



CONSTITUTIONAL COURT OF SOUTH AFRICA

H v Fetal Assessment Centre

CCT 74/14

Date of hearing: 28 August 2014
Date of judgment: 11 December 2014

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for leave to appeal against the decision of the Western Cape Division of the High Court, Cape Town (High Court). The High Court upheld an exception to a child's claim for damages against the Fetal Assessment Centre (Centre) for allegedly misdiagnosing the child's high risk of Down syndrome, as being bad in law. Our law recognises a claim by the mother for pre-natal misdiagnoses, but not by the child.

In the High Court, H brought a claim for damages on behalf of her minor child due to the Centre's alleged negligent conduct. H claimed that she approached the Centre for a nuchal translucency scan of her foetus in order to assess the possible risk of certain congenital conditions. She contended that the Centre failed to interpret the scan correctly and negligently failed to warn her of the high risk of her child being born with Down syndrome. She maintained that, had she been made aware of the high risk, she would have terminated the pregnancy. The child was born with Down syndrome and H claimed special and general damages on his behalf.

The Centre raised a number of exceptions to the claim, primarily that this type of claim by the child, as opposed to the parent, is not recognised in South African law. The High Court upheld this exception and dismissed the claim.

The Constitutional Court granted H leave to appeal and issued an anonymisation order to protect her identity as well as that of her family and child. In a unanimous judgment by Froneman J, the Constitutional Court found that the parties' papers do not address the constitutional injunction that a child's best interests are of paramount importance in any

matter concerning the child, which is essential to determining whether a child's claim may exist. In addition, the finding that a child's claim may be recognised involves complex factual and legal considerations which this Court is not best placed to evaluate. Accordingly, the Court held that it was not appropriate to make a final determination on the question of the child's claim.

After considering the law in other jurisdictions, as well as the implications for the South African law of delict, the Court emphasised that a child's claim in this context may in principle potentially exist. However, whether it does and in what form, must be decided by the High Court. The High Court should still determine whether all the elements of a delict, namely harm, wrongfulness, negligence, causation and damages have been established, or whether a claim in another form may have to be developed to remedy any wrong that may have been committed. This decision must accord with constitutional rights and values, and including the best interests of the child.

The Court therefore upheld the appeal and replaced the order of the High Court with an order granting H leave to amend her particulars of claim within 14 days.