

არამართლზომიერი ქმედების შედეგად სიცოცხლისა და დაბადების საქმეები - შედარებითსამართლებრივი ანალიზი

მარიამ გაიპარაშვილი

ივ. ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტის იურიდიული ფაკულტეტის დოქტორანტი, გენტის უნივერსიტეტის სამართლის და კრიმინოლოგიის ფაკულტეტის მაგისტრი საერთაშორისო და ევროკავშირის სამართალში, თბილისის სახელმწიფო უნივერსიტეტის მინვეული ლექტორი, სსიპ პარლამენტის კვლევითი ცენტრის მკვლევარ-ანალიტიკოსი ადამიანის უფლებებისა და სამართლის მიმართულებით

ელ.ფოსტა: mariam.gaiparashvili@gmail.com

აბსტრაქტი

სტატია ეხება არამართლზომიერი ქმედების/შეცდომის შედეგად სიცოცხლისა (wrongful life) და დაბადების (wrongful birth) სარჩელებზე მიღებული გადაწყვეტილებების შედარებითსამართლებრივ ანალიზს. შესწავლილია საფრანგეთის, გერმანიის, პოლანდიის, გაერთიანებული სამეფოსა და ამერიკის შეერთებული შტატების სასამართლო პრაქტიკა და კანონმდებლობა. აშშ-ში შტატების მიხედვით ორივე სარჩელის მიმართ მიდგომა და სტანდარტი განსხვავდება და არ არსებობს ერთიანი პოზიცია. შესაბამისად, სტატიაში გაანალიზებულია ყველა გადაწყვეტილება და ცხრილის სახით შეჯამებულია, თუ რა მიდგომა არსებობს სარჩელის სახეების მიხედვით.

შედარებითსამართლებრივი ანალიზისთვის ქვეყნების შერჩევა მოხდა რამდენიმე კრიტერიუმის გათვალისწინებით: 1. სარჩელების განხილვის ხანგრძლივი და არაერთგვაროვანი ისტორია; 2. ქვეყნები, რომელთაც ჰქონდათ პრეცედენტული, ინოვაციური და საერთაშორისო მნიშვნელობის გადაწყვეტილებები; 3. ხანგრძლივი დებატის შემდეგ, სარჩელების მიმართ პოზიცია უკვე დამკვიდრებულია უზენაესი სასამართლოს ან/და საკანონმდებლო ორგანოს მიერ.

ასევე, სტატიაში გაანალიზებულია დასახელებულ სარჩელებთან დაკავშირებით ღირსების მნიშვნელობა და ყველა ის გამონკვევა, რაც სასამართლომ უნდა გაითვალისწინოს გადაწყვეტილების მიღებისას.

საკვანძო სიტყვები: ფეტუსი, შეზღუდული შესაძლებლობა, ღირსება

Wrongful Birth and Wrongful Life Cases - Comparative Study

Mariam Gaiparashvili

PhD student at Faculty of Law at Ivane Javakhishvili Tbilisi State University, LL.M in International and European Law from Ghent University, Visiting lecturer at Tbilisi State University, Research Analyst from the Legal and Human Rights perspective at LEPL Georgian Parliamentary Research Center

Email: mariam.gaiparashvili@gmail.com

ABSTRACT

The paper encompasses two types of actions for damages against medical practitioners – wrongful life and wrongful birth claims in comparative analysis. Comparative analyses and overviews jurisprudence of France, Germany, the Netherlands, the UK and the USA on wrongful birth and life cases.

The preconditions for choosing comparable jurisdictions were the following: long and controversial history of dealing with wrongful cases; cases that are landmark and innovative with international importance; the last criterion was that the case had been challenged from early periods, however, now the practice is already established either by the Supreme Courts, or by the Legislative bodies.

The paper invited keen attention to the role of dignity in wrongful cases and highlights the challenges what is in front of the decision-making bodies while adjudicating.

KEYWORDS: Fetus, Disability, Dignity

INTRODUCTION

The paper encompasses two types of actions for damages against medical practitioners – wrongful life and wrongful birth claims¹ in comparative analysis.

The Second Chapter makes comparative analysis and overviews jurisprudence of France, Germany, the Netherlands, the

UK and the USA on wrongful birth and life cases. The central question is tested through the comparative method to advance knowledge on the wrongful cases. The preconditions for choosing comparable jurisdictions were the following: long and controversial history of dealing with wrongful cases; cases that are landmark and innovative with international impor-

1 GaiparaShvili, M., 2020. Wrongful Birth and Wrongful Life Cases from a Human Rights Perspective. Herald of Law, 1(1), pp. 11-12.

tance; the last criterion was that the case had been challenged from early periods, however, now the practice is already established either by the Supreme Courts, or by the legislative bodies. The paper mainly evaluates the landmark cases, and an appropriate weight is given to German and USA jurisdictions that directly evaluated the constitutionality of the wrongful cases. Hence the decisions on constitutionality are binding upon the civil courts, the paper further assesses how that legal reasoning influenced the civil law judgments in USA and Germany. The choice of the Netherlands was preconditioned by the highly cited and criticized case that established different practice from the majority. Thus, analysis of the judgment is outstanding and innovative. In France and the UK wrongful cases were highly debated among society, they both dealt with those cases in legislative and judicial frames.

Even though the compared jurisdictions are from different legal systems, it was relevant to compare the common law and the European system and simultaneously examine differences within the European countries in order to give the research a wide scope. The chapter shows how argumentations on wrongful cases have developed and what legal reasoning of different conclusions are. The research has shown that difference is apparent. The scope of comparative research covers the most relevant primary and secondary sources. Since the paper reviews historical developments and the cases when the wrongful claims were decided the first time or practice was established, it includes both older and newer cases. As all further discussed cases are from the highest courts and legislation are from the official legisla-

tive bodies of the different jurisdictions, they might be deemed comparable as soon as it achieves the aim of comparative analysis and shows the different reasoning of the countries.

The paper invited keen attention to the role of dignity in wrongful cases and highlights the challenges that are in front of the decision-making bodies while adjudicating. Chapter 3 delves deeply into the dilemma if a child's birth is a source of damage or a blessing. The last chapter provides the conclusion of the paper.

1. COMPARATIVE ANALYSIS

It was decisive to show how national levels within the various jurisdictions reflect and incorporate the paper's central matter. The central question is tested through the comparative method to advance knowledge on the wrongful cases. Therefore, the best way to analyse the central question was to use research methodology – comparative analysis. Henceforth the paper illustrates the outcome of the comparative survey that was conducted on the practice of France, Germany, the Netherlands, the UK and the USA.

The review of the secondary sources showed that the most national legal systems do not acknowledge the pregnant woman's right to self-determination as an independent issue in the wrongful birth actions. The monetary costs of raising the disabled child are the primary concern and additional compensation for the pain and suffering caused by the unwanted birth of a disabled child may be awarded. That is the law in Austria, Finland, Germany, Ireland, Italy and Spain, but there are exceptions

that challenge the predominant rule of non-acknowledgement of the woman's interest in self-determination: the Netherlands and Portugal.²

As scholars argue Wrongful life cases are typically not resolved in favour of the claimant throughout Europe, however, few jurisdictions indeed awarded such compensations to the child.³ Legal behind of majority's argument is that no one has a right not to be born. Greece, Italy, Austria, Poland, Portugal, France, Hungary, Spain Canada, U.S. turned down the wrongful life cause of action however abovementioned countries changed their position about this action few times and this once more highlights controversiality of the topic.⁴

In order to determine where the countries judiciary and legislative systems stand in wrongful birth and life cases, the following paragraphs will evaluate primary sources from different jurisdictions.

1.1. France

An applicant was "suffering from handicap" and even though that doctor told him that he did not have a hereditary disability man's wife gave birth to a child with the same disability, as her father.⁵ The Cour de Cassation awarded damages to the plaintiffs who seek a piece of advice regarding the absence of the risk and due to the medical malpractice risks were not assessed properly.⁶ Furthermore, in the highly publicised⁷ Perruche case, the Cour de cassation argued that when the faults committed by the doctor prevented a woman the choice to abort a foetus with disabilities, that child can demand reparation of the harm resulted by the disability.⁸

Opponents of the wrongful life actions and the Perruche case argue that allowing wrongful life claims is a slippery slope towards euthanasia and violates human rights.⁹ Once it is admitted

2 Brügge-meier, G., Ciacchi, A. and O'Callaghan, P., "eds.", 2010. *Personality Rights in European Tort Law*. Cambridge: Cambridge University Press, pp. 540-541.

3 Winiger, B., Koziol, B., Koch., B. and Zimmermann, R., "eds.", 2011. *Digest of European Tort Law*. Vol. 2: Essential Cases on Damage. De Gruyter, p. 958.

4 Giesen, I., 2012. The Use and Influence of Comparative Law in 'Wrongful Life' Cases. *Utrecht Law Review*, 8(2), pp. 35, 41.

5 Cour de cassation, Chambre civile, 26 March 1996, civ I Bull, no 155; Cass civ 1, 16 July 1991, Bull civ I, no 248.

6 Winiger, B., Koziol, B., Koch., B. and Zimmermann, R., "eds.", 2011. *Digest of European Tort Law*. Vol. 2: Essential Cases on Damage. De Gruyter, p. 911.

7 Brügge-meier, G., Ciacchi, A. and O'Callaghan, P., "eds.", 2010. *Personality Rights in European Tort Law*. Cambridge: Cambridge University Press, p. 520.

8 Cour de cassation (supreme court for judicial matters), 17 November 2000, JCP 2000, II, 10438, *Époux X v. Mutuelle d'assurance du corps sanitaire français* Subsequent developments.

9 The bishop of Tours, André Vingt-Trois, the president of the French Catholic church family committee, said that the ruling was an insult to all families who bring up children with disabilities. He said: "I think with great sadness of all families who have welcomed Down's children, who have showered them with love and received great love in return. This ruling amounts to a declaration that such love was worthless." [Online] Available at: <<https://www.independent.co.uk/news/world/europe/downs-syndrome-children-have-right-never-to-have-been-born-court-rules-5363055.html>> <<https://www.famguardian.org/subjects/Life/News/RightNotToBeBorn.htm>> [Accessed 1 november 2020].

that non-existence can, in some circumstances, be preferable to existence, the practice of involuntary and non-voluntary euthanasia of “undesirable” individuals will be encouraged.¹⁰ However, following the notorious Perruche case, Parliament passed a law restricting the wrongful birth and wrongful life actions where the liability of a health-care professional has established vis-à-vis the parents of a child with a disability. In particular, if doctors did not detect the disability during the pregnancy by reason of gross negligence, the parents may claim compensation in respect of their damage only.¹¹

After the legislative amendments, the case-law was consistent and settled on restricting wrongful life and birth cases. Nevertheless, the issue was so controversial and sensitive from the human rights standpoint that two cases were brought before the ECtHR (*Draon v. France* and *Maurice v. France*). They

were the first applicants who directly challenged restrictions on wrongful life and birth cases before the Court and whose applications were admissible (the third chapter discusses the decisions and the legal reasoning of the ECtHR).

1.2. Germany

Germany was one of the first countries in Europe that assessed wrongful cases in light of human rights and reviewed the constitutionality of those actions. In Germany decisions about prenatal life were not consistent for a long time. On the one hand the Federal High Court¹² and the first senate of the Federal Constitutional Court¹³ had allowed claims on wrongful conception. On the other hand, the second Senate of the Federal Constitutional Court in the case on abortion found that to regard the existence of a child as a ground for dam-

10 Lewis, P., 2005. The Necessary Implications of Wrongful Life Claims: Lessons from France. *Eur. J. Health Law*, 12, pp. 135, 141.

11 The Act of 4 March 2002 on the rights of the ill and the quality of the health system contains a First Title called Solidarity with disabled persons, Art. 1 of this Act notably states that “nobody can claim loss for the mere fact of having been born. The person born with a disability due to medical fault can obtain reparation of his/her harm when the culpable act directly caused the disability or aggrieved it, or prevented the taking of measures suitable to attenuate it. Once a professional or an institution in the medical sector is held liable vis-à-vis the parents of a child born with a disability which was not assessed during pregnancy because of a manifest fault, the parents can claim compensation on the basis of the loss suffered by them only. This loss will not include the particular expenses caused by the disability during the child’s entire life. The compensation of these expenses is a matter of national solidarity”.

12 BGH, 18.03.1980 – VI ZR 105/78: If the failure of a sterilization procedure leads to the birth of a healthy legitimate child, which is undesirable because of family planning, then the maintenance burden borne by the mother may result in a claim for damages against the person responsible for the faulty operation.

13 Bundesverfassungsgericht, BVerfGE 96, 375: The First Senate of the BVerfG has rejected the constitutional complaints of two doctors against their civil-law convictions for damages or compensation for pain due to failed sterilization and incorrect genetic counselling before procreation of a child. The jurisprudence of the civil courts on medical liability in case of failed sterilization and incorrect genetic counselling before procreation of a child does not violate human dignity.

ages was a violation of human dignity as laid down in Article 1 of the German Constitution.¹⁴

In 1983 German Supreme Court made a landmark decision according to which wrongful life cases are denied because there is no duty to prevent the birth of children with disabilities.¹⁵ The Court furthermore evaluated in this judgment, that the experience under the national socialist regime of lawlessness, does not permit the courts any legally relevant judgment about the value of the lives of others.¹⁶ Comparing the existence of the child and his or her non-existence and argument that life is a negative economic factor contradicts the main constitutional principle – protection of human dignity.¹⁷ According to scholars legal behind of the reasoning is that such a comparison means to quan-

tify the human life, make it relative¹⁸ and is inadmissible as “it would infringe the inviolability of the person”.¹⁹ However, the above-mentioned arguments are highly criticised because the professional negligence of the defendant was the cause of the damage suffered to the child. Moreover, even though the doctor did not damage the foetus, due to his/her negligence the mother lost the opportunity to have an abortion that is women’s crucial right.²⁰ Although, majority of scholars are more inclined to reject wrongful life claims based on the rationale that the right to life is a gift and compensation would be contrary to the sacred nature of the child’s life.²¹ Life is the most valuable right that law can protect²² and, therefore, giving birth cannot be considered as a tort.²³

- 14 Bundesverfassungsgericht, BVerfGE 88, 203 (Schwangerschaftsabbruch II); Busch, C. and Schulte-Nölke, H. “ed”., 2011. EU Compendium Fundamental Rights and Private Law, A Practical Tool for Judges. Sellier European law publishers, p. 40.
- 15 BGH, 18.01.1983 – VI ZR 114/81.
- 16 Ibid.
- 17 BGH, 16.11.1993 – VI ZR 105/92.
- 18 The Swiss Supreme Court (Bundesgericht) shares the point of view that a child is not damage (Entscheidungen des Schweizerischen Bundesgerichts (BGE) 20 December 2005, 132 III 359, 4C.178/2005).
- 19 Ruda, A., 2010. I Didn't Ask to Be Born: Wrongful Life from a Comparative Perspective. 1 JETL – Journal of European Tort Law, pp. 204, 210.
- 20 Winiger, B., Koziol, B., Koch., B. and Zimmermann, R., “eds.”, 2011. Digest of European Tort Law. Vol. 2: Essential Cases on Damage. De Gruyter, p. 907, According to practice in Austria the birth and existence of a child is not damage; however, the associated financial costs must be distinguished. If the parents would have decided to abort the seriously disabled child based on proper advice, then the doctor is liable for the entire maintenance costs concerning the disabled child. There is a consensus that the existence of a child as such does not constitute damage. Equally, any claim by the child based on its unwanted existence (wrongful life) is predominantly rejected.
- 21 Ruda, A., 2010. I Didn't Ask to Be Born: Wrongful Life from a Comparative Perspective. 1 JETL – Journal of European Tort Law, pp. 204, 228.
- 22 Markesinis, B. and Unberath, H., 2002. The German law of torts a comparative treatise. Hart, p. 161.
- 23 Bar, C., 2000. The Common European Law of Torts: Damage and damages, Liability for and without Personal Misconduct, Causality and defences – Volume Two. Oxford: Oxford University Press, p. 63.

The German Federal Supreme Court allowed wrongful birth action and argued that the defendant doctor was liable for the costs of the child's maintenance.²⁴ The Court was eager to show that it regarded neither the birth nor the existence of the child as damage and therefore, allowing tort in wrongful birth cases does not violate the Constitutional principle of human dignity.²⁵ The Court argued that there was only a "scientific chain of causation" between the existence of the child and the obligation to maintain it. It is disputed whether the legal link between the existence of the child and the obligation can be called "scientific" and many academic writers criticise the reasoning of the Federal Supreme Court.²⁶ In particular, the judgment has been criticised as being inconsistent with its decisions in the cases of wrongful life where the court regarded life sacred and untouchable.²⁷ However, the practice is established, and claimants can recover the full amount that is necessary to support their child. Nevertheless, if the court wants to avoid inconsistency, it must deny damages in both wrongful life and wrongful birth cases.

1.3. The Netherlands

The paragraph assesses the practice of the Netherlands on wrongful cases.

In doing so, attention is primarily devoted to the way the Dutch Supreme Court handled these issues in its Kelly decision. On the European scene, the Dutch Kelly case attracted much attention as well it is highly cited and criticised. It is one of the exceptional cases in the world that challenged the settled practice on wrongful life cases and argued an unconventional point of view from the human right perspective. Therefore, the paragraph reviews the ground-breaking and landmark case in wrongful life and birth actions history.

In a Dutch Kelly²⁸ case Hoge Raad (Supreme Court) expresses the opinion that the wrongful birth actions are not in conflict with the dignity of the child, nor with its right to life. According to the facts, during the pregnancy check-ups, Kelly's parents informed the midwife that the father's nephew had a severe disability. However, the midwife assured the parents that it was not necessary to have prenatal screening (or to consult a geneticist) since the parents already had a healthy child. When Kelly was born, it was clear that she had the same disability as her cousin. The Court ruled that the doctor's breach of duty deprived the patient of the right to prevent the birth of a child with a "genetic anomaly" and a decision on abortion is a part of a mother's right to self-determination. The Court

24 BGH, 22.11.1983 – VI ZR 85/82.

25 Regarding the wrongful birth cause of action, the Supreme Court of Austria held that when a child with a disability was born due to the lack information and in case of full information the claimants would have had an abortion that obliges the doctor to avoid parents from extreme financial burden and support an impaired child. The Supreme Court allowed the claim and reasoned that the establishment of liability does fall within the broad scope of the notion of damage under Austrian law (Oberster Gerichtshof, 11 December 2007, 5Ob148/07m = RdM 2008, 47).

26 Winiger, B., Koziol, B., Koch, B. and Zimmermann, R., "eds.", 2011. Digest of European Tort Law. Vol. 2: Essential Cases on Damage. De Gruyter, p. 906.

27 Ibid. pp. 937-938.

28 Hoge Raad, 18.03.2005, C03/206HR.

argued that in medical cases, the right to information which creates the ability to determine one's own life as much as possible is derived from Arts. 10 and 11 of the Constitution and from Arts. 7:448 and 450 BW (Dutch Civil Code).²⁹ If a doctor breaches his/her duty to provide his/her patient with information which is relevant in relation to that person's possibility to make choices, he/she is liable for the damage that has been caused by the breach. Therefore, the fact that mother was not given the relevant information to make a well-informed decision should be regarded as an infringement of a right of personality which entitles her to compensation of damages for non-economic loss.³⁰ The Supreme Court further held that the provider of care (a midwife) was not only liable towards the mother of the child with disabilities but also towards the father and the child (wrongful life) itself. The Court evaluated the role of human dignity and argued that by paying damages to Kelly, her human dignity is not compromised, but it enables her to live a dignified existence as much as possible. Apart from expenses for raising the child, the Court also acknowledged the possibility of compensation for loss of income for the mother.³¹

1.4. The UK

The UK has a long history of dealing with wrongful cases. Besides the large body of case-law about wrongful actions, it does have a law indirectly regulating those actions dated by 1976. From the diverse judgments, the paper chose to discuss the cases from England and Scotland that are decided on the highest judiciary level. The case law of the UK was relevant for the reason of an inadmissible decision on *Reeve v. The United Kingdom*,³² where the Commission found that British law touch upon an action for wrongful life is balanced and in line with the human rights principle. The paragraph also reviews the judgment from Scotland that in-depth evaluates father's claims in wrongful birth cases. On behalf of that ruling might be said that it is quite rare judgment since it examines a father's claims under the Human rights angle. Therefore, it was essential to incorporate the analysis of that judgment as it broadens the scope of the actions and gives the same value of protection to the fathers.

In the UK, according to established case law³³ and Congenital disabilities (civil liability) Act 1976, a child cannot bring an action for wrongful life because allowing the action would be inconsistent with the sanctity of life and secondly, the doctor's duty of care could not

29 Hoge Raad, 23.11.2001, NJ 2002, 387.

30 Brüggemeier, G., Ciacchi, A. and O'Callaghan, P., "eds.", 2010. *Personality Rights in European Tort Law*. Cambridge: Cambridge University Press, pp. 527-528.

31 Bussani, M. and Sebok, A., "eds.", 2015. *Comparative Tort Law Global Perspectives*. Edward Elgar Publishing, pp. 241-242.

32 *Reeve v. The United Kingdom*, App no 24844/94, Decision of inadmissibility of the former Commission of 30 November 1994.

33 *McFarlane v Tayside Health Board*, 2000, 2 AC 59, HL.

include a duty to terminate the pregnancy.³⁴ In *McKay v Essex AHA*³⁵ the Court explained that the law did not recognise being born as damage and to assess the damages in such cases is impossible.³⁶ The practice of the UK was disputed in the ECtHR. However, the commission noted that in the name of “public policy” and “sanctity of human life” that wrongful life restriction must be considered proportionate and under the State’s margin of appreciation as it involves the moral and ethical considerations.³⁷

The decision of the Court of Session of Scotland (Supreme Civil Court) in *McLelland v Greater Glasgow Health Board* is an illustration of a liberal approach towards wrongful birth claims. The court held that both parents were entitled to damages because it was reasonably foreseeable to the defendants, if they failed in their duty of care. The Court highlighted that the harmful effects on the claimants would include “both severe shock and distress on discovery that the child was affected by the syndrome, and also, in the longer term, increased stress and mental wear and tear in bringing up and caring for the child”.³⁸ According to practice in Scotland the equal standing of both parents is justified in wrongful birth cases, and it is not necessary for the father to plead nervous shock as his harm was indirect stress.³⁹

1.5. The USA

The following paragraph delineates the results of the jurisdictional survey conducted on legislation and the Supreme Court decisions from the USA States. The Federal Supreme Court of the United States has never dealt with wrongful life or birth cases. However, that issue was challenged in 42 states either by the Supreme Courts or by the legislative bodies. It was crucial to analyse the USA’s practice since the Courts deal with wrongful cases from 1967 thus, having a great deal of valuable case-law including the assessment of these disputes in the context of its constitutionality. Furthermore, on wrongful birth and life claims legislation and decisions of the states differ and contradict each other. For instance, while some States allowed the claims, other States, in contrast, have explicitly rejected the view that the birth of a child can constitute an infringement. The difference in legal reasoning from state to state emphasises the controversiality of the issue. Therefore, it was significant to show the underlying legal arguments of the different reasoning in the same jurisdiction.

In USA number of courts upheld a typical wrongful birth case where the parents argue that if not the doctor’s negligence they would have chosen to abort

34 Birks, P., “ed.”, 2000. *English Private Law*. Oxford: Oxford university press, p. 422.

35 *McKay v Essex Area Health Authority* [1982] QB 1166.

36 Jackson, E., 2016. *MEDICAL LAW: Text, Cases, and Materials*, Oxford: Oxford university press, p. 762.

37 ECtHR, *Reeve v. United Kingdom* (dec), App no 24844/94, Commission decision of 30 November 1994.

38 *McLelland and McLelland v Greater Glasgow Health Board*, SCS 7 MAR 2001.

39 Baginska, E., 2010. *Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation*, JETL, 1, pp. 171, 196.

the foetus.⁴⁰ The first case involving wrongful birth and wrongful life claims was *Gleitman v. Cosgrove*⁴¹ in New Jersey where the Supreme Court rejected the plaintiffs' claims. The connotation of this judgment was that children born with disabilities are not less valuable humans than children born without disabilities.⁴² The majority of states after *Gleitman v. Cosgrove* have recognized wrongful birth actions,⁴³ although, few states have statutorily banned it.⁴⁴ Illinois Supreme Court in *Siemieniec v. Lutheran General Hospital*⁴⁵ decided that wrongful life actions contradict to the sanctity of life and on wrongful birth actions clarified that

the parents were not entitled emotional distress damages because the defendant did not "endanger" them.⁴⁶ On the one hand, statutory prohibition of wrongful birth claims is becoming increasingly popular among States.⁴⁷ On the other hand, people are more prone to sympathise wrongful actions and on this indicates jury verdicts and settlements from states (for instance, Montana, Oregon, Florida, New York)⁴⁸ that do allow wrongful birth claims.⁴⁹

In 2017, the Iowa Supreme court recognised a personal injury claim in wrongful birth for the first time and relied its arguments on the trend toward judicial

-
- 40 Dobbs, D. and Hayden, P., "eds.", 2005. *Torts and Compensation personal accountability and social responsibility for injury* (American Casebook Series) 5th edn. West Group, p. 609.
- 41 The decision of the Supreme Court of New Jersey, 6 March 1967, case 49 N.J. 22, 28 227 A. 2d 689, 692, 22 A. L. R. 3d 1411. *Gleitman, v. Cosgrove* (1967).
- 42 Bloom, A. and Miller, P., S., 2011. *Blindsight: How We See Disabilities in Tort Litigation*. 86 *Wash. L. Rev.* pp. 709, 733.
- 43 Barber, P., 2012. *Prenatal diagnosis: an ethical and a regulatory dilemma*, *HOUJHLP*, 13, pp. 329, 336.
- 44 Idaho Code §5-334; Minnesota Statutes §145.424; MO Rev Stat §188.130; South Dakota Codified Laws 21-55-2; Indiana Code Ann. §34-12-1-1; Michigan Compensation Laws §600.2971; Ariz. Rev Stat Ann §12-719; Okla. Stat. tit. 63, §1-741.12; K.S.A. 60-1906; 42 Pa. Cons. Stat. Ann. §8305 that was appealed in *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 816 (Pa. Super. Ct. 1993), however, court concluded that the Pennsylvania wrongful birth statute passes constitutional muster and the protection of fetal life has been recognised to be an important state interest.
- 45 *Siemieniec, v. Lutheran General Hospital*, 117 Ill. 2d 230, 512 N.E.2d 691, 111 Ill. Dec. 302 (1987).
- 46 Nichele, J., 2019. *Recovery of damages for emotional distress*. *DCBABR*, 31, pp. 14, 16.
- 47 Harris, C., 2014. *Statutory prohibitions on wrongful birth claims & their dangerous effects on parents*. *Boston College Journal of Law & Social Justice*, 34, pp. 365, 380-382.
- 48 *Ibid.* p. 394.
- 49 Compare, the High Court of Australia decided by majority that the wrongful life claim should be denied, *Harriton v Stephens* [2006] HCA 15, paras 252-253: "A comparison between a life with disabilities and non-existence, for the nature of the damage caused, is impossible. Judges in a number of cases have been made to the philosophers and theologians as persons better schooled than the courts in apprehending the ideas of non-existence, nothingness and the afterlife ... There is no practical possibility of a court (or jury) who has never been arrested or evaluating or receiving proof of, the actual loss or damage as claimed by the appellant. It cannot be determined in what sense Alexia Harriton's life with disabilities represents a loss, deprivation or damage compared to non-existence."

acceptance of this action.⁵⁰ The Court claimed that at least twenty-three⁵¹ states recognise the claim by judicial decision while Maine allows wrongful birth claims by statute.⁵² However, three state supreme courts took a different approach and refused to allow wrongful birth claims.⁵³

Although most state courts have recognised wrongful birth actions, the

majority of courts refuse to accept wrongful life actions,⁵⁴ but the states of California,⁵⁵ New Jersey⁵⁶ and Washington⁵⁷ are the exceptions.⁵⁸ The main argument for denial of the claims is the robust public policy of protecting the right to life.⁵⁹ In Gleitman argument on Policy considerations⁶⁰ have led New Jersey Supreme Court to decline wrongful life actions. However, in

50 Plowman v. Fort Madison Community Hospital, 896 N.W.2d 393 (Iowa 2017).

51 According to other sources 28 states allow this action, [Online Available at: <<https://www.coloradoindependent.com/2012/03/22/arizona-joins-states-banning-wrongful-birth-litigation/>> [Accessed 1 november 2020].

52 Plowman v. Fort Madison Community Hospital, 896 N.W.2d 393 (Iowa 2017), para 400.

53 Kentucky (Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. 2003)); , North Carolina (Azzolino, v., Dingfelder, 315 N.C. 103, 337 S.E.2d 528, 537 (1985)); Georgia (Atlanta Obstetrics & Gynecology Grp. v. Abelson, 260 Ga. 711, 398 S.E.2d 557, 563 (1990)).

54 Linton P. B., 2011. The legal status of the unborn child under state law. USTJLPP, 6, pp. 141, 144.

55 Curlender V., Bio-Science Laboratories 106 Cal. App (3d) 811, 165 Cal. 477 (1980).

56 Procanik v. Cillo, 478 A.2d 755 (NJ 1984).

57 The decision of the Supreme Court of Washington, En Banc, 6 January 1983 case, 656 P.2d 483 (Wash. 1983). Harbeson, v. Parke-Davis, Inc.

58 Giesen I., 2012. The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases. Utrecht Law Review, Vol. 8, 2, pp. 35, 41.

59 Elliott v. Brown, 361 So.2d 546, 548 (Ala. 1978); Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. 1990), para 42: “it is unfair and unjust to charge the doctors with the infant's medical expenses. The position that the child may recover special damages despite the failure of his underlying theory of wrongful life violates the moral code underlying our system of justice from which the fundamental principles of tort law are derived”; Linninger v. Eisenbaum, 764 P.2d 1202, 1209-12 (Colo. 1988); Rich v. Foye, 976 A.2d 819, 834-38 (Conn. Super. Ct. 2007); Garrison, v. Med. Ctr. of Del., Inc., 581 A.2d 288, 293-94 (Del. 1990); Kush, v., Lloyd, 616 So.2d 415, 423 (Fla. 1992); Spires, v., Kim, 416 S.E.2d 780 (Ga. Ct. App. 1992); Blake, v., Cruz, 698 P.2d 315, 321-22 (Idaho 1984); Siemieniec, v., Lutheran Gen. Hosp., 512 N.E.2d 691, 696-703 (Ill. 1987); Grubbs, v., Barbourville Family Health Ctr., P.S.C., 120 S.W.3d 682 (Ky. 2003); Kassama, v., Magat, 792 A.2d 1102, 1114-24 (Md. 2002); Viccaro, v., Milunsky, 551 N.E.2d 8, 12-13 (Mass. 1990); Taylor v. Kurapati, 600 N.W.2d 670, 682-94 (Mich. Ct. App. 1999); Proffit, v., Bartolo, 412 N.W.2d 232, 238-43 (Mich. Ct. App. 1987); Greco, v., United States, 893 P.2d 345, 347-48 (Nev. 1995); Smith, v., Cote, 513 A.2d 341, 351-55 (N.H. 1986); Azzolino, v., Dingfelder, 337 S.E.2d 528, 532-33 (N.C. 1985); Willis, v., Wu, 607 S.E.2d 63, 71 (S.C. 2004); Dumer, v., St. Michael's Hosp., 233 N.W.2d 372, 374-76 (Wis. 1975); Procanik, v., Cillo, 478 A.2d 755, 760-63 (N.J. 1984) (same); Harbeson, v., Parke-Davis, Inc., 656 P.2d 483, 494-97 (Wash. 1983) (same).

60 See also, Becker v. Schwartz, 46 N.Y.2d 401, 411, 413 N.Y.S.2d 895, 900, 386 N.E.2d 807, 812 (1978), in New York an infant does not have a right to be born as a whole functioning human being and that it is beyond judicial competence to ascertain whether the infant has suffered any injury by being born.

Procanik it overruled the decision. The Court refrained from the philosophical discussion about the life and explained that the decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life,⁶¹ but is predicated on the needs of the living.⁶² When a child requires extraordinary medical care, the financial impact is felt not just by the parents, but also by the injured child.⁶³ Also, his/her siblings because money that is spent on the health care of one child is not available for the clothes, food, or college education of another child.⁶⁴ The Court furthermore argued that the law is more than an exercise in logic and logical analysis and it should not become an instrument of injustice. Therefore, the logic that permits par-

ents to recover for the wrongful birth action, but denies the child's own right to recover expenses, yields the unjust result.⁶⁵ Even though of financial arguments, Procanik reasoning is in the minority and most of the States do not recognise wrongful life actions. The concept of public policy, as perceived by most courts, has been utilised as the basis for denying the recovery. A deeply held belief in the sanctity of life has compelled most of the courts to deny recovery to those who have been born with a "serious impairment".⁶⁶

Besides the decisions, the number of States banned both wrongful life and wrongful birth causes of action by statute.⁶⁷ Constitutional challenges brought against these statutes included the argument that the legislation interfered with the "abortion liberty" recognized in

61 See also, *Harbeson, v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983), para 482: "...measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life and nonexistence precludes the action altogether. General damages are certainly beyond computation... But one of the consequences of the birth of the child who claims wrongful life is the incurring of extraordinary expenses for medical care and special training. These expenses are calculable. Thus, although general damages are impossible to establish with reasonable certainty, such special damages can be proved."

62 *Procanik v., Cillo*, 478 A.2d 755 (NJ 1984), para 353.

63 Whitney, D. and Rosenbaum, K., 2011. Recovery of Damages for Wrongful Birth. *J. Legal Med.*, 32, pp. 167, 175; but see, Burns, T., 2003. *When Life Is an Injury: An Economic Approach to Wrongful Life Lawsuits*. Duke L.J., 52, pp. 807, 811.

64 *Procanik, v., Cillo*, 478 A.2d 755 (NJ 1984), para 351.

65 *Ibid.* para 352.

66 *Curlender, v., Bio-Science Laboratories* 106 Cal. App (3d) 811, 165 Cal. 477 (1980), para 826.

67 Idaho Code §5-334; Minnesota Statutes §145.424; MO Rev Stat §188.130; N.D. Cent. Code §32-03-43; South Dakota Codified Laws 21-55-2; Indiana Code Ann. §34-12-1-1; Michigan Compensation Laws §600.2971; Okla. Stat. tit. 63, §1-741.12; 42 Pa. Cons. Stat. Ann. §8305; Ariz. Rev Stat Ann §12-719; K.S.A. 60-1906; At least four States, in the absence of legislation, have refused to recognize wrongful birth, as well as wrongful life, causes of action. See *Atlanta Obstetrics & Gynecology Grp.*, 398 S.E.2d at 558-63; *Grubbs*, 120 S.W.3d at 687-91; *Azzolino*, 337 S.E.2d at 533-37.

Roe.⁶⁸ Despite those arguments the actions were unsuccessful and the Courts rejected them since the states neither affect nor impose a significant burden on a woman's right to an abortion.⁶⁹ However, in Hickman case,⁷⁰ Chief Justice, in his dissenting opinion, pointed out that Roe protects the decision-making process to choose an abortion or not and simultaneously it gives a woman the possibility to make an informed choice concerning abortion. Therefore, as soon as a state interferes with a woman's decision-making process, the state's action is unconstitutional. The possibility that a doctor will be held responsible for negligent conduct is a guarantee that the woman will be fully informed. Therefore, judge argues by removing the safeguard of the negligence action does harm the full exercise of a woman's rights under Roe because it directly infringes the right on the informed decision-making process.⁷¹ Nevertheless, in Taylor case,

the Court balanced the conflicting rights in the constitutional frame and decided in favour of the restriction of wrongful claims. The Court established that the State "has no obligation [under Roe v. Wade] to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic, abortion".⁷² Those constitutional challenges highlight the inevitable tension of wrongful actions as well as it illustrates the need for the balance between the conflicting rights of being informed during the decision-making process on abortion and prohibition of eugenic/selective abortions.

68 Roe, v. Wade, 410 U.S. 113 (1973) is a landmark decision issued by the United States Supreme Court on the issue of the constitutionality of laws that criminalized or restricted access to abortions, para 153: "This right of privacy, whether it be founded in the Fourteenth Amendment's Concept of Personal Liberty and Restrictions on State Action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy The state would impose on the pregnant woman by denying this choice altogether is clear. And specific and direct harm to diagnosable even in early pregnancy may be involved Maternity, or additional offspring, may force on the woman a distressful life and future psychological harm may be imminent. Where is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved."

69 Hickman v. Grp. Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986); Dansby v. Thomas Jefferson Univ. Hosp., 623 A. 2d 816 (Pa. Super. Ct. 1993); Spires, v., Kim, 416 S.E.2d 780 (Georgia 1992); Taylor, v., Kurapati, 600 N.W.2d 670 (Mich 1999), para 687: the State "has no obligation [under Roe v. Wade] to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic, abortion".

70 Hickman v. Grp. Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986).

71 For similar reasoning see Robak v. U.S. 658 F.2d 471 (1981).

72 Taylor v. Kurapati, 600 N.W.2d 670 (Mich 1999), para 687.

Table⁷³ of USA Cases: Check-marks indicate that the cause of action is allowed and “X” indicates that it is not allowed in that state.

State	Wrongful Birth Cause of Action	Wrongful Life Cause of Action
Alabama	Keel v. Banach, 624 So. 2d 1022 (Ala. Supreme Court 1993); L.K.D.H. v. Planned Parenthood of Alabama, 944 So.2d 153 (Ala. Civ. App. 2006)	▪ Elliott v. Brown, 361 So.2d 546 (Ala. Supreme Court 1978)
Alaska	M.A. v. U.S., 951 P.2d 851 (Alaska Supreme Court 1998)	
Arizona	▪ Ariz. Rev Stat Ann §12-719: “A. A person is not liable for damages in any civil action based on a claim that, but for a child or child would not have been born.”	▪ the same statute: “B. A person is not liable for damages in any civil action based on a claim that, but for the act of bringing the action not born or not born.” Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. Supreme Court 1990)
Arkansas	▪ Brown v. Wyatt, 202 S.W.3d 555 (Ark. Ct. App. 2005)	
California	Turpin v. Sortini, 643 P.2d 954 (Cal. Supreme Court 1982)	Curlender v. Bio-Science Laboratories 106 Cal. App (3d) 811, 165 Cal. 477 (1980).
Colorado	Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. Supreme Court 1988)	▪ the same case
Connecticut	Ochs v. Borrelli, 445 A.2d 883 (Conn. Supreme Court 1982)	▪ Rich v. Foye, 976 A.2d 819 (Conn. Super. Ct. 2007)
Delaware	Garrison v. Medical Center of Delaware Inc., 581 A.2d 288 (Del. Supreme Court 1989)	▪ the same case
Florida	Kush v. Lloyd, 616 So.2d 415 (Fla. Supreme Court 1992)	▪ the same case
Georgia	▪ Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. Supreme Court 1990)	▪ the same case
Hawaii		
Idaho	▪ Idaho Code §5-334: “A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.”	▪ Prohibited by same statute; Blake v. Cruz, 698 P.2d 315, 321-22 (Idaho Supreme Court 1984)
Illinois	Clark v. Children’s Memorial Hosp., 955 N.E.2d 1065 (Ill. Supreme Court 2011)	▪ the same case
Indiana	▪ Indiana Code Ann. §34-12-1-1: “A person may not keep a cause of action or receive an award of damages on the person’s behalf, but for the negligent conduct of another, the person would have been aborted.”	▪ prohibited by the same statute; Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. Supreme Court 1991)
Iowa	Plowman v. Fort Madison Community Hospital, 896 N.W.2d 393 (Iowa Supreme Court 2017)	
Kansas	▪ K.S.A. 60-1906: “Wrongful life or wrongful birth claims; prohibited. (a) No civil action may be initiated in any court for any claim of wrongful birth or wrongful birth, and no damages may be recovered in any civil action for that minor damages out of a claim that a person’s action or omission contributed to such a minor’s mother not obtaining an abortion.	▪ prohibited by the same statute

73 Pergament D. and Ilijic K., 2014. The Legal Past, Present and Future of Prenatal Genetic Testing: Professional Liability and Other Legal Challenges Affecting Patient Access to Services. J. Clin. Med., 3, pp. 1437, 1447.

Kentucky	▪ Grubbs v. Barbourville Family Health Center, P.S.C., 120 S.W.3d 682 (Ky. Supreme Court 2003)	▪ the same case
Louisiana	Pitre v. Opelousas General Hosp., 530 So.2d 1151 (La. Supreme Court 1988)*	
Maine	Me. Rev. Stat. Ann. tit. 24, §2931: “3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child is born with limited risk to the disease, defect or handicap suffered by the child.”	
Maryland	Reed v. Campagnalo, 630 A.2d 1145 (Md. App.1993)	▪ Kassama v. Magat, 792 A.2d 1102 (Md. App. 2002)
Massachusetts	Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. Supreme Court 1990)	▪ the same case
Michigan	▪ Michigan Compensation Laws §600.2971: “(1) A person shall not bring a civil action on a wrongful birth claim, but for a child or child would not be born or born.”	▪ the same statute: “(2) A person shall not bring a civil action for damage on a wrongful life claim, but for the negligent act or the sentence of the defendant, the person bringing the action would not or should not have been born.” Proffit v. Bartolo, 412 N.W.2d 232, 238-43 (Mich. Ct. App. 1987)
Minnesota	▪ Minnesota Statutes §145.424: “Subdivision 1.Wrongful life action is prohibited. No person shall keep a cause of action or receive an award of damages on that person based on the claim that but for the negligent conduct of another, the person would have been aborted.”	▪ Minnesota Statutes §145.424: “Subdivision 2.Wrongful birth action prohibited. No person shall hold a cause of action or receive an award of damages on the claim but for the negligent conduct of another, a child will have been aborted.”
Mississippi		
Missouri	▪ MO Rev Stat §188.130: “No person shall hold a cause of action or receive a claim of damages based on the claim but for the negligent conduct of another, a child will have been aborted.”	▪ prohibited by the same statute
Montana		
Nebraska		
Nevada	Greco v. U.S., 893 P.2d 345 (Nev. Supreme Court 1995)	▪ the same case
New Hampshire	Smith v. Cote, 513 A.2d 341 (NH Supreme Court 1986)	▪ the same case
New Jersey	Gleitman v. Cosgrove, 227 A.2d 689, 689 (NJ Supreme Court 1967) denied but that decision was abrogated by Berman v. Allan, 404 A.2d 8 (NJ Supreme Court 1979)	Procanik v. Cillo, 478 A.2d 755 (NJ Supreme Court 1984)
New Mexico		

* Para 1162: “...the parents' estimate on pregnancy and delivery, the mother's pain and suffering, the father's loss of consortium, service and society, and their emotional and mental distress associated with the birth of an unplanned and unwanted child and the unexpected restriction on their freedom to plan their family. These damages were foreseeable consequences of the doctor's alleged negligent acts and omissions. The parents may not recover for the special expenses concerning the child's deformity, or for the emotional and mental distress associated with the child's deformity. The plaintiffs cannot recover the economic cost of an unplanned and unwanted child, including the cost of compensation for the fact that the mother must spread her society, comfort, care, protection and support over a big group "money to replenish the" family exchequer "so that the child will not deprive the other family members. These are the normal vicissitudes that befall any family with the birth of a healthy, normal child...”

New York	Bani-Esraili v. Lerman, 505 N.E.2d 947 (NY app. 1987)*	▪ Becker v. Schwartz, 386 N.E.2d 807 (NY app. 1978)
North Carolina	▪ Azzolino v. Dingfelder, 337 S.E.2d 528 (NC Supreme Court 1985)	▪ the same case
North Dakota	▪ N.D. Cent. Code §32-03-43: “No person may sustain a claim for relief or receipt on that person’s own behalf claiming that, but for the act or the omission of another, that person would have been aborted. As used in this section, “abortion” means the termination of human pregnancy with an intention other than to produce a living birth or to remove a dead embryo or fetus.”	▪ prohibited by the same statute
Ohio		▪ Hester v. Dwivedi, 733 N.E.2d 1161 (Ohio Supreme Court 2000)
Oklahoma	▪ Okla. Stat. tit. 63, §1-741.12: “In a wrongful act action or a wrongful birth act, a child’s birth if the claim is that the defendant’s act or omission contributed to the mother’s not having received an abortion.”	▪ prohibited by the same statute
Oregon		
Pennsylvania	▪ 42 Pa. Cons. Stat. Ann. §8305:** “(a) Wrongful birth .- – There shall be no cause of action or award of damage on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived will not or must not have were born.”	▪ prohibited by the same statute: “(b) Wrongful life . – There shall be no cause of action on behalf of any person upon that claim, but for an act or omissions of the defendant, the person would have been conceived or, once conceived , would or should have been aborted.”
Rhode Island	Emerson v. Magendantz, 689 A.2d 409 (RI Supreme Court 1997)	
South Carolina		▪ Willis v. Wu, 607 S.E.2d 63 (SC Supreme Court 2004)
South Dakota	▪ South Dakota Codified Laws 21-55-2: “Action or damages for birth of another is prohibited. There shall be no cause of action or award of the claim on that claim, but for the conduct of another, a person would have been allowed to have born alive.”	▪ prohibited by the same statute
Tennessee		
Texas	Nelson v. Krusen, 678 S.W.2d 918 (Tex. Supreme Court 1984)	▪ the same case
Utah	▪ Wood v. University of Utah Medical Center, 67 P.3d 436 (Utah Supreme Court 2002)	
Vermont		
Virginia	Naccash v. Burger, 290 S.E.2d 825 (Va. Supreme Court 1982)	

* *Para 808: “plaintiff could not recover ... the costs of those extraordinary expenses which plaintiff might incur for the continued support and special care of his son... after the child reaches the age of 21... plaintiff may be compensated only in the amount that represents his legally cognizable injury, namely the increased financial obligation arising from the extraordinary medical treatment rendered the child during minority”.*

** *Constitutionality of this Statute was unsuccessfully challenged in Sernovitz v. Dershaw, 57 A.3d 1254 (Pa. 2012) and Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 816 (Pa. Super. Ct. 1993).*

Washington	Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. Supreme Court 1983)	the same case
West Virginia	James G. v. Caserta, 332 S.E.2d 872 (W.V. Supreme Court 1985)	▪ the same case
Wisconsin	▪ Slawek v. Stroh, 215 N.W.2d 9 (Wis. Supreme Court 1974)	▪ the same case; Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 374-76 (Wis. Supreme Court 1975)
Wyoming	Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. Supreme Court 1982)	▪ the same case

Consequently, in the USA, more than 23 States allow and 12 States ban wrongful birth actions, while only three States allow wrongful life actions. There is no European consensus on wrongful life/birth actions: In the UK and Germany wrongful life suits are rejected while wrongful birth actions are allowed; In France, after the legislation amendment, wrongful life actions are excluded and wrongful birth cases are allowed only in gross negligence cases; the Netherlands is an exception that allows both claims.

2. INCITEMENT TO DISCRIMINATION AND STIGMATISATION

Claims for wrongful birth and wrongful life are highly debated all over the world due to the further stigmatization implications: What is the value of human life and can new life be considered as compensatory damage? What is the real importance of people with disability for inclusive society? Is best not to be born at all rather be born with a disability? Is it

morally acceptable that parents/child claim that child should have never been born at all?⁷⁴

Two main arguments outline the common European position on wrongful life/birth actions: Firstly, it is accepted that nobody has a right to his non-existence and cannot sue to rely on the fact that s/he was not aborted. Life is a fundamental precondition for exercising and enjoying all other rights. Therefore, it is incompatible with the idea of life and human dignity to degrade the joy of birth because of disabilities. All human beings are equal and enjoy the same protection irrespective of their health and their quality cannot be measured or quantified.⁷⁵ Accordingly, the possibility of selecting the genetic make-up of a child and arguments on non-existence implies the discrimination of people with disabilities.⁷⁶ Secondly, the unborn have a right to human dignity, which protects a child with a disability from treating as “defective goods”.⁷⁷ Allowing damages in wrongful birth cases harms a child’s self-worth and the fact that parents claim compensation for harms resulted by the

74 Falzon, C., 2014. Wrongful Life and Wrongful Birth: Legal and Moral Issues. Faculty of Theology University of Malta p. 11.

75 Smrynaki, E., 2012. Wrongful Life and Birth. 31 Med. & L. pp. 97, 112.

76 Soritsa, D., 2016. Damages Subject to Compensation in Cases of Wrongful Birth. Juridica Int'l, 24, pp. 105, 106.

77 Bar, C., 1998. The Common European Law of Torts: the Core Areas of Tort Law, Its Approximation in Europe, and its Accommodation in the Legal System – Volume One. Clarendon Press, pp. 601-602.

birth of a child stigmatise her/him.⁷⁸ The court's decision awarding the damages represents children as recoverable damage, thus, making it impossible for them to build healthy self-esteem, to have an identity without insecurities, guilt and shame.⁷⁹ The "irrebuttable presumption" of the law should be the parent's unconditional love towards the child, regardless of his/her health and if the child possesses the "ideal" traits should not be prerequisite of love.⁸⁰

Moreover, during the discussion of wrongful birth/life cases, scholars use different terms that might encourage discrimination or might be deemed insulting. The most often is criticised the phrase "foetal abnormalities" because children remain human beings with disabilities, they are not serious, severe, or gross "foetal abnormalities" and nobody can deprive the child of his/her dignity or rights that belong to the child because of that dignity.⁸¹ Therefore, it is more ethical to not differentiate foetus by the terms of "normal" or "abnormal" and use more decent words – foetus with disabilities.

Healthy self-esteem has a vital

role while humans deal with different hardships in life. It is the main instrument that helps to develop favourable self-concept and clear identity that they are full members of society. According to the "labelling theory", stigmatization has a profound and simultaneously devaluing impact on a person's self-worth, as well as, negative labels are capable of distorting one's identity.⁸² If a child's self-worth is polluted with insecurity, guilt and shame, the child would probably have a severe inferiority complex. Accordingly, if the State acknowledges that parents of the child with disabilities are victims and they need compensation for damages resulting from the child's birth meanwhile the State excludes children with disability from *socium* also marks them with a negative stigma.

The prohibition of discrimination imposes a legal obligation to treat all children with the same respect⁸³ and even though maintenance costs might be burdensome for some parents, children's interest should be the primary consideration.⁸⁴ To award damages in wrongful claims for pain and suffer illustrates

78 Sustek, P. and Šolc, M., 2017. COURT DECISIONS IN WRONGFUL BIRTH CASES AS POSSIBLE DISCRIMINATION AGAINST THE CHILD. Vol. 18, 1 Joaçaba, pp. 31, 41.

79 Ibid. p. 42.

80 Stein, J.T., 2010. Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims. 40 Seton Hall L. Rev. pp. 1117, 1145.

81 Joseph, R., 2009. Human Rights and the Unborn Child. Leiden: Brill, p. 157.

82 Sustek, P. and Šolc, M., 2017. COURT DECISIONS IN WRONGFUL BIRTH CASES AS POSSIBLE DISCRIMINATION AGAINST THE CHILD. 18 (1) Joaçaba, pp. 31, 41.

83 The decisions of the European Court: *Stec and Others v. the United Kingdom*, 6/07/2005. application 65731/01; *Zarb Adami. V. Malta*, 20/06/2006. application 17209/02.; *Hlimmenos v. Greece*, 6/4/200, application 34369/97.; *Hlimmenos v. Greece*, 6/4/200, application 34369/97.; *Glor v. Switzerland*, App no 13444/04, 30 April 2009, §80.

84 Article 3.1. of the Convention on the Rights of the Child; UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, §40: „The best interests of the child as a "primary" require a consciousness about the place that children's interests must all occupy in the interests of all circumstances, but especially when an action has an undeniable impact on the children concerned.“

society's inability to see value in the lives with a disability, reflects negatively on disability rights because it says that they should not be born and continues the historical tendency to marginalise and devalue people with disabilities.⁸⁵ No court will ever recover damages to a person without disabilities who deems that s/he should have never been born,* thus, courts that allow wrongful claims treat people differently on the ground of disability without justification. As a consequence, such policies fuel negative stereotypes that nonexistence is preferred to life with a disability and increases intolerance towards the vulnerable group. While adjudication of wrongful birth and life cases, courts must bear in mind that eugenics is the condemned practice and people with disabilities have an equal place in socium. Therefore, awarding damages for emotional distress in wrongful birth/life suits stigmatises people with disabilities since it legitimises the assumption that life with disabilities is a tragedy and suffering.

CONCLUSION

Furthermore, in wrongful birth cases, courts are acknowledging that the parents are “damaged” by the birth of a child with disabilities, as well as in wrongful life cases the life with disabilities is deemed as “damage”. Therefore, the paper suggests that by the recognition of these torts, the State indirectly

supports the idea of the eugenics, since they consider children as a financial burden because of their disabilities. As a consequence, such policies imply that nonexistence is preferred to life with a disability and it furthermore stigmatises them. Subsequently, allowing damages in wrongful birth cases, harms a child's self-worth and the fact that parents claim compensation for harms resulted by the birth of a child stigmatise her/him.

To summarise the comparative research outcome, it is evident that the majority of the States denied either by statute or decision wrongful life claims and wrongful birth claims are highly criticised. For instance, in the USA, more than 23 States allow and 12 States ban wrongful birth actions, while only three States allow wrongful life actions. There is no European consensus on wrongful/birth actions: In the UK, Austria and Germany wrongful life suits are rejected while wrongful birth actions are allowed; In France, after the legislation amendment, wrongful life actions are excluded and wrongful birth cases are allowed only in gross negligence cases; The Netherlands is an exception that allows both claims. The paper aimed to show the impact of human rights on wrongful life and birth actions. The central research question was to determine if allowing wrongful actions is in line with human rights. Comparative research methodology showed that wrongful life actions are not supported by the majority of the courts. Besides, it violates

85 Stein, J. T., 2010. Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims. 40 Seton Hall L. Rev. p. 1146.

* Wrongful conception claim is brought by parents for the negligently caused birth of a healthy child. It is a form of medical malpractice claim that arises when a doctor fails surgical sterilization procedures that leads to the birth of a healthy but unplanned child. Usually, most courts refuse to allow parents to recover the damage of raising the healthy child.

the rights of people with disability. Even though, about wrongful birth actions is not consensus and many states allow these actions, the paper still suggests that it as well contradicts human rights.

To conclude, healthy self-esteem and human dignity have a vital role while humans deal with different hardships in life.

The fact that State acknowledges that parents of the child with disabilities are victims and they need compensation for damages resulting from the child's birth, marginalise a person, incites discrimination based on disability and marks them with a negative stigma.

Bibliography:

Normative materials:

Conventions

1. Convention on the Rights of the Child (CRC), 20 November 1989. (in English)
2. European Convention on Human Rights (ECHR), 4 November 1950. (in English)

Resolutions/Recommendations

1. UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14. (in English)

The USA Legislation

1. 42 Pa. Cons. Stat. Ann. §8305. (in English)
2. Ariz. Rev Stat Ann §12-719. (in English)
3. Idaho Code §5-334. (in English)
4. Indiana Code Ann. §34-12-1-1. (in English)
5. K.S.A. 60-1906. (in English)
6. Michigan Compensation Laws §600.2971. (in English)
7. Minnesota Statutes §145.424. (in English)
8. MO Rev Stat §188.130. (in English)
9. N.D. Cent. Code §32-03-43. (in English)
10. Okla. Stat. tit. 63, §1-741.12. (in English)
11. South Dakota Codified Laws 21-55-2. (in English)

Judicial practice:

ECTHR

1. Thlimmenos v. Greece [GC], 6 April 2000, application 34369/97. (in English)
2. Stec and Others v. the United Kingdom [GC], 12 April 2006, application 65731/01. (in English)
3. Glor v. Switzerland, 30 April 2009, application 13444/04. (in English)
4. Zarb Adami v. Malta, 20 June 2006, Application 17209/02. (in English)
5. Reeve v. The United Kingdom (dec.), 30 November 1994, application 24844/94. (in English)

Australia

1. Harriton v Stephens [2006] HCA 15. (in English)

Austria

1. Oberster Gerichtshof, 11 December 2007, 5Ob148/07m = RdM 2008, 47. (in English)

France

1. Cour de cassation (supreme court for judicial matters), 17 November 2000, JCP 2000, II, 10438, Époux X v. Mutuelle d'assurance du corps sanitaire français Subsequent developments. (in English)
2. Cour de cassation, Chambre civile, 26 March 1996, civ I Bull, no 155; Cass civ 1, 16 July 1991, Bull civ I, no 248. (in English)

Germany

1. BVerfGE 96, 375. (in English)
2. BVerfGE 88, 203 (Schwangerschaftsabbruch II). (in English)

3. BGH, 18.03.1980 – VI ZR 105/78. (in English)
4. BGH, 18.01.1983 – VI ZR 114/81. (in English)
5. BGH, 22.11.1983 – VI ZR 85/82. (in English)
6. BGH, 16.11.1993 – VI ZR 105/92. (in English)

The Netherlands

1. Hoge Raad, 23.11.2001, NJ 2002, 387. (in English)
2. Hoge Raad, 18.03.2005, C03/206HR. (in English)

Switzerland: Entscheidungen des Schweizerischen Bundesgerichts (BGE) 20 December 2005, 132 III 359, 4C.178/2005. (in English)

The UK

1. McFarlane v Tayside Health Board, 2000, 2 AC 59, HL. (in English)
2. McKay v Essex Area Health Authority [1982] QB 1166. (in English)
3. McLelland and McLelland v Greater Glasgow Health Board, SCS 7 MAR 2001. (in English)

The USA

1. Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. Supreme Court 1990). (in English)
2. Azzolino v. Dingfelder, 337 S.E.2d 528 (NC Supreme Court 1985). (in English)
3. Bani-Esraili v. Lerman, 505 N.E.2d 947 (NY app. 1987). (in English)
4. Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. Supreme Court 1982). (in English)
5. Becker v. Schwartz, 386 N.E.2d 807 (NY app. 1978). (in English)
6. Berman v. Allan, 404 A.2d 8 (NJ Supreme Court 1979). (in English)
7. Blake v. Cruz, 698 P.2d 315, 321-22 (Idaho Supreme Court 1984). (in English)
8. Brown v. Wyatt, 202 S.W.3d 555 (Ark. Ct. App. 2005). (in English)
9. Clark v. Children's Memorial Hosp., 955 N.E.2d 1065 (Ill. Supreme Court 2011). (in English)
10. Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. Supreme Court 1991). (in English)
11. Curlender v. Bio-Science Laboratories 106 Cal. App (3d) 811, 165 Cal. 477 (1980). (in English)

12. Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816 (Pa. Super. Ct. 1993). (in English)
13. Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 374-76 (Wis. Supreme Court 1975). (in English)
14. Elliott v. Brown, 361 So.2d 546 (Ala. Supreme Court 1978). (in English)
15. Emerson v. Magendantz, 689 A.2d 409 (RI Supreme Court 1997). (in English)
16. Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 293-94 (Del. Supreme Court 1990). (in English)
17. Gleitman v. Cosgrove, 227 A.2d 689, 689 (NJ Supreme Court 1967). (in English)
18. Greco v. U.S., 893 P.2d 345 (Nev. Supreme Court 1995). (in English)
19. Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. Supreme Court 2003). (in English)
20. Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. Supreme Court 1983). (in English)
21. Hester v. Dwivedi, 733 N.E.2d 1161 (Ohio Supreme Court 2000). (in English)
22. Hickman v. Grp. Health Plan, Inc., 396 N.W.2d 10 (Minn. Supreme Court 1986). (in English)
23. James G. v. Caserta, 332 S.E.2d 872 (W.V. Supreme Court 1985). (in English)
24. Kassama v. Magat, 792 A.2d 1102 (Md. App. 2002). (in English)
25. Keel v. Banach, 624 So. 2d 1022 (Ala. Supreme Court 1993). (in English)
26. Kush v. Lloyd, 616 So.2d 415 (Fla. Supreme Court 1992). (in English)
27. L.K.D.H. v. Planned Parenthood of Alabama, 944 So.2d 153 (Ala. Civ. App. 2006). (in English)
28. Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. Supreme Court 1988). (in English)
29. M.A. v. U.S., 951 P.2d 851 (Alaska Supreme Court 1998). (in English)
30. McLelland v Greater Glasgow Health Board, OHCS 14 OCT 1998. (in English)
31. Naccash v. Burger, 290 S.E.2d 825 (Va. Supreme Court 1982). (in English)
32. Nelson v. Krusen, 678 S.W.2d 918 (Tex. Supreme Court 1984). (in English)
33. Ochs v. Borrelli, 445 A.2d 883 (Conn. Supreme Court 1982). (in English)
34. Pitre v. Opelousas General Hosp., 530 So.2d 1151 (La. Supreme Court 1988). (in English)
35. Plowman v. Fort Madison Community Hospital,

- 896 N.W.2d 393 (Iowa Supreme Court 2017). (in English)
36. Procanik v. Cillo, 478 A.2d 755 (NJ Supreme Court 1984). (in English)
 37. Proffit v. Bartolo, 412 N.W.2d 232, 238-43 (Mich. Ct. App. 1987). (in English)
 38. Reed v. Campagnalo, 630 A.2d 1145 (Md. App.1993). (in English)
 39. Rich v. Foye, 976 A.2d 819 (Conn. Super. Ct. 2007) (in English)
 40. Robak v. U.S. 658 F.2d 471 (1981). (in English)
 41. Roe v. Wade, 410 U.S. 113 (1973). (in English)
 42. Sernovitz v. Dershaw, 57 A.3d 1254 (Pa. 2012). (in English)
 43. Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 696-703 (Ill. 1987). (in English)
 44. Slawek v. Stroh, 215 N.W.2d 9 (Wis. Supreme Court 1974). (in English)
 45. Smith v. Cote, 513 A.2d 341 (NH Supreme Court 1986). (in English)
 46. Spires v. Kim, 416 S.E.2d 780 (Georgia 1992). (in English)
 47. Taylor v. Kurapati, 600 N.W.2d 670 (Mich. App. 1999). (in English)
 48. Turpin v. Sortini, 643 P.2d 954 (Cal. Supreme Court 1982). (in English)
 49. Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. Supreme Court 1990). (in English)
 50. Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. Supreme Court 1990). (in English)
 51. Willis v. Wu, 607 S.E.2d 63 (SC Supreme Court 2004). (in English)
 52. Wood v. University of Utah Medical Center, 67 P.3d 436 (Utah Supreme Court 2002). (in English)