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Is a Juristic Person Vicariously Liable for Maintenance of a Child? A Judicial Analysis

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Authors' contributions

This work was carried out in collaboration between the three authors. Author NPS designed the study, wrote the protocol and supervised the work. Author NPS also performed the statistical analysis and managed the analyses of the study. Author NPS wrote the first draft of the manuscript. Authors EO and TR managed the literature searches and edited the manuscript. All authors read and approved the final manuscript.

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ABSTRACT

The inquiry of this study is to explore whether a juristic person such as the Ministry of Health or a hospital is vicarious liable for the actions of its servants. This research purports that professionally skilled employees such as medical practitioners, surgeons, specialist obstetricians and gynaecologists are regarded as servants of the juristic person. The fact that the medical professionals are integrated into the organisational structures of a hospital and are subject to administrative directions suffices to make them "servants." So when these servants commit a delict or wrongful conduct against patients in the course and scope of their employment, the Ministry of Health or the hospital will be found to be vicariously liable. As far as they act as organs of the juristic person (hospital), the employing institution is vicariously liable for its servants' delictual actions. In the *Mildred*-case the appellant after being rape, requested a doctor to give her

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medication to prevent pregnancy. She was sent from pillar to post till the unwanted child was born. The questions this research raises are whether the juristic person (hospital) was negligent in the manner in which they dealt with the appellant's predicament. If this question is to be answered in the affirmative, then the hospital is liable to the appellant in damages for pain and suffering and for the maintenance of her child. The study will canvasses the issue of the vicarious liability of juristic persons for maintenance of children by invoking similar situated case law and draw a resolution from these court cases. These case law entail: *Administrator, Natal v Edouard*, *Mukheiber v Raath*, *Steward and Another v Botha and Another*, *Sonny and Another v Premier of the Province of KwaZulu-Natal and Another* and *Friedman v Glickman.* The approach to other legal systems remains of relevance and could assist us in developing our own domestic laws further.

Keywords: Juristic person; master-servant relationship; corporate vicarious liability; respondeat superior; wrongful pregnancy; wrongful birth.

1. JURISTIC PERSON AND ITS LEGALITIES

1.1 Introduction

1.1.1 Definition

Legal personality pertains to be capable of having legal rights and obligations in law. Legal persons are of two kinds: Natural persons and juristic persons [1].[1] The latter connotes to a group of individuals, such as government organisations and corporations, which are treated by law as if they are persons. The juristic personality allows one or more natural persons to act on behalf of a corporate body or government institution (for legal purposes) [2].

In applying the definition and concept of a personality, like hospitals (for the purpose of this discussion), the latter may shield its members from civil (personal) and even criminal liability of the wrongful or delictual acts of its servants. The individual or natural person, for example, the medical professional's negligent acts can be imputed to the hospital for the purpose of vicarious liability. The inquiry is to establish whether or not a delict was committed during the course and scope of the medical professional's work performing or executing another's (hospital) instruction. This means that a medical professional must have engaged in carrying out the function for which he or she was employed for the purpose of furthering the employer's (hospital) business [3].

1.1.2 Responsibility – obligations of maintenance and relation to juristic person

Obligations of maintenance arise in several cases in this study. The obligations can be contractual as well as delictual in nature. The *Mildred*-case (infra) postulates the delictual nature of the obligation factor. In failing to administer for the prevention of pregnancy of a raped woman, the hospital incurred for itself liability in maintaining the unwanted child to the age of majority coupled with entitlements to damages such as pain and suffering. The responsibility of the hospital for acts or omissions of medical doctors forms the basis of vicarious liability where the plaintiff has suffered loss, damage or injury as a result: *Respondeat superior* [4]. An indication of corporate (juristic) vicarious liability is found in *Eastern Counties Railway Co v Broom* [5], wherein it is stated that a corporation may be liable in delict for the acts of their servants.

The contractual nature of obligations is postulated in case law Administrator, *Natal v Edouard* and *Mukheiber v Raath (infra)*. In the former case, a woman and a medical doctor agreed that she is to be sterilised by the doctor.

[1] *PVL 101 Notes. Published by Alawi Jacobs. The characteristics of a legal person (juristic person): (a) It enjoys a legal existence independent from its members or the people who created it; (b) must always act through functionaries, i.e. directors of a company; (c) when functionaries act on behalf of the juristic person, the juristic person acquires rights, duties and capacities, i.e. bind itself to a contract, be owner of things, etc.*
The following is being recognised as a juristic person: (i). Associations incorporated - i.e. companies, banks, and close corporations etc.; (ii) Associations especially created and recognised as juristic persons in separate legislation i.e. university, semi-state organisations, public corporations (Eskom, SABC); (iii) Associations which comply with the common law requirements for the recognition of legal personality of a juristic person, i.e. churches, political parties, trade unions known as universitates. The associations must meet the following requirements: An association must have a continued existence irrespective of the fact that its members may vary. They must have rights, duties and capacities. Their object must not be the acquisition of gain. Trusts and partnerships are not recognised.

After the operation she felt pregnant again and sued the hospital for the delict of its servant. The father of the unwanted child claimed damages to compensate for the cost of supporting the child on the breach of contract. Contractual breach could also be inferred in the case of *Mukheiber v Raath (infra)*, where the husband and wife alleged that the gynaecologist had negligently misrepresented to them that he had sterilised the wife when in fact no sterilisation was done.

In all these cases responsibility or liability in the form of vicarious liability was ascribed (both delictual and contractual) to the juristic person (the hospital) for the wrongful and negligent acts of the medical professionals. The children that were conceived and borned evoked maintenance obligations from the hospital.

The defence of juristic persons (hospitals) in this regard is that the delictual principle of direct liability should also be invoked by the Courts. The Ministry of Health (Hospitals) have a constitutional and statutory duty to treat and heal ill people. Hospitals acts through the instruments of its organs – the medical professionals. The issue whether the hospital is liable for their conduct should no longer be dealt with as an aspect of vicarious liability, but rather as part of the normal enquiry into whether the elements of our law of delict are present when hospitals act. Hence the invocation of the delictual principle of direct liability. Where a hospital employee breaches his/her duty direct liability must be inferred upon the employee.

1.1.3 Liability

Juristic persons are liable for the wrongs of persons acting in a special representative capacity like medical practitioners [4]. A prerequisite for such claim is a delictual act committed by the medical practitioner. The basic principle of vicarious liability for juristic persons (hospitals) is not own fault, but imputation of another person's delictual act. These rules also apply to certain representatives of the State and its organisations. Public servants, on the one hand, who are acting beyond the scope of their respective duties are regarded as liable according to the general principles of vicarious liability (in delict). But, on the other hand, juristic and or corporate liability is introduced for the wrongs of public servants, thus excluding claims against the public servants themselves. These two opposing ideas can be epitomised in *New Zealand Guardian Trust Co. Ltd v Brooks and Others*: "[…] the acts of an employee or agent render the State or [company] vicariously liable [because] the employee or agent was in breach of a duty which he personally owed to the injured party […]" [6].

Besides that, claims against public servants only acting negligently were (and still are) excluded in cases where victims gain compensation from other sources [7].

Vicarious liability seeks to fix juristic or corporate liability by reference to an employee's conduct undertaken in the course of his or her employment.

2. HOW DID A JURISTIC OR CORPORATE PERSON CAME TO BE: A COMPARATIVE ANALYSIS

Juristic or corporate liability has its origin in ancient law and became the centre of doctrinal discussion at the end of the 19th century as will be envisaged in this study.

The Roman state and its territorial units, the *civitas* or *coloniae*, had legally enabled individuals to constitute trade and other charitable associations. These Roman entities were called *universitates personarum* (or *corpus*/universitas, which included the Roman state and other entities with religious, administrative, financial, or economic scopes) and *universitates rerum* (which included entities with charitable scopes). These entities also had their own identity, owned property separate from that of their founders and had independent rights and obligations. The existence of such independent entities with rights and obligations (in Rome), constituted the basis for the evolution of a juristic or corporate personality in the medieval period. The Roman law, though, rendered these organisations judicially incapacitated, because they lacked independent will [8]. This concept of juristic or corporate liability perpetuated its dynamics from the 12th until the 14th century. Pope Innocent IV, for example, had created a legal maxim, *societas delinquere non potest* (the fiction theory), which claimed that, unlike individuals who have willpower and a soul, *universitas* are fictions that lack a body and a soul and, therefore, cannot be punished. But despite the maxim, the realities of the time and the demands of the law eventually admitted the existence of juristic persons and their capacity of being sanctioned for their delictual acts. This idea has, however, be

implemented with hesitation and only utilised by powerful figures like the popes, who now frequently sanction the villages, provinces and corporations. These sanctions could be fines, the loss of specific rights, dissolution and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or even excommunication [8].

The later development of Roman *universitates* and its subjugation to delictual liability fell in place within the Germanic concept of corporate or juristic responsibility. German law considered that both the corporations and the individual were real subjects of law. The rationale for the collective responsibility under German law was that if damages resulted from an individual action, a sanction was imposed to repair the damages. Because the property was owned by the collectivity, it was only logical that the collectivity should pay the damages [8].

In the 14th century, the hesitancy to actuate liability upon juristic or corporate persons' had been cast off. Corporations had now their own willpower and were therefore liable for the actions of their members. This theory became prevalent in Continental Europe until the end of the 18th century. The dynamics in law were that corporations should be liable, both civilly and criminally for the acts committed by their members. Cities, villages, universities, trade and religious associations have been required to pay fines for the delictual actions of their members [8].

In France, criminal and civil liabilities against corporate persons or organizations had been enacted by the Ordonnance de Blois of 1579. The requirement for liability to the corporate entity was that a crime committed must have been the result of the collectivity's decision. The ordonnance provided for the simultaneous liability of individuals for committing the same crime as their accomplices. The French Revolution however brought changes in the French law. Adherents to the fiction theory, Malblanc and Savigny, sustained the principle *societas delinquere non potest*, which maintained that a corporation is a legal fiction which lacks body and soul and was not able of committing the criminal *mens rea* or to act in *propria persona*. By this pronouncement, these two proponents had taken the development of the law with regard to corporate responsibility back hundreds of years. Other adherents to the fiction theory, E. Bekker and A Briz, argued that corporations have a pure patrimonial character which is created for a particular commercial purpose and lacks juridical capacity. In light of these renditions, it is clear that corporations cannot be the subjects of civil and even criminal liability. A deviation to the fiction theory had been contrived by O. Gierke and E. Zitelman, who had explained that corporations are unities of bodies and souls and can act independently. They asserted that corporations' willpower is the result of their members' will. F. von Liszt and A Maester argued that corporations' capacity to act under the criminal law is not fundamentally different from that under law of delict or administrative law. They like their predecessors Gierke and Zitleman, asserted that corporations are juristic persons that have willpower and can act independently from their members. The latter groups' canvassing resulted in the *Nouveau Code Penale* in 1994. It is provided in Article 121-2 of the instrument that all juristic persons are civilly (and criminally) liable for the offenses committed on their behalf by their organs or representatives [8].

France's illuminating example was followed by numerous other European countries. Belgium instituted the civil and criminal liability of juristic persons in 1999 in Article 5 of the *Belgian Penal Code*. Netherland adopted the concept of corporate criminal and civil liability even earlier in 1976. Article 51 of the *Dutch Penal Code* provides that natural persons, as well as juristic persons can commit offenses. But Italy, Portugal, Greece and Spain recalcitrated and refused to hold corporations delictually and criminally liable for wrongful acts of their members [8].

Initially, England also refused to accept the idea of corporate civil and criminal liability. Under English law corporations were considered legal fictions, artificial entities that could do no more than what they are legally empowered to do. These laws contended further, like the fiction theorists that corporations lacked souls, that they could not have *mens rea* and could neither be blameworthy nor punished. But during the 16th and 17th centuries in England, corporations became more common and their importance had been spiralled. By borrowing the principle of vicarious liability from delict, courts now imposed vicarious criminal liability on corporations in those cases where natural persons could be vicariously liable as well. In 1944, the High Court of Justice decided to impose criminal liability on corporations and established that the *mens rea* of certain employees was to be considered as that of the company itself [8].

At present, corporate criminal and civil liability is broad as individual criminal liability.

3. DISCUSSION

3.1 Vicarious Liability of Juristic Persons Such As Hospitals

3.1.1 The master-servant relationship in the medical profession as basis for vicarious liability

After establishing what a juristic person is, the research now wants to engage on the practical dimension of vicarious liability for this institution. In hospitals there exists an employment contract between the employer and the employees/ servants. A test was contrived to regulate such a contractual relationship. The test used to determine the master-servant relationship focuses on three elements: (i) the master must assign certain duties to the servant; (ii) the servant must be integrated into the organisational sphere of the master's enterprise, and (iii) the servant must work under the direction of the master. These elements are based on the principle of vicarious liability for wrongs committed by medical professionals in the course and scope of their employment.

The criteria necessary to establish a master-servant relationship do not exclude persons with certain professional qualifications. As indicated in the abstract, professionally skilled employees such as medical practitioners are to be regarded "servants" for the purposes of vicarious liability.

The fact that they are integrated into the organisational structures of a hospital and are subject to administrative directions suffices to make them "servants." As far as they act as organs of the juristic person (hospital), the employing institution is vicariously liable for its servants' delictual actions [7].

3.1.2 Actions for wrongful pregnancy and wrongful birth for purposes of vicarious liability

Wrongful pregnancy actions are claims by parents against a juristic person (hospital) for the failure of its servant to perform a sterilisation or abortion properly, which result in the birth of a healthy, but unwanted child. Actions for wrongful pregnancy and wrongful birth have troubled Courts not only in South Africa, but in foreign jurisdictions as well. Whilst wrongful pregnancy and wrongful birth actions have received local and international recognition, in South Africa, the development of these actions has been particularly slow compared to its common law counterparts with only five reported judgments in the past two decades.

Claims for wrongful pregnancy and birth actions can be based in either contract or delict. The elements of wrongful pregnancy and birth actions are: (a) the existence of a patient-doctor relationship between the parents of the child and the medical practitioner; (b) the breach by the medical practitioner of his obligations in terms of the agreement and/ or negligent failure to perform a sterilisation procedure or to disclose to the prospective parents the risk of having a child with genetic or congenital disease; (c) the parents suffered harm/damages and (e) that the medical practitioner's breach of agreement or negligent conduct caused the harm.

In wrongful pregnancy claims, parents may be able to sue for damages on the basis of the costs of the unsuccessful procedure and any pain and suffering associated with the sterilisation or abortion. The parents may also recover damages for the medical expenses, pain and suffering attributable to the pregnancy, the mother's loss of wages due to the pregnancy, the husband's loss of consortium during the pregnancy, and the costs of rearing the child to maturity [9].

Wrongful pregnancy and wrongful birth actions are now universally accepted although they were, in the early years, treated with much circumspection based on public policy and expediency considerations.

In *Mildred v Minister of Home Affairs and Others* [10], the appellant appeal against the decision of the High Court in Case No. HC 4551/07. The facts of the case are as follows: On 4 April 2006, the appellant was attacked and raped at her home in Chegutu. She immediately lodged a report with the police and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a Dr. Kazembe. She repeated her request, but the doctor only treated her injured knee. He said that he could only attend to her request for preventative medication in the presence of a police officer. He further indicated that the medication had to be administered within 72 hours after the sexual intercourse had occurred. She duly went to the

police station the following day and was advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. On 7 April 2006, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already lapsed. Eventually, on 5 May 2006, the appellant's pregnancy was formally confirmed.

Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She indicated that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. In July 2006, acting on the direction of the police, she returned to the prosecution office and was advised that she required a pregnancy termination order. The prosecutor then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate on 30 September 2006. By that stage, the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. After the full term of her pregnancy, the appellant gave birth to her child on 24 December 2006.

The questions are whether or not the juristic persons (The Ministry of Health=hospital, the Ministry of Health and Child Welfare and Minister of Justice) were negligent in the manner in which they dealt with the appellant's predicament. The second question, assuming an affirmative answer to the first, is whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether these juristic persons are liable to the appellant in damages for pain and suffering and for the maintenance of her child.

The Court ruled that the appellant's claim for damages for physical and mental pain in the sum of US$ 10,000 and US$ 41,904 for maintenance in respect of her minor child were hereby confirmed and upheld.

The *Mildred* case will now be projected against cases of similar nature to establish appellant's entitlement to damages and awards. The aim of embarking on such analyses as *Mildred* is to forge a clear cut basis for the vicarious liability of juristic persons (medical profession/ hospitals) for the delictual acts of their members or employees.

In *Administrator, Natal v Edouard* [11], a woman and a medical practitioner agreed that the latter has to sterilise her. This has to be done when the medical practitioner is about to perform a caesarean section on her. It happened that the woman had after the operation felt pregnant again and begotten a child. The father of the unwanted child claimed damages to compensate for the cost of supporting the child on the basis of breach of contract. His second claim is based on the compensation for the inconvenience, pain and suffering, as well as loss of the amenities of life which his wife had to suffer as a result of the unwished pregnancy and birth.

In for example foreign cases, pregnancy claims have been disallowed upon considerations of public policy and also upon considerations of convenience or expediency. These considerations moved courts in medical malpractice cases to quash obligations to pay for the maintenance of a healthy child: "There is something inherently distasteful about a holding that a child is not worth what it costs to raise it, and something seemingly unjust about imposing the entire cost of raising the child on the physician creating in the words of one Court "a new category of surrogate parent." [12].

In the United States a pregnancy claim was established in *Custodio v Bauer* [13]. In this case the unwanted child was born normal and healthy and therefore a pregnancy action was disallowed. The action was denied even when a child is born abnormal. In Canada, the Supreme Court held that it would be against public policy to award damages for the birth of an unwanted child [14]. The German Bundesgerichtshof held that in a pregnancy action the cost of maintenance of an unwanted child may be recovered regardless of whether the child is healthy or not. The prevailing view in the United States and Canada is that child-raising costs are as a matter of law not recoverable, if the woman gave birth to a normal and healthy child. In England and Germany, on the other hand, the authoritative view is that policy and other considerations do not stand in the way of a pregnancy claim. The primary reasoning of those judges who hold the former view is that it would be morally wrong to saddle a medical man or institution with the cost of maintaining a child whilst allowing the parents to retain all the joys and benefits of parenthood. It has been

suggested that the birth of a healthy child is an occasion for the popping of champagne corks rather than for the preferring of a claim for damages.

In South Africa, intangible loss is in principle awarded only in delict and then only in the case of a bodily injury. If patrimonial loss is claimed the tangible benefits accruing as a result of a breach of contract or the commission of a delict must be brought into account. The monetary value of those benefits must be set off against the gross loss. In *Administrator, Natal v Edouard* (*supra*) the wrong consists not of the unwanted birth, but of the prior breach of contract (or delict) which led to the birth of the child and the consequent financial loss. Although an unwanted birth cannot constitute a legal loss, the burden of the parents' obligation to maintain the child is indeed a legal loss for which damages may be recovered. Parents who cannot afford a further child may be overjoyed by the birth of another, but unwanted, sibling, but will naturally be dismayed by the additional financial burden cast upon them. It is the burden, not the child that is unwanted. In Clark J's dissent it is stated: "It is not at all that human life or the state of parenthood are inherently injurious; rather it is an unplanned parenthood and an unwanted birth, the cause of which is directly attributable to a physician's negligence, for which the plaintiffs seek compensation" [15]. In the light of these factual depictions the respondent's pregnancy claim was rightly allowed. The respondent claimed an agreed amount of R2 500 as damages for discomfort, pain and suffering and loss of amenities of life in consequence of her pregnancy. The respondent's contention was that a breach of contract may give rise to a claim for intangible loss such as that occasioned by pain and suffering. The contention was rejected by the Court *a quo* which found that only patrimonial loss may be claimed *ex contractu*. It is also clear that under the Aquilian action only patrimonial loss could be recovered. An Aquilian liability does not attach to the causing of mental distress or wounded feelings. Only patrimonial loss may be recovered in contract and in delict.

The party guilty of breach of contract would be liable to compensate the innocent party for loss which is not even recoverable by the Aquilian action. The principles of our law relating to liability for breach of contract appear to be adequate to afford the innocent party sufficient satisfaction. Damages for pain and suffering for which an action lies in delict, should also be recoverable for breach of contract. The argument ran along these lines: Since the law of both contract and delict seeks to compensate the innocent party for the consequences of unlawful conduct on the part of another, it is anomalous that damages for pain and suffering can be claimed only by an action founded in delict, and that to allow the respondent's claim for R2 500 would effect a change in the law only to the extent that the respondent could claim such intangible loss as he would, in any event, have been able to claim in delict.

In summation: there is no agreement that the Hospital negligently failed to perform the sterilisation operation. And, it is not self-evident that neglect leading to conception and a consequent birth can be equated with the inflicting of a bodily injury. There are also no compelling reasons why damages for pain and suffering should be recoverable in an action for breach of contract.

On the basis of these renditions, the Appellate Division confirmed the judgment of the trial Court by upholding the first claim, but disallowed the second. The first claim is the claimant for damages to compensate for the cost of supporting the child. The second claim being for compensation for the inconvenience, pain and suffering as well as loss of the amenities of life which the wife had to suffer as a result of the unwished for pregnancy and birth.

In *Mukheiber v Raath* [16], the plaintiffs, husband and wife, alleged that the defendant, a gynaecologist, had negligently misrepresented to them that he had sterilised the wife when in fact no sterilisation was done at all. Relying on such misrepresentation, they desisted from conception, as a result of which a child was conceived and born as a healthy, normal boy. The plaintiffs claimed compensation from the defendant under two heads of pure economic loss, for the costs of confinement of the wife and for the maintenance of the child until it became self-supporting.

3.1.3 Legal duty

Mrs Raath was not sterilised by Dr Mukheiber when he performed the caesarean section on her. The representation by him that he had done so was false. The question that arose was whether there was a legal duty upon the defendant before making the representation, to take reasonable steps to ensure that it was correct. In the Mukheiber/Raath case it is

indicated that there was such a duty. The relationship between Mrs Raath (and her husband) and Dr Mukheiber and the nature of his (Dr Mukheiber) duties towards them amounted to special duty on his part to be careful and accurate in everything that he did and said pertaining to such relationship. The representation, on the one hands, objectively carrying the risk of the conception and birth of an unwanted child; on the other hand, subjectively speaking, the dangers of a false representation should have been obvious to the mind of a gynaecologist in the position of Dr Mukheiber.

The misrepresentation induced the Raaths' not to take contraceptive care. It must have been obvious to a person in Dr Mukheiber's position that the Raaths' would place reliance on what he told them, that the correctness of the representation was of vital importance to them, and that if it were incorrect they could suffer serious damage.

3.1.4 Negligence

Under South African law, the standard of conduct expected from all members of society is that of the *bonus paterfamilias*, *ie*. the reasonable man in the position of the defendant. An act which falls short of this standard and which causes damage unlawfully, is described as negligent. In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person and the Court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs [17]. Dr Mukheiber had made the representation and he was therefore negligent. He should reasonably have foreseen the possibility of his representation causing damage to the Raaths' and should have taken reasonable steps to guard against such occurrence and he failed to take such steps.

The Raaths' did not wish to have any more children for socio-economic and other family reasons. These are socially acceptable reasons, and it does not lie in the mouth of Dr Mukheiber to say that he is not liable because the Raath's reasons for not wanting a child were not legitimate.

The question is how far does Dr Mukheiber's liability go? As far as the confinement cost is concerned, there can be no defence: such costs were reasonably foreseeable and there is no reason to limit them. The problem arises in connection with the maintenance claim. The cost of maintaining the child is a direct consequence of the misrepresentation. But the claim cannot be unlimited. His liability can be no greater than that which rests on the parents to maintain the child according to their means and station in life, and lapses when the child is reasonably able to support itself.

In *Stewart and Another v Botha and Another* [18], the appellant and his wife have a son, Brian, who was born on 4 August 1993 with severe congenital defects. These included a defect of the lower spine which adversely affects the nerve supply to the bowel, bladder and lower limbs as well as a defect of the brain. The appellant's wife, as first plaintiff, instituted an action in the Cape High Court against the respondent-hospital, which servants included, respectively the general medical practitioner and specialist obstetrician and gynaecologist whom she consulted during her pregnancy. Her claims for special damages related to the maintenance, special schooling, past and future medical expenses consequent upon her son's condition. The appellant, as second plaintiff, on behalf of his minor son, instituted a delictual claim in the alternative to that of the first plaintiff for the same damages. The respondents excepted to the appellant's claim, which was upheld by Louw J, who dismissed the appellant's claim with costs. With the leave of that court the matter came on appeal to this court.

The respondents' has treated the first plaintiff during her pregnancy and were under a duty to detect any abnormalities in the foetus. They were to advise the first plaintiff of these abnormalities, who would have undergone a termination of pregnancy. And because of the failure to execute this caveat, Brian would not have been born and would not have suffered from the severe physical handicaps that he does.

The first respondent excepted to the appellant's claim on the basis that it does not disclose a cause of action, particularly as there is no duty on the first respondent to ensure that Brian was not born and that a claim that recognises such a duty would be *contra bonos mores*. The second respondent alleged in his exception that the appellant's claim is "bad in law, *contra bonos mores* and against public policy."

The first principle of the law of delict is that everyone has to bear the loss he/she suffers.

The Afrikaans *maxim* is that "skade rus waar dit val." But the Aquilian liability clause provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered. In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. Wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms.

Delictual damages seek not so much to punish the wrongdoer, but to compensate the plaintiff by seeking to place him/her in the position he/she would have been in if the negligence did not occur. If the negligence did not occur the child would not have been born. It has been argued in opposition to the claim that if it has to allowed it would cause medical practitioners to be overly cautious and advise termination of pregnancy in order to avoid the likelihood of liability. It has been recognised that this cause of action should only be allowed in instances of grave defects. Counsel for the appellant submitted that an application of ss 11, 12(2)(a), 27, 28(1)(d) and 28(2) of the *Constitution of South Africa*, Act 108 of 1994, would lead to a conclusion that the claim should be awarded. Section 11 of the Constitution gives "everyone the right to life." A consideration of the sanctity of life has been invoke and if an acceptance has been proffered that Brian's life is worse than non-existence, such view would trammelled on this section of the Constitution. Section 12(2)(a) of the Constitution relates to the first plaintiff's right – she would have had the right to and would have terminated her pregnancy if she was informed of the congenital defects of her foetus. Sections 27 [19][2], 28(1)(d)[20][3] and 28(2)[21][4] touch upon the issues of public policy considerations. Brian's best interest would have been served if he has access to all possible medical provision or his condition. But the paramount issue here is who is/are liable for his condition in the first place.

When one considers the content of the duty owed to the child by the medical practitioners, the corresponding right, wrongfulness, harm or damages, the choice between life with disabilities on the one hand and non-existence on the other, is unavoidable. Making the choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child, but involves an arbitrary, subjective preference for some policy considerations and the denial of others.

The essential question in this case is whether the law should recognise an action for damages caused by negligent conduct. The court rightfully answered this question in the affirmative, when it ruled that the respondent-hospital be held liable for the delictual actions of its servants. In applying the principle of vicarious liability (master-servant relationship) the medical practitioner's liability will vicariously spilled over to the hospital that employed them, if it was the case.

In *Sonny and Another v Premier of the Province of KwaZulu-Natal and Another* [22], the first and second plaintiffs, husband and wife, instituted an action against the first defendant, the premier of the province of KwaZulu-Natal and the second defendant the eThekwini Municipality. In the first instance the two plaintiffs claimed payment of an amount of R6 600 000 from the defendants jointly and severally, alternatively, the first defendant, and further alternatively, the second defendant. The second plaintiff claimed an amount of R150 000 from the defendants.

The plaintiffs made the following allegations in their particulars of claim. During February 2002 the second plaintiff conceived a child whose natural father was the plaintiff. At that time the plaintiff's age was 36.5 years. During the 26th June 2002 the second plaintiff attended at the Clare Estate clinic, which was under the control of the second defendant. She became a patient at that clinic. Thereafter she was referred to the antenatal clinic at Addington Hospital under the control of the first defendant.

The plaintiffs averred that a contract was concluded between the second defendant and the second plaintiff. The material terms of such contract were that the second plaintiff would

[2] *Everyone has the right to have access to – health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*

[3] *Every child has the right to be protected from maltreatment, neglect, abuse or degradation.*

[4] *A child's best interests are of paramount importance in every matter concerning the child.*

receive advice and treatment at the clinic in connection with her pregnancy. That advice and treatment were to be carried out with due and proper care and skill. In addition, the second defendant's servants would take reasonable steps to establish whether there existed a substantial risk that the foetus would suffer from any severe physical or mental abnormality. If such a risk existed the second defendant's servants would timeously advise the second plaintiff and afford her an opportunity of electing whether to terminate her pregnancy in terms of the *Choice on Termination of Pregnancy Act* (Act No 92 of 1997).

The second plaintiff (herein the plaintiff-wife) was diagnosed as being pregnant with a foetus of 17 weeks gestational age. On the 26th June 2002 an ultrasound scan indicated that the head of the foetus was low and difficult to assess. On 28th October 2002 a cordocentesis was performed on the plaintiff-wife. On 16th November 2002 the plaintiff-wife gave birth to a girl. The child suffered from Down syndrome. At the same time the first defendant's servants performed a bilateral tubal ligation upon the plaintiff-wife which rendered her permanently incapable of natural procreation. It is averred that this procedure was performed without the plaintiff-wife's informed consent.

The first defendant's servants breached their obligations in terms of the alleged agreement and they also acted unlawfully and negligently in breach of the duty of care. Had the plaintiff-wife been properly advised she would have caused the pregnancy to be terminated. Instead she gave birth to a child who is severely physically and mentally disabled and will be unable to support herself. The plaintiffs' (husband and wife) are in consequence obliged to support the child for the rest of her natural life.

The plaintiff-wife remembered she read the ultrasound examination report, reading "the head was low and difficult to assess." No one had suggested that there was anything wrong with the foetus. A nurse at the Clare Estate clinic told her that there was nothing wrong with the ultrasound report and everything was in order. No one had suggested to her at that stage that she was indeed a high risk patient who demanded a high level of care. The plaintiff-wife in addition also divulged she had a family history of diabetes. The plaintiff-wife said that if she had been told that there was a substantial risk that the foetus would suffer from severe physical or mental abnormality she would have terminated the pregnancy immediately. Her case is that the medical professionals charged with the duty of monitoring her pregnancy breached their obligations in various respects. The defendants' servants failed at an early stage of her pregnancy to perform the various tests that are required to determine whether the foetus was normal or whether it suffered from a genetic abnormality. All the expert witnesses that testified were in agreement that the plaintiff-wife was a high-risk patient. Her age alone proclaimed that her pregnancy ought to have been monitored at a higher level of medical care. The plaintiff-wife alleged she return to the doctor who read the ultrasound scan and the latter simply told her that she must return for a re-scan in two weeks' time. This same doctor told her that it is the clinic that will make an appointment for this second scan. The issue is whether the servants of the first defendant have been shown to have been negligent in not ensuring that an appointment was made there and then by the hospital for the re-scan. The question then is whether by sending her back to the clinic these servants created the risk that she may not return and therefore could not be subjected to the early tests to determine whether she carried a Down Syndrome child.

The test for negligence has been laid down in *Kruger v Coetzee* [23], where Holmes JA said at 430E the following: "For the purposes of liability culpa arises if – (a) a *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps." In the domain of medicine and surgery, the failure by a doctor or a surgeon to warn a patient as to the meaning of certain symptoms, the significance of which might not be apparent to a layman, might expose a practitioner to a charge of negligence.

In the *Sonny*-case the issue of contributory negligence was also touched upon. The plaintiff-wife's inaction (of returning to the clinic) was entirely due to a lack of proper instruction and warning. The plaintiff-wife is not guilty of contributory negligence if her lack of care for her own health or safety was caused by the conduct of the defendant which induced or misled her to believe or assume reasonably that her action or inaction would not endanger her health or safety.

With regard to the wrongfulness or not of the sterilisation or tubal ligation procedure – the plaintiff-wife averred that the consent to this procedure was obtained, but not her informed consent. What this means is that if she had been told she was carrying a Down syndrome child, she would not have consented. It is exerted that when the attending medical personnel obtained the plaintiff-wife's consent to the tubal ligation they would have believed on very reasonable grounds that the plaintiff-wife was about to give birth to a normal baby. The judge said on the basis of the evidence, that the servants of the first defendant in performing the tubal ligation, did not committed any wrongful act either intentionally or negligently. Liability on this part of the case had not been proved [24][5].

In summation, the judge ruled that the first defendant is liable to the plaintiffs for any damage the plaintiffs may prove arising from the birth of the child on 16 November 2002. On the sterilisation claim, the first defendant is absolved from the instance. The first defendant is directed to pay the plaintiffs' party and party costs. The second defendant shall be liable partly with regard to the latter direction by the judge.

In *Friedman v Glicksman* [25], the court acknowledged the claim for wrongful birth and allowed child-rearing expenses for the disabled child as well as all future medical and hospital treatments and related costs. Mrs Friedman entered into an agreement with Dr Glicksman to advise her whether she was at greater risk than normal of having an abnormal or disabled child. This information was necessary for her to make an informed decision whether or not to terminate the pregnancy. The defendant wrongly advised his patient and as a result of this negligent conduct a disabled child was born. The court held that such a contract is not only acceptable, but that wrongful birth claims for damage arising from either breach of contract or *ex legis Aquiliae* were not *contra bonos mores*. The court stated that the contract entered into between the plaintiff and the defendant was sensible, moral and in accordance with modern medical practice. The plaintiff was seeking to enforce a right, which she had, to terminate her pregnancy if there was a serious risk that her child might be seriously disabled. The court mentioned under para 1138H in the *Friedman*-case that it is better not to allow a foetus to develop into a seriously defective person causing serious financial and emotional problems to those who are responsible for such person's maintenance and well-being. The court found that the cause of action in *Friedman* is a logical extension of the principle earlier enunciated in the wrongful conception decision of *Edouard*. The court explained the harm of wrongful birth in *Friedman* under para 1138G as the wrong not of the unwanted birth as such, but of the prior breach of contract (or delict) which led to the birth of the child and the consequent financial loss. Put somewhat differently, although an unwanted birth as such cannot constitute a legal loss, the burden of a parents' obligations to maintain the child is indeed a legal loss for which damages may be recovered.

A doctor acts wrongfully if he either fails to inform his patient or incorrectly informs his patient of such information she should reasonably have in order to make an informed choice of whether or not to proceed with the pregnancy or to legally terminate such pregnancy. The fault element of the delict is to be found in the foreseeability of harm which the doctor-patient relationship gives to the doctor. Once proper disclosure is not made and the patient is deprived of her option, it seems that the damages she has suffered by giving birth to a disabled child are clearly caused by the default of the doctor, provided she would have terminated the pregnancy if the information had been made available to her.

4. INTERNATIONAL JURISDICTION

In the case of *Becker v Schwartz* [26] a wrongful birth action succeeded and pecuniary damages were recovered for the institutional care of a child born with Downs Syndrome. The action is the result of the negligent failure of the defendant-physician to inform and advise an amniocentesis in such a case of advanced age of pregnancy. Satisfaction for emotional pain and suffering was, however, denied.

In *Keel v Banach* [27] a wrongful birth action was allowed. Despite the fact that Dr Banach performed two sonograms during the pregnancy, the plaintiff's child was born with multiple birth defects. The plaintiff-parents instituted action

[5] *Since Roe v Wade 410 U.S. 113 (1973) medical science's ability to predict and detected defects in the unborn has expanded significantly. Prenatal screening and diagnosis have changed society's viewpoint on genetic possibilities and birth expectations in such a way that wrongful birth litigation is a logical and necessary development in delict in reaction to these medical advances and societal viewpoint changes. This new type of litigation could be explained as a reaction to developments in medical science and is designed to protect the constitutional rights of parents and protect societal interests in promoting quality prenatal health care.*

based on medical negligence against Dr Banach and asserted that he was negligent on at least two accounts, namely that he failed to meet the standard of prenatal care by firstly failing to further investigate questionable sonogram findings, and secondly, by failing to warn his patient of increased genetic risk after the disclosure that Mr Keel had previously fathered an anencephalic stillborn. Under such circumstances an amniocentesis should have been performed. The plaintiff alleged that she would have aborted the pregnancy had the defects been discovered in time.

In *Naccash v Burger* [28] the Virginia Supreme Court compensated the parents of a child suffering from Tay-Sachs disease. In spite of undergoing genetic tests the plaintiff conceived an affected child because of the negligence of a laboratory official.

In *Harbeson v Parke-Davis Inc* [29], a physician acted negligently by failing to warn his patient of an increased risk of birth defects due to her use of the drug Dilatin during pregnancy. A handicapped child was born and Mrs Harbeson was compensated for all extraordinary expenses caused by the impairment as well as her mental anguish and emotional stress as a result of the handicapped child.

5. CONCLUSION

The issue of vicarious liability of juristic persons such as the Ministry of Health or hospitals for the delictual acts of their "servants" have been settled in this study. A well-thought-out analyses of South African case law on delict such as *Mildred v Minister of Home Affairs*, *Administrator, Natal v Edouard*, *Mukheiber v Raath*, *Steward and Another v Botha and Another*, *Sonny and Another v Premier of the Province of KwaZulu-Natal and Another* and *Friedman v Glickman* are a reflection that hospitals are to be held vicariously liable for the wrongful acts of their servants when a delict was committed during the course and scope of their employment. The Mildred-case for example explicated that the hospital was negligent in the manner in which it dealt with the applicant's predicament. It is answered in the affirmative in this research that the hospital is responsible/liable for the maintenance of her unwanted child accompanied by damages for her pain and suffering. This ruling ran like a golden thread through all the analysed case law in this study. These case laws bolstered by international jurisdiction denote that juristic persons are vicariously liable for the maintenance of a child.

It is said that wrongfulness depends on the existence of a legal duty not to act negligently. Delictual damages seek not so much to punish the wrongdoer, but to compensate the plaintiff by seeking to place her in the position she would have been in if the negligence did not occur. If the negligence did not occur the child would not have been born. This serves as the fulcrum of the research and hospitals need to pay heed to the caveats engendered in this study.

COMPETING INTERESTS

Authors have declared that no competing interests exist.

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