

CHAPTER 12

Final reflections

1. In review

After considering some aspects of wrongful life litigation, every reader should make up his/ her own mind whether these actions should receive legal recognition or not. On only one point there seems to be no disagreement, and that is there is no "hard and fast" solution in reaching a verdict.¹ It is suggested that a possible reason for this difficulty is the many facets of life that are involved,² which could all sway a decision either way. Hol³ writes that this legal consideration requires a control of one's emotions.⁴ A few final thoughts before reader will be asked to give judgement.

"Whether it is better to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."⁵

1.1 Reasons for rejecting wrongful life⁶

- plaintiffs deny their own standing to sue when asserting they should never have been born;
- damages are not calculable because it is impossible to assess the condition of non-existence and therefore no comparison can be made with life as a handicapped

¹ of "to be, or not to be".

² ie moral, ethical, social, religious, philosophical, economic, legal etc.

³ 1996. Beantwoording rechtsvraag: Wrongful life. *Ars Aequi* (45:4), 273.

⁴ "Deze rechtvraag is een oefening in de beheersing van onze emoties. In het recht zijn deze niet altijd een goede raadgever. Men is dus gewaarschuwd."

⁵ **Becker v Schwartz** 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (Judge Jasen).

⁶ Objections raised against wrongful conception, wrongful birth and wrongful life actions are mentioned: reader must therefore distinguish which would be applicable in each instance - see ch 1 and 2 for a basic understanding of the various actions. Objections that are applicable to wrongful conception are for this reason marked with a *, while concerns exclusively applicable to wrongful conception objections are marked ** - it is submitted that principally similar arguments are used against wrongful birth and wrongful life actions.

person;

- plaintiff has not suffered any legally cognizable injury, as life is always and under all circumstances more precious than no life at all;*
- the mother's physician owes no duty of care or any other duty towards the foetus;
- the judiciary is unable and not compelled to evaluate metaphysical, theological, philosophical issues;*
- there is no legal right "not to be born";
- the physician's wrongful⁷ act did not actually cause the defect itself, therefore there is no legal causal link between the physician's conduct and the resulting damage;*
- courts recognize that the sanctity of life outweighs the consideration of quality of life;*
- there is no fundamental right to be born "as a whole, functional human being";
- the social impact of recognition of such actions could be staggering - it would open a floodgate of dissatisfied lives actions, which would be untenable from a legal public policy viewpoint;*
- the recognition of these actions against health care providers would lead to wrongful life actions against parent, which is untenable from a legal/ public policy viewpoint;*
- actions arising from childbirth have a detrimental effect on the psyche of the children involved with such litigation;*
- the benefit of having a child cannot be equated or diminished by the economic burden of rearing a child;*
- public policy deems that the birth of a healthy child to be a precious gift that outweighs the economic loss of rearing the child;**
- the cost of supporting a life and the value of life is not comparable;***
- to impose liability would be wholly out of proportion to the wrongdoer's culpability;*
- liability would be an unreasonable burden on health care providers;*
- recovery of child-rearing expenses would be a windfall to parents;*
- possibility of fraudulent claims;*
- it is against public policy and is rather a matter that should be resolved by the legislator.*

1.2 Viewpoints in favour of wrongful life

Although many critical opinions have been mentioned against the awarding of damages in wrongful life actions, Stolker,⁸ conveys the following thought:

⁷ alleged.

⁸ 1994. Wrongful Life: The Limits of Liability and Beyond. *International and Comparative Law Quarterly* (43), 531.

"The UK Law Commission also questioned whether, in rejecting the wrongful life claim, it was not attaching too much weight to considerations of logic. Law is an artefact and, if social justice requires that there should be a remedy given for a wrong, then logic should not stand in the way."⁹

It is further argued¹⁰ that recognition of individuals' rights¹¹ could be practically enforced if legal policy ensures that we proceed into a period of increased legal protection with adequate safeguards to protect those individuals' other rights based in principles of equality and liberty.

1.2.1 Hope of recovery

A worthy consideration in allowing these claims is the assistance these prejudiced plaintiffs would receive in dealing with their situation and overcoming their prejudiced state, as they would be compensated for an injury that was inflicted due to the negligence of another.¹² To achieve this goal the traditional fields of application of the law of delict should be expanded in order to accommodate this new development in the law of obligations¹³. Not only would afflicted children be compensated for wrongs committed against them, but at the same time genetic counsellors and doctors would be encouraged to accurately and responsibly undertake the important task of genetic testing and counselling.

1.2.2 Benefit to family life

Harrer¹⁴ refers to a persuasive argument raised by the German Supreme Court in rejection of the view that child-rearing expenses should not be awarded. The court believes that because an award reduces the financial burdens associated with unwanted childbirth,¹⁵ damage awards will improve the parent-child relationship and will cause the parents to feel more positive towards the child as a person. The reimbursed parents will at the same time be in a better financial position to cope with the inevitable high costs associated with raising a (handicapped) child.

⁹ it is submitted that this is a point worthy of consideration.

¹⁰ Shepherd, L: 1996. Sophie's choices: Medical and Legal responses to suffering. *Notre Dame Law Review* (72:1), 156.

¹¹ eg right to make informed procreative decisions.

¹² "for every wrong committed, there should be a remedy."

¹³ law of delict and law of contracts both fall under the law of obligations in the South African legal framework.

¹⁴ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 91.

¹⁵ it is submitted that unwanted childbirth in this sense could encompass both wrongful conception and wrongful birth actions.

1.3 Plaintiff's rights

Much has been said about the plaintiff's supposed right to be born healthy. While some have acknowledged such a right, the majority of courts have criticised the "right to be born as a whole and functional human being". It is my contention that the arguments raised against recognition of such a right are not convincing. There seems to be no logical reason why a person who is in a prejudicial state should not be allowed to claim compensation for the mere reason that he is still "better off" than others, or than would otherwise have been the case.

Here the compelling example exposing the flaws in the abovementioned point of criticism comes to mind: Should a person whose life is saved because of an excessively drastic amputation (under the reasoning in question) be prohibited from instituting action against the operating physician for the reason that he has his life thanks to the physician's improvident conduct? This could certainly not be the case, especially where it is found that a proper diagnosis would have revealed that a less drastic procedure or simply the right medication would have had the similar lifesaving effect.

If one draws a parallel between this example and the position of a wrongful life plaintiff, no substantive difference can be found. The wrongful life plaintiff does live, which is a positive attribute, but he also has to suffer from some or other hereditary condition because of another's negligence. Such a plaintiff can surely not be barred from claiming compensation for his disabilities and suffering merely for the reason that the alternative for his condition would have been non-existence?

What should be kept in mind is the fact that the physician's conduct in both instances discussed above has caused both positive and negative consequences. It would be too simplistic to consider either instance from one perspective only.¹⁶ Concerning the positive attribute: In the first set of facts the physician saved a life, whilst in the second instance the physician caused a child to be born. With regard to the negative consequence: In the first instance the patient unnecessarily lost a member of his body and in the second a child is born with severe congenital malformations.

If the negative consequence in both instances were to be an inevitable result, one could justifiably weigh the value and importance of each result and then decide whether a life without a particular member is better than death, or whether a handicapped life is more beneficial than no life at all. It is my submission, however, that in both given situations there need not be such

¹⁶ *ie* to consider only the positive or only the negative attribute.

a weighing of interests.¹⁷ In both the given example and wrongful life instances there need not have been either an amputation or a handicapped child.¹⁸ It is submitted that in both cases the physician's improper diagnosis and/ or treatment has caused the (unnecessary) prejudicial side-effect.

The fact remains that although a wrongful life plaintiff might be thankful for the life he has, there is no sound reason why he may not be compensated for the suffering and expenses he experience because of the fact he lives.

Commentators alternatively believe that the basis of a wrongful life plaintiff is founded on the right not to be born, of which the majority is of the opinion that such a right does not exist. It is my submission that wrongful life plaintiffs do not base their claim on this right, as it is not life itself that is complained of. The basic premise of the wrongful life plaintiff is that a medical professional's negligence has disallowed him a normal and healthy life.

1.3.1 Corresponding duty towards foetus?

Because patients seeking genetic counselling are under the medical control¹⁹ and responsibility of their physician, Fain²⁰ believes that this relationship of "control"²¹ imposes not only a duty on the physician towards his patients, but also creates a duty to protect²² the *foetus*²³ from

¹⁷ and a subsequent choice.

¹⁸ parents planning to have children who are informed that a specific drug being used by the mother could cause birth defects, could choose to discontinue the use of the dangerous drug before conceiving a child; parents who are informed of a high risk of foetal abnormality in mothers of an advanced age could plan to have children at a younger age or could closely follow the foetal development to ensure normal birth; prospective parents who are both found to be carriers of a recessive gene could responsibly decide not to have their own children and rather adopt or consider surrogate parenthood *etc.*

¹⁹ as patients will base their procreative decision on the physician's opinion, it is clear that he has control over their choices.

²⁰ 1987. Wrongful Life: Legal and Medical Aspects. *Kentucky Law Journal* (75), 585.

²¹ or rather "influence", derived from a special relationship based on trust and contract.

²² it is submitted that a physician could enforce such protection by performing accurate genetic tests, by providing precise genetic counselling, by appropriately warning parents of expected risks and through advising patients to take certain precautions and/ or to change certain circumstances.

²³ or potential foetus.

harms such as: environmental teratogens; embryo toxins;²⁴ auto immune deficiency syndrome (AIDS); environmental chemicals and all other damaging circumstances.²⁵

It is enthralling to consider the rationale used by Fain²⁶ to establish a nexus between the unborn foetus and the physician. His submission that the physician should be expected to protect the unborn foetus from harm is worth contemplating. The physician is after all in an excellent position to ensure that the unborn child has a healthy development, as he will be in the unique position and have the ideal opportunity to continually examine the pregnant mother as she reports for her periodical check-ups. One point of criticism against this view is that the individual's rights to privacy, bodily integrity and self-determination²⁷ would be infringed by such a duty.²⁸

2. Solutions

2.1 Value of legislative guidance²⁹

Stolker³⁰ conveys a basic truth: liability in law is not established by how far we can stretch our imagination or by what we deem as "reasonable", but is rather determined by clear the beacons of breach of a norm, relativity, fault, damage and causality.

"De grenzen van het aansprakelijkheidsrecht worden in eerste instantie niet bepaald tot waar ons voorsellingsvermogen reikt of tot waar dat voor ons gevoel 'redelijk' is,

²⁴ which include maternal infections such as *rubella*, syphilis, herpes, gonorrhoea - see ch 11.

²⁵ such as the inhalation of damaging substances *eg* nicotine found in cigarette smoke, excessive alcohol intake or uncontrolled drug use *etc*.

²⁶ *op cit* p 589.

²⁷ which rights are protected and entrenched.

²⁸ one would therefore seriously have to question whether such a duty could legally be placed on a physician or other health care provider in any instance where the execution of such a duty to protect the interests of the foetus would infringe upon the recognized rights of the patient.

²⁹ researcher will propose a draft of possible wrongful life legislation in a following paper.

³⁰ 1997. Een onrechtmatig bestaan in Nederland - een stand van zaken. *Aansprakelijkheid en Verzekering* (5:2), 38.

maar door de grensstenen normschending, relativiteit, schuld, schade en causaliteit."³¹

Despite his realistic approach concerning the limitations of tort principles, Stolker³² offers a solution: specific legislative recognition.

"More simply, it fails because the plaintiff is unable to prove all of the traditional elements. If the traditional balance is to be altered in favour of either plaintiffs or defendants, it is up to the legislature to make that change."

Hondius³³ gives a report on legislation that was introduced in the Netherlands in 1995 that comprehensively regulates medical treatment agreements.³⁴ The question has arisen whether such legislative guidance is indeed necessary, or whether a general regulation by the profession or an independent authority should not rather be preferred.

One point of criticism against internal regulation³⁵ is that these guidelines are often unilateral and biased, whereas modelled regulation bridges the gap between behavioural norms of a professional organisation and contractual consistency. A second suggested inadequacy of self regulation is the fact that decisions and guidelines do not bind non-members, which does obviously not hold true for legislative parameters.

It is submitted that these considerations should be taken into account when possible solutions for the wrongful life debate is discussed, especially with regard to a proposed legislative restitution.

2.2 Judicial guidelines

It is my submission that the judicial guidelines for recognition of actions based on unwanted

³¹ *op cit* p 39.

³² 1994. Wrongful Life: The Limits of Liability and Beyond. **International and Comparative Law Quarterly** (43), 521.

³³ 1995. De privaatrechtelijke positie van de patiënt in Europees perspectief. **Tijdschrift voor Privaatrecht** (32:4), 1684.

³⁴ in which the rights of the patient is primarily protected.

³⁵ Hondius, *op cit* p 1685.

birth, as suggested by Hampton³⁶ should be considered: the birth of a child is a foreseeable consequence of the negligent conduct of the defendant; the expenses associated with the rearing and education of such a child is also foreseeable; the inquiry into wrongful conception liability should commence with recognition of an actual injury to the plaintiff;³⁷ in application of the mitigating principle of the benefit rule, courts must recognize the fact that the benefits associated with the birth of a child will not always be greater than its detrimental consequences and; the courts should allow the trier of fact to make a proper evaluation of the factual situation³⁸ in order to come to a equitable conclusion to the matter.

2.3 Value of effective insurance

It is submitted that if liability for wrongful life cannot be recognized because of an inability of traditional tort principles to adapt to modern society, one should maybe consider alternative measures, such as compensation based on insurance.

Hondius³⁹ argues that medical malpractice litigation usually involves civil court procedures whereby the litigating parties are gathered in conflicting camps. He believes that this hostile relationship between patient and physician need not necessarily develop, as the injuries suffered can effectively be compensated by medical insurance. It is suggested that the Swedish system of patient-protection insurance could be considered, whereby hospitals take out a compulsory collective insurance on behalf and for the benefit of patients.

Sluyters⁴⁰ reports on the introduction of medical liability insurance in the Netherlands. He explains that the need to identify a wrongdoer would be replaced by the criteria of avoidability of damage caused by medical malpractice.⁴¹

³⁶ 1986. The Continuing Debate over Recoverability of the Costs of Child-rearing in 'Wrongful Conception' Cases: Searching for Appropriate Judicial Guidelines. *Family Law Quarterly* (20), 59.

³⁷ identifying the injury at its source, namely the fact that the physician breached the required standard of care.

³⁸ using all relevant methods, as well as quantitative and qualitative analyses of the costs on the one side and the benefits on the other.

³⁹ *op cit* p 1711.

⁴⁰ Arisz. H.B. 1991. Inleiding: Beroepsaansprakelijkheid. **Beroepsaansprakelijkheid: Recht op een scheve schaats**, 100. Jonge Balie Congres- W.E.J. Tjeenk Willink, Zwolle.

⁴¹ *"Er wordt over gedacht in Nederland een medische ongevallenverzekering te introduceren."* and also *"Het toewijzingskriterium zou dan niet meer zijn; een beroepsfout, maar, vereenvoudigd gezegd, de vermijdbaarheid van schade veroorzaakt door een medische behandeling."*

Van Roermund⁴² suggests that a comprehensive method of insurance could solve probably the most difficult wrongful life challenge, namely that a value must be placed on the life of an individual. He concludes that only if society as a whole has created a comprehensive and inclusive system of insurance in terms of which the vast majority financially contributes, would it be morally acceptable to keep a physician fully liable. He argues that in this way, not the value of the child, but the value of the physician's insurance would be the relevant amount of compensation.⁴³ It is my submission that this view of shifting off the risk of losses to an independent insurer, should be thoroughly considered as a logic alternative to expensive and complex litigation based on stringent legal rules.

It is submitted that, although this insurance-based solution might be generally more expensive than the current liability system, the greatest advantage is that the patient-physician relationship is not necessarily adversely affected by the institution of a claim by the patient. An additional advantage for physicians that could potentially be involved in wrongful life litigation, is the fact that they would not be held personally liable for payment of potentially enormous claims for damages. Insurance premiums could be generally passed on to patients by means of an increased consultation fee, or specific patients with particular genetic counselling/ testing requirements could be asked to foot the bill. A further solution would be to make specific mention of the availability of such insurance as an option to patients during their first consultation, or even for the physician to personally take out the necessary insurance. When the importance of solving the wrongful life debate has been fully appreciated, it could indeed be possible that financial state subsidy could be obtained.

Kamp⁴⁴ reports on a dramatic increase of insurance claims for (medical) professional negligence in the Netherlands.⁴⁵ He conveys that for this reason only five insurance companies have remained in this competitive field.

It is my submission that specific wrongful life liability insurance will benefit all parties involved, as patients would not need to engage in lengthy, expensive and risky civil litigation to be

⁴² 1997. De rekening van het kind: Aansprakelijk voor "wrongful birth". *Rechtskundig Weekblad* (39), 1313.

⁴³ *"Alleen doordat onze sameleving een uitgebreid verzekeringsinstrumentarium heeft onworpen waar nagenoeg alle leden van die sameleving aan meebetalen, kunnen wij ons een moreel besef permitteren dat de arts voluit aansprakelijk stelt, voor zover hij althans verzekerd is. Echter: niet de waarde van een kind, maar de waarde van een arts komt daarin tot uitdrukking."* op cit p 1318.

⁴⁴ 1995. Beroepsaansprakelijkheid in stroomversnelling. *De Naamloze Vennootschap* (73), 21

⁴⁵ *"Een inhaalrace in claimgedrag tegen medische hulpverleners"*.

compensated for their injuries and losses. Professional negligence insurers will undoubtedly calculate whether such insurance will be profitable and accordingly offer a market related policy.

3. Unfounded concerns

3.1 Excessive litigation?

Schoonenberg⁴⁶ believes that the bounds of litigation and liability need not get out of hand when a proper and effective social support system is in place.⁴⁷ Damage awards should, however, be kept modest.⁴⁸ She⁴⁹ also downplays the feared consequences of so-called “defensive medicine and believes that it can be prevented:

“Waar dit niet (meer) mogelijk is, kan een redelijke schadevergoeding de levensomstandigheden van het kind in ieder geval enigermate verbeteren. Verder reiken de juridische mogelijkheden op dit moment waarschijnlijk niet.”

The fears that have been expressed that recognition of wrongful life actions would cause a floodgate of new litigants and also create an unacceptable expectation from the legal system, are to my mind, unfounded. It should be mentioned that serious doubts exist that South African courts will be as adversely affected by excessive litigation as other Western countries.

Strauss⁵⁰ has various ideas why the excessive litigation found in the United States of America will not affect South Africa to the same extent. He firstly mentions that South African courts have traditionally had a protective attitude towards the medical profession. He supports this view with reference to the fact that the evidential rule of *res ipsa loquitur*⁵¹ does not locally

⁴⁶ Gevers, J.M.K. and Leenen, H.J.J. 1986. *Rechtsvragen rond voortplanting en erfelijkheid* Kluwer - Serie Gezondheidsrecht no.19, 75.

⁴⁷ as is the case in the Netherlands and most (richer) first world countries.

⁴⁸ which minimises the fears of those who believe that excessive liability will follow recognition of wrongful life.

⁴⁹ *ibid.*

⁵⁰ 1991. *Doctor, patient and the law* JL van Schaik (3rd edition) *op cit* p 245.

⁵¹ the matter speaks for itself/ it stands to reason.

apply to medical negligence cases.⁵² Another strong incentive to settle a medical malpractice case out of court is the exorbitant cost factor.⁵³ A further reality of South Africa litigation is that our courts are relatively conservative in their awards for damages.⁵⁴ This judicial restraint will to a large extent de-motivate possible fraudulent plaintiffs from instituting action for pure financial gain. In this regard it must be mentioned that well thought through legislation will authoritatively regulate the whole wrongful life debate, while closing the loopholes for possible fraudulent claims.

3.2 An acceptable solution

Weiss⁵⁵ is of the opinion that wrongful life recognition by the courts would produce a more just legal system and adds that if this were not to be, a legislatively enacted no-fault solution may ultimately be the best alternative.⁵⁶ He mentions various difficulties currently experienced by the wrongful life plaintiff: omission of information must be proved, and an omission is difficult to prove; the current tort system is inefficient, as prevailing plaintiffs receive less than half of the damages awarded in wrongful life and birth actions.⁵⁷

A suggested alternative⁵⁸ that would be more just, is a legislated program that distributes the available pool of funds among handicapped children.

“Although the program might not fully compensate some parents and their children because the money would provide only a fixed rate of compensation, it would reach all parents struggling with the expense of raising handicapped children and would save litigation costs. The program might resemble the current workers’ compensation and

⁵² **Van Wyk v Lewis** 1924 AD 438 - an obvious result or consequence of specific conduct (eg the fact that a child is born after the parents have been sterilised constitutes the obvious, namely that the sterilization procedure was not successfully performed), therefore, does not raise an inference of negligence as is the case in other fields of law - it is merely considered with the other evidence in the case.

⁵³ although, it is submitted, that this is not a phenomenon restricted to our shores.

⁵⁴ as opposed to high compensation orders allowed in America - note that the Americans also recognize so-called “punitive damages”.

⁵⁵ 1987. *Wrongful Birth and Wrongful Life: In search of a logical consistency. Annual Survey of American Law*, 507.

⁵⁶ *op cit* p 521.

⁵⁷ fees for attorneys, expert witnesses and other litigation costs consume the rest - in America more than 60% of the amount awarded in gross compensation are spent on legal fees.

⁵⁸ *op cit* p 522.

no-fault car insurance programs. The costs of the program could be borne by obstetricians, hospitals, genetic counselors and prospective parents. Moreover, such a no-fault program, unlike current proposals for a national health insurance for all 'catastrophic illness', would be self-funded, and therefore would not be a major new source of domestic spending."⁵⁹

It is submitted that this program would avoid the greatest difficulty in wrongful birth and wrongful life litigation, namely the traditionally required valuation of human life. I am of the believe that this suggested solution of Weiss should be seriously considered, as it addresses not legal, but also social needs.

4. Conclusion

Society should not fear the individual's increased cognizance of his legal rights and should not solely focus on the adverse consequences of increased litigation. It is praiseworthy that wrongs are exposed and wrongdoers are held accountable. It should also not be forgotten that the reality of professional accountability increases existing levels of proficiency and ensure that high standards of work ethics are maintained.

It should further not be forgotten that plaintiffs in wrongful life cases are real people who frequently suffer greatly from debilitating diseases and serious birth defects.⁶⁰ These people have been wronged by the medical profession and should be entitled to recovery whenever a complete cause of action has been established. It would be unfair if these plaintiffs were to be prejudiced by traditionally conservative courts and overburdened lawmakers who might reject liability based on rhetoric and outdated public policy considerations. It is therefore submitted that serious consideration should be given to regulate the increasingly pressing legal conundrum which is wrongful life litigation. As stated in **Curlender v Bio-Science Laboratories**,⁶¹ courts should take a strong stance that for every wrong there should be a remedy.

"The reality of the 'wrongful life' concepts is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into

⁵⁹ *ibid.*

⁶⁰ see ch 11 where some of the serious hereditary ailments are discussed.

⁶¹ 106 Cal. App. 3d 811, 165 Cal.Rptr. 477 (1980).

meditation on the mysteries of life.”⁶²

It is my submission that the viewpoint held by Belsky⁶³ is the correct one, also with reference to South African law. He reiterates that it is a basic principle of modern tort law that a cause of action should not be denied when the only obstacle preventing recovery is the plaintiff's inability to prove precisely calculated damages. He⁶⁴ refers to the well known American case of **Story Parchment Co. v Paterson Parchment Paper Co.**⁶⁵ where the court reasoned as follows:

“Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer for making any amend for his acts....(I)t will be enough if the evidence show(s) the extent of the damages as a matter of just and reasonable inferences, although the result be only approximate.”

I further agree with Patterson⁶⁶ who supports the dissenting judgement of Jacobs J in **Gleitman v Cosgrove**.⁶⁷

“While the law cannot remove the heartache or undo the harms, it can afford some reasonable measure of compensation towards alleviating the financial burdens. In declining to do so, it permits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of torts.”

A real obstacle for the local plaintiff in seeking justice in the courts is the fact that the majority of South Africans are not, through personal means,⁶⁸ financially capable to take on the medical

⁶² at 829.

⁶³ 1993. Injury as a matte of law: Is this the answer to the Wrongful life dilemma? **University of Baltimore Law Review** (22:3), 185.

⁶⁴ *op cit* p 235.

⁶⁵ 282 U.S. 555, 563 (1931).

⁶⁶ 1982. "Wrongful Life": Should the cause of action be recognized? **Kentucky Law Journal** (70), 163.

⁶⁷ 227 A.2d 689, 703 N.J. (1967).

⁶⁸ Strauss *op cit* p 244 conveys that the existence of a legal-aid system has done much to assist indigent plaintiffs in bringing their cases to trial.

fraternity. It is submitted that, once legal certainty has been established,⁶⁹ one might find that few wrongful life cases would even be brought to trial. Once the legal principle has therefore been entrenched, the population at large⁷⁰ will be legally protected.

It is therefore submitted that, although our legal system is a dynamic one based rather on fundamental principles than legislative guidance (and is in essence uncodified) one should consider the importance of legal certainty and visible legislative protection of interests in a community where the majority of people is financially unable to protect their rights through lengthy and expensive court battles. Providing a remedy in statute will considerably advance the legal position of these indigent plaintiffs.

It is my submission that courts should be bold to allow recovery in meritorious cases even without legislative backing. They should have faith in the equitable operation of the justice system which will ensure that no fraudulent or undeserving plaintiffs succeed with a claim and concomitantly limited litigation to acceptable bounds.

Finally, it must be agreed that proper, workable and comprehensive legislation could attribute much to obtaining legal certainty in the wrongful life phenomenon and thereby ensure the necessary execution of justice.

⁶⁹ either by means of clear judicial acceptance and instruction, or (preferably) through clear and practical legislative guidelines.

⁷⁰ many of whom is indigent and is in any event unable to enforce their rights or claim recompense where their interests have been infringed.