

Forward

The actions for Wrongful Life, Wrongful Birth and Wrongful
Conception - a comparative study from a South African
perspective.

by

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Foreword

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Opsomming

Die proefskrif "*The actions for Wrongful Life, Wrongful Birth and Wrongful Conception - a comparative study from a South African perspective*" ondersoek nuwe ontwikkelinge op die gebied van mediese nalatigheid en meer spesifiek die aksies wat ontstaan wanneer onbeplande en/ of gestremde kinders gebore word. Hierdie tipe aksies het die afgelope jare telkens groot opslae gemaak in regskringe en ook in die media. Die ontstaan van geboorteverwante aksies is grootliks toe te skryf aan die snelle ontwikkeling van die mediese wetenskap, asook die beskikbaarheid van akkurate genetiese toetse en effektiewe geboortebeperkingsmetodes. 'n Verdere rede waarom *wrongful life* litigasie plaasvind, is die klem wat deesdae geplaas word op die regte van die individu en die gevolglike ontstaan van 'n sogenaamde 'afwentelingskultuur' wat bepaal dat gelede skade van ander bronne verhaal behoort te word.

Ouers eis gevolglik die koste wat verband hou met die onderhoud van die kind. Ander skadeposte is verlies aan verdienvermoë, genoegdoening vir psigiese skok, verlies aan *consortium*, pyn en lyding (geboortepyn, pyn verbonde aan die uitvoer van 'n verdere sterilisasie *et cetera*). Hierdie aksie het relatiewe sukses oorsee geniet, waarna dit ook in die Suid-Afrikaanse reg erkenning ontvang het. 'n Vereiste wat vir die plaaslike eiser gestel word, is dat die motivering vir die besluit om nie verdere kinders te hê nie, ekonomiese oorwegings moes wees.

Beide die aksies vir *wrongful birth* en *wrongful life* ontstaan as gevolg van die geboorte van 'n gestremde kind. Eersgenoemde aksie word deur die ouers gevoer, wat die dokter aanspreeklik wil hou vir die feit dat hy nie genoegsame inligting verskaf het ten aansien van geboortefwykings of die risiko's van gestremdheid (of die moontlikheid van 'n aborsie) by die gebruik van sekere medikasie tydens swangerskap of swangerskap op 'n gevorderde leeftyd nie. Laasgenoemde aksie word namens die gestremde kind self ingestel. Sy eisorsaak is uiters kontroversieel, aangesien hy aanvoer dat hy skade ly omdat hy gebore is en eerder sou verkies het om nie te bestaan nie.

Die *wrongful life* eiser blameer die dokter van sy ouers vir die se nalatige optrede wat sy (die gestremde se) bestaan veroorsaak het. Hoewel die ouers se aksie beperkte sukses gehad het (ook in Suid-Afrika), is die kind se vordering slegs in uitsonderingsgevalle toegestaan. Die howe in 'n handjievol Amerikaanse state, Israel en Frankryk gee die *wrongful life* eiser gelyk, maar beperk die skadevergoeding tot spesiale skade vir addisionele onkoste verbonde aan die opvoeding, versorging en medikasie van 'n gestremde persoon. Die hoof skadepos, naamlik genoegdoening vir die veroorsaking van lewe, word deurgaans verwerp. Howe vind

dit onmoontlik om skade vas te stel, aangesien dit onmoontlik is om 'n vergelyking te tref tussen 'n toestand van nie-bestaan en gestremdheid.

Gevolgtrekking: Hoewel die Suid-Afrikaanse reg die vraagstukke van *wrongful conception* en *wrongful birth* relatief progressief benader, bestaan daar 'n definitiewe behoefte om die regsposisie ten aansien van *wrongful life* vir toekomstige eisers seker te maak. Twee moontlike oplossings is: doeltreffende wetgewing wat die spesifieke vraagstukke (kenmerkend aan die besondere aksie) aanspreek en, tweedens, die alternatief van voldoende versekering vir professionele mediese nalatigheid.

Summary

The thesis entitled “*The actions for Wrongful Life, Wrongful Birth and Wrongful Conception - a comparative study from a South African perspective*” explores the new developments in the medical field arising from negligence, more specifically the legal actions that can result from the birth of an unplanned or handicapped child. The past few years these actions have had serious repercussions in law circles and made headlines in the mass media. The origin of birth-related actions can be attributed to the momentum of medical developments, the availability of accurate genetic tests and effective contraceptive methods. Another reason for wrongful life litigation is the emphasis that is placed on the rights of the individual and the consequence of a “passing the buck culture” that determines that losses incurred/experienced can be recovered from another source.

An unplanned birth can result in a legal action of wrongful conception. The parents subsequently claim maintenance costs linked to or connected with the unplanned child. Other costs claimed could include costs related to loss of income, psychological stress caused by the birth of the child, loss of consortium, pain and suffering caused by the birth (labour pain, pain associated with another sterilisation process *et cetera*.) These actions achieved relative success abroad and consequently gained some recognition in South Africa. A requirement for the local claimant is that the motivation for a decision not to have more children, should be an economic decision.

Actions for both wrongful birth and wrongful life originate as a result of the birth of a handicapped child. Wrongful birth legal actions are entered into by the parents who hold the medical practitioner responsible for the lack of information about medication taken during the pregnancy that could result in birth defects. Wrongful life actions are instituted on behalf of the handicapped children themselves. The origin of these claims are highly controversial as the child alleges that he/she suffered losses because of his/her birth and would, if given the choice, not have chosen to be born.

The claimant in a wrongful life action blames his/her parents' medical practitioner for negligent conduct that caused his/her handicapped existence. In contrast to the parents' legal actions that resulted in limited success (including South African cases), the actions taken by children have been far less successful. The courts in a few American states, Israel and France indulged the wrongful life claimant, but limited compensation in these law suits. Claimants were only reimbursed for losses brought about by special education, care and medication for their handicapped children. The main head of damages, *viz* satisfaction for the causing of life to commence, has consistently been rejected since courts find it difficult to determine loss incurred for wrongful life, as it is impossible to make a comparison between non-existence and a limited/restricted handicapped existence.

Conclusion: Although South African law has a progressive view of wrongful conception and wrongful birth cases, a need exists to ensure a definite legal view/position for future wrongful life actions and compensation. Two possible solutions could be: effective legislation that will address specific issues characteristic of these unique legal actions and, alternatively, sufficient insurance for professional medical negligence.