IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT 74/14

In the matter of the application for the recognition of a wrongful suffering claim between:

C J H
(on behalf of her minor son M) Applicant

and

THE KINGSBURY FOETAL ASSESSMENT

CENTRE(PTY)LTD Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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1. A Introduction

1. It is a well-established principle and a constitutional imperative that the courts are obliged to develop the common law.[1] The issue to be determined here is whether a claim for wrongful suffering (often mislabeled as a 'wrongful life' claim) should be recognised in our law. Claims for wrongful birth and wrongful conception have for some time already been recognised in South African law.[2]

(i) Terminology

2. The term "wrongful life" was apparently coined by the Appellate Court of Illinois in the early 1960's when it adjudicated a claim by an illegitimate child who alleged that illegitimacy was a real and substantial burden for him to bear and that the defendant had acted wrongfully in having promised the child's mother that he would marry her although he was already married.[3] The court dismissed such a claim for fear that it would be flooded with suits for "wrongful life" filed by everyone born under

[1] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
[2] *Friedman v Glicksman* 1996 (1) SA 1134 (WLD); *Stewart v Botha* 2007(6) SA 247 (C); *Stewart v Botha* 2008 (6) SA 310 (SCA); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA); and *Administrator, Natal v Edouard* 1990 (3) SA 581 (A)
[3] *Zepeda v Zepeda*, 41 Illinois Appellate Court Reports, Second Series (Ill App 2d) 240, 190 North Eastern Reporter (NE) 2d 849 (1963), cert denied, 379 United States Supreme Court Reports (US) 945 (1964)

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conditions which he or she regarded as adverse. The term suggests that there is something not right about the life of the plaintiff, that the wrong relates to the very fact that the child was permitted to be born, and therefore that she should not have lived. It is, however, clear that life as such cannot be wrongful and that the term commonly used is an 'over-simplification' of the conflict of interests which are at stake.[4]

3. The plaintiff in a wrongful suffering action does not maintain or assert that his or her existence is wrongful or that his or her life should be terminated. The wrong alleged is the negligence of the defendant that has directly resulted in the present suffering. Unfortunately, such terminology may have made a substantial contribution to making such claims so problematic since the implication is that the plaintiff is challenging life itself and because of this, courts and even the legislatures, are reluctant to allow such claims. The legal action is a limited exercise constructed only in order to attempt to recover damages to support the life that is now being lived, one which, as described,

[4] Ruda, A *'I didn't ask to be born': Wrongful Life from a comparative Perspective'* (2010) 1 Journal of European Tort Law 204-205; See *Reed v Campagnolo_332* Md 226 (1993) 237: *"These labels are not instructive. Any 'wrongfulness' lies not in the life, the birth, the conception or the pregnancy, but in the negligence of the physician. The harm, if any, is not the birth itself but the effect of the defendant's negligence on the {parents] resulting from the denial of the parents of their right, as the case may be, to decide whether to bear the child with a genetic or other defect".*

involves total dependence and continuing care, a life that includes suffering.

4. It is therefore untenable to approach these cases as an exercise in misreading, based on mislabelling.[5] It is submitted that the term "wrongful suffering" accurately describes this cause of action. The principle issue is therefore whether an admittedly negligent health professional and/or geneticist should be asked to absorb the costs of the long term consequences of the negligence? Alternatively, should that be left to either general public taxation or the private and philanthropic interest of the plaintiff's family and friends?

5. The mislabeling of the cause of action is propaganda designed to destroy it and it is submitted that the more accurate and appropriate label "wrongful suffering" is preferable, and accordingly, the term "wrongful suffering" will be used throughout the submissions, instead of the pejorative "wrongful life" tag, which is demeaning of the disability suffered by M and others in his position and unworthy of such dignity as they are

[5] Morgan, DM and White, BP (2006) *'Everyday Life and the edges of existence: Wrongs with no name or the wrong name?'* University of New South Wales Law Journal, 29 (2) pp 239-249: 12 and 17

able to salvage, given their circumstances. The court is also urged to adopt the appropriately sensitive terminology and to jettison reference to "wrongful life" as an abominable term that has no place in a society built on respect for life and other human rights, which are justiciable in terms of a Bill of Rights. The term "wrongful life" belongs in a bygone century, does not really apply to the factual matrix here under consideration on the common cause basis of a legal exception, and is ripe for replacement with the appropriate "wrongful suffering" terminology.

(ii) The core issues in wrongful suffering cases

6. The issues involved in wrongful suffering claims are principally of a legal and moral nature. In South Africa the legal issues relate to the law of delict involving wrongfulness, damages, causation and public policy. The moral issues relate to the way we think about life in general, more particularly the way we think about newborn life in the context of modern medicine and its possibilities juxtaposed with religious and ethical principles, which have evolved through the ages.[6]

[6] Giesen, I *'The Use and Influence of Comparative Law in 'Wrongful Life' cases'* Utrecht Law Review Vol 8 Issue 2 (May 2012): 38

(iii) The role of the South African courts in wrongful suffering cases

7. In *Stewart v Botha*[7] *("Stewart (2008)")* Snyders AJA held that: *"I have pointed out that from whatever perspective one views the matter the essential question that a court will be called to answer (. . .) is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law."* This approach, with respect, denies the very essence of the law and the function of the court. Law and the law of delict, in particular, *"is about people, their choices, human conduct and about regulating that human conduct. This is by no means different if that involves solving difficult problems. Denying an answer because the law should not deal with certain questions equals a denial of doing justice once the question has been raised. From the moment a certain issue, however difficult it may be, has been brought up, the Jaw must step up to the plate and do what it does best, i.e. decide highly controversial societal issues through the courts. It must do so without exception and therefore also in wrongful life claims in order to*

[7] 2008 (6) SA 310 (SCA). [28]

keep the members of society from deciding the issue themselves by taking the law into their own hands." [8] We respectfully associate ourselves with the sentiments expressed by Giesen in this regard.

B Applicant's cause of action and the development of the common law

8. The applicant, acting in her representative capacity as mother and natural guardian of, and on behalf of her son, M, who was born on 4 April 2008, with "Down Syndrome" ("OS"), serious and permanent cardiac defects, and further related complications, instituted action against the respondent, alleging that the respondent owed her a duty of care, in her representative capacity as mother of the fetus, to inform her of the risks of M's abnormalities, thereby granting her the opportunity of aborting the fetus. [9]

9. The sections of the Bill of Rights that require to be considered and taken into account in adjudicating the applicant's appeal,

8 Giesen 2012 *(supra)* 48.
9 Record pp. 7 - 8 (10.1) to [10.9); pp. 2 -4: (4) to [11)

include C 7(2), C 27, C 28(2), C 12(1)(c) and (e), 12(2)(a) and (b), C 9(1), C 10 and C 11, read with C 39(2), which enjoins this court to *"promote, the spirit, purport and objects of the Bill of Rights".* The following sections of the Children's Act 38 of 2005 ("Children's Act") also need to be considered, namely sections 6(1)(b) and 6(2)(a), (b) and (c), sections 7(1)(i), (h) and (j), sections 11(1), 11(2), and section 9.

(i) South African case law

(a) Wrongfulness

10. In the Western Cape High Court in *Stewart v Botha* [10] *("Stewarl (2007)'}* Louw J held that the wrongfulness of the defendant's negligent omissions towards 8[11] was that its failure to properly inform B's mother precluded her from making an

informed decision on whether or not to abort the fetus. The aforesaid obligation to inform the mother properly was a duty owed to B, mediated through his mother. It was therefore incorrect to categorise the duty to the child as being a duty to terminate the life of the fetus. The defendants owed the child a duty to properly advise the mother.

[10] 2007(6) SA 247 (C)

[11] "B" was the minor child in this matter (Brian Stewart)

11. According to Louw J, the fact that the only remedy at the time available to prevent the child from being born with severe congenital deformity was a legally sanctioned abortion, should not have been the reason for denying the child, after it was born, an action which he clearly should, on moral grounds, be entitled to bring against the professional person who negligently made it impossible for the mother to exercise a properly informed choice to have an abortion. The court reasoned that in time medical science may render the treatment of congenital disorders of the fetus possible. The negligent failure to diagnose or treat such disorders, in accordance with procedures, resulting in the birth of a disabled child, would then clearly form the basis of an action on behalf of the child.

12. In accordance with the court's aforesaid approach it should simply be stated that B now exists in a disabled state as a result of the negligent conduct of the defendants. If B, in such circumstances, has a claim for medical expenses and cost of special schooling and maintenance in his disabled state, he should be able to sue for the recovery thereof irrespective of whether his parents also have such a claim. The parents may,

for example, because their claim has become prescribed, or may for moral of other reasons, decide not to claim.

13. The Supreme Court of Appeal ("SCA") in *Stewart* (2008) also viewed the central question in cases of this nature, as one of wrongfulness and duty. In this regard the court confirmed that where pure economic loss is caused by the negligence of another, the act or omission is not *prima facie* wrongful. It is only wrongful if public policy considerations demand that, in the circumstances of the case, the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. The court confirmed that in such cases the element of wrongfulness depends on the existence of a legal duty not to act negligently. In considering whether conduct is wrongful, the court has to weigh up the interests of the parties *inter* se and the conflicting interest of the community, and with due recognition of constitutional imperatives, strike a balance in accordance with what the court conceives to be the society's notions of what justice demands.[12]

(b) Sanctity (preciousness) of life

[12] Stewart (2008) : [27]

14. Policy decisions in relation to wrongful suffering are grounded by the sanctity or preciousness of life argument. Louw J in *Siewert* (2007) was of the view that the sanctity of life argument has been eroded in South Africa in a number of respects. He referred to the Choice of Termination of Pregnancy Act 92 of 1996 ("TOP"), section 2, of which provision specifically allows an abortion in circumstances that fall within the ambit of the Act's provisions. Allowing B's claim therefore does not involve the prevention of conception or the taking of life. By allowing the claim it is recognised that B is now in existence in a disabled state, which would not have been the case, had he not been born. At that stage the Act had survived two constitutional challenges.[13] TOP is still on the statute book.

15. The SCA failed to pronounce on the question as to whether the provisions of TOP have eroded the principle of the sanctity of life. It is also not clear from the SCA judgment whether the court viewed the inroad of the sanctity of life by the TOP as a violation of the constitutional right to life. The court made no

[13] *Christian Lawyers' Association v Minister of Health* 1998 (4) SA 1113 (T) & 1998 (11)

BCLR 1434; *Christian Lawyers Association v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T) & 2004 (10) BCLR 1086

attempt to explain its association of the principle of the sanctity of life with section 11 of the Constitution.

16. In view of the fact that, in *Friedman v Glicksman* [14] and in *Administrator, Natal v Edouard,* [15] the courts recognised the mother's wrongful birth and wrongful conception claims where similar issues of public policy arise, Lauw J in *Stewart* (2007), found that there did not appear to be any valid reason for being

more accommodating towards the parents' claims and for holding that where the mother is the plaintiff, the sanctity of life argument does not prevent the action, whereas in the case of the disabled child being the plaintiff, the sanctity of life argument is an insurmountable obstacle to the claim. The notion that this consideration requires one to enter the metaphysical realm of non-existence was, in his view, an irrational and emotional response to a very real situation of a person living in a state of disablement. If it was not for the negligence of a professionally qualified person who was engaged to advise the mother on that very situation, which advice would have enabled the mother to exercise an informed choice to terminate the pregnancy, the

14 1996 (1) SA 1134 (WLD)
15 1990 (3) SA 581 (A)

child's current and future suffering in a disabled state could have been prevented from becoming a reality.

17. The SCA also refrained from commenting directly on the issue of the tenability of the argument that it would be inconsistent to recognise wrongful pregnancy and wrongful birth claims, but to deny wrongful suffering on the strength of the sanctity of life argument.

18. In *Friedman (supra),* one of the grounds on which the wrongful suffering action was disallowed, was the fear that it would open the door for disabled children to sue their parents because they may for a number of reasons have allowed the child to be born while cogniscant of the risks associated with such a decision. A couple who decides with knowledge of the risks involved to conceive, and the expecting mother who decides not to terminate the pregnancy in the face of known or foreseeable risks, acts in the exercise of their constitutional right to make decisions concerning reproduction. Whether this act should be held to be unlawful vis-a-vis the child will depend on the circumstances and views of the community, incorporating the constitutional values and norms as set out in the

Constitution. The issue in this matter should be determined by the fact that the child should be entitled to sue the doctor in accordance with the standards demanded of her, namely to treat and advise the mother properly.

19. The SCA also in this instance failed to pronounce on the matter, but merely stated that the counter argument was that the mother's choice not to avail herself of her right to terminate the pregnancy cannot be regarded as unlawful. It also held in this context, that allowing a claim against one category of claimants, could not offer a principled basis on which to allow or refuse a claim against another category of defendants.[16]

(c) Damages

20. With regard to damages Lauw J, in *Stewart* (2007), *inter etie*, opined that one should differentiate between two issues that come to mind in this context. Firstly, the proof, on a balance of probability, that the plaintiff suffered damages, and secondly, the quantification of such damages. With regard to quantification of damages in respect of further medical treatment, special schooling and maintenance, Lauw J rejected

16 *Stewart* (2008) *supra*, [19]

the argument that in cases of difficulty in respect of quantification the court must make an assessment of the damages to the best of its ability. He further pointed out that the objection to B's claim was not the difficulty in the assessment of damages, but the more fundamental question whether B had suffered damages at all.

21. Because of the fact that the state of severe disability in which B was born, was not caused by the negligent conduct of the defendants, it was inevitable that he would be born in exactly the state of severe disability in which he was born. The negligent conduct of the defendants was therefore legally irrelevant to the disabled state in which B was born.

22. With regard to this issue the SCA referred to various jurisdictions to support the notion that it was impossible to quantify such damages and also that delictual damages awarded to compensate the plaintiff in order to place him or her in the position that he or she would have been in, if the negligence had not occurred, was not possible, because had the negligence not occurred, the child would not have been born.

C. RESPONDENT'S EXCEPTION

23. The cases of *Friedman* and *Stewart* (2007 & 2008) are distinguishable from the current case, as the births in the aforementioned cases (and the concomitant negligent acts complained of therein) occurred prior to the coming into operation of the new constitutional dispensation in South Africa.[17] As a result, the courts seized with those matters were not able to examine the parameters of the duty of care owed to children within the context of their rights afforded to them in the Bill of Rights and the Children's Act, as the provisions contained in the Bill of Rights and the Children's Act do not, and did not, operate retrospectively and therefore could not be applied to *Friedman* and *Stewart*.

24. The court a *quo* misconstrued submissions made in this regard, on behalf of the applicant.[18] *In casu* the respondent's alleged negligence occurred in October 2007, and M was born

[17] According to the SCA record on Appeal Vol 1 p24 B was born on 4 August 1993. (SCA Case No 340/07), Alexandra Friedman was born on 5 March 1991 *(Friedman, supra,* at p. 1137A)

[18] Judgment of court *a quo*: [21] and [22]

on 4 April 2008; making his case subject to the values and principles of the Constitution.

25. The court a *quo* misinterpreted the SCA's rejection of a claim for wrongful suffering in *Stewart* (2008), by stating that the SCA did consider the issue of developing the common law after a consideration of the relevant constitutional provisions.[19] In fact, Snyders AJA states that *"[n]o suggestion was made which common-law principle or principles are to be developed or how the application of those sections would result in an award of the claim".*[20] The matter of developing the common law in terms of the Bill of Rights was not properly considered or placed before the SCA in the aforementioned matter. The SCA did, however, make it clear that, for the reasons stated in its judgment it was not prepared to favourably consider a claim for wrongful suffering. The applicant accordingly did not to appeal to the SCA, preferring to request this Honourable Court to develop the common law with due regard to the normative values of the Constitution.

19 Judgment of court *a* quo: (22]

20 *Stewart* (2008) *(supra)* : (22 et seq]

26. In *Carmichele v Minister of Safety and Security*[21] this Honourable Court, in confirming the obligation on courts to develop the common law, refers to the obligations and inherent powers of the courts as stated in C 173, C 7(2), C 8(1) and C 39(2). This Honourable Court observes, *"that the common law, especially in the field of delictual liability, has constantly required development".* Furthermore, the basis for distinguishing the pre-constitutional case law is to be found in the exercise of this court's duty to develop the common law of delict in such a way as to recognise M's claim for wrongful suffering, by basing it on the proper application of the relevant rights in the Bill of Rights to the (common cause on exception) factual matrix revealed in the particulars of claim. That the court can do this, is inescapable when regard is had to the approach of the unanimous judgment by Khampepe J in the case of *Mankayi v Anglogold Ashanti Ltd.*[22]

27. The court a *quo* erred in overlooking and not applying the child-focused jurisprudence of the Constitutional Court and the normative values of the Constitution in its judgment, as was

[21] 2001 (4) SA 938 (CC): [33] to [39]
[22] 2011 (5) BCLR 453 (CC) : [15] to [17]

done in C *v Department of Health and Social development, Gauteng.* [23] When considering the sections of the Bill of Rights and the Children's Act, as set out in paragraph 9 above, a claim for wrongful suffering ought to be recognised, thereby attributing wrongfulness to the respondents' conduct and creating a duty of care to the fetus.

D. THE COURT *A QUO'S* MISDIRECTIONS

(i) Legal duty

28. The court a *quo* erred in not finding that the respondent owed the applicant a legal duty of care, in her representative capacity on behalf of M.

29. When considering the developments in modern medicine and medical technology, such as *in vitro* fertilsation, *in utero* fetal surgery, genetic modification and such like, the duty of care owed by the medical practitioner, is ultimately, and on a proper analysis of whose rights are most affected, a duty of care owed to the child whose well-being is forseeably at risk as

[23] [2012] ZACC 1. Discussed in the SA Law Journal: Couzens M *'The Constitutional Court consolidates its Child-focused Jurisprudence'* 2013 SALJ (4) 672

a result of any negligence in the carrying out of the type of assessment to which the fetus which became M, was subjected by the respondent. [24] In the same way that a parent takes medical decisions on behalf a minor, the parent, similarly *in* /ocis *parentis,* takes medical decisions on behalf of a fetus, which is unable to state a choice between non-life and life in an impaired state, and the parent thus effectively acts in the best interests of the fetus.

30. Legal issues surrounding, for example, reproductive genetics, are still emerging and both statutory and case law are still developing to regulate these novel issues. Legal developments are therefore likely to continue to arise in a number of areas, including liability for causation of genetic and chromosomal abnormalities, prescription once genetic abnormalities are discovered, the legal relevance of the scientific methods used to determine any abnormalities and the appropriate standards of care and the scope of the physician's duty, in this regard. For example, there are now tests for more

[24] Human S & Mills L *'The immeasurable wrongfulness of being: the denial of the claim for wrongful life'* Stellenbosch Law Review 2010 167-89 : 69ff; Ellis E & *McGivern* B *'The wrongfulness or rightfulness of actions for wrongful life'* (2007) 15 Tort Law Review 1 - 27 : 16ff; Coetzee LC *'An analysis of judicial pronouncements by South African courts on the action for wrongful life'* 2012 (75) *THRHR* 422-450: 431

than 1400 genetic diseases available, either clinically, or as a part of research. There is furthermore a procedure called 'pre-implantation genetic diagnosis' ("PIGD"), which allows scientists to test embryos directly for genetic defects before they are implanted into a woman's uterus[25]

31. Both the USA and Canada recognise liability in negligence towards a fetus.[26] In Australia a legal duty of care is also recognised towards the fetus.[27] In the United Kingdom the potential liability for injury that is inflicted on an unborn child was resolved by legislation rather than by common law.[28]

32. In South Africa the traditional approach with regard to wrongfulness in the case of an orrussron **lies in the establishment of a breach of a legal duty which the defendant owes to the plaintiff. The existence of the aforesaid legal duty depends on the legal convictions of the society.**

[25] Crockin SL *'Overview of court decisions involving reproductive genetics'* Genetics and Public Policy Centre: pp 1, 12

[26] Ellis E and McGivern B *(supra)* : 3

[27] *Watt v Rama* [1972] VR 353; *X and Y (by her Tutor X)* Pal (1991) 23 NSWLR 26; *Wrens/ow v Mennonite Hospital* (367 N.E. 2d 1250 IL. 1977). In the latter case, the issue was whether physicians could be held liable for a fetal blood disorder suffered by a child due to the negligent transfusion of the mother nine years prior to conception. It was held that the plaintiff child was a foreseeable victim of negligence.

[28] Congenital Disabilities (Civil Liability) Act 1976 (UK). Enabling a child born alive after 22 July 1976 to sue in respect of injuries sustained prenatally.

33. In consideration of whether or not there is a legal duty, many factors interplay: *"the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas* as *to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."*[29]

34. In *Road Accident Fund v Mtati*[30] the court found that the driver of a vehicle owed a legal duty to an unborn child not to cause it harm while *in utero.* Although in this situation the driver of the vehicle actually caused the harm to the fetus, it can be argued that a medical practitioner, who is *intimately acquainted with every facet of the unborn child's development to the extent of ensuring that the child* is *born healthy and alive,*[31] owes a duty of care to the unborn child to take reasonable steps to avoid conduct which might foreseeably cause pre-natal injury. Medical practitioners seldom cause their patients' illnesses and yet they may be held liable in negligence for pain and suffering

[29] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A), at 27 G-1
[30] 2005 (6) SA 215 (SCA); *Pinchin NO v Santam Insurance Co Ltd* 1963 (4) SA 666 (A)
[31] Van Niekerk C *'Wrongful life claims: a failure to develop the common law?'* Stellenbosch Law Review 2012 3: 527-539, at 536ff.

and medical costs, where such illness could have been cured or prevented with reasonable intervention.[32]

35. *In casu,* the applicant sought the professional fetal assessment services of respondent for the reason of her being pregnant and her being concerned about the viability and good health of her fetus that became M. Her own health was only indirectly involved, the procedure being aimed entirely at the fetus and the possibility of the applicant exercising her statutorily and constitutionally entrenched reproductive rights by making a properly informed decision to abort the 'defective' fetus. The respondent thus owed M a duty of care to have properly advised the applicant of the high risk of her fetus being born with OS, to enable the applicant to exercise her right to make an informed decision whether or not to terminate her pregnancy.

36. The rights to human dignity, bodily and psychological integrity and not to be treated in an inhumane and degrading way, read together with C 7(2) which obliges the state to respect, protect, promote and fulfill the rights in the Bill of

[32] Human S & Mills L 2010 *(supra):* 74ff.

Rights, and the limitations of C 36, must be balanced against any right to life in an impaired and disabled state such as that in which M unfortunately finds himself.

37. Both internationally and in South Africa, a legal duty towards the unborn fetus has been established. In the South African context the legal duty is mediated through the mother of the fetus.

(ii) 'Sanctity of life' argument

38. There is a wide inclination or repulsion to the deeply disturbing idea that some lives are not worth living or worse thannothing (non-existence). On the other hand, there are medical conditions, which result in the quality of life being so low as to make it reasonable to regret having been born at all. This ambivalence manifests itself in the discrepancy of prospective and retrospective evaluations with regard to lives with serious birth defects. The symptoms of certain congenital diseases are frequently so severe as to make people doubt whether life is always a blessing, *inter a/ia*, Tay-Sachs' disease,

Lesch-Nyan-Syndrome and dystrophicepidermolysis bullosa (in **particular, the Junctional Herlitz type).**[33]

39. **Even those people who are most apprehensive about the anti-disability sentiment in pre-natal diagnoses, would in all probability welcome abortions after the diagnoses of Tay-Sachs**

[33] For example, the typical symptoms of Tay-Sachs' disease run as follows: *"a Tay-Sachs child is doomed to a short and increasingly handicapped existence. The child appears well at birth and develops normally for 6 to 8 months, when progressive psychomotor degeneration slowly begins. By eighteen months the child is likely to be paralyzed and blind, unable to take food by mouth, and suffer from constipation and bed-sores. There are increasingly frequent convulsions that cannot be controlled by medication. The last few years of the child's life are usually spent in a vegetative state. Death typically occurs between the ages of three and five years, usually from infection.* [See Kim H *'The uncomfortable truth about wrongful life cases'* Philosophical Studies July 2013: 164 (3), 623-641, at footnote 3];

In *"Clinical features of the Lesch-Nyan syndrome"* 1979 *Arch Intern Med.* 186; 186-189, 191, some of the horrors of the clinical features are described: *"All of the patients have had severe degrees of motor retardation. None of the patients we have studied have been able to walk. They have been able to sit only when supported. They much prefer being supported. They much prefer being upright and are best managed by tying them securely to a chair with arm and leg* rests … *none has been successfully toilet trained … Ultimately they have all developed muscular hypertonicity. This has in* some *progressed to contractures and to dislocation of the hips. Scissoring of the lower extremities is prominent …. Their speech is characterised by athetoid dysarthria.* As *they get older this problem in communication becomes particularly frustrating to the patients, and, of course, frustration and anger only increase dysarthria … Athetoid dysphagia* is *another problem, and this can be life threatening. These patients have* so *much difficulty in swallowing that they are very difficult to feed. Furthermore, they all vomit frequently and dramatically … Aggressive self-mutilating behaviour is probably the most striking aspect of the syndrome. Self-mutilation may begin as early* as *the eruption of teeth. It usually begins at least shortly thereafter. Most patients bite both their lips and fingers destructively. Every patient we have seen has bitten his lips destructively, unless the primary teeth have been removed very early. In most patients the hallmark of the syndrome* is *loss of tissue about the lips. Partial amputations of fingers are common … In hyperuricemic children sensation* is *intact. They scream in pain while they bite themselves and they are really happy only when securely protected from themselves by physical restraint. Many of these children scream all night until their parents and guardians are taught to restrain them securely in bed … When protective coverings or restraints are removed their personality changes immediately. They appear terrified.* As *they get older they learn to call for help. Often while they are screaming or calling they are already tearing at their flesh". [See* Van den Heever P *"Pre-natal Medical Negligence in South African Medical Law: Wrongful Life (the right not to be born) and the Non-existence paradox"* (2006) 69 *THRHR* 188-201, at footnote 38]

and other degenerative conditions that cause extreme pain, loss of awareness of self and of others, and death in early childhood.

40. Globally, various policy considerations support the recognition of a wrongful suffering cause of action. Firstly, failure to impose delictual liability may impact on health care practitioners' decisions regarding genetic testing apart from the failure to deter negligent conduct *per* se. Also, because abortion or termination of pregnancy is such a highly emotional and controversial issue the absence of clear liability for wrongful suffering could impact on a non-negligent doctor's otherwise objective medical judgment. In this regard pro-life physicians may consciously or unconsciously fail to conduct appropriate genetic testing or fail to fully disclose the results of genetic testing in order to prevent termination of pregnancy. In order to deter doctors' from making decisions about genetic testing and disclosure based on personal philosophy, liability should be imposed.

41. Secondly, and although most jurisdictions recognise wrongful birth actions, wrongful suffering actions are still necessary to ensure compensation to wrongful suffering victims. Parents may

fail to institute wrongful birth proceedings timeously with the result that the child is left with no funds whatsoever to meet his needs. Not to recognise a wrongful suffering cause of action also results in a failure to protect disabled children from their parents ignorance of the law negligence or irresponsibility, in either failing to pursue an action or failing to utilize the proceeds of such action, wisely. In South Africa, where a parent's liability to maintain a minor terminates when such a child attains the age of majority or becomes self-supporting. It may result in the newly emancipated disabled person being left without any remedy should his parents, for whatever reason, not be able to further support her after reaching the age of majority. This may leave the emancipated disabled person with little or no ability to earn even minimal wages without the prospect of compensation in any form. [34] Thus, until such time as the legislature promulgates legislation to provide for a disabled person in these circumstances recognition of wrongful suffering claims must and should prevail. [35]

[34] Pollard DA *'Wrongful analyses in wrongful life jurisprudence'* (2004) Alabama Law Review 55 : 327 (pp. 1 - 38) : 340ff (page 14ff)
[35] Van Niekerk C 2012 : 527; Stein JT *'Backdoor Eugenics: the troubling implication of certain damages awards in wrongful birth and wrongful life claims'* Seton Law Review; Vol 40; ISS.3, article 11 (2011) : 52

42. Human dignity is central to our new dispensation; besides being part of the Bill of Rights (C 10) and thus guaranteed to all, it is also a foundational value (C 1(a)). C 12(2)(a) affords everyone the right to bodily and psychological integrity, including the right to make decisions concerning reproduction. Having regard to the provisions of TOP, the 'sanctity of life' premise does not accord enough weight to the allowable limitations on the right to life that abortion legislation inevitably brings into play in our law (C 36(1)). Claims for wrongful suffering and wrongful birth are based on conceptually the same set of facts. Since the termination of pregnancy is legally sanctioned and undermines the sanctity of life, logic and consistency dictate that the sanctity of life argument cannot bar a wrongful suffering cause of action while at the same time allowing a wrongful birth action.[36]

43. In this regard an action for wrongful suffering will presumably only be instituted if, for whatever reason, the parents are unable to sue for wrongful birth. The most common reason for instituting a wrongful suffering action, is that the wrongful birth

[36] *Stewart (supra)* 2007 : 18; Van den Heever P *"Pre-natal Medical Negligence in South African Medical Law: Wrongful Life (the right not to be born) and the Non-existence paradox"* (2006) 69 *THRHR* 188 - 201 at 192; Coetzee LC *(supra)* : 433

37

action has prescribed. Another reason may be that the biological parents of the child are no longer involved in the life of their child. In circumstances where the child has for example been adopted, fostered or institutionalized, it may also be the only way of accessing damages that may provide urgently needed resources for the child.[37]

44. The court a *quo* erred in finding that there has not been a change in the "convictions of the community" [38] since the *Stewart* (2008) matter, and in finding instead that "public opinion continues to be influenced by the remarkable resilience in overcoming enormous odds displayed by many disabled persons in all walks of life, refuting those who *treat their lives as inferior to non-existence".*[39] Questions of public policy have to be decided with reference to the rights guaranteed and entrenched in the Constitution and courts are required to develop the common law accordingly.

[37] Rioux MH, Sasser LA & Jones M, Critical perspectives on Human Rights and Disability Law 2011: 108

[38] Judgment of court *a quo* : [29]

[39] *Stewart.* (2008): [13]

(iii) Damages

45. The three South African authorities of *Friedman* and the two *Stewart* decisions all state that the only measure of damages can be the difference in value between non-existence and existence in a disabled state, making it essentially an impossible calculation. Furthermore, it is argued that granting such a remedy would inherently involve endorsing a claim that a person would be better off not having been born at all, rather than having been born in a disabled state.

46. The approach followed in *Cur/ender v Bio-Science Laboratories* [40] was that *"[t]he reality of the 'wrongful life' concept* is *that such a plaintiff both exists and suffers, due to the negligence of others. It* is *neither* necessary *nor just to retreat into meditation on the mysteries of life".* Kirby J, in his dissenting judgment in *Harriton v Stephens*, [41] held that "assessing *damages* is always *a practical exercise in approximation. There can never be an exact equivalence between a personal injury and money".* The learned judge stated further that courts often assign monetary values to

[40] 106 Cal. App 3d 811 (1980)
[41] (2006) 226 ALR 391: [82 *et seq]*

intangible personal injuries, such as *'pain and suffering',* 'loss *of expectation of life';* or to other intangible injuries, such as *'reputation'* and *'deprivation of /iberty'.*[42]

47. The focus needs to be shifted from the wronged individual to the wrongdoing. In this manner, the issue is not that the wronged individual should not exist, but rather the very fact that such an individual exists in a disabled state. By awarding damages in a wrongful suffering action the court is not endorsing a claim that such disabled individual would be better off not having been born, but rather that such disabled individual would be better off with access to resources.[43]

48. The argument, which holds that it is impossible to compare and quantify the 'value' of M's present existence in a disabled state, with the 'value' of his hypothetical non-existence, for the purposes of awarding damages, stands to be rejected. The measurement is not about the novel comparator of non-

[42] See also *Van der Merwe* v *Road Accident Fund* 2006 (4) SA 230 (CC), [37 - 41]; *De Klerk* v *ABSA Bank* 2003 (4) SA 315 (SCA).

[43] Rioux MH, Basser LA & Jones M 2011: 110; Ellis E & McGivern B 2007; Stretton D *"Harriton* v *Stephens; Walker* v *James: Wrongful life and the logic of non-existence"* (2006) Melbourne University Law Review 31: 1 - 31; Burns TA *"When life is an injury: an economic approach to wrongful life lawsuits"* Duke Law Journal 2003 Vol. 52: 807 - 839; Pollard(supra) 2004

existence, but rather a measurement of the diminution of the *patrimonium* of M as a consequence of him being born with OS.

E. INTERNATIONAL APPROACHES TO THE RECOGNITION OF WRONGFUL SUFFERING ACTIONS

49. The majority of international jurisdictions do not at present recognise a claim for wrongful suffering action. There is, however, a growing tendency in some of the more progressive and advanced jurisdictions to recognise the validity of such a claim.

(i) The United States of America

50. During 1980 a California Appellate Court took a bold step in wrongful suffering jurisprudence in *Cur/ender (supra).* The salient facts are that Shauna Curlender was born with Tay• Sachs disease and had a four-year life expectancy because Bio-Science negligently failed to detect that her parents were potential carriers of the aforesaid hereditary disease. The parents and Shauna sued for medical expenses, emotional distress, and the deprivation of "72.6 years of her life." In permitting recovery for wrongful suffering the court, *inter alia*,

held as follows: *"We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all ... [A] reverent appreciation of life compels recognition that plaintiff, however impaired she may be,* has *come into existence* as a *living person with cerlain rights.*[44]

51. The court tailored damages to allow the child to recover general and special damages for the pain and suffering she experienced during her actual life span. The court also permitted the child to recover punitive damages in wrongful suffering lawsuits.

52. The Supreme Court of California first considered wrongful suffering in *Turpin v Sorlini.*[45] In this case a doctor negligently misdiagnosed the couple's first child as having hearing within the normal limits, whereas the child was stone deaf and the condition was hereditary. Relying on this diagnosis the couple conceived and gave birth to a second child who was also afflicted with deafness. The child sued for special and general

[44] At 488. See also Burns TA 2003 : 818 to 820
[45] 643 P.2d 954 (Cal. 1982)

damages. With reference to the sanctity of life argument the court had the following to say: *"Although it* is easy *to understand and to endorse these decisions' desire to affirm the worth and sanctity of less-than-perfect life, we question whether these considerations alone provide a sound* basis *for rejecting the child's tort action. To begin with, it* is *hard to* see *how an award for damages to a severely handicapped or suffering child would "disavow" the value of life or in any way suggest that the child* is *not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.*[46] The court in this instance fashioned a middle ground allowing the child to recover special damages, but not general damages.

53. In *Harbeson v Parke-Davis, Inc* [47] the court found the *Turpin* case to be highly persuasive in considering the *Harbeson* children's wrongful suffering claim, especially the rationale for awarding special damages. In addition to allocating these special damages to the negligent doctors, the court also intended to deter negligent doctors in the sense that the imposition of a corresponding duty to the child would foster the

[46] At 961-962
[47] 656 P2d 483 (Wash. 1983)

societal objectives of genetic counseling and prenatal testing, and would discourage malpractice.

54. In *Procanik v* Cil/o[48] the court concluded that a wrongful suffering plaintiff could recover special damages, but not general damages. With an emphasis on fairness the court held as follows: *"Law* is *more than an exercise in logic, and logical analysis, although essential to* a *system of ordered justice, should not become an instrument of injustice. Whatever logic inheres in permitting parents to recover for the* cost *of extraordinary medical care incurred by* a *birlh-defective child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the "who/Iv forluitous circumstance of whether the parents are available to* sue". [49]

(ii) The Netherlands

55. During March 2005 the Supreme Court of Netherlands (Hoge Raad) recognised a claim for wrongful suffering for Kelly

[48] 478 A.2d 755 (N.J. 1984)
[49] 762. Our emphasis

Moolenaar'" In this case a woman who had two miscarriages previously, subsequently gave birth to a healthy daughter. When she then became pregnant again she asked the midwife whether there was any need to perform tests on the fetus in connection with severe genetic abnormalities in her husband's family. The midwife told them that testing was unnecessary. After this, a child was born with those very abnormalities. It was established that those tests would have revealed the fetal abnormalities and that the mother would have reacted, in consultation with the father, by terminating the pregnancy. In its judgment the court *inter alia*, found that since the medical practitioner is under an obligation to the unborn child, on the basis of his primary duty of care to the pregnant woman, to order pre-natal tests in the given circumstances, the woman should be given an opportunity to make a well-informed decision as to whether she wishes to maintain or terminate, her pregnancy, also with a view to the interests of her unborn child. If the medical practitioner does not fulfil this obligation to the woman, he is also violating the unwritten legal rules in relation to the unborn child.

so Kelly Moolenaar LJN AR 5213, Hoge Raad, C03/206HR

56. With regard to damages, the fact that it is impossible to compare non-existence to existence in financial terms does not imply that a claim for damages made on the disabled child's behalf, cannot lawfully be upheld. A court must assess the damages to be awarded in a manner that is most appropriate to the damage suffered. *In casu,* the nature of the damage was such that compensation covering all the costs of Kelly's care and upbringing and of mitigating the consequences of her disabilities could be awarded in full. By using its powers to uphold these claims, the courts are not denying or denigrating the human dignity of the child who has been born with disabilities, for the award of the claims at issue here is not based on the view that Kelly's disabled existence should be considered of less value than her non-existence, but on the fact that it must be concluded that the hospital and the midwife acted unlawfully in relation to her by failing in their duty of care, which extended to the unborn fetus.

(iii) Belgium

57. The court of first instance of Brussels has twice allowed a wrongful suffering claim under Belgian tort law and the Brussels Court of Appeal has recently allowed a claim as well. The

defendant hospital in the latter case has lodged an appeal, which is apparently still pending.[51]

(iv) Italy

58. A recent decision of the Italian Supreme Court, for the first time recognised wrongful suffering suits. The court accentuated the following principles: (a) the contract between the mother and the doctor also has protective effects in favour of third parties who have the right to be compensated; (b) the right to compensation is based neither on the right to be born, nor on the right to be born healthy, but it is rather based on the breach of duty of care, which coincides with the child's disabled status; (c) siblings may suffer due to the reduced availability of their parents; and (d) the doctor is held responsible for not providing full information to the mother about the fetal deformity.

59. The Supreme Court in this instance emphasised the importance of information in the matter of very personal choices, such as termination of pregnancy in the case of fetal malformation. *In casu*, the gynaecologist had breached the duty to inform the patient, especially after the patient had requested

[51] Giesen : 2012 *supra* at pp 40; Case reference for appeal: Cour d'Appel Bruxelles, 21 September 2010, R.G. 2009/AR/1392 (VU Brussel/Una!)

diagnostic tests designed to highlight any fetal malformations and had informed the doctor of the possibility of an eventual subsequent termination of pregnancy, if fetal malformations were discovered.[52]

(v) Israel

60. From 1986 to 2012 Israel recognised both a claim for wrongful birth and a claim for wrongful suffering.[53] In 2011 while the case of *Hammer et al. v Prof Amit et al.*[54] was pending, the Ministry of Justice nominated a public committee to provide recommendations to the Attorney-General to assist him in formulating his official position on the subject which would be brought before the Supreme Court. During March 2012 the committee published a comprehensive report, which recommended that a no-fault based administrative solution would replace wrongful suffering tort actions. In May 2012 the Supreme Court decided the *Hammer* case, which reversed the former 1986 ruling in *Zeitsov v Katz*.[55] According to the new

[52] Paolo F et al *'The physician's breach of the duty to inform the parent of deformities and abnormalities in the foetus: "wrongful Life" actions, a new frontier of medical responsibility'* ~he ~ournal of Maternal-Fetal & Neonatal Medicine, 2014; 27(11) : 1113-1117

[53] Zeitsov v Katz, CA 512/81 [1986] IsrSC 40 (2) 85 (Hebrew); Hammer et al. v Prof. Amit et al., C.A. 1326/07 [2012] (Hebrew); Mor,S *'The dialectics of wrongful life and wrongful birth claims in Israel: a disability critique'* in *'Studies in Law, Politics and Society'* Vol 63, 113-146

[54] C.A. 1326/07 [2012] (Hebrew)

[55] Zeitsov v Katz, CA 512/81 [1986] IsrSC 40 (2) 85 (Hebrew)

ruling, Plaintiffs are barred from claiming damages based on wrongful suffering, but are allowed to pursue compensation for wrongful birth. The problem that the Supreme Court encountered in *Hammer* was that wrongful birth compensation tends to be lower than wrongful life compensation, since it only covers the parents' expenses until the child reaches adulthood. Under the new ruling parents are allowed to sue for lifelong related disability costs.[56]

61. In the case of *H. A. (minor) v The State of Israel - Ministry of Health,*[57] the court accepted a wrongful suffering claim because the parents lost their opportunity to claim, since the limitation period for wrongful birth had passed and the court did not want the claimant to lose her opportunity to claim for economic support.

F. LEGAL OPINION

(i) International

62. Despite the fact that a claim for wrongful suffering is not recognised in the majority of international jurisdictions, scholarly

[56] Mor, at 116
[57] TA (HI)207/07, 1 July 2012

opinion increasingly supports the recognition of such a claim, especially with reference to the continuous development of novel issues relating to medical technology such as *in vitro* fertilisation, *in utero* fetal surgery and genetic modification.[58]

(ii) South Africa

63. In spite of the SCA's ruling in *Stewart (2008)*, the majority of South African academics who have written on the topic support the recognition of a claim for wrongful suffering with specific reference to the development of the common law and with due

[58] International opinion in favour of recognising a wrongful suffering claim: **Burns TA** *"When life is an injury: an economic approach to wrongful life lawsuits"* Duke Law Journal 2003 Vol. 52: 807-839; **Colb S** *'Better to never have been born? A look at wrongful life litigation'* http://edition.cnn.com/2003/LAW//05/23/findlaw.analysis.colb.existence; **Crockin SL** *"Overview of court decisions involving reproductive genetics"* Genetics and Public Policy Centre. 1-13; **Ellis E & McGivern B** *"The wrongfulness* or *rightfulness of actions for wrongful life"* (2007) 15 Tort Law Review 1-27; **Giesen I** *"The Use and Influence of Comparative Law in Wrongful Life cases"* Utrecht Law Review Vol 8 Issue 2 (May) 2012 : 35-54; **Kim H** *The uncomfortable truth about wrongful life cases'* Philosophical Studies July 2013: 164 (3), 623-641; **Morgan DM et al.** *'Everyday Life and the Edges of Existence: Wrongs with No Name* or *the Wrong Name?'* Univ of New South Wales Law Journal (2006) 29 (2) : 239 - 249; **Paolo F et al** *'The physician's breach of the duty to inform the parent of deformities and abnormalities in the foetus: "wrongful Life" actions, a new frontier of medical responsibility'* The Journal of Maternal-Fetal & Neonatal Medicine, 2014; 27(11) : 1113-1117; **Pollard DA** *"Wrongful analyses in wrongful life jurisprudence"* Alabama Law Review 55 : 327 (pp. 1-38); **Rioux MH, Sasser LA** & **Jones M** Critical perspectives on Human Rights and Disability Law 2011:106ff; **Ruda, A** *'I didn't ask to be born': Wrongful Life from a comparative Perspective'* (2010) 1 Journal of European Tort Law 204:205; **Stein JT** *'Backdoor Eugenics: The troubling implications of certain damages awards in wrongful birth and wrongful life claims'* Seton Hall Law Review (2011) 40 (3) 1117-1168; **Scott R** *"Reconsidering 'wrongful life' in England after thirty years: Legislative mistakes and unjustifiable anomalies"* Cambridge Law Journal, 72(1), March 2013: 115-154; **Stretton D** *"Harriton v Stephens; Walker v James: Wrongful life and the logic of non-existence"* (2006) Melbourne University Law Review 31: 1-31; **Weiss T** *'Assisted reproduction and the duty of care to the unborn child' http://www.aic.gov. au/media library/conferences/medicinelwiess.pdf*

regard to constitutional imperatives and certain sections of the Children's Act[59] The court a *quo* erred in ignoring the current trends in academia, as placed before the court, which trends argue cogently and convincingly in favour of a claim for wrongful suffering.

G Liability for costs

64. Should this court decide that the exception is bad in law, then it is submitted that costs should follow the event.

65. In relation to the engagement of three counsel; it is submitted that this is justified given the novelty and complexity

[59] (i) South African opinion in favour of recognising a wrongful suffering claim: **Blackbeard M** *'Die aksie vir "wrongful lite": "to be or not to be"? THRHR* 1991 (54) : 57-74; **Brownlie S** *'Wrongful life: Is it a viable cause of action in South Africa:'* 1995 *Responsa Meridiana* 18; **Human S & Mills L** *'The immeasurable wrongfulness of being: the denial of the claim for wrongful life'* Stellenbosch Law Review 2010 1: 67-89; **Lind C** *'Wrongful birth and wrongful life actions?'* 1992 (109) *SALJ* 428Neethling J *'Personality Rights: a comparative overview'* The Comparative and International Law Journal of Southern Africa (2005) 38 (2) : 210-245; **Van den Heever P** *"Pre-natal Medical Negligence in South African Medical Law: Wrongful Life (the right not to be born) and the Non-existence paradox"* (2006) 69 *THRHR* 188-201; **Van Niekerk C** *"Wrongful life claims: a failure to develop the common law?"* Stellenbosch Law Review 2012 3: 527-539.

(ii) South African opinion that is neutral on recognising a wrongful suffering claim: **Van der Westhuizen CS** *"A proposed framework for the legal protection of premature and critically ill neonates in the context of South African Child Law"* Unpublished Doctoral Thesis, University of the Free State 2012: 120ff;

(iii) South African opinion that is against recognising a wrongful suffering claim: Churr **C** *"A delictual claim based on 'wrongful life': is it possible? Stewart v Botha 2007 (6) SA 247 (C)" THRHR* 2009: 168-174; **Coetzee LC** *"An analysis of judicial pronouncements by South African courts on the action for wrongful life"* 2012 (75) *THRHR* 422-450.

of the matter. The widely divergent views m comparative international jurisprudence, the copious local academic discussion of the vexed problems posed by the cause of action and its interrelationship with similar causes of action that are recognised in our law make this a difficult matter to work up properly. The importance to M's future of the outcome of the matter is also of sufficient moment to justify the engagement of three counsel.

66. Should this court decide that the exception was well taken and that it is not prepared to develop our common law of delict in line with the guaranteed human rights upon which M has placed reliance in argument, then it is submitted that there should be no order as to costs adverse to him.

67. The matter is in the nature of a test case. It is the first case of its kind in the post 1994 constitutional dispensation. All other local cases were decided in respect of claims that arose in the pre-constitutional era. M has sought to assert rights that are guaranteed to him in terms of the Bill of Rights. If he fails in his quest for compensation based on the infringement of his rights the general rule is that he should not be mulcted in costs. The

leading case of *Biowatch*[60] and the words of Ngcobo CJ in the unanimous part of the *Glenister II* judgment apply: *"I* am *not persuaded that we should depart from the general rule that, where* a *private litigant is unsuccessful in vindicating his or her constitutional rights, he or she should not be mulcted with* costs".[61]

H The reliefsoughton appeal

68. When it is in the interests of justice, and with the leave of this court, an applicant is permitted to appeal directly to this court from any other court under C 167(6) (b). The issues on the merits in this matter have already been dealt with by the SCA in Stewart's case, upon which the respondent and the Court a *quo*

relied in the argument and judgment a *quo.*

69. Although *Stewart's* claim arose before the new constitutional dispensation was put in place, it is plain from the reasoning of the SCA that on grounds of public policy it was not prepared to countenance the development of the common law to

[60] *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14.

[61] *Glenister v President of RSA and Others* 2011 (3) SA 347 CC at 396 [158].

accommodate wrongful suffering claims of the kind under consideration in this case. In these circumstances, and given the novelty of the cause of action, it would be appropriate to allow an appeal directly from the high court to this court. M, in any event does not have the financial means to litigate his way through two appeal processes.

70. It is manifestly in the interests of justice that the issues in the exception receive consideration by this court. As a matter of simple economics, the outcome of these proceedings will determine whether the not inconsiderable costs of negligent fetal assessments will be borne by the negligent assessor or by the parents (and failing them) the state. For the purpose of these proceedings on exception it must be assumed that there was negligence on the part of the respondent; issues of wrongfulness, a legal duty of care and public policy considerations are at stake and this court has yet to be seized with them in the circumstances revealed in the pleadings in this case.

71. The development of the common law in line with the values of the Constitution, and in particular, the duty of this court to

promote the spirit, purport and objects of the Bill of Rights as set out in detail in C 39, suggest, so it is submitted, that it would be in the interests of justice to grant leave to appeal in this matter.

72. Should the court find that the exception is bad because the common law is indeed in need of development in such a way as to recognise the cause of action pleaded by M, then the judgment and order *a quo* on the exception should be set aside and an order dismissing the exception with costs, including the costs of three counsel should be substituted for it.

73. Should the court find that the exception is good in law because the common law is not in need of development so as to recognise the cause of action pleaded then, having given leave to appeal, the judgment of the court *a quo* on the merits of the exception should be upheld, but its order for costs should be deleted and substituted with an order that there be no order of costs in the matter.

74. Finally, should the court find that the manner in which the cause of action was pleaded a *quo* was inadequate, but that it is

prepared to entertain the type of cause of action which is the basis for the applicant's claims, properly pleaded, (or possibly expanded to plead reliance on the *stipulatio alteri* as recently recognised in Italy) then the exception should be upheld, M should be given leave to amend his pleadings appropriately within a period of one month and there should be no order as to costs, either a *quo* or in this court.

J Conclusion

75. *"Currently, many courts are unable to see through the miasma of the nonexistence paradox and the fog of sanctity of life concerns to hold doctors liable to children for their special medical expenses. However, by narrowly conceiving the injury in an economic manner, court can focus their inquiry to burn through the haze of the nonexistence paradox, causing its concomitant sanctity of life concern to dissolve and dissipate, and revealing the compassion and logic of requiring negligent doctors to lighten the burden of children with birth defects."*[62]

62 Burns TA 2003 : 839

76. In all the circumstances the applicant asks that this court grant him leave to appeal. He respectfully requests that the judgment and order *a quo* be set aside and that there be substituted for them an order dismissing the exception with costs, such costs to include the costs of engaging the services of three counsel.

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