



H v. Fetal Assessment Centre

(CCT 74/14) [2014] ZACC 34

Country: South Africa

Region: Africa

Year: 2014

Court: Constitutional Court of South Africa

Health Topics: Child and adolescent health, Disabilities, Health care and health services, Health information, Hospitals, Informed consent, Medical malpractice, Sexual and reproductive health

Human Rights: Right to health

Facts

The mother of the applicant, who was born in 2008 with Down Syndrome instituted a claim on his behalf for damages against the Fetal Assessment Centre. Her son was born in 2008 with Down syndrome. She claimed that the Centre negligently failed to warn her of the high risk that her child would be born with Down syndrome. She stated that if she had received that information, she would have chosen to have an abortion and the child would have avoided a life of disability. The child claimed special damages for past and future medical expenses and general damages for disability and loss of amenities of life.

The claim was denied by the High Court because a claim brought on behalf of the child was not recognized under the law of delict (tort) in South Africa in such a scenario. The applicant appealed to the Constitutional Court of South Africa. The applicant argued that the common law should be developed to recognize this claim.

South African law recognised the claim by parents for patrimonial damages in these circumstances but not of the child. The central issue considered by the court was whether this situation should be changed to extend the right of damages to the child

Decision and Reasoning

The Court held that a child's claim for damages in such a situation of misdiagnosis could be recognized under the common law of South Africa. The court returned the action to the High Court to decide whether the claim should be allowed on basis of the facts.

The Court stated that Article 39(2) of the Constitution requires that the courts must promote the spirit, purpose and objectives of the Bill of Rights while developing common law. The court further stated that the constitution protects the interests of children and requires all law including the common law to reflect the principles enshrined in the Constitution.

The Court stated that this constitutional right of the child included a negligent pre-natal misdiagnosis. The Court held that such a claim should satisfy the following elements: harm-causing conduct, wrongfulness, negligence and causation. First, the Court found that despite the absence of physical harm resulting from the misdiagnosis, the conduct resulted in patrimonial (financial) loss for the parents. The Court reasoned that if the parents failed to claim patrimonial damages, the child should be allowed to claim these same damages. Second, the Court stated that the medical expert has a legal duty to put the child's best interests first. This duty may be breached by a negligent misdiagnosis. Third, it stated that negligence should be established on behalf of the medical expert in consonance with the general principles of negligence. Fourth, the Court stated that factual causation should be established as misdiagnosis being a part of the chain of events leading to the birth.

The Court set aside the decision of the High Court and allowed the Plaintiff to amend the claim. The Court declined to decide on the substantive merits of this case, which was to be decided by the High Court.

Decision Excerpts

“While the judgments that do not find for a “wrongful life” claim often do not emphasize the interests of children, the judgments that place the greatest emphasis on the rights of children tend to be the ones that find that such a claim exists...Our Constitution explicitly protects the interests of children.” (paras 45-46)

“The misdiagnosis could arguably cause harm in the sense of a burden on the child in circumstances where the parents, who have their own claim, are unable to pursue it against the medical expert. Recognition of this kind of harm may not sit comfortably with existing notions of harm in our law of delict. One way of dealing with this difficulty may lie in viewing this burden on the parents and the child as a single one, in the sense that it is not cumulative. If the parents pursue the claim in their own names it need only pay damages to them. If they do not, then it may be liable to the child for no more than it would have been liable to the parents.” (para 65)

“Part of the established wrongfulness enquiry is to determine whether there has been a breach of a legal duty not to harm the claimant, or whether there has been a breach of the claimant’s rights or interests. Under the Constitution children have the right to have their best interests be given paramount importance in every matter concerning them. That includes a pre-natal medical expert misdiagnosis that results in the child being born with a disability. Translated into legal terms, that would mean that there may be a legal duty not to cause that loss. Failure to do so might breach that duty and infringe the child’s right under section 28(2) of the Constitution.” (para 69)

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