

FRIEDMAN v GLICKSMAN 1996 (1) SA 1134 (W)

SUMMARY

- An agreement between a pregnant woman and a doctor that he would advise her whether there was a greater risk than normal that she might have a potentially abnormal or disabled child so that she might make an informed decision on whether or not to terminate the pregnancy is not *contra bonos mores* but sensible, moral and in accordance with modern medical practice.
- She is, by making such an agreement, seeking to enforce a right which she has in terms of s 3(c) of the Abortion and Sterilisation Act 2 of 1975 to terminate her pregnancy if there is a serious risk that her child might be B seriously disabled.
- If a doctor fails to inform a pregnant patient that she is at greater risk than normal of having an abnormal or disabled child, or incorrectly informs her that she is not at greater risk, when she reasonably requires such information in order to make an informed choice whether to terminate such pregnancy, he is delictually liable to her for the damages she has suffered by giving birth to an abnormal or disabled child.
- The fault element of the delict is to be found in the foreseeability of harm which the doctor-patient relationship gives to the doctor.
- A mother cannot claim, as mother and natural guardian of her abnormal or disabled child, general damages and loss of future earnings from the doctor who agreed to advise the mother, when pregnant, whether she was at greater risk than normal of having an abnormal or disabled child, so that she could make an informed decision whether or not to terminate her pregnancy, and who incorrectly informed her that she was at no greater risk than normal.
- There can be no claim in contract because (i) the child's legal personality only commences at birth and a principal cannot claim on behalf of a non-existent principal and (ii) the agreement cannot be a contract for the benefit of a third party since the third party could only accept the alleged benefit, ie the termination of pregnancy, when it was no longer possible.

- There can be no claim in delict because (i) the doctor owed no duty to the child to give the child's mother an opportunity to terminate the pregnancy, and (ii) it was impossible to calculate damages, being the difference between an impaired life and no life.
- In her particulars of claim, the plaintiff (respondent) alleged that, when pregnant, she had consulted the defendant, a specialist gynaecologist, to advise her on the risk of her being pregnant with a potentially abnormal and/or disabled infant; that he had advised that there was no greater risk than the normal and that it was safe to proceed to full term to give birth; that the advice was erroneous and her child was born disabled.
- She alleged that he had acted negligently in giving this advice and that his negligence was a breach of his duty of care and of an alleged contract that the defendant would provide the advice sought in order that the plaintiff might make an informed decision on her own behalf and on the unborn child's behalf whether to terminate the pregnancy or not.
- She claimed (a) in her personal capacity, for the expenses of maintaining and rearing the child and for all future medical and hospital treatment and other special expenses; (b) in her capacity as mother and natural guardian on behalf of the child, general damages and future loss of earnings.
- The defendant excepted to the particulars of claim as disclosing no cause of action cognisable in South African law.
- The defendant argued that it would be against public policy to enforce the contract because it would encourage abortion and thus be inimical to the right to life enshrined in s 9 of the Constitution of the Republic of South Africa Act 200 of 1993 and also to the generally recognised sanctity accorded by society to life and the process by which it is brought about.
- *Held*, that the contract was not contrary to public policy but was sensible, moral and in accordance with modern medical practice.
- *Held*, further, dismissing the exception to claim (a), that the facts set out in the particulars of that claim were sufficient to satisfy the requirements of the Aquilian action and that they accordingly disclosed a cause of action.
- *Held*, further, upholding the exception to claim (b), that South African law could not recognise that the facts alleged by the plaintiff on behalf of the child were sufficient to sustain a cause of action either in contract or in delict.