LL Case No 5/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ADMINISTRATOR OF NATAL Appellant

and

MERVYN GREGORY EDOUARD Respondent

CORAM: JOUBERT, VAN HEERDEN, MILNE JJA
NICHOLAS et GOLDSTONE AJJA

HEARD: 7 MAY 1990

DELIVERED: 30 MAY 1990

JUDGMENT

VAN HEERDEN JA:

The issues

Arising from the birth of his fourth child, Nicole, the respondent instituted an action for damages against the appellant in the Durban and Coast Local Division. The appellant was cited in his capacity as head of the Natal Provincial Administration ("the Administration"). The respondent sued in "his capacity as husband of, and as the administrator of the joint estate of himself" and his wife, Andrae. Damages were claimed under three different heads, only two of which are still relevant; viz, i) the cost of maintenance of Nicole from the date of her birth to the age of 18 years, and ii) damages for discomfort, pain and suffering and loss of amenities of life, suffered by Andrae in consequence of her pregnancy and the subsequent birth of Nicole.

After the close of pleadings the parties agreed upon a written statement of facts and submitted a special case, in terms of Rule 33(1), for the

adjudication of the court. The salient facts set out in the special case, as later amplified, may be summarised as follows:

1) In August 1982 Andrae, duly assisted by the respondent, concluded an agreement with the Administration. In terms thereof the Administration agreed to cause a surgical tubular ligation of Andrae's fallopian tubes to be carried out. This surgery, intended to render Andrae sterile, was to be performed at the time of the birth of Andrae's third child which she was then expecting.

2) Andrae gave birth to her third child in September 1982 but in breach of its obligation the Administration failed to cause the above surgery to be performed.

3) In consequence of the breach of contract Andrae again fell pregnant during January 1983. This led to Nicole's birth some 9 months later.

4) Andrae's pregnancy and Nicole's birth;

Andrae's discomfort etc in consequence thereof, and the fact that the respondent and Andrae became obliged to support Nicole all flowed as direct and natural consequences of the breach of contract, and were within the contemplation of the parties at the time of the conclusion of the agreement, as likely consequences of such breach.

5) To the knowledge of the Administration Andrae concluded the contract because the respondent and Andrae could not afford to support any more children.

6) The respondent and Andrae would not have agreed to Nicole being given out for adoption.

The two issues submitted to the court for adjudication were whether the Administration was in law obliged, because of its breach of contract, to pay i) a sum representing the cost to the respondent and Andrae of maintaining and supporting Nicole, and ii) general damages for the non-patrimonial loss suffered by

Andrae. It was agreed that, should the court find for the respondent on the first issue, an amount of R22 500 was to be awarded, and that an affirmative finding on the second issue would carry an award of R2 500.

In the court a quo Thirion J concluded that the claim for maintenance and support of Nicole was well-founded, but held that in our law a breach of contract does not give rise to a claim for non-patrimonial ("intangible") damages. In consequence he gave judgment for R22 500 on the first issue but disallowed the claim for the agreed amount of R2 500. (The decision has been reported: 1989 (2) SA 386 (D).) With the necessary leave the appellant now appeals against the award of R22 500, whilst the respondent cross-appeals against the disallowance of the claim for R2 500.

The Appeal

Introductory

The question whether child-raising

expenditure may be claimed when unwanted conception ensues because of breach of contract or the commission of a delict, has not arisen in any previous South African case. The question is, however, by no means novel. For it has led to conflicting decisions in the municipal law of various foreign jurisdictions. The respondent's claim under consideration is unique only in the sense that it is based upon a complete failure to perform a sterilization operation. In the wealth of foreign case law of which I am aware, the plaintiff's action was invariably based upon a failed sterilization procedure (including a vasectomy), 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, that in principle the precise nature of the breach of contract or neglect giving rise to the birth of an unwanted child, is immaterial. Thus it can

make no difference whether the breach of contract consists of a complete failure to carry out the agreed procedure, or of an ineffective surgical intervention.

An action for recovery of the expenditure of maintaining a child conceived as a result of inter alia a breach of contract, has been designated an action for wrongful birth, or wrongful conception, or wrongful pregnancy, or unplanned or unwanted birth. None of these designations is entirely apposite. Moreover, such an action may encompass various claims. For convenience I shall, however, refer to a claim for child-raising (or child-rearing) expenditure merely as a pregnancy claim.

In those foreign cases in which a pregnancy claim was disallowed, the courts relied heavily upon considerations of public policy, and, sometimes, also on considerations of convenience or expediency. Those considerations made so strong an appeal to the courts concerned that the idea of medical malpractice giving

rise to an obligation to pay for, or contribute to, the maintenance of a healthy child, was at times rejected in rather emotive language. Thus it has been said:[1]

> "Personally, I find this approach to a matter of this kind which deals with human life, the happiness of the child, the effect upon its thinking, upon its mind when it realizes that there has been a case of this kind, that it is an unwanted mistake, and that its rearing is being paid for by someone other than its parents, is just simply grotesque."

And:[2]

> "[T]here 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.'"

In England a pregnancy action was disallowed

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1. Doiron v Orr, 86 D L R 3d 719 at 722-723 (Ontario High Court of Justice).
2. Hartke v McKelway, 526 F Supp. 97, 104 (D D C 1981).

in Udale's case.[3] But in a case decided in the next year (1984), Thake and Another v Maurice,[4] Peter Pain J took the opposite view and allowed inter alia a claim for child-rearing expenses. When Thake went on appeal this part of the judgment of Peter Pain J was not questioned in the Court of Appeal.[5] The reason was that that court had in the meantime given judgment in Emeh v Kensington and Chelsea and Westminster Area Health Authority.[6] In this case a failed sterilization operation had led to the birth of a child which was congenitally abnormal. It was held that there was no rule of public policy which prevented the plaintiff from recovering her expenditure incurred and to be incurred in maintaining the child, regardless of

3. Udale v Bloomsbury Area Health Authority, (1983) 2 All ER 522.
4. (1985) 2 WLR 215; (1984) 2 All ER 513.
5. Thake and Another v Maurice, (1986) 1 All ER 497 (CA).
6. (1984) 3 All ER 1044 (CA).

whether the child was healthy or abnormal.[7]

The decision in Emeh has not met with universal acclaim in England. In a later unreported case Ognall J observed that, speaking personally, he was surprised

> "that the law acknowledges an entitlement in a mother to claim damages for the blessing of a healthy child."

He also said that:

> "those who are afflicted with a handicapped child or who long desperately to have a child at all and are denied that good fortune would regard an award for this sort of contingency with a measure of astonishment."[8]

The first case in the United States which held that a pregnancy claim was well-founded, was Custodio v Bauer.[9] The decision of the California

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7. Per Slade LJ at 1053-4, and per Purchas LJ at 1056.
8. Jones v Berkshire Health Authority, cited by Symmons, Policy Factors in Actions for Wrongful Birth, 50 Modern Law Review 269, 277.
9. 27 ALR 3d 884 (1967).

Court of Appeal in that case opened the flood gates and since 1967 numerous pregnancy claims have come before the courts. Useful summaries of the relevant case law are to be found in judgments delivered in the last decade.[10] It appears that according to the majority view (in some 20 jurisdictions) considerations of policy and convenience preclude the recognition of a pregnancy claim;[11] that in a few jurisdictions full recovery of child-raising costs are allowed,[12] and that courts in five states have adopted an in-between approach, viz, that the

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10. See, e g, Smith v Gore, 728 SW 2d 738; Weintraub v Brown 470 NYS 2d 634 (1983); Kingsbury v Smith, 442 A 2d 1003 (1982), and Byrd v Wesley Medical Centre, 699 P 2d 459 (1985).

11. See, e g, Wilbur v Kerr, 628 SW 2d 568 (1982); Coleman v Garrison, 327 A 2d 757 (1974): White v United States, 510 F Supp 146 (1981); and O'Toole v Greenberg, 477 NE 2d 445 (1985).

12. See Custodio, supra, and Smith, supra, at pp 742-3.