

## Significance

This case was instituted in 2000, 10 years before Section 43(1)(a) of the Constitution of Kenya, 2010 which recognises the right to health care services, including reproductive health care, came into effect. However, a ruling was made 13 years in the future, in 2013. No information was provided in the judgment for this lengthy delay.

Although this case was decided entirely on the private law of negligence, further scrutiny of the case reveals that the duty to provide information might have been taken for granted by the providers. It is not indicated in the case that the health providers warned the Plaintiff that the urine-based pregnancy test might not detect a very early pregnancy. It was likely taken for granted that her chance of getting pregnant was remote since she had indicated that she had been using an injectable contraceptive method.

The Court focused on the fact that the health providers did everything according to proper protocol regarding the procedure. However, further scrutiny of the judgment reveals that one thing was overlooked in the pre-operative procedures. The providers should have warned the Plaintiff that the urine-based pregnancy test was not failure-proof. The lack of this important piece of information had serious consequences for the Plaintiff.

This case is significant in terms of human rights, in relation to the right to receive information. The right to health care services, including reproductive health care, includes the right to receive the necessary information about procedures in order for clients to make informed choices.

***H v. Fetal Assessment Centre***  
**[2014] ZACC 34**  
**South Africa, Constitutional Court**

## COURT HOLDING

The issue of whether a child could claim damages against a medical expert for pre-natal misdiagnosis that could have enabled the mother to exercise her informed choice to terminate the pregnancy, and resulting in the birth of the child with a disability, presented a complex factual situation and an uncertain legal position. It could therefore not be determined using the exception procedure, which allows a claim to be dismissed as having no merit without a court hearing any evidence.

A child's claim against a medical expert whose misdiagnosis resulted in the birth of the child with a disability could potentially exist.

## Summary of Facts

The applicant was a boy born with Down syndrome. His mother instituted a claim for damages in the High Court on his behalf, against the Fetal Assessment Centre (Centre), for wrongful and negligent failure of the Centre to warn the mother of the high risk of the child being born with Down syndrome. It was alleged that, had she been warned, she would have chosen to undergo an abortion. The

applicant claimed damages for past and future medical expenses and general damages for disability and loss of amenities of life. The respondent defended the claim as being bad in law, and not disclosing a cause of action recognised in law. The High Court had upheld the defence of exception and dismissed the claim as having no merit without hearing the evidence. The applicant sought leave to appeal to the Constitutional Court.

## Issues

The Constitutional Court isolated the following issues for determination:

1. Whether a child's claim for damages against a medical expert for pre-natal misdiagnosis of a condition that deprived the child's mother of the informed choice to terminate the pregnancy potentially existed; and
2. Whether the exception procedure was appropriate in determining the matter.

## Court's Analysis

The Constitutional Court (the "Court") recognised the importance of the exception procedure as a useful mechanism "to weed out cases without legal merit". The Court indicated that it had previously ruled that questions regarding development of common law would better be served after hearing all the evidence. It referenced *Carmichele v. Minister of Safety and Security* ([2001] ZACC 22) in which the Court held that it would be better not to determine an issue involving developing the Common law using the exception procedure, especially in cases where the issue presented a complex factual situation and an uncertain legal position.

The Court then addressed the issue of whether the child's claim could be recognised in law, a question which in its view was complex and had important normative implications. It rejected the use of the term "wrongful life", because it suggested that courts would be involved in determining the paradox of whether non-existence was preferable to existence. It therefore distinguished its approach from *Stewart and Another v. Botha and Another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA), wherein the South African Supreme Court of Appeal held that a child could not advance a similar claim, precisely because the Supreme Court thought allowing the child to make a claim involved making value judgments regarding existence or non-existence of a child.

In the opinion of the Court, the paradox had to be acknowledged because avoiding it masked value judgments that have to be brought under the scrutiny of constitutional values and rights. The Court was aware that in the final analysis, a court determining the matter might still rule that a child could not claim. However, the point was that the matter raised issues that could not be addressed by way of the exception procedure. It held therefore that the proper procedure was for the High Court to hear the substantive matter and not to dispose of it prematurely without hearing the merits.

The Court proceeded to address the possibility that the child's claim could in fact be allowed if the matter was to be considered, taking into account all the relevant facts. It reviewed comparable foreign jurisprudence and noted that while some countries allowed parents to claim damages due to negligently-caused unwanted pregnancies, most countries did not address the issue of the child as a claimant. It also noted that the variability in treatment of claims on "wrongful birth" was due to the

diverse constitutional, political and social contexts within which the law of the country was created, or in other words, the legal culture. From this analysis, the Court concluded that the South African legal culture required that the issue be determined with respect to constitutional values. The Court therefore affirmed that the law, including common law, must conform to the values of the Constitution of the Republic of South Africa, 1996, and the development of the law ought to promote the spirit, intent and objectives of the Constitution. The Court observed that the values and rights that were particularly important included equality, dignity and the right of children to have their best interests considered of paramount importance in every matter concerning them.

The Court then considered whether common law could be developed to recognise the child's claim, taking into account the principle of the best interests of the child, as well as other constitutional values. It examined this in relation to the elements that ought to be proven to sustain the claim, including: harm or loss, wrongfulness, negligence, and causation.

The Court recognised the difficulty of proving harm or loss in the absence of physical injury or harm to his person or property. Referencing the law as explained in *Natal v. Edouard* ([1990] ZASCA 60; 1990 (3) SA 581 (A)) and endorsed in *Mukheiber v. Raath and Another* ([1999] ZASCA 39; 1999 (3) SA 1065 (SCA)), the Court affirmed that legal harm was not only physical injury to the person or property, but included the added financial burden to the parents as a result of the birth of the child. In the context of constitutional rights, the Court said that the harm to the parents might be addressed as an infringement on the right of the parent to exercise free and informed choice regarding reproduction. However, the added financial burden remained a legal loss that had implications if the child was to be considered a potential claimant. This harm or loss to the child would become apparent only if parents were unable to pursue their claim. The Court highlighted that even if in this circumstance the child suffered no loss of constitutionally protected choice, the best interests of the child principle required that the issue of loss for the child also be considered.

The question that the Court addressed then was what would happen if for some reason the parents failed to make a claim against a negligent medical practitioner, as was the issue in this case. The Court postulated that a court could find the medical expert liable for the child's claim, for the same loss for which he would have been liable to the parents.

With regard to the claim of wrongfulness, the Court was of the opinion that the principle that the best interests of children be given paramount importance in every matter concerning them implicated the medical expert's misdiagnosis that results in birth of a child with a disability. In the event that the parents failed to claim, the best interests of the child principle would not allow the loss to lie with the child. The Court's view was that allowing loss to lie with the child might breach a duty not to cause such loss and invoked the rights of the child under Section 28(2) of the Constitution. However, in order for liability not to be indeterminate, either parents or the child may claim, but not both cumulatively. The Court concluded that it would not be inconceivable to impose liability with respect to the child where the parents failed to claim.

On the element of causation, the Court was of the view that pre-natal misdiagnosis would not be the cause of the disability itself, but of the birth of the child with a disability. It therefore considered the misdiagnosis as part of the chain of events that led to the birth that resulted in the loss.

As for negligence, the Court said that this would have to be proven in accordance with established principles. The Court also said that the damages were already those recognised in law that the parents could claim.

In conclusion, the Court held that a child's claim against a medical expert whose misdiagnosis resulted in the birth of the child with disability might potentially be found to exist. The Constitutional Court was therefore of the view that the High Court ought to hear the substantive matter and make a determination in light of constitutional values and rights.

## Conclusion

Leave to appeal was granted, and the order of the High Court was set aside and replaced with an order of leave for the plaintiff to amend the particulars of the claim.

## Significance

The decision of the Court hinged on its cognisance of the fact that the decision to terminate pregnancy involves making value judgments. When a woman makes a choice to terminate pregnancy, she is effectively choosing whether the potential developing life in her should continue to exist or not. South African law allows a girl or woman to choose to terminate pregnancy on request up to 12 weeks of gestation. The reasons a woman may want to terminate pregnancy are varied, and include avoiding financial burden. The fact that the law allows people to terminate pregnancy on such grounds therefore implies that the law accepts certain value judgments that form the basis of the decision to terminate pregnancy. This cannot be avoided.

If a woman can claim damages for "wrongful birth", should it now become a metaphysical issue just because it is the child claiming damages for his or her own wrongful birth? Take for instance the case of *Registered Trustees of Aga Khan University Hospital, Nairobi*, (Civil Cause no. 3 of 2013, High Court of Kenya) (*Aga Khan*), in which the applicant successfully claimed damages for maintenance of a child who could not have been born if not for the negligence of the health provider in providing contraceptive services.

The *Aga Khan* case might be the case that properly raises the paradox of existence or non-existence, because in this instance the choice to use contraceptives or not determines the coming into existence or not of a child and even when couples use contraception, unintended pregnancy can still result. In the present case however, the choice is rather about the continued existence or non-existence of the foetus. This is what raises the paradox because the termination of pregnancy is based on the perceived risk of having a child with a disability, which as the Court suggested, involves a value judgment. The Court seemed to have addressed this difficult issue by first basing its decision on the premise that the law implicitly accepts the value judgment that persons make when they choose to terminate pregnancy on various grounds. Secondly, the Court said that it was dealing with a situation when the child was already born, because prior to being born, the issues do not arise.

The Court's analysis in developing the common law to allow the child to claim is important as it builds on the jurisprudence on application of human rights principles and values in determining issues impacting on the rights of the child. This was also particularly significant because in the process, the Court had to address the ethical-legal dilemma otherwise couched in the term "wrongful birth." It should be noted, however, that the Constitutional Court did not make the final decision on the matter, but only gave its opinion on how the High Court could approach the issue in the appeal.