

CHAPTER 1

Introduction

With the recent announcement that the global population has reached the six billion mark, the world's attention was only briefly focussed on this "achievement" before "more important matters" were, once again, given pre-eminence. A few words of concern were raised with regard to the detrimental consequences of over-population and the importance of proper family planning also received some recognition. But do the governments of the world take sufficient heed to the vital necessity of procreative responsibility?

Medical science has evolved rapidly over the past few years as man has acquired a wealth of revolutionary knowledge and has achieved power over life¹ to such an extent that ethical, moral, religious and, certainly, legal dilemmas have arisen as a result. In every-day life uncertainties created by this newly acquired know-how lead to the clashing of interests between patients and physicians which have to be resolved by the legal system in a just and equitable manner. Medical negligence forms the basis of a new class of litigation that has evolved to solve specific intricacies created by advances in genetic science, which in general is collectively referred to as "wrongful life litigation".²

The *wrongful conception action*³ is the first branch of this cluster of actions. Such an action is instituted where the parents of a healthy but unplanned child argue that their physician breached a pre-conception duty of care when he failed to perform a sterilization procedure with due care. In other instances the parent-plaintiffs submit that a pharmaceutical manufacturer or pharmacist negligently prepared or dispensed a contraceptive prescription. Plaintiffs usually

¹ geneticists can perform with great accuracy various prenatal tests to learn within a few weeks of gestation whether a specific foetus will be born normal or physically/psychologically challenged, (tests can even be done on prospective parents to indicate any genetic aberration or increased risk of transferring family frailties or hereditary diseases) - for detailed information on the various genetic tests and anomalies, see ch 11.

² basically, three divergent actions are grouped under this general term to note: wrongful life, wrongful birth and wrongful conception actions - Stolker, in 1997 *Weekblad voor Privaatrecht, Notariaat en Registratie* (6262:128) on p 193 writes with regards to the various terms used to describe "wrongful life actions" and with special reference to the terms wrongful conception or wrongful pregnancy, that some American writers prefer to use the term "wrongful sterilization" because it sounds more neutral (the previously mentioned and generally used term would seem to be too unsympathetic).

³ also regularly referred to as "wrongful pregnancy actions".

sue for full child-rearing expenses. This action is commonly recognized in South Africa.⁴

In *wrongful birth actions* the parents of an impaired child brings to court the fact that they have extraordinary expenses in child-rearing because of the failure of their physician or genetic counsellor to timely and accurately inform them that their child will be born disabled and accordingly infringed upon their right to abort the afflicted foetus. The South African courts have recently recognized this cause of action.⁵

The *action for wrongful life* is instituted by a disabled child against a medical practitioner, not because the latter caused the defect, but because of his omission to inform its parents about the impairment or counsel them with regard to genetic tests and risks, which prevented them from taking steps to terminate the pregnancy when it was still legally possible. Thus, the defendant's wrongful act is allowing a disabled child to be born. Here the question arises whether the existence of life can ever be equated with damage or loss. Because of difficulties inherent in comparing no life with a defective life, only special damages have been awarded in the few states where the action for wrongful life has been acknowledged. In South Africa the action has not yet been successful.⁶

Various relevant aspects to the legal phenomena of wrongful life litigation are current issues of public and legal debate, such as the shift of public policy concerning sterilization as an accepted form of contraception, the abortion question, divergent opinions about the commencement of legal personality, the medical-legal discussion on physician paternalism *versus* patient autonomy, the right of a patient to comprehensive information and the concomitant right to give an informed consent. Another interesting challenge inherent in all these actions is the calculation of *quantum*.

In this study the researcher will investigate all the abovementioned corresponding aspects as well as the aggregate of legal principles, problems, current approaches and possible alternative solutions to wrongful life litigation in South Africa, Europe and the United States of America. The researcher will attempt to summarise the South Africa legal position by debating past court judgements and by discussing the merits of unknown and unsuccessful actions through comparative legal analysis.

⁴ Administrator, Natal v Edouard 1990 (3) SA 581 (A).

⁵ Friedman v Glicksman 1996 (1) SA 1134 (W).

⁶ *ibid.*

Legal comparison is of vital importance when relatively new legal concepts are studied. This truth is emphasised even more in South African medical law, as medical negligence litigation seldom occurs and, when it does, rarely reaches the courtrooms as these cases are commonly settled out of court. Solutions found in other legal systems can be fruitfully applied to and integrated in our management of the challenges pertaining to medical negligence cases.

The South Africa legal system has in the past and will in future continue to benefit from foreign examples and judgments of courts abroad. It is true that international contributions to local problems is of great assistance in all spheres of life. The researcher is of the opinion that this tendency towards international co-operation and unanimity concerning legal and other matters will increase in future. This can be attributed to the well advanced communication facilities currently available and the overall dwindling and communal solving of international issues in the "global village" in which we live. Uniformity and general collaboration between countries with regard to important affairs emphasise the importance of a legal comparative study.

From the title of the thesis it is clear that this study is undertaken from a South African perspective and therefore exclusive research of foreign legal systems would be insufficient. Recent developments in the South African legal sphere contribute to the importance and relevance of a study into wrongful life litigation locally. The first fundamental development was the enactment of a new constitution⁷ in which South Africa's first Bill of Human Rights⁸ has been incorporated. This new constitution constitute the supreme law of the land which has fundamental legal implications on current and future legislation and practical legal issues. Another progression in the domestic legislative sphere which magnifies the relevance of wrongful life litigation is the dramatic shift in public policy concerning abortion brought about by a new and exceptionally liberal abortion act.⁹

Therefore, taking into account the inherent complexity of wrongful life litigation,¹⁰ which is manifested in a general sense of confusion and uncertainty clouding the various actions and relevant issues, one must admit that it is of great importance that legal certainty must urgently be sought. In this study the researcher attempts to achieve this prodigious goal.

⁷ **Constitution of the Republic of South Africa Act 108 of 1996** - find a copy of the relevant sections of the bill of fundamental rights in ch 9.

⁸ ch 2 of the constitution.

⁹ **Choice on Termination of Pregnancy Act 9 of 1996** - see ch 3.

¹⁰ note that researcher, when referring to this new class of litigation in general terms, will use the collective term "wrongful life litigation" - thereby including wrongful conception, wrongful birth and wrongful life actions, as well as other birth related medical negligence based actions.

Because of the immense scope of the study topic and a seemingly endless list of related aspects of interest (from a diverse range of human sciences), it is submitted that this report is but an introduction to some of the facets of wrongful life. Out of concern that this study might continue indefinitely, researcher has left many issues unanswered for the present. I undertake to address further relevant issues in future.

Research Proposal

Title

The actions for Wrongful life, Wrongful birth and Wrongful conception - a comparative study from a South African perspective.

Motivation for choice of study

A pilot study on the topic of wrongful life was done for a dissertation as partial fulfilment of the degree LLB. Because of the extent of this study field however, further research is required at the LLD level. During undergraduate studies I realised that there is a general lack of certainty in law concerning wrongful life litigation in South Africa. A possible reason for this is the rapid development of medical science, especially in respect of genetic analyses and counselling, contrasted against the relative conservative legal system which traditionally adapts slower in comparison. Although helpful research on this topic has already been done locally, very little case law exists which makes legal solution of the inherent problems exceedingly difficult.

Aim of the study

- To evaluate the present South Africa legal system's approach to wrongful life litigation and clarify legal uncertainty in this respect;
- To examine foreign legal systems' solution and handling of the problems associated with wrongful life, wrongful birth and wrongful conception actions abroad;
- To compare the relevant legal backgrounds and draw certain parallels between the foreign law and the South African law in respect of the study topic;
- To assess whether within the South African legal system these actions are viable;
- To formulate proposals for law reform in this field, if they were to be desirable.

Research methodology

Qualitative research methodology will be used, involving detailed examination of all the relevant Dutch cases and legal principles and a detailed analysis of American law which will enable me to ascertain the context and ambit of the relevant rules of law.

Three different types of research are combined to guide this study:

Firstly, **basic research** which deals with comparative law. The different legal systems consists of different legal prepositions in addressing certain problems. Thus, the Roman-Dutch system which is used in South Africa, allows wrongful life actions on different bases as would the Anglo-American legal system.

Secondly, **applied research** will be necessary to accommodate the possibility of these actions which established a totally new branch of private law. The research and evaluation of the foreign legal principles will substantiate this phenomena. The existence of wrongful life litigation also necessitates a culture of medical expertise and technology. It is vital for these actions that certain medical procedures can be performed and that the expertise and resources are available to implement these procedures. Thus, interviews with experts in the field of medical technology and even more so, experts in this specific field of medical law which does not exist in South Africa, was of the utmost importance.

Lastly, **developmental research** enables the researcher to indicate at a larger stage the impact of recent abortion legislation in South Africa and the legal implications it will have on wrongful life litigation.

The overlapping of the law of delict, medical law and the law of contract in this field poses an interesting study.

Research strategy and procedures

- Data collection by means of extensive literature study;
- Interviews with experts in the Netherlands consisting of academics and practitioners.

Process of data analysis:

Classification of data into relevant subsections namely wrongful life, wrongful birth and wrongful conception actions with reference to their American, European (mainly Dutch) and South African origin. Due to the fact that a qualitative research approach is used there will not be statistical results to analyse, rather summaries of expert opinions.

Interpretation of data:

The gathered data will be examined and reviewed in the light of studied literature and theoretical knowledge obtained.

Value of research

- Because of great uncertainty in the South African courts with regards to wrongful life litigation locally and since academics can at present merely speculate as to what the position should be, it is of utmost importance that clarity should emerge through an objective and extensive scientific analysis of the legal position abroad. In the Netherlands and the United States of America especially, a considerable amount of research has been done in this field.
- The nature of wrongful life challenges is such that no fruitful results can be gained from research into the Roman-Dutch common law. To date no extensive research on this topic has been done in South Africa, although invaluable works of local academics have contributed much to an initial view of the problem. By implication the existing research done locally on this topic will be expanded and hopefully enriched.
- The fact that medical negligence is becoming an increasing problem in South Africa and that more and more cases will be brought to court, accentuates the importance of this research project. The research results will probably be of use for direct implementation by lawyers, courts and academics. These findings may lead the field for possible law reform, if such should be desirable.
- From a developmental point of view, abortion on demand is new in South Africa and by far the majority of people benefiting from the new dispensation will be poor and black. The legal system has to ensure that maximum care is taken by way of accurate assessment and proper counselling. The only way this can be ensured legally is to make provision for relevant actions in cases of negligence. Even if few people have the means to go to court, which is the case with all aspects of the law, at least the principle would have been established and the general public legally protected.

Progress of study

A period of four years was planned to complete this research project of which five months were spent in the Netherlands between August and December 1997. The research commenced in January 1996 at the University of Pretoria. During 1997 I had the privilege to receive doctoral scholarships from the CSD and the University of Pretoria to do research abroad for specific research in and guidance from various academic centres in the Netherlands. This overseas working period was vital in order to collect the necessary data and consult with experts in this field of study. This collection of foreign data and information was necessary for the completion of a thesis based on comparative law.

The main objectives of the research in the Netherlands were to establish contact with and do basic research at primarily two academic institutions, namely The Free University, Amsterdam (Vrije Universiteit) and Erasmus University, Rotterdam. Amsterdam was chosen as the head base of activities and the entire project was planned and executed from the Vrije Universiteit, under supervision from and with the assistance of Prof. J.E. Doek. The following contacts were made and research facilities used:

- **Vrije Universiteit**

Prof. Soeteman (Dean: Faculty of Law); Prof. J.E. Doek (Head: Department of Medical Law);

Prof. Schrage (Professor of Law);

Mrs. H.J.C. Smink (Lecturer in Department of Medical Law);

Mrs. Op't Einde van Dolen (Faculty administrator and initial contact person).

- **Erasmus Universiteit**

I met with the following contact persons in Rotterdam:

Dr. C.G.M. van Wamelen (Lecturer: Law of Persons, Family Law and Youth Law);

Prof. A.I.M. van Mierlo (Professor of Law);

Prof. A.J.M. Nuytinck (Law of Persons, Family Law and Law of Succession);

Prof. J.E.M. Akveld (Medical Law);

I was familiarized with the library of the Sanders Institute as well as the University library and received the necessary passes and assistance.

- **University of Amsterdam**

Prof. S. Gevers (Professor of Health Law, Academic Medical Centre)

- **Rijks Universiteit, Leiden**

Contact persons:

Prof. C.J.J.M. Stolker (Director: E.M. Meijers Institute of Legal Studies)

Prof. Veenstra (Study Centrum Gravensteen)

Prof. B. Sluyters (Hugo de Groot Study Centrum)

- **Peace Palace Library, The Hague**

Contact person:

Me. F. Markx-Veldhuijzen (Head: Reading Room Collection Development)

- **Het Nederlands Instituut voor Wetenschappelijke Informatiediensten, Amsterdam**

Interim findings/innovative insights/new directions

Interm findings

Various new ideas from Dutch academics as to the solution of the problems concerning wrongful life, wrongful birth and wrongful conception actions were recorded. From the large selection of literature gathered in selected centres, many diverse opinions can be identified. I have formulated a number of opinions on the handling of the multifaceted issues and problem areas associated with these actions.

I have found that the Dutch legal system is much more conservative in their approach to the moral/ ethical questions that arise from these actions, than I originally anticipated. A relevant example of this statement is their relative strict abortion laws, compared with the new abortion legislation in South Africa.

An interesting discovery concerning the Dutch approach in wrongful life actions, was their different (and sometimes confusing) use of internationally recognized terminology. They incorrectly refer to wrongful conception actions as wrongful birth actions. This unclear position should not be allowed, as it is of vital academic importance that the correct terms be used to describe specific legal phenomena. Because of the superficial resemblance between the varying wrongful life actions (in the broad sense) it is necessary that specific reference is made to specific actions. The actions under discussion differ in a number of fundamental issues.