Voluntary Sterilisation for Convenience:
The Case of the Unwanted Child

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In this article, the author, a well-known medicolegal authority, deals with the recent decision of the Appellate Division to the effect that damages in the form of maintenance for the child were recoverable in cases of "wrongful conception" (pregnancy resulting from medical negligence in respect of sterilisation), as well as other situations to which labels of "wrongful birth" and "wrongful life" have been attached. The worst fears of doctors have now come true and controversy is bound to continue, says the professor.

Introduction

Earlier in the century, sterilisation for convenience, ie where there was no medical indication but the procedure was resorted to merely to prevent the conception of a child, or further children, was frowned upon.1 Where, on the other hand, the objective was medical or eugenic, such as prevention of the transfer of a genetic disease, the juristic attitude was more favourable.2

Over the years the juristic and societal attitude has changed markedly. Today it is generally accepted in Western Europe and the USA that voluntary sterilisation is lawful in principle.3 The same is certainly true of South Africa.4 Most of the world is in the grip of the population explosion and family planning is encouraged and actively promoted in many societies. It is known that in mainland China the law positively discourages married couples to have more than one child.

Voluntary sterilisation has become an important method in limiting the size of families and is also utilised openly and increasingly in South Africa. In earlier years the view prevailed that doctors, in sterilising a married person, had to seek the consent of his or her spouse because husband and wife were said to have had "a mutual right to procreation". The modern view, however, is that each spouse is autonomous as far as his or her body is concerned and that consent of the other spouse is not a requirement.5

Thorny issue

As sterilisation for convenience became more and more acceptable and common, a thorny legal issue soon came to the fore: What is the liability of the medical practitioner who undertook to perform the sterilisation where the procedure was unsuccessful for some reason and an undesired child was born? The same question arose where it was alleged that contraceptive measures, medically advised, or failure to advise genetic screening, produced that result - or where something went wrong with an abortion a doctor had undertaken and a child was nevertheless born.

Since the 1950s a number of cases have come before the courts - particularly in the USA - involving allegations of medical negligence in respect of contraception, sterilisation, genetic screening and abortion which resulted in the birth of an unwanted child - a child which, in addition to being unwanted, in some cases was also seriously handicapped. The general label "wrongful life" (or "wrongful birth") was attached to this type of case.

In the USA, courts initially held that a doctor would not be held liable for negligence in the performance of
sterilisation operations which resulted in the birth of an unwanted, normal child, on the ground – as it was put in a 1957 case – that “to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people”.

**Changed outlook**

Later the judicial outlook changed, and doctors were held liable in some cases of this nature. Generally speaking, courts were prepared, in cases of proved negligence on the part of the doctor (e.g., in performing a sterilisation, or in failing to advise genetic screening of a pregnant woman, or in failing to advise her to have the pregnancy terminated) to order the doctor to pay damages in the form of medical expenses in connection with the birth of the child. In exceptional cases the doctor was held liable for maintenance of the child, but usually the courts were not prepared to go to such an extreme.

There have been several such cases in England since 1980. In some of these cases the plaintiffs have succeeded in recovering damages and in other cases their claims have failed. It is difficult at this stage to extract hard and fast rules from the English cases. Only two of these cases will be discussed here; both are decisions of the Court of Appeal.7

In *Thake and Another v Maurice* a married man underwent an unsuccessful vasectomy and a sixth child was born to his wife and himself. The couple instituted an action for damages against the medical practitioner who had performed the vasectomy. The Queen’s Bench held that the medical practitioner had committed breach of contract. On appeal, the Court of Appeal held that there had been no implicit guarantee that the husband would be sterile. In the absence of an express guarantee of the success of any operation or treatment performed by a medical practitioner, he does not give the patient such a guarantee; medical science is too unpredictable for this. All that a medical practitioner implicitly undertakes is to take reasonable care in effecting treatment. The plaintiffs therefore did not have an action for breach of contract against the medical practitioner concerned. The plaintiff’s action (which was successful) was based on negligence on the ground of the practitioner’s failure to comply with a contractual agreement, and to exercise a delictual duty to take care, in that the medical practitioner failed to warn them that the husband could again become fertile. The Court held that the plaintiffs were entitled to damages for prenatal stress, pain and suffering as well as the reasonable cost of rearing the unplanned child. A total amount of £11,177 in damages was awarded.

In *Eyres v Meadway* a woman who had undergone a sterilisation operation nevertheless gave birth to a child. She could not prove that the operation had been performed negligently, nor did she allege that the doctor ought to have warned her that the operation may have been unsuccessful. Accordingly her claim was rejected.

**First decision in South Africa**

The first decision on “wrongful conception” in South Africa was handed down in *Behrmann and Another v Klugman*. In that case Mr and Mrs B sued Dr K, a specialist surgeon, for a total of R299 609 damages in consequence of the birth of a normal child which had been conceived following a vasectomy performed by the doctor on Mr B. The plaintiff’s action was based upon alleged breach of contract on the part of the doctor, and alternatively, negligence. The plaintiffs alleged *inter alia* that there had been an express or implied agreement that the doctor would properly and skilfully carry out the vasectomy, taking all necessary precautions to ensure that the vasectomy rendered Mr B permanently sterile and to prevent recanalisation of the vas deferens (sperm duct). It was contended by the plaintiffs that the doctor had failed to advise Mr B to have a sperm count before intercourse without contraception was resumed. The doctor denied that he had breached the agreement or had been negligent.

The decision in the *Behrmann* case essentially turned on whether the plaintiffs had been adequately warned about the necessary sperm counts in order to establish infertility. The plaintiffs testified that statements made by the doctor caused them to believe that the operation was irreversible and would render Mr B sterile after ten weeks. Dr K testified, however, that it was his practice to tell patients that it could take up to nine months to achieve two negative sperm counts and that he would first have to declare the husband sterile. Melamet J found in favour of the doctor. The judge found on the evidence of the plaintiffs that they had in fact waited 16 to 20 weeks after the operation before commencing intercourse without contraceptives.

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accordingly the judge had grave reservations whether Mr and Mrs B had in fact believed that Mr B would be sterile after 10 weeks.

The court agreed with the view expressed by the English Court of Appeal in *Eyre v Measday*, that in the absence of an express warranty, the court should be slow to imply that a medical man gives an unqualified warranty as to the results of an intended operation.

Melamet J concluded that Mr and Mrs B, on a balance of probabilities, had failed to establish that the contract between them and Dr K contained an express or implied term or warranty as to the permanent success of the operation.

**The boni mores**

The following remarks made by the judge are also of interest:

At the outset I raised a query as to whether an action for damages of this nature was not contra bonos mores particularly in the light of the fact that the boy was born in wedlock and was apparently a healthy child. Defendant accepted that such action was permissible and did not wish to raise any objections in this regard. The trial proceeded without any decision in this regard – it apparently being the first trial of this kind in South Africa – although the matter has been considered in England where it has been decided that such an action would not be contrary to public policy despite doubts previously expressed in this regard.

In the light of the grounds on which the plaintiff’s action was dismissed, the decision left open the question whether such an action is not contra bonos mores. On the other hand, the decision does not afford authority for the proposition that an action for damages might not have succeeded if the facts as alleged by the plaintiffs had formed the basis of the court’s decision.

**Administration liable**

In a comparable case, *Edouard v Administrator of Natal*,

the verdict of the trial court went in favour of the parents of a child. In that case, the parents had agreed with a provincial hospital that a tubal ligation was to have been performed on the woman, at the time of her giving birth by Caesarean section to her third child. The hospital staff failed, however, “to cause the said surgery to effect the tubal ligation of the [woman’s] fallopian tubes, to be performed at all”.

The woman and her husband believed that the sterilisation procedure had been performed and accordingly took no precautions to use any contraceptive methods to prevent pregnancy. Approximately four months after the birth of her third child the woman fell pregnant again. She gave birth by Caesarean section to a normal child and a tubal ligation was then performed on her by Dr F.

The child’s father brought action against the Provincial Administrator in his capacity as the executive of the provincial administration, for damages allegedly suffered in consequence of breach of contract. The defendant conceded that the administration was liable for damages for breach of contract as a result of its failure to effect the tubal ligation that had been agreed upon and contended that payment of the cost of the surgery (R622,79) subsequently performed by Dr F would discharge its liability. (A factor in this case, it is to be noted, was that the defendant had also conceded that the woman had requested the procedure because she and her husband could not afford to support any more children.)

The plaintiff, however, averred that he was entitled to receive further compensation, namely—

(a) general damages for the discomfort, pain and suffering and loss of amenities suffered by his wife (with whom he was married in community of property and on whose behalf he sued);

(b) the cost of maintaining the child until she attains the age of 18 years.

The defendant denied liability for such further compensation on the ground that although the contract for the woman’s sterilisation is valid and enforceable, it would be contrary to public policy to allow the parents of a healthy and normal but unplanned child to recover the cost of bringing up the child where the parents refuse to give the child out for adoption.

**Pandora’s box**

Counsel for the defendant argued that it is the notion that the court in assessing “damages” of this nature is called upon to decide whether a value or no value in monetary terms has to be given to a healthy life, which is offensive, in the light of the South African view of the sanctity of life “in the context of our anti-abortion laws”. The cost of maintaining a child, it was submitted, is “but one of those incidents of parenthood – that Pandora’s box of joy, expectation, disillusionment, worry, expense and resignation and hopefully in old age, reward”.

The court held, however, that damages in the form of maintenance for the child were recoverable. Sterilisation, the judge said, has become
an accepted form of contraception for married couples: “It is in the interest of society that the size of a family should not exceed the limit beyond which it would not be possible to maintain a reasonable standard of living.”

There would be nothing inconsistent in the attitude of parents if they were to say that they had not wanted another child but now that the child has been born they love it and refuse to part with it. The acceptance of the responsibilities of parenthood, however, would still leave the parents in the dilemma which they had wanted to avoid with the sterilisation, ie that they have a child whom they are unable to support.

The loss which the parents complain of is an economic loss which cannot and need not be weighed against the value of the life of the child. The emotional benefits which the birth of the child bestow on the parents do not increase their patrimony and are irrelevant in the determination of the quantum of damages.

“...It would be fair and equitable”, Thirion J said, “that liability to provide for the maintenance of a child should fall on the doctor through whose neglect it was born, rather than that it should fall on the parents, who because of their inability to provide adequately for the child had not wanted to have it. Fathers are regularly ordered by the courts to bear the cost of maintaining their illegitimate offspring. It would be a novel argument for the father of such a child to claim that by fathering a child he had conferred a benefit or a blessing on the mother which outweighs the cost of maintaining the child.”

Squeamish and pedantic

The court regarded the argument that it is morally wrong that a normal healthy life should be the basis of a compensable wrong as “squeamish and pedantic”. Compensation would not be awarded for the fact that a child has been allowed to be born. It would be awarded for the loss which the parents suffer in having to support the child whose conception the doctor negligently failed to avoid and whom they cannot support.

No court would require parents to mitigate their loss by having the child adopted. An innocent party who has suffered loss as a consequence of breach of contract has to take only reasonable steps to mitigate his loss. To require that parents should give away their child would not be reasonable. That would run counter to our accepted community values.

The judge felt that although the assessment of damages in wrongful birth actions may raise difficulties, those difficulties are not by any means insurmountable.

The fears that imposition of liability would lead to awards of damage quite disproportionate to the normal culpability of the doctor or might tend to warp professional standards - in that doctors might be tempted to improperly advise patients to have abortions or make practitioners unwilling to undertake sterilisation operations - were exaggerated in the opinion of the judge.

In the event, the court came to the conclusion that it would not be contrary to public policy to recover damages in respect of the child’s maintenance. The defendant was accordingly ordered to pay R22 500 to the plaintiff, the amount on which the parties had agreed.

No general damages

The court was not prepared, however, to award general damages for the woman’s pain and suffering etc. “The question whether liability on contract for damages should be extended so as to cover damages for non-pecuniary loss flowing from a breach of the contract, involves considerations of legal policy”, the judge said. Considering the case with which a delictual claim – ie an action based on a civil wrong, for which general damages may be claimed – can be conjoined with a contractual claim, the judge saw no real need for extending liability to contract for that kind of loss. (In this case a delictual claim was not so conjoined because the plaintiff had failed to give timeous notice of his intention to bring such an action, as is statutorily required.)

It is to be noted that the court, for the sake of convenience, used the term “wrongful birth” to describe this type of case. Legal terminology is not quite settled as yet, however. The following terms seem to have gained fairly general acceptance in American literature now:

- “wrongful pregnancy” or “wrongful conception” for cases of healthy but unwanted children where a claim is brought by the parents;
- “wrongful birth” where a claim is brought by the parents of an abnormal or disabled child;
- “wrongful life” where a claim is brought by the abnormal or disabled child itself.

Appellate Division’s findings

Edouard’s case was taken on appeal and the judgment of the court a quo was confirmed unanimously by a five-judge bench of the Appellate Division in Administrator of Natal v Edouard. In his judgment Van Heerden JA drew attention to the fact that the case was unique in the sense that it was based upon a complete failure to perform a sterilisation procedure agreed upon. “In the wealth of foreign case law of which I am aware”, the learned judge said, “the plaintiff’s action was invariably based upon a failed sterilisation procedure... or a failure to warn that the procedure might not be 100% successful or that its effect might be reversible, and, on occasion, the incorrect dispensing of a prescription for birth-control pills.”

It stands to reason, however, the judge said, that in principle the precise nature of the breach of contract or neglect giving rise to the birth of an unwanted child, is immaterial in relation to the question whether a claim for child-raising expenditure was sustainable. As far as terminology was concerned, the judge found designations such as “wrongful birth”, “wrongful conception”, “wrongful pregnancy” and the like, inappropriate. He preferred the simpler designation of a “pregnancy claim”.

Van Heerden JA gave an overview of case law in a number of jurisdictions which pointed to the variety of opinions on how this type of claim should be assessed in the light of considerations of public policy. The prevailing view in the USA and, possibly, Canada is that child-raising costs are as a matter of law not recoverable, at least if the woman
not invariably constitute a blessing. In any event, the burden cast upon them.

As such which is unwanted. What remains unwanted, is the additional financial burden caused by his birth. Should the child learn that his birth was a mistake, what will matter to him is not why he was born, but how his parents subsequently cared for him.

The main submission of counsel for the appellant was that it was against public policy that the basic legal duty of parental support be transferred to the hospital authority; this, it was argued, would interfere with the sanctity accorded by law to the parent-child relationship. The Appeal Court regarded this contention as basically fallacious. The judgment in favour of the child's father - in so far as the sum of R22 500 was awarded - in no way relieved him or his wife from the obligation to support the child. There was, accordingly, no transfer of that obligation. Should the money be lost for some reason, the father will remain obliged to support the child "from such other sources as he may be able to muster'.

In the event, the Appeal Court held, the father's pregnancy claim had rightly been allowed by the court a quo. An important qualification was added by the Court to this finding: This conclusion "is intended to pertain only to a case where, as here, a sterilization was performed for socioeconomic reasons'.

As far as the father's claim for damages for discomfort, pain and suffering, and loss of amenities of life experienced by his wife in consequence of her pregnancy and confinement was concerned, the Appeal Court also confirmed the judgment of the trial court that an intangible loss cannot be recovered in contract. Only patrimonial loss may be recovered.

The decision of the Appellate Division in Edouard leaves little doubt that in South Africa liability will arise (a) in the "classical" situation of "wrongful conception" (pregnancy resulting from medical negligence in respect of sterilisation and a normal child is born), as well as (b) in the situation of "wrongful birth", ie where it is alleged that the birth of a defective child should have been medically prevented by means of a lawful abortion. It is still an open question, however, whether our courts will uphold a claim for "wrongful life" in the narrow sense, ie where a suit for damages is brought on behalf of the impaired infant rather than the parents. The infant does not claim that the doctor caused the impairment but that he (the doctor) was responsible for the infant's very existence. Different policy considerations may apply in respect of such a claim: "It is life itself that is construed as harm'.

As far as liability for "pregnancy claims" is concerned, it is for South Africa now a case of Bloemfontein locuta causa finita. The worst fears of many doctors have now come true and controversy is bound to continue in medicolegal circles. It may be expected, for example, that the Appeal Court's response to the argument pertaining to the child's trauma when he learns one day about the suit involving his birth, might be viewed by psychologists as perhaps too facile a disposal of an issue with potentially complex implications. But that, of course, is only a single aspect of this important and well-reasoned ruling.

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Footnotes:

1 See eg the comments of Denning LJ in his dissenting judgment in Bravery v Baeroy [1954] 2 All ER 59; Zitelmann in 99 Archiv f Civ Praxis (1906) 86-87; Smith 14 Rocky Mountain Law Rev 233 (1942) 278 et seq.


4 See Edouard v Administrator of Natal 1989 2 SA 368 (D).


7 [1986] 1 All ER 497 (CA).

8 [1986] 1 All ER 488 (CA).

9 1988 WLD, unreported.

10 See note 4 above.

11 1990 3 SA 581 (A).