

of failure,²⁸³ was not negligent. In reaching its decision, the court applied the so-called "Bolam test"²⁸⁴ in terms of which the proper standard of medical care is established by the medical profession itself.²⁸⁵

Grubb²⁸⁶ reports on yet another place that the Court of Appeal was anxious to restrict medical negligence actions for failed sterilization in cases where the procedure itself has been properly performed.²⁸⁷ Grubb criticises that fact that he court did not want to award damages for the birth of a healthy child based on the premise that this would make the physician the 'financial father' of the child, as it was clearly established in *Emeh* that it is not against public policy to award damages for the cost of maintaining a child to majority.

He writes²⁸⁸ in summary of the English position regarding wrongful conception:

"In conclusion, it is submitted that the courts should allow these claims, but perhaps they should limit the damages that can be recovered. Until *Gold* is reversed, the best that can be hoped for is that the medical profession, out of an abundance of caution and fearing that a failure that a future court might take a different view of the law, will adapt its practices to ensure a greater disclosure. Ironically, this may be an example of beneficial defensive medicine!"

4. Legal position in Germany

4.1 Historical background

The first wrongful conception action in Germany was instituted in the year 1967.²⁸⁹ *In casu a*

²⁸³ a vasectomy performed on the patient's husband would have been a more secure option.

²⁸⁴ see ch 5 on informed consent.

²⁸⁵ as opposed to an aspect of negligence determined by the courts, as is the case in South Africa - see *Castell infra*.

²⁸⁶ 1988. Contraceptive advice and doctors - A law unto themselves? *The Cambridge Law Journal*, 12.

²⁸⁷ *ie* to cases where negligence lie in respect of a failure to inform.

²⁸⁸ *op cit* p 14.

²⁸⁹ *Landsgericht Itzehoe* 21 Nov. 1968, 1969 *Zeitschrift für das gesamte Familienrecht* 90 ff.

pharmacist gave the plaintiff stomach tablets,²⁹⁰ where in fact the contraceptive pill "Eugynon" was prescribed. The result of this negligent disposal of medication, was the birth of plaintiff's sixth healthy child. Stoll²⁹¹ also reports on this German wrongful conception case. The court²⁹² in *Landgericht Itzehoe* gave judgement against the chemist and awarded damages for breach of contract in the form of periodical maintenance payments. The court awarded an amount of DM 100 per month as child-rearing expenses until such time as the child in question has reached majority.

In the judgments of two important wrongful conception cases²⁹³ the Supreme Court of Germany, the *Bundesgerichtshof*, established several principles relevant to the awarding of damages in wrongful conception actions:²⁹⁴

- the birth of a normal child may in certain instances be seen as a damage causing event;
- the object of damage resulting from breach of contract in a wrongful conception action, is not the child itself but rather the rearing costs of that child;
- child-rearing expenses may only be awarded if the parent's family planning measurers were necessitated by economic pressure and frustrated because of negligence;
- the courts should burden the award of damages by imposing the regulation that the moment the parents accept the child in the family home and no longer see it as unwelcome, the amount of damage should become refundable *ex tunc*.²⁹⁵

²⁹⁰ "Enzynorm" tablets.

²⁹¹ 1989. A Doctor's liability for the unwanted birth of a child. *Comparative and International Law Journal of South Africa*, 206.

²⁹² LG Itzehoe 21, 11, 1968: (FamRZ 1969 90 = VersR 1969 256).

²⁹³ both decided in 1980.

²⁹⁴ Bundesgerichtshof 18 Mrt. 198, *Entscheidungen des Bundesgerichtshof in Zivilsachen* 76, 249/ 76,259.

²⁹⁵ Mayor criticism can be expressed against this inhuman structure which defeats the bonds of family unity and would probably result in the child feeling unloved. The child could even develop personality defects because of this feeling of being unwanted. This regulation contradicts the court's first finding that the child himself is not the object of damage, but rather the expenses. Why should the parents and the child be punished if the negligence of the defendant caused this difficult position?

When subsequent changes in the family planning should occur, (and benefit the child), the damage lapses. This is an illogical premise and contrary to normal principles of damage calculation: eg at one stage the child is seen as damage, where at another stage, the child is not seen as damage. Such a premise, offends the "once and for all" rule (assessment of damages is made only once), as well as the collateral-benefit rule.

- the courts have striven to confine awards of damages to those injuries which the sterilization procedure was designated to avoid, therefore, an award would be denied if the actual reason for sterilization was fear of bearing a handicapped child (and a healthy baby is eventually born, or where a mother did not want children because of fear that she might die during childbirth and she lives to see her healthy child).
- when child-rearing expenses are awarded, only basic expenses are covered, as calculated from the standard child-rearing expenses scale.²⁹⁶

It is reported²⁹⁷ that since the regular German Supreme Court decisions,²⁹⁸ have been published on this problem:²⁹⁹

4.2 Extent of Wrongful Conception liability in Germany

Harrer³⁰⁰ reports that in both American and German jurisdictions it is necessary to distinguish between the birth of healthy and impaired children when addressing *the extent of liability* in wrongful conception actions, as courts have treated both instances differently. An interesting comparison is drawn between the varying approaches followed in these two countries.³⁰¹

German Courts have found that the lack of statutory remuneration provisions does not justify the refusal of wrongful conception compensation altogether.³⁰² These courts consistently hold that the birth of a child³⁰³ entitles parents to compensable damages to address their burden of maintenance. It is reported³⁰⁴ that the remuneration is based on and limited to a global sum corresponding to the amount provided for by the maintenance-ordinance for illegitimate

²⁹⁶ this system is discussed in detail in ch 8, where its concurrent application to wrongful life actions in Germany is explained.

²⁹⁷ Stoll *op cit* p 207.

²⁹⁸ "Bundesgerichtshof"

²⁹⁹ BGH 18 3 80 VI ZR 105/78, BGHZ 76, 249; 18 3 1980, VI ZR 247/78, BGHZ 76, 259; 2 12 1980, NJW 1981 630; 18 1 1983, BGHZ 86, 240; 10 3 1981. NJW 1981, 2002; 22 11 1983, BGHZ 89, 95; 19 6 1984, NJW 1984, 2625; 27 11 1984, NJW 1985, 671; 25 6 1985 NJW 1985 2749; 9 7 1985, BGHZ 95, 199; 7 7 1987, NJW 1987 2923.

³⁰⁰ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 89.

³⁰¹ see *supra* for American position.

³⁰² Harrer *op cit* p 94.

³⁰³ even a healthy child.

³⁰⁴ *ibid.*

children under German law (sec 1615(f) BGB). This ordinance prescribes the amount of maintenance a natural father of an illegitimate child is legally obligated to contribute as "ordinary maintenance" until majority of the illegitimate child. The amount in question is fixed by the legislator from time to time, being the amount of maintenance required to maintain a modest/ average standard of living. The relevant contributions have to be payed monthly by the parent and depends on the age of the child while the amount increases as the child becomes older.³⁰⁵ In 1994 the schedule prescribed the following monthly contributions:

- DM 291-under 6 years of age
- DM 353- under 12 years of age
- DM 418-under 18 years of age

The German legal system therefore solves the various challenges associated with the extent of damages in wrongful conception cases by ordering the defendant to pay in a global amount and taking into consideration all other relevant factors, a similar contribution to maintenance than expected from the natural father of an illegitimate child.

The courts consider it necessary to incorporate a reasonable surcharge to balance the value of rearing services rendered and obviously consider all underlying circumstances when calculating a suitable damage award. For this reason the amount is generally reduced by the child rearing subsidy received by parents from the government.³⁰⁶ These state subsidised child-grants³⁰⁷ were last amended on 30 January 1990. The state contribution increase with each child and amount to a monthly payment of:

- DM 50 - for the 1st child
- DM 130 - for the 2nd child
- DM 220 - for the 3rd child
- DM 240 - for the 4th child and up to 4 children DM 240

4.3 Varying comments

The German solution to wrongful conception is quite unique to approaches followed in other

³⁰⁵ reflecting the increased financial needs for everyday expenses as the child becomes increasingly active in various spheres of life.

³⁰⁶ the German government contributes to each child's maintenance a certain amount per month, in order to assist with the financing of such an expensive (and therefore ever decreasing) venture.

³⁰⁷ enacted in section 10(1) BKGG.

countries as damage are generally restricted to child-rearing expenses³⁰⁸ until the age of majority. It is reported³⁰⁹ that the German Supreme Court consistently curtails the total damage award as the award is intended to compensate only the economic burden created by the wrongful act of the wrongdoer.³¹⁰ The courts accordingly argue that damages should be limited to an amount consistent with the average necessities needed in raising a child as the wrongdoer cannot be expected to meet liabilities beyond this boundary. A further limitation placed on the award is the fact that liability is confined to a global sum.³¹¹

Claassen³¹² also refers to the West German Federal Supreme Court that found wrongful conception damages cannot be claimed in full and that only the amount a biological father would have had to pay if the child had been born illegitimately, *in addition to* the lump sum for such services which are necessary for the caring and raising of a child.³¹³

Harrer³¹⁴ believes that mere compensation for child-rearing expenses is an insufficient recompense as a sense of justice must also be satisfied.³¹⁵ He suggests³¹⁶ that this will be achieved through a "compromise solution" whereby not only compensation for maintenance should be allowed, but also further injuries such as increased medical expenses, loss of earnings, pain and suffering and so forth be recompensed. As a counter balance for such a comprehensive award certain subtractions should be made for benefits stemming from the cause of action, while further limitations could be introduced to contain the damages to a fair and reasonable amount.

The current German method of calculating damages could be criticised for obvious reasons.³¹⁷

³⁰⁸ where many other jurisdictions are weary of compensating these expenses.

³⁰⁹ Harrer *op cit* p 95.

³¹⁰ BGH, 1980 VersR 561, also OLG Saarbrücken, 1986 VersR 1550.

³¹¹ corresponding to the abovementioned maintenance ordinance for illegitimate children.

³¹² Claassen, N.J.B. and Verschoor, T. 1992. *Medical Negligence in South Africa* (ch 5) Digma.

³¹³ *op cit* p 82.

³¹⁴ *ibid.*

³¹⁵ see Visser's viewpoint on the nature of compensation, ch 2.

³¹⁶ *op cit* p 96.

³¹⁷ The fact that all plaintiffs' claims are calculated in the same way and based on the same given data could raise concerns that individual circumstances are not taken into consideration. Only objective/ hypothetical factors such as a standard rate

As an alternative, critics³¹⁸ supports a concrete and individually based computation of damages. In following this method no persuasive arguments are necessity to deviate from the general principle of individual determination in assessing damages. "The wrongdoer should take his victim as he finds him."³¹⁹ When applying the individual computation method the extent of loss varies greatly from plaintiff to plaintiff, as the specific circumstances of each plaintiff-family are taken into account.

4.4 Conclusion

It appears, in conclusion, that the wrongful conception action is in principle allowed in Germany.³²⁰ Criticism may, however, be expressed against the intimidating condition set by the courts, that damages should be paid back, if the parents admit that they accept the child into their own family, and that the unexpected child is no longer unwanted. The purpose of true compensation is defeated by such an inhuman qualification.

5. Legal position in the Netherlands

5.1 General background

maintenance payable per month and a standard state contributions determine the outcome and basis of the award. This method is therefore contrary to the traditional damages assessment formula whereby each plaintiff's unique circumstances are taken into account and each plaintiff's *actual* damage is compensated.

A glaring shortfall pertinent to this approach is the fact that no award would be ideally fair or justifiable, as specific circumstance of plaintiffs are ignored. (When all plaintiffs receive the same amount damages, based on the average child's maintenance, it would unjustly prejudice wealthy plaintiffs and would certainly benefit poor plaintiffs without obvious reason.) The actual damage is therefore never computed and in stead a general average is used in order to simplify claims and produce a workable solution for wrongful conception actions. The achievement of this goal, however, is of great value and it is submitted that serious consideration should be given to this type of regulated and uniform approach in solving wrongful conception challenges - see recommendations *infra*.

³¹⁸ OLG Karlsruhe, 1979 NJW 599.

³¹⁹ meaning that if the wrongdoer physician is unfortunate enough to chose a well-off plaintiff as his "victim", his claim will be of greater proportion because of the higher maintenance required to maintain the plaintiff's high standard of living.

³²⁰ Harrer *op cit* p 97 draws attention to the fact that, in direct contrast to the German approach, the majority of courts in the United States of America limit damages to those losses occurred directly as result of pregnancy, but usually excluding the child-rearing expenses of a normal child.

Stolker³²¹ mentions in his summary of the wrongful conception action in the Netherlands that the majority of cases are settled out of court.³²² According to him the first case of this kind was heard³²³ in the 1970's and it has become increasingly prevalent ever since. In accordance with and in direct correlation to this development, the importance of family planning has also increased. An example illustrating this phenomenon is the Dutch Organisation for Obstetrics and Gynaecology who gave out a note in 1992, in which they gave their support to the sterilization of women. This note was circulated on advice of a large *aansprakelijkheidsverzekeraar* or liability insurance company, foreseeing future problems in respect of wrongful conception.

Gevers³²⁴ reports with regard to wrongful conception in the Netherlands that courts have generally rejected damages for child-rearing and education costs.³²⁵ He reflects on divergent academic views on this point and mentions that although Stolker is in favour of judicial restraint concerning educational costs, Sluyters finds it difficult to understand why these claims cannot be awarded.

5.2 Recent judgement

Stolker³²⁶ discusses the most recent decision of the *Hoge Raad* of the Netherlands³²⁷ with regard to wrongful conception actions.³²⁸ The facts of this important case³²⁹ were as follows:

-
- 321 1997. Who's afraid of wrongful birth? *Weekblad voor Privaatrecht, Notariaat en Registratie* (6262:128), 191.
- 322 it is interesting to note that the same phenomenon is found in South Africa - see ch 4.
- 323 (in the Netherlands).
- 324 1987. Juridische aspecten van erfelijkheidsonderzoek en -advies. *Verslag: Vereniging voor Gezondheidsrecht* (10 April), 25.
- 325 1978 (10 juli) Hof Arnhem (NJ 1979, 247) en 1979 (2 november) Hoge Raad (NJ 1980, 77).
- 326 *ibid.*
- 327 the *Hoge Raad* is the country's highest legal authority, similar to the Highest Court of Appeal in South Africa, or the Supreme Court in the United States of America.
- 328 Note that the Dutch academics and courts incorrectly refer to wrongful conception actions as "wrongful birth actions". This interesting discovery concerning the Dutch approach in wrongful life actions was their different and sometimes confusing use of internationally recognized terminology. This unclear position should not be followed, as it is of vital academic importance that the correct terminology be used to describe specific legal phenomena. Because of the superficial resemblance between the varying wrongful life actions (in the broad sense) it is necessary that specific reference is made to specific actions. The actions under discussion differ with regard to a number of fundamental issues - see research proposal and ch 2

In 1986 a gynaecologist took out a *spiraaltje* or contraceptive device that was positioned in Mrs. O's uterus during 1984 in order to prevent future pregnancies. He did not replace the device after this routine inspection and also failed to inform Mrs. O of this important detail. As a result Mrs. O continued sexual relations with her husband without taking alternative contraceptive precautions, became pregnant and delivered their third healthy baby in 1987. Their reason for obtaining the particular contraceptive device was the fact that it was financially impossible for them to support a further child. In fact, the family lived on a monthly social support handout,³³⁰ awarded by the state to Mrs. O's husband.

Mrs. O instituted an action for wrongful conception against the gynaecologist. The following heads of damage were in dispute:

- damages for child-rearing expenses³³¹ until the age of 18 years;
- damages for the plaintiff mother's loss of income; and
- satisfaction for the immaterial rather non-patrimonial damages suffered by the plaintiff.

The following heads of damage were not argued and were accordingly paid by the defendant:

- costs of a baby attendant/ babysitter;
- costs involved with the arranging and modifying of a baby room; and
- all additional costs in respect of the pregnancy and birth.

The defendant admitted that he, by failing to inform his patient of the fact that she no longer had a contraceptive device in place, had committed a *beroepsfout* or professional misconduct. Stolker³³² mentions that professional negligence in the medical sphere can roughly be divided into cases of negligence with regard to treatment and negligence with regards to the duty to properly inform. *In casu*, both these classes of negligence were present. The plaintiff primarily based her case on the negligent treatment of the physician and subsidiarily on ground of lack of information. Stolker³³³ reports that there is still much uncertainty in Dutch academic circles and in the judgement of the courts concerning the precise meaning and sphere of the failure

where definitions are given and varying terminology are discussed.

³²⁹ HR 21 februari 1997.

³³⁰ *RWW-uitkering*.

³³¹ including care and education of the child.

³³² 1995. Aansprakelijkheid voor beroepsfouten - van droom-carrière naar nachtmerrie. *Ars Aequi* (44:1), 13.

³³³ *op cit* p 15.

of a physician to properly inform his patient about the treatment and its (possible) effects.³³⁴

5.2.1 Varying views

In the *Hoge Raad's* judgment, the statement was made that in so far as the parents are obliged to maintain and to provide the basic needs³³⁵ of their children, these costs would not be seen as damage in the sense of patrimonial loss.³³⁶ This would be possible in only two extraordinary circumstances:

- if the parents were to live in serious financial difficulty because of the additional child;
or
- if the circumstances would force the parents into a substantially lower standard of living.

Criticising this viewpoint, the Advocate General Vranken,³³⁷ in his opinion to the *Hoge Raad* on this matter, refused that educational costs be awarded. According to him the central problem in allowing educational costs as a head of damage is that the child himself is then seen to be the object of damage and this would be an unacceptable state of affairs.³³⁸ Vranken's final view of wrongful conception actions is that it should generally not be permitted. He paraphrases the German author Picker³³⁹ in the following words:

"... schadevergoeding is gericht op het herstellen van de oorspronkelijke waarde van iets. Dat kan een object zijn dat beschadigd is, dat kunnen ook de gezondheidstoestand of de levenskansen van een mens zijn die letsel heeft opgelopen. Het object, de gezondheid of de levenskansen van de mens worden hierbij als intrinsiek waardevol en als juridisch beschermenswaardig vooropgesteld. Juist daarin is de rechtvaardiging gelegen voor het toekennen van een vergoeding voor hun herstel: de schadevergoeding komt ten goede aan iets dat waardevol is en probeert die waarde zoveel mogelijk weer op het nivo van voor de schadetoebrengende

³³⁴ eg it is uncertain who must prove that the duty to inform has not been fulfilled.

³³⁵ incl education costs.

³³⁶ and the plaintiff would therefore not be able to claim these costs from the defendant.

³³⁷ in the Netherlands each province has an Advocate General - these judicially appointed legal officials give advise to the *Hoge Raad*.

³³⁸ see ch 8 *infra* where this very concern is discussed in reference to wrongful life actions.

³³⁹ Picker. 1995, *op cit* p 492.

handeling of gebeurtenis te brengen. Bij 'wrongful birth'³⁴⁰-vorderingen ontbreekt dit alles. De oorspronkelijke waarde is een leven zonder het niet geplande kind. Op zichzelf is dit een intrinsiek waardevol en juridisch beschermenswaardig iets, maar niet meer als het kind er eenmaal is. Dan immers is de oorspronkelijke toestand alleen voor herstel vatbaar, zij het in natura, zij het in geld, indien men het kind wegdenkt, althans indien men het kind uitsluitend beschouwt in termen van kosten c.q. van een kostenbaat analyse. (...) Het civiele aansprakelijkheidsrecht heeft op dit terrein dan ook niets te zoeken...^{341 342}

Notwithstanding this viewpoint, Vranken is of the opinion that *never* allowing educational costs for an unwanted child would be too rigid an approach. He finds the forced distinction between the child and its worth as a human being on the one hand set against the harsh reality of the child's educational and other expenses on the other hand an impossible situation to bear. An acceptable middle road must be found between the two extremes of no damage award³⁴³ and a full damage award.³⁴⁴ He believes that neither of these viewpoints is totally defensible under all circumstances. The undiluted application of pragmatism as found in the basic principles of the law of damage does not satisfy fundamental questions. Similarly, the usage of the principle perspective only could lead to the unacceptable position of earlier times where no criterion or yardsticks of equity and humanity were tolerated.

In his own words, Vranken expresses the seeming impossibility of reaching the final solution to the expected "magic formula" of the *via media* approach:³⁴⁵

"Ik slaag er niet in een scherpe grens te trekken tussen enerzijds de erkenning van de waarde van het kind en anderzijds het onloochenbare feit dat de arts inbreuk heeft gemaakt op het recht van de vrouw haar leven naar eigen inzicht in te richten. (...)

³⁴⁰ actually a wrongful conception action - take note of the incorrect use of terminology by Dutch legal writers in this respect - see research proposal in this regard.

³⁴¹ conclusion of Advocate-General Vranken, sub 19.

³⁴² A paraphrased summary of this quotation is: Damages is awarded in order to replace, to the previous level of worth, an object which is legally protected and intrinsically valuable. In a wrongful conception action this legally protected object is a life without the unplanned child. After the arrival of the child this object loses its worth. The only way in which the original level of worth can be replaced, is by eliminating the child from the equation. The law of civil liability has no business venturing into this field of controversy.

³⁴³ as propagated by Picker *ibid*.

³⁴⁴ including educational costs as dictated by the basic principles of the law of damages.

³⁴⁵ Stolker. 1997, *op cit* p 193.

Misschien... behoort de 'wrongful birth'³⁴⁶ -problematiek tot de soort waarin altijd tot op zekere hoogte geschipperd moet worden tussen principe en werkelijkheid.³⁴⁷

He foresees that countries with a high level of social support³⁴⁸ would be better able to confront the daunting problems associated with these actions.³⁴⁹ It is reported³⁵⁰ that Vranken poses many questions with regards to the seemingly illogical and divergent decisions made in courtrooms around the world, in respect of wrongful conception awards:

- why are educational expenses often limited to average expenses³⁵¹ rather than the actual costs spent by the plaintiff on his child's education?³⁵²
- why can it not be expected from a woman who does not want the additional child to limit/ mitigate her damage by obtaining an abortion or adoption?³⁵³
- why is the damage in wrongful conception seen to remain/ persist until the age of 18 years³⁵⁴ even if the initially unwanted child is later as accepted and loved as any other

³⁴⁶ a wrongful conception action.

³⁴⁷ This can be paraphrased as follows: Vranken cannot succeed in drawing a definite line between the recognition of the child's worth on the one hand and the insurmountable fact that a physician has infringed upon the right to self-determination of the mother. Maybe the wrongful conception phenomenon belongs to that group of problems that can only be approached by floating between considerations of principle and fact.

³⁴⁸ the Netherlands has an exceptionally high level of social support and many programs are in place to help underprivileged communities and other struggling groups, such as handicapped people - in contrast to this state of affairs, the South African government experiences great difficulty in providing for the most basic needs of the majority of the masses.

³⁴⁹ it is submitted that if a state is in the position to look well after its disabled and indigent peoples, plaintiffs from these groups would not need to institute big claims against the physician-defendant to care for their unexpected or disabled children.

³⁵⁰ Stolker. 1997, *op cit* p 195.

³⁵¹ as seen in the German legal system.

³⁵² it is submitted that a family's usual standard of living should be taken into account when a wrongful conception award is made - eg if the plaintiff's themselves received private college education, they should be entitled to be fully compensated by defendant for their child's education at a private institution and other additional expenses.

³⁵³ for criticism on this viewpoint, see ch 2.

³⁵⁴ in other instances awards are given to accommodate for the unplanned child up to 21 years of age.

planned child?³⁵⁵

- why are no immaterial damages awarded in cases where the mother of a unwanted child has to attend to the child, instead of fulfilling her own personal goals in business, study or travelling?³⁵⁶
- why are immaterial damages deemed to be in conflict with the value and dignity of the child as a human being, whereas patrimonial damages with regard to educational expenses are acceptable?

5.3 Damages

In contrast to the cautious approach of the Advocate General Vranken, the *Hoge Raad* in its decision on the wrongful conception action of February 21, 1997, boldly committed themselves in awarding damages:

“Het gaat immers uitsluitend om vergoeding voor de extra last die als gevolg van de fout van de arts op het gezinsinkomen wordt gelegd en die juist door de aanvaarding van het kind ontstaat. Voormelde gedachtegang kan evemin worden gezegd in strijd te komen met de waardigheid van het kind als mens of zijn bestaansrecht te ontkennen. Integedeel mag, mede in het belang van het kind, aan de ouders niet de mogelijkheid worden onthouden om ten behoeve van het gehele gezin, met inbegrip van het nieuwe kind, aanspraak op vergoeding van de onderhavige kosten te maken.”
(r.o.3.8)³⁵⁷

The *Hoge Raad* declared that the child itself was not the object of the damage, but instead found that the financial consequences of its birth should be seen as the main object of damage. Stolker³⁵⁸ is of the same opinion.³⁵⁹ According to him it is not immoral to “think away” the

³⁵⁵ it is submitted that this point of view is based on an incorrect understanding of the true nature of wrongful conception damages - it is namely not the child itself, but rather the unavoidable expenses occasioned by the child that is complained of.

³⁵⁶ these unrealised dreams surely show an infringement of personality rights or expectations.

³⁵⁷ This can be paraphrased as follows: Reparation for the additional burden placed on a family's income by the negligent conduct of a physician is the only relevant consideration before us. This approach cannot be seen to reduce the worth of the child as such. Rather, it enhances the child's value and the parents may not be barred from demanding damages for the child's costs which may benefit the entire family.

³⁵⁸ 1997, *op cit* p 193.

³⁵⁹ I agree with this reasoning.

damage-causing object³⁶⁰, it is merely a way in which to assess the damage. In much the same way, adopting parents will surely make a calculation as to how much their new addition to the family will cost them!

Dutch law is codified and Stolker³⁶¹ mentions in this respect that the *Hoge Raad* did not base its decision to allow an award for wrongful conception solely on the principles of the law of damages. He shows that *in casu* we have to do with a claim found in Book Six, and not a Book One claim. It is further reported that in Advocate-General Vranken's descending conclusion to the recognition of damages in wrongful conception actions, he did not base his decision on conservative restrictive reasons, but was rather moved by considerations of fear of fraudulent application by greedy parents.

Vranken is apparently further perplexed by the solution of the German courts with regard to educational expenses in wrongful conception actions:³⁶² They restrict awards to the average educational costs of the average German child and do not allow the genuinely expected cost of the plaintiff's child to be claimed. Vranken argues that if a decision is made to compensate the parents for this specific head of damage, then the basic damages principle should be followed, which states that a full redress must take place.³⁶³

In Dutch law section 6:98³⁶⁴ provides that, with regard to the calculation of damages, the final amount may be reduced in the discretion of the judge on grounds of the *nature* of the damage.

5.3.1 Specific family circumstances

Cobben³⁶⁵ discusses a novel possibility that could be used to limit wrongful conception claims to acceptable bounds.³⁶⁶ He explains that the plaintiffs' family circumstances should be taken into account when an award is made, for example where the plaintiffs have three children, it should be considered that the eldest might leave the family home within six years of the unplanned sibling's birth. If this reasoning is applied, plaintiffs' wrongful conception claim

³⁶⁰ the unwanted child.

³⁶¹ *ibid.*

³⁶² see German discussion *supra*.

³⁶³ a plaintiff is entitled to be placed in the same position he would have been in had the damage causing event not taken place.

³⁶⁴ *ie* Book 6, sec 98.

³⁶⁵ 1997. *Autonomie versus zorgplicht*. *Nederlands Juristenblad* (11:72), 479.

³⁶⁶ especially as the concern for excessive compensation has in the past been used to prohibit wrongful conception altogether.

would be limited to such an occurrence.

“Uit de feiten waarvan in cassatie kon worden uitgegaan, valt af te leiden dat het oudste van de drie kinderen binnen zes jaar na de geboorte van zijn ongeplande broer of zuster meerderjarig is geworden. Vanaf dat moment kwamen in beginsel wederom slechts twee kinderen ten laste van het gezinsbudget. Moet de periode waarover schadevergoeding is verschuldigd niet worden beperkt tot dat moment?”

Stolker,³⁶⁷ accordingly, suggests how the problem concerning the just allocation of educational expenses³⁶⁸ and limitation of awards in so-called “windfall claims”³⁶⁹ could be solved. By simply taking into account the actual needs necessitated by the unplanned child *versus* the means of support for that child³⁷⁰ in each instance, a just and fair damages award could be assigned every time. The result would be that poor families³⁷¹ would be financially assisted, while better-off families³⁷² would be precluded from receiving a so-called “double blessing”.³⁷³ Stolker also mentions the probability that richer plaintiffs may sue for higher damages than average plaintiffs in order to maintain their higher standard of living.³⁷⁴ By assessing each claim on its own merits, the much-feared possibility of excessive claims for damages would be prevented. The basis of this limitation of damages would be the special nature³⁷⁵ of the damage. The *Hoge Raad* specifically referred to the criterion of section 6:98:

“Zoals hiervoor in 3.7 reeds aangegeven, komt uitsluitend voor vergoeding in aanmerking schade die aan de arts naar de maatstaf van art. 6:98 als een gevolg van zijn fout kan worden toegerekend. Deze maatstaf sluit de mogelijkheid niet uit kosten die de gemiddelde kosten van verzorging en opvoeding van een kind te boven gaan, niet toe te rekenen aan de arts, maar aan de ouders zelf, die in de hen persoonlijk betreffende omstandigheden aanduiding hebben gezien tot het besluit tot het maken

³⁶⁷ 1997, *op cit* p 194.

³⁶⁸ to deserving parents.

³⁶⁹ of undeserving parents.

³⁷⁰ each plaintiff's family has to their disposal.

³⁷¹ who would be harder hit by an additional mouth to feed and child to care for.

³⁷² who generally already maintain a high living standard.

³⁷³ by receiving the benefits and joys associated with parenthood and claiming damages for all the child's expenses.

³⁷⁴ even so, it is submitted that the maxim: “wrongdoers should take their victims as they find them” should apply.

³⁷⁵ as required by sec 6:98.

van deze kosten."³⁷⁶ 377

From this statement we may draw the conclusion that all Dutch wrongful conception plaintiffs, regardless of their financial circumstances, are entitled to at least a minimum of the average child-rearing expenses and educational costs. The court stated that the NIBUD, could provide the courts with helpful information regarding the true costs of an average child's development.

Stolker³⁷⁸ shows that if his suggested reasoning is followed,³⁷⁹ it would be possible under certain circumstances that no award of damages will be allowed. In such an instance he would have reached the same result as proposed by Advocate-General Vranken but by following a totally different route. Stolker, however, declares that the *Hoge Raad* did not go *that* far in restricting awards, as they did allow damages for the average child-rearing expenses to all plaintiffs, irrespective of their wealth. He concludes to say that the actual figure of this average amount would expeditiously be established, and would then become a rule of application.

The *Hoge Raad* added to their conclusion that the presiding judge could still further limit the award in so far as the physician's insurance does not cover his professional negligence liabilities. If the liability insurance³⁸⁰ is sufficient to cover the total amount further limitation of the claim is accordingly not possible.

5.3.2 Various arguments

Another important aspect regarding the subjective positions³⁸¹ of plaintiffs in wrongful conception actions is discussed.³⁸² He argues that the motive for the parents' decision to implement birth control measures in order to achieve family planning is extremely relevant to

³⁷⁶ A paraphrased summary of this quotation is: Only the damages awarded on the criterion of sec 6:98, should be allowed for the damage caused by the error of the physician. This criterion does not exclude the possibility that above average maintenance and educational costs could be for the account of the parents and not the defendant-physician.

³⁷⁷ the reason suggested for this approach is that since it is the parents who chose to incur the higher than average costs they should also have to pay for it.

³⁷⁸ 1997, *op cit* p 195.

³⁷⁹ keeping sec 6:98 in mind.

³⁸⁰ see final reflections (ch 12) on the important role of professional insurance in solving wrongful life challenges.

³⁸¹ *ie* financial position, religious believes governing *eg* the position on abortion *etc.*

³⁸² Stolker. 1997, *op cit* p 196.

the court's award of damages.³⁸³ He gives the example of a couple, who because of their fear for the possibility of a handicapped child, decided to use contraception to prevent the birth of such a child. The contraceptive measures do not work and a healthy baby is eventually born. Stolker feels, it would be incorrect to award these parents child-rearing expenses and educational costs in an ensuing wrongful conception action.³⁸⁴

A certain amount of criticism has been raised against this viewpoint. It has been said for example, that it would be impossible to establish the true intentions and motives of the plaintiff-parents at the time of conception.³⁸⁵ Nothing but integrity and honesty stands in the way of plaintiff-parents to declare that their motive to implement birth control measures was indeed for financial reasons.³⁸⁶ Stolker, however, is not convinced that this opportunity for fraud is an insurmountable obstacle. He is in this respect encouraged by the decision of the *Hoge Raad* to take into account the true financial capabilities of the parents when considering wrongful conception claims.

Another argument raised against the awarding of wrongful conception damages *in casu* was that the child will suffer psychologically if he one day learns of the litigation surrounding his birth, especially the fact that his parents refused to pay for his upbringing.³⁸⁷ The *Hoge Raad* was, however, not persuaded by this concern:

“Die kosten hebben derhalve met het gewenst zijn van het ind als mens niet van doen. In de derde plaats mag ervan worden uitgegaan dat ouders in het algemeen in staat zijn om aan het kind duidelijk te maken dat een indruk als voormeld onjuist is, nog daargelaten dat zij zelf die indruk kunnen logenstraffen door het kind met liefde en zorg

³⁸³ the exact same reasoning is followed in South African law (see *infra*) and I submit that it is the correct viewpoint to follow.

³⁸⁴ For the same reason I think it would be wrong to award child-rearing expenses in wrongful birth actions. These parents wanted to have a child and were prepared to pay for the expenses associated with the upbringing of a child. Their only complaint with the birth is the fact that the child is disabled/ genetically impaired. I believe therefore that the true motivation, attitude and circumstances of plaintiffs should be carefully considered, so as to ensure that justice prevails and equitable decisions are made.

³⁸⁵ Note that the appropriate point in time for the plaintiffs' feelings to be tested is at time of conception, as it is at this point that the parents' lives will start to change because of the unplanned pregnancy. It is possible that plaintiff-parents might have a change of heart concerning the pregnancy, in which case no action will be instituted.

³⁸⁶ whereas the true motivation for their decision was based on some other reason eg a fear of bearing a handicapped child, personal health considerations, etc.

³⁸⁷ see also *supra* where the same concerns were raised by English and American courts.

groot te brengen." (r.o.3.9)³⁸⁸

Stolker³⁸⁹ makes an interesting comparison between the specific position of "wrongful conception children" and unplanned children in general,³⁹⁰ for example late-comer children.³⁹¹ According to the viewpoint mentioned above all unplanned children should suffer from psychological trauma.³⁹² The only difference between unplanned children in general and "wrongful conception children" is the fact that their parents did not take the necessary precautionary measures and would not be entitled to claim for child-rearing expenses. It could be therefore argued that these children would be even worse off³⁹³ than "wrongful conception children" because of the additional financial implications of an unplanned child.³⁹⁴ This argument should be rejected when used to reject wrongful conception actions.

The viewpoint that the benefits of a healthy child should influence the amount of damages³⁹⁵ was also dismissed by the *Hoge Raad*:

"Met name dient het standpunt te worden verworpen, dat het enkele feit dat het gezin met een gezond kind wordt uitgebreid, reeds een immaterieel voordeel oplevert dat tegen elke vermogensschade van de onderhavige aard opweegt. In de eerste plaats strookt het niet met de ontwikkelde gedachtingang om reeds op grond van dit enkele feit aansprakelijkheid te dezer zake van de arts te laten vervallen. In de tweede plaats zou het, gegeven het uitgangspunt dat de schade is ontstaan door het doorkruisen van een mede door financiële verwachtingen ingegeven gezinsplanning, ook niet redelijk zijn in de zin van art. 6:100. Veeleer moet ervan worden uitgegaan dat immateriële

³⁸⁸ This can be paraphrased as follows: An award for child-rearing costs have nothing to do with the desirability of the child as a human being. The parents would generally speaking be able to make it clear to the child that the suggested impression (that the child itself is unwanted and the parents do not want to pay for its maintenance) is incorrect and will be able to prove it by raising the child with love and care.

³⁸⁹ *ibid.*

³⁹⁰ a study was done in the United States of America where it was found that 1/3 of all Americans are born from unplanned pregnancies - see *supra*, where another study reported this figure to be 40%.

³⁹¹ "laatlammers".

³⁹² because of the great number of "unplanned" children actually born, it is doubtful whether serious psychological harm is done.

³⁹³ and would accordingly suffer worse psychological trauma.

³⁹⁴ the parents without a claim would certainly be in a worse financial position and this could easily lead to the parents transpiring their negative feelings to the child.

³⁹⁵ *ie* the application of the benefit theory - see *supra*.

voordelen slechts in rekening behoren te worden gebracht bij de vaststelling van eventuele immateriële schade.”³⁹⁶

One other well known argument used to disallow wrongful conception is that the parents could have limited their damages by obtaining an abortion or alternatively by giving away the child for adoption. This supposition was dismissed by the *Hoge Raad*.³⁹⁷

The current discussion of the recent Dutch wrongful conception decision only dealt with child-rearing expenses and educational costs. Other important head of damage, to be considered is: the plaintiff mother's loss of future income. The *Hoge Raad* rejected this claim. They held that it was the own choice of the mother not to work³⁹⁸ the first years after the birth as the fact that a woman bears a child generally does not stop her from choosing and following a career. Stolker³⁹⁹ believes that the *Hoge Raad* in this respect the was too restrictive. The *Hoge Raad* namely stated that it would in principle be possible for a wrongful conception plaintiff to acquire such damages, but only in cases where the given circumstances would make it reasonable.⁴⁰⁰

“Daarbij zal enerzijds gewicht moeten worden toegekend aan de vrijheid van de vrouw om haar leven met het oog op het belang van het kind zodanig in te richten als haar met het oog daarop goeddunkt, terwijl anderzijds in het oog moet worden gehouden dat de vrouw haar schade voor zover haar dit mogelijk is en redelijkerwijs van haar kan worden geveerd, dient te beperken... Voort zullen bij de beoordeling van de redelijkheid van voormelde keuze onder meer een rol kunnen spelen de specifieke gezinsomstandigheden, zoals het aantal en de leeftijd van de andere kinderen, het al dan niet ingeschakeld zijn van de echtgenoot in het arbeidsproces en de financiële middelen van het gezin.”⁴⁰¹

³⁹⁶ (r.o.3.10) A paraphrased summary of this quotation is: The viewpoint that a family at the birth of a healthy child necessarily receives an immaterial advantage of such proportion that it bars all future relevant patrimonial loss should be rejected. According to sec 6:100 it would not be reasonable to state that the damages caused by the frustration of family planning could not be claimed. Importantly, it should also be remembered that only immaterial benefits could be taken into account when calculating future immaterial loss.

³⁹⁷ Stolker. 1997, *op cit* p 196 similarly rejects this line of reasoning and declares that neither the supporters nor the adversaries of the wrongful conception actions should further pursue this easily contradict able argument.

³⁹⁸ in order to attend to her child.

³⁹⁹ *ibid.*

⁴⁰⁰ *in casu* the circumstances, therefore were not sufficiently compelling.

⁴⁰¹ (r.o.3.13.2) This can be paraphrased as follows: The following important aspects have to be balanced: Firstly, the right of a woman to freedom of choice and to self determination. To make decisions in the best interest of her child on the one hand

Stolker⁴⁰² shows that also in this respect the *Hoge Raad* opted for a compromising middle road. The woman's right to self-determination enjoys preference, the question whether she will actually receive an award for damages compensating her loss of income, would only be answered by the criteria of whether it would be reasonable in her circumstances or not. Stolker has a logical solution for establishing reasonable conduct in these cases: If the woman continued working after the birth of previous children, then she has no grounds for an award for loss of income in this instance and *visa versa*.⁴⁰³

5.3.3 Non-patrimonial damage

Over and above all these heads of suffered loss the plaintiff *in casu* also sued for immaterial damage under the head of loss of amenities to the liberal amount of fl.25 000.⁴⁰⁴ Both the court *a quo* and the *Hoge Raad* disallowed this specific claim. They admitted that the unexpected birth of a child due to the negligent conduct of another could in principle lead to psychological shock and a feeling of helplessness, but they doubted whether it could lead to any permanent psychological scar.⁴⁰⁵

In this respect the court mentioned that an award for satisfaction should also be influenced and limited by the joy experienced by the parents, because of the birth.⁴⁰⁶ The possibility of a plaintiff actually suffering from a psychological scar under these circumstances should, however, not be completely negated and in such an instance a reasonable satisfaction award should be ordered.

Van der Wiel,⁴⁰⁷ in discussing the same judgement,⁴⁰⁸ informs us that the amount of

while on the other hand having a corresponding duty to within reasonable bounds limit damages to others. In judging whether an award for loss of income should be approved in a particular instance or not, the following aspects and criteria of the plaintiff's circumstances must be considered: The specific family circumstances including the number of children and their ages, as well as the economic contributions of the spouse and the financial position of the family as a whole.

402 *ibid.*

403 if she stopped working for a period after the birth of previous children or if the family's standard of living dictates, the court may give the plaintiff an award for loss of income.

404 approx R 85 000, 00.

405 this viewpoint is also in accordance with South African law - see *infra*.

406 once again the so-called benefit rule applied - see *supra*.

407 1997. Wrongful birth. *Trias* (25:6), 21.

408 HR 21 Februari 1997, RvdW 1997, 54C.

damages⁴⁰⁹ was never in question but that only the merits of paying such damages was under dispute.

Due to the highly controversial character of damage in wrongful conception, all three levels of judiciary considering the matter differed in opinion. The *rechtbank*⁴¹⁰ was of the opinion that maintenance costs should be allowed, while the loss of earnings should not. The Court of appeal thought differently on the award for maintenance and argued that the expenses incurred by the mother for general maintenance and education were made because of the legal duty on parents to care for their offspring. The Court believed that in cases where this legal duty is shifted to someone else⁴¹¹ it must only be allowed under special conditions.⁴¹²

Koopmann⁴¹³ believes that professional liability and professional insurance influence each other. She reports⁴¹⁴ that although there is no general statutory-compulsory duty on professionals to take out professional insurance, they have generally done so independently. She supports this trend and indicates a beneficial consideration for a prejudiced party - such a person has a direct action against the insurer for any damages suffered.⁴¹⁵

Van der Wiel⁴¹⁶ remarks that the birth of the child is a *conditio sine qua non* for the need to incur expenses for its maintenance. He believes that compensation for educational costs is more of an ethical consideration than a legal question.⁴¹⁷

5.3.4 The German model

⁴⁰⁹ the parties agreed on fl 250 000 (Dutch Guilders) this amounts to approximately R 850 000 or \$ 116 000, which is not an inconsiderable amount of money - it is submitted for this reason that comprehensive insurance against professional liability should be of paramount importance to physicians.

⁴¹⁰ (court *a quo*).

⁴¹¹ defendant or his insurer.

⁴¹² such as when serious financial difficulty or a notable decline in standard of living is brought about by the maintenance burden.

⁴¹³ 1995. Beroepsaansprakelijkheid en verzekering. *Ars Aequi* (44:10), 755.

⁴¹⁴ *op cit* p 758.

⁴¹⁵ sec 6 of the **Liability Act**.

⁴¹⁶ *ibid*.

⁴¹⁷ see discussion on the ethical problems of wrongful life actions in general, ch 8.

Van der Wiel⁴¹⁸ comments on a statement by Advocate-General Vranken that the German courts have allowed the compensation of child-rearing expenses and educational costs⁴¹⁹ to wrongful conception parents since the early 1980's.⁴²⁰ The German *Bundesverfassungsgericht* (constitutional court) however, made a decision in 1993 that did not correspond with the German courts' approach up to then. The constitutional court stated that a child may not be seen as the origin/ object of damage. In their response the German courts did not change their position on the matter but maintained that the child itself is not the object of damage but rather the expenses resulting from its birth.

Van der Wiel⁴²¹ reports on the German writer, Picker, who is of the opinion that the main object of the (German) law of damages is to accomplish *naturalherstellung*.⁴²² Picker expands this theory and comes to the conclusion that the child has to be "thought away" in order to achieve the same position as before the birth of the child.⁴²³ Van der Wiel does not agree with this contention.⁴²⁴ According to him it is the duty of maintenance⁴²⁵ and not the child itself that is the origin of the expenses and should therefore be "thought away". He remarks on the contention of Advocate-General Vranken that damages as a general rule⁴²⁶ should not be allowed, but should only be considered under exceptional circumstances. Vranken bases this opinion on the reject-able concept that the child itself is seen as the origin of damage.

In its decision, the *Hoge Raad* shows that the very same argument used by the court *a qua* to reject an award because of the legal duty to maintenance can be used to prove the contrary. The reasoning behind this conclusion is that the type of damage is pure unavoidable patrimonial damage caused by the negligent conduct of a physician. It is this negligent conduct that in fact created the obligation of maintenance and care.⁴²⁷

⁴¹⁸ *op cit* p 22.

⁴¹⁹ of the average German child.

⁴²⁰ see *supra*.

⁴²¹ *ibid*.

⁴²² to place an injured party in the closest possible position to that which existed prior to the damage causing event - see theories of compensation in ch 2.

⁴²³ see ch 2 on the *conditio sine qua non* theory.

⁴²⁴ I concur Van der Wiel in this respect.

⁴²⁵ for the child.

⁴²⁶ in cases like these.

⁴²⁷ incl costs such as child-rearing expenses and educational costs.

Concerning the amount of damages, Van der Wiel⁴²⁸ maintains that the *Hoge Raad's* solution is closely related to that followed by the German courts, that is, the average cost of an average child's maintenance and education. The *Hoge Raad* is approached nevertheless keeps open the possibility of a higher than average award.⁴²⁹ It is on the other hand also possible that a judge could still further limit the award of average costs to the amount of the physician's insurance coverage.⁴³⁰

Van der Wiel⁴³¹ declares that this "limitation to average costs"-concept employed by the Dutch Courts in wrongful conception actions is based on the closely related legal duty placed on parents to care for their children. The boundaries of this legal duty are also stipulated by the average cost of an average child's education and other expenses. If parents wish to spend more on their children than this legally required amount,⁴³² it is indeed for their own account. Van der Wiel⁴³³ warns that the mechanism used to calculate the quantum of maintenance claims in general family law matters, should not be used unchanged in wrongful conception cases. The main reason for this concern is that the ability of the defendant to actually pay the damages is usually a central consideration which should not be the case in wrongful conception litigation.⁴³⁴ Two problems that could result from similar application can be identified:

Firstly, the financial resources of a person under a legal obligation to pay maintenance⁴³⁵ are relevant and directly linked to the need for higher than average costs.⁴³⁶ The defendant or

⁴²⁸ *op cit* p 23.

⁴²⁹ in the second *alinea* of r.o.3.11 of its decision.

⁴³⁰ and thereby restrict the amount of damages.

⁴³¹ *ibid.*

⁴³² Van der Wiel *op cit* p 22 mentions that the premise layed down by the Dutch family law, is the actual needs of the child. Regarding the needs of the child, "normally expected" needs are the guideline. He further pronounces that if the parents' financial position and living standard would require it, a higher award could even be considered.

⁴³³ *op cit* p 22.

⁴³⁴ note that the *Hoge Raad* introduced this very principle (founded in sec 6:109 of the Civil Code), stating that awards could be further limited to the extent of the physician's liability coverage.

⁴³⁵ *eg* unmarried fathers are obliged to pay maintenance for their children.

⁴³⁶ the amount of maintenance payable is calculated by weighing the need for maintenance against the ability to provide maintenance.

physician's financial state in such an event, however, is a totally unrelated matter.⁴³⁷

Secondly, the nature of the two duties are totally different: The one is a common law to maintain a child, whilst the other is an award laid down by a court to compensate damages resulting from negligent conduct.

5.4 Conclusion

The much quoted maxim: "a tortfeasor should take his victims as he finds them", is relevant in this respect. The application of this maxim will have the effect that if the damages in a certain factual situation are much higher than could reasonably be expected under similar circumstances, the wrongdoer is still obliged to pay the full damages. In the same way, therefore, a physician⁴³⁸ should be liable for *all* the damage inflicted to the "victim". If, by chance, the negligent physician chooses a wealthy patient⁴³⁹ then he should still be liable for these high(er) expenses.

Van der Wiel⁴⁴⁰ remarks that it seems from the decision of the *Hoge Raad* that this well-known principle of the law of delict does not apply in cases of wrongful conception.⁴⁴¹ He supports this viewpoint and states that if parents incur additional costs on their own free will⁴⁴², they should not be allowed to claim it from the defendant, but should be expected to finance it themselves.⁴⁴³ He concludes that wrongful conception damages should be linked to and limited to the level of average child-rearing expenses.

Hijma⁴⁴⁴ states that in terms of sections 6:74 and 6:98 a physician could be held liable in a wrongful conception action⁴⁴⁵ for all patrimonial damages brought about by his conduct that

⁴³⁷ "you should take your victims as you find them" - see the relevant discussion in ch 2.

⁴³⁸ or the insurer of the tortfeasor.

⁴³⁹ who spends much more on his children than the average parent.

⁴⁴⁰ *op cit* p 23.

⁴⁴¹ as discussed in the paragraph above.

⁴⁴² higher than the average child-rearing expenses.

⁴⁴³ he contends that in other factual circumstances (where personal factors such as living standard of plaintiff are taken into account), patrimonial damage is suffered, but not out of the plaintiffs own free will.

⁴⁴⁴ 1997. Wrongful birth. *Ars Aequi* (46:6), 431.

⁴⁴⁵ incorrectly referred to as "wrongful birth".

can be legally attributed to him according to the standard set by section 6:98 of the Dutch Civil Code.⁴⁴⁶

6. Legal position in South Africa

6.1 Background

The South African law recognizes the wrongful conception actions of plaintiffs who sought to implement family planning for economical reasons. Although the first case was heard by the courts much later than in other jurisdictions, recent cases have established the acceptance of this particular cause of action beyond any doubt.

6.2 Initial view

The first wrongful conception action instituted in South Africa was the unreported case of **Behrmann and another v Klugman**.⁴⁴⁷ *In casu* a normal but unwanted child was born in spite of the fact that Mr. Behrmann underwent a vasectomy operation a few months prior to the unexpected pregnancy. Damages to the amount of R 300 000 was sued for. The claim was based on breach of contract.⁴⁴⁸ The plaintiff argued the following points:

- that either an explicit or an implied guarantee was given to Mr. Behrmann that he would be sterile after undergoing this operation and that the necessary degree of skill and competence will be adhered to in the performance of this procedure;⁴⁴⁹ and
- that defendant neglected to advise the plaintiff to first undergo a sperm count before resuming sexual intercourse without alternative contraceptive measures.

The relevant legal question before the court was whether the plaintiff was sufficiently

⁴⁴⁶ "In verband met de art. 6:74, 6:96 en 6:98 BW, in onderliggende samenhang gelezen; brengt dit mee dat de arts aansprakelijk is voor alle vermogensschade die in zodanig verband met die fout staat dat zij hem naar de maatstaf van art. 6:98 als een gevolg van die fout kan worden toegerekend." op cit p 432.

⁴⁴⁷ 1988 WLD - (unreported, judgment delivered on 18 May 1988).

⁴⁴⁸ and alternatively on delict.

⁴⁴⁹ 1986. Grubb. A. *Cambridge Law Journal*, op cit p 197 mentions that the effect of a vasectomy operation can be naturally reversed through the spontaneous recanalisation of the tubes severed in the procedure.

informed⁴⁵⁰ on the advised practice of obtaining a sperm count.⁴⁵¹ The plaintiff stated that the defendant brought him to believe that the operation would be final and that he would be completely sterile within ten weeks after the operation. The defendant replied hereto that it was his practice to allow at least nine months after the operation, before a final conclusion on sterility could be made.

The plaintiff's claim did not succeed, as the court found that he was unable to prove on a preponderance of probabilities that a guarantee of sterility, either implied or explicit was given.⁴⁵² The court left open the question whether this type of action is *contra bonos mores*⁴⁵³ considering the facts that the child was born healthy and legitimate.

Pearson⁴⁵⁴ reports that the plaintiffs' action was unsuccessful, since they had failed to prove that the doctor had guaranteed⁴⁵⁵ the success of the operation.⁴⁵⁶ Strauss⁴⁵⁷ rightly predicted that "Behrmann's case is not the last word that we shall hear in South Africa on wrongful conception."

6.3 Recognition of claim

Administrator, Natal v Edouard⁴⁵⁸ is the *locus classicus* of the legal position set out by the Appeal Court on wrongful conception actions in South African law. In the initial case⁴⁵⁹ the wrongful conception action was in principle recognized and an award for damages was allowed.

⁴⁵⁰ *ie* whether the duty to inform was properly fulfilled.

⁴⁵¹ which would have clarified the question of sterility.

⁴⁵² there are basically two types of guarantees that are generally given for medical procedures - see discussion in ch 4.

⁴⁵³ "against the good morals of society" or whether certain conduct is legally reprehensible/ unacceptable according to the legal norm of society - see a detail discussion in ch 2 and arguments *supra* based on this viewpoint, denying wrongful conception action in various jurisdictions.

⁴⁵⁴ 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 93.

⁴⁵⁵ expressly or impliedly.

⁴⁵⁶ following English case of **Eyre**, which held that the court should be slow to imply an unqualified warranty by the doctor in the absence of an express warranty.

⁴⁵⁷ 1988. First South African claim against doctor for Wrongful Conception Fails. **South African Practice Management** (9), 6.

⁴⁵⁸ 1990 (3) SA 581 (A).

⁴⁵⁹ **Edouard v Administrator, Natal** 1989 (2) SA 368 (D).

Mrs. Edouard⁴⁶⁰ contracted with the Natal provincial hospital that she would be sterilised by means of a hysterectomy operation during the same procedure by which her third child would be delivered by a Caesarian section. The decision for this sterilization operation was based on economic considerations. What indeed happened was that the hospital carried out the Cesarean section, but neglected to perform the planned hysterectomy.⁴⁶¹ Mr. and Mrs. Edouard were not informed of this crucial omission and as a result Mrs. Edouard became pregnant with their fourth child four months later. Mr. Edouard sued on behalf of his wife for damages based on breach of contract. The defendant (the provincial administration of Natal) was prepared to pay the costs of the original hysterectomy operation. The plaintiff sued for the following additional heads of damage:

- child-rearing costs until the age of eighteen years; and
- a non-patrimonial award for discomfort, loss of amenities, as well as pain and suffering.

The defendant admitted that the contract in question was valid and enforceable, but contended that an legal action to enforce it is *contra bonos mores* since the child was born healthy and normal.⁴⁶² The defendant alternatively submitted that the plaintiff's failure to give the child away for adoption constituted a *novus actus interveniens*⁴⁶³ which omission defeats the basis of claim. Strauss⁴⁶⁴ reports that in **Edouard** the court regarded the argument that it is morally wrong that a normal healthy life should be the basis of a compensable wrong as "squeamish and pedantic".⁴⁶⁵

6.3.1 Basic principles

It its judgement the court formulated the following basic principles concerning the position of

⁴⁶⁰ Mr. Edouard.

⁴⁶¹ in the vast majority of cases the facts in wrongful conception actions reveal that the defendant neglected to inform the plaintiff sufficiently of the risks or other relevant information concerning sterilization - the facts in Edouard are quite exceptional in that the negligent conduct was the failure to operate itself.

⁴⁶² and that it would therefore be against the legal conviction of the community if action is taken over the birth of a child.

⁴⁶³ a new fact changing the relevant circumstances and thereby breaking the legal causal link between defendant's action and the resultant damage.

⁴⁶⁴ 1990. Voluntary sterilisation for convenience: The Case of the unwanted child. *Consultus* (3), 93.

⁴⁶⁵ *op cit* p 95.

wrongful conception actions in South Africa:⁴⁶⁶

- Sterilization became a recognized form of contraception for married couples in modern society. It is in the best interest of society that families do not become larger than planned for by parents.⁴⁶⁷ A reasonable standard of living should be maintained by means of responsible family planning.
- The court made the declaration that this type of action should only be instituted on economic grounds, to reimburse plaintiffs for economic losses incurred by child-rearing expenses. It further stated that it is not necessary to establish the value of the child him/ herself in order to allow the action, since the child is not the object of damage.
- The emotional benefits⁴⁶⁸ the parents derive from their child are not to influence the quantum decided on by the courts.⁴⁶⁹
- A plaintiff-doctor, who is found liable should pay full damages, including child-rearing costs since his negligence caused the birth of the child. In this regard the court reminded us that the natural fathers of illegitimate children are regularly obliged by court orders to pay maintenance for their offspring.⁴⁷⁰ In these cases an argument that the illegitimate child causes the mother much happiness and joy does not reduce the amount of maintenance.⁴⁷¹
- The court rejected the argument that it would be morally unacceptable to base an action on the birth of a healthy and normal child. Compensation is not awarded because the child was born, but is allowed for the expenses incurred by the parents because of this unexpected child. This reasoning seems sound as in most of the cases these parents cannot afford another child and have for this reason taken steps to limit their families.

⁴⁶⁶ also summarised by Strauss in *Doctor, patient and the law* (1991), *op cit* p 178.

⁴⁶⁷ taking into account the financial resources of each household.

⁴⁶⁸ such as love and affection.

⁴⁶⁹ *ie* rejection of the benefit rule.

⁴⁷⁰ Note that courts who order unmarried fathers to pay a certain amount of maintenance do not consider the child as the object of damages - the only relevant question is how much the illegitimate child's natural father should pay for child-rearing expenses. It is submitted that the wrongful conception defendant should similarly pay for the unwanted expenses occasioned by the child's birth.

⁴⁷¹ the same should be true of wrongful conception actions.

- No court would force parents to give their child away for adoption in order to alleviate them from the financial burdens of another sibling. There is a duty to mitigate damages on every blameless party,⁴⁷² but only in so far as the damage can be limited by *reasonable steps*. Forced adoption⁴⁷³ is not reasonable.⁴⁷⁴
- The court was of the opinion that all the challenges associated with wrongful conception actions could be solved. For example, the fear that doctors will be forced to pay more than what they morally should be held accountable for was found to be over exaggerated. Further arguments namely that doctors will be put under unnecessary pressure to perform illegal abortions,⁴⁷⁵ or would refuse to perform sterilization operations out of fear for malpractice litigation were similarly not convincing to the court.
- Judge Thirion added that sterilization operations are relatively simple medical procedures and further stated that any medical practitioner could effectively protect himself from unwanted litigation⁴⁷⁶ by simply informing his patient of the possibility that the operation could still be unsuccessful and that there always exists a chance of fertility, even after a sterilization. An obvious way to ensure protection from malpractice suits is to contract with each patient on the basis that no action would be instituted against the physician.⁴⁷⁷

In casu the plaintiff then succeeded with a claim of R 22 500, an amount settled on by the parties which included child-rearing costs. The second claim for satisfaction due to pain and suffering was, however, rejected.

6.3.2 Non-patrimonial loss based on breach of contract

⁴⁷² to a breach of contract or delict.

⁴⁷³ not even to mention forced abortion.

⁴⁷⁴ remember that although the parents have decided not to have any additional children, generally because they simply can't afford it, they are still only human and will naturally get attached to this unexpected addition to the family.

⁴⁷⁵ remember that abortions on request or eugenic abortions were not legalised in South Africa until 1997 with the introduction of the new **Termination of Pregnancies Act** - see the discussion in ch 3 of this new legislation.

⁴⁷⁶ and liability.

⁴⁷⁷ or a "*pactum de non petendo in anticipando*" as a contractual undertaking not to hold the actor liable - see ch 5 for a further discussion.

A pressing legal policy question, that had to be answered, was whether accountability for non patrimonial loss should be extended to the sphere of breach of contract in South African law.⁴⁷⁸ The court did not see any compelling reason why it should broaden liability in this manner⁴⁷⁹ as such a claim could easily be joined to a delictual claim.⁴⁸⁰

Taitz⁴⁸¹ conveys that plaintiff's claim for non-patrimonial damages resulting from discomfort, pain and suffering and loss of amenities caused by the pregnancy and subsequent birth of the child was dismissed. "The authorities, both at common law and the authorities cited *in casu* and earlier judicial decisions and learned authorities are of the view that non-patrimonial loss based on breach of contract is not recoverable in our law".

De Waal⁴⁸² comments on this particular aspect of the case of **Edouard v Adiministrator, Natal**⁴⁸³ and agrees that the main reason for the courts not awarding damages for non patrimonial loss⁴⁸⁴ is because the claim was based on breach of contract. The fact that no common-law authority could be found in matters where non patrimonial loss was compensated due to breach of contract naturally played an important roll in the decision. According to the court there were not sufficient practical and policy need for such an extension.

The facts of this case differ from most other wrongful conception cases in that the usual cause of action, a negligently performed sterilization operation, was *in casu* not performed at all! Although the facts show a highly improbable and gross form of medical negligence, the principle of liability stays exactly the same. There is no fundamental difference for example,

478 1989. **Current Law** (Review Five) K 669: "If there is a need to extend the rules of our law relating to the recover ability of non-pecuniary loss flowing from breach of contract, such need best be accommodated in the law of delict where the concepts of wrongfulness and fault (in the form of *culpa* and *dolus*) and the defences germane to delict can be used to define the limits of the relief." - refer to **Edouard v Administration, Natal** 1989 (2) SA 368 (D).

479 to an action based on breach of contract.

480 through which satisfaction can easily and without uncertainty be recovered.

481 1991. Maintenance Damages against an erring medical authority for the birth of an unwanted child confirmed by the Appellate Division. **THRHR** (54), 138.

482 1990. Remedies by Kontrakbreuk - of skadevergoeding verhaal kan word vir onderhoud van kind gebore na onsuksesvolle sterilisasie. **De Rebus**, 711.

483 *ibid.*

484 *ie* discomfort, pain and suffering and loss of amenities caused by the pregnancy and eventual birth of their fourth child.

with a case of 1% negligence, although it is possible in some jurisdictions⁴⁸⁵ that a higher amount of damages may be awarded for acts of gross negligence.

6.3.3 Edouard on Appeal

The Court of Appeal unanimously concurred with the decision of the court *a quo*:

- The Appeal judges rejected the argument advanced by plaintiff that liability would be against public policy. According to appellant, an award for maintenance would transfer the duty which usually rests on parents, to the defendant in the matter, the hospital authority. The court concluded that the duty to maintain is not really transferred by holding the negligent hospital authority liable. Although the parents might receive an amount of money from the defendant for child-rearing expenses, the responsibility to care for the child still rests with the parents. The rationale behind this fact can clearly be seen in the example that, should the parents lose the entire amount of damages in a crooked investment they would still be obliged to pay their sibling's maintenance bills.
- The Appeal Court also rejected the defendant's contention that a normal and healthy child's birth can not constitute a cause of action. Although the parents are probably overjoyed about their newborn child, the reality of the additional expenses is still a source of great uncertainty and remains a real burden. It is after all not the child itself that is unwelcome, but rather the financial burden that follows as a consequence.
- Another reality of modern society recognized by the court is that a normal and healthy child is not necessarily a blessing. The court explained that a loving child could still become a drug addict or a violent psychopath⁴⁸⁶ In later years.
- An important prerequisite⁴⁸⁷ for the success of this action in South African courts is that the decision not to have further children must have been made based on socio-

⁴⁸⁵ in the United States of America, courts award so-called "punitive damages" - see ch 2 where the South African position regarding damages is discussed.

⁴⁸⁶ *op cit* p 591 C-D.

⁴⁸⁷ see *supra*, where the same requirement has been set in American courts.

economic reasons.^{488 489 490}

- A further principle was laid down namely that liability for wrongful conception could follow whether a healthy child is born or whether the child is handicapped and suffers from a serious hereditary disease.
- The pertinent question whether a wrongful life action could be instituted in South Africa was left unanswered by the court.

6.3.4 Opinions on the decision

Keyser⁴⁹¹ supports the decision in **Edouard**⁴⁹² that damages should be allowed for wrongful conception actions, rejecting the various public policy objections to the claim.

"The court's forthright approach is to be welcomed, especially in view of the reluctance of courts in the United States to award damages for the maintenance and education of a healthy but unwanted child"

Norrie⁴⁹³ conveys that the **Edouard** court has followed the English approach, as it was held that there is no policy requirement that the courts find as a matter of law that the benefits of parenthood outweigh the losses.

6.4 Recent developments

⁴⁸⁸ Welborn, in *Tulane Law Review* (1989), 1221 reports on a similar requirement set in American courts: "Many courts have inquired into the reasons behind the sterilisation procedure in determining whether child-rearing costs should be awarded... Thus, recovery of child-rearing costs is allowed only when the parents' purpose in having the sterilisation was economic in nature."

⁴⁸⁹ 1990 *Annual Survey of South African Law*, 148: "These considerations, however, applied only when, as in *Edouard*, a sterilization procedure was performed for socio-economic reasons; different considerations might apply when sterilization was sought for some other reason."

⁴⁹⁰ see the discussion of Milsteen's views dealing with the motivation for sterilization in ch 9.

⁴⁹¹ Keyser, B. 1989. Wrongful birth. *Annual Survey of South African Law*, 8.

⁴⁹² special reference is made to p 383 G-H of the judgement.

⁴⁹³ 1991. Wrongful Birth and the Supreme Court of South Africa. *International and Comparative Law Quarterly* (40), 439.

In a recent South African wrongful conception action, **Chalk v Fassler**,⁴⁹⁴ the surprised mother of a totally unexpected but healthy child sued for a whopping R 800 000 in child-rearing expenses from a gynecologist-defendant who failed to successfully perform a legal abortion.⁴⁹⁵

This case represents the first South African case based on failed abortion. The plaintiff's claim for damages was in respect of the birth of her child following the allegedly negligent performance of a lawful abortion by the defendant. The claim was rejected, as the court held that the expert evidence indicated that even with the exercise of due skill and care, it was possible for abortions to fail. It was further judged that there was no evidence to suggest that the defendant had been negligent in performing the procedure. A final basis for disallowing the claim was the fact that the plaintiff took no further steps to effect termination of her pregnancy once she realised that the initial procedure was unsuccessful.

It is submitted that the failure of the **Fassler** case should not be interpreted as a return to non-recognition of wrongful conception in South Africa. The principle of recovery has been firmly founded in the Highest Court of Appeal,⁴⁹⁶ and the **Fassler** case was simply lost because of poor merits.

6.5 Evaluation

When we look at the various findings on wrongful conception actions of courts around the world, it appears that the majority holds an optimistic view. An important prerequisite that a prospective South African plaintiff will have to comply with is that the reasons for making use of the failed contraception in question was economically based.⁴⁹⁷ Prospective plaintiffs should sue for realistic amounts of damages that could be properly motivated and proved.

⁴⁹⁴ 1995. WLD - unreported (judgement delivered in first week of May 1995) - this case received much publicity in the media, see references in "Beeld" (1995-03-21) 1.

⁴⁹⁵ note that this recent litigation still took place under the previous abortion act - for a detailed discussion of this act and the dramatic changes that came about under the new act, see ch 3.

⁴⁹⁶ **Edouard supra.**

⁴⁹⁷ therefore stating that the parents can not afford the unexpected child.

7. Various related aspects

7.1 Pure economic loss

Cleaver⁴⁹⁸ argues that there should be no reason why a wrongful conception action based on delict could not be allowed in South Africa as such a claim is one for pure economic loss. Although the South African law does allow such claims, it is approached with much circumspection. In **Administrateur Natal v Trust Bank van Afrika, Bpk**⁴⁹⁹ the court extended the ambit of the Aquillian action to negligent misstatements⁵⁰⁰ giving rise to pure economic loss. This broadening of delictual liability was done cautiously in order to contain such liability within reasonable bounds. In **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty)Ltd.**⁵⁰¹ the appeal court confirmed that pure economic loss may be wrongful, but warned that it must not be regarded as *prima facie* wrongful.

Cleaver⁵⁰² investigates whether liability under pure economic loss should be extended towards physicians in professional negligence cases.⁵⁰³ He believes that wrongfulness would be the most difficult issue to prove. The question would be: did the physician owe a legal duty of care to plaintiff? Cleaver is of the contention that the physician does and particularly because of the existence of a physician-patient contract and a relationship of trust between the parties. This much is implicit in terms of the **Lillicrap** decision. A final assessment of wrongfulness and the concurrent existence of a legal duty could be determined by the public-policy consideration of "reasonableness".⁵⁰⁴

There are many factors used to determine whether wrongfulness is present or not, such as the fact that the physician has expert knowledge, the patient had reasonable reliance on his skill and judgement, the direct contractual relationship between parties, a limited loss and a limited number of claimants. Based on these factors, it is submitted that legal duty on physicians does exist.

⁴⁹⁸ *op cit* p 62.

⁴⁹⁹ 1979 (3) SA 825 (A).

⁵⁰⁰ it must be established that the defendant was under a legal duty not to make a negligent misrepresentation.

⁵⁰¹ 1985 (1) SA 448 (A).

⁵⁰² *ibid.*

⁵⁰³ and more specifically, in wrongful conception actions.

⁵⁰⁴ see ch 2 - a discussion of delictual principles in the South African law.

7.2 No automatic medical guarantee

In **Jackson v Anderson**⁵⁰⁵ damages were allowed on grounds of breach of guarantee and the negligent performance of a sterilization operation. De Vries and Rifkin⁵⁰⁶ are of the opinion that breach of guarantee is only present in the event where a medical practitioner has guaranteed a successful medical intervention or procedure without delivering the promised result. They emphasize, however, that an action based on breach of warranty will fail if it cannot be proved that the medical practitioner expressly gave an enforceable promise or guarantee of success.⁵⁰⁷ It is also trite law in South Africa that no automatic or implicit guarantee of success arises when a medical procedure is performed.⁵⁰⁸

7.3 Sterilization for economic reasons

Einheuser⁵⁰⁹ writes that it is imperative for the success of an ensuing wrongful conception action in the United States of America, that the motivation for a sterilization operation⁵¹⁰ was for reasons of financial restraint.⁵¹¹

Bogdan⁵¹² also reports on the interesting similarity between American and South African law with regard to wrongful conception actions, specifically concerning the requirement set out in **Edouard** that the purpose of plaintiff's contraception must have been for economic considerations. He refers to the case of **Hartke**⁵¹³ where the court denied the parents damages for the economic expenses of raising a healthy child because the mother sought sterilization solely for health reasons. In **Hartke** the mother's interest was the health of herself and her

⁵⁰⁵ 230 So. 2d 503 Fla. App. (1970).

⁵⁰⁶ 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. **The Forum** 207.

⁵⁰⁷ *op cit* p 215.

⁵⁰⁸ **Behrmann v Klugman** 1988 WLD (unreported), **Bulls v Tsatsarolakis** 1976 (2) SA 891 (T) - see ch 4

⁵⁰⁹ 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), 651.

⁵¹⁰ only if a sterilization or any other attempt in contraception was obtained because of economic constraints will an award for child-rearing expenses be considered - see a similar requirement in South African law, **Edouard** case.

⁵¹¹ *op cit* p 654.

⁵¹² Bogdan, F.W. 1983. Wrongful Birth: Who Owes What to Whom and Why? **Washington and Lee Law Review** (40), 125.

⁵¹³ 707 F.2d 1544, 1549 D.C. Cir. (1983).

child, not the pecuniary expense of raising a child. Since the mother's interest suffered no harm, the court did not allow the plaintiff to recover the economic costs of raising the child.

7.4 Injury vs Harm

In the case of *Hartke v Mc Kelway*⁵¹⁴ the plaintiff was Sandra Hartke. She had a legitimate medical fear that a future pregnancy would endanger her life,⁵¹⁵ and accordingly she underwent a sterilization operation.⁵¹⁶ Her physician, Dr. McKelway, omitted to inform her that an average failure rate for the procedure performed on her was approximately three out of every 1000. Mrs. Hartke indeed became pregnant, gave a normal birth⁵¹⁷ to a healthy child and then instituted a wrongful conception action. The action was based on:

- the negligent performance of a sterilization operation;
- the failure of the physician to properly inform his patient and thereby not obtaining an informed consent;⁵¹⁸ and
- breach of warranty.

In the court *a quo* the jury awarded damages for medical expenses, pain and suffering, mental anguish, as well as the anticipated rearing costs.⁵¹⁹

The Appeal Court⁵²⁰ upheld the decision on two separate bases, namely the failure to inform the patient of a material risk and also on grounds of a negligent sterilization procedure. The court upheld all of the heads of damage, except the compensation for child rearing expenses. Both parties further appealed against this judgment. The Court of Appeal asked the following important questions: Was there a duty to inform the patient of a remote risk? Did the plaintiff

⁵¹⁴ *Hartke v McKelway* 526 F. Supp. 97 D.D.C. (1981).

⁵¹⁵ her medical condition was such that it was dangerous for her to bear a child and at the time of the sterilization she had already had a number of miscarriages.

⁵¹⁶ note that the motivation for sterilization was based on personal medical reasons.

⁵¹⁷ her feared expectations did not materialize.

⁵¹⁸ the failure rate of the procedure was argued to be a material aspect of Mrs. Hartke's decision.

⁵¹⁹ with application of the benefit rule, restricting the total amount of damages by subtracting the estimated benefits that would be derived from the child.

⁵²⁰ *Hartke v McKelway* 707 F.2d 1544, 1549 D.C. Cir. (1983).

establish a proximate cause⁵²¹? Was the court correct in disallowing rearing costs? All three questions were answered affirmatively.

Einheuser⁵²² explains with reference to the *Hartke* case that during the past few years the judiciary in the United States has become actively involved in the decision making process of several moral issues. He believes that the active involvement of society in this fashion could be seen as judicial activism and may be an attempt from the judiciary to close the gap between what is referred to as moral order and the law.⁵²³

In casu, no consensus could be reached on the question of damages. The circuit court held that where the purpose of sterilization was therapeutic,⁵²⁴ there is a rebuttable presumption against allowing an award for child rearing expenses⁵²⁵; in this respect. Einheuser⁵²⁶ believes the court's logic is internally inconsistent as it allowed recovery for other damages resulting from the same negligent act.⁵²⁷ This illogical approach could be the result of a confusion between the terms injury⁵²⁸ and harm.⁵²⁹

Although Mrs. Harthe's health was not *harmed* by the unexpected birth an *injury* had nevertheless occurred.⁵³⁰ All her injuries were direct consequences of the unexpected

521 would she have gone through with the sterilization, if she knew about the risks involved.

522 *op cit* p 655.

523 As was previously seen in landmark decisions such as *Griswold* 381 US 479 (1965) (contraceptives fall in zone of privacy), and *Roe* 410 US 113 (1973) (unwanted pregnancies are injurious). As society progresses and moral values change, so the moral order of the community is inevitably influenced and constantly altered. In order to ensure the legitimacy of the courts it is vital that the legal system should adapt to these societal changes.

524 and not on account of medically necessity.

525 the court based this presumption on the premise that when basic tort law principles are followed, the plaintiff suffers no cognizable injury.

526 *op cit* p 658.

527 If a defendant's conduct is found to have been negligent, a plaintiff should generally be allowed to recover *all* damages suffered as a result, *ie* to put her once again in her pre-injury condition being that prior to conception. Should a plaintiff be unable to prove negligence, then the plaintiff failed to prove its case and should not be allowed to recover any damage.

528 the invasion of any *legally protected interest* of another.

529 the loss or detriment of *any kind* to a person resulting from any cause.

530 by the actual materialisation of the undisclosed risk.

conception. From this single injury various manifestations flowed: pain, suffering, mental anguish, monetary expenses *et cetera*. One must therefore acknowledge that the element of injury was present and under strict application of tort law principles, all compensable damage⁵³¹ should be recoverable. It is believed⁵³² that the court also confused the concept *injury* with the actual *harm* that Mrs. Hartke sought to prevent. She namely sought to prevent pregnancy. Therefore, the court need not look into the subjective motives underlying her decision. The defendant argued in this regard that no interest of the plaintiff was invaded, as is required by **Restatement 2nd of Torts**: "The actor is liable for an invasion of an *interest* of another".

It is submitted⁵³³ that "interest" is defined as the object of human desire. The wrongful conception defendant may accordingly argue that the plaintiff's wish not to become pregnant was the *subject* of the plaintiff's desire and not its *object*. The object of desire must be distinguished from the thing in respect to which the desire is entertained. For example, everyone desires that his/ her body shall be free from material harm. The object of this desire is the security of the body and not the body itself. The body's for which security is desired is therefore the subject of the desire and not its object.

In casu the defendant could have argued that the object of his desire was to preserve the plaintiff- mother's health were as successful sterilization was merely "the thing in respect to which the desire is entertained". Therefore, if the plaintiff's health was in fact not prejudiced by the birth of a child,⁵³⁴ no injury was suffered. Einheuser⁵³⁵ is of the opinion that even if the defendant had pursued and the court had accepted this argument, it still would not be sufficient to explain the court's contradiction in awarding certain heads of damages while denying others. Had the court based its decision on a public policy rationale rather than judging that no injury was established, the decision would have been sound. However, a public policy rationale would have been inconsistent with the court's prior discussion that the plaintiff had suffered no injury.⁵³⁶ By discussing the social effects that recovery of certain damages will have, the public policy rationale by this very recognition concedes that the plaintiff indeed suffered injury!⁵³⁷

531 incl child-rearing expenses.

532 *op cit* p 659.

533 *ibid.*

534 caused by the unsuccessful sterilization.

535 *ibid.*

536 Einheuser *op cit* p 660.

537 the court merely does not all the heads of damage.

The court set forth a rebuttable presumption which places a burden of proof on a plaintiff to prove that economic harm was in fact caused by the negligence of the defendant. This burden of proof is more difficult than what a plaintiff ordinarily would have to prove: Actual injury in this case pertains to the materialisation of an undisclosed risk and not the proof of economic injury.⁵³⁸

The plaintiff sought sterilization for therapeutic reasons.⁵³⁹ The court ominously held that the logical nexus to this fact was that the parents would otherwise⁵⁴⁰ have wanted the child. Einheuser⁵⁴¹ believes that here are two fundamental problems with such a postulate: The first is that this presumption appears to be lacking strong probative force between the basic given fact and the presumed fact. It is possible that Mrs. Hartke sought sterilization mainly for therapeutic reasons, but even so did not want any children. Secondly, the precedential value of this rebuttable presumption may serve as nothing more than a warning to plaintiff's attorneys⁵⁴² to have some proof of economic harm accessible in order to rebut the required presumption.

The approach introduced by the Hartke court gives us a new perspective on the issue of child-rearing expenses : The court's analysis is internally inconsistent, allowing recovery for certain damages while denying recovery for others⁵⁴³ caused by the same act of negligence.

In conclusion Einheuser⁵⁴⁴ writes that the Hartke court reaffirms the judicial acceptance of wrongful conception as legal cause of action. A new approach in defining the recover ability of child-rearing expenses is however introduced as sterilization for therapeutic purposes now raises a rebuttable presumption against recovery of child-rearing expenses. She ascribes this seemingly inconsistent viewpoint to a clear misinterpretation of the distinction between injury and harm.

7.5 In summary

⁵³⁸ as a result of the materialisation of the undisclosed risk *ie* percentage of failed sterilization.

⁵³⁹ *ie* based on medical advice for her own protection.

⁵⁴⁰ had there been no substantial risk related to childbirth.

⁵⁴¹ *op cit* p 661.

⁵⁴² and all future plaintiffs.

⁵⁴³ based on the premise that no injury was sustained.

⁵⁴⁴ *op cit* p 662.

Basically three schools of thought exist concerning wrongful conception actions: They are those who deny the action, those who allow the action and lastly the intermediate group, who allows full recovery, but subtracts any benefit derived from the damage causing event.

Some of the reasons given by those Courts who deny child-rearing expenses:

- public policy reasoning that a child is a precious gift and always outweighs the economic loss suffered by parents;⁵⁴⁵
- the benefits that a child bring cannot be equated with loss or injury;⁵⁴⁶
- the value of a human life can not be compared to its cost;⁵⁴⁷
- respect for human life is at the heart of any legal system and recognition of the action would jeopardise this respect;⁵⁴⁸
- liability for wrongful conception actions is wholly out of proportion to the wrongful conduct (of the negligent physician);⁵⁴⁹
- recovery of an award would be a windfall to the plaintiff parents;⁵⁵⁰
- liability would be an unreasonable burden on a negligent physician;⁵⁵¹
- recognition of the action would cause emotional and psychological harm to the child;⁵⁵²
- damages in wrongful conception actions is not measurable;⁵⁵³
- damages in wrongful conception actions is too remote and speculative;⁵⁵⁴ and
- possibilities of fraudulent claims.⁵⁵⁵

⁵⁴⁵ **Cockrum v Baumgartner** 96 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E. 2d 385 (1983); **Garrison v Foy** 486 N.E.2d 5 Ind. App. (1985); **Hickman v Myers** 632 S.W.2d 869 Tex. Ct. App. (1982).

⁵⁴⁶ **Christensen v Thornby** 192 Minn. 123, 255 N.W. 620 (1934).

⁵⁴⁷ **Coleman v Garrison** 349 A.2d 8 Del. (1975).

⁵⁴⁸ **Cockrum v Baumgartner**.

⁵⁴⁹ **Rieck v Medical Protective Company** 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

⁵⁵⁰ **White v United States** 510 F. Supp. 146, 149 D.Kan. (1981).

⁵⁵¹ **Beardsley v Wierdsma** 650 P. 2d 288 Wyo. (1982).

⁵⁵² **Wilbur v Kerr** 275 Ark. 239, 628 S.W.2d 568 (1982).

⁵⁵³ **McKernan v Aasheim** 102 Wash. 2d 411, 687 P. 2d 850 (1984).

⁵⁵⁴ **Coleman v Garrison**.

⁵⁵⁵ **Rieck v Medical Protective Company; Beardsley v Wierdsma**.

Block⁵⁵⁶ lists additional rationales given by courts in dismissing child-rearing costs:

- they are too remote and not within the foreseeable risk undertaken by the defendant,⁵⁵⁷
- the damages would be excessive,⁵⁵⁸
- the defendant should not have to bear the costs of rearing the child while someone else enjoys the benefits associated with child rearing;⁵⁵⁹ and
- the child would feel like a “emotional bastard” when it learns that its financial needs and general maintenance are not being provided for by its parents.⁵⁶⁰

7.6 Conclusion

Garfinkle⁵⁶¹ is of the opinion that the full recovery approach to wrongful conception must be followed, in order to best protect society from the negligence of its physicians. She warns that by limiting or eradicating liability in negligent sterilization actions, physicians are immunised from their negligent acts, which discourages conformity to a high standard of care when performing these procedures.

“We must also ensure that the traditional tort principles of damages continue to be applied. To create instances where some causes of action are not bound by ordinary principles of law is to create uncertainty within our system of compensation for injury.”⁵⁶²

⁵⁵⁶ *op cit* p 1110.

⁵⁵⁷ **Schork v Huber** 648 S.W. 2d 861, 862 Ky. (1983).

⁵⁵⁸ **White v United States**.

⁵⁵⁹ **Boone v Mullendore** 416 So. 2d 718, 723 Ala. (1982).

⁵⁶⁰ **McKernan v Aasheim**.

⁵⁶¹ 1991. **Burke v Rivo: Towards a more rational approach to Wrongful Pregnancy.** *Villanova Law Review* (36:4), 830.

⁵⁶² *ibid.*