

8. Legal position in England

8.1 Legislative background

In England the wrongful life debate was slow to catch on compared to its rapid development in the United States of America. In order to clarify the English legal position regarding wrongful life actions, the British Legal Commission was given the task in 1974 to investigate the matter. The Commission produced a report "Injuries to unborn children" wherein they criticised the claim and suggested that it be disallowed.³⁷¹ They found that although there should principally be an action in cases where a disability or an abnormality was directly caused by a tortfeasor,³⁷² this was not the basis of a wrongful life action.³⁷³ The opinion of the Legal Commission was accepted and made law through enactment of the **Congenital Disabilities (Civil Liability) Act of 1976**.³⁷⁴

Another inquiry into the merits of wrongful life actions was done by the Pearson Commission³⁷⁵ two years after the act has been introduced. This commission similarly rejected wrongful life actions.

8.2 A case study

In the case of **Mc Kay v Essex Health Authority**³⁷⁶ the plaintiff's mother contracted German measles during her pregnancy. Assured by the (incorrect) advice of her physician who failed to diagnose the disease, she did not consider the possibility of investigating the matter any further. At its birth it was established that the plaintiff was in fact seriously affected by its

³⁷¹ "Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one. It must not be forgotten that in certain circumstances, the parents themselves might have a claim in negligence."

³⁷² Blackbeard *op cit* p 64 declares that in England, torts committed against the unborn are recognized and the plaintiff need not even be conceived for a defendant to be in a position to act negligently towards the plaintiff.

³⁷³ *ie* a straightforward action for physical injury, based on tort - the difference between these actions and wrongful life actions is that, in the first instance a normal healthy baby would be born was it not for the injurious conduct, while in wrongful life a normal existence was never an option.

³⁷⁴ sec 1(2)(b).

³⁷⁵ Royal Commission on Civil Liability and Compensation for Personal Injury (1978).

³⁷⁶ (1982) Q.B. 1166 (1982) 2 All. E.R. 771.

mother's infirmity and was subsequently born with various debilitating abnormalities, including partial blindness and a hearing deficiency. A claim for wrongful life was accordingly based on the negligent conduct of the physician which prevented the option of an abortion and caused the plaintiff to be born as a seriously handicapped person. The court *a quo* rejected the claim.

On appeal, the court unanimously agreed that this claim does not have a reasonable legal cause of action. Robertson³⁷⁷ writes that this verdict was to be expected because of the legislative prohibition of wrongful life actions in section (1)(b) of the Congenital Disabilities (Civil Liability) Act. The reasons given by the Court of Appeal for its decision are summarised in the following points:

- there existed no legal duty on the physician towards the unborn child to insure that it be aborted;
- such a cause of action would undermine the sanctity of human life and is accordingly against public policy;
- insurmountable problems regarding calculation of damages.

Robertson³⁷⁸ mentions that the value of the judgement does not lie in the rejection of the wrongful life action,³⁷⁹ but rather in the implied support the court gave towards recognition of the wrongful birth action.³⁸⁰

Finch³⁸¹ reflects that the general importance of the Appeal Court's ruling in **McKay v Essex Area Health Authority** is in fact considerably restricted for practical purposes by the Congenital Disabilities (Civil Liability) Act 1976 which, by s 4(5) has the effect of depriving any child born after July 22, 1976 of a cause of action (if ever there had been one) for wrongful life.

To summarise, it seems as if the position concerning wrongful life actions in the English legal system is clear: the cause of action is rejected because of legislative prohibition.³⁸²

³⁷⁷ 1982. Wrongful Life. *Modern Law Review* (45), 697.

³⁷⁸ *op cit* p 700.

³⁷⁹ since this could be predicted.

³⁸⁰ which is discussed in ch 7.

³⁸¹ 1982. No Wrongful Life. *New Law Journal* (132:6043), 235.

³⁸² it is submitted that the clear statutory regulation of the entire wrongful life issue is plausible, as much harm is done in terms of legal uncertainty and unnecessary litigation in countries where the exact position concerning these actions is unknown - see ch 12 where it is suggested that legislative guidance is therefore a certain solution to the entire wrongful life dilemma.

9. Legal position in Israel

9.1 Brief discussion

It seems as if the Israeli courts are especially liberal in comparison to most other Western countries with regards to wrongful life actions. Blackbeard³⁸³ reports on the case of **Saul, Shmuel & Nvadra Katz v Dr R Zeitzov, Beilinson Hospital**,³⁸⁴ where an action was boldly allowed by the Israeli courts. The facts of the case were that the plaintiff's mother sought genetic advice before her marriage on the possibility of her being a carrier of the hereditary *disease of Hunter*.³⁸⁵ The reason she specifically inquired about the risk was the fact that this disease has been prominent in her family history. She decided beforehand that if she was found to be a carrier, she would never give birth to a son. She was negligently examined and accordingly the wrong diagnosis was made. Dr. Zeitzov ensured her that there existed no chance of her passing on this genetic disease to her unborn son. The plaintiff was indeed born with Hunter's disease and he accordingly instituted a wrongful life action. In the court *a quo* the claim was dismissed on the following two grounds:

- the wrongful life debate falls outside the courts' jurisdiction and therefore the legislator should solve the problem by statutory means;
- as the true tortfeasors are the parents,³⁸⁶ who will escape liability when the action is only instituted against a third party namely the physician.

9.1.1 On appeal

On appeal the plaintiff's action succeeded. According to section 2 of the Israel Tort Ordinance the plaintiff indeed suffered damage.³⁸⁷ The court found that the well known comparison between a condition of non-existence and handicapped life is the correct formula by which damage must be calculated. Although the holiness and value of a human life could establish the presumption that any form of life is more valuable than the alternative, the court stated that

³⁸³ *op cit* p 65.

³⁸⁴ Civil Appeal 518/ 82, 540/ 82; 40 PD (2) 85.

³⁸⁵ a genetic disease which only affects male offspring - see ch 11.

³⁸⁶ the court argued that because the parents conceived the child, they should be directly responsible for the plaintiff's physical anomalies.

³⁸⁷ the damage include: "loss of life; loss of property; comfort, physical welfare or reputation; or a lessening thereof; and any loss or diminution derived from the above."

in Israeli law the question of damages for the reduction in lifespan is approached in a quantitative manner.³⁸⁸ This implies that in Israeli law there exists a presumption that life always has a positive value.

The court further declared that the comparison between life and non-existence has already been made earlier in the "Babylonian Talmud",³⁸⁹ where it is stated that life under certain circumstances is not preferred to non-existence.³⁹⁰

Carmi³⁹¹ reports on the Court of Appeal's judgment in **Saul, Shmeulen Nvadra Katz v Benlin Hospital**³⁹² and writes that the court eventually allowed a wrongful life action by awarding not only special, but also general damages. He deliberates that this claim seems to have been based on "the foetal right to life without defects", since judge Barak held the view that human beings do not have the right not to live, but that they are entitled to life without defects. Therefore the damage does not lie in the creation of life but in the causing of a defective life.

The assessment of the damage should therefore be made by comparing a defective life to a life without defects.³⁹³ Judge Barak founded his view on the believe that non-existence is not a human state and that other courts accordingly have made an incorrect comparison by weighing disabled life with non-existence in order to establish damage in wrongful life actions.³⁹⁴

Chief Justice Ben-Porat found that in certain cases it is possible that it would be better not to have lived at all. He suggested that one should approach the handicapped life debate by

³⁸⁸ in contrast to the English law where this calculation is made with reference to qualitative values where the degree of happiness and expected quality of life is an important consideration.

³⁸⁹ Aruvin tract 13(b).

³⁹⁰ it should therefore be recognized that it is sometimes better not to have been created.

³⁹¹ 1990. Wrongful Life: An Israeli Case. *Medicine & Law* (9) *Medicine and Law*, 777.

³⁹² C.A. 518, 540 (82); PD (2) 85.

³⁹³ according to Carmi *op cit* p 778, this premise is based on a misunderstanding of the basis of wrongful life litigation - the plaintiff never had the option of normal existence and judge Barak, therefore, applied a wrong method.

³⁹⁴ Blackbeard *ibid*.

implementing an objective "reasonable man test".³⁹⁵ Would the reasonable man find a specific handicapped condition (identical to that of the plaintiff) bearable or not? If the answer is no, then one could declare that the plaintiff's specific life is not more advantageous than non-existence.

According to the Chief Justice the most important issue was not whether it is possible to cause life and an impaired condition through a single wrongful conduct, but rather if actual, legally cognisable damage was caused. He believes that this question should be answered before the issue of a duty of care is discussed, since it serves as a basis for the existence of such a duty.³⁹⁶

In casu there was no doubt that the physician owed a duty of care to the parents³⁹⁷ and he would surely have had to compensate the parents under a claim for wrongful birth. Judge Ben-Porat was convinced that damage has indeed been proven and accordingly felt that physicians should owe a similar duty towards the unborn and allowed the wrongful life action.

The debate on the right of a child to sue his parents for being born disabled was also considered by the court. Here, Carmi³⁹⁸ declares that one must find an equitable balance between the interests of the parties involved. Nevertheless, relevant guidelines should be laid down by either the legislator or the courts. He reports that the court *in casu* was convinced that this should definitely be a matter for legal policy makers to consider.

In conclusion Judge Carmi³⁹⁹ states that there are three vital questions must be answered in order to establish a basis for wrongful life actions, namely:

- does a foetus have rights?
- does there exist a duty of care on the physician *and* parents towards the foetus?
- in what manner should damages be calculated in wrongful life actions?

³⁹⁵ this reference to the "reasonable man test" should not be confused with the commonly recognized reasonable man test applied in establishing negligence.

³⁹⁶ Blackbeard *op cit* p 66.

³⁹⁷ not only was there a contractual relationship between the physician and his patients, but also as a result of his negligent advice, a seriously ill child was born - *res ipsa loquitur*.

³⁹⁸ *op cit* p 779.

³⁹⁹ *op cit* p 780.

Tedeschi⁴⁰⁰ writes that "even as for predictable causes, it is only possible to contemplate those which should have compelled the parents to refrain from procreating, having regard to circumstances and on the basis of moral responsibility."⁴⁰¹

10. Legal position in the Netherlands

10.1 Introduction

Stolker⁴⁰² declares that wrongful life actions are seen as the "frontier of medical malpractice litigation". He believes that these actions are becoming ever more relevant worldwide as genetic counselling becomes more popular by the day. He notes that the majority of wrongful life cases are based on insufficient genetic advice. Stolker proclaims that the position held by courts in maintaining that the actions should not be allowed has basically stayed the same over the past years. Only in exceptional instances have courts allowed this action.⁴⁰³ In reaction to this general unwillingness to accept the claim, it is reported⁴⁰⁴ that erudite authors are still searching for arguments to convince courts to change the *status quo* and accept the actions.

He⁴⁰⁵ explains that wrongful life actions are generally more difficult to decide than "normal delictual actions". If the facts show that a physician injured a healthy foetus to such an extent that it is born handicapped, it would be presumable that a cause of action in delict exists.⁴⁰⁶

⁴⁰⁰ 1966. On tort liability for "Wrongful Life". *Israel Law Review* (1:4) 513.

⁴⁰¹ "On what grounds could this position be inferior to that of others? Since he belongs to a class which is determined by reference to the time when damage will be caused and not when the act is committed, one is not to take account of a "class of those-to-be-born" as such, but of a class to which a person unborn or not conceived at the time of the wrongful act will be found to belong at the time of the damage." *op cit* p 522.

⁴⁰² 1997. Een onrechtmatig bestaan in Nederland - een stand van zaken. *Aansprakelijkheid en Verzekering* (5:2), 39.

⁴⁰³ it is reported *ibid* that the wrongful life action has only been successful in three American states: that of *Procanic v Cillo*; *Curlender v Bio-Science Lab.* and *Harbeson v Parke-Davis (supra)*.

⁴⁰⁴ *ibid*.

⁴⁰⁵ Stolker, *op cit* p 40.

⁴⁰⁶ that is if all the other required delictual elements are proven: (as stated in my preview, only "true" wrongful life actions will be discussed in this study and cases where healthy foetuses are injured before birth fall within the recognized ambit of delictual claims and cause little difficulty in legal theory) - the defendant will then be in the same position as a negligent driver of a motor vehicle who injures an unborn child).

Much more difficult to judge, however, are cases where the defendant did not directly cause the impaired condition itself, but through negligent conduct caused a handicapped child to be born.⁴⁰⁷

Stolker comments that although he dismissed the wrongful life claim on dogmatic grounds in an earlier comment,⁴⁰⁸ he now has come to realise that behind the reasoning of wrongful life claims there lies deep human suffering and pain. It is accordingly submitted that this basic truth might make these plaintiffs more worthy of damage awards than in wrongful conception plaintiffs.⁴⁰⁹

Schoonenberg⁴¹⁰ writes that even though the basis of wrongful life liability lies in the improper provision of genetic information and failure to warn of foreseeable genetic anomalies, the practical implication of a failed sterilization could similarly constitute liability.

“Aan de behandelend arts van de ouder(s) wordt verweten onvoldoende informatie te hebben verschaft omtrent voorzienbare genetische afwijkingen bij de patiënt. De aansprakelijkheid kan echter ook gebaseerd zijn op een mislukte sterilisatie of abortus.”

10.2 Recent case law

Stolker and Levine⁴¹¹ reports on a very recent and yet undecided wrongful life action that was instituted in the Netherlands. *In casu* the plaintiff, Kelly, was born with serious physical and psychological impairments that were caused by a very uncommon genetic aberration. In the ensuing action it was argued for the plaintiff that this unfortunate birth could have been prevented if an *amniocentesis test* was performed on her mother by the Academic Hospital in Leiden. It was alleged that, had the rare genetic digression been detected, an abortion would have been obtained which would have prevented her current suffering.

⁴⁰⁷ *ie* wrongful life: the defendant is basically reproached for unlawfully depriving the option of an abortion from concerned parents - alternatively the defendant is held accountable for insufficient or incorrect genetic advice given before conception; or for depriving the parents of the possibility and right to choose not to have children at all.

⁴⁰⁸ 1986. *Aansprakelijkheid van de arts voor mislukte sterilisaties* Kluwer-Deventer (Serie Gezondheidsrecht no. 17).

⁴⁰⁹ where the birth of a healthy baby is the cause of action, which claims are commonly recognized - see ch 6 for a discussion on wrongful conception.

⁴¹⁰ 1986. *op cit* p 61.

⁴¹¹ *op cit* p 38.

Volker⁴¹² summarises the vital aspects of the case.⁴¹³ To ascertain whether the physician in question has acted below the level of proficiency expected from him, the court applied the test of the reasonable colleague.⁴¹⁴ The court recognized that there does exist a contractual relationship between the mother-patient and the physician in terms of section 7:446 Civil Code.⁴¹⁵

This agreement was partially concluded with the interests of the child in mind and the child should therefore be included in the scope of protection afforded by the contract.⁴¹⁶ It is suggested that not only other Dutch writers,⁴¹⁷ but also the courts⁴¹⁸ support such an extension of liability.

The question whether one should therefore take into account the interests of a third party depends on the fact if one was expected to have knowledge of the existence of such a third party.⁴¹⁹ Although the case which was used as authority was founded in delict, it is submitted that direct application should be made to the current issue, which was based on contract.⁴²⁰

It is suggested⁴²¹ that a physician acts wrongfully in terms of section 6:162 Civil Code, if he acts in contravention of unwritten law (socially unacceptable conduct). The physician could consequently be imputed to have committed a delict in terms of section 6:162 (3), inasmuch as the blame for the detrimental result could be cast on him, according to the view of the community.⁴²² It is submitted⁴²³ that the mere fact that discussions are held concerning a

⁴¹² 1997. *De wrongful life vordering - Toewijzing mogelijk of niet?* Skripsie, Erasmus Universiteit, Rotterdam.

⁴¹³ September 1997.

⁴¹⁴ as reiterated in the *Hoge Raad* decision of 9 November 1990, NJ 1991, 26.

⁴¹⁵ the specific medical treatment agreement - see *supra*.

⁴¹⁶ "De overeenkomst die de vrouw sloot met de arts werd ook gesloten in het belang van het kind. De beschermingsomvang van de norm strekt zich uit tot het ongeboren kind." op cit 6.

⁴¹⁷ eg Stolker and Levine, Hol etc - see *supra*.

⁴¹⁸ the well known "verstekeling-arres" of HR 27 Januari 1984, NJ 1984, 536.

⁴¹⁹ which is clearly the case in wrongful life.

⁴²⁰ op cit p 7.

⁴²¹ *ibid*.

⁴²² "Onrechtmatige daat vloeit voort uit een buitencontractuele relatie. De arts handelt onrechtmatig, indien hij handelt in strijd met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt (artikel 6:162 lid 2 BW). Een onrechtmatige

delictual or contractual basis of liability, indicates that a wrong has been committed, for which compensation should be given.

Volker⁴²⁴ refers to German⁴²⁵ and American⁴²⁶ authority where the wrongful birth action of the mother was recognized, but the child's action refused. In a recent French⁴²⁷ case, however, a wrongful life action was allowed. The Dutch court followed the German and American example.

Appeal Judge Vranken, as quoted in a recent wrongful conception action,⁴²⁸ is generally less enthusiastic about the use of dogmatic reasoning in these type of cases:

*"Het minst bevredigend, m.i. zelfs ronduit onjuist, is het wanneer men de oplossing zou willen zoeken op het niveau van de dogmatiek, bijvoorbeeld in het begrip schade of in de gezinsbeplanning als persoonlijkheidsrecht. Dogmatiek is niet meer dan de inkadering van de initiële keuze in het bestaande systeem. De rechtvaardiging van de initiële keuze ligt elders. Op dat niveau moet zich dan ook de argumentatie bewegen."*⁴²⁹

Schoonenberg⁴³⁰ argues that wrongful life actions should be legally recognized in the Netherlands. She addresses the question whether a duty of care could exist between a physician and their posterity:

daad kan aan de arts worden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt (artikel 6:162 lid 3 BW)." op cit p 8.

⁴²³ op cit p 9.

⁴²⁴ op cit p 15.

⁴²⁵ Bundesgerichtshof: BGH 18 Januarie 1983, Juristenzeitung 1983.

⁴²⁶ **Sundi A. Greco v United States of America** 893 P.2d 345 Nev. (1996): "We decline to recognize any action by a child for defects claimed to have been caused to the child by negligent diagnosis or treatment of the child's mother".

⁴²⁷ Cour de Cassation 26 March 1996 (2 arrêts), Recueil Dalloz 1997.

⁴²⁸ HR 21 februari 1997, RvdW 1997, 54c.

⁴²⁹ Conclusion of Vranken sub 23 - a paraphrased summary of this quotation is: It is highly unsatisfactory and even unjust to find the solution (to this problem) in dogmatic reasoning for example in reference to the damage issue or the right to procreative decisions as a personality right. Dogmatics is nothing more than support for an initial decision/ choice in a current (legal) system. The justification of the initial decision lies on another level. It is on this level that the argument must be founded.

⁴³⁰ 1986. op cit p 62.

“Mag men aannemen dat er in de Nederlandse samenleving in dit verband sprake is van een zodanige norm van maatschappelijk behoren, dat er aanleiding is voor bescherming door het recht? Schut stelt dat het bij toetsing aan de zorgvuldigheidsnorm gaat om toetsing aan maatschappelijke normen van een zodanig gewicht en zo algemeen aanvaard dat zij tevens het karakter van rechtsnormen hebben aangenomen. Scherpe grenzen zijn hier niet te trekken. De rechter heeft een grote mate van vrijheid bij het tot rechtsregel verheffen van normen van maatschappelijk behoren.”⁴³¹

It is mentioned ⁴³² that another valid point concerning the basis of wrongful life litigation⁴³³ is that these actions are derived from social questions that have developed from recent biomedical advancements. Scientific development has therefore extended the duty of physicians.

“Bij WL acties gaat het evenals bij WB acties om maatschappelijke vragen welke door de ontwikkeling in de biomedische wetenschap juridische relevantie krijgen. Wetenschappelijke ontwikkelingen brengen een uitbreiding van de taak van de arts met zich mee.”⁴³⁴

She⁴³⁵ is of the opinion that a clear duty of care on a physician to consider the interests of unborn children has not yet been established in the Netherlands. The legal recognition of such a duty would depend on societal attitudes, which would on its part be determined through a process of societal development and change in correlation with scientific advances and moral-ethical standards in the particular community.

10.3 Based on contract or delict?

Schoonenberg⁴³⁶ declares that as the unborn child of the patients have no contractual link with the family physician, an action that is instituted by the child would have to be based on delict.⁴³⁷

⁴³¹ *op cit* p 67.

⁴³² Schoonenberg *op cit* p 66.

⁴³³ and similarly wrongful birth.

⁴³⁴ key issues in both wrongful life and wrongful birth actions are the relevance in the legal sphere of societal questions regarding the development of medical science.

⁴³⁵ Schoonenberg *ibid*.

⁴³⁶ *op cit* p 68.

⁴³⁷ refer to ch 2.

An interesting issue that is considered in this regard⁴³⁸ is the possible delictual liability of a physician under these circumstances, based on the legal concept of professional liability towards third parties. It is namely an established principle in Dutch law⁴³⁹ that an individual can be held accountable for reasonably foreseeable injury caused to third parties because of his negligence.⁴⁴⁰

Although professional liability based on malpractice towards third parties is therefore easily established,⁴⁴¹ it is unclear whether such responsibility will also extend to unborn plaintiffs or even plaintiffs that have not yet been conceived at the time of misconduct.

It is reported that Dutch academics differ in opinion:⁴⁴² although Sluyters is not convinced that a duty of care can be imputed to the physician, Leenen is of the opinion that a breach of the duty to act with proficiency could infringe the interests of the unborn. Schoonenberg seems to agree with him.⁴⁴³

Stolker⁴⁴⁴ explains that an important principle in Dutch law of contract is that agreements exclusively exist between the particular contracting parties. Third parties do not derive any rights or duties in terms of such an agreement. Section 6: 253 of the Civil Code, however, is an exception.⁴⁴⁵

“Een hoofdregel van ons contractenrecht is dat overeenkomsten slechts van kracht zijn tussen de handelende partijen (in dit geval de KNMG en het LP/CP). Derden (de patiënt) ontleen aan een overeenkomst geen rechten of verplichtingen. Een uitzondering daarop is het derdenbeding (art.6:253 e.v. BW).”

10.4 Is wrongful life attainable in the Netherlands?

⁴³⁸ and to the question of a duty of care in wrongful life actions.

⁴³⁹ 1971 (30 december) Rb. Den Haag; 1973 (15 januari) Curaçao.

⁴⁴⁰ *ibid.*

⁴⁴¹ as soon as plaintiff can prove that the damage to third parties was reasonably foreseeable.

⁴⁴² *ibid.*

⁴⁴³ *op cit* p 68.

⁴⁴⁴ 1994. De nieuwe Wetgeneeskundige behandelingsovereenkomst en het juridische belang van de Modelregeling arts-patiënt. *Nederlands Tijdschrift voor Bureerlijk Recht* (11:1), 118.

⁴⁴⁵ see further discussion of sec 6: 253 in ch 6.

Kruithof⁴⁴⁶ expresses his personal view on wrongful life and states that it should not be allowed on the following reasons: a comparison between life and non-existence is not impossible and the plaintiff-child is thereby placed in the absurd position of denying his very existence:⁴⁴⁷

“Persoonlijk kan ik deze redenering niet onderschrijven. Niet alleen omdat een vergelijking tussen leven en niet-leven onmogelijk is, maar omdat het kind hier in de absurde positie geplaatst wordt zijn eigen bestaansrecht te ontkennen.”

Major challenges to the acceptance of wrongful life in other jurisdictions are now considered from a Dutch perspective and applied to current law in the Netherlands.

10.4.1 Familial litigation

Leenen⁴⁴⁸ conveys that a wrongful life action of a child against its parents is conceivable, although somewhat more complex than an average wrongful life action.

“Bij een wrongful life action van het kind tegen de ouders ligt de situatie ingewikkelder. Zij zou eventueel denkbaar zijn bij het bewust schade toebrengen aan de vrucht tijdens de zwangerschap. Doch de vraagstukken, waarin men bij acties van kinderen tegen ouders terecht komt, zijn groot. Nog weer een stap verder is een actie van het kind tegen de ouders op grond van het verwijt, dat zij, op de hoogte van genetische risico's, het genetisch beschadigde kind desondanks hebben voortgebracht. Zonder te denken aan een recht van het kind om gezond geboren te worden, zou het een vordering hebben omdat de ouders vermijdbare risico's vóór en na de conceptie niet hebben vermeden? Zou het de ouders ervoor aansprakelijk kunnen stellen, dat geen amniocentesis en op grond daarvan geen abortus is verricht of dat zij chromosomale schade vóór de conceptie niet hebben voorkomen?”⁴⁴⁹

⁴⁴⁶ 1987. Schadevergoeding wegens de geboorte van een ongewenst kind? *Rechtskundig Weekblad* (50:41), 2737.

⁴⁴⁷ *op cit* p 2754.

⁴⁴⁸ 1984. Nieuwe wetenschappelijke ontwikkelingen rond het begin van het leven; problemen voor het gezondheidsrecht. *Tijdschrift voor Gezondheidsrecht*, 116.

⁴⁴⁹ *Op cit* p 120 - a paraphrased summary of this quotation is: The instance where a child sues its parents for wrongful life is complicated, but certainly conceivable, especially where the harm was inflicted knowingly during the pregnancy. A further step beyond this troublesome prospect is the case where the action is based on the reproach of the child that its parents continued with the pregnancy in spite of a high risk of abnormality. Would the parents be accountable for their failure to minimise the risks of genetic aberration or their failure to obtain an amniocentesis or a subsequent abortion?

Gevers writes:⁴⁵⁰

“Ten aanzien van een actie van het kind tegen de ouders wegens het niet voorkomen van zijn geboorte is mijns inziens even grote terughoudenheid gewettigd. Wat er zij van een eventuele morele of maatschappelijke plicht om bij zware genetische risico's van progentuur af te zien, juridisering van zo 'n verplichting is in strijd met de individuele vrijheid over voortplanting te beslissen.”⁴⁵¹

10.4.2 Elements of unlawful conduct

A brief discussion of the traditional elements of unlawful conduct in Dutch law with regard to wrongful life follows:

10.4.2.1 Damage

The recognition and calculation of damages has probably posed the most stringent opposition to wrongful life. Schoonenberg⁴⁵² comments that the award of damages aims to place the plaintiff in the position he was before the damage causing event. Because the hypothetical condition of 'non-existence' cannot be calculated⁴⁵³ much uncertainty remains as to the awarding of damages in wrongful life. It is submitted that although the traditional method of damage calculation does not produce a faultless solution in these circumstances,⁴⁵⁴ one should keep in mind that an award of money will doubtlessly soften the suffering and ease the financial burden of wrongful life plaintiffs:⁴⁵⁵

“De schadevergoeding de situatie, waarin het zonder die onrechtmatige daad zou zijn geweest, zo dicht mogelijk benader, doch heeft de functie het lijden van het kind zoveel mogelijk te verminderen of te verzachten.”⁴⁵⁶

⁴⁵⁰ 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. *Verslag: Vereniging voor Gezondheidsrecht* (10 April), 27.

⁴⁵¹ a paraphrased summary of this quotation is: Regarding a child's action against his parents for the fact that they allowed him to be born impaired, it is suggested that restraint be applied. The moral and social pressure that would mount on parents to abort an impaired foetus would be an infringement of the individual's right to freedom of choice and procreation.

⁴⁵² *op cit* p 69.

⁴⁵³ as no person can evaluate the condition of non-existence.

⁴⁵⁴ as the plaintiff logically cannot be placed in the position he was before.

⁴⁵⁵ see compensation theories in ch 2.

⁴⁵⁶ *op cit* p 69.

In answer to the question how a plaintiff's diseased or impaired condition can be related to the subsequent claim for damages, Schoonenberg⁴⁵⁷ writes that these injuries should be marked as physical injuries⁴⁵⁸ in terms of section 1407 of the Dutch Civil Code. She argues that although the physical injury was not directly inflicted by the physician, his negligence nevertheless caused the impaired condition and should therefore be accounted to the physician as each time the 'potential injury' materialises.

Frenk,⁴⁵⁹ reflecting on the recent Dutch decision, explains that although no non-patrimonial damages were awarded *in casu*, it would be in fact possible where plaintiff can prove an actual injury, which is more than mere intense psychological discontent.

10.4.2.2 Causation

It is reported⁴⁶⁰ that Leenen acknowledges that damage can in a legally-technical sense be suffered long after the damage causing event has taken place. In wrongful life this would be the instance when the plaintiff actually experiences his injury, namely at birth.⁴⁶¹

*"De onrechtmatigheid van de gedraging van de arts tegenover het kind schuilt dan in het feit dat de behandelend arts van de ouders de redelijkerwijs voorzienbare belangen van het ongeboren of ongeconcipeerde kind bij zijn beroepsuitoefening onvoldoende in aanmerking heeft genomen."*⁴⁶²

In conclusion it is submitted that in the Netherlands, a statutory basis for wrongful life liability exists:⁴⁶³

"Wanneer men met mij aanneemt dat het kind in bovergenoemde situaties letselschade in de zin van artikel 6.1.9.11a Ontw. Inv. Wet lijdt, kan alleen het kind zelf vergoeding van de kosten van voor hem of haar benodigde medische voorzieningen vorderen. De ouders hebben dan - uit eigen hoofde - slechts een vordering voor zover

⁴⁵⁷ 61.

⁴⁵⁸ "letselschade".

⁴⁵⁹ 1997. Schadevergoeding na ongewenste zwangerschap door medische fout: HR 21 februari 1997, RvdW 1997, 54C Nieuwsbrief BW (7:5), 52.

⁴⁶⁰ Schoonenberg *op cit* p 70.

⁴⁶¹ although the physician's negligence caused the injury even before the plaintiff was conceived.

⁴⁶² *ibid.*

⁴⁶³ Schoonenberg *op cit* p 70.

*zij die kosten hebben betaald (37). Daarnaats kan het kind op grond van artikel 1407 BW en artikel 6.1.9.11a Ontw. Inv. Wet jo. Artikel 6.1.9.11, lid 1 sub b, NBW smartegeld vorderen.*⁴⁶⁴

10.4.3 Importance of social services

Schoonenberg⁴⁶⁵ is convinced that the recognition of wrongful life and wrongful birth actions in the Netherlands will not have the feared detrimental result expected by some.⁴⁶⁶ She explains that the main head of damage in wrongful life is that of medical expenses for the handicapped/ diseased child, which would to a large extent be covered by societal support systems such as the AWBZ.⁴⁶⁷ Children⁴⁶⁸ with maintenance needs will similarly be entitled to a AAW allowance. Because these institutions do not have a right of recourse against the wrongdoer and since a judge in a wrongful life action will doubtlessly take the plaintiff's social benefits into account, no dramatic effect on professional insurers are expected. Schoonenberg is also confident that other heads of damage, such as claims for satisfaction will not unnecessarily burden insurers, as Dutch courts award modest immaterial damages.⁴⁶⁹

10.5 Conclusion

Gevers and Leenen⁴⁷⁰ views the wrongful life action as the equivalent of the wrongful birth

⁴⁶⁴ A paraphrased summary of this quotation is: If one agrees that a wrongful life plaintiff has in fact suffered damage ito sec 61911a, only the child itself would be entitled to claim for these expenses. Its parents would merely have a claim of their own for expenses already incurred. The plaintiff-child should additionally be able to receive satisfaction for pain and suffering ito sec 6.1.9.11b of the New Dutch Civil Code.

⁴⁶⁵ *op cit* p 75.

⁴⁶⁶ concerns have been expressed that too wide and superfluous liability will have the end result that certain risks will not be insurable.

⁴⁶⁷ a social support handout given to needy citizens.

⁴⁶⁸ up the age of 18 years.

⁴⁶⁹ reference is made to the unacceptable American position where, *eg* an award of \$ 900000 was given in the *Curlender* case (*infra*) - it is reported that awards of more than fl.100000 is seldom given, and usually much smaller awards are allowed for immaterial damages.

⁴⁷⁰ 1986. *Rechtsvragen rond voortplanting en erfelijkheid* Kluwer - Serie Gezondheidsrecht no.19, 11.

action,⁴⁷¹ with the only difference that the action is instituted by the impaired child itself.⁴⁷²

Leenen⁴⁷³ is therefore of the opinion that wrongful life actions could succeed in the Netherlands:

"Een wrongful birth action van de ouders en een wrongful life action van het kind tegen een schadeveroorzakende derde lijken mij ook naar Nederlands recht mogelijk. Bij een wrongful life action van het kind tegen de ouders ligt de situatie ingewikkelder."⁴⁷⁴

11. Legal position in South Africa

11.1 Background

The majority of medical malpractice cases in South Africa are settled out of court.⁴⁷⁵ Claassen⁴⁷⁶ communicates in support, that although several wrongful life actions have been instituted in South Africa the vast majority have been settled. The effect of this phenomenon is amplified by a general scarcity of wrongful life litigation up to recent times.⁴⁷⁷ Although precious little research and publications on the subject have been done locally when compared to other countries, the existing viewpoints of various legal writers are now considered:

11.2 Local opinions

11.2.1 Blackbeard's opinion

⁴⁷¹ it is submitted that this viewpoint is basically sound, although one should be weary of an over-simplification of matters: see ch 2 for a detail discussion on the inherent differences between the actions.

⁴⁷² see their consideration of whether these actions would be successful under Dutch law or not, taking into account the limited success of the action in America, as discussed in ch 7.

⁴⁷³ 1984. Nieuwe wetenschappelijke ontwikkelingen rond het begin van het leven; problemen voor het gezondheidsrecht. *Tijdschrift voor Gezondheidsrecht*, 116.

⁴⁷⁴ *Op cit* p 119 - a paraphrased summary of this quotation is: According to me it seems possible to acknowledge both the wrongful birth action of the parents and the wrongful life action of the child against a third party as wrongdoer under Dutch law. The situation becomes more troublesome in the event where a child institutes an wrongful life action against its parents.

⁴⁷⁵ Strauss. 1991, *op cit* p 245.

⁴⁷⁶ Claassen, N.J.B. and Verschoor, T. 1992. *Medical Negligence in South Africa* (ch 5) Digma. 94.

⁴⁷⁷ in a traditionally conservative society.

Blackbeard,⁴⁷⁸ in an article published before the first wrongful life action came to the South Africa,⁴⁷⁹ foresees two possible problems that local courts might encounter when faced with wrongful life actions. She is of the opinion that firstly it would be difficult to prove causality, since one must depart from the premise that the parents would have opted for an abortion if they were to be confronted with the reality of a handicapped foetus.⁴⁸⁰ Secondly, as in most jurisdictions around the world, it would be difficult (if not impossible) to establish and calculate damage.

In spite of her reservations concerning the two mentioned hindrances, she feels that an action should be allowed in cases of extreme retardation or handicapped life. She believes that under such circumstances life could actually be regarded as more disadvantageous than non-existence.⁴⁸¹

Blackbeard⁴⁸² writes that it seems as if advances in medical technology have created a new right for foetuses namely, to be born without the debilitating effect of a reasonably detectable genetic disorder. This deduction finds support in American cases such as **Park v Chessin**, where a fundamental right has been awarded to the unborn "to be born as a normal and functional human being".⁴⁸³

The obstacles perceived by Blackbeard⁴⁸⁴ might have the effect that wrongful life actions could not be theoretically founded using the traditional negligence tort structure without first making the necessary adjustments. She⁴⁸⁵ is of the opinion that the South African legislator has previously foreseen certain circumstances where life would be less preferred than non-existence and she therefore maintains that courts should not have any fundamental problems with accepting this premise in the wrongful life debate. An example of legislation supporting this

⁴⁷⁸ 1991. *op cit* p 57.

⁴⁷⁹ see her comment on a recent wrongful life action *infra*.

⁴⁸⁰ a further obstacle in this regard was the fact that abortions on demand were at that stage still illegal - refer to previous abortion act, ch 3.

⁴⁸¹ *op cit* p 74.

⁴⁸² *op cit* p 59.

⁴⁸³ it is my submission that in the quest for solutions to the plight of the wrongful life plaintiff, one should at least consider the merits of such a novel right and broaden one's paradigm accordingly.

⁴⁸⁴ concerning the difficulty in calculating damage and problems with establishing a causal link.

⁴⁸⁵ *op cit* p 69.

statement is the **Abortion and Sterilisation Act No. 2 of 1975**, section 3(1)(c).⁴⁸⁶

In order to establish damage, Blackbeard⁴⁸⁷ suggests that a comparative approach be used. This should be done by comparing the financial position of the plaintiff before the damage causing event with the state of affairs directly thereafter. Although no condition of comparison exists for the plaintiff in a wrongful life action before the damage causing event,⁴⁸⁸ actual expenses associated with the birth can readily be identified. Regarding the *extent* of damage, Blackbeard⁴⁸⁹ perceives that a qualitative difference between the financial position before and after the delict would be similarly difficult to establish. Although the condition of non-existence can not be calculated in a quantitative manner, the medical costs and other patrimonial liabilities can accurately be worked out.⁴⁹⁰

With regards to the question whether the plaintiff's personality interests have been infringed, Blackbeard suggests⁴⁹¹ that the answer is quite obviously "yes". Possible damage posts are: pain and suffering;⁴⁹² stress associated with a general feeling of unhappiness;⁴⁹³ loss of amenities and sometimes even a shortened lifespan. It is reported that in South Africa it seems as if the extent of the psycho-physical loss is generally expressed as a product of the intensity of the physical or affectionate infringement of the plaintiff's personality, in relation to the nature and duration thereof. In application to wrongful life actions, therefore, the plaintiff's loss⁴⁹⁴ in this regard will be determined with reference to the degree and nature of the physical or psychological handicap of the plaintiff, which will necessarily differ from case to case.

11.2.2 Boberg's opinion

In expressing his opinion on the possible success of wrongful life litigation in South Africa,

⁴⁸⁶ in terms of this act a mother was entitled to obtain an abortion if her child would be born with serious handicaps - see the discussion where this act is compared to the new **Choice on Terminations of Pregnancies Act**, ch 3.

⁴⁸⁷ *op cit* p 72.

⁴⁸⁸ because of its unknown condition of non-existence.

⁴⁸⁹ *op cit* p 73.

⁴⁹⁰ and should therefore be awarded.

⁴⁹¹ *ibid*.

⁴⁹² because of the inherited impairment.

⁴⁹³ because of a deformed body.

⁴⁹⁴ the extent of the infringement of the plaintiff's personality rights.

A fundamental issue that should be correctly approached, Boberg⁵⁰³ states, is the nature of the interest sought to be protected, namely mental suffering and distress. The Aquilian action should therefore not be instituted,⁵⁰⁴ but rather the *actio iniuriarum*. Taking this into account, one should agree that it might be too far fetched to say that a physician had *animus iniuriandi*⁵⁰⁵ to injure the plaintiff.

Although there would seem to be no other fundamental legal impediments prohibiting the action, Boberg⁵⁰⁶ feels that it would at least amount to a very original adaption of existing legal principles to an entirely novel situation. He nevertheless has serious reservations concerning the success of these actions in South Africa.

11.2.3 Brownlie's opinion

Brownlie⁵⁰⁷ discusses the question whether South African courts will allow wrongful life actions from a hypothetical⁵⁰⁸ perspective. He believes that in order for a wrongful life claim to be successful in South Africa, it is essential that the plaintiff should be able to prove with absolute certainty that the mother would have aborted⁵⁰⁹ had she known of any real risk of her future child being born seriously handicapped. If such a claim were to be instituted in South Africa it should be based on the *actio legis Aquiliae* because it would be impossible to prove that the physician had *animus iniuriandi*.⁵¹⁰

"Unfortunately, our case law provides few guidelines by means of which public policy is determinable, since the truth must be that policy is largely determined at the whim of the presiding judge...Fortunately, a perusal of overseas case law allows us to identify clearly factors which would be involved in a discussion of public policy with respect to a wrongful life claim."⁵¹¹

503 *ibid.*

504 *actio legis Aquiliae* - see ch 2.

505 or *intent* to injure the plaintiff - a prerequisite for the *actio iniuriarum*.

506 *op cit* p 502.

507 *op cit* p 18.

508 at the time of his article, no such case has yet been brought before the South African courts.

509 under the previous **Abortion and Sterilisation Act**, sec 3(1)(c).

510 see, however, Boberg's view on this point *supra*.

511 *op cit* p 21.

All the elements of delict should subsequently be established. Brownlie⁵¹² recommends that the traditional delictual principles be used in a local approach to wrongful life. These principles are sufficiently elastic to accommodate the wrongful life action in South African law,⁵¹³ with little or no distortion of principle.⁵¹⁴ The truth is that South African law compensates on a fault basis and it is thus within this system that the answer is to be found.

11.3 Traditional tort elements

It is important to scrutinize the traditional tort elements in reference to the wrongful life cause of action and then consider legal writers' viewpoints on these principles, in order to see whether these actions could be founded in South African law. According to Blackbeard⁵¹⁵ an action for wrongful life in the South African law should be based on delict.⁵¹⁶ She agrees with Brownlie⁵¹⁷ that the common law *actio legis Aquiliae* should be instituted in order to claim patrimonial damages, whereas she submits, the action for pain and suffering would cover the compensation for the non-patrimonial sphere of loss. In order to establish whether an action for wrongful life would suffice in South African law each element of delict will be examined separately, using a typical wrongful life factual situation:

11.3.1 Conduct

Would consist of a the physician's failure to make a correct diagnosis or a failure to advise⁵¹⁸ his patient of the availability of genetic tests and the option of an abortion.⁵¹⁹

⁵¹² *op cit* p 33.

⁵¹³ Brownlie *ibid* believes that the previous **Abortion and Sterilisation Act** limited the application of Aquilian liability by leaving the success of the wrongful life claim essentially at the whim of the mother of an injured child - it was namely quite difficult for the mother of a child to satisfy the prerequisites of the act, in order to obtain a legal abortion: as these restrictions have fallen away with the enactment of the new and significantly more liberal **Choice on Termination of Pregnancy Act**, a greater chance of wrongful life success can be expected.

⁵¹⁴ under the previous abortion act it was possible to obtain a legal abortion if the foetus would suffer from any serious handicap or psychological anomaly - in theory, therefore, it was even possible to base a wrongful life action under those circumstances if the supporting facts established a cause of action.

⁵¹⁵ 1991. *op cit* p 69.

⁵¹⁶ see the viewpoint that these actions should primarily be based on contractual principles, relating to breach of contract.

⁵¹⁷ *supra*.

⁵¹⁸ *ie* to properly inform his patient - see ch 5.

⁵¹⁹ Brownlie *op cit* p 19.

The defendant-physician's conduct could also consist of a neglect to diligently perform⁵²⁰ the specifically required or necessary medical procedure.⁵²¹

11.3.2 Wrongfulness

According to Brownlie⁵²² the element of wrongfulness may be termed as "that quality of a damage causing event that makes a claim actionable in delict". Since it has been a tool of judicial control over new frontiers of liability with regards to novel litigation in the past,⁵²³ it could in the same way be implemented to address the question of wrongful life. He⁵²⁴ mentions two possible approaches to determine wrongfulness:

- did A⁵²⁵ owe B⁵²⁶ a legal duty? or
- has A infringed a right/ interest of B which the law deems worthy of protection?

Our case law provides few guidelines whereby public policy is determinable in specific, novel circumstances since the truth must be that policy is largely determined at the notion of the presiding judge.⁵²⁷ Brownlie⁵²⁸ takes a look at foreign case law concerning public policy considerations relevant to wrongful life actions and then identifies six areas important to any court's decision regarding the question of wrongfulness in these claims:

- sanctity of human life,⁵²⁹

⁵²⁰ or total failure to perform - see the *Edouard* case in ch 6, where the physician forgot to even perform a sterilization.

⁵²¹ *ie* proper performance of genetic tests; a success sterilization prior to conception of a high-risk foetus; or an effective abortion of such a foetus.

⁵²² *op cit* p 21.

⁵²³ such as liability for omissions and pure economic loss.

⁵²⁴ *ibid*.

⁵²⁵ the physician.

⁵²⁶ the plaintiff.

⁵²⁷ who has to perceive what the *boni mores* concerning the matter in question would be.

⁵²⁸ *op cit* p 22.

⁵²⁹ he believes that South African courts would have the same opinion on this matter as expressed in the English case of *McKay* and he doubts whether the United States decisions will be followed - *op cit* p 23.

- defective birth as “damage” in law;⁵³⁰
- conceptual socio-legal issues;⁵³¹
- social consequences;⁵³²
- preservation of the integrity of the courts;⁵³³
- ideal of compensatory justice.⁵³⁴

In conclusion to this issue, Brownlie⁵³⁵ feels it is both feasible and desirable to label the conduct of physicians under typical wrongful life circumstances as wrongful. There appears to be no public or legal policy considerations contradicting or prohibiting this conclusion.

Blackbeard⁵³⁶ agrees that the element of unlawfulness is established by asking whether a legal duty on the physician to act in a positive manner in order to avert a damage causing event to another existed and whether this duty was breached by the defendant. If in the legal opinion of society (*boni mores*) there did exist such a duty and the physician neglected to act is this

⁵³⁰ in the *Gleitman* case the court judged that the conduct complained of did not give rise to any damages recognizable at law - Brownlie, however, thinks that a defective birth may be regarded as *damnum* and argues that if it was not for the physician's negligence, the conditions of impaired life would not have come to fruition and having now matured such condition necessitates pecuniary expenses be indemnified - *op cit* p 25.

⁵³¹ parents are given the responsibility of making decisions concerning (and to the benefit of) their children - since the statutes regulating abortions and sterilizations do not impose any *duty* on mothers or medical practitioners to abort defective foetuses, there should be no fear that children will sue their parents (because there is no duty on them to abort - *op cit* p 28.

⁵³² Many feel that recognition of wrongful life would place an intolerable burden on physicians - this, however, does not change the fact that it is for the parents to decide whether or not to abort (because advances in medical technology make it possible for physicians to be certain about future birth complications and foetal impairments, parents are placed in a position to make these decisions). Although it can be difficult (in some jurisdictions) to determine when an abortion can legally be performed (for the reasons that only seriously impaired foetuses may be aborted), this issue will not cause any significant problems in South Africa with its new abortion act - see ch 3.

⁵³³ This is an emotive and morally complex issue: courts would generally rather have the legislator handle the problem, although Brownlie is of the opinion that the action can be allowed without legislative intervention. He submits *ibid* that the courts' integrity would be further undermined if every difficult task which confronts them was “palmed off” into the legislative sphere.

⁵³⁴ that for every wrong that is committed, there ought to be a remedy - as reiterated in the *Turpin* case.

⁵³⁵ *op cit* p 31.

⁵³⁶ *op cit* p 70.

manner, he then acted in an unlawful manner. She⁵³⁷ believes that the existence of a doctor-patient relationship is also a factor that could indicate such a legal duty.

11.3.3 Fault

Negligence or *culpa* is established by the objective "test of the reasonable man".⁵³⁸ A person acts negligently⁵³⁹ if he acts differently from a reasonable person, who under the same circumstances, would have foreseen the possibility that his conduct could injure another⁵⁴⁰ and accordingly would have taken reasonable steps to guard against such occurrence. In wrongful life, therefore, a physician should conduct himself with a reasonable degree of skill and care as would "the reasonable physician in the same situation" in order not to act negligently.⁵⁴¹ The negligent physician's conduct is therefore found to have been ill-judged and inconsiderate under the circumstances.⁵⁴²

11.3.4 Causation

Brownlie⁵⁴³ believes that the relevant test to establish factual causation is the *sine qua non* test or the "but for" test.⁵⁴⁴ Legal causation can be determined by applying the test of reasonable foreseeability.⁵⁴⁵ He mentions that in the United States the action was allowed without even discussing the matter of causation in some cases, which implies that certain jurisdictions do not have too much trouble in finding a legal nexus between conduct and damage. South African courts could easily follow suit.

Blackbeard⁵⁴⁶ writes that unlawful and negligent conduct which resulted in damage to another

⁵³⁷ *ibid.*

⁵³⁸ see ch 2 and 4.

⁵³⁹ before the element of fault can be considered, a wrongful conduct should already have been established.

⁵⁴⁰ in his person or property.

⁵⁴¹ the level of professionalism by which a doctor's negligence is compared, is the test of the reasonable doctor - South African authority for this principle is the decision of *R v Van der Merwe* 1953 (2) PHH 124 (W), see ch 4.

⁵⁴² Blackbeard *op cit* p 71.

⁵⁴³ *op cit* p 20.

⁵⁴⁴ see ch 2.

⁵⁴⁵ *Masiba v Constantia Insurance Co.* 1982 (4) SA 333 (C).

⁵⁴⁶ *op cit* p 71.

must legally be seen to have caused the detrimental state of affairs.⁵⁴⁷ The neglect of the physician must not only factually have caused the birth of a handicapped or genetically impaired child, but also legally have done so. The consequence of the unlawful conduct should therefore be imputed to a specific person.⁵⁴⁸

11.3.5 Damage

The question on what basis damage should be considered, is often asked. Special damages comprise of actual expenditure incurred and other patrimonial losses suffered to date and can in general be precisely calculated. General damages, on the other hand, comprise of those future expenses and prospective losses which are likely to occur, as well as awards for disfigurement, pain and suffering and (ironically in this context) loss of amenities.⁵⁴⁹

Brownlie⁵⁵⁰ believes that the calculation of neither special, nor general damages in wrongful life should be done by the impossible comparison of existence and non-existence.⁵⁵¹ He proposes an alternative solution whereby the measure of damages should be artificially constructed:⁵⁵² It is namely suggested that the pragmatism of the **Curlender** court should be followed when awarding damages, where the court artificially constructed a measure of damages by construing the wrongful life cause of action:

"as the right...to 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."⁵⁵³

In order to prove damage in a wrongful life action, Blackbeard maintains,⁵⁵⁴ a plaintiff must show that handicapped life is more detrimental than non-existence. She suggests that this is a difficult moral dilemma that has to be answered with reference to public policy considerations.

⁵⁴⁷ in **Minister van Polisie v Skosana** 1977 (1) S A 31 (A), the court made use of the *condictio sine qua non* test.

⁵⁴⁸ *ie* the negligent physician.

⁵⁴⁹ the plaintiff's claim is based on the fact that his life is not worth living and that non-existence would be preferred.

⁵⁵⁰ *op cit* p 32.

⁵⁵¹ although this fact *per se* should not preclude an award if it were to be applied.

⁵⁵² whether the collateral benefit rule should apply, is matter of speculation - see the discussion of the benefit rule in ch 2 and 6.

⁵⁵³ at 489.

⁵⁵⁴ *op cit* p 73.

The question of damage is evidently the most difficult element of the delict to prove in these cases⁵⁵⁵ and she believes that this might prove to be the ultimate stumbling block preventing acceptance of wrongful life actions in South African courts.

11.4 Recent developments

*Friedman v Glicksman*⁵⁵⁶ is a recent wrongful life action that came to the South African courts. *In casu* the plaintiff's mother alleged that she consulted with a gynecologist in order to assess whether her unborn child had an above average chance of being born abnormal or physically challenged. If the risks for such an occurrence were to be greater than normal, she was adamant to have the foetus aborted. After conducting various tests the specialist came to the conclusion that Mrs. Friedman had a perfectly normal pregnancy. A few months later a disabled child was born. The mother instituted a wrongful birth action in her own name and a wrongful life claim on behalf of her handicapped child Alexandra. It was stated that the physician acted negligently by breaching his duty to take care, as well as his contractual obligations towards them.

In the ensuing wrongful life action, general damages were demanded together with a claim for the loss of future earnings. After consulting various overseas judgements in this regard, the court made its decision known:

" Thus the legislature has recognised, as do most reasonable people, that cases exist where it is in the interest of the parents, family and possibly society that it is better not to allow a foetus to develop into a seriously defective person, causing serious financial and emotional problems to those who are responsible for such person's maintenance and well being... In my view the contract entered into between the plaintiff and the defendant was sensible, moral and in accordance with modern medical practice. The plaintiff was seeking to enforce a right, which she had, to terminate her pregnancy if there was a serious risk that her child might be seriously disabled."⁵⁵⁷

Although Mrs Friedman's wrongful birth claim was awarded,⁵⁵⁸ the court rejected the wrongful life action on the following grounds:

- the physician-defendant owed no duty of care to the unborn child by giving the child's

⁵⁵⁵ see history of cases *supra*.

⁵⁵⁶ 1996 (1) SA 1134 (W).

⁵⁵⁷ *ibid*.

⁵⁵⁸ see ch 7.

mother the opportunity to terminate the pregnancy;

- it is against public policy for the *courts* to make the decision whether non-existence is preferred to disabled life.⁵⁵⁹ Blackbeard puts the court's view in her own words: "...it would be contrary to public policy for a court to decide that it would be better for a person not to have the unquantifiable blessing of life rather than to have such life albeit marred by disability."⁵⁶⁰
- it is possible that the acceptance and success of wrongful life litigation against third party physicians might lead to similar actions being instituted against *parents* of handicapped children and such a situation would be intolerable.
- the method used to calculate damages in these actions is inconsistent with the usual method used in delictual claims,⁵⁶¹ as the defendant did not cause the child to be handicapped or afflicted with a hereditary disease.⁵⁶²

Pearson⁵⁶³ comments on litigation flowing from failed abortion:

"Moreover, the general allowing of abortion of an irreparably seriously handicapped child is indicative of society's response of defective fetuses. Such a response may be generated by the reality that neither the state nor parents can afford the burden of a handicapped child. An extreme illustration is evidenced by Beijing's proposed eugenics law designed to prevent "inferior" births by means of sterilization of the mentally handicapped and abortion of abnormal fetuses."⁵⁶⁴

Pearson⁵⁶⁵ believes that, like the wrongful birth action," the action for wrongful life may be accommodated within the increasingly pervasive scope of the *Aquilian* action. It would appear

⁵⁵⁹ such a decision should rather be made by the legislator.

⁵⁶⁰ *op cit* p 713.

⁵⁶¹ no person nor court could place a value judgment on the condition of non-existence based on actual knowledge of such a situation.

⁵⁶² the only possible manner in which damage can be assessed, is to compare non-existence with disabled life - for such a comparison certain criteria of *both* possible situations must be known to mankind, which *in casu* is not.

⁵⁶³ 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 94.

⁵⁶⁴ he quotes the Public Health Ministry in **Time** 2 May 1995, 54 stating: "The law will serve to prevent or reduce the number of births of seriously sick and disabled children".

⁵⁶⁵ *ibid*.

that the aforementioned delictual elements are satisfied in wrongful life actions.⁵⁶⁶

He writes⁵⁶⁷ that although the future remains indeterminable, it is necessary to keep abreast of the constantly evolving *boni mores* or sense of justice in the community and accordingly suggests that wrongful life should be recognized by South African courts in the future.⁵⁶⁸

It is suggested⁵⁶⁹ that, in accordance with the plaintiff's contention in the Glicksman case, the proper measure of damages should be "the determination of an amount necessary to compensate the child for having to live in a disabled state and should not be the difference between non-existence and a disabled existence".

Furthermore, it is argued that "the **Choice on Termination of Pregnancy Act** has clearly made an inroad into the sanctity-of-human-life principle by in effect recognising, even at an advanced stage of pregnancy, that non-existence is preferable to an irreparably seriously handicapped life."⁵⁷⁰ Because both the claims for wrongful life and wrongful birth, rest on the premise that the child's mother would have procured an abortion had the information regarding the child's defective condition been available to her, it is concluded:⁵⁷¹

"Thus, the wrongful life claim appears to rest on the whim of the mother. Whilst anomalous, this situationdoes not preclude the possibility of the action arising".

Blackbeard⁵⁷² conveys that the court considered American decisions such as **Becker v Schwartz** and **Park v Chessin**⁵⁷³ where the impossibility of comparing no life with impaired life was acknowledged but the actions nevertheless allowed, as it was considered unnecessary for the plaintiff child to prove this comparison.

⁵⁶⁶ *op cit* p 105.

⁵⁶⁷ Pearson, *ibid.*

⁵⁶⁸ "If courts have gone so far in some cases as to no longer view birth as a "blessed event", how far behind is another court decision that favours a cause of action on the grounds of "wrongful life"?"

⁵⁶⁹ *op cit* p 106.

⁵⁷⁰ *op cit* p 107.

⁵⁷¹ *ibid.*

⁵⁷² 1996. Actions for wrongful birth and wrongful life. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 713.

⁵⁷³ *supra.*

She⁵⁷⁴ reports that with regard to the wrongful life action, there could be no claim in contract, as the child's legal personality only commences at birth and because an agent cannot claim on behalf of a non-existing principal. The agreement between the plaintiff and physician can neither be moulded in a contract for the benefit of a third party, as the third party could only accept the alleged benefit⁵⁷⁵ when it was no longer possible.⁵⁷⁶

11.5 Evaluation

It can reasonably be expected that a broadening of liability with regards to wrongful life actions will occur as medical technology and genetic studies advance. The more thorough and accurate genetic tests become, the more implicit will the resultant duty be on a physician to properly inform parents on the risks associated with their potential future or yet unborn children. If a genetic disorder or serious hereditary disease could accurately be predicted and the results thereof be totally relied upon, it is obvious that a legal duty will firmly rest on the physician or genetic counsellor to communicate these facts to the parties involved. Liability should then follow where the damage is obvious⁵⁷⁷ and the defendant's conduct was grossly negligent.⁵⁷⁸ Divergent viewpoints remain:

De Vries and Rifkin⁵⁷⁹ are of the opinion that in cases where damages for wrongful life claims have been awarded in the past, it was done because of philanthropic reasons and considerations of equity. They do not believe that the action will ever be entirely accepted on pure legal considerations.⁵⁸⁰

Teff⁵⁸¹ declares that allowing wrongful life actions does not deny the value and worth of a human life. In fact, he argues, it is the acknowledgement of handicapped people and their

574 Blackbeard, *ibid.*

575 *ie* non-existence, as the pregnancy would have been terminated.

576 see ch 2, where the merits of this very possibility is discussed.

577 because of serious physical or psychological impairments or a genetic disease with considerable consequences.

578 Hughes. 1987. *Tort and Insurance Law Journal* 585.

579 *op cit* p 221.

580 they report, however, that "several recent cases" allow recovery of special damages.

581 *op cit* p 440.

value in society that results in the need to protect the rights of disadvantaged people.⁵⁸²

Brownlie⁵⁸³ reaches the conclusion that because compensation is awarded on the basis of fault in South Africa, a wrongful life claim should succeed. He suggests that the *actio legis Aquiliae* be used.

Bey-Berkson⁵⁸⁴ reports on different views⁵⁸⁵ concerning wrongful life:

"Troublesome damage issues in wrongful life cases could be ignored for policy reasons so that a court can deal with the reality of a defective child who needs care and attention."

In purporting his view on wrongful life, Hughes⁵⁸⁶ writes:

"Liability seems appropriate only where the damages are apparent and extreme, and the physician was obviously negligent. A wrongful life cause of action should not be an insurance policy. It is a method of compensation for the damages arising out of wrongful conduct. Taking these limitations into account, it seems logical that wrongful life actions should be available where the traditional tort elements exist."

Cheslik⁵⁸⁷ states:

"While computing a dollar amount for the value of a child's aid, comfort, and society is a difficult task, courts have routinely asked juries to make such determinations in loss of consortium and wrongful death cases."

Personally, although I feel that a seriously impaired wrongful life plaintiff should be

⁵⁸² courts are commonly called upon to enforce these rights - much litigation therefore follows in instances where these rights are breached, incl wrongful life actions.

⁵⁸³ *op cit* p 33.

⁵⁸⁴ 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 69.

⁵⁸⁵ Annas, *Righting the Wrong of "Wrongful Life"*, 11(1) *Hastings Center Report* 8 (1981).

⁵⁸⁶ 1987. Recognition of Wrongful Life Actions: Trend or aberration? **Tort & Insurance Law Journal** (22), 585.

⁵⁸⁷ 1985. Wrongful Conception. **F.I.C. Quarterly**, 302.

accommodated,⁵⁸⁸ have serious reservations as to the chances of wrongful life success locally within the next few years. Not only have the local courts denied the action recently,⁵⁸⁹ but alarmingly few judgments in all of the wrongful life history have thought differently.

Vital challenges⁵⁹⁰ remain to bar the acceptance of the action when traditional tort elements are applied. On the other hand, it must be said that the overwhelming majority of the "traditional arguments" raised against the action are superficial or originated from a misconceived understanding of the true basis of wrongful life.

The mayor influence of the enactment of the **Choice on Termination of Pregnancy Bill** on the wrongful life issue should also not be underestimated. The liberal viewpoint concerning abortion taken by this statute and the emphasis placed on a women's freedom and right to choose,⁵⁹¹ definitely advances the cause of future wrongful life plaintiffs. It is further true that the wrongful life issue has not yet advanced to the highest court in South Africa,⁵⁹² nor has the matter been considered by Constitutional Court. The final word has therefore not yet been spoken.

I believe that as medical technology advances and as society's opinions on relevant issues evolve over the years,⁵⁹³ increasing pressure will be placed on courts and the legislator to come up with a solution to this very real problem of the wrongful life plaintiff.⁵⁹⁴

12. Summary

It is commonplace that much confusion and uncertainty remains to exist in the minds of legal

⁵⁸⁸ these plaintiffs are real people, who often genuinely suffer a great deal because of another's negligence.

⁵⁸⁹ **Friedman v Glicksman.**

⁵⁹⁰ such as the impossibility to establish damage and public policy considerations prohibiting limitless liability - see *supra*.

⁵⁹¹ which rights are protected in the constitution - see ch 9.

⁵⁹² the High Court of Appeal situated in Bloemfontein.

⁵⁹³ the South African public sentiment with regards to abortion, for example, seems to have changed quite dramatically over the past few years (with the general acceptance of one of the world's most liberal abortion laws).

⁵⁹⁴ ever since the enactment of the new constitution, it seems as if South Africans have generally become more aware of their rights - a direct result of the dawning of a new human rights culture touching every aspect of life.

writers and judges alike, with regard to the entire wrongful life issue. The incorrect application of wrongful conception and wrongful birth actions principles used in solving wrongful life actions, contributes to this problematic state of affairs. A possible explanation for this phenomenon is the fact that all these actions are based on principally the same public policy considerations, namely the value of human life and the worth of a handicapped life.

Maybe Snyderman⁵⁹⁵ is correct as she expresses her view on wrongful life:

"Every question involves serious legal, ethical and moral considerations that may never be satisfactorily resolved by the courts or the legislature. Undoubtedly, however, courts will continue to recognize these torts in varying degrees - a mixed blessing of increased individual rights coupled with skyrocketing medical costs."⁵⁹⁶

Because of the changes in public opinion over the years and specifically the recent trend in recognising euthanasia⁵⁹⁷ and other taboos of the past,⁵⁹⁸ courts are progressively inclined to make more liberal decisions. There now seems to be more reason than ever to allow the wrongful life cause of action, based on the fact that public opinion no longer questions the vital basis of the claim.⁵⁹⁹

Weiss⁶⁰⁰ concludes:

"Because the tort system should recognize all injured parties and compensate them fully for all their injuries, both wrongful birth and wrongful life claims should be recognized and full compensation awarded. However, a legislative program similar to workman's compensation or no-fault car insurance is an alternative - and perhaps better - solution."⁶⁰¹

⁵⁹⁵ 1982. Wrongful Life and Wrongful Birth Claims: Judicial Recognition and Acceptance. *Medical Trial Technique Quarterly*, 15.

⁵⁹⁶ *op cit* p 30.

⁵⁹⁷ the "right to die" has recently been acknowledged in various countries, which implies that there do exist certain circumstances where life is no longer worth living, nor preferable.

⁵⁹⁸ *ie* pre-conception injury, abortion on demand *etc.*

⁵⁹⁹ *ie* that life itself could be an "injury".

⁶⁰⁰ 1987. Wrongful Birth and Wrongful Life: In search of a logical consistency. *Annual Survey of American Law*, 507.

⁶⁰¹ *op cit* p 522.