BASIC QUESTIONS OF THE WRONGFUL LIFE AND WRONGFUL BIRTH CONCEPTS

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Abstract: The issues of “wrongful life” and “wrongful birth” are recently highly debated topics related both to the tort law and medical law. As it may be seen from the comparative point of view, the outcomes reached in several jurisdictions as well as reasonings used by several courts against or for recognising wrongful life or wrongful birth claims differ significantly. Thus, both actions present a rather controversial concept of claims leading to contradicting outcomes in several legal systems or to different judicial decisions.

Obviously, there may be distinctive public policy reasons that influence answers to principal questions, i.e. can existence of a child be considered injury, would it be possible to measure damages in such cases, what will be the consequences of judicial acceptance of such claims, etc.?

Many jurisdictions have deliberately left the issues of wrongful life and wrongful birth unregulated partly because of their controversial nature partly because of their unsettled nature, whereas these areas of law have been generally reserved to be developed by the courts.

The aim of the paper is to examine the basic features of the concept of wrongful life and wrongful birth actions, particularly in the light of recent two czech judicial decisions in this field.

Keywords: wrongful life, wrongful birth, wrongful conception, civil liability for damage, medical liability, medical malpractice, tort liability

1 Introduction

In 2000 a wave of contradictory reactions was triggered by the decision of the French Cour de cassation in case of Nicholas Perruche, in which the parents of severely disabled child were awarded a compensation of loss against the doctor who wrongfully interpreted the results of the tests for antibody to rubeola in the mother’s body during the pregnancy. As a result of the overcome disease of the mother,
a child was born with severe disabilities (massive neurological deficits: deafness, partial blindness, severe brain damage), despite of previous notices of mother that she would interrupt the pregnancy if it is discovered that she overcame this disease during the pregnancy. A civil court awarded the mother damages for effective nullification of her right to choose. In parallel, the higher court awarded the compensation of loss also to the disabled child who was represented by the parents as her statutory representatives which was demanded by the parents on his behalf.¹

Similarly, in 2005 compensation was awarded for wrongful birth and wrongful life by the Dutch Supreme Court in case of Kelly Molenaan – a child who was born severely disabled, unable to walk, speak, with the hearing and sight disability, heart disorder and later diagnosis of autism.² In this case the court of law awarded the compensation of the costs for nutrition and upbringing of Kelly as well as compensation for her handicap and pain suffered.

Both mentioned examples are amongst the most frequently presented examples of actions for wrongful life and actions for wrongful birth.³ Especially recently, the permissibility and/or impermissibili-

¹ When the higher court granted Nicholas the right to sue on his own behalf for the damages he has suffered as a result of being born, the Perruche case led to an „affair“. The case is now only of historical interest because shortly afterwards, legislation was passed (known as the loi anti Perruche) banning this kind of actions. Further see: Jackson, E.: Medical law: Text, Cases and Materials. Oxford: Oxford University Press, 2013, p. 730-731


³ „Wrongful life“ claims were first brought in the USA by two illegitimate, healthy children (Zepeda v Zepeda and Williams v State of New York). They are now usually referred to as „dissatisfied life“ rather than wrongful life cases. However, the reasonings in these cases have become the basis for later „true“ wrongful life claims. Liu, A. N.: Wrongful life: some of the problems. In: Journal of Medical Ethics, Num. 13, 1987, p. 69-70.
ty of these actions in national laws of particular countries is a heavily discussed issue in relation to the liability of the health-care providers within the tort law. In general, these include the actions on the basis of a liability of the health-care provider for birth of unwanted disabled child and/or moreover, even healthy child who would not have been born, should a failure of the health-care provider never occurred (non-lege artis actions) (wrongly performed abortion or sterilization, failure to perform or wrongful performance of prenatal diagnostics or wrongful interpretation of the results of prenatal diagnostics etc.).

It is obvious that the nature of the mentioned institutes triggers various questions of not only legal but also ethical and moral nature and legal solution of the above mentioned, whatever it is, triggers contradictory reactions of both legal experts as well as general public.

2 Main features of wrongful birth and wrongful life actions

Despite of the fact that both types of legal actions are mutually connected as far as subject matter is concerned, they constitute separate types of legal actions distinguished especially by the plaintiff (i.e. a person who brought an action against the health-care provider and/or is entitled to bring it).

Legal action regarding „wrongful birth“ is a legal instrument by which the parents as the plaintiffs claim the compensation of material and mitigation of immaterial loss as a consequence of birth of unwanted child. This could be a situation when the parents do not wish for any other child for any reason or a situation when they do not want the birth of given specific child (as a result of genetic disorder discovered during the pregnancy), despite of that the child is born due to failure by the health-care provider who

– failed to prevent the conception of a child (so-called wrongful conception) – for example by wrongful implanting of anti-conceptive instrument, by wrongful performance of sterilization etc. (Action
for wrongful conception is in some countries structured as a separate action, different from wrongful life, whereas the separation criteria is a moment in which a faulty action of the health-care provider occurred – either prior to the conception or after the conception. However, in most countries which admit this action the issue of wrongful conception is solved within the institute of wrongful birth.

- did not terminate the pregnancy due to its failure or
- failed to perform or wrongly performed necessary prenatal diagnostics\(^4\) or
- provided wrong information to the future parents.

The substance of the mentioned legal action is that as a result of the faulty wrongful act of the health-care provider a child was born which would not have been born as a result of the mother’s decision, should there be no failure by the health-care provider. In case of institute of wrongful birth the case may include birth of not only unwanted disabled child whose parents were determined to terminate the pregnancy should they be correctly informed by the doctor regarding the harm to the fetus, but it may also include birth of healthy child whose birth was unwanted for any reason (in this context the cases of birth of healthy child are sometimes referred to as wrongful pregnancy - claim by parents for damages arising from the negligent performance of a sterilization procedure or abortion).

Within the legal action for wrongful birth of a child the parents demand the compensation of the costs for upbringing and nutrition of the wrongfully born child – i.e. the costs by which their assets were reduced as a result of birth of their child and which, if not born, would not have to be incurred, as well as compensation of non-pecuniary loss represented by the fact that a child whose birth was unwanted,

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impacted their life, whereby it adversely affected their routine family life and/or it denied them the opportunity to live a family life they wanted to live without this child.

Legal action for „wrongful life“ is a legal instrument by which a child itself – in this case solely disabled child - claims vis-à-vis the health-care provider a compensation of pecuniary loss and mitigation of non-pecuniary loss for life which a child must live in suffering as a result of its disability. The substance of this legal action is that the disabled child who claims the compensation of loss and who was not supposed to be born in the first place, was born despite of the above as a result of failure by the health-care provider (failure to perform or wrong performance of prenatal diagnostics, wrongful interpretation of the results of prenatal diagnostics etc.). Should such faulty failure of the provider not occur and on the basis of the prenatal diagnostics, the parents would have had information about the disability of the child, the pregnancy would have been terminated in accordance with their decision, which however did not occur since the option to decide in this manner was taken from them due to failure of the doctor. Despite of the fact that the disabled child is an entity entitled to file the action for wrongful life, the action is usually filed via statutory representative, i.e. the parents in most cases.

As a part of action for wrongful life a child usually claims compensation of the costs of his disorder which include the increased costs caused by his disorder, i.e. costs which would have not been incurred by a person without disorder, as well as compensation of non-pecuniary loss for a child consisting of the fact that a child considers his life so painful and full of suffering that it would have been better for him not to be born.

Institute of wrongful life is also present, even in more controversial form, in the legal action by a child born with a disability sues not a health-care provider, but his own parents who, by not deciding to terminate the pregnancy (despite of the fact that they knew about the child's disability), made way for his birth. Loss suffered by the di-
sabled child consists of the fact that a life with a disability is worse than non-existence itself, should the parents or the mother decided to terminate the pregnancy.

3 Foreign judicial approach to the wrongful birth and wrongful life decisions

Despite of the fact that they have significantly resonated in the society only in the past decades, the mentioned legal actions are no new institutes in the judicial practice of the foreign courts of law.5

A legal action of the parents for „wrongful birth“ is accepted in certain form by most of foreign national laws as permissible legal institute and it enables compensation of pecuniary as well as non-pecuniary loss which occurred as a result of failure of a health-care provider resulting in birth of (mostly) disabled child. On the contrary, legal actions for „wrongful life“ are mostly opposed by foreign courts of law and most of foreign laws do not grant to a child the claims for compensation of loss as a result birth of a child as a disabled one.6

The reason for this trend is probably the fact that the courts consider more acceptable to recognize a loss of parents consisting of an absence of option to freely terminate the pregnancy as a response to a question whether non-existence of a child may be given a preference

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over life, which is however difficult and full of suffering due to disabili-
yty. As opposed to judicial practice, number of academics dealing with
tort law came to conclusion that both types of legal actions for wrong-
ful birth as well as for wrongful life should be permissible.\(^7\)

The following are the examples of jurisdictions which reject the
concept of wrongful life, i.e. provision of compensation to disabled
child: Austria, Australia, Canada, Denmark, France, Germany, Hun-
gary, Italy, Portugal, Spain and Great Britain. In some of these coun-
tries these actions were prohibited by law (Belgium, France, Great
Britain).\(^8\) In France the legislative prohibition of these actions was
a direct result of passionate expert as well as all-society discussion
which followed the decision of French Cour de cassation in the case
of Nicholas Perruche mentioned in the beginning of this paper, where
a court of law awarded compensation of loss not only to the parents
but also to a child for the fact that a child was even born. The law – so-
called loi anti-Perruche which was adopted afterwards, stipulated that
no one is entitled to claim a compensation of damage due to the mere
fact of birth.

The countries which, on the other hand, permit the possibility
to apply the actions for wrongful life include some states of USA or
Netherlands.\(^9\)

The legal actions which include the institute of wrongful birth
and/or wrongful conception also appeared in the judicial practice
in the neighbouring Czech Republic. These include two cases which
drew media attention and related to a failed abortion and sterilisation.

In the first case a woman sued hospital in Jihlava and claimed com-
ensation – compensation of non-pecuniary loss of CZK 400,000.00

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\(^7\) Hensel, W.-F.: The Disabling Impact of Wrongful Birth and Wrongful Life Ac-

\(^8\) Ruda, A.: I Didn’t Ask to be Born’: Wrongful Life from a Comparative Perspective

\(^9\) Ibid., p. 206.
due to wrongly performed abortion during which, out of two fetuses in the uterus, the doctors removed only one (the court concluded that a doctor performed the abortion insufficiently from technical point of view and at the same time a doctor wrongfully performed the immediate inspection of surgery performance). As a result of such action woman gave birth to a child who was healthy. Regional Court in Brno approved the brought action only in partial extent, whereas it calculated non-pecuniary loss of woman at CZK 240,000.00, whereas, however, it finally reduced this amount to CZK 80,000.00 due to contributing fault of the woman to her loss. Contributory fault was due to irresponsible attitude towards unwanted pregnancy (woman and her spouse did not use any form of birth-control) as well as due to negligence in medical inspection after performance of the surgery when it was possible to discover faulty abortion and surgery could have been repeated.

Non-pecuniary loss of CZK 80,000.00 awarded by the court was due to long-term mental fears and stress of the mother regarding growth and health of a child due to failed abortion as well as due to making impossible for a plaintiff to freely decide about her future life (i.e. as a result of failure of the doctor the woman was denied an option to live her life in the way she planned without a child).

The other case related to a woman who sued hospital in Kutná Hora for CZK 500,000.00 due to the fact that, despite of performed sterilisation, the woman got pregnant and had a child which she and her husband could not afford due to their difficult financial situation as well as due to the fact that they did not want another child since they already had three children. Despite of the fact that during the lawsuit it was demonstrated that sterilisation was performed lege artis, the Regional Court of Prague awarded to woman a compensation of non-pecuniary loss of CZK 30,000.00 due to insufficient instruction of the patient regarding possible complications of the performed sterilisation (in this case regarding the fact that in certain cases a body may spontaneously renew the path between ovary and uterus and
a pregnancy may occur). However, the decision of the Regional Court in Prague was revoked by the Supreme Court in Prague and finally the woman was not awarded with any compensation of loss.

4 Controversial nature and contradictory nature of opinions regarding the substance and particular aspects of the actions

Controversial nature of the institutes of wrongful birth and wrongful life does not lie only in the substance of these legal actions, in which the legal aspects collide with ethical and moral aspects, but also terminology of these institutes may be subject to criticism (wrongful=unlawful), as a result of which the terms wrongful birth and wrongful life are used in their original identification and in most cases they, being the common concepts, are not translated into other languages. However, term wrongful in relation to birth or life should not apply to the fact that birth or life would be against the law and thus unlawful, however, term wrongfulness is related to the activity of the health-care provider which leads to unintended birth of the affected child.\(^\text{10}\)

In case of deciding on the above mentioned legal actions, problematic aspect is also the extent of compensation of loss which should be awarded to the parents and/or child. The range of compensable types of loss which are awarded in particular countries varies from compensation for upbringing and nutrition of a child including additional costs as a result of disability of a child, mother’s loss of income, costs of childcare as a pecuniary loss up to compensation of non-pecuniary loss including for example pain and suffering of the disabled due to its existence, pain suffered by the mother during the pregnancy and labour, loss incurred by intervention of the unwanted child to original

family plans as well as mental suffering of the parents as a result of necessity to take care of the disabled child. 11

Regardless of different approaches of particular countries to awarding the compensation of non-pecuniary loss, the award of compensation of the costs for nutrition and upbringing of a child as a pecuniary loss is problematic. Arguments against award of the costs for upbringing and nutrition is that, despite of the fact that the parents primarily did not wish to have a child, they subsequently accepted birth of the child and incurred the costs of upbringing and nutrition voluntarily (e.g. they did not decide to give a child out for adoption) and therefore incurring these costs should not be deemed a damage. On the contrary, counterargument points to the fact that despite of later “acceptance” of a child, the failure of the doctor caused that the parents could not afford termination of pregnancy as primarily preferred option.

Another issue with various solutions in particular countries is, whether, as a part of upbringing and nutrition of unwanted child, the courts should award the entire amount of these costs which had to be incurred by the parents or, whether these costs should be limited to those related solely to the disability of a given child and due to this disability the costs exceed the costs of upbringing and nutrition of a healthy child.

5 Conclusion

Both courts as well as legal theory are not unified in respect of the issue of the benefits (pecuniary as well as non-pecuniary) which were gained by the parents by birth of unwanted child (i.e. allowances from the state as pecuniary benefit or joy caused by a child as a non-pe-

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cuniary benefit etc.) in respect to the loss caused by birth of a child. On one hand there is an opinion that the amount of awarded compensation of loss should be reduced by these benefits, on the other hand there is a contradictory opinion arguing against such set off.

Ethical point of view is also a significant factor which had to be taken into account also by Czech courts deciding upon the above mentioned cases of legal actions on wrongful birth by assessment whether the legal action itself is not in contradiction to the institute of good morals, based on thinking that birth of every child must be viewed as a “blessing (a gift)“, whereby the view of a loss (damage) is thus excluded.

Similarly, it is necessary to solve, in accordance with ethical principles, also the issue, whether the courts are even authorities authorized to classify the value of life with disability in respect of non-existence of such life and/or whether they are the authorities authorized to decide whether a healthy child could be considered damage.

**References**


