

CHAPTER 9

Philosophical Aspects

1. Introduction

Although the primary focus of this study is placed on the legal implications of wrongful life litigation, these actions also entail many complicated philosophical, moral and religious questions. Some of these issues raised in previous chapters will now be addressed on an *ad hoc* basis and from a philosophical viewpoint.

Cobben¹ philosophises on legal development by asking: Is that which is technically possible also ethically-socially acceptable? Does that which is technically possible and ethically-socially acceptable deserve juridical recognition and protection?

“Is wat technisch kan, ook etnisch-sociaal toelaatbaar? Verdient wat technisch kan en etnisch-sociaal toelaatbaar is, ook juridische normering en sanctionering?”

Einhenser² suggests that within the past several decades the judiciary has increasingly become involved in the decision-making process of several “moral” issues. Einhenser believes that this “judicial activism may be an attempt to close the gap between what is referred to as ‘moral order’ and the law.”

2. Diverse philosophical questions

2.1 Medical assessment of the value of human life

Sheperd³ is of the opinion that society today relies too much on medical technology and the medical fraternity's ethical norms and perceptions in response to human suffering. He criticises their unacceptable viewpoint that futility of a patient's circumstances entitle them (as medical

¹ 1997. Autonomie versus zorgplicht. *Nederlands Juristenblad* (11:72), 479.

² 1984. Wrongful Conception - Recovery of child-rearing expenses is denied when the purpose of sterilization was therapeutic, not economic. *Hartke v Mc Kelway*. *Journal of Urban Law* (61), 655.

³ 1996. Sophie's choices: Medical and Legal responses to suffering. *Notre Dame Law Review* (72:1), 103.

experts) to withhold medical attention in extreme cases:

He⁴ feels that society has essentially adopted a medical model in its response to suffering, involving medical definitions and perceptions of suffering, medical perceptions and tolerances of risk, and medical solutions to suffering through technology. He believes that science has created some of the expectations about how life should be, thus causing us to turn to science to realize those expectations for us. He is concerned about suffering (or perceived suffering) caused by natural circumstances and especially how we look to medical science to provide the means by which to judge what we have been dealt (by nature) and determine *if it falls below a certain level of acceptability*.⁵

"...we look to medical science to provide the means by which to judge what we have been dealt (*by nature/ circumstances*)⁶ and determine if it falls below a certain level of acceptability."⁷

Shepherd⁸ pronounces that in addition to providing its own definitions of suffering, medicine also prescribes tolerances for medical risk.⁹ He mentions that these prescriptions are quite conservative and then illustrates his statement with the fact that genetic counsellors and physicians often see a certain genetic risk as intolerably high, were parents may be more willing to accept them. The medical response to suffering is to alleviate it, and if alleviation is not possible, to avoid it:¹⁰

"The risk/ benefit analysis medical professionals conduct to determine whether a therapy or treatment should be undertaken necessarily and understandably opens the discussions for quality of life assessments."¹¹

4 *op cit* p 126.

5 for a detailed discussion on "the minimum level of quality of life", and the relevance of this measure for wrongful life actions, see *infra*.

6 my emphasis - note that circumstances could be perceived as harmful.

7 *op cit* p 127.

8 *ibid*.

9 even the use of the term "risk" implies value judgements, when compared to a more neutral term such as "chance".

10 in wrongful life terms, to avoid the suffering that will result from a seriously disabled life, by aborting the affected foetus in time.

11 *op cit* p 129.

In this regard, he explains that the medical profession initially were driven only by the duty to preserve life at all cost, while doctors of today first take into account the quality of the life that will be preserved. Shepherd¹² warns that this could be a dangerous practice because the assessment of statistics, probabilities, and risk does not take into account any personal criteria for quality of life, such as relationships, religious beliefs, ethical norms, the personal tolerance for pain, strength or the desire to live. Where a life or death decision must be made, the justification depends on an assessment of quality of life and the decision must be based on the values of the individual patient, and not the physician's values.

"Futility is the justification physicians rely on to refuse to perform or advise patients against certain treatments, generally life-prolonging treatments...Futility, as applied, means that the doctors do not think the treatment will enable you to have a *good enough life*.¹³ If the medical profession cannot give you a better life, then perhaps you should have no life at all."¹⁴

This last thought is also discussed¹⁵ by another author.¹⁶

¹² *ibid.*

¹³ My emphasis - the question as to what a "good enough life" is, is extremely complex and simply does not have a straightforward answer: the main reason for this complexity is that to each person different matters are important and each individual experiences life from a unique perspective (and accordingly, many subjective factors must be taken into account). In this respect we can criticise courts who in the past have found that "life is always preferred", as oversimplifying a immensely complicated philosophical debate, see ch 8.

¹⁴ *op cit* p 131.

¹⁵ In both instances it is suggested that life, under certain detrimental circumstances, could possibly not be worth living. Shepherd explains that society no longer makes such value judgments on grounds of morality, but has rather acceded to the perspective of medical science. Morreim, on the other hand, explains that the mere fact that an individual suffers, could under certain circumstances constitute harm by itself. In order to establish such harm, one must be able to draw a minimum line of acceptable human living standard. Establishing this minimum standard involves a variety of different value judgments.

¹⁶ See Haavi Morreim *infra*. He criticises the current method of assessing damages and proposes a totally new theory for establishing harm. One of his solutions is to attribute to each circumstance of life a certain minimum level of acceptability. If a person should fall below this socially acceptable level, a status harm results and this person is in principle entitled to restitution.

A difficult problem to solve in this respect, is to find a scientifically defensible theory with which "levels of acceptability" can be formulated and assigned - according to Sheperd, it would not be wise or acceptable to use the norms dictated by medical science.

Clarke¹⁷ comments on society's view on reproduction and genetic disorders, as influenced by expectations created by medical science:¹⁸

"The notion of social responsibility in reproduction, coupled to the mistaken but increasingly popular belief that almost all genetic disorders and other causes of 'handicap' can be prevented by terminating affected pregnancies, is leading to the expectation that all babies will be biologically perfect. Where a baby is 'flawed' there must be someone to blame; if the medical profession has not been negligent, then it must be the parents' fault for not having had 'the tests', or for not having terminated the pregnancy. Such attitudes could have serious repercussions for the provision of care by society for those with congenital malformations and genetic disease."¹⁹

Wertz²⁰ comments on the thoughts of Brock²¹ who claims that there are other cases - compatible with a worthwhile life - where the parents have "a moral obligation to prevent the genetically transmitted disability". He calls these cases "wrongful disability" or "wrongful handicap" and argues that parents have a moral obligation to prevent such disabilities before conception, by conceiving with a different person.²²

Werts²³ submits that:

"The weakness in Brock's argument is that he assumes that it is possible to draw a line between 'lives not worth living' (wrongful life) and 'wrongful handicaps'. If it is a moral duty to abort a life not worth living, this duty may inevitably spill over into cases of wrongful handicap. Also, who will decide which disorders belong in which categories and how will this affect genetic counseling?"

2.1.1 An alternative estimation of life's value

¹⁷ 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge.

¹⁸ which Shepherd *supra* warns against.

¹⁹ *op cit* p 19.

²⁰ 1997. Is there ever a moral duty to use prenatal diagnosis and selective abortion? **The Gene Letter** (2:1), 1 (Found on Internet at: <http://geneletter.org/0897/prenatal.htm>).

²¹ Brock expressed these ideas at a May 26-29 conference on Eugenic Thought and Practice at Tel Aviv University, Israel.

²² different mate, donor sperm or donor egg.

²³ *ibid.*

Morin²⁴ discussed the relevant question: what is the correct means of calculating the value of a human life? In his report, he refers to the formula of an economist, Feldman,²⁵ who believes that calculation begins by asking individuals how much they would be willing to pay to extend their life for a finite period of time. Feldman's theory is in the minority, however, as most economists calculate the value of a human life by examining how much an individual is willing to pay to reduce the risk of death. It is reported that the courts similarly use this "human capital model" to determine damages in cases of wrongful death. It is submitted that "this [theory] views people as a machine - a stream of income."

Scheid²⁶ conveys an interesting perspective regarding this assessment of the value of life in wrongful death cases, as opposed to wrongful birth cases:

"Consequently, it would be inconsistent for a court to simultaneously assert in child wrongful death cases that parents have been deprived of something essentially worthwhile (the love, companionship, affection and joy that a normal and healthy child brings to the family) but then, in a wrongful birth case, to award parents damages for the cost of raising the child to majority."²⁷

It is suggested in criticism of that the "human capital model" does not correctly assess what people are willing to pay to avoid death as the model does not count and figure how people enjoy their lives.²⁸

2.2 Background to the right of the child not to be born

Veerman²⁹ comments on philosophical ideas expressed by the Swedish writer, Ellen Key, who wrote early in the century about the rights of children. Ellen Key was, amongst others, influenced by Herbert Spencer (1820-1903), whose philosophy entails that the individual's

²⁴ 1998. Economist Feldman takes different route toward assessing value of a life. **George Street Journal** (Found on Internet).

²⁵ as the report was obtained from the Internet, no further references could be found, although it is submitted that this would not in any way minimise the application value of the theory on wrongful life actions.

²⁶ 1985. Benefits vs. Burdens: The Limitation of Damages in Wrongful Birth. **Journal of Family Law** (23), 57.

²⁷ *op cit* p 96.

²⁸ it is my submission that, taking into account the subjective nature of valuing life, these are valid points of criticism.

²⁹ 1992. The Rights of the Child and the Changing Image of Childhood. **International Studies in Human Rights** (18), 75.

aspirations must be judged after taking into consideration the effects they will have on the lives of future generations.³⁰

In 1900 Key published her book "The Century of the Child", in which she describes the child's first right, namely: "The right to choose your parents wisely". In this work, she argues for the prohibition of those with inherited physical or psychical diseases, to transmit these impairments to their offspring. Although it is impossible for a child to actually make a decision on who his parents should be, the abovementioned right basically means that a man and woman, about to conclude a union that could result in the birth of a child, must ask themselves seriously whether their own physical and spiritual constitution gives them the right to suppose that such a child would be physically and spiritually healthy.³¹

The basic idea of children having a right to be born "of a sound body and mind", is, as most things in life, not a new concept. Even before Key's work in this regard, Frances S. Hallowes wrote in 1896 on prospective children's rights to be born into the world in a healthy condition.

In support of her children rights theories, Ellen Key believed that the right to family planning fundamentally belongs to the child. Accordingly, when dealing with the question of a right "not to exist", the right of the child "to choose it's parents" can be re-formulated as the right of the child "not to be born",³² should prejudicial circumstances prevail.

2.3 Life free from suffering

Shepherd³³ explains that American society has created a new type of right, namely the right to be free from suffering. He warns us about the dangers of such developments (in an unrestricted form) and suggests reasons for it's emergence, as well as guidelines by which to approach it.

³⁰ the relevance and reality of this philosophy is seen in the efforts of many parents when making responsible and informed decisions concerning future children - irresponsible decisions to conceive children cause much suffering and heartache.

³¹ *ie* instead of emphasising the right of the parents to have children, consideration should be given to the necessary duties and responsibilities that parenthood entails - which would include responsible choices concerning hereditary traits and genetic diseases.

³² this right is generally acknowledged to be the basis of wrongful life actions - see ch 8.

³³ *op cit* p 126.

He states³⁴ that the medical science has developed to such an extent that one can, in a great number of cases, accurately predict future suffering by means of proper diagnosis.³⁵ By applying medical technology, a physician can choose to escape suffering by either avoiding³⁶ or eliminating³⁷ the life of the one who suffers or will suffer. This is often the best solution physicians, compelled by their seemingly expanded role as "participant" in the process of dying, can offer their unfortunate patients. Shepherd³⁸ criticises society's apparent willingness to concede to this (purely) medical approach, without considering other perspectives and interests.³⁹

2.4 Euthanasia

Also at the end of life, people are (under certain circumstances and in certain countries)⁴⁰, given the right to die:

"In such instances the basis of the rights espoused is the principle that people should not be required to suffer when the means are available to end or altogether avoid such suffering, even if such means are ending the life or avoiding the life of the one who will suffer."⁴¹

Shepherd⁴² has the following opinion on how society's acceptance of medical values and

³⁴ *op cit* p 127.

³⁵ *eg* by means of an amniocentesis test, a foetus with a fatal or exceptionally vicious genetic disease can be detected, or a patient with a terminal disease can be identified - see ch 11.

³⁶ in wrongful life actions it is stated that a plaintiff's life should have been avoided (by abortion or by not being conceived), because of the great suffering his life would entail.

³⁷ the right to be free from suffering (sometimes utilized to support wrongful life actions), is similar to the line of thought used to advocate euthanasia or the right to die - see the discussion on similarities between the right to die and the right to be free from suffering in ch 8.

³⁸ *op cit* p 129.

³⁹ *eg* that a handicapped person might enjoy life, despite his physical condition.

⁴⁰ see the discussion on euthanasia in ch 8.

⁴¹ Shepherd, *op cit* p 116.

⁴² *op cit* p 116.

standpoints against suffering, can support and ultimately lead to the recognition of a right to die:

"Despite longstanding assumptions in favour of life, however, the culture of medicine is undergoing a change in its understanding of the relationship between life prolongation and suffering. Where medicine *cannot* provide a means of prolonging life and *cannot* significantly improve the quality of life of the very ill, medicine is increasingly open to the idea of *relief from suffering through death*, which is a shift from the mere acceptance of an increased risk of death occasioned by the use of painkillers (the doctrine of "double effect")."

Hubben⁴³ is of the opinion that Dutch supporters of euthanasia incorrectly believes that the *Hoge Raad* decision of 28 April 1989⁴⁴ favours their point of view. He reports that the decision has merely set the circumstances under which treatment to a handicapped newborn may be suspended, these are: if a real chance exists that treatment will cause the child excruciating pain and where treatment is futile and merely postpones inevitable death.

Brahams⁴⁵ draws an interesting parallel between the phenomenon of euthanasia and that of wrongful life. He reports that although euthanasia remains a criminal offence in the Netherlands, physicians who conform to certain narrow guidelines are unlikely to be prosecuted or disciplined.

Foutz⁴⁶ conveys:

"In light of recent right-to-die cases, courts now have precedent for acknowledging that life, in some circumstances, is not always preferred. By allowing a "wrongful life" action, courts can further the objectives of tort recovery. Not only will injured children be compensated, but more importantly, adequate genetic counselling will be encouraged."

Brahams⁴⁷ writes:

⁴³ 1989. Levensbeëindiging bij ernstig gehandicapte pasgeborenen. *Nederlands Juristenblad* (25), 914.

⁴⁴ where a physician was not held accountable for his patient's (a handicapped newborn) death.

⁴⁵ 1990. The reluctant survivor. *New Law Journal* (140:6453), 586.

⁴⁶ 1980. Wrongful Life: The Right not to be born. *Tulane Law Review* (54), 499.

⁴⁷ 1990. The reluctant survivor. *New Law Journal* (140:6453), 586.

"Analogies with claims for expenses incurred for bringing up loved but unplanned and unwanted babies, healthy or otherwise, which may on occasion include private school fees suggest that a negligence claim for damages for failure to deliver euthanasia would be logically sustainable."

2.4.1 Better of dead?

Steinbock and Ron McClamrock⁴⁸ conveys that to establish damage in wrongful life is more complex than the case is when a terminal patient requests euthanasia, as a competent adult could rationally judge that he is better off dead.⁴⁹

It is rightly submitted that this test, cannot be applied in the case of infants, because infants cannot express their preference and do not have the intellectual capacity for having the relevant preferences.⁵⁰ For this reason an objective decision should be made on behalf of the infant to determine whether life would be worth living or not.⁵¹

Labuschagne⁵² refers to Heifetz and Mangel and argues that a right to euthanasia should be recognized, as we have reached a new level of civilisation wherein one need not endure unnecessary pain and suffering.

"We must weigh the validity of that future subhuman existence, the right to maintain that life, against the sadness and cruelty imposed on parents and siblings living with a subhuman organism."⁵³

2.4.2 Suffering as an injury

Shepherd⁵⁴ further states that unprecedented claims to rights, based on the avoidance of suffering, are being made and recognized by both courts and legislators. He remarks that suffering has thus become a sufficient condition for a right. He concludes that therefore, there

⁴⁸ *op cit* p 16.

⁴⁹ and consider life not worth living.

⁵⁰ *ibid.*

⁵¹ and to promote his or her general welfare.

⁵² 1988. Dekriminalisasie van eutanasië. *Tydskrif vir Suid-Afrikaanse Reg*, 167.

⁵³ *op cit* p 193.

⁵⁴ *op cit* p 104.

need no longer be a tortfeasor,⁵⁵ neither any harm⁵⁶ caused by society, nor any inequity, for a suffering individual to claim relief.

This right “not to suffer” has far reaching consequences, as articulated by Shepherd:⁵⁷

“...the right to avoid suffering is not merely a right to be let alone and instead entails duties of affirmative action on the part of others; the stronger the right becomes, the more the corresponding duties will require affirmative action. Thus, the right not to be born, requires that physicians predict and evaluate the risk and degree of suffering of children yet to be born and requires that prospective parents act on that information to avoid the suffering of children. The right to die, requires that physicians assess the degree of suffering that a patient is experiencing or will experience and prescribe the relief sought *if that suffering is adequately severe*.⁵⁸”

At another place, Shepherd⁵⁹ suggests a combination of two developments to explain the emergence of claims based on the so-called “right no to suffer”. They are:

- society’s increasing acceptance and *expectation* of technology-based⁶⁰ solutions to human problems; and
- the development of a collective conscience- a community empathy for other individuals in matters of personal well-being.⁶¹

⁵⁵ it is my submission that although this is true of euthanasia cases, this contention does not apply to wrongful life actions, where the harm is caused by a wrongdoer (if the action is based on delict), or the guilty party (in breach of contract) - see ch 2.

⁵⁶ see *infra* where an alternative definition for harm is discussed and “new” classes of harm are introduced.

⁵⁷ *op cit* p 105.

⁵⁸ my emphasis - refer to ch 8 where it is proposed that only plaintiffs who “suffer severely enough” be allowed to claim in a wrongful life action.

⁵⁹ *op cit* p 126.

⁶⁰ in his own words: “Science is in effect an attempt to know the world; technology is the tool through which scientific principles are applied. While science is based on the idea that the world is knowable,...technology is based on the idea that we can bring about purposeful change; it is knowledge that is applied.” *op cit* p 126

⁶¹ “In the collective conscience, we share not only a growing awareness of the suffering, and especially the visible suffering, of others, but a growing sense of responsibility to help others avoid avoidable suffering. We find conceptual support for this heightened social responsibility in such theories as the feminist ethic of care. The ethic of care requires attending to responsibilities and relationships, rather than attending to rights and fairness (the ethic of justice).” *ibid*.

Shepherd's view on the right not to be born⁶² is now discussed in more detail.

2.5 Pro-wrongful life and anti-wrongful birth

The viewpoint of Anthony Jackson⁶³ concerning the value of wrongful life actions on the one hand, contrasted against the damaging effects of wrongful birth actions on the other hand is a concept that is shared by other commentators⁶⁴ as well:

"..Wrongful birth actions are highly denigrating to the child and to the handicapped population in general, whereas wrongful life actions allow compensation to the child whose suffering outweighs the benefits of life."

While the wrongful birth suit provides recovery for the parent's injury, it does not address the suffering of the child.⁶⁵

Courts have in the past granted children the right to be born with a sound mind and body,^{66 67} in order to allow torts suffered prenatally. Shepherd⁶⁸ observes that what the courts were trying to do, was to protect the child's right to be free from harmful bodily interference from third parties while *in utero*. The courts, however, had to refrain from saying that *foetuses* had rights,

⁶² the very basis of wrongful life actions.

⁶³ Jackson, A. 1995. "Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England." *Loyola of Los Angeles International and Comparative Law Journal* (17:2), 535.

⁶⁴ *eg* Schoonenberg, (see ch 8) who is of the opinion that wrongful life actions should have a greater chance of success in the Netherlands than wrongful birth actions (although wrongful birth has generally received much wider acceptance in other jurisdictions) - see ch 7.

⁶⁵ He states that damages in a wrongful birth action will generally only cover the life of the child to majority. At that time the parents are (under state law) no longer responsible for providing care for the child. Disability may extend the parent's responsibility for their children's needs beyond minority, but the prediction of such continued disability and its degree of severity must be made years earlier at the time of the parent's wrongful birth suit. The test laid down by the Supreme Court of California, is whether it can be proven at the trial if the disabled child would be able to maintain himself by work on reaching adulthood.

⁶⁶ **Smith v Brennan**, 157 A.2d 497, 503 N.J. (1960) - holding that "...justice requires ...that an infant has a legal right to begin life with a sound mind and body" and **Womack v Buckhorn**, 187 N.W.2d 218 Mich. (1971), also *In re Baby X*, 293 N.W.2d 736, 739 Mich. Ct. App. (1980).

⁶⁷ it appears as if this right is based upon a right to be free from reasonably avoidable suffering.

⁶⁸ *ibid.*

since the injury complained of may have occurred at a time and under conditions when the mother may have legally terminated the pregnancy.⁶⁹

2.6 Foetal rights?

Jecker⁷⁰ states that the duty owed by hospital and physician to this infant presumably arises in virtue of the fact that the conduct in question caused foreseeable harm to the child in question, despite the fact that at the time misconduct took place, the infant had not yet been conceived.⁷¹ She believes that a different approach to the duty issue in wrongful life claims is that the duty owed to parents extends derivatively to child.⁷²

It is conveyed⁷³ the ascription of a right not to be born to plaintiffs in these cases implicitly assumes the position that possible persons have rights.

According to Jecker,⁷⁴ recognition of plaintiff's right not to be born with certain opportunities foreclosed logically entails recognition of the rights of persons who never exist. She argues:

- if a person, p , is the bearer of a right, r , then p is the bearer of r regardless of whether r is or is not successfully exercised;
- suppose that some person, $p1$, who exists at the present time has a right, $r1$, not to have been conceived or born with important opportunities foreclosed; and suppose further that $p1$ has some deformity (eg spina bifida) that would inevitably foreclose important opportunities for $p1$;
- given (2), it follows that if $p1$'s parents knew about her spina bifida beforehand, and if it were also the case that $p1$'s right not to be conceived or born with certain opportunities foreclosed had been successfully exercised, the $p1$ would never have come into existence - ie $p1$ would be a possible person who never exists rather than a possible person who exists;
- then, given (1), if the actual person, $p1$, has a right not to have been born with certain

⁶⁹ through abortion - legalised since *Roe v Wade* 410 U.S. 113 (1973).

⁷⁰ 1987. The Ascription of Rights in Wrongful Life Suits. *Law and Philosophy* (6), 149.

⁷¹ *op cit* p 150.

⁷² the reasoning in *Schroeder v Perkel* 432 A. 2d 839 (1981).

⁷³ Jecker *op cit* p 153.

⁷⁴ *op cit* p 154.

opportunities foreclosed, so does the possible person that *p1* "would have been" (so to speak) if *r1* had been successfully exercised.

She⁷⁵ gives an example:

"If members of a nation A agree that starving persons living in nation B have a moral right to receive food from them, then if such aid is provided, we would still want to say that the latter individuals are receiving what they are morally entitled to receive. It is hardly plausible to maintain that in cases such as these, where rights are successfully exercised, rights lose their force. We do not suppose, in other words, that an individual's rights come and go, so to speak, depending upon whether the rights in question are or are not successfully exercised in that particular context in which they arise."

Jecker's conclusion⁷⁶ is that because possible persons fail to satisfy the family of requirements that are typically put forward as a basis for rights.⁷⁷ She remarks that it is absurd to ascribe rights to persons who never exist just because these persons possibly possess interests, sentience, free will, and so on.

2.7 Philosophy behind wrongful birth

Harrer⁷⁸ reasons on a philosophical level that wrongful birth parents essentially could not have had another child, conceived at exactly the same time, without a handicap. It would be possible for them at precisely the same time not to have had a child at all,⁷⁹ but they could not have had a healthy child on *that* date and time, even if they had the opportunity to go back in the past to have another opportunity to conceive.⁸⁰

2.7.1 Only non-patrimonial damages

⁷⁵ *op cit* p 155.

⁷⁶ *op cit* p 156.

⁷⁷ *eg* they do not actually or potentially possess interests or the capacity to reason or free will or the capacity to suffer or some combination of the above.

⁷⁸ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 89.

⁷⁹ the parents could have used contraceptives.

⁸⁰ Haavi-Morreim has a different opinion - see *infra*.

Harrer⁸¹ argues therefore, that because wrongful birth parents were willing to conceive a healthy child and also knowingly accepted the costs of child-rearing and the other expenses associated with extending the family, they should not be entitled to normal child-rearing expenses in terms of a wrongful birth action. Only the additional expenses necessitated by the handicapped condition of the child should be justifiably compensated.

The reasoning behind this sound argument is that the disgruntled parents in wrongful birth actions are compensated for their defeated expectations⁸² as well as additional rearing expenses necessitated by a handicapped child. They are, however, not entitled to be unfairly benefited through a comprehensive award including maintenance for a normal child, since they were prepared to incur these costs when conceiving the child.

2.8 Alternative to foetal rights

To avoid admitting that fetuses have rights to be free from bodily interference, Shepherd explains,⁸³ the courts rather used more positive language to solve this problem and referred to a right “to begin life with a sound mind and body”. Such a right vests in the child later born alive, and not in the foetus at all.⁸⁴

Shepherd⁸⁵ gives an alternative solution by which the courts might have negotiated their way around this problem: By finding that the tort was committed against the mother (as in wrongful birth actions),⁸⁶ the necessary damages can be awarded to cover the child’s additional life expenses stemming from the injury.⁸⁷ This solution is especially applicable in cases of negligent prenatal screening, because of the direct contractual link between the mother and the genetic counsellor. He continues with his discussion on the so-called “right to a sound mind and body” and reaches the following conclusion:

⁸¹ *op cit* p 113.

⁸² of having a healthy child.

⁸³ *op cit* p 111.

⁸⁴ similar to the South Africa position, where legal subjectivity only begins at birth - the foetus does not enjoy any rights prior to live birth, see the discussion on the beginning of legal personality in this regard in ch 3.

⁸⁵ *Ibid.*

⁸⁶ see, however, *infra* where critics argue in favour of wrongful life, whilst rejecting wrongful birth.

⁸⁷ a challenge to this viewpoint is that the plaintiff in a wrongful life action is the disabled child himself (and not his parents) - if the parents institute an action against a physician or genetic advisor, it is classified under wrongful birth actions.

"Because the suffering of many of these children could have been avoided by avoiding their births, the "right to a sound mind and body" becomes a "right not to be born," and we begin to look to parents to avoid the children's suffering through prenatal testing and abortion."⁸⁸

Here one can see a positive duty⁸⁹ placed on the parents of impaired *foetuses* to avoid the birth of impaired children. Influenced by various circumstances, these unfortunate parents are forced to make a life or death decision on behalf of their unborn children. It is submitted that society strongly encourages these parents to choose abortion, rather than to allow these disabled and/or genetically diseased children to be born. According to this viewpoint, abortion seems to be the better choice, since unnecessary suffering is avoided in this way.⁹⁰

2.9 Motivations for sterilization

Milsteen⁹¹ states that the motivation behind a sterilization is helpful in identifying the specific interests that have been impaired. He reports⁹² that in the case of *Speck v Finegold*⁹³, the court identified principal purposes for limiting the size of a family: the eugenic purpose; to prevent the birth of a defective child; the therapeutic purpose, to prevent harm to the mother's health; and the socioeconomic purpose.

It is reported⁹⁴ that a *therapeutic sterilization* procedure is designed to protect the physical or mental health of the patient or, in the case of a vasectomy, the wife of the patient. If the health

⁸⁸ *op cit* p 112.

⁸⁹ Concerning duties placed on parents, Shepherd refers to the views of Barbara Katz Rothman regarding the difficult decision parents have to make against an abortion, once the amniocentesis has revealed a serious genetic anomaly in the foetus. Concerns are expressed that parents may even be forced to obtain information on whether or not their offspring carries a congenital defect. Once a woman chooses to conceive and carry the child to term, certain obligations might ensue under this view, including a duty to undergo prenatal testing "where there is a reason to believe that this screening may identify congenital defects correctable with available therapies".

⁹⁰ society seems to be convinced that if a person's quality of life is too low or suffering is unbearable, it becomes more advantageous to end that life or prevent it's existence.

⁹¹ 1983. Recovery of childrearing expenses in wrongful birth cases: A motivational analysis. *Emory Law Journal* (32:1), 1167.

⁹² *op cit* p 1189.

⁹³ 497 Pa. 77, 439 A. 2d 110 (1981).

⁹⁴ Milsteen *op cit* p 1190.

of the putative mother is the only interest to be protected by the operation, then the only injury within the contemplation of the parties at the time of the sterilization was the impairment of the mother's health as a result of the pregnancy and subsequent delivery.

With an *eugenic motivation*, it is explained,⁹⁵ a couple attempts sterilization in order to prevent the known possibility of conceiving a genetically defective child, the interests sought to be protected are easily identifiable. Although parents seeking sterilization for eugenic reasons may have wanted a child, they have chosen sterilization, instead, to avoid the anxiety of wondering whether the child would be born defective, and to forego the financial and emotional strain of rearing a child with an impairment they specifically sought to avoid. It is suggested⁹⁶ that if a eugenically motivated sterilization fails and a defective child is born, parents should be permitted to recover for the mental anguish and emotional distress suffered during the pregnancy and after the birth, and for extraordinary child-rearing expenses.

With regard to the influence of *adoption*, Milsteen writes:⁹⁷

"Most courts dealing with the avoidable consequences rule in the wrongful birth context have tended to lump the abortion and adoption alternatives together, treating both as equally unreasonable. Can it be said with legal certainty, however, that placing a child for adoption is unreasonable *per se*? Admittedly, a genetically effective child may be difficult to place for adoption. Thus, in seeking to promote the best interests of the defective child, adoption may not be a viable alternative. The reasonableness of this alternative, like abortion, should be left to the jury."

Milsteen⁹⁸ conveys that the socio-economic motivation could be divided into a "pure economic" motivation⁹⁹ and a socio-economic motivation that is not entirely economically motivated, but rather a more "social" motivation. He explains that; "here, the parent or parents simply choose not to have a child that places a burden on their lifestyles or affects their career choices. It is in these cases that the appropriate interests are the most difficult to identify."

It is finally concluded¹⁰⁰ that one should not focus on the child as an injury *per se*:

⁹⁵ *op cit* p 1192.

⁹⁶ *op cit* p 1193.

⁹⁷ *op cit* p 1194.

⁹⁸ *ibid.*

⁹⁹ where the child is truly "unwanted".

¹⁰⁰ *op cit* p 1197.

"The courts should no longer engage in philosophical pontifications as to the worth of a child. Rather, legal analysis should focus on the specific interests the plaintiff sought to protect by undergoing a sterilization operation. The best way to determine these interests is through a motivational analysis that would disclose the plaintiff's underlying reasons for engaging the physician's services."

It is suggested¹⁰¹ that the benefit rule should be applied to offset against those recoverable damages any benefits conferred upon the plaintiff's protected interests as a result of the child's presence. "Finally, the avoidable consequences rule should be applied in the wrongful birth context, and the reasonableness of the plaintiff's failure to mitigate should be left to the trier of fact."

2.10 Influence of partial counselling on reproductive decisions

The very purpose of prenatal testing is to permit pregnant women to abort fetuses with genetic anomalies. Studies done¹⁰² under a group of genetic counsellors revealed distinct bias attitudes in favour of abortion, in cases of severe genetic anomalies. It is submitted that the "perceived seriousness" of any genetic anomaly is largely determined by the judgements of medical professionals.¹⁰³

Berry¹⁰⁴ agrees that individuals and couples who seek genetic counselling are not only affected by scientific factors on a logical-rational level, but that their entire being could be influenced by it:

"Decisions about reproduction are not made solely on the basis of logical, scientific factors so it is important to discover what aspects are paramount for the couple concerned: have they already decided that whatever the risk they are going to start another pregnancy (or have already done so) as the only way they can see of restoring self-esteem? Or is their confidence so devastated by a recent tragedy that they feel unable ever again to face the uncertainties of another pregnancy? What are their views on abortion?"¹⁰⁵

101 *ibid.*

102 in the study done by Barbara Katz Rothman, Shepherd *op cit* p 113.

103 see ch 5, where the influence of a genetic counsellor's subjective opinions on the patient's decision is discussed.

104 1994. **Genetic Counselling - Practice and Principles: Professional Ethics** Routledge.

105 *op cit* p 30.

Shepherd¹⁰⁶ believes that because these professionals constantly see people with disabilities and medical problems, their perceptions about the quality of life are often excessively negative. He conveys that the medical profession also appears to have a more conservative perceptive of what an acceptable degree of risk is, than the laymen community.

2.11 A feminist view

Ryan¹⁰⁷ gives a feminist viewpoint on wrongful birth and reports that:

"Much of the trouble plaguing the wrongful birth claim stems from reliance by courts and legislatures on male norms under particularly inappropriate circumstances. Courts have judged pregnancy, motherhood, and abortion by male standards, even though each of these experiences is an uniquely female one. The result has been confusion, distortion, and misrepresentation of women's experiences."¹⁰⁸

Ryan¹⁰⁹ gives a feminist analysis of theories courts have used to deny damages for emotional harm in wrongful birth cases. She believes that there is a disparity between woman's actual experiences and the law's description of experiences such as pregnancy, birth and also a mother's reaction to the knowledge that her child will be born disabled or abnormal.

Ryan¹¹⁰ criticises the courts' use of the Impact doctrine¹¹¹ in establishing emotional harm damages. She believes that even if this doctrine was applied to wrongful birth actions, the plaintiff mother could easily prove the required "physical contact", as mothers always experience some physical effects flowing from the defendant's negligence.¹¹² She further argues that the courts' use of the bystander doctrine is unacceptable from a feminine perspective, as "one simply cannot speak of a pregnant woman only as a 'bystander' to

¹⁰⁶ *ibid.*

¹⁰⁷ 1994. Wrongful Birth: False Representations of Women's Reproductive Lives. *Minnesota Law Review* (78), 857.

¹⁰⁸ *op cit* p 858.

¹⁰⁹ *op cit* p 879.

¹¹⁰ *ibid.*

¹¹¹ the requirement that a plaintiff should have suffered "physical impact" before emotional damages may be sought.

¹¹² *ie* she carries her pregnancy to term.

anything that happens to her unborn child."¹¹³

She writes that "it is untenable for the law to split the mother and her unborn child into two entities. By applying the bystander rules to wrongful birth cases, however, this is precisely what courts have done."¹¹⁴

"Courts should examine these concerns directly when deciding whether to award mental harm damages in wrongful birth cases, instead of hiding behind rules that were conceived for a world in which pregnant women do not exist."¹¹⁵

It is further reported¹¹⁶ that the courts' application of the "benefit/ burden" rule has a prejudicial effect on predominantly woman-plaintiffs in wrongful birth.

"In the case of a severely impaired child, the stereotype plays on the romanticized notion of parenthood while it trivializes the emotional pain of parents who must witness the early death of a young child or care for a severely impaired child for the rest of their own lives. By invoking the stereotypical view of woman as fulfilled mother, courts play a cruel joke on parents who may have been emotionally devastated by their child's impairment and who may have found little if any emotional satisfaction in the burden they have taken on as a result of the defendant's negligence."

It is argued that patriarchal interests are served by the misrepresentation of woman's actual reproductive experiences.¹¹⁷

"By speaking only of the technical rules regarding emotional harm damages and ignoring the details of the actual harm that results from wrongful birth, courts deny the importance and severity of the emotional harm suffered by parents who must watch their children suffer and sometimes die, while at the same time knowing they may have been able to do something to prevent it."

Ryan¹¹⁸ conveys her opinion on the influence of societal attitudes in wrongful birth:

¹¹³ *op cit* p 881.

¹¹⁴ *ibid.*

¹¹⁵ Ryan *op cit* p 884.

¹¹⁶ Ryan *op cit* p 885.

¹¹⁷ Ryan *op cit* p 886.

¹¹⁸ 1994. Wrongful Birth: False Representations of Women's Reproductive Lives. *Minnesota Law Review* (78), 857.

"Of course, much of the mental anguish suffered by parents in wrongful birth cases would not exist if our world were less hostile toward the physically and mentally impaired. A significant portion of the emotional pain these parents suffer is caused by the fact that society will discriminate against their children."¹¹⁹

2.12 Actions against parents

Successful actions instituted by children against their parents are no longer a ridiculous impossibility of the distant future.¹²⁰ It is conveyed that current legal recognition of a child's claim against his parents is neither fanciful nor without support and suitably articulates the opinion of John Robertson on this point:¹²¹

"Even absent legal recognition of such a claim against the mother, prospective parents face growing medical, economic, and moral pressure to avoid the births of such children, primarily because of the extent of suffering that the birth will entail. Prospective parents may feel an ethical or moral duty not to continue such pregnancies, to follow the medically indicated and prescribed solution rather than rely upon their own autonomous ethical and moral capacities. The emerging notion that a child has the right to be born healthy- a right essentially based in suffering- requires parents to adopt a medical response to predicted suffering which excludes other equally caring responses."

Legal precedent that opened the way for such actions exist. In **Curlender v Bioscience Laboratories**,¹²² for example, the court found no reason why parents (who proceeded with a pregnancy of a foetus they knew to be carrying a genetic defect) could not be sued by that disabled child. As quoted from the case:

"Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have

¹¹⁹ *op cit* p 889.

¹²⁰ Shepherd *op cit* p 114.

¹²¹ J. A. Robertson 1983. "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth." *VA. Law Review*, (69:405), 43. - supporting the recognition of a legal duty on parents "not to conceive under certain circumstances," and arguing on behalf of a child's right to "allege that his or her parents had the duty not to conceive at all," and must therefore be held legally responsible to the child "for causing misery, pain, suffering, and death, if it could have been avoided" - on this viewpoint, please also refer to the ideas of P.E. Veerman mentioned *supra*.

¹²² 106 Cal. App. 3d 811 (1980).

wrought upon their offspring."¹²³

This principle recognition of actions against parents, Silverman¹²⁴ comments, is in line with an increasing willingness to exert pressure on women to abort fetuses with detectable genetic anomalies.¹²⁵ He fears that the pregnant woman herself could even be held liable under criminal or tort law as the guilty party engaging in the wrongful conduct¹²⁶ (where such wrongful conduct traditionally came from third parties).

Schedler¹²⁷ has an interesting opinion on this viewpoint:

"It seems logically odd, if not inconsistent, to claim that the physician's failure to inform the mother causes the defective fetus's defective birth and thereby wrongs the fetus, when the mother would have done no legal wrong to the fetus had she brought it to term knowing it was defective."¹²⁸

Regarding the possibility of children suing their parents in cases like these, the views of Shaw¹²⁹ is also of interest:

¹²³ once again, one can see the importance that is placed on the suffering of others - a consideration the court did not take into account, is the fact that by relieving the child from his pain and suffering, he also loses his opportunity to experience life itself.

¹²⁴ Silverman, A.M. 1993. Constitutional Law: Pennsylvania's Wrongful birth statute's impact on abortion rights: state action and undue burden- *Edmonds v Western Pennsylvania Hospital Radiology Assocs. Temple Law Quarterly* (66:4), 1087.

¹²⁵ Consequential to the existence of a feeling described as "collective care" in society of today, and together with the general notion that "people shouldn't suffer", is the possibility that parents could be obliged in future to have genetic tests done before birth and to abort fetuses with serious genetic anomalies. This raises an important question- whether this affirmative obligation on parents would be morally and ethically acceptable/ sustainable.

¹²⁶ *Eg*, if the mother damaged the foetus through the intake of drugs during pregnancy, or if the mother knowing the risks, infected her foetus with HIV. It should be noted that these forms of unlawful conduct is not under detailed discussion in this thesis. These "traditional/ normal torts" (where disability is caused by a tortfeasor) are irrelevant for our current discussion, because the prejudiced plaintiffs in these cases, are potentially healthy children. See research proposal.

¹²⁷ 1986. "Women's Reproductive Rights: Is There a Conflict with a Child's Right to Be Born free From Defect's?" *Journal of Legal Medicine* (7), 357.

¹²⁸ this statement is shocking, but fundamentally true - this reasoning might be used to ultimately reach a decision that wrongful life actions and wrongful birth actions should not be allowed at all (it is submitted that under South African law, actions instituted against parents in these cases, would be *contra bonos mores* or against public legal policy).

¹²⁹ 1984. "Conditional Prospective Rights of the Fetus." *Journal of Legal Medicine*, (5:63), 110.

"Instead of designating a third party medical provider as the tortfeasor, however, the mother's failure to obtain an abortion when one was legally available to her is the proximate cause of the child's life of suffering."

A possible (future) duty placed on parents to undergo medical check-ups and genetic tests before bringing a child in the world, is maybe not so far-fetched. This will almost certainly become a reality if a child's right "to be born with a sound mind and body", is generally excepted. In **Grodin v Grodin**¹³⁰ the court warned of the proportions this legal duty, if indeed placed on parents, could have:

"...a child could maintain an action against his mother on grounds that his mother negligently failed to seek proper prenatal care, failed to ask her doctor to test her for pregnancy, and failed to tell her doctors she was taking the drug tetracycline which caused the child's teeth to be discolored."

2.13 Right to happy childhood?

This discussion is relevant to the question whether a general, separate duty on parents exists to ensure that they provide an acceptable environment for their children.¹³¹ It is thus contended that these parents should themselves be physically and psychologically fit and must be able to offer their offspring healthy and happy circumstances to grow in.

According to Ellen Key,¹³² there should be a duty on parents to ensure they do all they can to make a suitable environment for their children and be adequately prepared and willing to support the child in all aspects of parenthood. Two questions arise:

- does the child have a reasonable chance to be born healthy or without serious defects?¹³³
- did the parents take sufficient action in order to adhere to this duty?

¹³⁰ 301, N.W. 2d 869, 870 Mich. Ct. App. (1980).

¹³¹ this duty is discussed by Veerman, P.E. 1992. The Rights of the Child and the Changing Image of Childhood. **International Studies in Human Rights** (18), 75 (Martinus Nijhoff Publishers).

¹³² as discussed by Veerman *supra*.

¹³³ are there any genetic anomalies in the family *etc* - it is suggested *ibid* that to ensure the duty is adhered to and in order to minimise risks, genetic tests should be undertaken by the parents and genetic advice should be obtained from a professional counsellor.

It is my submission that such a stringent selection and examination of parents to determine whether they are "approved for parenthood", would mean that parents with HIV-Aids, for example, will not be allowed by social pressure and prejudices to have children.¹³⁴ If this reasoning is taken to its very limits, such conduct could even constitute an action by the child against such parents.

Roberts¹³⁵ similarly recognizes that there is social pressure that influences parents to abort impaired foetuses: "According to the prevailing wisdom, it is morally problematic to produce children whose existence is bound to be flawed in some material respect."

"A principle of parental responsibility should require of individuals that they attempt to refrain from having children unless certain minimal conditions can be satisfied. This principle maintains that in deciding whether to have children, people should not be concerned only with their own interests in reproducing."¹³⁶

The same concept of responsible parenthood, as discussed by Veerman,¹³⁷ is supported by Steinbock and Ron McClamrock¹³⁸ "failing to have a child, even when you could have had a happy one, is neither right nor wrong."

"Having a child under conditions which should enable one to predict that it will be very unhappy is morally objectionable, not because it violates the rights of a presently existing potential person, but because it results in the frustration of the interests of an actual person in the future."¹³⁹

4.14 One chance to live?

¹³⁴ because of the great risks of infecting the child and since they will not be able to ensure a healthy and suitable environment.

¹³⁵ 1995. Present duties and future persons: When are existence - inducing acts wrong? *Law and Philosophy* (14), 297.

¹³⁶ *op cit* p 17.

¹³⁷ *supra*.

¹³⁸ *ibid*.

¹³⁹ *op cit* p 18.

Harrer¹⁴⁰ discusses this philosophical question¹⁴¹ about how and in what state of health humans are born into this world. Is every person's birth (with each unique attribute of an individual) predestined or is it a matter of chance whether you or another of your possible brothers or sisters are conceived and later born? Is it possible for parents who conceive a child at a specific time to have conceived a normal healthy child one time around and a seriously debilitated child suffering from various serious hereditary diseases the next time?

Hypothetically speaking, it is my submission that, if one argues that no matter what the parents could do, they would always conceive the same handicapped child at a specific period in time, then their only option to not have a (that) handicapped child would be to conceive another at an earlier or later stage in time. The only alternative to prevent the unwanted birth of such a handicapped child would then be by detection (through proper pre natal testing) and abortion.

If the birth of a child (handicapped or healthy and with one or the other personality and different unique attributes) is decided by chance, then it is possible for parents to conceive either a healthy or handicapped child, when conceived at exactly the same time in history, in different attempts (off course). If this was the case, some of the responsibility to prevent seriously debilitated children from being born would be shifted from physicians and genetic counsellors to "lady luck", since either a healthy or disabled child could be born!

2.15 Forced genetic testing?

Gevers¹⁴² is adamant that no person could be obliged to undergo genetic testing in terms of Dutch law, as such action would constitute an infringement of the untouchable right to physical integrity as entrenched in section 11 of the Dutch constitution. He is of the opinion that this issue could become increasingly relevant as growing societal and moral pressure is expected to force prospective parents to only bear healthy and normal children, as medical and genetic knowledge increases.¹⁴³ He writes:

"Daarbijwordt dan genoemd de mogelijkheid van schadeplichtigheid van onzorgvuldige ouders jegens later geboren kinderen met defecten (wederom de 'wrongful life' problematiek), wettelijk verplichtingen bepaald onderzoek te ondergaan (prenuptiaal of prenataal) en zelfs als extreme maatregel procreatieverboden. Zoals gezegd is dit

¹⁴⁰ op cit p 99.

¹⁴¹ (which is without any simple and final answer).

¹⁴² 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19.

¹⁴³ op cit p 57.

een heilloze weg, die zich niet verdraagt met de huidige rechtsorde.”

2.16 Genetic manipulation acceptable?

Strauss¹⁴⁴ writes on the ideological considerations inherent in difficult questions raised by developments in genetic science, such as genetic manipulation and foetal medical treatment. He believes that each procedure should be judged on its own merits to ascertain whether it is socially acceptable and in line with the *boni mores* of a particular community. One difficulty in assessment could be the fact that the lawyer is a layman in the field of natural science and might not fully be able “to envisage the exact nature, scope and effects of a particular scientific procedure”. Factors that should be taken into account are: is there a therapeutic objective; would other benefit from it; is it purely of scientific relevance; has the individual who is the subject of the procedure been fully informed of potential harmful consequences?

It is submitted¹⁴⁵ that one should, in answering these questions, take note of the views of recognized religious denominations and theologians and also be guided by general ethical considerations,¹⁴⁶ including medical professional ethics.

In discussing various possible applications, Strauss¹⁴⁷ conveys that where medical procedures contribute to the needs of mankind and are guided by therapeutic objectives, such conduct would probably be lawful.¹⁴⁸ He gives an example, however, of where a normal developing foetus is removed from its mother’s womb as an experiment to test a artificial womb. He is of the opinion that such a scientific venture would be unlawful and “that the prevailing *boni mores* prevailing in this country would thoroughly disapprove of such a procedure”,¹⁴⁹ even though the mother has consented to it after having been informed of the risks to the foetus and warned of possible birth defects.

2.17 When do we begin?

¹⁴⁴ 1991. *Doctor, patient and the law* JL van Schaik (3rd edition), 194.

¹⁴⁵ Strauss, *ibid*.

¹⁴⁶ here it would also be helpful to take into account the values protected by other laws.

¹⁴⁷ *op cit* p 195.

¹⁴⁸ the legal meaning of lawfulness is discussed in ch 2.

¹⁴⁹ it is reported by that successful experiments on artificial wombs have in fact been done in Japan.

Ford¹⁵⁰ writes that the question when human existence legally begins causes many moral problems, such as in the instance where contraceptive measures are used by adults (the prevention of life) and also where experimentation is done on human embryos (severe infringement of rights if one views that human individuality starts at conception).¹⁵¹ She criticises the inadequate legal position in this regard:

"Morality and the law dictate what ought to be done or omitted in relation to a human individual, but they do not determine what constitutes a human individual."¹⁵²

She argues¹⁵³ that we presuppose what the concept "human" is and explains that our attitudes determines this fact, as we can easily distinguish between a child and an animal based on the perception that a human is superior in nature and dignity. However, she argues, it is not our attitudes that *make* the child a human, but rather the fact that "we respond to the recognition of the child's human nature and personal dignity by our attitudes of respect and love". She believes that the same attitudes could be applied towards unborn children as well.

2.18 Collective Conscience phenomena

Shepherd¹⁵⁴ discusses the so-called "collective conscience" phenomena and summarises it as follows:

"As we continue to move along the path of a collective conscience in matters of health, the responsibility we feel for the care of others becomes duty, and in the language of advocacy for recognition and adherence to that duty, we see constant recourse to the familiar language of rights. To give proper weight to a concern within our rights-based constitutional framework, there is pressure to discover or proclaim (depending on your natural law or positivist proclivities) a right. *Thus, to ensure that we properly adhere to the collective duty we feel to alleviate individual's suffering, there is pressure to recognise an individual's right to claim the resources needed for the alleviation of that*

¹⁵⁰ 1988. *When did I begin? Conception of the human individual in history, philosophy and science*. Cambridge University Press, 2.

¹⁵¹ see ch 3.

¹⁵² *op cit* p 3.

¹⁵³ *ibid*.

¹⁵⁴ *op cit* p 135.

suffering.¹⁵⁵⁻¹⁵⁶

Shepherd¹⁵⁷ is concerned that these rights, (based on suffering) do not merely define and require minimum levels of behaviour, but create new and unprecedented expectations of rescue-like behaviour. He is sceptical about the consistency of the implementation of these rights, which appears to originate from caring concerns for the suffering of others.

If we consider the ethic of care in cases of prenatal diagnosis of disability, we can expect a compassionate response to the parents faced with this difficult and sad situation. Their initial suffering, together with the difficult choices they have to make concerning a possible abortion, is obvious. Also if the child is born, a similar caring and accepting response would be expected. Shepherd¹⁵⁸ contends that a right not to be born does not constitute any such care. He states that the right not to be born, as well as the right to die, although both originated from concerns of individual suffering, are "by their universal nature, absent of individualized care."

The implications that are expected if these rights based in suffering, are generally accepted, are well summarised in Shepherd's own words:

"If we let medical definitions of and responses to suffering prevail, and give these the weight of law, we risk two grave results. First, we crowd out other definitions and responses to suffering. Our law combined with medicine will create the norms for behaviour at the edges of life. Individuals acting singly, in families, or as communities will have less influence than doctors in setting such norms. Second, we face a potential erosion of rights we have traditionally held dear. We have now, through medicine, the tools to evaluate the worth of an individual's life, and, through law, the language of rights to support action taken on the basis of that evaluation. But as we recognize an individual's rights to liberty and equality, and provide the language and the justification for taking a suffering individual's life for another's good."¹⁵⁹

2.19 Measuring quality of life

"Quality of life assessments abound in determinations of the presence of suffering and

¹⁵⁵ my emphasis - here it is clearly stated how a collective conscience could lead to the thought of rights protecting people against unnecessary suffering.

¹⁵⁶ *op cit* p 137.

¹⁵⁷ *ibid.*

¹⁵⁸ *op cit* p 138.

¹⁵⁹ *op cit* p 138.

it's degree of severity."¹⁶⁰

In society it often happens that assessments are made of another's quality of life. Courts and physicians daily have to make decisions concerning other people's quality of life (and even deciding whether it is worth living).¹⁶¹

Blackbeard¹⁶² argues that no right to be born normal exists as "normality" is a subjective determination and each person measures the quality of life differently:

"Should a doctor, however, have a duty towards an unborn child to prevent that he or she be born disabled, the child may have the right to be born 'as a whole and functional human being'. No such right can, however, be recognised, as no objective standard exists to determine what is understood by 'whole and functional'."

Kruithof¹⁶³ recognizes that underlying and differing values in society contributes to the complexity of wrongful life studies:

*"Gevallen tonen niet alleen aan dat het aan de orde zijnde probleem in zeer uiteenlopende situaties voorkomt, maar ook dat hier vaak onderliggende waardenconflicten aan bod komen die in onze samenleving op zeer verschillende wijze beoordeeld worden."*¹⁶⁴

2.19.1 Discrimination on base of disability

Shepherd¹⁶⁵ fears that these assessments of other's lives will result in characterization and classification of these lives into: "normal" and "disabled" or "genetically impaired" groups, which might lead to discrimination against individuals suffering from hereditary disadvantages.¹⁶⁶

¹⁶⁰ Shepherd *op cit* p 140.

¹⁶¹ in a successful wrongful life action, the court has to find that plaintiff's life is not worth living.

¹⁶² 1996. Actions for wrongful birth and wrongful life. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 714.

¹⁶³ 1987. Schadevergoeding wegens de geboorte van een ongewenst kind? *Rechtskundig Weekblad* (50:41), 2737.

¹⁶⁴ *op cit* p 2740.

¹⁶⁵ *Ibid.*

¹⁶⁶ it is suggested *ibid* that not only diminished abilities, but even cosmetic differences are seen as sources of suffering.

One can therefore argue that the mere fact that society classifies people as “disabled” or “handicapped”, is in itself a form of discrimination. Although some might say that disabled people are in a “separate, but equal group”, history shows that separate is not always equal.

2.19.2 Value of disabled life

Shepherd¹⁶⁷ contends that society should have equal respect for all persons, whether disabled or not. This would mean that we should not use individuals as mere means, but recognize them as ends in themselves, implicating that we can not decide that one person’s life is worth more than another person’s life.

In this regard it could be argued that wrongful life actions will be detriment to the status of disabled or seriously handicapped people in society. The lives of genetically handicapped people are already worth so little in the eyes of a large proportion of society, that additional recognition to the disadvantageous realities concerning disabled people’s lives (emphasized by allowing wrongful life actions), could be devastating to the plight of the handicapped community for equal treatment and general recognition.

“The enjoyment of a right to relief from suffering (as in a right to physician-assisted suicide or a right not to be born) demands a direct, corresponding duty on the part of others: one cannot exercise a right to physician-assisted suicide unless someone in society makes a quality of life judgment that “weighs” one type of suffering against that of another, to determine if the suffering is severe enough to warrant granting the request. If, as I have argued, the issue is not autonomy, but suffering, then the issue is not how the suffering individual feels, but how we feel; whether we feel the suffering merits relief through death, and we decide who can or cannot die. Some courts have already recognized the inevitability of this sort of assessment in wrongful life cases; that is, that judicial fact finders are faced with determining whether a life with disabilities is worse than no life at all.

These are decisions I say are not ours to make. Recognizing rights based in suffering requires that we (meaning those unconnected to the decision: physicians, courts, society) make decisions about other people’s suffering, their quality of life and therefore their value in living. If we decide that the suffering is severe and the quality of life substantially diminished, then we are justified in treating this unequal life differently. We are justified in making decisions that erode autonomy and equality in the name of providing relief from suffering.

The potential (though improbable) application of wrongful life suits against parents, and the more likely and already apparent economic, professional, and social pressure

¹⁶⁷ *op cit* p 144.

on parents to abort "defective" fetuses, acknowledge the right of children to avoid suffering. But they do so at the cost of individual instances of parental autonomy and, as I have argued elsewhere, as a general matter, they threaten the highly important relationship of attachment between parent and child."¹⁶⁸

Other commentators¹⁶⁹ have similarly argued that recognition of such injury to the handicapped child will diminish the progress which has been made in the physical and attitudinal aspects of public policy toward the handicapped.

Teff¹⁷⁰ believes that it is no longer commonly maintained that we devalue the handicapped, by providing them with social benefits.¹⁷¹ "On the contrary, such provision is properly seen as one of the hallmarks of a compassionate society."¹⁷²

"Permitting a remedy does not imply a cynical disregard for the preciousness of human existence. It is precisely the recognition of the value of life and the laudable reluctance to stigmatise it when impaired that should enable "wrongful life" litigation to be kept within socially acceptable limits".¹⁷³

Hubben¹⁷⁴ summarises the viewpoint of physician who believe that, although seriously handicapped children could sometimes be kept alive for many years, they would prefer to terminate their impaired lives at birth, based of the reason that these children would experience no real quality life.¹⁷⁵

2.20 Conclusion

¹⁶⁸ *op cit* p 146 -7.

¹⁶⁹ Kohnen, D.A. and Zoellner, R.M. 1986. Wrongful Life: Existence v. Nonexistence - Is Life Always Preferable? **Federation of Insurance & Corporate Council Quarterly** (63), 239.

¹⁷⁰ 1985. The Action for Wrongful Life in England and The United States. **International and Comparative Law Quarterly** (34), 423.

¹⁷¹ or that such expenditure encourages societal intolerance of them.

¹⁷² *op cit* p 438.

¹⁷³ *op cit* p 440.

¹⁷⁴ 1993. Levensbeëindiging van ernstig gehandicapte pasgeborenen en ernstig demente bejaarden: waar ligt de grens? **Tijdschrift voor Gezondheidsrecht** (17), 207.

¹⁷⁵ "De consequentie van dit standpunt van de kinderartsen is, dat bijvoorbeeld in het geval van een pasgeborene met een ernstige geestelijke handicap, die bij normale verzorging lange tijd kan overleven, op grond van de prognose van de kwaliteit van het leven opzettelijke levensbeëindiging tot de mogelijkheden gaat behoren." *op cit* p211.

Shepherd¹⁷⁶ asks whether we should recognize individual's rights to relief from or avoidance of suffering, being the underlying principle to the right not to be born. He pleads for the principles of equality and liberty to protect individuals' rights, although he is sceptical whether these would render sufficient protection against the new rights based in suffering.

"The developing medical model of suffering that I have described is powerful. Adding rights to that medical-technology formula threatens to overwhelm other rights that do not have the same psychological and social force that medicalized suffering does. What is needed is a new alternative model of responses to suffering that includes, as a component of that model, medical solutions, but also includes other responses to suffering and that elevates above medical perceptions other, broader perspectives."¹⁷⁷

These broader perspectives that Shepherd speaks of, I agree, should include religious, social-cultural, legal and other relevant perspectives.

3. Damage perspectives

3.1 A new definition for harm required

Haavi Morreim¹⁷⁸ believes that a key issue in correctly understanding wrongful life actions, is by properly understanding the legal term "harm". In order to describe harm, we must compare the condition in which the individual now exists with that condition in which he would otherwise have been, but for the allegedly harmful event.¹⁷⁹ He shows this definition to be conceptually and morally flawed¹⁸⁰ and he accordingly proposes an alternative general definition which, when applied to wrongful life cases, prove that we can easily define harm in these cases.

Often the pivotal point of dispute in wrongful life actions is whether the plaintiff has suffered

¹⁷⁶ *op cit* p 155.

¹⁷⁷ *op cit* p 156.

¹⁷⁸ 1988. The Concept of Harm Reconcived: A different look at Wrongful Life. *Law and Philosophy* (7), 3.

¹⁷⁹ see ch 2.

¹⁸⁰ see critical discussion *infra*.

any legally recognized injury.¹⁸¹ Injury is established by comparing the child's damaged existence with his only alternative, namely non-existence. An argument often used by courts in dismissing the cause of action is plaintiff's failure to prove that an injury was suffered.¹⁸² Other courts, however, assert that even though damages cannot be measured in a fair, non-arbitrary way,¹⁸³ this fact should not prohibit a cause of action.¹⁸⁴ Haavi Morreim¹⁸⁵ tries to explain the reasoning behind these viewpoints and illustrates the deficiency in the traditional legal definition of harm in taking hold of these new actions:

"Where we may (justifiably) identify a harm in some pre-legal sense (like telling a little white lie) which we do not choose to recognise as a legal harm suitable for litigation or compensation, rather these courts (without any merited reason) deny altogether that we can predicate the concept of harm in wrongful life cases."

3.2 The traditional definition

The "otherwise-condition"¹⁸⁶ of harm (used in the traditional definition to establish harm by comparing the actual prejudiced situation plaintiff finds himself in, with the hypothetical situation where no damage-causing event took place) is summarised by Haavi Morreim.¹⁸⁷ Harm according to this "otherwise-condition" occurs when the ongoing course of events is deflected for the worse by some particular event E¹⁸⁸, which can be:

- some natural event;¹⁸⁹

¹⁸¹ see ch 8.

¹⁸² *Turpin v Sortini* 182 Cal. Rptr. 337 (1982).

¹⁸³ *ie* general damages, but nevertheless allow special damages: *Gleitman v Cosgrove* 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967); *Harbeson v Parke-Davis Inc* 98 Wash. 2d 460, 656 P. 2d 483 (1983); *Procanic v Cillo* 97 N.J. 339, 478 A. 2d 755 (1984).

¹⁸⁴ *Turpin v Sortini* 182 Cal. Rptr. 337 (1982); *Goldberg v Ruskin* 113, Ill. 2d 482, 499 N.E. 2d 406 (1986); *Azzolino v Dingfelder* 71 N.C. App. 289, 322 S.E. 2d 567 N.C. App (1984) - see ch 8.

¹⁸⁵ *op cit* p 7.

¹⁸⁶ this term is used by Haavi Morreim to describe the alternate position/ condition implemented when comparing a plaintiff's current (prejudiced) situation to *that in which he would have been*, was it not for the damage-causing event.

¹⁸⁷ *op cit* p 10.

¹⁸⁸ or in traditional legal terminology, the "damage-causing event".

¹⁸⁹ *eg* where a pregnant woman contracts German measles or any other disease potentially dangerous to the foetus.

- an act performed by a person or group;¹⁹⁰ or
- a specific omission.¹⁹¹

There are several important aspects to be recognized in the traditional definition¹⁹² of harm, that would make it possible to fully understand why this conventional method is not sufficient to deal with unique problems associated with wrongful life actions.

Overall, the otherwise-condition definition¹⁹³ asks us to conceive harm in terms of a “change-change” event or situation in someone’s ongoing course of affairs. This is seen in the assumption that to simply be in an unfortunate condition, cannot by itself constitute a harm.¹⁹⁴ We must describe quite precisely some alternative (better) condition in which that person would have been, but for event E (which sent him instead to his current inferior/ prejudiced condition).¹⁹⁵ One must be careful not to compare the child’s life with a normal¹⁹⁶ life, because this child could never have been normal.¹⁹⁷

One problem associated with the otherwise-condition definition used to assign harm, is that many commentators assume that the only way to identify event E, is “causing the child to be born”, therefore *he* can only exist as this impaired person and he is only harmed by this act if his life is not worth living. According to Haavi Morreim¹⁹⁸ this assumption can be criticised on at least two bases:

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- ¹⁹⁰ when dealing with wrongful life litigation, many instances of culpable conduct by health care workers could be mentioned - see ch 7 and 8.
- ¹⁹¹ not simply any possible omission, but a particular event which was specifically due to befall the plaintiff, and which would certainly have happened in the normal course of events, (but did not, due to some reason or another).
- ¹⁹² a description of injury given in the South African judgement of **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814 (A) at 840: “...based upon *damnum* suffered by the plaintiff which is to be measured by the difference between the *universitas* of his rights and duties as it is after the wrongful act and what it would have been if the act had not been committed.”
- ¹⁹³ or the so-called “traditional” definition of harm.
- ¹⁹⁴ *ie* to be born with a birth defect is not a harm, but rather “an unfortunate fact of life”.
- ¹⁹⁵ in wrongful life actions, the harmful event is the culpable conduct of defendant which causes the plaintiff-child to be born - a comparison is made between the total result of the physician’s actions, namely the child’s impaired existence and the child’s otherwise-condition, which is non-existence.
- ¹⁹⁶ without hereditary physical or psychological impairment.
- ¹⁹⁷ see the philosophical discussion on this topic *infra*.
- ¹⁹⁸ *op cit* p 14.

- In denying that this individual (the plaintiff) could exist as himself without the disabling condition or hereditary disease¹⁹⁹ this view appears to rely on some debatable ontological assumptions about the nature of personal identity.²⁰⁰
- There is no good reason why we should restrict ourselves so narrowly in selecting the appropriate causal event E, for example, the belief that a mother's *rubella* caused a birth defect in her child. Alternatively, we might suppose that the event E is instead the physician's failure to suggest *rubella* immunization a year ago. If everything else would have gone on *ceteris paribus*, the woman would still have conceived this child at this time, but without *rubella*. On this selection of event E, the child is clearly harmed, even on an otherwise-condition account!

3.3 Fundamental flaws in the traditional "otherwise-condition" definition

Haavi Morreim²⁰¹ exposes certain fundamental flaws that he finds in the otherwise-condition definition. He mentions that the otherwise-condition definition cannot account for certain clear instances of harm and that the definition has morally untenable implications. Here a number of these flaws are mentioned:

3.3.1 Missed harms

The otherwise-condition definition of harm is unable to account for two large and important classes of harm. By assuming that harm arises only as events cause changes in ongoing affairs (*event-harms*), the definition omits those cases in which harm resides in the ongoing affairs themselves (*status-harms*) and instances in which harm arises through a dereliction of duty (*default-harms*).²⁰²

3.3.2 Morally untenable results

Haavi Morreim²⁰³ supports his critical viewpoint concerning the morally indefensible results derived from using the otherwise-condition definition, through illustrations of possible factual situations.

¹⁹⁹ see ch 11 for more detail on hereditary diseases.

²⁰⁰ can a specific person exist only at a specific given time in history, or is it possible that same person could have lived at another time under the same circumstances - eg as a healthy person.

²⁰¹ *op cit* p 15.

²⁰² *op cit* p 16.

²⁰³ *op cit* p 19.

Example 1: Carla, pregnant, learns that unless she takes some treatment, there is a risk that her child may have a handicap. She decides not to have the treatment. Carl, the child born from the pregnancy, is indeed born handicapped.

Example 2: Paula, trying to become pregnant, learns that if she conceives now, there is a risk of bearing a handicapped child. If she waits for two months, there would be no such risk. She decides not to wait and her child, Paul, is born handicapped.

According to the otherwise-condition based analysis, Carla has clearly harmed Carl, since he could have had a normal existence. Paula, on the other hand, did not harm Paul in the least, because if Paula waited, Paul would not have been born at all. His existence is as this handicapped child or not at all, and thus he is only harmed if his life is not worth living!

Another example illustrates this point: What would be the position if a malicious scientist employs genetic screening and in vitro fertilization to produce the most diseased, handicapped individual he possibly can, just to watch his "experiment" suffer. If the child's life is just barely worth living,²⁰⁴ then, on the otherwise-condition approach, the scientist has not harmed him in the least!

The problem pervading all these examples is that once we are denied the opportunity to assign a harm, we are at a loss to account for the moral seriousness of a individual's actions. It is suggested²⁰⁵ that "promote the good" approaches²⁰⁶ are inadequate, "because they do not account for moral seriousness." These approaches try, by adopting a "right not to be born"²⁰⁷ to defend a compendious way of referring to the plausible moral requirement that no child should be brought into the world unless certain very minimal conditions of well-being are assured. Parents who knowingly bear seriously affected children, wrong them in many ways²⁰⁸

²⁰⁴ the argument that "life is always more preferable and precious" than no life (irrespective of living standard or quality of life), is often quoted by courts disallowing wrongful life actions - this example illustrates the superficial foundations of this maxim.

²⁰⁵ *op cit* p 20.

²⁰⁶ as seen in judgments where a right to be born as a whole and functional human being, is given to plaintiff-children in some wrongful life actions - see *supra*.

²⁰⁷ Haavi Morreim *op cit* p 21 feels that these "birth rights" stretch beyond reason and our usual notion of a right as a fairly specific, legitimate claim against moral agents for specific types of conduct.

²⁰⁸ seriously handicapped people often have a low self-esteem and generally find it difficult to adapt to life in general; job opportunities for handicapped people are also scarce and usually these individuals remain dependant for the rest of their lives - some hereditary diseases cause a lifetime of suffering and pain.

that would affect them for the rest of their lives, even though they have not legally harmed them in the least.

The entire “future generations” theory²⁰⁹ is unable to give a moral account for the abovementioned examples. The answers proposed by these “future generations” writers are morally anaemic: by focussing on positive duties to promote good, they miss what seems to be the central point, namely that moral agents have acted in ways which directly produced avoidable suffering.

It is submitted that the following dilemmas arise from the given examples:²¹⁰

- we see an intuitively obvious harm which is also evidently connected to moral wrong;
- we are precluded by the otherwise-condition definition from ascribing harm in the most obvious locus/focus (the infant’s disease itself), because we cannot assign to each person an otherwise-condition in which he personally would have been; and
- we must then retreat from strong statements about avoiding harm into weaker arguments about promoting good or about avoiding other side-harms.

3.4 New definition

A new definition of harm that would have more equitable results is proposed by Haavi Morreim.²¹¹ Although not all harm arises from an adverse change in ongoing affairs, all assignments of harm do involve comparisons. We do not assign harm simply on the ground that something or a certain situation is unfortunate. We use the crucial expression “worse than” which presupposes that there is some appropriate comparative state that, when compared to one’s current condition, is more favourable because of the absence of a damage-causing event. Haavi Morreim²¹² suggests that instead of looking to what would have been the case, we must look to what should have been the case, more precisely:

“We will say that a person P is harmed at time T in respect R if his condition regarding R is worse than it *should have been* at time T.”

²⁰⁹ which propagates the premise that future generations already have certain rights currently.

²¹⁰ *op cit* p 23.

²¹¹ *op cit* p 23.

²¹² *Ibid.*

In order to explain the functioning of the new definition of harm, it is important to distinguish between three classes of harm: *status-harms* (which is the most basic of the three); *event-harms* and *default-harms*.

3.4.1 Status-harm

In ascribing a status-harm we identify a condition or state of affairs as being a harm, independent of locating any cause or ascribing any moral judgment. The concept is nevertheless normative and comparative, for we judge that the harmed state is worse than some comparative condition. The question how precisely to identify this comparative state of affairs, remains. It is suggested²¹³ that a baseline comparison state is introduced (which is a minimal, socially acceptable, decent human welfare standard of living) and any significant deviation below this baseline standard of living, will accordingly constitute harm.

This concept of minimal welfare is, however, not original and has already been described by many philosophers.²¹⁴ Through status-harm ascription we say that someone is in a harmed condition wherever his welfare is significantly below some minimal standard of normality. The *condition* is a harm, without concomitantly having to say that something or some event harmed a person.

When establishing a status-harm, we are interested in serious impairments in human living, not in someone merely existing below the average quality of living shared by his community. Also important to note is that one does not necessarily have to consider a person's life as a whole and in totality in order to assign a harm condition. A person needs only to be "sub-par" or "restricted" in a particular aspect of his/her life in order to say that he/she is harmed in that respect. To say that a condition is worse than it should be, is not only normative, but can be relative to personal or societal values. The notion of a decent minimum of well-being is vague, therefore the aim of the new definition is not to provide a precise criterion for ascribing harm, but only to characterise harm rather generally and at the same time to offer a plausible, (if somewhat sketchy) alternative to the otherwise-condition approach.

Status-harms necessitate a minimum state or level of well-being. Here, two types of normative judgments are made: The first is the very act of defining "human normality", such as deducting that all humans have one nose, two ears *et cetera*. Such defining requires not only the empirical observation that such attributes are typical, but also the normative and

²¹³ *op cit* p 25.

²¹⁴ Griffin, *eg* suggests that a certain minimum level of standard of living be introduced, against which one can establish whether a certain individual's circumstances are by themselves harmful to the individual or not. Feinberg, on the other hand, made a list of certain minimum welfare interests.

conceptual judgment that we will not stretch our attributions of normality beyond a certain point. Secondly, as we speak on a minimal level of well-being, we are suggesting (normatively) that some states of affairs are sufficient/ good enough and some are not (maybe in part arising from human fellow-sympathy).

3.4.2 Event-harm

Here the baseline of comparison is not some general minimum of well-being, but a particular individual's own baseline condition, as determined by his previously ongoing affairs. For example, a rich man who loses R1000 will still be financially better off than the average person (or above the general minimum standard), in spite of the fact that he was harmed by the damage-causing event. This type of harm is traditionally associated with the so-called "otherwise-condition definition" of harm. Event-harms involves, in part, an empirical judgment about what in fact will happen if things progress normally. We do not routinely look up every single event (positive or negative) in our lives. We generally only label as event-harms those events which we say in some sense, should not have happened. These event-harms are accordingly established either through the moral judgment that someone did something wrong, or through the sympathetic-ideal judgment that "such things should not happen to a person".²¹⁵

3.4.3 Default-harm

Here the baseline condition of comparison is that condition in which the individual should have been, and would have been, had duty-bearing agents fulfilled their obligations. The baseline is determined, not by previously ongoing events, but by moral entitlement. Default-harms are quite plainly a moral determination. These harms are commonly defined in terms of the nature and scope of the relevant duty, for example: Each parent has a duty to feed his child, not to entertain the child. The child's starving would therefor count as a default-harm, but not his boredom, as the harm is defined in terms of the duty itself and not according to our final judgment about the agent who defaulted.²¹⁶

It is therefore clear that in each of the three classes of harm discussed above, the should in "worse off than", functions somewhat differently. The differences found in studying various bases of harm not only broaden our viewpoints on harm, but also open up new ways of thinking about one of the stumbling blocks to wrongful life actions, namely the question of injury.

3.4.4 Conclusion

Although Haavi Morreim does not offer precise criteria for identifying harms, as assigning

²¹⁵ *op cit* p 25-26.

²¹⁶ *op cit* p 26.

moral and legal duties, imputing liability or awarding damages, he at least shows that it is possible and plausible to do so.

3.5 Insufficient tort based compensation

Peters²¹⁷ believes that compensation based on tort is insufficient to address wrongful life plaintiffs, who are in need of comprehensive support,²¹⁸ which can only be provided by family law principles. It is submitted that this be rectified by means of legislative measures. He writes:²¹⁹

"Because tort law is designed to insure compensation for harm, not adequate child support, tort law leaves children born as a result of tortious conduct inadequately protected. The problems and complexities associated with proof of harm in wrongful life and wrongful birth actions cause courts to significantly limit the recovery of compensatory damages. These limitations threaten to leave many families without the resources necessary to adequately provide for their children. To protect these children, lawmakers need to abandon their exclusive reliance on tort doctrine as it is traditionally construed."

3.5.1 A new approach needed

Peters explains²²⁰ that family law is based on a "care-based orientation",²²¹ which is consistent with a secondary child support obligation in wrongful life cases. He admits that his suggested application of family law principles to create a new cause of action for wrongful life has not been previously recognized, but remains convinced that the following materials for constructing could be validly implemented:

- it imposes child support responsibility on non-parents who contribute to the birth of a child without requiring proof of harm to the child;

²¹⁷ 1993. Rethinking Wrongful life: Bridging the boundary between Tort and Family Law. *Tulane Law Review* (67:1), 397.

²¹⁸ "Unlike tort damages, child support awards are not intended to compensate for harm. Rather, they are intended to protect the child's welfare by fairly apportioning support responsibility among the responsible adults" *op cit* p 399.

²¹⁹ *op cit* p 398.

²²⁰ *op cit* p 429.

²²¹ while tort law is designed to compensate losses.

- it sometimes imposes a child support remedy for tort-like misconduct;²²²
- this new claim would base child support on tortious conduct that causes the life of a child *whether or not it harms the child*.²²³

It is suggested²²⁴ that the following policy considerations should be considered in recognizing a tort-based claim for child support, as it is a question of values and policy, not a matter of logic: fairness; compensation; social consequences; impact on the family; unbundling parental rights and responsibilities; deterrence; the choice between tortfeasor assistance and charity.

Peters²²⁵ is convinced that his suggested use of Family law support principles could be superimposed on wrongful life and states that the strongest cases for such imposition are the following elements:

- tortious interference with the procreative rights of the parents;
- the foreseeable birth of a child who would not otherwise have been born; and
- the inability of the legal parents to provide adequately for the child's ordinary or extraordinary support needs without requiring inequitable sacrifices by other family members.

He suggests²²⁶ that where these factors exist, backup support liability is appropriate unless other policy objections outweigh the normative claim.

3.6 Associated causes of action

Harrer²²⁷ reports on another mutation of wrongful life litigation,²²⁸ namely suits between parents as to misrepresentation regarding use of birth control or sterility prior to sexual intercourse. He explains that in the standard case, the natural mother would falsely represent to her partner

²²² admittedly, no family law doctrine combines the two lines of cases the way an action for backup child support would.

²²³ as a result, it would require an extension of tort and family law beyond existing precedent.

²²⁴ Peters *op cit* p 441.

²²⁵ *op cit* p 454.

²²⁶ *ibid*.

²²⁷ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 119.

²²⁸ as family planning will gain further importance.

that she is taking birth control pills to induce the father (of the eventually born child) to engage in sexual relations with her.²²⁹ He reports²³⁰ that courts in both America and Germany have held that the deceived father cannot recover damages because of the highly intimate nature of the relationship.

²²⁹ in reliance upon such representation.

²³⁰ *ibid.*