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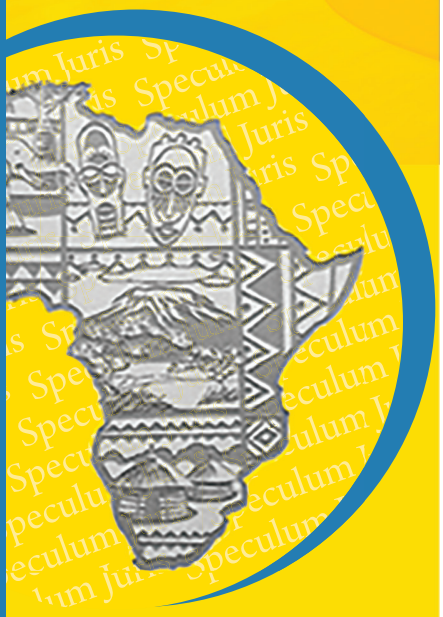

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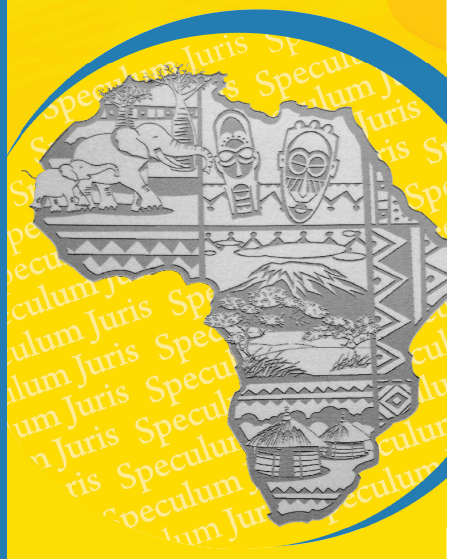

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A Civil Claim against a General Practitioner by a Child Born with Disabilities as a Result of Preconception Negligence

Magda Slabbert*
Professor, Medical Law, Department of Jurisprudence, School of Law, University of South Africa

Melodie Labuschaigne**
Professor, Medical law, Department of Jurisprudence, School of Law, University of South Africa

Abstract

The recent Toombes v Mitchell cases in the United Kingdom ([2020] EWHC 3506 (QB); [2021] EWHC 3234 (QB)) have again drawn attention to the possibility of a child born with disabilities claiming damages from a general practitioner on the basis that the practitioner allegedly negligently failed to provide necessary preconception advice to the mother prior to conception. These cases have expanded the legal scope for claimants born with disabilities following pre-conception negligent advice to claim damages in their own right for their so-called "wrongful conception and birth." This case note examines these cases and briefly considers the potential impact of this development on South African law, particularly in view of the 2014 Constitutional Court judgment in H v Fetal Assessment Centre ([2014] ZACC 34). The case note concludes that a similar scenario arising in South Africa seems likely and hence issues a caution to doctors in South Africa treating pregnant women or women expressing the wish to conceive a child.

*BA (UFS); BA Hons (Stell); HED (UFS); BProc LLB (Unisa); LLD (UFS).

** BA (UP); BA Hon MA (UP); DLitt (UP); LLB LLD (Unisa).

Keywords: reproductive wrongs; wrongful life; medical negligence; preconception advice; children born with disabilities; South African law.

1 INTRODUCTION

Not every pregnancy is a dream come true. Certain events that take place before, during or after a pregnancy may turn a pregnancy into a nightmare for the parents. Some of these nightmares may be labelled "reproductive wrongs,"[1] broadly divided in South African law into three categories, namely wrongful conception, wrongful birth and wrongful life. These categories are mainly characterised by the following: (a) an allegation of wrongful conduct by a specific doctor; (b) the consequence being that a child is born; (c) if proper advice were given, the child would not have been born; and finally (d) because of the child's birth, either the parents or the child have suffered loss or harm.[2]

Wrongful conception claims relate mostly to failed sterilisation operations.[3] These claims are brought to court by the parents of a healthy child that was born after a failed sterilisation, in which case damages are claimed to support the "unwanted" child, whose conception and birth should not have taken place. Wrongful birth claims, on the other hand, are lodged by the parents of a child born with a disability[4] of whom the parents claim that they would have aborted the embryo or fetus, had they known about the disability. These parents may claim costs for the support and care of the disabled child.

Wrongful life cases differ from the above in that the child living with the disability may institute the claim.[5] In wrongful life cases, such children argue, in essence, "that they would have been better off not being born at all and that the very fact of their birth is an injury for which they should be compensated."[6]

The question arising here is what would transpire should a child born with disabilities, whose claim falls outside the three categories above, yet still alleges negligence on the part of the mother's general practitioner (GP) prior to conception. This scenario was the focus of the English case of *Toombes v Mitchell*[7] (hereafter the 2020 *Toombes* case), in which it was shown that there is legal scope for claimants who are born disabled because of "pre-conception negligent advice" to claim damages in their own right for their own "wrongful conception and birth."[8]

This case note will focus briefly on the 2020 *Toombes* case, followed by a discussion of the case *Toombes v Mitchell*[9] (hereafter the 2021 *Toombes* case) that followed the initial 2020 judgment in *Toombes*. A brief comparison of the different legal approaches to reproductive wrongs in South Africa and in England will be made as well as an evaluation of the reaction of doctors to the case and how this type of negligence may be avoided in future. In conclusion, this case note

1 *ACB v Thomson Medical Pty Ltd* [2017] SGCA 20 para 28.

2 Todd "Wrongful Conception, Wrongful Birth and Wrongful Life" 2005 *Sydney Law Review* 525–542.

3 *Behrmann v Klugman* 1988 (W); *Edouard v Administrator of Natal* 1989 2 SA 368 (D); *Administrator of Natal v Edouard* 1990 3 SA 581 (A); *Mukheiber v Raath* 1999 3 SA 1065 (SCA).

4 *Friedman v Glicksman* 1996 1 SA 1134 (W); *Sonny v Premier, Kwazulu-Natal* 2010 1 SA 427 (KZN); *Premier, Kwazulu-Natal v Sonny* 2011 3 SA 424 (SCA); *Stewart v Botha* 2008 6 SA 310 (SCA); *Stewart v Botha* 2007 6 SA 247 (C).

5 *H v Fetal Assessment Centre* 2015 2 SA 193 (CC).

6 *ACB v Thomson Medical Pty Ltd and others* [2017] SGCA 20 para 29.

7 [2020] EWHC 3506 (QB).

8 Wallace "Toombes v Mitchell: Wrongful Life v Wrongful Birth" https://www.dacbeachcroft.com/en/What-we-think/Toombes-v-Mitchell-wrongful-life-v-wrongful-birth#:~:text=Toombes%20v%20Mitchell:%20wrongful%20life%20v%20wrongful%20birth (accessed 03-10-2024).

9 [2021] EWHC 3234 (QB).

will consider the relevance of the English case for the South African context.

2 A BRIEF BACKGROUND TO THE CASES

Evie Toombes instituted a civil (tortious) action against the GP who advised her mother prior to her conception. She instituted the action on becoming an adult and thus had *locus standi* to sue in her own name for the loss or harm she suffered due to an omission by the GP who had advised her mother when she consulted him for advice on family planning. At the time it was standard practice in the United Kingdom (UK) for GPs to advise prospective mothers of the potential benefits of taking sufficient folic acid before conception and during the first trimester of the pregnancy. Shortly after her mother's consultation with the GP, the claimant was conceived. The claimant was born in 2001 and was diagnosed with lipomyelomeningocele, a condition that manifests as a neural tube defect, leading to stunted development of the bones along the spinal cord, causing permanent disability. She also suffers from bowel and bladder incontinence and requires urinary catheterisation twenty-four hours a day. She would eventually end up in a wheelchair.[10]

The National Health Service (NHS) in the UK recommends that a woman, who is planning to start a family, should take 400 micrograms of folic acid every day from even before the pregnancy until the twelfth week after conception.[11] Folic acid aids the production of red blood cells, and it helps to prevent birth defects, such as neural tube defects, including spina bifida. Interestingly, neither the claimant nor the defendant called an expert witness to testify on the scientific issues surrounding the use of folic acid either before conception or thereafter.[12]

3 *TOOMBES v MITCHELL* [2020] EWHC 3506 (QB): ESTABLISHING A CAUSE OF ACTION

In this case the claimant alleged that the cause of her physical disability was her mother's failure to take folic acid before her conception, which, in turn, was caused by the defendant's (the GP's) negligent advice.[13] She alleged, *but for* the negligence of the doctor, "she would never have been conceived and that her damages and disability are due to this [the GP's negligence]" (the authors' addition).[14] The judge in this preliminary case thus had to determine whether this allegation constituted a lawful cause of action.

The defendant argued that this was a "wrongful life" claim which is expressly excluded by the provisions of the Congenital Disabilities (Civil Liability) Act 1976 (hereafter the English 1976 Act), which makes provision for civil liability in the case of children born disabled as a consequence of another person's fault. The defendant further alleged that based on the judgment of the Court of Appeal in *McKay v Essex Area Health Authority*,[15] the claim will also not be recognised under common law. In other words, the defendant submitted that both in terms of the English 1976 Act and under common law, the agreed facts did not disclose a lawful cause

10 Dyer "Show Jumper Wins Case Against Mother's GP for 'Wrongful Conception' That Resulted in Her Disability" 2021 *BMJ* 375:n 2999; Papanikitas *et al* "Wrongful Conception" Ruling Against UK General Practitioner" 2022 *BMJ* 376–379.

11 NHS "Vitamins, Supplements and Nutrition in Pregnancy" https://www.nhs.uk/pregnancy/keeping-well/vitamins-supplements-and-nutrition/ (accessed 03-10-2024).

12 2021 *Toombes* case para 55.

13 2020 *Toombes* case para 1.

14 *Ibid*.

15 [1982] 2 All ER 771.

of action.

However, the claimant rejected the labelling of the claim as a "wrongful life" claim and submitted that the claim fell within the scope of subsection 1(2)(a) of the English 1976 Act which permits recovery by children born disabled because of negligence affecting a parent's ability to have a healthy child. The focus of the preliminary trial was thus the proper interpretation of section 1 of the English 1976 Act.

The English 1976 Act states in its preamble it is "an Act to make provision as to civil liability in the case of children born disabled in consequence of some person's fault." Section 1 states as follows:

> Civil liability to child born disabled.
>
> (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.
>
> (2) An occurrence to which this section applies is one which –
>
> (a) affected either parent of the child in his or her ability to have a normal, healthy child.

The English 1976 Act gave effect to the recommendations of the Law Commission's *Report on Injuries to Unborn Children*[16] (hereafter "the Report").

In the 2020 *Toombes* case, the judge discussed the Report in detail in her judgment, and indicated that the commissioners conluded that a child born disabled "due to tortious injury inflicted upon its parent before conception should have a remedy."[17] The law commissioners also noted that in wrongful life cases "the negligence did not cause the disability; it caused the birth […]."[18] The commissioners went on to point out that there was a difference between claims based upon pre-conception occurrences and those involving occurrences during pregnancy. Occurrences during pregnancy provide the mother with the option of abortion, which is not the case with pre-conception occurrences.[19]

To have a cause of action under section 1 of the English 1976 Act, three components need to be proved, namely: a wrongful act or omission; an occurrence and a child born disabled. The wrongful act was the non-disclosure of the risk if there is a folic acid deficiency in the mother's body.[20] The occurrence, the judge held, was having sexual intercourse whilst in a folic acid deficient state. It was not disputed that the claimant was born disabled.[21] All three required components were thus present in this case.

Since all elements in section 1 of the English 1976 Act were established, the judge concluded that "[…] the claimant in this case has a lawful claim for damages for personal injury arising from her disability."[22] Now that a lawful cause of action was found to exist, the merits of the

16 [1974] EWLC 60 1 January 1974 https://www.bailii.org/ew/other/EWLC/1974/60.pdf (accessed 10-03-2024).

17 2020 *Toombes* case para 21.

18 The Report para 86 of.

19 *Ibid* paras 84 to 86; 2020 *Toombes* case para 52.

20 2020 *Toombes* case para 56; s 1 of the 1976 Act.

21 2020 *Toombes* case para 56.

22 *Ibid* paras 59–60.

case should be considered next.

4 *TOOMBES V MITCHELL* [2021] EWHC 3234 (QB): A BASIS FOR THE CLAIM

After the judge in the initial case established that there was a cause for action, the case escalated to another court to determine the basis of, or merits for the claim. The basic questions to be decided were the following: What advice did Dr Mitchell (the GP) provide to Mrs Toombes during the consultation preceding the conception? Was Mrs Toombes pregnant, or may she already have been pregnant by the time of the consultation? What would Mrs Toombes have done if she had been provided with the correct information—would she have delayed conception? There were only three witnesses who provided oral evidence in this case: Mrs Toombes, Mr Toombes and Dr Mitchell. No expert was asked to testify.

Mrs Toombes testified that she went to the doctor for preconception advice as she had been on contraceptives ("the Pill") for several years. Although she believed it was better to leave a time gap between not taking the Pill and falling pregnant, the GP assured her that such an interval was not necessary. She specifically enquired about taking folic acid but was left with the impression that the doctor felt it was not something that you had to take if you were maintaining a healthy, balanced diet. On this advice, she and her husband had intercourse with the aim of conceiving. Had the advice she received been different, she would have refrained from sexual intercourse. She only started taking folic acid supplements after receiving advice from the midwife. She also stated that no abnormalities were detected during the pregnancy, as the particular form of spina bifida which the claimant subsequently suffered from, was "occult", meaning it was closed or hidden, known as spina bifida occulta.[23]

Mr Toombes testified that they had decided not to have sex until his wife consulted with a doctor about their plans to conceive a child. Their approach to starting a family was carefully considered, seeing that she sought preconception counselling. The judge found Mrs Toombes and Mr Toombes to be honest witnesses.

The defendant's case was twofold; firstly, he alleged Mrs Toombes might have already been pregnant during the consultation and secondly, he stated categorically that the advice he had provided was in accordance with recommended guidance at the time. He had a vague recollection of the consultation and added that it was not common for him to be asked for preconception advice. He had made a note in Mrs Toombes's file stating "Preconception counselling. Adv. Folate if desired discussed."[24] This note creates the impression that Mrs Toombes had been told that she should take folic acid if she had wished to do so.[25] He said that, at the time, his usual advice to patients was to tell them that the relevant guidance recommends folic acid supplementation of 400 µg daily for women preparing for pregnancy and also during the first trimester of pregnancy. He also stated that he did not advise his patients to delay attempting to conceive, but rather to start taking folic acid and to continue taking it until after the first 12 weeks of pregnancy.[26] He conceded that, without being told the recommended dose, as well as the reason for taking folic acid and the timing of taking it, the patient would not have been able to make an informed decision.[27]

The judge found that because Dr Mitchell's notes were inadequate, he therefore speculated or made assumptions: "I find therefore that his evidence was not reliable as it would have been if

23 Spina bifida occulta https://my.clevelandclinic.org/health/diseases/22825-spina-bifida-occulta (accessed 07-10-2024).

24 2021 *Toombes* case paras 31–32.

25 *Ibid* 2021 *Toombes* case para 61.

26 *Ibid* paras 29–43.

27 *Ibid* para 40.

the note had been as complete as it should have."[28]

The judge found that Dr Mitchell should have given Mrs Toombes advice about folic acid in accordance with the guidance provided in the British National Formulary and the Practical General Practice publication that states that "[w]omen who are planning a pregnancy should be advised to take folic acid as a medicinal or food supplement at a dose of 400 μg daily before conception and during the first 12 weeks of pregnancy."[29]

The judge accepted that the parents had not engaged in sexual intercourse until after the consultation.[30] The judge also found that Mrs Toombes had not been pregnant when she consulted the doctor, and she was not advised about the relationship between folic acid supplementation and the prevention of spina bifida/neural tube defects. Had she been provided with the correct recommended advice, "she would have delayed attempts to conceive. In the circumstances, there would have been a later conception which would have resulted in a normal healthy child."[31]

5 THE LEGAL POSITION IN SOUTH AFRICA CONCERNING WRONGFUL LIFE OR SIMILAR CLAIMS

South Africa does not have legislation resembling the English 1976 Act. If a claim needs to be instituted locally concerning a so-called "reproductive wrong" in the context of medical negligence, the claim may relate to one of three types of claims recognised by courts mentioned in the introduction, namely wrongful conception, wrongful birth or wrongful life. Two cases, namely *Friedman v Glicksman*[32] and *Stewart v Botha*,[33] reflected the legal position regarding wrongful life claims in South Africa, which *inter alia* held that a claim for wrongful life was not possible, because it would be regarded as contrary to public policy, and the views of the community; would establish a precedent for disabled children to sue their parents; and finally, because recognising such a claim would need to consider the difference in value between the non-existence of the child *vis-à-vis* the existence of the child with disabilities. These cases emphasised that wrongful life should not be recognised because human existence, although affected by birth defects or disabilities, should never be regarded as an injury cognisable at law.

However, in the case of *H v Fetal Assessment Centre*,[34] the South African Constitutional Court made the following *obiter* remark: "For most people the birth of a child and life itself are causes for celebration. But that does not mean that the reality of being born into a life with disability should be ignored by the law."[35] Importantly, the Constitutional Court observed—with regard to the development of the common law in this regard—that a child's "wrongful life" claim *may be found to exist*, provided that such a claim is properly formulated in the law of delict, and that this is done within the constitutional imperative that accords with constitutional rights and values, including a consideration of the child's best interests.[36] For a delictual claim to succeed in terms of South African law, the elements of a delict must be proven on a balance of

28 *Ibid* para 52.

29 *Ibid* para 58.

30 *Ibid* para 70.

31 *Ibid* para 80.

32 1996 1 SA 1134 (W).

33 2008 6 SA 310 (SCA).

34 [2014] ZACC 34, para 19.

35 *Ibid*.

36 Boezaart "'Wrongful Life' – The Constitutional Court Paved the Way For Law Reform" 2015 *Stell LR* 399–423; Chürr "Wrongful Life Claims Under South African Law: An Overview of the Legal Framework" 2015 *Obiter* 745–761; Rabie "Die Eis om Onregmatige Lewe: Bestaanbaar in die Deliktereg of Word die Gemenereg Buite sy Perke Gestrek" 2016 *LitNet Akademies* 502–553; Britz and Slabbert "Wrongful Suffering: A Life That Should Never Have Been" 2015 *THRHR* 577–588.

probabilities, namely, conduct, fault, wrongfulness, causation and harm. Although a discussion of the above-mentioned South African cases falls outside the scope of this case note, it would be helpful to unpack the delictual elements in a simulated scenario in South Africa, based on the facts of the *Toombes* case.

Considering the delictual element of conduct, a medical practitioner in a South African case simulating the *Toombes* scenario will be seen to have *failed to provide*—an omission—the necessary medical advice regarding the need to take folic acid whilst trying to conceive, in other words, prior to falling pregnant, as well as explaining the consequences of, including the risks for a child born with spina bifida, especially for folic acid-deprived women as per the required standard advice. The medical practitioner in the 2020 *Toombes* case acknowledged, based on the testimony provided, that his conduct was negligent and wrong, which satisfies the fault element in proving the elements of a delict. As far as the required element of wrongfulness is concerned, based on the facts in the *Toombes* case, it should be demonstrated that the medical practitioner's omissions unreasonably infringed a legally protected interest, which in accordance with established case law, South African courts asses by relying on the *boni mores* (legal concept of good morals) test, which considers whether imposing liability aligns with public policy and reasonableness. Slabbert and Britz[37] correctly point out that the term "wrongfulness" in the context of wrongful life cases in South Africa is inappropriate, as "it implies that it is the life of the child that is wrongful as opposed to the suffering the child has to endure" and "that implying that it is the life of the child that is wrongful is an oversimplification of a complex matter", because "the emphasis should shift to a life of suffering."

Not only would the practitioner's conduct be determined as wrongful because of his failure to act professionally as is expected of a medical practitioner (*eg* he has a legal duty not to act negligently), but if it wasn't for his failure to provide the necessary advice (and indirectly by providing inaccurate information by stating that her healthy diet did not necessitate taking folic acid at the time), Ms Toombes was unable to follow the correct and prescribed medical advice by taking folic acid as is standard practice for women planning conception or whilst being pregnant. This fact establishes causation, because of the practitioner's fault, a handicapped child was born, in other words, the damage (spina bifida) was a foreseeable outcome of the failure to inform Ms Toombes correctly. Finally, there is no doubt that a child born with spina bifida due to her mother being provided with incorrect or negligent advice, or an omission to do so, suffers harm and hence this element is present in our simulated scenario.

Although a case like *Toombes* has not yet been adjudicated by a South African court and no civil liability legislation resembling the English 1976 Act exists in South Africa, a similar scenario *may* arise in this country. In view of section 39 of the Constitution of the Republic of South Africa, 1996, directing courts to consider foreign law, the *Toombes* cases may become relevant especially because section 28 of the Constitution emphasises that the best interests of the child is paramount. Should a *Toombes*-like scenario arise in South Africa, it will be dealt with under the law of delict as discussed above. At this point in South Africa, we do not see a need to promulgate legislation such as the English 1976 Act, as the law of delict will be able to adequately address such a claim, as is argued above.

6 A CAUTION TO DOCTORS

The adjudication of the two English cases above was followed by an outcry from many doctors in Britain who expressed major concerns regarding the implication of the judgments. They also believed that the judgments would force doctors to resort to practise defensive medicine, which

37 Britz and Slabbert 2015 *THRHR* 580.

will also have a negative bearing on future doctor-patient relationships.[38] The defendant's legal team pointed out that the case was "a reminder to medical practitioners of the need to take clear and detailed notes of their consultations."[39]

Without a proper patient record, a doctor faced with litigation will have difficulties supporting his or her treatment in the circumstances.[40] Comprehensive and accurate records provide hard evidence of the treatment or advice given to the patient.[41] For example, in accordance with the ethical guidelines of the Health Professions Council of South Africa provided in Booklet 9, titled *Guidelines for good practice in health care professions*, Saner emphasises that: "[G]ood treatment record-keeping is essential, to back up any allegation that the defendant acted (or did not act) in a manner which accords with the standard of a reasonable healthcare practitioner in the circumstances."[42]

Following the *Toombes*-cases, Papanikitas and others cautioned in an article in the *British Medical Journal* that "all health professionals providing clinical advice to women of childbearing age should consider the implications [of the *Toombes* cases]" (our addition).[43] They added that health practitioners should regularly review their practice on preconception advice and always make sure they are aware of current guidance provided by the NHS. It could be easily implemented in their practices by using a consultation template.[44]

The *Toombes* cases have changed the legal landscape in the United Kingdom that a claim for disabilities arising from possible negligence before birth is now a real possibility. The doctor's notes, despite written almost twenty years ago, does refer to a discussion regarding folic acid. It should be noted that it was not recognised as practice at the time of Mrs Toombes consultation that routine GP consultations should record questions from patients, including whether there was sufficient understanding of explanations provided by the GP to the patient. The judge clearly expected the GP's notes to have been more detailed, despite contrary views held by practitioners as to the standard practice.[45] The medical profession needs to consider what this means for clinical practice in the United Kingdom, but equally in South Africa, especially regarding the complex trust relationship that exists between a doctor and a patient and the now common trend of the practice of defensive medicine generally.

It comes as no surprise that calls are being made both in the United Kingdom and South Africa, for the consideration of a no-fault medical regulatory system similar to the model in New Zealand, where patients have the assurance of knowing that the costs of their injury will be

38 Rose "Doctors Up in Arms Over 'Pre-conception Negligence' Ruling" 2021 https://www.legalfutures.co.uk/latest-news/doctors-up-in-arms-over-pre-conception-negligenceruling/print/ (accessed 26-09-2024).

39 *Ibid*.

40 *Meyers v MEC, Department of Health, Eastern Cape* [2020] ZASCA 3; *McGregor v MEC Health, Western Cape* [2020] ZASCA 89 and *Beukes v Smith* (211/2018) (2019) ZASCA 48.

41 Saner *Medical Malpractice in South Africa* LexisNexis 2020 ch 6; Van den Heever and Lawrenson *Expert Evidence in Clinical Medicine* Juta 2015 ch 1.

42 Saner *Medical Malpractice* 2020 ch 6:3.

43 Papanikitas *et al*. 2022 *BMJ* 376–379.

44 *Ibid*.

45 Welch and Cranfield "What Implications Does the *Toombes vs Mitchell* Case Have For Other Healthcare Professionals?" 2022 *BMJ* 376 https://doi.org/10.1136/bmj.o162.

considered, despite the fact that they are unable to sue for damages.[46]

7 CONCLUSION

As indicated earlier in this article, although South Africa does not have civil liability legislation in the form of the English 1976 Act, this does not mean that an action similar to that of the claimant in the *Toombes* cases could not be entertained in future. Such a claim may be recognised in South Africa if the elements of delict are satisfied and a High Court is convinced that the common law should be developed to recognise a well-argued and justified claim, supported by the child's best interests and with reference to the relevant constitutional rights and values. Until then, obstetricians and medical practitioners treating pregnant women in South Africa should consider the potential impact of the *Toombes* cases in the medico-legal context.

46 Welch and Cranfield 2022 *BMJ* 376; Wallis "No-fault, No Difference: No-fault Compensation For Medical Injury and Healthcare Ethics and Practice" 2017 *British Journal of General Practice* 38–39 https://doi.org/10.3399/bjgp17X688777; Bismark and Paterson "No-fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety" 2006 *Health Affairs* 278–283.