Limits of liability:
The case of “wrongful conception”, “wrongful life”, and “wrongful birth”

*A legal, ethical, or philosophical issue, and how to solve it?

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TABLE OF CONTENTS

REFERENCES ....................................................................................................................... 3

I. ABSTRACT ..................................................................................................................... 5

II. CASE SCENARIOS ....................................................................................................... 5

III. MATERIALS AND INPUTS FOR ANALYSIS ................................................................. 6

A. GERMANY ...................................................................................................................... 6
   1. Relevant legislation ..................................................................................................... 6
   2. Introductory text .......................................................................................................... 7
   3. Jurisprudence ............................................................................................................. 8

B. NETHERLANDS .......................................................................................................... 10
   1. Relevant legislation ..................................................................................................... 10
   2. Introductory text .......................................................................................................... 10
   3. Jurisprudence ............................................................................................................. 12

C. UNITED STATES ......................................................................................................... 12
   1. Relevant legislation and jury instructions ................................................................. 12
   2. Introductory text .......................................................................................................... 14
   3. Jurisprudence ............................................................................................................. 15

IV. QUESTIONS .................................................................................................................. 18

V. CONCLUSION ............................................................................................................... 20

ANNEX: TABLE 1 ............................................................................................................... 21
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I. ABSTRACT
This paper illustrates the approaches of three different legal systems (Germany, the Netherlands, and the United States) with regard to the so-called claims of wrongful conception, wrongful birth and wrongful life. Starting from case studies, the hope is to highlight the different approaches of these states. Beside legal aspects, inevitably, some ethical questions will also be considered, since these claims touch directly upon the way we think about life in general.

II. CASE SCENARIOS

Scenario 1: Wrongful conception claim
A couple consciously decides not to have any more children because of their troublesome financial state of affairs and agrees to undergo a sterilization operation. However, by negligence on the part of the doctor, the operation fails and a fourth (healthy) child is born. The parents are now claiming damages from the doctor, in particular compensation for raising the child, as well as non-pecuniary losses for the pain experienced during the pregnancy.1

Scenario 2: Wrongful birth claim
A girl is born severely handicapped due to a rubella infection caught by her mother in the first weeks of pregnancy. The gynecologist who treated the mother has not drawn the mother's attention to the illness and its dangers at the time of the pregnancy. It is certain that if the mother had been aware of the risks, she would have had an abortion. The mother is now claiming damages from the doctor, in particular for the extra costs of raising a handicapped child.2

Scenario 3: Wrongful life claim
A girl is born severely handicapped. By the time she is two-and-half-years old she is diagnosed as being retarded, autistic and unable to walk or talk. Her mother would have aborted had she known in time about the birth defects that would cause such suffering to her child. In fact, she had asked her obstetrician to carry out some tests regarding possible hereditary diseases and genetic defects in order to avoid such a result, but the doctor, erroneously, did not mention the evident risks. The child is now claiming (through her mother) compensation for the cost of living, extra costs related to her handicaps and non-pecuniary losses for her suffering.3

2 Inspired by the German case BGH, 18 January 1983, VI ZR 114/81 (BGHZ 86, 240).
III. MATERIALS AND INPUTS FOR ANALYSIS

A. GERMANY

1. Relevant legislation

Bürgerliches Gesetzbuch, BGB (Civil Code)


§ 823. Schadenersatzpflicht. (1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.

Grundgesetz, GG (Basic Law)

Art. 1 Abs. 1. Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.

Strafgesetzbuch, StGB (Criminal Code)

§ 218a Abs. 1. Der Tatbestand des § 218 ist nicht verwirklicht, wenn: (1) die Schwangere den Schwangerschaftsabbruch verlangt und dem Arzt durch eine Bescheinigung nach § 219 Abs. 2 Satz 2 nachweisen hat, dass die sich mindestens drei Tage vor dem Eingriff hat beraten lassen, (2) der Schwangerschaftsabbruch von einem Arzt vorgenommen wird und (3) seit der Empfängnis nicht mehr als zwölf Wochen vergangen sind.
2. Introductory text
   a. Wrongful conception claim
   In a wrongful conception claim, the highest German civil court, the Bundesgerichtshof, ruled that the doctor was at fault and that the hospital was liable for his faults. The court considered that the doctor did not inform the parent properly about the necessity of taking a test four weeks after the sterilization in order to confirm the success of the operation, and the mother was granted compensation for both the maintenance of her child and for her pain and suffering. The court specified that it was not the existence of the child in itself that was to be considered as damage, but rather, the damage resulting from the maintenance costs of the child. In a previous decision, the court had already established that a doctor who performed a sterilization negligently had breached his contractual obligation and was to be held liable for damages. The doctor was also considered liable as he negligently injured the mother’s body by not preventing the pregnancy.

   b. Wrongful birth claim
   In 1983, the Bundesgerichtshof decided that a physician who gave wrong information to the parents regarding the health of a (yet) unborn child - by not drawing the mother's attention to the dangers of a rubella infection - was to be considered liable. The court ordered the physician to provide for the raising and maintaining of the handicapped child and to pay damages for the pain and suffering of the mother. According to the court, correct information would have prevented the couple from conceiving the child, and since the physician knew this, he should have taken all the necessary measures to avoid these consequences. In short, the doctor negligently breached his contractual obligation to properly inform the parents about the risks to the child, and, therefore, the duty of the parents to maintain the child was created by the doctor’s breach of contract.

   In 1993, the second Senate of the Federal Constitutional Court asserted that “from a legal point of view, neither the existence, nor the maintenance costs, of a child may be considered as a damage; otherwise, the human dignity, as protected by Art. 1 of the Grundgesetz, would have been violated”. However, the first Senate of the same court upheld the reasoning of the Bundesgerichtshof, and confirmed its position of allowing wrongful birth claims.

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4 BGH, 27 June 1995, VI ZR 32/94.
5 Ibid.
6 BGH, 18 March 1980, VI ZR 105/78 (BGHZ 76, 249).
7 BGHZ 76, 249. See also Martens/Zimmermann (2011), pp. 875-876. This practice has been confirmed in a later decision when a doctor was held responsible for a failure in a contraceptive implant and a healthy child was born (see BGH, 14 November 2006, VI ZR 48/06). See also BGH, 8 July 2008, VI ZR 259/06.
8 BGH, 18 January 1983, BGHZ 86, 240. See also Van Dam (2006), pp. 157-159.
c. Wrongful life claims
In the same case of 1983, the Bundesgerichtshof denied the possibility of issuing a wrongful life claim. The court ruled that negligence had been committed against the mother (entitled to damages), but not directly against the child: a direct obligation to prevent the birth of a child on account of the fact that it would presumably be born with handicaps would make its life seem "not worth living". Furthermore, the court argued that the doctor did not cause the child’s handicap, but merely prevented the child from being aborted and that the child did not have a “right to be aborted”. Since the child also did not have a claim in the law of delict, nor in the law of contract for damages due to being born, it could not give rise to legal obligations upon the doctor.13

3. Jurisprudence
3.1. On wrongful conception claims
BGH, 27 June 1995, VI ZR 32/94
Guideline (Leitsatz) of the Court:

Hat der Arzt bei der Sterilisation eines Mannes nicht ausreichend über die Notwendigkeit eines Spermiogrammes aufgeklärt, so kann - wenn es trotz des Eingriffs zur Geburt eines Kindes kommt - dessen Unterhaltsbedarf im Weg des Schadensersatzes und daneben auch ein Schmerzensgeld für die Mutter verlangt werden [...].

Some excerpts from the decision:

II.1.a. [...] Indessen wird [...] der Arzt seiner vertraglich geschuldeten Beratungspflicht nur dann gerecht, wenn er nach den Umständen sicher sein darf, daß der Patient die fraglichen Hinweise auch verstanden hat und sich des möglicherweise fortbestehenden Risikos einer Zeugung bzw. Empfängnis bewußt geworden ist [...].

[...] Auch wenn es sich bei einer Schwangerschaft um einen normalen physiologischen Vorgang handelt, stellt doch jeglicher unbefugte Eingriff in das körperliche Befinden eine Körperverletzung dar, da bei anderer Sichtweise das Recht am eigenen Körper als gesetzlich ausgeformter Teil des allgemeinen Persönlichkeitsrechts nicht hinreichend geschützt wäre.

[...] Vielmehr wird der Zurechnungszusammenhang zwischen der Pflichtwidrigkeit des Arztes und dem Eintritt der Körperverletzung nicht deshalb unterbrochen, weil der Verletzungserfolg beim schließlich Verletzten erst durch eine zusätzliche Ursache, nämlich den Geschlechtsverkehr mit dem fehlerhaft behandelten Patienten, eintritt. [...] Deshalb wäre es widersprüchlich, den Zurechnungszusammenhang zwischen Arztfehler und Körperverletzung wegen des dazwischen geschalteten Geschlechtsverkehrs entfallen zu lassen, wenn die Sterilisation gerade dessen folgenlose Ausübung und damit die Unterbrechung des Funktionszusammenhanges zwischen Geschlechtsverkehr und Zeugung ermöglichen sollte


12 BGHZ 86, 240. See also Giesen (2008), p. 263.

[...]

Folglich stellt es entgegen der Auffassung des Berufungsgerichts keine aus verfassungsrechtlichen Gründen unzulässige Mißachtung des Kindes dar, wenn der fehlerhaft handelnde Arzt auf Ersatz des Unterhaltsschadens in Anspruch genommen wird.

**BGH, 14 November 2006, VI ZR 48/06**

Guideline (Leitsatz) of the Court:
Unterläuft dem Arzt bei dem Einsatz eines Verhütungsmittels (hier: Implanon-Implantat) ein Behandlungsfehler und kommt es zur Schwangerschaft, hat er den Eltern den entstehenden Unterhaltsschaden zu ersetzen.

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3.2. On wrongful birth and wrongful life claims

**Bundesgerichtshof, BGH 18 January 1983, BGHZ 86, 240**

Guideline (Leitsatz) of the Court:

Ist die Gefahr der Schädigung eines Ungeborenen (der durch Röteln-Erkrankung der Mutter während der Frühschwangerschaft), die den Wunsch der Mutter auf Unterbrechung der Schwangerschaft gerechtfertigt hätte, von dem die Mutter beratenden Arzt schuldhaft nicht erkannt worden, haftet dieser den Eltern auf Ersatz der durch die Behinderung bedingten Mehraufwendungen (über den Ersatz des normalen Unterhalts war nicht zu entscheiden).

Ein Ersatzanspruch des Kindes gegen den Arzt besteht nicht.

**BverfGE, 28 May 1993, 2 BvF 2/90**

Guideline (Leitsatz) of the Court:

**BGH, 18 June 2002, VI ZR 136/01**

Guideline (Leitsatz) of the Court:
Zu den Voraussetzungen, unter denen das auf einem ärztlichen Behandlungsfehler beruhende Unterbleiben eines nach den Grundsätzen der medizinischen Indikation gemäß § 218a Abs. 2 StGB rechtmäßigen Schwangerschaftsabbruchs die Pflicht des Arztes aus lösen kann, den Eltern den Unterhaltsaufwand für ein Kind zu ersetzen, das mit schweren Behinderungen zur Welt kam.
B. NETHERLANDS

1. Relevant legislation

Burgerlijk Wetboek (Dutch Civil Code)

Artikel 6:74. 1. Iedere tekortkoming in de nakoming van een verbintenis verplicht de schuldenaar de schade die de schuldeiser daardoor lijdt te vergoeden, tenzij de tekortkoming de schuldenaar niet kan worden toegerekend. 2. Voor zover nakoming niet reeds blijvend onmogelijk is, vindt lid 1 slechts toepassing met inachtneming van hetgeen is bepaald in de tweede paragraaf betreffende het verzuim van de schuldenaar

Artikel 6:97. De rechter begroot de schade op de wijze die het meest met de aard ervan in overeenstemming is. Kan de omvang van de schade niet nauwkeurig worden vastgesteld, dan wordt zij geschat.

Artikel 6:98. Voor vergoeding komt slechts in aanmerking schade die in zodanig verband staat met de gebeurtenis waarop de aansprakelijkheid van de schuldenaar berust, dat zij hem, mede gezien de aard van de aansprakelijkheid en van de schade, als een gevolg van deze gebeurtenis kan worden toegerekend.

Artikel 6:106, §1, b. Voor nadeel dat niet in vermogensschade bestaat, heeft de benadeelde recht op een naar billijkheid vast te stellen schadevergoeding: indien de benadeelde lichamelijk letsel heeft opgelopen, in zijn eer of goede naam is geschaad of op andere wijze in zijn persoon is aangetast;

Translation

Article 6:74. 1. Every imperfection in the compliance with an obligation is a non-performance of the debtor and makes him liable for the damage which the creditor suffers as a result, unless the non-performance is not attributable to the debtor. 2. As far as it is not yet permanently impossible to accomplish the indebted performance, paragraph 1 of this Article only applies with due observance of what is regulated in Subsection 2 for a debtor who is in default.

Article 6:97. The court estimates the extent of the damage in the way which is most consistent with the nature of the damage caused. Where the extent of the damage cannot be assessed exactly, it shall be estimated.

Article 6:98. Only damage that is connected in such a way to the event that made the debtor liable, that it, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation.

Article 6:106, §1, b. The injured person has a right of compensation for damage that does not consist of material loss, assessed in conformity with the standards of reasonableness and fairness: if the injured person sustained physical injuries or if his honour or reputation is injured or if he is harmed otherwise in person;

2. Introductory text

a. Wrongful conception claim

In the Netherlands, wrongful conception claims have been permitted since the so-called Missing IUD case in which the Dutch Supreme Court (Hoge Raad) awarded maintenance costs to the
parents\textsuperscript{14} The case concerned a family that had specifically decided not to have any more children because of their difficult financial situation. The doctor removed an intra uterine device during an operation, negligently omitting to replace it afterwards, and a third healthy child was born.\textsuperscript{15} The Hoge Raad found that the plaintiff’s material damage could be compensated, since the error made the doctor responsible for the consequential loss, namely, the costs of raising the child. The damage thus consisted in the extra costs that the family had to carry in order to raise the child.\textsuperscript{16} The claim for non-pecuniary loss was rejected with the argument that the emotional distress suffered by the mother was not enough to qualify as mental illness giving rise to compensation.\textsuperscript{17}

b. Wrongful birth claim
In 1994, a girl named Kelly was born severely handicapped in the Netherlands.\textsuperscript{18} Kelly’s mother had asked the obstetrician to carry out some tests regarding possible genetic defects, but the obstetrician did not take any action, omitting a prenatal diagnosis. This obstetrician’s omission was considered by the court as a breach of contract in relation to both parents and a condition \textit{sine qua non} for the damage suffered by the parents (in the sense of art. 6:98 BW).\textsuperscript{19} It therefore granted her the cost of maintainance, as well as the extra costs related to her handicaps. Regarding non-pecuniary damages, the mother was denied her right to decide to end her pregnancy of a severely handicapped child due to a negligent omission of the obstetrician, this meaning a violation of the right of self-determination and violation of art. 6:101 §1b BW.\textsuperscript{20} The Dutch legislator did not subsequently intervene, considering that this Supreme Court decision was handed down in accordance with the rules of private law in the Netherlands.\textsuperscript{21}

c. Wrongful life claims
In the Netherlands, since the 2005-Kelly-case wrongful life claims are also accepted. The court recognized that Kelly herself could recover damages and granted her the cost of living, as well as the extra costs related to her handicaps and non-pecuniary losses for her suffering.\textsuperscript{22} It did so based on the reasoning that the damages that she experienced (handicap and suffering) were a predictable consequences of the obstetrician’s mistake. According to the court, considering the obstetrician liable for breaching his duty towards the child is not a violation of its human dignity, but rather it allows the child to conduct a more humanly dignified life thanks to greater financial support.\textsuperscript{23}

\textsuperscript{14} HR, 21 February 1997, Nederlandse Jurisprudentie 1999, 145.
\textsuperscript{15} See Giesen (2008), p. 261.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} HR, 18 March 2005, Nederlandse Jurisprudentie 2006, 606.
\textsuperscript{20} Ibid., p. 914.
\textsuperscript{21} Hondius (2005), p. 107.
\textsuperscript{22} HR, 18 March 2005, Nederlandse Jurisprudentie 2006, 606. See also Hondius (2005), pp. 105 ff.
\textsuperscript{23} Lindenbergh/Vos (2011), p. 945.
3. Jurisprudence
3.1. On wrongful conception claims

HR, 21 February 1997, Nederlandse Jurisprudentie 1999, 145 (Missing IUD case)

Excerpts from the decision:

At issue is the medical fault of a physician who failed to fulfill his contractual obligation to treat the female plaintiff. As a result of a combined reading of Arts. 6:74, 6:94 and 6:98 Civil Code the physician is therefore liable for all the material damage which may be considered to be related to the fault, to the extent that it should be imputed to him in accordance with Art. 6:98 […]. The damage for which compensation is here requested consists of expenses which, by their very amount, must in principle be deemed to influence the financial situation of the family until the child comes of age. Such expenses are indisputably material damage.

3.2. On wrongful birth and life claims

HR, 18 March 2005, Nederlandse Jurisprudentie 2006, 606 (Kelly case)

Excerpts from the decision:

The doctor who failed to conduct the required prenatal diagnosis which would have been required in the given circumstance did not only breach his contractual duty towards the mother, but also acted unlawfully towards the unborn child, even though the child has no right not to exist or to require that the pregnancy be terminated.

According to art 6:97 BW, the court has to assess the damage in a manner most appropriate to its nature. In a case as this, due to the nature of the damage, all costs that will be incurred for the upbringing and care of the child, as well as the costs necessary to meet the consequences of her handicap, are to be compensated. Holding the obstetrician and the hospital liable for breaching their duty towards the child does not offend the human dignity of the child. On the contrary, it puts her in a position, as far as money can achieve this, to lead a humanly dignified life.

The child is, because she is severely handicapped, also entitled to compensation of non-pecuniary loss. The amount of the compensation should not be assessed according to the severity of her handicap. The court has to take into account all the relevant circumstances at the time of its decision, among others, the way the girl has developed since her birth, the extent to which she is prevented by her handicap from leading a “normal” life and the extent to which she suffers as a consequence thereof.

C. UNITED STATES
1. Relevant legislation and jury instructions

California Civil Jury Instructions

511. Wrongful Birth - Sterilization/Abortion Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] negligently failed to prevent the birth of her child. To establish this claim, [name of plaintiff] must prove both of the following:

1. That [name of defendant] performed a negligent [sterilization/abortion] procedure; and
2. That [name of plaintiff] gave birth to an unplanned child after this procedure was performed.

24 This corresponds to what I have called « wrongful conception » in this paper. Available at https://www.justia.com/trials-litigation/docs/caci/500/511.html. Last accessed: 16 May 2016.
512. Wrongful Birth - Genetic Testing - Essential Factual Elements
[Name of plaintiff] claims that [name of defendant] was negligent because [name of defendant] failed to inform [him/her] of the risk that [he/she] would have a [genetically impaired/disabled] child. To establish this claim, [name of plaintiff] must prove all of the following:
1. That [name of defendant] negligently failed to [diagnose/ or warn] [name of plaintiff] of] the risk that [name of child] would be born with a [genetic impairment/disability];
2. That [name of child] was born with a [genetic impairment/ disability];
3. That if [name of plaintiff] had known of the [genetic impairment/disability], [insert name of mother] would not have conceived [name of child] [or would not have carried the fetus to term]; and
4. That [name of defendant]’s negligence was a substantial factor in causing [name of plaintiff] to have to pay extraordinary expenses to care for [name of child].

513. Wrongful Life - Essential Factual Elements
[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] failed to inform [name of plaintiff]’s parents of the risk that [he/she] would be born [genetically impaired/disabled]. To establish this claim, [name of plaintiff] must prove all of the following:
1. That [name of defendant] negligently failed to [diagnose/ or warn] [name of plaintiff]’s parents of the risk that [name of plaintiff] would be born with a [genetic impairment/disability];
2. That [name of plaintiff] was born with a [genetic impairment/disability];
3. That if [name of plaintiff]’s parents had known of the [genetic impairment/disability], [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and
4. That [name of defendant]’s negligence was a substantial factor in causing [name of plaintiff]’s parents to have to pay extraordinary expenses for [name of plaintiff].

Minnesota Statute Annotated
§145.424. No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted. Wrongful birth action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.

Michigan Comp. Laws Annotated
600.2971. Wrongful birth or wrongful life claims; prohibitions; exceptions. (1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would

not or should not have been born. (2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born. (3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived. (4) The prohibition stated in subsection (1), (2), or (3) applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code, 1931 PA 328, MCL 750.1 to 750.568.

2. Introductory text
a. Wrongful conception claim
In the US, many jurisdictions reject claims for damages for maintenance of a child born after a negligent sterilization procedure, based on the reasoning that parents cannot claim to have been damaged by the birth of a healthy child.27 It is considered that “to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people”.28 However, some states accept that doctors can be held accountable in such cases and can be ordered to pay different amount of damages, including: all medical expenses incident to the unplanned pregnancy (Kingsbury v Smith); the mother’s loss of earning during the pregnancy (Beardsley v Wierdsma); pain and suffering as a result of the pregnancy and birth (Boone v Mullendore); emotional distress experienced by the parents (Troppi v Scarf); and the costs of raising the child until the age of majority (Custodio v Bauer).29 A minority of states allows for recovery of all damages, deducting “the benefits, including […] the services, love, joy and affection that parents will receive by virtue of having raising the child”.30 The majority of US states permit damage claims related to pregnancy and childbirth.31

b. Wrongful birth claim
Twenty-five US states recognize wrongful birth claims.32 On the other hand, some have banned these types of action by statute or by court decisions.33 The states recognizing wrongful birth actions usually allow parents to recover the extraordinary costs necessary to treat the abnormality

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and other additional costs of raising the child attributable to the handicap. Some courts also allow for compensation for emotional distress suffered by the parents of the handicapped child.

c. Wrongful life claims
Most states do not recognize wrongful life claims. This is sometimes justified by the fact that there is no question of a “legally cognizable wrong”, as otherwise it would mean weighing up the value of the child’s life now (with disability) against its non-existence. It is argued that it is impossible to calculate life itself in monetary terms. Furthermore, wrongful life claims are often seen as being against “public policy”: nobody should make their own existence open to public discussion. In fact, some judges, as in the Becker v Schwartz case, feel that these types of claims would be better discussed in the field of philosophy, rather than legal. Finally, some courts reject wrongful life claims based on the argument that, nowadays, we need to contain the medical liability crisis. There are, however, four states in the US that recognize these claims: California, New Jersey, Louisiana and Washington. In these states the parents can bring both wrongful birth and life claims, but they can recover the extraordinary damages only once.

3. Jurisprudence
3.1. On wrongful conception claims
Sherlock v Stillwater Clinic, 260 N.W. 2d 169 (1977)
Excerpts from the decision:

ROGOSHESKE, Justice. The principal question raised on this appeal is whether and to what extent compensable damages may be recovered for the birth of a normal, healthy child proximately caused by a negligently performed sterilization operation. We hold that in cases such as this an action for "wrongful conception" may be maintained, and that compensatory damages may be recovered by the parents of the unplanned child. These damages may include all prenatal and postnatal medical expenses, the mother's pain and suffering during pregnancy and delivery, and loss of consortium. Additionally, the parents may recover the reasonable costs of rearing the unplanned child subject to offsetting the value of the child's aid, comfort, and society during the parents' life expectancy. Because of errors in the submission of the issue of damages to the jury in this case, we remand for a new trial limited to that issue.

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38 Ibid.
40 Becker v. Schwartz, 413.
41 See Lyons, Vill L Rev, 681 ff.
3.2. On wrongful birth claims

*Keel v. Banach, 624 So. 2d (1993)*

Excerpts from the decision:

**Shores, Justice.** The plaintiffs are Karen and Danny Keel, parents of Justin Keel, who was born on January 18, 1985, with severe multiple congenital abnormalities. Justin died in February 1991, at the age of six. The defendants are Warren Banach, M.D., who was Karen's doctor and who performed the sonographic examinations of the fetus, and his professional corporation. The Keels charged the defendants with medical malpractice in failing to discover several severe, life-threatening fetal abnormalities that, the Keels say, had they been known to them, would have caused them to terminate the pregnancy. Actions such as that filed by the Keels have come to be called actions for "wrongful birth." The trial judge entered a summary judgment for the defendants, holding, as a matter of law, that no cause of action for wrongful birth, or damages for wrongful birth, are recognized in the State of Alabama. The plaintiffs appealed. We reverse and remand.

3.3. On wrongful life claims


Excerpts from the decision:

[…]. The appeal presents an issue of first impression in California: What remedy, if any, is available in this state to a severely impaired child - genetically defective - born as the result of defendants' negligence in conducting certain genet tests of the child's parents – tests which, if properly done, would have disclosed the high probability that the actual, catastrophic result would occur?

[…]. We have no difficulty in ascertaining and finding the existence of a duty owed by medical laboratories engaged in genetic testing to parents and their as yet unborn children to use ordinary care in administration of available tests for the purpose of providing information concerning potential genetic defects in the unborn. The public policy considerations with respect to the individuals involved and to society as a whole dictate recognition of such a duty, and it is of significance that in no decision that has come to our attention which has dealt with the "wrongful-life" concept has it been suggested that public policy considerations negate the existence of such a duty. Nor have other jurisdictions had any difficulty in finding a breach of duty under appropriate circumstances or in finding the existence of the requisite proximate causal link between the breach and the claimed injury; we find no bar to a holding that the defendants owed a duty to the child plaintiff before us and breached that duty.

[3] The real crux of the problem is whether the breach of duty was the proximate cause of an injury cognizable at law. The injury, of course, is not the particular defect with which a plaintiff is afflicted - considered in the abstract- but it is the birth of plaintiff with such defect.

The circumstance that the birth and injury have come hand in hand has caused other courts to deal with the problem by barring recovery. The reality of the "wrongful-life" concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.
[...] In our consideration of whether the child plaintiff has stated a cause of action, we find it instructive to look first to the statutory law of this state. Our Civil Code section 3281 provides that "[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." Civil Code section 3282 defines detriment as "a loss or harm suffered in person or property." Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this [106 Cal. App. 3d 830] Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[6] In addition, we have long adhered to the principle that there should be a remedy for every wrong committed. "Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer. Although we recognize exceptions from these fundamental principles, no departure should be sanctioned unless there is a strong necessity therefor. [7] The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not." (Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433 [58 Cal. Rptr. 13, 426 P.2d 173].)

[7a] We have concluded that it is clearly consistent with the applicable principles of the statutory and decisional tort law in this state to recognize a cause of action stated by plaintiff against the defendants.


Excerpts from the decision:

This case presents the question of whether a child born with an hereditary affliction may maintain a tort action against a medical care provider who - before the child's conception - negligently failed to advise the child's parents of the possibility of the hereditary condition, depriving them of the opportunity to choose not to conceive the child. Although the overwhelming majority of decisions in other jurisdictions recognize the right of the parents to maintain an action under these circumstances, the out-of-state cases have uniformly denied the child's right to bring what has been commonly termed a "wrongful life" action. In Curlender v. Bio-Science Laboratories (1980) 106 Cal.App.3d 811 [165 Cal.Rptr. 477], however, the Court of Appeal concluded that under California common law tort principles, an afflicted child could maintain such an action and could "recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition" (id., at p. 831), including the costs of medical care to the extent such costs were not recovered by the child's parents.

[...] In sum, we conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child - like his or her parents - may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.
IV. QUESTIONS AND INPUTS FOR ANALYSIS

1. What is the difference between wrongful life, wrongful conception and wrongful birth claims?
Wrongful conception claims are brought against doctors following failures in the provision of family planning techniques resulting in the birth of a healthy child. The parents claim that they would not have conceived the child but for the negligence of the doctor in the family planning methods (either negligence in the performance of such procedures or in the provision of advice). On the other hand, in a wrongful birth claim the doctor failed to properly warn the parents of the risk of giving birth to a child with genetic or congenital abnormalities, and the parents claim that the doctor prevented them from making a truly informed decision as to whether or not to have the child. Finally, in a wrongful life claim, the (simplified) postulate put forward by the child is the following: “You, the doctor, ought to have given my mother the opportunity of having me aborted. My life is not worth living: I would prefer no life to the life I have”. Due to a negligent act by the doctor, no abortion has been effectuated and he must now live under very difficult conditions, with genetic or congenital abnormalities, and it is the child himself making a claim against the doctor.

2. What are the main ethical questions at stake with these types of claims?
The claims of wrongful conception, life and birth are highly controversial since they inevitably touch upon the way we think about life in general. In particular, when considering these claims, the first major question is whether the existence of a child (even a healthy one, such as in the case of wrongful conception) can ever be considered as a source of damage. With regard to wrongful life claims, one can also wonder whether a disabled child has a sort of “right to be aborted”. Furthermore, for both wrongful life and wrongful birth claims the question arises whether a handicapped life is of less value than a “normal” one. Another relevant question is whether it is possible to accept wrongful birth claims without also accepting wrongful life claims. This occurs in various jurisdictions; however, one could wonder whether, if you give the parents a claim in the case of a born handicapped child, you should not also provide the child itself with a claim. These claims also raise the question of whether we can accept the risk of creating a great anxiety in the medical sector. Indeed, the techniques used for diagnosing problems pre-natally have seen an important development in the past decade, and this has been followed by greater expectations from

43 Priaulx (2007).
44 Ibid.
parents to receive more precise information with regard to their yet unborn child.\(^{47}\) This advancement of technology, along with the increasing chances of possible lawsuits, have caused a growing anxiety in the medical field, whereby doctors tend to advise abortion as soon as there is a sign of a problem due to the fear of being liable for diagnosis errors: a form of \textit{defensive medicine}.\(^{48}\) Finally, both wrongful birth and wrongful life claims are directly related to the \textit{right to self-determination}, especially of the mother, but also of the father.\(^{49}\) The parents have a right to make an informed decision regarding whether or not they want to have a child. It is this fundamental right that is breached by the doctors’ fault in the situations considered in this paper.

3. \textbf{What variety of damages can be awarded for wrongful conception, birth and life claims?}

Such damages can go from nothing at all (no recovery), to covering immaterial loss (mainly consisting of emotional distress, pain and suffering), to material loss involving medical expenses connected with the pregnancy and the birth, the costs of raising the child, as well as loss of income of the parents and lost career opportunities. Most jurisdictions only allow for the costs associated with the raising of a handicapped child namely, the extra medical costs incurred by the handicap.\(^{50}\)

4. \textbf{What are the main issues when arguing for these types of claims?}

Some argue that the award of expenses can only be based on the concept that the child itself must be regarded as a \textit{damage}, and this is contrary to the human dignity of the child.\(^{51}\) However, this argument can be dismissed by arguing that it is not the child itself that is considered as a damage, but rather the financial consequences borne by the parents for raising a (healthy or unhealthy) child, or the pain and suffering experienced by the mother due to an unwanted pregnancy. Furthermore, some argue that allowing for compensation will allow the child to live, as much as possible, in human dignity (as argued in the Kelly case).\(^{52}\)

As problematic is the issue of causation. Indeed, in the cases of wrongful life and birth, the disabilities are not caused by the doctor, but by a sickness or a genetic problem. However, as the Hogue Raad determined in the Kelly case, “the facts which establish liability are not Kelly’s birth or the chromosomal defect, but rather the absence of a correct test by the obstetrician”. In other words: “[t]he reality of the ”wrongful-life” concept is that such a plaintiff both exists and suffers, due to the negligence of others”.\(^{53}\) One can also argue that the negligence of the doctor deprived the parent of the opportunity to fully choose whether or not they wanted to go on with the pregnancy or

\(^{47}\) Huayama, p. 3.
\(^{48}\) Ibid.
\(^{49}\) See Giesen (2008), p. 268; see also Van Dam (2006), pp. 157 ff.
\(^{50}\) For the specific cases at stake see Table 1 and introductory texts.
\(^{52}\) Ibid.
abort the fetus; this is where liability lies: the negligence of the doctor prevented the parents from exercising their freedom to proceed to a termination of the pregnancy in order to avoid the birth of a handicapped child (in the wrongful conception case they were deprived of an informed choice of whether to have a child at all).

Another issue that is sometimes raised is that damages are practically impossible to calculate, since such a calculation would involve measuring the difference between a “life with defects” against “non-existence”. 54

Regarding the duty of the doctor, jurisdictions that accept these claims argue that his duty is not to prevent the birth of the child, but rather merely to inform the mother of any risks associated with the birth of her child. Finally, one of the central questions in these cases is: to whom does the doctor owe a duty of care? It is rather clear that he owes a duty to the mother, but the question remains as to his specific duty to the child; this is more controversial. 55

5. What are the main arguments in favor and against wrongful birth and life claims?

Arguments against: allowing these claims may increase the number of abortions; it might lead to a defensive medicine; it might lead towards a sort of eugenic society; some consider these actions as unethical and an indication of social intolerance toward disabled individuals.

Arguments in favor: the prospective parents have an interest in making informed and autonomous decisions about whether or not to have a child; a doctor who fails to adequately inform of the risk of abnormalities is depriving the parents of the chance to make a fully informed procreative decision; the child itself should also be able to claim that he would have preferred to avoid such a sufferance; without wrongful birth claims the parents would have to carry the financial consequences of a (disabled) child they wanted to avoid precisely for financial reasons.

6. Can you identify the approaches to wrongful conception, birth and life claims in Germany, Netherland, and in the US?

Cf. introductory texts for each country and Table 1.

V. CONCLUSION

This paper has briefly shown the approaches of three legal systems to the controversial claims of wrongful birth, life and conception. Generally speaking, there is no doubt that the most contentious claim remains wrongful life, while wrongful birth and conception claims tend to be accepted (at least in the legislations under examination in this paper). Furthermore, we can say that the considered states are generally generous with compensation, awarding in most cases damages for

54 See e.g. Gleitman v. Cosgrove, cf. supra at 37.
the maintenance of the child, and not only the extra costs directly related to the handicap. This paper has also illustrated the main arguments and reasoning in support and in rejection of these claims and has hopefully given an idea of the complexity surrounding the issue. This intricacy is probably mainly due to the controversial ethical questions that are at stake when discussing these types of claims and, as we have seen, some even consider that these claims would be better discussed in the filed of philosophy rather than in that of law.\(^5^6\) However, it is precisely the role of the law to guide behaviors, even when touching the branch of ethics, and a comparative analysis might be a good way to expand our horizons and consider other possible legal solutions.

**ANNEX: TABLE 1**

<table>
<thead>
<tr>
<th></th>
<th>Wrongful conception</th>
<th>Wrongful birth</th>
<th>Wrongful life</th>
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<tbody>
<tr>
<td><strong>Germany</strong></td>
<td>✓ claim accepted</td>
<td>✓ claim accepted</td>
<td>× claim rejected</td>
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<td>Compensation:</td>
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<tr>
<td>- maintenance</td>
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<td>- non-pecuniary loss</td>
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<td><strong>Netherlands</strong></td>
<td>✓ claim accepted</td>
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<td>✓ Claim accepted</td>
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<td>Compensation:</td>
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<td>- maintenance</td>
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<td>- non-pecuniary, only if emotional distress reaches the level of mental illness</td>
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<tr>
<td><strong>US</strong></td>
<td>≈ ✓ claim accepted in some states</td>
<td>≈ ✓ Claim accepted in some states</td>
<td>≈ × Claim gen. rejected</td>
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<tr>
<td>Compensation depends on state. These are some awards allowed:</td>
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<td>- none</td>
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<td>- medical expenses (majority)</td>
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<td>- non-pecuniary loss</td>
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<td>- maintenance (minority)</td>
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<td>Claim allowed in 25 states</td>
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<td>Exception from rejection:</td>
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<td>- California</td>
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<td>- Washington</td>
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\(^5^6\) Becker v Schwartz, 413.