Everyone has the right to life – Fact or a nasciturus fiction?

The debate surrounding prenatal life is a multifaceted and convoluted legal topic, notwithstanding the various religious and philosophical arguments it triggers. Without becoming all dogmatic about life and when it begins, it seems appropriate in light of recent case law surrounding delictual claims of children, to evaluate the right that children have to institute wrongful life claims and the repercussions this has for law reform in the interpretation of the right to life.

Definitions

- Everyone’s right to life is guaranteed in s 11 of our Constitution, which section is further left unqualified.
- In Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T) however, the High Court ruled that the word ‘everyone’ as contained in s 11, does not extend to un-born foetuses, which do not have legal personality under our Bill of Rights.
- The so-called nasciturus fiction, refers to the legal principle in which foetuses if subsequently born alive, will acquire all of the rights of born children whenever this is to its advantage. Pinchin and Another NO v Santam Insurance Co Ltd 1963 (2) SA 254 (W) also confirmed that this principle extends to the law of delict.
- Wrongful life is a legal action, which embodies a severely disabled child suing a medical practitioner and/or hospital through the assistance of a parent, for failing to prevent the child’s birth. It is argued that had the medical practitioner provided a genetic outlook before the pregnancy or alternatively information about the likelihood of disability during the pregnancy, the mother would have prevented the child’s birth or opted for termination of the pregnancy respectively.
- The Choice on Termination of Pregnancy Act 92 of 1996 (the Act), is the law governing abortion in South Africa and embodies the mother’s right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

Analysis

The most recent wrongful life claim in which judgment was given by our courts took centre stage at an appeal to the Constitutional Court in August 2014, after the Western Cape High Court delivered judgement in April 2014, upholding an exception to a mother’s claim for wrongful life on behalf of her minor son. Exception was raised by the defendant in H v Kingsbury Foetal Assessment Centre (Pty) Ltd (WCC) (unreported case no 4872/2013, 24-4-2014) (Baartman J), in that, inter alia –
- the particulars of the claim were alleged to be contra bonos mores and against public policy, as our courts should not be tasked with the question of whether it is better to not have life at all than to have a life shrouded with disabilities; and
- that in applying general principles of delictual law, the defendant could not have undertaken a legal duty towards the foetus that would oblige the defendant to take such action as might be necessary to cause the foetus to be terminated.

The above together with Friedman v Glickman 1996 (1) SA 1134 (W) and Stewart and Another v Botha and Another 2008 (6) SA 310 (SCA) are the cases thus far that stand as precedent for the institution of wrongful life actions. The irony in these decisions is that in rejection of such claims, our courts have more firmly established their regard for the right to life of an unborn foetus and its value vis-à-vis termination of a defective pregnancy. It is clear from the reasoning given by the judges who upheld exceptions to the wrongful life claims in these matters, that in making the decision to grant such claims, the courts will inevitably have to decide on and accept in its calculation of damages, that never being born at all is a better alternative to a disabled life. This is something for public policy reasons that the courts are refusing to rule on.

The questions that need to be asked is that in making their decision not to allow wrongful life actions, have the judges erred in bringing the development of our common law in line with constitutional principles, which clearly do not accord any constitutional rights to unborn children, let alone the right to life?

With constitutional values being applicable to all law and thus also to the Act, (which we accept as constitutional), the decision by the courts not to rule on the right to life versus never being born at all, seriously questions whether they are of the opinion that social ethics have shifted. It could be argued from the above that our courts are giving the impression that the blessing of life, albeit a tainted one, reigns sovereign over the prevention of a child’s birth by abortion needed to protect the foetus from the future harms of disability.

Many would advocate that there is a great public interest in having the right to life extended to include a foetus and there could very well have been a change in the convictions of the community since the promulgation of the Act almost 20 years ago.

Even more so now than ever, public opinion is being influenced by the over-achieving and spirited disabled persons of the world who against all odds achieve success in sports, arts and science. The Pinchin case also lends the idea that since an unborn child can acquire subjective rights as a foetus, the law regards the foetus as a legal person.

Pro-life and pro-choice, the debate is never-ending. And while South Africa’s progressive laws are applauded for upholding women’s rights, there seems to be a grey area into which the courts do not feel comfortable entering; The delicate balance between the right to life and the right to prevention of child birth when considering wrongful life actions. It seems this great debate will stand the test of time.

Valerie Teresa Smit BCom LLB (Unisa) is a candidate attorney at Boshoff Njokweni Inc in Cape Town.