman J upheld the defendant’s exception that the claim does not disclose a cause of action relying on *Stewart v Botha*.⁶⁵ Leave to appeal is in this instance sought from the Constitutional Court because of the recent judgement by the Supreme Court of Appeal in that matter.⁶⁶

In a watershed case for the law of delict, the Constitutional Court granted leave to appeal to allow for the development of the common law.⁶⁷ The Constitutional Court found that the High Court should not have decided the current matter on exception.⁶⁸ Froneman J noted that the courts are obliged to develop common law in line with constitutional rights and values and that the complicated factual issues involved, together with the normative considerations, warrant a decision after hearing all the evidence.⁶⁹

The Constitutional Court correctly warned that “characterising” the case as one of “wrongful life” avoids (or obscures) the substantive issue.⁷⁰ The arguments framed along the lines that if the medical practitioner had (properly) informed his patient she would have terminated the pregnancy and then the life with disability might have to be compared with non-existence, resulted in the Supreme Court of Appeal’s decision that an answer could not be found in law.⁷¹ This approach hides the value judgement that courts are obliged to make.⁷²

⁶¹ Para 28.

⁶² Para 28.

⁶³ 2015 2 SA 193 (CC).

⁶⁴ Para 3.

⁶⁵ Para 5.

⁶⁶ Para 7.

⁶⁷ Para 9. If the common law is developed to recognise the child’s claim it would be an issue of major legal and constitutional importance.

⁶⁸ Paras 11-16 applying *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 80 regarding absolution from the instance.

⁶⁹ Para 13 referring to s 39(2) of the Constitution and *K v Minister of Safety and Security* 2005 6 SA 419 (CC) paras 16-17.

⁷⁰ Para 20. See also para 2 above.

⁷¹ Para 21 referring to *Stewart v Botha* 2008 6 SA 310 (SCA) para 28 quoted in para 4 above.

⁷² Paras 22-24. See *Stewart v Botha* 2008 6 SA 310 (SCA) para 22 where the court acknowledged that counsel for the appellant submitted that various sections of the Constitution would lead to a conclusion that the claim should be awarded but since no suggestions were made regarding which common-law principles had to be developed, the matter was not considered any further. Thus the court failed to apply s 8(3)(a) of the Constitution which states that in applying a provision in the Bill of Rights, the court *must* develop the common law. It is an imperative and should not be brushed aside if counsel’s arguments are meagre.

Turning to the merits, the Constitutional Court immediately acceded that *Stewart v Botha* did not sufficiently consider the viability of the child’s claim within the normative framework of our Constitution.⁷³ A proper approach to the matter at hand has to abide by the constitutional imperative when interpreting the Bill of Rights and promote the values that underlie our society *inter alia* based on dignity and equality.⁷⁴ It goes without saying that the current matter concerns the rights of the child as contained in the Bill of Rights.⁷⁵

The Constitutional Court then embarked on an elaborate comparative review of several other jurisdictions and provided clear guidance on the value of comparative law on the matter at hand.⁷⁶ The court put the following considerations forward that should be discounted when considering foreign law:

- Courts *may*, but are not obliged to consider foreign law.⁷⁷
- Caution is apposite in matters involving the law of delict due to the conceptual nature thereof.⁷⁸ The South African law of delict is based on general principles as opposed to the casuistic character of the law of torts in common-law countries.⁷⁹
- Courts must be cognisant of both the historical context out of which our Constitution originated and the present social, political and economic context when conducting comparative analyses.⁸⁰
- Jurisprudence from countries founded on a system of constitutional supremacy is more valuable than comparison with other systems.⁸¹
- All the doctrines, precedents and arguments in the foreign law must be viewed through the lens of our own Bill of Rights and constitutional values.⁸²

Applying these guidelines to the current matter the prominence afforded to the best interests of the child stands out when considering the normative framework of our Constitution.⁸³ In its social context the country’s stance on the termination of pregnancies and the recognition of children’s rights are relevant.⁸⁴ Where women have a right to choose, as is the case in South Africa,⁸⁵ there is a tendency to recognise the child’s claim.⁸⁶ The same applies

⁷³ Para 27. The reference to the High Court case and the *Friedman* case in the footnote implies that the same can be said of those judgements as well.

⁷⁴ S 39(1)(a) of the Constitution.

⁷⁵ See para 6 below where this assumption will briefly be dealt with.

⁷⁶ Paras 28-47 and note tables A and B attached to the judgement.

⁷⁷ Para 28 referring to s 39(1)(c) of the Constitution and contrasting ss 39(1)(c) to 39(1)(b) which deals with international law. See also para 31.

⁷⁸ Para 30.

⁷⁹ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 34. See also J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7 ed (2015) 4.

⁸⁰ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 31(b) and see para 32 highlighting the social context.

⁸¹ Para 31(c) and Table B attached to the reported judgement.

⁸² Para 31(d).

⁸³ Para 42.

⁸⁴ Para 43.

⁸⁵ South Africa has very lenient legislation in this regard, see ss 2(1)(a), 2(1)(b) and 2(1)(c) of the Choice on the Termination of Pregnancy Act. See also para 2 above.

⁸⁶ Para 44.

when there is an emphasis on children's rights⁸⁷ and in South Africa, the Constitution provides explicitly for children's rights.⁸⁸ A decision based on a claim brought in delict, as is the case in every aspect of private law, has to reflect or be in accordance with our constitutional values and rights.⁸⁹

In passing, the Constitutional Court also indicated that there are common-law principles relating to the best interests of children.⁹⁰ One such example is the principle that the High Court is the upper guardian of children and "has extremely wide powers in establishing what such best interests are".⁹¹ Unfortunately, neither the *Stewart* nor the *Kingsbury* case revealed any real engagement at this level.

The Constitutional Court did not decide on the viability of the child's claim in our law as the material on record was insufficient and the procedure flawed.⁹² This decision was left to the High Court while stating that the child's claim may be found to exist.⁹³ However, the Constitutional Court did give two instructions that have to be considered when this decision is made. The starting point is to develop our common law in line with constitutional rights and values⁹⁴ and then to decide on the viability of the child's claim in line with the generally accepted requirements of our law of delict.⁹⁵ It is therefore appropriate to explore these two topics further.

6 Constitutional rights and values

The constitutional rights and values that have to be considered in relation to the child's current claim are equality (section 9(1)), dignity (section 10) and the paramountcy of the children's best interests (section 28(2)).⁹⁶ Equality and dignity go hand in hand.⁹⁷ Dignity is both a value underlying human rights and a right in itself.⁹⁸ Human dignity has been described as "the touchstone of the new political order [in South Africa] and ... fundamental to the new Constitution".⁹⁹ All children have a right to human dignity. This is the right to be considered as complete human individuals with inherent worth despite

⁸⁷ Para 45.

⁸⁸ Section 28. See also para 46.

⁸⁹ Para 47.

⁹⁰ Para 64.

⁹¹ Quoting from *Kotze v Kotze* 2003 3 SA 628 (T) 630G which was endorsed by the Constitutional Court in *Mpofu v Minister of Justice and Constitutional Development* 2013 9 BCLR 1072 (CC).

⁹² Paras 48 and 78. See para 66 where the court said: "the child's claim is not necessarily inconceivable under our law". The Constitutional Court in para 79 also indicated that the High Court should have granted leave to amend the particulars of claim instead of dismissing the claim.

⁹³ Para 81.

⁹⁴ Paras 49 and 81. The constitutional injunction that the child's best interests are of paramount importance is emphasised again in para 78.

⁹⁵ Para 52.

⁹⁶ Para 49.

⁹⁷ LA Basser Marks "Human Dignity" in MH Rioux, LA Basser Marks & M Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (2011) 17 34.

⁹⁸ Basser Marks "Human Dignity" in *Critical Perspectives on Human Rights and Disability Law* 21. See s 1 of the Constitution where dignity is a foundational value and s 10, where it is a right: *Dawood v Minister of Home Affairs*; *Shalabit v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 para 35. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 2 SA 1 (CC).

⁹⁹ O'Regan J in *S v Makwanyane* 1995 3 SA 391 (CC) para 329, referring to the 1993 Constitution.

being different from (adults and) other children.¹⁰⁰ The principle of dignity requires that all human beings be empowered to enjoy the benefits of society on an equal basis.¹⁰¹ Section 9(3) mentioned disability explicitly as one of the grounds upon which no direct or indirect discrimination is tolerated.¹⁰² It is submitted that the acknowledgement of the child’s inherent worth and the necessity to empower the child in every way to live a full life is nothing more, but also nothing less, than acknowledging “the fundamental right of the child to be born as a whole, functional human being”.¹⁰³

It is also submitted that the right to life (section 11) should play a role. The right to life is afforded to *everyone* but sometimes gets brushed aside.¹⁰⁴ The right to life is a Bill of Rights right that has to be interpreted while promoting the values based on human dignity¹⁰⁵ and considering international law.¹⁰⁶ The applicable international law in South Africa is at the very least article 6 of the CRC, article 10 of the CRPD and article 5 of the African Charter on the Rights and Welfare of the Child (“ACRWC”).¹⁰⁷ In considering the child’s claim, the appreciation of the right to inherent life would have acknowledged the child’s loss without further hypothesising.

The Constitution is renowned for the protection afforded to children.¹⁰⁸ The court mentioned the fact that the child’s best interests are of paramount importance when decisions are being made concerning that child.¹⁰⁹ The Constitutional Court has recognised the paramouncy of the child’s best interests as a separate or independent right.¹¹⁰ The Constitutional Court has also provided guidelines for the implementation of this very important child’s right.¹¹¹ However, in this context section 28(1)(d) is also important because it gives every child a right to parental or family care. The child has a right to nutrition, shelter and health care services.¹¹² The child has a right to be protected from maltreatment, abuse and degradation at all times.¹¹³ When dealing with children the right to education cannot be overemphasised.¹¹⁴ It is submitted that in many cases of this nature the child’s claim should be brought

¹⁰⁰ B Woodhouse *Hidden in Plain Sight the Tragedy of Children’s Rights from Ben Franklin to Lionel Tate* (2008) 35; Basser Marks “Human Dignity” in *Critical Perspectives on Human Rights and Disability Law* 17-20.

¹⁰¹ Basser Marks “Human Dignity” in *Critical Perspectives on Human Rights and Disability Law* 22.

¹⁰² Read with s 9(4) of the Constitution.

¹⁰³ *Park v Chessin* 60 AD 2d 80, 400 NYS 2d 110 (Supreme Court of New York 1977) where a claim for special damages was allowed under these circumstances, but the claim for general damages was refused.

¹⁰⁴ *Stewart v Botha* 2008 6 SA 310 (SCA) para 23.

¹⁰⁵ S 39(1)(a) of the Constitution.

¹⁰⁶ S 39(1)(b).

¹⁰⁷ See also art 2 of the European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 and para 8 below.

¹⁰⁸ S 28 of the Constitution.

¹⁰⁹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 49 referring to s 28(2) of the Constitution.

¹¹⁰ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 18; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) para 20.

¹¹¹ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 31; *S v M (Centre for Child Law as Amicus Curiae)* para 25 and also see para 15.

¹¹² S 28(1)(c) of the Constitution. See also s 27(1) and (2) regarding the right to health care and social security.

¹¹³ S 28(1)(d). See also s 12(1)(c) and 12(2)(b) on the right to freedom and security of the person and the right to bodily and psychological integrity.

¹¹⁴ S 29.

before the court by a curator *ad litem* and not by the child's parent due to the possibility of conflicting interests.¹¹⁵ The child's right to participate in legal proceedings has been acknowledged in international law and has been further explored in the post-constitutional era.¹¹⁶

7 "Wrongful life" and the law of delict

The basis of the child's claim for damages against the medical practitioner(s) that wrongfully and negligently failed to diagnose congenital deformities or failed to inform his or her parents about the existence and extent of such deformities, is in delict. In South Africa, delictual liability is governed by a system where the general principles or elements of a delict establish liability. These principles apply irrespective of which individual interest has been impaired and irrespective of the way in which it was impaired.¹¹⁷ Patrimonial damage is recoverable with the *actio Legis Aquiliae* and compensation for pain and suffering will be claimable under the action for pain and suffering.¹¹⁸ It is therefore necessary to consider the requirements or elements of delict in this instance.

Conduct is the first requirement in line.¹¹⁹ Conduct as an element of the delict consists of the physician's failure to correctly diagnose and/or properly advise the patient.¹²⁰ It may either be a *commissio* (positive conduct) or an *omissio* (omission). In a case being brought for and on behalf of the child in these instances it could be either. It is a *commissio* if the medical practitioner has made the wrong diagnosis¹²¹ and an *omissio* if the medical practitioner failed to perform the appropriate tests or failed to communicate the test results to his patient. It is sometimes important to establish whether the conduct consisted of a *commissio* or an *omissio* because liability is more limited in the latter.¹²²

Wrongfulness plays a very important role in curtailing liability.¹²³ It is a well-known fact that wrongfulness may be couched as the infringement of rights or interests.¹²⁴ This is the rights-based approach to wrongfulness. Our

¹¹⁵ In line with s 28(1)(h) of the Constitution.

¹¹⁶ See paras 8.1 and 9 below.

¹¹⁷ Neethling & Potgieter *Law of Delict* 5.

¹¹⁸ See also M Blackbeard "Die Aksie vir 'Wrongful Life': 'To Be or Not to Be?'" (1991) 54 *THRHR* 57 69-73.

¹¹⁹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 54.

¹²⁰ Para 57 referring to *Administrator Natal v Edouard* 1990 3 SA 581 (A) 590E-F. See also para 58 with reference to *Mukheiber v Raath* 1999 3 SA 1065 (SCA) para 46. However, I do not agree with Froneman J (para 59) that "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 [referring to their fundamental right to make decisions on reproduction and the right to security in and control over one's body] interests". I view the infringement of rights, including constitutional rights, as a perfect example of unlawfulness and in this case it illustrates the direct application of the Constitution in the *boni mores* test for wrongfulness.

¹²¹ Para 60. See also paras 62 and 65.

¹²² M Loubser, R Midgley, A Mukheiber, G Niesing & D Perumal (eds) *The Law of Delict in South Africa* (2012) 63-64; Neethling & Potgieter *Law of Delict* 30.

¹²³ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 53 referring to *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC) para 20. The court rejected the floodgates arguments as a bogey (para 70) and denied that children with disabilities could have a claim against their parents for not terminating the pregnancy (para 71).

¹²⁴ *Mukheiber v Raath* 1999 3 SA 1065 (SCA) para 25; *H v Fetal Assessment Centre* 2015 2 SA 139 (CC) para 69.

pre-constitutional law of delict was not devised to protect constitutional rights but currently this is the case.¹²⁵ This approach entails the direct application of the Constitution and the Constitutional Court found that the *Stewart* case did not consider the application of our Constitution in this regard.¹²⁶

In the law of delict, constitutional rights and values are also applied indirectly, in particular to the so-called open-ended test for wrongfulness, namely the legal convictions of the community or *boni mores*.¹²⁷ Applied to the case under discussion the doctor’s conduct is wrongful if his or her action or inaction, according to the legal convictions of the community (*boni mores*) and in all the circumstances of the case, infringes the rights of the child in an unreasonable manner. If one expected a medical practitioner to impart his or her expert knowledge regarding the prenatal test(s) to the parents, his or her conduct is wrongful. Viewed from a different angle, the conduct of the medical practitioner was not merely morally wrong but also unreasonable because it is expected of medical practitioners to perform the applicable tests and properly inform the patient.¹²⁸ The *boni mores* are infused with the rights and norms of the Constitution and therefore it saddles the medical practitioner with a legal duty.¹²⁹ However, many other factors could also have influenced the *boni mores* to the extent that a legal duty is established. For instance, a special relationship exists between the medical health practitioner and the patient, which entails a duty to furnish the patient with all the information regarding the well-being of the foetus through genetic or prenatal diagnosis. The wrongfulness of the physician’s conduct is thus apparent with reference to the breach of a legal duty.¹³⁰

The Supreme Court of Appeal,¹³¹ under the influence of English law, allowed a new (third) variant to test for wrongfulness in some instances,¹³² namely that “conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission”.¹³³ If this variant is applied, the rights that inform public policy and values of the Constitution and the outcome should not in this instance differ from the legal duty approach to wrongfulness as applied above.¹³⁴ Sadly, this did not happen in the *Kingsbury* case although it

¹²⁵ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 51 referring to *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) where it was decided that the abolition by the legislature of the common law claim to sue a driver for physical injury implicated that the limitation of the fundamental right enshrined in s 12(1)(c) of the Constitution must pass the constitutional muster of s 36.

¹²⁶ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 52.

¹²⁷ Neethling & Potgieter *Law of Delict* 22.

¹²⁸ *Minister van Polisie v Ewels* 1975 3 SA 590 (AD) 597; *H v Fetal Assessment Centre* 2015 2 SA 139 (CC) para 69.

¹²⁹ Loubser et al *The Law of Delict* 153-154.

¹³⁰ And regarding negligence, the usual principles will apply, see para 75. See also *Durr v ABSA Bank Ltd* 1997 3 SA 448 (SCA) if he or she is a specialist.

¹³¹ *Telematrix Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA).

¹³² Which has very recently been endorsed by the Constitutional Court in *Loureiro v Invvula Quality Protection* 2014 3 SA 394 (CC) para 56.

¹³³ *Telematrix Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA) 468 per Harms JA.

¹³⁴ See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 67 that the Constitutional Court considered this third variant as well.

seems that Baartman J had this (new) variant test for wrongfulness in mind when she considered wrongfulness.¹³⁵ Unfortunately, *stare decisis* rejected the invitation to develop the common law in conformity with the Constitution.¹³⁶ She dismissed the child's claim because, according to her, "the convictions of the community" has not changed since the *Stewart* decision.¹³⁷ Instead, according to her, public policy relies on the resilience of people with disabilities to overcome the odds.¹³⁸ Although I do not underestimate the resilience of the human body and mind, it is conceivable that dedicated care, special education and extensive medical treatment are essential to achieve exactly this outcome.

The child's claim does not depend on a comparison between existence and non-existence.¹³⁹ I strongly oppose the argument that the remedy is based on the doctrine that it is better not to live at all than to live as a person with disabilities.¹⁴⁰ I do not agree with the view that acknowledging the child's claim necessarily has a negative impact on people with disabilities.¹⁴¹ This line of reasoning does not explain the availability of the parents' actions.¹⁴² The Constitutional Court confirmed that the loss suffered in this case has nothing to do with the metaphysical.¹⁴³ It is about life with disabilities,¹⁴⁴ and sometimes with severe and profound disabilities.¹⁴⁵ In this case, the harm or loss is manifest at birth.¹⁴⁶ The child's right of action only becomes complete upon his or her live birth.¹⁴⁷

¹³⁵ *C J H v The Kingsbury Foetal Assessment Centre (Pty) Ltd* para 13 with reference to *inter alia Telematrix Ltd v Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA).

¹³⁶ *C J H v The Kingsbury Foetal Assessment Centre (Pty) Ltd* para 22. Instead, she considered *Loureiro v Invula Quality Protection* 2014 3 SA 394 (CC) paras 23-28 where the prevalence of house robberies and the need for crime prevention informed public policy considerations to impose liability on a private security company.

¹³⁷ And the *Stewart* case (SCA) failed dismally to develop the common law in line with the Bill of Rights. See also *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 52 for the Constitutional Court's view on this matter.

¹³⁸ *C J H v The Kingsbury Foetal Assessment Centre (Pty) Ltd* para 29.

¹³⁹ Therefore emotional arguments regarding functional limitations that warrant the preference of non-existence are not at all relevant. For that viewpoint see Hensel (2005) *Harv CR-CLL Rev* 174, 176 and 182. Van den Heever (2006) *THRHR* 199 supports my viewpoint.

¹⁴⁰ See A Lawson "Mind the Gap! Normality, Difference and the Danger of Disablement through Law" in A Lawson & C Gooding (eds) *Disability Rights in Europe From Theory to Practice* (2005) 273; Giesen (2012) *Utrecht L Rev* 44.

¹⁴¹ For this view see Hensel (2005) *Harv CR-CLL Rev* 144. See her argument (154) that in the case of unwanted but "normal" children the courts emphasise the benefit of rearing a child while this is not considered in "wrongful life" actions. This differential treatment is interpreted as the bias of modern society towards disability. Also see her view (164 and 170) that the benefits secured by "wrongful life" (and "wrongful birth") actions "come at the cost of demeaning and demoralizing anti-therapeutic messages delivered to the community of people with disabilities and to greater society". *Sed contra* Van den Heever (2006) *THRHR* 199 and Giesen (2009) *THRHR* 268. In my view the same anti-therapeutic messages can be read in the Choice on the Termination of Pregnancy Act. On the same note, if allowing the "wrongful birth" action "reflects the benevolent paternalism imbedded in the medical model of disability" (Hensel (2005) *Harv CR-CLL Rev* 171), the same applies to the Choice on the Termination of Pregnancy Act.

¹⁴² See *Turpin v Sortini* 643 P 2d 954 (Cal 1982) 965 why it is important to acknowledge both actions.

¹⁴³ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 63.

¹⁴⁴ See *Curlender v Bio-Science Laboratories* 106 Cal App 3d 829:

"The reality ... is that such a plaintiff both exists and suffers".

¹⁴⁵ See also C Lind "Wrongful-Birth and Wrongful-Life Actions" (1992) 109 *SALJ* 428 445; Van den Heever (2006) *THRHR* 199; Human & Mills (2010) *Stell LR* 82.

¹⁴⁶ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 50.

¹⁴⁷ *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) para 39. The elements or requirements of the delict occur, separated by time and space. See also paras 60-61.

The Constitutional Court expressed the view that the medical expert will not be liable for anything more when the child claims than he or she would have been liable to the parent(s).¹⁴⁸ This statement refers only to the child’s patrimonial loss and the non-cumulation principle applies.¹⁴⁹ In this instance, the child’s claim also included “general damages for disability and loss of amenities of life.”¹⁵⁰ The Constitutional Court refrained from deciding whether the child’s non-patrimonial loss is recoverable.¹⁵¹ I hold the view that both general and special damages may be claimed.¹⁵² Patrimonial loss (special damages) may be recovered with the Aquilian action, which would typically include medical expenses, special schooling and the maintenance of the child with disabilities,¹⁵³ and non-patrimonial loss is recoverable with the action for pain and suffering.¹⁵⁴ Pain and suffering are commonplace in the child’s life with severe or extreme disabilities and bodily disfigurement, loss of amenities of life and loss of life expectancy not far-fetched either. It is true that “the infliction of a bodily injury on the claimant” was a requirement in Roman-Dutch law¹⁵⁵ but the Supreme Court of Appeal has dispensed with that requirement in the area of emotional shock.¹⁵⁶ I submit that this action now protects the physical-mental integrity of a person in its entirety. This contention is strengthened by the fact that a person’s bodily and psychological integrity enjoys constitutional protection.¹⁵⁷ A rights-based approach to wrongfulness, the application of the child’s Bill of Rights-rights¹⁵⁸ and the development of the common law in line with constitutional rights and values,¹⁵⁹ form the basis of my contention. The assessment of the last mentioned compensation

¹⁴⁸ Para 63. See also para 65.

¹⁴⁹ This is clear read with para 77.

¹⁵⁰ *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) para 3. See also *Friedman v Glicksman* 1996 1 SA 1134 (W).

¹⁵¹ Para 77.

¹⁵² On the difference between general and special damages see *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as Amicus Curiae)* 2006 6 SA 230 (CC) paras 38-39, per Moseneke DCJ.

¹⁵³ That is exactly what the parents would have claimed (and received) in a “wrongful birth” action, see eg *Turpin v Sortini* 643 P 2d 954 (Cal 1982) 965.

¹⁵⁴ The latter was not claimed in *Stewart v Botha* 2007 6 SA 247 (C) para 3. Another debatable argument has been put forward by Van Niekerk, namely that pain and suffering is not actionable because life with disabilities is not less valuable than life without disabilities: Van Niekerk (2012) *Stell LR* 530, referring to *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as Amicus Curiae)* 2006 6 SA 230 (CC) para 40. [The question is, has there been “a wrongful reduction in the quality of a recognized personality interest which entitles the victim to claim for non-patrimonial damages”?

¹⁵⁵ As indicated in *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 77. The reference to *Administrator Natal v Edouard* 1990 3 SA 581 (AD) 595H is not convincing. Van Heerden JA decided in the *Edouard* case (597) that breach of contract *per se* does not found a claim for pain and suffering. The child’s claim is based on the infringement of constitutional rights, the breach of a duty and on the reasonableness to hold the medical practitioner liable and not on the breach of contract. The fact that a contract did exist is but one factor indicating that there might be a duty on the medical practitioner to conduct himself/herself in a particular way.

¹⁵⁶ Botha JA explained in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 777-779 that this requirement relates to wrongfulness. See the application of the *Bester* case in *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 52 by Navse J where the parties suffered psychological harm due to babies being switched in neonatal care. See also Neethling & Potgieter *Law of Delict* 300-302.

¹⁵⁷ S 12 of the Constitution.

¹⁵⁸ S 8(3).

¹⁵⁹ S 39(1)(a) and 39(2).

might have to be artificially construed.¹⁶⁰ However, the fact that it is usually more difficult to calculate non-patrimonial loss does not imply that it is impossible.¹⁶¹

Whether general damages for loss of future income are claimable will depend on the facts of each case. It was not claimed in *Stewart v Botha* or *H v Fetal Assessment Centre* and it is my view that the plaintiff will be well advised not to claim future loss of income if his or her disabilities are such that the prospect of future earnings is none.¹⁶² The maintenance in those instances would cover his or her sustenance until he or she becomes self-supporting, which, in all likelihood, would not happen at all.

For delictual liability to exist, the causal connection between the wrongdoer or defendant's conduct and the harm suffered by the claimant has to be proved.¹⁶³ Once all the elements of delict are proved and this nexus exists, legal causation has to be considered. The present flexible approach of the courts to legal causation will once more allow constitutional rights and values to infuse public policy considerations and direct the outcome. The Constitutional Court had to leave this decision to the trial court where all the facts will be considered.¹⁶⁴

The Constitutional Court confirmed that acknowledging the child's claim in delict does not necessarily devalue life with disabilities.¹⁶⁵ The claim is rather based on the realisation that life can be unbearable.¹⁶⁶ I hold the view that social justice demands that the life and dignity of the child be vindicated. This delictual remedy is appropriate and desirable in systems where public health and social services are overburdened and/or do not meet international standards.¹⁶⁷ Recognition of this claim will restore the sanctity of the child's life as far as the principles of law can do so and might even enhance health care and medical services in this country.

The Constitutional Court's decision in *H v Fetal Assessment Centre* is a watershed case for the law of delict. The table is set for the High Court to develop the common law promoting the spirit, purport and objects of the Bill of Rights¹⁶⁸ and promote the values based on human dignity and equality while

¹⁶⁰ Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, a United Kingdom royal commission better known as the Pearson Commission, (1978) 1 para 89, cited by S Brownlie "Wrongful Life: Is it a Viable Cause of Action in South Africa?" (1985) 5 *Responsa Meridiana* 18 26. The type of disability will also have a role to play; if not in whether the action for pain and suffering is viable, then in the extent of the compensation to be awarded.

¹⁶¹ *Administrator-General, SWA v Kriel* 1988 3 SA 275 (A) 288; D Stretton "Harriton v Stephens, Waller v James: Wrongful Life and the Logic of Non-Existence (Australia)" (2006) 30 *Melb Univ L Rev* 972 989. Also see Neethling & Potgieter *Law of Delict* 252-253 that money is not even in all cases of patrimonial loss a true equivalent. The object of the action for pain and suffering is to provide imperfect compensation.

¹⁶² Damages for loss of future income was claimed in *Friedman v Glicksman* 1996 1 SA 1134 (W).

¹⁶³ Para 74 where the Constitutional Court seems to apply the "but for" test or the *conditio sine qua non* theory in this regard.

¹⁶⁴ Para 74.

¹⁶⁵ Para 72.

¹⁶⁶ Para 72. The court compares the claim under discussion with allowing claims for physical injury that caused disability.

¹⁶⁷ See also Dickens "Wrongful Birth and Life, Wrongful Death before Birth, and Wrongful Law" in *Legal Issues in Human Reproduction* 95.

¹⁶⁸ S 39(2) of the Constitution.

doing so.¹⁶⁹ There is one constitutional injunction that the Constitutional Court did not mention at all, namely the fact that a court is also obliged to consider international law.¹⁷⁰ It is therefore mandatory to consider the applicable international law before drawing conclusions.

8 International Law

8.1 Convention on the Rights of the Child

The CRC is a very important international instrument when children’s rights are considered. This convention has been ratified by all the countries in the world, except the United States of America and South Sudan¹⁷¹ and has found its way into legislation in South Africa.¹⁷² The judiciary has relied on this instrument in the past¹⁷³ and it has paved the way for acknowledging the rights of children with disabilities. It was the first human rights treaty explicitly prohibiting discrimination against children based on disability.¹⁷⁴ The Preamble to the CRC recognises that in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

The general principles of the CRC¹⁷⁵ contain the “soul” of the CRC, namely the right to life, survival and development, non-discrimination, the best interests, standard and participation.¹⁷⁶

The right to life, survival and development is granted to every child by the CRC.¹⁷⁷ It was suggested in *Stewart v Botha* that the right to life militates against the granting of a “wrongful life” action.¹⁷⁸ Furthermore, the comparative method to establish whether the plaintiff has suffered loss, and what the extent of the loss is, was used, which implied a comparison between life with disabilities and non-existence.¹⁷⁹ Article 6(1) of the CRC indicates

¹⁶⁹ S 39(1)(a).

¹⁷⁰ S 39(1)(b).

¹⁷¹ The most recent ratification came from Somalia. See Child Rights International Network “Somalia: Government Ratifies UN Convention on the Rights of the Child” (20-01-2015) *Child Rights International Network* <<https://www.crin.org/en/library/news-archive/somalia-government-ratifies-un-convention-rights-child>> (accessed 01-04-2015).

¹⁷² See s 28(2) of the Constitution; the Children’s Act 38 of 2005 and the Child Justice Act 75 of 2008 to mention a few examples.

¹⁷³ For example in *S v M (Centre for Child Law as amicus curiae)* 2008 3 SA 232 (CC) paras 16-17.

¹⁷⁴ General Comment No 9: “The Rights of Children with Disabilities” (2006) para 2, UN Doc CRC/C/GC9 (27-02-2007). Until the adoption of the CRPD, the CRC was the only international human rights treaty that acknowledged “disability” as a status, art 2 prohibiting discrimination on the basis of disability. Art 23 provides children with disabilities with a right to special care, education and training so that they may have a full and decent life with the highest level of self-reliance and social integration possible.

¹⁷⁵ Ratified by South Africa on 16-06-199.

¹⁷⁶ Committee on the Rights of the Child *General Guidelines Regarding The Form and Content of Initial Reports to be Submitted By States Parties Under Article 44, Paragraph 1(A), Of The Convention:19/10/30 CRC/C/5* para 13.

¹⁷⁷ Art 6 of the CRC.

¹⁷⁸ *Stewart v Botha* 2008 6 SA 310 (SCA) paras 23 and 27.

¹⁷⁹ *Stewart v Botha* 2007 6 SA 247 (C) para 16 and in *Friedman v Glicksman* 1996 1 SA 1134 (W) 1142 quoting *Speck v Finegold* Pa 268 Super 342 (408 A 2d 496) 508 (per Cercone J) and 512 (per Speath J) with approval. The reasoning behind the comparison is that if the doctor informed the parents about the disability/defects that the child may suffer, the parents would have terminated the pregnancy: *Stewart v Botha* 2007 6 SA 247 (C) para 30. The parents’ word is taken for the truth that they would in fact have made that decision without knowing the facts that have since been revealed.

that the comparison is flawed. Every child has an inherent right to life, and therefore a court of law cannot use “non-existence” as a point of reference when asked to consider the remedies available to the *child*. The parents had the option to terminate the pregnancy but that option is not available once the child is born. Article 6(2) takes the matter even further with a holistic approach, stressing that survival and development are crucial and must be provided to the maximum extent possible.¹⁸⁰ In the context of this delictual remedy, it *inter alia* implies that every child, also the child with severe and profound disabilities, is vested with a right to life and must be afforded special care and education to maximise his or her potential as far as possible.

The right to life, survival and development is related to many of the provisions in the CRC, over and above the protection provided for in article 6. The following provisions substantiate this statement: Article 18 contains the basic rule that parents share a joint but primary responsibility regarding the upbringing and development of their child in the best interests of the child.¹⁸¹ States Parties must provide appropriate assistance in this regard and bear the responsibility to develop services, facilities and institutions for the care of children.¹⁸² In the context of wrongful life actions article 23 is very important and should be read with section 6(2) referred to above.¹⁸³ Article 23 affords children with disabilities the right to special care and participation that have to promote a full and decent life.¹⁸⁴ Furthermore, States Parties must provide the necessary assistance subject to available resources.¹⁸⁵ Article 24 is perhaps the most important provision in the facts of the case under discussion because the child’s right to the highest attainable standard of health and medical care is acknowledged.¹⁸⁶ All children must be provided with medical care and assistance.¹⁸⁷ Article 28 provides for the child’s right to education and article 29 mentions explicitly that education shall be directed to the child’s mental and physical abilities.¹⁸⁸

Inseparable from the right to life is the principle of non-discrimination. Non-discrimination is very important when dealing with people, in our case children with disabilities. The CRC requires States Parties to apply all rights to all children without discrimination, and disability is explicitly mentioned as one of the grounds on which no discrimination is allowed.¹⁸⁹ The principle of non-discrimination is then taken even further because States

¹⁸⁰ Committee on the Rights of the Child General Comment No 5: “General Measures of Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, Para 6)” (2003) para 12.

¹⁸¹ Art 18(1).

¹⁸² Art 18(2). Note the mention made of the children of working parents in this context: art 18(3).

¹⁸³ Art 27(2) stipulates that the parents have the primary responsibility to provide the child with a standard of living necessary for the child’s development; art 27(4) states Parties must take appropriate measures to ensure the recovery of children’s maintenance.

¹⁸⁴ Art 23(1). See also art 31 on the child’s right to play and participate in recreational activities.

¹⁸⁵ Art 23(2). Art 23(3), health care services and education are specifically mentioned in this context.

¹⁸⁶ Art 24(1).

¹⁸⁷ Art 24(2).

¹⁸⁸ Art 29(1).

¹⁸⁹ Art 2(1).

Parties are obliged to take positive action to protect children from any form of discrimination.¹⁹⁰

Returning to the comparison between life with and without disabilities that has been used when considering the child’s claim, it is clearly discriminatory because it implies that life with disabilities is so bad that it makes no sense of living at all. I agree with Neethling and Potgieter that the comparison is irrelevant.¹⁹¹ What is more, denying this remedy means excluding severely disabled children from compensation.¹⁹² This would entail that not all children or people enjoy equal protection, which goes to the root of what discrimination actually is.

The Constitutional Court was firm on the relevance of the best interests of the child. In terms of the CRC, the best interests of the child is a primary consideration in all actions concerning that particular child, whether undertaken in the public or private domain, by courts of law or by administrative or legislative bodies.¹⁹³ States Parties shall provide the child with the protection and care necessary for his or her well-being¹⁹⁴ and must ensure that particularly safety and health institutions and facilities conform to appropriate standards and supervision.¹⁹⁵ In my opinion, it is unnecessary to belabour the point that it is in the child’s best interests to have access to the best possible medical care, dedicated daily care and schooling that takes account of his or her special needs.

The South African Constitution and the legislation and jurisprudence of many years echo the standard provided for in the CRC. The Constitution elevated the best interests standard to a principle of paramountcy,¹⁹⁶ and the body of constitutional jurisprudence has developed clear guidance on its application.¹⁹⁷ In *H v Fetal Assessment Centre* the Constitutional Court once more elevated this principle in its instruction to develop the common law accordingly.¹⁹⁸ This brings me to the last general principle of the CRC, namely participation.

The basis for child participation is to be found in article 12(1) where States Parties are instructed to ensure that a child capable of forming his or her own views has the opportunity to do so and that due weight be given thereto. For these purposes, the child could either participate and thus be heard directly, or do so through a representative or an appropriate body.¹⁹⁹

The South African Constitution has taken children’s participatory rights further and has given every child the right to have a legal practitioner assigned

¹⁹⁰ Art 2(2).

¹⁹¹ Neethling & Potgieter *Law of Delict* 70.

¹⁹² See Committee on the Rights of the Child General Comment No 9: “The Rights of Children with Disabilities Para 9(B) on Providing Effective Remedies to Children with Disabilities” (2009).

¹⁹³ Art 3(1).

¹⁹⁴ Art 3(2).

¹⁹⁵ Art 3(3).

¹⁹⁶ S 28(2) of the Constitution.

¹⁹⁷ Eg in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 31; *S v M (Centre for Child Law as amicus curiae)* 2008 3 SA 232 (CC) para 24-26; *Teddy Bear Clinic for Abused Children v Minister of Constitutional Development* 2014 2 SA 168 (CC) para 69.

¹⁹⁸ Para 69.

¹⁹⁹ Art 12(2).

to him or her by the state at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result.²⁰⁰ The Constitutional Court has interpreted this right of children to include the appointment of a curator *ad litem*.²⁰¹ This broad interpretation of section 28(1)(h) is in my opinion correct.²⁰²

In South African law, a parent brings a wrongful life action in his or her representative capacity. It is part of our common law that parents supplement their children's lack of, or limited capacity to litigate. However, the common law also provides for instances where a curator *ad litem* should be appointed for a child,²⁰³ and one such instance is where the interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict.²⁰⁴ I view a case where a parent avers that his or her child should not have been born at all as one where there is at least the possibility of conflicting interests. I find it very difficult to accept that we appoint curators *ad litem* for the unborn, for example, where their hereditary interests are at stake,²⁰⁵ but we deny a child the same protection. The courts have also in recent years appointed curators *ad litem* in a number of ground-breaking cases that suggest a broader role than that which was traditionally ascribed to curators *ad litem*. One example is a case in which the Constitutional Court appointed a curator *ad litem* (in an adoption matter) and the curator served the best interests of children that were *not* before the court.²⁰⁶ I submit that the appointment of a curator *ad litem* for the child is the appropriate way to put the best interests of the child before the court in these cases.

8 2 Convention on the Rights of People with Disabilities

The *Stewart v Botha* cases (and *Friedman v Glicksman*) were decided before South Africa ratified the CRPD.²⁰⁷ Only the *Kingsbury Assessment Centre* matter has been decided since then, and therein no mention was made

²⁰⁰ S 28(1)(h) of the Constitution.

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

“Where there is a risk of injustice, a court is obliged to appoint a *curator [ad litem]* to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution ...”

²⁰² T Boezaart “The Role of a Curator *Ad Litem* and Children's Access to the Courts” (2013) 3 *De Jure* 707 725.

²⁰³ De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen *cf* 2 1 10 8.

²⁰⁴ *Wolman v Wolman* 1963 2 SA 452 (A) 459C, where the father applied to have the grandfather's will set aside when such will would be to the detriment of the son; *B v E* 1992 3 SA 438 (T); B van Heerden, A Cockrell, R Keightley with J Heaton, B Clark, J Sinclair & T Mosikatsana *Boberg's Law of Persons and the Family* 2 ed (1999) 903, where the child's injuries are attributable partly to the parent's negligence and partly to the negligence of a third party and this is why PQR Boberg “Law of Delict” (1959) *Annual Survey of South African Law* 113 114-116 criticised *Kleinhans v African Guarantee & Indemnity Co Ltd* 1959 2 SA 619 (E). There was a conflict between the father's interests as plaintiff in his representative capacity as the child's guardian, and his interests as a potential defendant in a subsequent action by the present defendant to recover a contribution from him. Boberg opined that under those circumstances a curator *ad litem* should have been appointed.

²⁰⁵ *Du Plessis NO v Strauss* 1988 2 SA 105 (A); *G v Superintendent, Groote Schuur Hospital* 1993 2 SA 255 (C) 257D, 259C-G.

²⁰⁶ *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) para 3.

²⁰⁷ On 30-11-2007. On 04-08-2014 158 states have signed and 147 states have ratified the Convention information available at <http://www.un.org/disabilities/countries.asp?navid= 12&pid=166>.

of this convention. It was not mentioned in the Constitutional Court either. In light of the insignificant role that the CRC has played in those decisions, it is unfortunately unlikely that the CRPD's²⁰⁸ ratification would have had a greater impact. However, the CRPD contains valuable international standards regarding the rights of people with disabilities. It is disappointing that these standards have not yet been incorporated into legislation in South Africa. Such a step could have enhanced the effect thereof in legal practice.

As is the case with the CRC, the right to life is enshrined in the CRPD. Article 10 provides the following:

“States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”

The Committee on the Rights of the Child asserted in a General Comment²⁰⁹ on “The rights of children with disabilities” that the right to life, survival and development warrants special attention when the rights of children with disabilities are concerned.

As far as children with disabilities are concerned, the CRPD builds upon and elaborates on the provisions of article 23 of the CRC. The rights of, and protection afforded to children with disabilities are specifically highlighted in various sections of the CRPD.²¹⁰ It is explicitly stated that persons with disabilities should be entitled to equal protection and equal benefits of the law.²¹¹ Article 7 is solely devoted to children and places additional obligations on States Parties with respect to the paramountcy of the best interests of the child²¹² and child participation.²¹³ The importance and the relevance of these principles in the context under discussion have already been highlighted above.²¹⁴

A range of other obligations are also imposed on States Parties in respect of children with disabilities, such as –

- the adoption of child-focused legislation and policies (article 16);²¹⁵
- protecting the physical and mental integrity of every person with disabilities (article 17);
- ensuring that children have equal rights with respect to family life and that they are not separated from their parents against their will (article 23);
- ensuring that children are not excluded from free and compulsory education (article 24);
- providing health services to children to minimise and prevent further disabilities (article 25); and

²⁰⁸ Adopted in December 2006 and ratified by South Africa on 30-11-2007.

²⁰⁹ General Comment No 9: “The Rights of Children with Disabilities” (2006) para 31.

²¹⁰ For example in the Preamble and art 3(h).

²¹¹ Art 5(1). See also art 13(1).

²¹² In art 7(1), the wording of which is very similar to art 3 of the CRC.

²¹³ In art 7(2) and compare art 12 of the CRC.

²¹⁴ Para 8.1 above.

²¹⁵ The Children’s Act 38 of 2005, with special reference to the rights of children with disabilities, proves that our problem is not with child-focused legislation and policies but rather with the implementation thereof: T Boezaart “The Children’s Act: A Valuable Tool in Realizing the Rights of Children with Disabilities” (2011) 74 *THRHR* 264 279.

- ensuring that children have equal access with other children to participation in play, recreation and leisure and sporting activities (article 30).

Of particular importance in the context of the child's claim is perhaps article 12 relating to legal capacity, which requires States Parties to provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. The safeguards are to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the disabled person, are free from conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible, and are subject to regular review by a competent authority.²¹⁶ I am of the opinion that this article also substantiates my claim that a curator *ad litem* should be appointed for the child in these matters.

8 3 African Charter on the Rights and Welfare of the Child

It is interesting to note that the ACRWC²¹⁷ deals with the right to life under the heading "Survival and Development". Article 5 makes provision for the following:

- "1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child."²¹⁸

When comparing the right to life in the ACRWC with the same in the CRC, the ACRWC stands must stronger. On the African continent, the inherent right to life is to be protected by law. However, to play the zero-sum game, one would have to fully investigate all the applicable provisions in both documents to ascertain whether all that is gained by one side, is not lost by the other.²¹⁹ One would for instance point out that the ACRWC uses stronger language in proclaiming the paramouncy of the best interests principle,²²⁰ but takes a more restrictive approach when dealing with children's participation rights.²²¹ With reference to children with disabilities, the ACRWC does not contain the likes of article 23 of the CRC, but article 13 (of the ACRWC) stands firm on the fact that the child with disabilities should enjoy a full and decent life, with the support of the state if necessary.²²² It may safely be asserted that the international law has a contribution to make on the topic under discussion.

²¹⁶ Also see rule 15.1 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities that States Parties have the obligation to enable persons with disabilities to exercise their rights.

²¹⁷ OAU Doc CAB/LEG/24./49 (1990) entered into force on 29-11-1999 ratified by South Africa on 07-01-2000.

²¹⁸ Art 5(3) forbids the imposition of the death sentence for child offenders.

²¹⁹ BD Memzur [sic] "The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-sum Game?" (2008) 23 *SAPR/PL* 1 2.

²²⁰ In art 4(1), compared to the wording of art 3(1) of the CRC.

²²¹ In art 4(2) where the children must be capable of communicating their views compared to art 12(1) of the CRC where they only need to be able to form their own views.

²²² Art 13(1) of the ACRWC. See also art 26 of the ACRWC on non-discrimination.

9 The Children’s Act

Would it have made any difference if the Children’s Act 38 of 2005 had been in operation when *Stewart v Botha* was heard in the court *a quo*?²²³ The Children’s Act was in operation before the Supreme Court of Appeal heard the matter,²²⁴ but that is irrelevant. The court of appeal has to apply the law, as it was when the cause of action arose.²²⁵ What a pity that the Supreme Court of Appeal was not obliged to respect and to promote the child’s Bill-of-Rights rights in conformity with the Children’s Act.²²⁶ It would then have reached a decision respecting the child’s inherent dignity.²²⁷ The court would have recognised the child’s disability²²⁸ and would have been inspired to protect the child against discrimination based on his or her disability.²²⁹ The court would also have given due consideration to the fact that the child with disabilities needs special care,²³⁰ has special needs regarding education,²³¹ that the child needs conditions that insure his or her dignity, self-reliance and participation in society,²³² and that the parents will need support to fulfil their responsibilities.²³³

Having done so, the child’s need to develop would have played a role (in calculating the damages).²³⁴

If this case was decided after the Children’s Act had taken effect, the court should have appreciated the fact that the rights that a child have in terms of the Act supplement those contained in the Bill of Rights.²³⁵ Therefore, the court should have appointed a curator *ad litem*²³⁶ to present the child’s best interests²³⁷ if there was a possibility of conflicting interests and nobody else had approached the court already.²³⁸ As soon as the best interests standard has to be applied, any disability that the child has, must be taken into account.²³⁹ The final decision should never have been taken without considering the best interests of that particular child being of paramount importance.²⁴⁰

²²³ Judgment was given in the High Court on 09-05-2007 and most of the general principles contained in chapter 2 (all but s 12) came into operation on 01-07-2007 in GG 30030 of 29 June 2007.

²²⁴ It was heard on 21-05-2008 and judgment was given on 03-06-2008.

²²⁵ *Thom v Moulder* 1974 4 SA 894 (SCA).

²²⁶ S 6(2)(a) of the Children’s Act.

²²⁷ S 6(2)(b).

²²⁸ S 6(2)(f). See Boezaart (2011) *THRHR* 264 *et seq* regarding the fact that this Act is aimed at protecting and promoting the rights of children with disabilities but also indicating (279) that implementation is problematic.

²²⁹ S 6(2)(d).

²³⁰ S 11(1)(a). See s 94(3) for the appropriateness of early childhood development programmes regarding children with disabilities and/or their special needs.

²³¹ S 11(1)(b).

²³² S 11(1)(c).

²³³ S 11(1)(d).

²³⁴ S 6(2)(e).

²³⁵ S 8(1).

²³⁶ S 14. Also see s 10 on child participation.

²³⁷ S 7 read with s 9.

²³⁸ See s 15(2) for the list of people that has the right to approach a court when a child’s right in terms of either the Bill of Rights or this Act have been infringed or threatened.

²³⁹ S 7(1)(i).

²⁴⁰ S 9.

Sadly, the *Kingsbury* case was decided at the exception stage applying *stare decisis* and ignoring the fact that the Children's Act came into operation after *Stewart v Botha* was heard in the court *a quo*. This casts some doubt on the reliability of the court's perception regarding the legal convictions of the community. The Constitutional Court has now given the High Court another opportunity to consider the prevailing norms in our society regarding children and the Children's Act cannot be ignored when doing so.

10 Conclusion

The Constitutional Court has laid the characterising (or stereotyping) of the child's claim in the scenario under discussion to rest. The principles of the law of delict are able to accommodate the claim perfectly. It is very important to draft the particulars of claims carefully to incorporate all the requirements of the remedy or remedies involved.²⁴¹ The facts of the case will determine whether only patrimonial loss or patrimonial and non-patrimonial loss should be claimed. It is conceivable that the type of disability will play a role in determining whether a claim for non-patrimonial loss is suitable, and if so, the extent thereof.²⁴²

The Constitutional Court has laid the foundation for transformative constitutionalism in the law of delict.²⁴³ The Constitution could be applied horizontally in both the direct and indirect way. When wrongfulness is considered, the answer stays the same irrespective of the approach to wrongfulness.²⁴⁴ Observing the rules of international law²⁴⁵ is much more appropriate in these cases than case law in foreign jurisdictions.²⁴⁶ The Children's Act has implemented many of the international standards regarding children into our law.

Granting a child this remedy vindicates damage wrongfully caused by negligent medical practitioners infringing upon children's rights.²⁴⁷ Social justice is being served by granting claimants a remedy to receive compensation for their financial loss and the experience of pain and distress attributable to another's negligent failure to prevent foreseeable harm when duty-bound to do so.²⁴⁸ It is both possible and desirable to retain the law's integrity and entertain this remedy in the framework provided by the law of delict in South Africa.

²⁴¹ *H v Fetal Assessment Centre* 2015 2 SA 139 (CC) para 4.

²⁴² I agree with M Blackbeard "Actions For Wrongful Birth and Wrongful Life Friedman v Glicksman 1996 1 SA 1134 (W)" (1996) 59 *THRHR* 711 714 and Van den Heever (2006) *THRHR* 192 and 199-200 that the action for pain and suffering should at least succeed in case of severe disabilities such as Tay-Sachs, Lesch-Nyan and the type of disabilities referred to in ss 2(1)(b)(2) and 2(1)(c)(ii) of the Choice on Termination of Pregnancy Act 92 of 1996.

²⁴³ Note the reference to private law in *H v Fetal Assessment Centre* 2015 2 SA 139 (CC) para 47.

²⁴⁴ Para 7 above.

²⁴⁵ See *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 96 on the important role of binding and even non-binding international law.

²⁴⁶ *H v Fetal Assessment Centre* 2015 2 SA 139 (CC) para 41.

²⁴⁷ See also H Teff "The Action for Wrongful Life" (1985) 34 *Int and Comp LQ* 423 440-441.

²⁴⁸ See also Dickens "Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law" in *Legal Issues in Human Reproduction* 107.

SUMMARY

The so-called “wrongful life” action is a widely debated topic in South Africa and abroad. In South Africa academic discourse escalated after *Stewart v Botha* 2007 6 SA 247 (SCA). The recent Western Cape decision of the High Court in *C J H v The Kingsbury Foetal Assessment Centre (Pty) Ltd* case number 4872/2013 (WCC) 24 April 2014 and the subsequent appeal to the Constitutional Court in that matter call for a review of the development of our common law regarding the child’s remedy in delict to ensure that it is in line with our Constitution. As the *Kingsbury* matter was decided at exception stage, the record was such that the Constitutional Court granted leave to amend the particulars of claim, referred the matter back and provided guidance to the High Court to reconsider the merits.

This contribution recommends a new stance on the child’s remedy in light of the direct and indirect application of our Constitution, applicable international law and last but not the least, the Children’s Act 38 of 2005. It is recommended that this delictual remedy should rid itself of its inappropriate name and take its rightful place within the framework of our generalised law of delict. The facts of each case will then determine whether only patrimonial loss or patrimonial and non-patrimonial loss should be claimed.