



WRONGFUL BIRTH AND WRONGFUL CONCEPTION: IS THERE A RIGHT TO COMPENSATION?

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SUMMARY

As the courts face a rising number of wrongful birth and wrongful conception claims brought by the parents, who are seeking for the compensation for a birth of an unwanted child, caused by the health care provider's wrongful actions, the courts were bound to find a way to be able to arrive at a reasonable decision concerning allowable damages in birth-related cases.

The common law jurisdictions experience fewer problems while dealing with these types of claims and throughout the years of case practice the common law courts managed to distinguish the public policy considerations that a child is a blessing, from the point of view that it actually causes financial damages which are triggered by the doctor's negligent actions. It is commonly agreed that in certain situations there is a breach of health care provider's duties owed to their patients and that they are liable for the damages occurred, and they are entitled to compensate for the financial losses that their patients had experienced.

Although, it must be stressed that the burden of acting as a reasonably prudent person falls not only on the health care provider's shoulders, but also must be applied to the patients, in this way preventing the possible over-speculation of the wrongful birth and wrongful conception causes of the action.

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Nevertheless, there are a lot of facts that need to be proved and conditions to be met in order to be able to bring a wrongful birth or wrongful conception lawsuit before the court, but it is clear that the parents have a right to seek for damages for a birth of an unwanted child when the birth was caused by the health care provider's negligent actions.

KEYWORDS

Wrongful birth, wrongful conception, medical malpractice, negligence, damages.

INTRODUCTION

While there are certain doubts, that the birth of an unwanted child constitutes no damage, recently, it is being found that raising an unplanned child is an expensive financial burden, which if caused against genuine parents' will, can be held as an existence of an injury, which should be compensated. These claims are brought before the courts by the parents who argue that they experienced damages caused by the health care provider's negligence and those damages arose from a lack of information, negligently performed termination of pregnancy, poor genetic counselling or failed vasectomy or sterilization procedures, which resulted in a birth of an unwanted child.² Wrongful conception claims arise because of health care provider's negligent actions and subsequently the parents give birth to a healthy, although, unwanted child.³ Wrongful birth claims are brought before the court by the parents, who seek for damages for a birth of a disabled child, who originally was a planned child, but if the parents would have been informed about the probability of impairment, they most likely would have terminated the pregnancy.⁴ All these cases raise the same question: do the parents have a right to seek for damages for a birth of an unwanted child, caused by the health care provider's negligence? This article discusses the wrongful birth and wrongful conception causes of action as an issue arising from the health care

² M. Kancler, "To be or not to be born? Civil Liability for damages resulting from birth in a comparative context: recent Polish and Irish caselaw concerning wrongful birth and wrongful conception", *Electronic Journal of Comparative Law*, vol. 13.3 (September, 2009), <http://www.ejcl.org>

³ *Nanke v. Napier*, 346 N.W.2d 520, 521 (Iowa 1984)

⁴ *Procanik by Procanik v. Cillo*, 97 N.J. 339, 348 (1984)

provider's negligent actions point of view and does not dispute its relevance with a fundamental human right to life.

Considering today's development of medical technology, conditions such as Down's syndrome can be identified during the first weeks of pregnancy and it allows the parents to make a reasonable decision whether they want to proceed with the pregnancy or terminate it on the legal basis. The damages might be also caused by the failure to inform the parents about the availability of prenatal tests, which can provide information about the pregnancy and could, affect their decision either to continue the pregnancy or to terminate it.

The purpose of this article is to answer the question whether the parents can claim for financial loss in wrongful birth and wrongful conception cases and to disclose what the criteria for the allowable damages are in common law and civil law legal systems.

The main object of this issue is the parents' legal right to receive a compensation for the experienced financial loss caused by the health care provider's negligent actions.

The analysis consists of a comparison of different national courts' decisions under the applicable laws of common law and civil law countries. It is essential to emphasise the novelty of these types of claims in civil law countries as opposed to common law countries, as, for example, in the courts of the United States the wrongful birth claims have been intensively discussed, while in civil law countries, these types of cases are usually being avoided or dealt in the most conservative way possible. Besides the main object to be discussed in these types of cases, it is also obligatory to disclose the different legal capacities of the allowable damages and the elements of the traditional requirements for negligence claims. Also, it is essentially important to determine to what extent the awards should be granted for the experienced damages and to identify the legal basis of the application of the offset.

In order to answer the raised question, whether parents have a right to compensation, three main research methods were used. Firstly, the historical method was used to analyse how the wrongful birth and wrongful conception claims developed and how courts' decisions changed throughout the years. Secondly, a comparative method was used to disclose allowable damages rewarded in common law and civil law legal systems. Thirdly, a systematic analysis was employed to determine different approaches regarding wrongful birth and wrongful conception causes of action concerning different circumstances of cases.

1. WRONGFUL BIRTH AND WRONGFUL CONCEPTION

1.1. THE CONCEPT OF WRONGFUL BIRTH AND WRONGFUL CONCEPTION

The doctrine and jurisprudence commonly distinguish two types of claims that are linked to the fact of the birth of an unwanted child. These types are wrongful birth and wrongful conception claims.

Wrongful conception claim⁵ is brought by the parents against the health care provider, who negligently performed either sterilization or vasectomy procedures, or failed to conduct an abortion.⁶ One of these negligently performed procedures is the cause of an unplanned pregnancy and the birth of an unwanted child. Wrongful conception claims argue that if not for the health care provider's negligent actions, the parents would have avoided conceiving and giving birth to a child, thus in other words, the plaintiffs originally did not want to have (any more) children. In many cases the main reasons for parents who have tried to prevent the pregnancy vary in many personal reasons ranging from economics to preference.⁷ However, no matter what the reason was, it is unanimously agreed that this is a personal decision that the couple is entitled to make.

Generally, these types of claims arise as a consequence of poorly performed pregnancy preventing procedures such as sterilization or vasectomy, which resulted in an unplanned pregnancy or a failed termination of pregnancy leading to a continuation of carriage of an unwanted child. The most common wrongful conception type of claim brought before court is illustrated in the example, of Mr. And Mrs. Rouse⁸. Mrs. Rouse who sought medical advice of Dr. Wesley for a tubectomy⁹ was informed that “the procedure would result in her being unable to conceive a child and that the procedure would be permanent.”¹⁰ The test results after the

⁵ In some scientific literature also known as “wrongful pregnancy” claims.

⁶ Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984)

⁷ Byrne v Ryan, High Court, 20 June 2007, [2007] IEHC 207⁵⁵.

⁸ Rouse v. Wesley, 196 Mich. App. 624, Michigan Court of Appeals (Mich. Ct. App. 1992)

⁹ Also known as a tubal ligation, which is a surgical procedure for sterilization in which a woman's fallopian tubes are clamped and blocked, which prevents eggs from reaching the uterus for implantation.

¹⁰ See no.8, Rouse v. Wesley.

surgery showed that the sterilization procedure wasn't successful and the patient might still get pregnant, if other contraceptive measures will not be taken. Mrs. Rouse was not informed about the current situation what subsequently led to Mrs. Rouse becoming pregnant with her sixth child.¹¹ Mr. and Mrs. Rouse brought a claim before the court, arguing that the health care provider acted negligently and his actions caused a birth of an unwanted, although healthy child.¹² The court allowed the claim to be brought for a hearing and awarded damages for the Rouse family, motivating its decision on the grounds that a claim for wrongful conception was allowable when the pregnancy could have been avoided if not for the health care provider's negligent actions, which caused the recognizable injury.¹³

The second birth-related claim involving a birth of an unwanted child that is being brought before the court is the so-called wrongful birth claim. The wrongful birth claim is brought before the court by the parents in order to seek for damages for the birth of a disabled child, when the impairment resulted either from defendant's failure to provide necessary information for the parents or misdiagnosed impairment during the early stage of pregnancy, thus depriving the parents of a right to terminate the pregnancy. The wrongful birth claims do not involve the cases when the impairment or any other harm was caused by the health care provider's negligent actions to the newly born child. On the contrary, these types of claims consider the defendant's negligence that was the cause of the parents being deprived of the possibility of making a reasonable decision either to terminate the pregnancy or to continue it and give birth to a defected child.

In cases when the child is born with a certain kind of disability and that impairment could have been foreseen by the health care provider, the child himself, whilst genuinely a wanted child, becomes an unwanted consequence and a financial burden with higher expenses than planned before.¹⁴ The reasoning behind this type of claims is that the parents are making the defendants take the responsibility for not making them aware of the potential abnormalities and not being able to make a timely decision, whether to proceed with the pregnancy or not.

¹¹ *Id*

¹² *Id*

¹³ *Id*

¹⁴ C.M. Thomas, *Claims for wrongful pregnancy and child rearing expenses*, Discussion paper series 213, New Zealand, 2002, p.14.

The essential thing is to distinguish a wrongful birth cause of action from wrongful conception cause of action. In order to fulfil the wrongful birth claim, there have to be three main conditions: the expected child has to be wanted from the beginning of the pregnancy; the parents have to be deprived of a right to be informed and denied to make a reasonable decision whether to proceed with the pregnancy or to terminate it; the health care provider's negligent actions have to be identified. To fulfil the wrongful conception claim, there has to be a negligently performed pregnancy-preventing procedure carried out by the health care provider, loss of the possibility to make a decision to terminate the pregnancy and an initial intention by the parents not to have (any more) children from the beginning of pregnancy. Still there is one common issue uniting these two causes of action - as a result of health care provider's negligent actions, parents are left off with an unwanted child.

1.2. THE HISTORICAL DEVELOPMENT

In the earliest cases, courts refused to recognize wrongful birth or a wrongful conception as causes of action and rejected any claims by the plaintiffs seeking for an award for damages experienced. These types of decisions were based on a public policy statement that a birth of a child could never be considered as a compensable wrong or as damage overall.

However, one of the first cases to recognize wrongful birth action was *Jacobs v. Theimer*¹⁵, where a child was born with major organs defects caused by the mother contracting rubella in her first month of pregnancy.¹⁶ Mrs. Jacobs was seeking for the medical advice whether her illness might have any impact to the foetus and was reassured that there is no possible threat for the child.¹⁷ The claim was brought before the court by Mrs. Jacob and her husband, arguing that the health care provider was negligent in failing to diagnose the rubella and to advise them of the possible risk.¹⁸ Mrs. Jacobs said that if she had known about the possibility that the child would be born with some kind of abnormalities, she would have terminated the pregnancy, but because

¹⁵ *Jacobs v. Theimer*, 507 S.W.2d 288, Court of Civil Appeals of Texas, Forth Worth (Tex. Civ. App. 1974)

¹⁶ *Id*

¹⁷ *Id*

¹⁸ *Id*

of the health care provider's malpractice, she was deprived of this right.¹⁹ The court allowed damages, but only for the expenses reasonably necessary for the care and treatment of the child's disabilities.²⁰ The parents were not awarded for any non-pecuniary damages, such as emotional pain or suffering.²¹

The first wrongful birth claims caused some disturbances in the courts because the health care providers were brought before the courts by the claims for the genetic abnormalities that the children had, even though there was nothing in health care provider's power to do to prevent these type of defects from happening. It must be emphasised that at that time the parents couldn't do anything either, because terminating the pregnancy was illegal in most of the jurisdictions. After allowing the abortion, the wrongful birth cause of actions became more recognized.

The most significant change in the area of birth-related cases, involving an unwanted child, was made after the *McFarlane v. Tayside Health Board*²² decision. In *McFarlane*, the father Mr. McFarlane underwent a vasectomy operation with the agreement of his wife, because they both considered their family complete, as they already had four children.²³ The McFarlanes were advised that no contraceptive precautions need to be taken and by relying on this advice, subsequently Mrs. McFarlane became pregnant.²⁴ The McFarlanes sued the health board arguing that if not for the negligent advice by the health care provider, Mrs. McFarlane would have not become pregnant, which was the initial aim of Mr. McFarlane undergoing the vasectomy.²⁵ The plaintiffs were also awarded for the parental economic losses and upcoming financial burdens in the future, since the court found that unplanned pregnancy is a breach of parent's right to family planning and that the defendant had a duty to foresee it, and as a result, he is liable under the law of negligence.²⁶

After the *McFarlane* decision, it became clear that the main reason holding the courts back from awarding damages was the public policy issue, which argued whether the genetic

¹⁹ *Id*

²⁰ *Id*

²¹ *Id*

²² *McFarlane v. Tayside Health Board*, 2000 SC (HL) 1, [2000] 2 AC 59, 2000 SLT 154, 1999.

²³ *Id*

²⁴ *Id*

²⁵ *Id*

²⁶ *Id*

abnormalities can be held as a compensable injuries and whether a birth of an unwanted child should have a monetary value. After a while of considerations and numerous amounts of wrongful birth and wrongful conception cases being brought before courts, the public policy issue, that a new born child cannot be held as damage, was reconsidered. The courts overcame their firm opinion that the only cause of action requiring the award of damages because of a deprived right to terminate a pregnancy, can only be dependent upon the reason when there was a threat to mother's health or the pregnancy was caused by a criminal act.²⁷ It was decided, that there's a social interest in decreasing the incidents of genetic defects by actually posing liability upon health care providers, under the general tort principles, for the direct negligent actions, such as deprivation of a woman's right to be informed about the foetus that she is carrying and make a reasonable decision whether to continue her pregnancy.

1.3. THE PARENTS' RIGHT TO FAMILY PLANNING

The growth of wrongful birth and wrongful conception claims started to raise moral questions, whether a woman's life can be put first of a new born child's life and even if the parents' right to plan their family exists or if the child could be held as a source of damage, when claiming for a reward before the court?

In 1994, The United Nations coordinated an International Conference on Population and Development in Cairo, which resulted in adopting a document for the United Nations Population Fund. One of the issues discussed in this conference was the right to family planning and that all the individuals, as all the couples, have a fundamental right to make their own decisions based on a number and spacing of their children, the right to be provided with all the necessary information about their children and make reasonable decisions based on the information provided.²⁸ It was also decided that it is essential to “ensure that family planning, medical and related social services aim not only at the prevention of unwanted pregnancies but also at the

²⁷ *Id*

²⁸ World Population Plan of Action, United Nations Population Division, Department of Economic and Social Affairs, with support from the UN Population Fund (UNFPA), <http://www.un.org/popin/icpd/conference/bkg/wppa.html>.

elimination of involuntary sterility and sub fecundity in order that all couples may be permitted to achieve their desired number of children, and that child adoption may be facilitated”²⁹.

However, the wrongful birth and wrongful conception legal suits brought up a moral discussion, especially towards the birth of disabled children claims disapproving of these motions by arguing that this type of attitude devalues the lives of new born children with disabilities and in this way a question of discrimination might be implied. At first, the courts found it hard to distinguish public policy considerations from general torts liability, when taking these types of birth-related claims made it almost impossible to get a reward for experienced damages. The judicial system struggled recognizing such right as family planning, although it was a fundamental right recognized all around the world and the courts associated wrongful birth and wrongful conception claims as a contribution to discrimination against persons with impairments by relating the disability to the right for compensation.

The European Convention on Human Rights, Article 8 on the right to respect for private and family life states that “everyone has the right to respect for his private and family life ...” and that “[t]here shall be no interference by a public authority with the exercise of this right ...”. In *R.R. v. Poland*³⁰ case, the European Court of Human Rights stated that “the 1993 Act³¹ determining the conditions permitting termination of pregnancy expressly and unequivocally provides, and provided at the relevant time, for the State’s obligation to ensure unimpeded access to prenatal information and testing. Section 2 (a) of this Act imposed such an obligation on the State and local administration in particular in cases of suspicion of genetic disorder or development problems. This obligation covered all cases in which such suspicion arose in respect of a pregnancy, with no distinction whatsoever being drawn in the Act based on the severity of the

²⁹ World Population Plan of Action, United Nations Population Division, Department of Economic and Social Affairs, with support from the UN Population Fund (UNFPA), <http://www.un.org/popin/icpd/conference/bkg/wppa.html>. para. 29(c).

³⁰ *R.R. v. Poland*, no. 27617/04, European Court of Human Rights, fourth section, Strasbourg, 26 May 2011. (a pregnant woman, Mrs. R.R. Who claimed that she was abusively denied access to the genetic prenatal tests to which she was entitled when pregnant due to doctor’s lack of proper counselling. She therefore missed the time-limit for a legal abortion and subsequently gave birth to an impaired child).

³¹ The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act, section 4 (a) states, that “[a]n abortion can be carried out only by a physician where pregnancy endangers the mother’s life or health; prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening ailment; there are strong grounds for believing that the pregnancy is a result of a criminal act”.

suspected ailment”.³² The European Court of Human Rights grounded that “private life” is a broad concept which holds the right to personal autonomy and personal development, and the notion of private life applies to decisions to both have or not to have a child.³³

Throughout the years, it was finally recognized that birth-related legal suits are not only about the personal tragedy about raising a child with abnormalities, but more likely about the financial burden which comes along with the birth of a disabled child, especially when the birth was a result of a health care provider’s negligent actions. The *McFarlane*³⁴ case was one of the first steps down the path where the birth of an unwanted child was considered as an economic burden that the parents must shoulder. It is essentially important that the couple would have the resources needed in order to complete the goals of raising a child and when a family reaches a decision that it does not have enough financial resources to take care of a new-born child, and by the negligent actions of a health care provider, the family is being put in the situation which they have been trying to avoid, it obviously constitutes a deprivation of the right to family planning. By bringing the claim for causes of action of wrongful birth or wrongful conception, the plaintiffs try to recover the unwanted financial burden that occurred as an injury.

2. ALLOWABLE DAMAGES AND THE REQUIREMENTS FOR NEGLIGENCE CLAIMS

2.1. THE REQUIREMENTS FOR A NEGLIGENCE CLAIM

Since the first birth-related claim until now, the elements for causes of action of wrongful birth and wrongful conception in common law jurisdiction, include the same traditional requirements as a general negligence claim. In order to state the case as a negligence case there must be four elements – duty fulfilled, breach, causation (or proximate cause) and damages.³⁵ Before allowing birth-related claims being accepted as a lawsuit, the courts are bound to examine all four negligence claim requirements as a whole and each one of them separately, to identify

³² See No. 30, R.R. v. Poland

³³ *Id*

³⁴ *McFarlane v. Tayside Health Board*, 2000 SC (HL) 1, [2000] 2 AC 59, 2000 SLT 154, 1999

³⁵ *Smith v. Cote*, 128 N.H. 231 Supreme Court of New Hampshire Hillsbrough (N.H. 1986)

that there are all the legal grounds to start the proceedings. Although the burden of proof of such negligence falls on the plaintiff's shoulders.

The analysis of the elements necessary for a negligence claim starts from the most important requirement - the plaintiffs must prove that the defendant had a duty to act in a certain way or provide some services. In birth-related type of negligence cases, the main duties that the health care provider is usually held liable for are the duty to provide the information for the parents or provide successful procedures that the patient asked for.

The second necessary element is commonly called breach of the duty.³⁶ These two elements (duty and breach) go to make up what the courts usually call negligence; but the term is frequently applied only to the second one. Usually plaintiffs in birth-related suits face no difficulty in claiming duty and breach, because it is acknowledged that the health care provider has a duty of care to the patients. The main question arising is if that owed duty was breached and this fact can be proved only by the evidence of the health care provider's treatment of the plaintiff.³⁷ Most traditional birth-related actions involve the misinterpretation of pre-natal tests, but parents have also successfully pursued health care provider for failing to advise that a particular post-pregnancy or pre-natal test was available.³⁸

The third requirement for the negligence claim is a reasonably close causal connection between the conduct and the resulting injury.³⁹ This is commonly called causation. Proving the cause is an exceptionally difficult task to do, as, for example, in wrongful birth cases one of the reasons occasionally given for refusing to recognize these types of claims is that “the physician cannot be said to have caused the defect”⁴⁰ because “[t]he disorder is genetic and not the result of any injury negligently inflicted by the doctor”.⁴¹ But wrongful birth suits do not require the plaintiff to prove causation “in the sense that a physician's negligence caused the birth defect”⁴²

³⁶ Torts: cases and materials, 9th edition, John W. Wade, Victor E. Schwartz, Kathryn Kelly, David F. Partlett, Westbury New York, The Foundation Press. Inc. 1994

³⁷ Gleitman v. Cosgrove, 227 A.2d 689, The Supreme Court of New Jersey, 49 N.J. 22 (1967)

³⁸ Reed v. Campagnolo, 630 A.2d 1145 (Md 1993) (finding cause of action where doctor allegedly failed to inform plaintiffs about existence of a diagnostic test that would detect neural tube defects); Berman v. Allan, 404 A.2d 8 (N.J. 1979) (finding cause of action where doctor allegedly failed to inform mother of availability of amniocentesis).

³⁹ See no. 35, Smith v. Cote.

⁴⁰ Becker v. Schwartz, 46 N.Y.2d 401, Court of Appeals of the State of New York (N.Y. 1978)

⁴¹ *Id*

⁴² McKenney v. Jersey City Medical Center, 771 A.2d 1153, 1161 (N.J. 2001)

but rather that “the defendant’s negligence was a proximate cause of the parents being deprived of the option to have an elective abortion”.⁴³ In jurisdictions that recognize birth-related suits, proximate cause requires a plaintiff to show that the mother would have had an abortion had she known of the defect or that the born child was unwanted *ab initio*.

The fourth and final element is an actual loss or damages resulting to the interests of the plaintiff. Proof of damages is an essential part of the plaintiff’s case, although the actual injury does not necessarily need to be physical, it must be real as opposed to imaginary. Courts in birth-related claims do not rush into naming the birth of a child as “damage”, but rather identifies the injury as a deprived right to make an informed decision or to be informed altogether.⁴⁴ When analysing the damages caused, the courts usually are facing the problem with determining the difference based on expenses associated with having a child as opposed to not having a child at all. However, there is no mutual point of view related to damage awards - each jurisdiction approaches different measures of damages awarded.

In general, in order to allege a negligence claim, the plaintiff must prove that there was a duty that the health care provider owed to the patient, that the health care provider breached it and that it was a proximate cause of damages experienced by the patient. It is important to prove all four requirements for the negligence to be imposed; otherwise, the court might not allow damages to be recovered. Since the burden of proof is the plaintiff’s responsibility, it is essential that the injury caused by the health care provider would be reasonable enough to proceed with the claim.

2.2. THE EXTENT OF HEALTH CARE PROVIDER’S LIABILITY

As for the health care provider who owes a duty to his patients, the law has recognized medical negligence as a lawful cause of action and as a provider of professional services he must meet specific requirements set by relevant rules. Negligence, as the most common theory of liability in medical malpractice litigations, is defined as a “conduct which falls below the standard

⁴³ *Id*

⁴⁴ *Roe v Wade*, 410 U.S. 113, U.S. Supreme Court (1973)

established by law for the protection of others against unreasonable risk”⁴⁵. The three main requirements for health care providers’ liability are: qualification, reasonable care and best judgment. Thus, the health care provider must possess the necessary degree of professional skills, for the medical field he’s meaning to practice.⁴⁶ Also, the health care provider must use his knowledge by exercising reasonable care to the patients and must give his best judgment for the treatment of his patients.⁴⁷

Based on the health care provider’s liability, there are three main duties that a health care provider owes to a patient, which are: to follow the accepted standard of care⁴⁸, provide all the essential information⁴⁹ and provide a fully informed consent⁵⁰. In order for the liability to be imposed, the health care provider must act wrongfully, in other words, he has to breach one of the duties owed to the patient. Clearly, for the negligence cause of action to be implied, there has to be harm suffered by the patient when the health care provider’s failure to provide adequate medical service is a proximate cause to the injury suffered. The failure to offer the screening for genetic testing, when there is a serious possibility of a genetic abnormality in the child, is one of them and should be considered as a departure from the standard of care.⁵¹

It must be stressed that the patients rely on the health care provider and expect to be supplied with the necessary information, since the health care provider is the first and sole source of this type of knowledge. Although, it is understandable that the health care providers cannot possess all the scope of increasing medical knowledge, but it is considered his duty to be familiarized with the recent developments as it is his area of expertise.⁵² Clearly, acting in the standard of due care for health care providers, in a situation when a health care provider is not certain that he did

⁴⁵ Restatement (Second) of Torts §282 (1965)

⁴⁶ Smith v. Cote, 128 N.H. 231 Supreme Court of New Hampshire Hillsbrough (N.H. 1986)

⁴⁷ *Id*

⁴⁸ Therefore, the physicians have to do everything in his power to perform a procedure as professionally as he is expected to regarding the level of standard care of a reasonable physician.

⁴⁹ This duty involves pre-operative and post-operative testing and counseling, meaning that the patient has to be informed throughout the whole process of vasectomy, sterilization or pregnancy.

⁵⁰ As for example, it cannot be said in advance that the vasectomy or sterilization procedure will be successful, so the physician is liable to inform his patient about this before and after the performance of the procedure.

⁵¹ See no. 46, Smith v. Cote

⁵² A. Holder, *Medical Malpractice law no. 49* (2d ed. 1978)

everything in his power to provide a suitable medical service, it is advisable to consider directing the patient to another specialist.⁵³ Failure to do that can also be held as a negligent action.

Concerning providing necessary information to a patient, a great example would be the *Becker v. Schwartz*⁵⁴ case where it was found that a woman, who was 37 years old, gave birth to a child suffering from a Down's syndrome and sued her health care provider for his negligent actions which caused a birth of an unwanted, disabled child.⁵⁵ The cause of such actions was that the plaintiff was not informed about the possible risk of having a child after age 35 and she was not inquired by her health care provider about possible genetic defects, and that a genetic testing would be a reasonable action to do.⁵⁶ The court reached a decision that the health care provider was liable for the damages experienced by the plaintiff, since foreseeability is attributable to the health care provider.⁵⁷ It is a health care provider's duty to supply any necessary information to the patient and make him aware of any possible negative consequences, in this case that giving birth to a child after age 35 may result in the child having some sort of abnormality, such as the Down's syndrome.⁵⁸

As in the *Keel v. Banach*⁵⁹ case, the court held that health care provider's liability may arise when he fails to provide information about the availability of genetic testing when there is at least a small possibility of a risk that he might foresee.⁶⁰ The health care provider is also liable when “<.> a reasonable physician should have known of the risk because the couple's previous child had a genetic disorder or because of the woman's advanced age”.⁶¹ However, health care provider's negligent actions arise not only from failing to give a proper advice or provide all the necessary information. It may also arise from failure to properly perform a medical procedure, such as vasectomy or sterilization. In *Boone v. Mullendore*⁶² the plaintiff claimed that her health

⁵³ Timothy J. Carey, *Physician's Liability for Pre-Conception Torts*, 54 Notre Dame Law, 696 (1978-1979), p. 704

⁵⁴ *Becker v. Schwartz*, 46 N.Y.2d 401, Court of Appeals of the State of New York (N.Y. 1978)

⁵⁵ *Id*

⁵⁶ *Id*

⁵⁷ *Id*

⁵⁸ *Id*

⁵⁹ *Keel v. Banach*, 624 So.2d 1022, Supreme Court of Alabama (Ala. 1993)

⁶⁰ *Id*

⁶¹ *Id*

⁶² *Boone v. Mullendore*, 416 So.2d 718, Supreme Court of Alabama (Ala. 1982)

care provider failed to remove her Fallopian tubes⁶³ and as a result she conceived and gave birth to a healthy, although unwanted child.⁶⁴ The court held that by recognizing wrongful conception claims and penalizing those health care providers, who acted negligently, it will encourage health care providers to accurately perform their tasks.⁶⁵ So, since mistakes can be made regarding performing procedures, such as sterilization or vasectomy, tort cause of action is a reasonable remedy for the patients who seek award for the damages caused by the health care provider's negligent actions.

However, since it is a common thing to expect that when an injury occurs, it involves health care provider's negligent actions, there are some situations when the health care provider is not liable for the damages experienced by the patients. As far as it concerns health care provider's liability, it should be mentioned that regarding birth of an unwanted child, it can result not only from health care provider's negligent actions. There are some situations when the parents, by their negligence or untruthfulness, put themselves in a situation when an unwanted child is born. As for example in *Tosh v Tosh*⁶⁶ case where a dispute arose between the former wife and husband, regarding a child born after the divorce.⁶⁷ It was found, that the former husband had undergone a vasectomy procedure years before the divorce, although after the mentioned divorce the broken up couple had engaged in numerous sexual intercourses.⁶⁸ The health care providers were involved, as stating a possibility for negligently performed vasectomy and possibly liable for the birth of an unwanted child.⁶⁹ As it was found later on, the health care providers were not liable for the birth of a child, since the former wife was untruthful and had other sexual partners besides her former husband.⁷⁰ Eventually it was held that the health providers did not breach their duties in performing vasectomy, since the former husband was sterile and the former wife was at fault by finding out who is the real father of the unwanted child.⁷¹

⁶³ See no. 9, Tubal litigation

⁶⁴ See no. 55, *Becker v Schwartz*

⁶⁵ *Id*

⁶⁶ *Tosh v Tosh*, 214 Cal.App.2d 483, Court of Appeal of California, First District, Division Three (Cal. App. 1963)

⁶⁷ *Id*

⁶⁸ *Id*

⁶⁹ *Tosh v Tosh*, 214 Cal.App.2d 483, Court of Appeal of California, First District, Division Three (Cal. App. 1963)

⁷⁰ *Id*

⁷¹ *Id*

To summarize, in order to impose health care provider's liability, there must be a breach of one of the three duties, either the expected standard of care to the patient was not fulfilled, the health care provider failed to provide all the necessary information or a fully informed consent. However, there are some cases when a health care provider conformed to the raised standard of care for his field of practice and a birth of an unwanted child was a result of patients' negligent actions, and the health care provider could not be held liable for the damages occurred.

2.3. ALLOWABLE DAMAGES AND THE MAXIMUM AMOUNT OF REASONABLE AWARDS

2.3.1. The cases of wrongful conception

The distribution of damages relating to wrongful birth and wrongful conception cases is uneven from one court to another. Regarding wrongful conception cases, the courts have considered three different paths for allowable damages, which consist of:

- 1) Complete recovery of child-rearing costs;
- 2) Recovery of child-rearing costs reduced by evaluating the benefit of parenthood;
- 3) No recovery of child-rearing costs at all;

The jurisdictions that have considered wrongful conception claims most commonly allow only the financial damages experienced during the pregnancy, such as expenses for the maternity clothing, medication, pre-natal tests, loss of women's monthly incomes, etc. The court finds it hard to reward the parents for the financial burden after the birth of an unwanted child and opposes it to the parents' duty to take care of a newly born child. For example in *Sorkin v. Lee*⁷² case, the court had to deal with the plaintiffs' claim for damages where a vasectomy was performed negligently and resulted in a birth of a normal, healthy child.⁷³ It was declined to reward the parents with a child-rearing costs, arguing that “[d]amages may not be recovered for the normal expenses of rearing and educating a healthy but unwanted child. Such damages are not only speculative beyond realistic measurement, but in this case they were avoidable because plaintiffs did not claim that the defendant's conduct prevented them from discovering the

⁷² *Sorkin v. Lee*, 53 N.Y.2d 797, Court of Appeals of the State of New York (N.Y. App. Div. 1980)

⁷³ *Id*

pregnancy or terminating it or that abortion was contraindicated because of any medical condition of the mother”.⁷⁴ The court held that since there was no medical condition of the mother to be contraindicated in terms of an abortion, wherefore she had a choice to terminate the pregnancy as she found out about it in an early stage and it was medically safe to do so, there was no need to increase the award for the plaintiffs because of the opportunity to make a reasonable decision.⁷⁵ Although, the court came to a decision that when the pregnancy was the result of medical malpractice “<.> the established law permitted Mr. Sorkin to recover damages for the medical expenses for the care and treatment of his wife during pregnancy and delivery of the baby and for the loss of her services and consortium and it permitted Mrs. Sorkin to recover for the physical injury and pain occasioned by her unanticipated pregnancy.”⁷⁶

These types of decisions are mainly made by examining the circumstances of the parents, in other words, the courts takes into account such factors as the number of children in the family, the financial possibilities to take care of a new family member and the reason itself as to why the parents choose to limit the size of their family. In *Ziemba v. Sternberg*⁷⁷ case, the health care provider failed to discover the pregnancy for more than four months and “<.> that the failure to diagnose her pregnancy was due solely to the negligence and carelessness of the defendant in failing to recognize obvious signs and symptoms within a reasonable time when she would have taken the necessary medical steps and terminated her pregnancy”.⁷⁸ Thus, the woman was deprived of the right to make an informed decision and ended up with an unwanted child without an opportunity to make a reasonable decision, whether she wanted to keep the child or terminate the pregnancy.⁷⁹ It was decided by the court that the defendant had all the possibilities to foresee the possible damages, knowing his qualification and the development of the recent medical technologies that might arise from his negligent actions which include the maintenance of a

⁷⁴ Id

⁷⁵ Id

⁷⁶ *Sorkin v. Lee*, 53 N.Y.2d 797, Court of Appeals of the State of New York (N.Y. App. Div. 1980)

⁷⁷ *Ziemba v. Sternberg*, 45 A.D.2d. 230, Appellate Division of the Supreme Court of New York, Fourth Department (N.Y. App. Div. 1974)

⁷⁸ Id

⁷⁹ Id

child.⁸⁰ Following its argumentation, the court awarded the plaintiffs with a complete recovery for child-rearing costs, which includes the offset until the majority of the child.⁸¹

As the courts clarify their decisions, it becomes obvious that in wrongful conception claims there are two turning points - whether the plaintiffs are going to be awarded only for the pregnancy-related costs or complete child-rearing costs until the child reaches full age. The important factors are the following: when the plaintiffs found out about the pregnancy and if they had the opportunity for abortion, in other words, it is essential to determine whether the plaintiffs had a right to make a decision to terminate the pregnancy, or they were deprived of it and were forced to proceed with carrying the unplanned child.

2.3.2. The wrongful birth cases

As compared to allowable damages in wrongful conception claims, the rewards for damages experienced under wrongful birth cause of actions are fairly equal in common law jurisdiction. The amount of the offset for the damages caused by the health care provider's negligent actions is usually based on the costs that exceed the usual costs of raising a healthy child, such as extraordinary expenses for the care, maintenance and education of the handicapped child. "The usual rule of compensatory damages in tort cases requires that the person wronged receives a sum of money that will restore him as nearly as possible to the position he would have been in if the wrong had not been committed".⁸² By rewarding parents with these types of damages, it is thought to be not speculative and consecutive with the idea that health care providers must be liable only for the damages caused by negligent actions. Also, it is held that the parents must be awarded for the deprived right to make a reasonable decision whether to continue with the pregnancy or to terminate it⁸³. In *Haymon v Wilkerson*⁸⁴, the plaintiffs alleged that if not for Dr.

⁸⁰ *Id*

⁸¹ *Id*

⁸² *Smith v. Cote*, 128 N.H. 231, 232 Supreme Court of New Hampshire Hillsborough (N. H. 1986)

⁸³ Maria Canellopoulou Bottis, *Wrongful Birth and Wrongful Life Actions*, *European Journal of Health Law* 11: 55-59, 2004.

⁸⁴ *Haymon v. Wilkerson*, 535 A.2d. 880, District of Columbia Court of Appeal (D.C. 1987)

Wilkerson's negligent actions, involving the reassurance that the amniocentesis⁸⁵ was not necessary, the parents would have had an abortion, but they were deprived of this right and Ms. Haymon gave birth to an impaired child with the Down's syndrome.⁸⁶ "Ms. Haymon conceded on appeal that Dr. Wilkerson should not be held responsible for the expenses of raising a healthy child because the Haymons willingly undertook to conceive and raise a healthy child. She sought only to recover the wholly unanticipated extraordinary medical expenses which she, and her husband, would incur in raising their mentally and physically handicapped child".⁸⁷ The court held that the plaintiffs' claimed damages were reasonable enough and although they will derive some pleasure from the parenthood, they will still experience a financial burden caused by the abnormalities that their child had.⁸⁸ By rewarding the plaintiffs not only with the damages for the extraordinary expenses they might experience, but also for the deprivation of the right to be informed and, consequently, make a reasonable decision, the court held that "[t]o hold otherwise would in effect "immunize from liability" the health care provider giving inadequate guidance to persons who would choose to exercise their constitutional right to terminate pregnancy where the child, if born, would suffer from genetic defects"⁸⁹.

Generally, when resolving the question of allowable damages, they are measured by the life of the child, more specifically, his dependence on his parents. In some jurisdictions, the obligatory support of the parents to the child does not have a bar, which means that if a child is in need of financial support, the parents are bound to provide it for him/her. Although in most of the jurisdictions, the dependence of a child terminates when he reaches majority, however the bar of majority varies from one country to another, which can be from 18 years old to 21 years old.

However, there are some exceptional cases, where the consistent rule that the pecuniary damages can be awarded just for the period of time, until the child reaches full age, is disobeyed and some of the parents are awarded with the offset for rearing an impaired child in post-majority,

⁸⁵ A medical procedure used in prenatal diagnosis of chromosomal abnormalities and fetal infections, usually done to determine whether a baby has certain genetic disorders or a chromosomal abnormality, such as Down syndrome.

⁸⁶ Haymon v. Wilkerson, 535 A.2d. 880, District of Columbia Court of Appeal (D.C. 1987)

⁸⁷ *Id*

⁸⁸ *Id*

⁸⁹ *Id*

as in *Clark v. Children's Memorial Hospital*⁹⁰, where the plaintiffs alleged that because of the health care provider's fault, Mrs. Clark gave birth to a child, named Timothy, with the Angelman Syndrome.⁹¹ The plaintiffs claimed for their damages for extraordinary costs of raising their dependent, impaired child beyond the age of majority.⁹² It was found that the Clarks already had their first child Brandon with the Angelman Syndrome and before conceiving the second one, they wanted to be reassured that he will not be affected by this disease, so they sought genetic testing and were confirmed that they were not the carriers of this disease.⁹³ As the plaintiffs were given inaccurate information, the court found that the health care provider's negligent actions were the direct effect of the birth of an impaired child and that the damages in this type of birth-related case for the extraordinary costs of caring and supporting a dependent disabled child beyond the age of majority were proportionately reasonable.⁹⁴ The court reached a decision that “<.> as a disabled adult, Timothy will not be able to take care of himself in any way and will never be emancipated; plaintiffs will continue to care for Timothy into his majority; and plaintiffs have incurred and will continue to incur extraordinary expenses necessary to properly manage and treat Timothy's Angelman Syndrome throughout his majority.”⁹⁵ Thus, since there was a collision between wrongful birth and wrongful conception cause of actions, as the child was unwanted before the conception because of the probability of abnormalities in the born child, the allowance of damages beyond the age of majority was held as a reasonable and just decision, since the birth itself was caused by health care provider's negligent actions.⁹⁶

⁹⁰ *Clark v. Children's Memorial Hospital*, 391, Ill.App.3d. 321, Appellate Court of Illinois, First District (Ill. App. 2009)

⁹¹ Angelman Syndrome is a neuro-genetic disorder characterized by severe intellectual and developmental disability, sleep disturbance, seizures, jerky movements and other unusual behavior. This disease is genetically inherited and can be detected by the genetic testing, even before the conception of the fetus.

⁹² See no. 90, *Clark v. Children's Memorial Hospital*

⁹³ *Id*

⁹⁴ *Id*

⁹⁵ *Id*

⁹⁶ *Clark v. Children's Memorial Hospital*, 391, Ill.App.3d. 321, Appellate Court of Illinois, First District (Ill. App. 2009)

2.3.3. Non-pecuniary damages

As obvious as it gets, the parents who suffer from damages caused by the health care provider's negligent actions, regarding wrongful conception cases, generally are awarded only with the pecuniary damages, and their claims concerning emotional suffering and distress are being rejected. As a rule, the parents who allege wrongful conception cause of actions are not rewarded for the emotional suffering and distress arguing that a birth of a healthy child is not an emotional damage.⁹⁷ The only possible situation for the plaintiffs to be rewarded emotional damages in wrongful conception claims is when the newly born child is being placed for adoption. In other words, in order to allege emotional damages, the unwanted child has to be placed for adoption immediately after birth; hereby the parents would be able to claim damages for the recovery period, pain and suffering, emotional distress regarding pregnancy and the adoption process.

A similar situation occurs with the claims regarding wrongful birth cause of actions; it is commonly agreed that the birth of an impaired child may bring up some emotional pain and suffering caused by the burden of a disablement occurred to the child, but rewarding parents for tangible and intangible damages would be held as over-penalizing and unjust.⁹⁸ In order to avoid the risk of over penalizing, the court must evaluate the emotional suffering experienced and award the parents to such extent that the emotional distress would result in tangible pecuniary losses, such as medical expenses or counselling fees⁹⁹ as in the *Smith v. Cote*¹⁰⁰ case, where the plaintiff sued her health care provider for failing to advise on possible consequences of her being exposed to rubella while being pregnant.¹⁰¹ As a result of the health care provider's negligent actions, the plaintiff gave birth to a child suffering from the congenital rubella syndrome¹⁰²; if she had known about the potential defects in a foetus exposed to rubella, she would have had terminated the

⁹⁷ *Id*

⁹⁸ *Smith v. Cote*, 128 N.H. 231, 232, Supreme Court of New Hampshire Hillsbrough (N.H. 1986)

⁹⁹ *Id*

¹⁰⁰ *Id*

¹⁰¹ *Id*

¹⁰² This syndrome can occur in a developing foetus of a pregnant woman who has contracted rubella, usually in the first trimester. Children exposed by this disease might born with eye abnormalities, congenital heart diseases, spleen, liver or bone marrow problems, intellectual disability, etc.

pregnancy.¹⁰³ The court reached a decision that in wrongful birth cause of action, as long as the tangible damages are recovered, the damages experienced in emotional distress cannot be awarded, unless they manifested in tangible pecuniary losses.¹⁰⁴

As far as allowable damages in birth-related causes of action are concerned, there is no common rule or consistent practice that would directly lead to problem solving answers. It is obvious that since there was a negligence claim, whether it is a wrongful birth or wrongful conception claim, courts generally allow pecuniary damages for the financial losses experienced by the plaintiffs. It is rare that the parents would be rewarded for the emotional distress and pain suffered, since there is a reasonable possibility of over-penalizing the health care provider, which would be held unjust and against the law.

3. THE CIVIL LAW COURTS' APPROACH TOWARDS WRONGFUL BIRTH AND WRONGFUL CONCEPTION CLAIMS

3.1. HEALTH CARE PROVIDER'S LIABILITY UNDER TORT LAW IN A CIVIL LAW LEGAL SYSTEM

The common law legal system has been dealing with the wrongful birth and wrongful conception cases for over 50 years, which means that there is a numerous amount of birth-related case practice, clarifying the position of the courts in common law jurisdictions. The causes of action of wrongful birth and wrongful conception is not a topic that had never been mentioned before in the civil law system, but it is evidently less discussed in courts, as compared to the common law countries. There are just a few cases which deal with birth-related claims and even fewer amounts of decisions in favour of the parents seeking for recovery of the damages experienced by the health care provider's negligent actions. Since there is no harmonization under the European Union Law, each civil law country is left to decide the wrongful birth or wrongful conception cases under their own national laws, which makes it almost impossible to determine a common view on birth-related types of court decisions.

¹⁰³ See no. 98, *Smith v. Cote*

¹⁰⁴ *Id*

Regarding wrongful conception or wrongful birth claims, the view of the courts varies from one country to another, but most commonly the civil law courts resemble common law courts approach and imply tort liability in wrongful birth and wrongful conception cases. For example, in Austria¹⁰⁵, under the national law, the wrongful conception claims are not allowed even though the birth of a child arose from the health care provider's negligent actions.¹⁰⁶ The Supreme Court of Austria stated that there is no liability for the health care provider to compensate for the costs of the maintenance of a child, who was born healthy and will only bring joy of the parenthood to the parents.¹⁰⁷ Although, even if a health care provider's duty owed to the patient was breached, it would be held inappropriate and unreasonable to allow remuneration for a joyful thing that is a birth of a healthy child.¹⁰⁸ Under the French law, the *Cour de Cassation* takes a similar point of view towards birth-related cause of action¹⁰⁹, reasoning that even though there was an infringement of a doctor's duty, a newly born child cannot be held as a damage and since there is no injury, there is no case to be solved or a legal damage to be rewarded.¹¹⁰

A completely different point of view concerning wrongful conception cases is held under the Swiss law, where the *Tribunal Fédéral Suisse* not only allowed a birth-related cause of action, but also rewarded the parents with a pecuniary relief regarding maintenance of a child.¹¹¹ The court emphasises that it is not the child who should be held as damage, but the financial consequences that come along with the birth and maintenance of the child.¹¹² The *Tribunal Fédéral Suisse* also stated that the damage caused by the health care provider's negligent actions consists of the legal obligation that applies to the parents and by failing to perform a medical

¹⁰⁵ Oberster Gerichtshof (Supreme Court) 14 September 2009, 6 Ob 101/06f (the plaintiff's husband undergone a vasectomy procedure, which however failed and the plaintiff became pregnant, and gave birth to a healthy child.)

¹⁰⁶ *Id*

¹⁰⁷ *Id*

¹⁰⁸ *Id*

¹⁰⁹ Cour de Cassation, Chambre 1 (Supreme Court, Civil Division) 25 June 1991. (a pregnant women underwent a failed abortion and later gave birth to a healthy child. She sued the doctor who had carried out the abortion and the court rejected her claim as there was no relation to the doctor's fault).

¹¹⁰ *Id*

¹¹¹ Tribunal Fédéral Suisse, 20 December 2005, ATF 132 III 359. (the plaintiff had a contractual relationship with her physician and it was agreed that right after the birth of her second child, a sterilization procedure would be performed, since she wanted to have no more children. By his forgetfulness, the physician failed to perform the procedure asked and as a consequence, the plaintiff gave birth to her third child.)

¹¹² *Id*

procedure, the health care provider is directly responsible for the tangible financial loss that the parents will experience in the future.¹¹³

Though some civil law jurisdictions allow wrongful conception cause of action, the allowable damages rewarded to the parents are nothing compared to those recovered in the common law jurisdiction. As far as a birth of a healthy child is concerned, a compensation for the costs of the maintenance of the child is a rare relief to be awarded with. The Belgian Court of Appeal grounded¹¹⁴ that the only compensation allowed was for the material damages resulting from the sterilization procedure, loss of salary, the necessary clothing and food, during the pregnancy.¹¹⁵ Since the child was born healthy and he will only bring love and affection to the parents, it is held that the benefits of the parenthood will compensate any tangible or intangible damage experienced by the parents,¹¹⁶ although, under the Netherlands law, there is an exception for receiving a compensation for the maintenance of a healthy child.¹¹⁷ In order to be awarded with a compensation for the maintenance of a child, the parents must prove that because of the size of the family, the birth of another child would impose a heavy financial burden and will likely affect the financial situation of the family.¹¹⁸

As a contrast to wrongful conception lawsuits, wrongful birth claims are accepted more easily and the damages are being awarded more generously. The courts of the civil law legal system find that the financial distress in which the parents are being put by the birth of an impaired child, should qualify as a compensable damage.¹¹⁹ It should be noted that in order to claim for damages the parents must prove that if not for the health care provider's negligent actions and if they had known about the possible abnormalities, they would have opted to terminate the

¹¹³ *Id*

¹¹⁴ Hof van Beroep (Court of Appeal) Antwerp, 8 September 2003. (A woman underwent a sterilization procedure in order to have no more children, since she already had four. Despite the procedure, the woman became pregnant and gave birth to a healthy child. The parents sued the physician alleging that he had committed a fault in the sterilization procedure and that he did not warn them of the risk of failure.)

¹¹⁵ *Id*

¹¹⁶ *Id*

¹¹⁷ Hoge Raad (Supreme Court) 21 February 1997. (the plaintiff underwent a sterilisation procedure in order not to have any more children, but because of the physician's negligently performed procedure, she became pregnant and gave birth to a healthy, although unwanted, child).

¹¹⁸ *Id*

¹¹⁹ G Viney/P Jourdain, *Les conditions de la responsabilité* (3rd edition 2008) no 249-5

pregnancy. Although this issue does not arise in the jurisdictions where an abortion is held illegal, such as Ireland.

The most extreme difference between birth-related claims is found under Austrian national law, where in wrongful birth cases the plaintiffs are awarded with full maintenance costs and in wrongful conception cases the claims are not accepted by the courts at all. Regarding wrongful birth cause of action, the Supreme Court of Austria held¹²⁰ that, when a disabled child was born due to negligent information provided and if not for the health care provider's malpractice, the claimants would have had an abortion and avoided the extreme financial burden that comes with the maintenance of an impaired child.¹²¹ It must be taken into account that in cause of action of wrongful birth, the birth of a child itself is not considered the damage, since the child was wanted from the start, but the unwanted disabilities that occurred to the child and the increased costs of raising an impaired child.¹²² Regarding wrongful birth claims under the French law, the *Cour de Cassation* grounded¹²³ that the birth of a handicapped child caused by the negligent diagnosis is directly linked with health care provider's liability and should be compensated.¹²⁴ Even more conflicting is the law passed by the French Parliament regulating wrongful birth cause of actions. Art L 114-5 of the Code of social actions and families regulates that "where the liability of a health-care professional or establishment is established vis-à-vis the parents of a child born with a disability not detected during the pregnancy by reason of gross negligence (*faute caractérisée*), the parents may claim compensation in respect of their damage only. That damage cannot include the special burdens arising from the disability throughout the life of the child".¹²⁵ This point of

¹²⁰ Oberster Gerichtshof (Supreme Court) 11 December 2007, 5 Ob 148/07m. (a 36 years old woman became pregnant and seek for medical advice about the possible risk of having an impaired child. She was incorrectly reassured by the physician that there is not disabilities detected, so as an impaired child was born, the woman claimed for damages for being deprived of a right to terminate the unwanted pregnancy)

¹²¹ *Id*

¹²² *Id*.

¹²³ Court de Cassation, Chambre civile 1 (French Supreme Court, Civil Division) 26 March 1996. (a man suffering from a physical handicap consulted medical health provider in order to know if the disease is inheritable or not. Being misinformed, the man's wife gave birth to a child suffering from the same handicaps as his father.)

¹²⁴ *Id*

¹²⁵ Art L 114-5, al 3, Code de l'action sociale et des familles: 'Lorsque la responsabilité d'un professionnel ou d'un établissement de santé est engagée vis-à-vis des parents d'un enfant né avec un handicap non décelé pendant la grossesse à la suite d'une faute caractérisée, les parents peuvent demander une indemnité au titre de leur seul préjudice. Ce préjudice ne saurait inclure les charges particulières découlant, tout au long de la vie de l'enfant, de ce handicap.'

view of French courts towards wrongful birth claims is highly confusing, since as well as in Austria, under the French law, the claims regarding wrongful conception cause of action are not allowed. Nevertheless, by this provision, it is expected that the medical health provider's liability will be restricted in order to avoid gross economic losses.

In some civil law jurisdictions getting an abortion is legal only under certain circumstances, as for example, under the Polish law¹²⁶, a woman can terminate her pregnancy in only three specific cases:

1. When the pregnancy constitutes a hazard for the life or health of the pregnant woman;
2. When prenatal examinations or any other medical premises indicate a high risk that the foetus will be severely and irreversibly impaired or will be suffering from an incurable, life-threatening disease;
3. When there is justified suspicion that the pregnancy occurred as a result of a criminal act.¹²⁷

The Polish Supreme Court grounded¹²⁸ that refusing to terminate a pregnancy which occurred from a criminal act, such as rape, is unlawful and violates a human right to plan their own personal life.¹²⁹ The court held that the raped woman is entitled to compensation regarding the expenses linked to pregnancy and birth, as well as the loss of income.¹³⁰ Although the court held that “in a case where an abortion was wrongfully denied to a raped woman and the offender has not been identified, the person responsible for the denial is liable to cover the costs of supporting the child to the extent that cannot be covered by its mother who exercises personal care of the child”.¹³¹

¹²⁶ Article 4a § 1 of the Polish Law of 7 January 1993 on family planning, protection of the human fetus and the conditions for abortion admissibility (commonly referred to as the Family Planning Act)

¹²⁷ For example, rape.

¹²⁸ Sąd Najwyższy (Supreme Court) 21 November 2003, VCK 16/03 (After having been raped. Woman became pregnant and was seeking for an abortion, but the hospital refused to perform an abortion, because she was 14 weeks pregnant, and under the national law, the abortion is allowable only until the twelfth week of pregnancy.)

¹²⁹ *Id*

¹³⁰ *Id*

¹³¹ *Id*

3.2. HEALTH CARE PROVIDER'S LIABILITY UNDER CONTRACT LAW IN CIVIL LAW LEGAL SYSTEM

However, the civil law legal system is more divergent than common law legal system and the health care provider can be held liable not only under the tort liability, but also under contractual liability. In contractual liability as well as in tort liability, there is a necessity for a damage to occur from a wrongful act. Nevertheless, the contractual liability is based on the terms that are agreed by the parties and stated in the contract, so there is no need to fulfil the four requirements (duty, breach, causation and damages) implied to the tort liability. For example, under Greek law in order to claim for damages the claimant must prove the wrongful act and the health care provider's improper performance of the contract, due to his fault.¹³² As far as wrongful birth or wrongful conception causes of action are concerned, the claimed damages would be rewarded as contractual violation rather than tortious behaviour.¹³³

Also, one of the differences between the contractual and tort liability is that in contractual liability the parties have had some contact before entering into an agreement and are fully aware of their contractual duties before any breach of the contract occurs.¹³⁴ Nevertheless, it must be mentioned that the contractual health care provider-patient relationships involve money exchange, so usually these types of relationships exist in private medical institutions which are not regulated by the government or municipality and do not provide free health care services. Furthermore, it must be noted that when there's a liability arising out of contractual relationships between a patient and a health care provider, they are bound by the terms to which both of the parties agreed on.¹³⁵ Clearly, the existence of a contract makes it easier for an injured party to be rewarded with compensation, as opposed to the proceedings under tort liability, since under tort law the claimant has to prove the wrongfulness of damages and under contractual liability the plaintiff only has to prove the fact of the contract being breached.¹³⁶

For example, in Germany the health care providers are held liable under the contractual liability and the relationships between a patient and a health care provider are based on a contract

¹³² U. Magnus (Ed.), *Unification of tort law: damages*, vol. 5, Kluwer Law International, 2001, p. 110.

¹³³ *Id.*, p. 114

¹³⁴ Vivienne Harpwood, *Law of Tort*, Second edition, 1996, p. 2

¹³⁵ *Id.*

¹³⁶ U. Magnus (Ed.), *Unification of tort law: damages*, vol. 5, Kluwer Law International, 2001, p. 130

signed by both parties.¹³⁷ In a wrongful conception case, the Federal Supreme Court of Germany stated¹³⁸ that the health care provider breached his contractual obligation to sterilize the claimant, which was the main aim of the contract between the patient and the health care provider, so the health care provider is liable for the damages inflicted to the patient.¹³⁹ The Federal Court grounded that the restitution is applicable and that the claimant should be put in the position as if the injury did not happen at all, at least from the financial perspective.¹⁴⁰ It was decided, that the health care provider breached his duty to perform a procedure which should prevent the patient from having any more children and by failing to do so, he was liable for any financial loss that the claimant will experience because of the pregnancy and the birth of an unwanted child.¹⁴¹ The health care provider was bound to not only compensate the financial loss experienced during the pregnancy, but also for the necessary unwanted child's maintenance costs.¹⁴²

A similar point of view is held under the Swiss law¹⁴³, where a woman signed an agreement with a health care provider to sterilize her in order not to have any more children for economic reasons.¹⁴⁴ The contract signed was explicitly aimed at a certain goal - to prevent the patient from getting pregnant, and by the health care provider's negligent actions which manifested in failing to perform a sterilization procedure, he breached a contract and became liable for the damages experienced by the claimant.¹⁴⁵ As the court motivated its judgment, the damages consisted not only from the failed procedure, but also from the legal obligation imposed on the parents to maintain the child, and as this burden was placed involuntarily, since the sterilization procedure was performed in order to avoid this type of burden, the health care provider was liable not only

¹³⁷ *Id*

¹³⁸ Bundesgerichtshof (Federal Supreme Court) 18 March 1980, VI ZR 105/78, BGHZ 76, 249 (a woman and a medical health provider signed an agreement, where it was agreed that the medical health provider will perform a sterilisation procedure so that the patient would not get pregnant ever again. The procedure was performed negligently and subsequently the patient became pregnant with an unwanted child).

¹³⁹ *Id*

¹⁴⁰ *Id*

¹⁴¹ *Id*

¹⁴² *Id*

¹⁴³ Tribunal Fédéral Suisse, 20 December 2005, ATF 132 III 359

¹⁴⁴ *Id*

¹⁴⁵ *Id*

for the financial damages experienced during the pregnancy, but also for the burden of maintaining the child.¹⁴⁶

One of the most significant differences between contractual liability and tort liability is that in the contractual liability case there can be a limitation of damages.¹⁴⁷ This means, that the contract signed by the patient and the health care provider includes a compensation for any consequences that might be foreseen and can be roughly estimated at the time that the contract was signed.¹⁴⁸ It must be noted that the possibility to limit the damages does not bound the parties to act in this way and it is only up to the patient and the health care provider to decide whether they are going to indicate the limitation of damages. The only limitation to contractual relations is that it cannot be stated in the contract that the patient will not get any compensation arising out of the breach of the contract. Usually, the physical pain and emotional distress are not subjects to this type of compensations and are not rewarded.¹⁴⁹ It is held as a disadvantage of contractual liability in health care relationships, since there might be emotional distress and other non-pecuniary losses experienced by the injured party, and these types of contracts incapacitates the patient from being awarded with non-monetary damages.

Wrongful conception and wrongful birth cases, under the civil law legal system, are accepted by the courts on highly restricted grounds. As opposed to the common law system, birth-related causes of actions are being derived more from contract infringements than tort law. What is striking is the fact how differently each legal system deals with wrongful conception cases on the one hand and wrongful birth cases on the other. The fact that some jurisdictions do not even accept wrongful conception claims, but reward the parents with full maintenance costs in wrongful birth cases, shows how inconsistent and uneven the case practice is compared to the common law system's integrity. However, the common law and civil law legal systems share a common view on protection of a fundamental human right to make an informed decision and protection of a person's private life.

¹⁴⁶ *Id*

¹⁴⁷ U. Magnus (Ed.), *Unification of tort law: damages*, vol. 5, Kluwer Law International, 2001, p. 130

¹⁴⁸ *Id*

¹⁴⁹ *Id*

4. CONCLUSIONS

Despite the inconsistent case-law practice regarding wrongful birth and wrongful conception causes of action, it is clear that the courts face a rising number of birth-related claims brought by the parents, who are seeking for compensation from their health care providers. Although, after analysing common law legal system's case-law practice, it is obvious that the common law jurisdictions experience less problems while dealing with this type of claims and throughout the years of case practice, the common law courts managed to distinguish the public policy considerations that a child is a blessing, from a point of view that it actually is a financial damage that is caused by the health care provider's negligent actions. Nevertheless, the civil law jurisdictions are far more conservative and find it highly difficult to allow an award for a birth of an unwanted child, stating that by rewarding the parents for the damages they are alleging, it would be against fundamental human rights and might cause discussions under discrimination and moral issues.

However, it must be stressed that both jurisdictions agree that in certain situations there is a breach of the health care providers' duties owed to their patients and that they are liable for the damages occurred, but despite the fact that all four negligence claim elements - duty, breach, causation and damages - are fulfilled, some civil law jurisdictions cannot overcome the moral stigma that a birth of a child will only bring joy and happiness into the parents lives. Hereby, in civil law jurisdictions wrongful birth claims are most commonly rewarded in dissimilar distribution of damages and wrongful conception claims are not being rewarded at all. As compared to the common law courts decisions, where wrongful birth cause of action as well as wrongful conception cause of action are usually treated as an ordinary negligence case, in this way the courts are avoiding the moral issues of a newly born child being held as a damage.

Furthermore, the attention must be brought to the fact that there are certain situations where the parents are suing the health care provider for a birth of an unwanted child, claiming health care provider's malpractice, although the unwanted consequences occurred by the negligent actions of the patients themselves. There are exceptional situations where because of the plaintiffs' carelessness or untruthfulness, they are left off with unwanted consequences and the health care provider cannot be held liable, since he has done everything he is entitled to. The

burden of acting as a reasonably prudent person not only falls on the health care provider's shoulders, but also must be applied to the parents, in this way preventing the possible over-speculation of the wrongful birth and wrongful conception causes of action.

As far as the parents have a right to compensation is concerned, it becomes clear that they have a right to seek for damages for a birth of an unwanted child, when the birth was caused by the health care provider's negligent actions. Still it is essentially important to note that there are many facts that need to be proved and conditions to be met in order to be able to bring a wrongful birth or wrongful conception lawsuit before the court. However, there are still some unsolved disputes among the civil law jurisdictions regarding compensation in wrongful conception cases, but as far as a wrongful birth cause of action is concerned, the civil law jurisdictions, as well as the common law jurisdictions, allow the parents to be rewarded for the damages, caused by the health care provider's negligent actions.

TABLE OF CONTENTS

LITERATURE

1. A. Holder, *Medical Malpractice law* no. 49 (2d ed. 1978);
2. G Viney/ P Jourdain, *Les conditions de la responsabilité* (3rd edition 2008) no. 249-5;
3. John W. Wade, Victor E. Schwartz, Kathryn Kelly, David F. Partlett, *Torts: cases and materials*, 9th edition, Westbury New York, The Foundation Press. Inc. 1994;
4. M. Kancler, "To be or not to be born? Civil Liability for damages resulting from birth in a comparative context: recent Polish and Irish caselaw concerning wrongful birth and wrongful conception", *Electronic Journal of Comparative Law*, vol. 13.3 (September, 2009);
5. Timothy J. Carey, *Physician's Liability for Pre-Conception Torts*, 54 *Notre Dame Law*, 696 (1978-1979);
6. U. Magnus (Ed.), *Unification of tort law: damages*, vol. 5, Kluwer Law International, 2001;
7. Vivienne Harpwood, *Law of Tort*, Second edition, 1996.

CASES

1. Becker v. Schwartz, 46 N.Y.2d 401, Court of Appeals of The State of New York (N.Y. 1978);
2. Boone v. Mullendore, 416 So.2d 718, Supreme Court of Alabama (Ala. 1982);
3. Bundesgerichtshof (Federal Supreme Court) 18 March 1980, VI ZR 105/78, BGHZ 76, 249;
4. Clark v. Children’s Memorial Hospital, 391, Ill.App.3d. 321, Appellate Court of Illinois, First District (Ill.App. 2009);
5. Court de Cassation, Chambre civile 1 (French Supreme Court), Civil Division 26 March 1996;
6. Cour de Cassation, Chambre 1 (Supreme Court, Civil Division) 25 June 1991;
7. Gleitman v. Cosgrove, 227 A.2d 689, The Supreme Court of New Jersey, 49 N.J. 22 (1967);
8. Haymon v. Wilkerson, 535 A.2d. 880, District of Columbia Court of Appeal (D.C. 1987);
9. Hof van Beroep (Court of Appeal) Antwerp, 8 September 2003;
10. Hoge Raad (Supreme Court) 21 February 1997;
11. Jacobs v. Theimer, 507 S.W.2d 288, Court of Civil Appeals of Texas, Forth Worth ITex. Civ. App1974);
12. Keel v. Banach, 624 So.2d 1022, Supreme Court of Alabama (Ala. 1993);
13. McFarlane v. Tayside Health Board, 2000 SC (HL) 1, [2000] 2 AC 59, 2000 SLT 154, 1999;
14. McKenney v. Jersey City Medical Center, 771 A.2d 1153, 1161 (N.J. 2001);
15. Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984);
16. Oberster Gerichtshof (Supreme Court) 11 December 2007, 5 Ob 148/07m.;
17. Oberster Gerichtshof (Supreme Court) 14 September 2009, 6 Ob 101/06f;
18. Procanik by Procanik v. Cillo, 97 N.J. 339, 348 (1984);
19. R.R. V. Poland, no. 27617/04, European Court of Human Rights, fourth section, Strasbourg, 26 May 2011;
20. Reed v. Campagnolo, 810 F. Supp. 167 (D. Md. 1993);
21. Rouse v. Wesley, 196 Mich. App. 624, Michigan Court of Appeals (Mich. Ct. App. 1992);
22. Sąd Najwyższy (Supreme Court) 21 November 2003, VCK 16/03;
23. Smith v. Cote, 128 N.H. 231 The Supreme Court of New Hampshire Hillsbrough (N.H. 1986);

24. Sorkin v. Lee, 53 N.Y.2d 797, Court of Appeals of the State of New York (N.Y.App.Div. 1980);
25. Tosh v. Tosh, 214 Cal. App.2d, Court of Appeal of California, First District, Division Three(Cal. App. 1963);
26. Tribunal Fédéral Suisse, 20 December 2005, ATF 132 III 359;
27. Ziemba v. Sternberg, 45 A.D.2d 230,233, 357 N.Y.S.2d 265, 269 (1974).

LEGISLATION

1. Code de l'action sociale et des familles, Modifié par Loi n°2005-102 du 11 février 2005 - art. 2 (V);
2. Restatement (Second) of Torts (1965);
3. The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act, 7 January 1993;
4. World Population Plan of Action, United Nations Population Division, Department of Economic and Social Affairs, with support from the UN Population Fund (UNFPA).

SANTRAUKA

Vis dažniau šiuolaikinėje teisėje tampa aktualus “neteisėto gimimo” bei “neteisėto pastojimo” institutas, kuris pasireiškia ieškinių pateikimu teismams, kuriais tėvai siekia prisiteisti žalos atlyginimą iš gydytojų, dėl kurių aplaidžių veiksmų, tėvai susilaukė nenorimo vaiko. Neteisėto pastojimo atveju tėvai teikia ieškinį dėl aplaidžių medicininės paslaugas suteikusių gydytojų veiksmų, kuomet pacientui buvo nesėkmingai atlikta procedūra, kurios dėka pacientas turėjo tapti nevaisingas, arba turėjo būti nutrauktas nenorimas nėštumas, bet dėl gydytojo aplaidumo gimsta sveikas, tačiau nenorimas, vaikas. Nenorimo gimimo atveju tėvai teikia ieškinį, kuomet gydytojas tėvų neinformuoja arba netinkamai informuoja apie esančią realią grėsmę, jog vaikas gims su tam tikra negalia ar kita nepagydoma liga, pvz. Dauno sindromu, ir jei pacientas būtų informuotas apie tokią grėsmę, būtų priėmęs sprendimą nutraukti tokį nėštumą.

Bendrosios teisės sistemos teismai patyrė mažiau sunkumų atskiriant visuomenėje nusistovėjusią nuostatą, jog bet kokios būklės gimusio vaiko gyvybė negali būti laikoma žala, nuo teisinio požiūrio, jog nenorimo vaiko gimimas yra finansinė atsakomybė, kuri yra užkraunama tėvams, prieš jų pačių valią. To pasekoje, tėvai patiria materialinę žalą, kuri kyla iš gydytojo aplaidžių veiksmų suteikiant medicininės paslaugas ar konsultacijas. Bendrosios teisės teismų sprendimai pasižymi ganėtinai vieningai plėtojama teismų praktika, tiek neteisėto gimimo, tiek neteisėto pastojimo bylose. Akivaizdu, jog neteisėto pastojimo bylose tėvams yra priskiriamas turtinės žalos atlyginimas, kurį sudaro finansinės išlaidos patirtos nėštumo metu bei finansinės išlaidos, kurias tėvai patirs rūpinantis vaiku iki jis taps pilnametis. Tačiau, neturtinė žala, neteisėto pastojimo bylose nepriteisiama, motyvuojant tuo, jog sveiko vaiko gimimas negali sukelti tėvams emocinio skausmo, dvasinių išgyvenimų ar kitaip neigiamai juos paveikti.

Neteisėto gimimo bylose, tėvams yra atlyginama, tiek turtinė, tiek neturtinė žala. Turtinės žalos atveju, gydytojas įpareigojamas atlyginti finansinius nuostolius, kuriuos tėvai patirs augindami neįgalų vaiką, tiek kiek tokios išlaidos yra susijusios su vaiko turima negalia, iki jis taps pilnametis. Išimtiniais atvejais, teismai įpareigoja gydytojus atlyginti vidutines finansines išlaidas visam neįgalaus vaiko gyvenimo laikotarpiui, bet tokios išimtytys taikomos ypatingai sunkių ligų atvejais bei tuomet, kai vaikas nebūtų norimas dar jo nesusilaukus dėl esamos tikimybės, jog vienas iš tėvų yra genetikos ligos nešiotojas ir vaikas galėtų gimti su įgimta negalia. Neturtinės žalos atvejais, tėvams yra skiriama kompensacija, kuomet akivaizdu, jog neįgalaus vaiko gimimas emociškai paveikė tėvus, tai gali patvirtinti tokie faktai, kaip psichologo konsultacijos ar medikamentai.

Pabrėžtina, kad, tiek bendrosios teisės šakos, tiek daugumos civilinės teisės šakos teismų vieningai sutaria, jog gydytojų aplaidžiais veiksmais padaryta žala pacientams turi būti atlyginama. Tačiau privalu išpildyti daugėtą sąlygų, siekiant pateikti ieškinį dėl neteisėto gimimo ar neteisėto pastojimo. Akivaizdu, jog augantis tokių bylų poreikis priverčia teismus persvarstyti jų formuojamą praktiką ir vis dažniau tėvams yra priteisiama materialinė žala už nenorimo vaiko gimimą, kurį įtakojo gydytojo aplaidžiai suteiktos medicininės paslaugos.

REIKŠMINIAI ŽODŽIAI

Neteisėtas gimimas, neteisėtas pastojimas, žala, gydytojo aplaidumas.