

CHAPTER 7

Wrongful Birth Actions

1. Summary

Wrongful birth actions are basically instituted by parents who claim that they would have aborted their impaired fetuses if they had prior knowledge of expected or diagnosed developmental abnormality. Berenson¹ emphasizes the fact that in wrongful birth actions the right to recovery is based solely on the mother² testifying that she would have chosen to abort if the physician, hospital or laboratory³ had but told her of the unfortunate results of an amniocentesis test⁴ or alternatively of a scientifically based expectation of increased risk in the pregnancy because of other determining factors.⁵ The plaintiff's injury therefore results from a denial of her right to an informed choice⁶ or no choice at all.⁷ These plaintiffs fundamentally differ from wrongful conception parents in that they planned the birth of a child, but indeed only

¹ 1990. The Wrongful Life Claim - The legal dilemma of existence versus nonexistence: "To be or not to be". *Tulane Law Review* (64), 895.

² in South African law the mother has the sole right to decide on an abortion in terms of the **Choice on Termination of Pregnancy Act No. 9 of 1996** (there is not even a duty on a pregnant woman to inform the father of the child of her decision) - sec 5(2) reads: "Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy".

also in the case of **Friedman v Glicksman** 1996 (1) SA 1134 (W) the court made it clear that even prior to the new abortion act the final decision to abort a foetus rested exclusively with the mother of the child: "However, it must be stressed that the election to proceed with or terminate the pregnancy in these circumstances rests solely with the mother, who bears the moral and emotional burden of making such election".

³ **Robak v United States** 658 F. 2d 471 (1981).

⁴ Berenson *ibid* writes that the percentage of woman who refuse to consider abortion because of religious or other beliefs is astoundingly high - courts should therefore be cautious when adjudicating these actions as plaintiffs may institute action and *ex post facto* argue that they would have aborted an impaired foetus, while they genuinely would not even have considered such prospect.

⁵ as many factors may have an influence on foetal development (eg pollution, drug use by the mother and other damaging elements in the surroundings) - see ch 11, physicians should also take into consideration the family health history and look at possible increased risk areas in a specific community or family - see ch 5 for a suggested thorough genetic analysis.

⁶ see ch 5 dealing with informed consent and the right to an informed choice.

⁷ in cases of failed abortion and/ or sterilization procedures - see *infra*.

a healthy offspring.⁸

The child itself is therefore not unwanted, but rather the defective state of the child. The plaintiff-parents do not institute action for their child's impediments, since the defendant did not actually cause the disease or handicap and because it is the parents who are the victims of the defendant's negligence.⁹ Plaintiffs rather seek compensation for the deprivation of their right to choose whether or not to be parents of a healthy child.¹⁰

De Vries¹¹ conveys: "It is generally advanced that to consider a birth an injury would offend fundamental values attached to human life."¹²

Symmonds¹³ comments with regard to wrongful birth and states that the policy factors that govern these actions are "virtually unique when compared with policy factors in negligence generally." He believes that the wrongful birth cause of action is so different that "treatment of this as an area where the mainstream principles of negligence can easily be applied is palpably wrong".¹⁴

Grobe¹⁵ agrees with this premise and expands this theory of liability by stating that the physician's negligence in wrongful birth precludes the parents from making an informed decision about whether to bear a genetically diseased child. He¹⁶ emphasizes that this action is based on a woman's constitutional right¹⁷ to choose termination of pregnancy.

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- ⁸ as opposed to the unplanned pregnancy (failed contraception) and/or birth (failed abortion) in wrongful conception actions.
- ⁹ not the child - the child's action is that of wrongful life.
- ¹⁰ see Faircloth's opinion on this matter *infra*.
- ¹¹ 1985. Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the birth-related torts. *The Forum*, 218.
- ¹² **Cockrum v Baumgartner** 95 Ill. 2d 193, 447 N.E. 2d 385 (1983), cert denied, 104 S. Ct. 149 (1983).
- ¹³ 1987. Policy factors in actions for Wrongful Birth. *The Modern Law Review* (50), 269.
- ¹⁴ *op cit* p 305.
- ¹⁵ 1992. The future of the "wrongful birth" cause of action. *Pace Law Review* (12:3), 717.
- ¹⁶ *op cit* p 719.
- ¹⁷ abortion on demand is a constitutional right in America (also in South Africa) - see ch 3 where abortion is discussed in more detail.

Bodgan¹⁸ reports that the defendant could be negligent either in providing inaccurate genetic counselling,¹⁹ in performing an unsuccessful abortion²⁰ or in performing an unavailing sterilization operation that failed to prevent conception.²¹

Damages relating to the additional medical and special care expenses necessitated by handicapped children are often sued for in wrongful birth actions and in addition many disgruntled parents also seek satisfaction for emotional shock.²² Most writers²³ agree with this proposition of damage and in support of their opinion that such expenses may be claimed cases such as **Phillips v United States**²⁴ and **Robak v United States**²⁵ are quoted as authority. In these cases the principle was laid down that damage awards may embody all general as well as extraordinary expenses associated with child-rearing.²⁶

2. General Aspects

2.1 Factual causes of action

Three typical factual situations can be identified in giving rise to this cause of action, namely where a medical practitioner or authority fails to properly advise prospective parents of the fact that they have a higher than average chance of conceiving a child afflicted with birth defects or suffering from a genetic disease,²⁷ secondly where an unsuccessful abortion was performed

¹⁸ 1983. Wrongful Birth: Who Owes What to Whom and Why? *Washington and Lee Law Review* (40), 125.

¹⁹ **Phillips v United States**. 575 F Supp. 1309 D.S.C. (1983).

²⁰ **Speck v Finegold** 497 Pa. 77, 439 A.2d 110 (1981).

²¹ see previous fn.

²² some courts do allow compensation for the mental anguish and pain and suffering experienced by the parents in wrongful birth, eg **Schroeder v Perkel** 432 A. 2d 834 N.J. (1981) and **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983).

²³ Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. *Harvard Law Review* (100), 2017.

²⁴ *supra*.

²⁵ 658 F. 2d 471 (1981).

²⁶ discussed in more detail *infra*.

²⁷ **Naccash v Burger** 223 Va. 406, 290 S.E.2d 825 (1982).

on a woman with such high risks²⁸ and thirdly where a negligent sterilization procedure was carried out on such a plaintiff-mother.²⁹

Schoonenberg³⁰ similarly recognizes three basic types of medical negligence from which wrongful birth actions originate, but reports that an incorrect diagnosis could also be marked as possible cause of action.³¹ He refers to the American case of **Turpin v Sortini**³² where the failure to diagnose deafness in older children has precluded the parents from deciding against further children and where another child afflicted by a hereditary hearing deficiency was subsequently born.

2.2 Tort basis³³

When a wrongful birth action is based on tort,³⁴ it is obvious that all the elements required by law for liability because of a particular wrongful conduct must be present. Although the South African and American legal systems have different approaches in formulating these requirements,³⁵ both is basically founded on the believe that a person prejudiced by another's breach of a legal duty is entitled to compensation. Since wrongful birth actions have been thoroughly examined and tried by American courts over the past few decades, their analysis of

²⁸ **Speck v Finegold** *supra*.

²⁹ **Hartke v McKelway** 526 F. Supp. 97 D.D.C. (1981).

³⁰ Gevers, J.M.K. and Leenen, H.J.J. 1986. **Rechtsvragen rond voortplanting en erfelijkheid** Kluwer - Serie Gezondheidsrecht no.19, 62.

³¹ the other two instances mentioned are the insufficient provision of information (**Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983), and the inaccurate performance of laboratory tests (**Curlender v Bio-Science Laboratories** 106 Cal. App. 3d 811 (1980) which could also entail the incorrect calculation of percentages based on test results - see ch 4 regarding laboratory negligence.

³² 182 Cal. Rptr. 337 (1982).

³³ see ch 2 dealing with the bases of claims.

³⁴ more commonly referred to as delict in South African law.

³⁵ in South African a wrongdoer commits a delict if the requirements of conduct; unlawfulness; fault; causality; and damage are proven - in terms of American law various torts exist, although the tort of negligence comprises of the following requirements: duty; breach; proximate cause; and loss/ damage must be established.

wrongful birth based on tort is discussed here.³⁶ Schoonenberg³⁷ suggests that both the wrongful life action of a handicapped child and the wrongful birth action of the parents of a disabled infant base their actions on delict.³⁸

2.2.1 Duty of care

Grobe³⁹ believes that the physician's professional relationship with his patient⁴⁰ clearly establishes the required duty of due care.⁴¹ Physicians are therefore required to impart all material information to their patients regarding all relevant information, such as the likelihood of future children to be born with congenital impairments.

2.2.2 Breach

In wrongful birth, breach of duty is most commonly found in the failure of the physician to inform prospective parents of the risks of foetal disorders and genetic diseases. A physician's conduct is measured by the failure to conform to the appropriate standard of skill, care and learning.⁴²

2.2.3 Proximate Cause

According to Grobe⁴³ the parents' assertion that they would have avoided the birth of a defective child if they had been properly informed, is sufficient to establish the causal connection between defendant's failure to inform and plaintiff's damages.⁴⁴

2.2.4 Damage

³⁶ the South African application of law of delict to local wrongful birth actions will be discussed later, see *infra*.

³⁷ *op cit* p 63.

³⁸ he observes that in terms of Dutch law these causes of action would fall within the scope of the "*hulpverleningscontract*" or medical treatment agreement and would accordingly be better founded on breach of contract - see the discussion on the legal position in the Netherlands *infra*.

³⁹ *ibid*.

⁴⁰ usually a pregnant woman or a woman considering the prospect of pregnancy, although (prospective) fathers could also be the relevant patient.

⁴¹ as opposed to wrongful life actions, where the plaintiff often has difficulty to establish that the physician in question also owed him a duty of care (although no agreement exists between them) - see ch 8.

⁴² of the reasonable physician - see ch 4.

⁴³ *ibid*.

⁴⁴ the damage issue in wrongful birth is discussed separately and in more detail *infra*.

Bodgan⁴⁵ conveys that damages for both economic and emotional loss are recognized.⁴⁶ It is stated⁴⁷ that the plaintiff typically characterize economic loss as: pecuniary expenses associated with pregnancy and birth;⁴⁸ medical expenses related to the raising of a handicapped child;⁴⁹ and pecuniary expenses in excess of the special medical/ training costs for the child in question.⁵⁰ With regard to emotional or non-patrimonial damages, the following heads of damage are reported⁵¹ to be claimed: mental pain and suffering associated with pregnancy and birth;⁵² difficulty associated with raising a handicapped child;⁵³ suffering loss of consortium;⁵⁴ and also compensation for the interference with established family relationships.⁵⁵

2.3 Medical Technological advances

Pearson⁵⁶ states that because technological progress in the field of obstetrics and gynaecology facilitates detection of foetal defects or chromosomal abnormalities prior to birth and even prior to conception,⁵⁷ an increased standard of care is placed upon medical practitioners in this field. He states:

"An obligation thus results to apprise parents of the availability of such procedures, as well as to provide accurate information regarding test results and potential physiological aberrations. Thus, liability ensues where the attendant physician fails to inform parents properly of the risk of producing a defective child, thereby depriving

⁴⁵ *op cit* p 128.

⁴⁶ **Gildiner v Thomas Jefferson University Hospital** 451 F. Supp. 692 Pa. (1978), **Berman v Allan** 80 N.J. 421, 404, A. 2d 8 (1979).

⁴⁷ *op cit* p 129.

⁴⁸ **Stribling v de Quevedo** 288 Pa. Sup. 436, 439 A.2d 240 (1981).

⁴⁹ **Jacobs v Theimer** 519 S.W. 2d 846 Tex. (1975).

⁵⁰ **Robak v United States** 658 F. 2d 471 (1981).

⁵¹ *ibid.*

⁵² **Stribling v de Quevedo**.

⁵³ **Naccash v Burger** 290 S.E. 2d 825 Va. (1982).

⁵⁴ **White v United States** 510 F. Supp. 146, 149 D.Kan. (1981).

⁵⁵ **White v United States**.

⁵⁶ 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 91.

⁵⁷ see ch 11 where new genetic tests are discussed.

them of the right to make an informed decision regarding conception or abortion (that is, negligent genetic counselling). Moreover, the general allowing of abortion of an irreparably seriously handicapped child is indicative of society's response to defective fetuses. Such a response may be generated by the reality that neither the state nor parents can afford the burden of a handicapped child.⁵⁸

Harer⁵⁹ feels that because the birth of child no longer is considered an inevitable act of nature but rather a perfectly planable enterprise, family planning fails in the first instance if an unplanned child is born despite the parents' wish not to have a child,⁶⁰ secondly when parents' wishes to have a normal child is defeated⁶¹ and lastly if the birth of a desired child is prevented or unattainable.⁶²

Others⁶³ agree with this premise and write that since the *Roe*⁶⁴ era medical science's ability to predict and detect defects in the unborn has expanded significantly.⁶⁵ Prenatal screening and diagnosis have changed society's viewpoint on genetic possibilities and birth expectations in such a way that wrongful birth litigation is a logical and necessary development in tort law in reaction to these medical advances and societal viewpoint changes.⁶⁶ This new⁶⁷ type of litigation could be explained as a reaction to developments in medical science and is designed to protect the constitutional rights of parents and protect societal interests in promoting quality prenatal health care.⁶⁸

It is submitted that recognition and availability of wrongful birth actions will ensure that

⁵⁸ *ibid* p 95.

⁵⁹ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 89.

⁶⁰ *ie* wrongful conception.

⁶¹ typical wrongful birth cause of action.

⁶² which set of facts traditionally does not fall in the wrongful birth scope of actions.

⁶³ Anon. 1987. Wrongful Birth Actions: The Case against Legislative Curtailment. *Harvard Law Review* (100), 2017.

⁶⁴ *Roe v Wade* 410 U.S. 113 (1973) see next fn.

⁶⁵ see ch 11 where modern genetic tests are discussed.

⁶⁶ *op cit* p 2021.

⁶⁷ the first true wrongful birth action was instituted in *Gleitman v Cosgrove* (1967) *infra*.

⁶⁸ *op cit* p 2022.

physicians exercise due care in prenatal counselling and provide accurate information necessary to make informed procreative decisions.⁶⁹

Not all authors, however, support the premise that medical advances have had positive results. Faircloth⁷⁰ is of the opinion that the extraordinary advancements in medical technology have been accompanied by a corresponding rise in efforts to "lay blame for life's vicissitudes at the feet of others". As an example of this statement he names the new birth-related causes of action⁷¹ and quotes:⁷²

"But one little thing has been overlooked in their preoccupation with our wonderful new ability to take the forces of nature and harness them. Our scientific and intellectual advances were not accompanied by similar moral strides...Technology, instead of making us morally better, has been accompanied by a time of moral disintegration."⁷³

Bodgan⁷⁴ is of the opinion that wrongful birth actions originated from a variety of contributing factors. Not only does he agree with the vital influence that legal abortions have had on wrongful birth litigation,⁷⁵ but he also reminds us of the importance of factors such as the dramatic increases in the number of sterilization operations⁷⁶ and more effective prenatal diagnostic techniques⁷⁷ which in combination result in ever growing numbers of wrongful birth actions.

3. Position in the United States of America

3.1 American legal principles

⁶⁹ *ibid.*

⁷⁰ 1994. Keel v Banach: Alabama gives life to Wrongful birth actions. Should we sue for malpractice? *Cumberland Law Review* (24:3), 545.

⁷¹ such as wrongful conception, wrongful birth and wrongful life actions.

⁷² *ibid.*

⁷³ *ibid* - quoted from A.W. Tozer, *Faith Beyond Reason* (1989), 122.

⁷⁴ *op cit*, p 124.

⁷⁵ possible after the decision of *Roe v Wade*.

⁷⁶ Bodgan *ibid* reports that there was an increase of 500 000 sterilization procedures performed between 1971 and 1978 - this is indicative of the change in societal attitudes in the time of genetic science's introduction to the broad public.

⁷⁷ see ch 11.

It seems as if the majority of American courts have recognized the wrongful birth cause of action in negligence, thereby basing recovery on medical malpractice/ negligence claims. To succeed with a negligence claim the traditional elements have to be proven⁷⁸ and a plaintiffs must accordingly show that the defendant owed them a duty to use reasonable care in giving genetic counselling; or in performing an abortion; or sterilization procedure.⁷⁹ The plaintiffs must further prove that defendant's conduct constituted a breach of a duty of care owed to the plaintiffs and that the defendant's negligent conduct proximately caused injury to the plaintiffs.⁸⁰ Some plaintiffs have founded their claims on breach of contract or breach of warranty.⁸¹

It is reported⁸² that "virtually every court since *Roe* that has considered the validity of a wrongful birth cause of action has upheld it".

Bey-Berkson⁸³ agrees that the majority of American courts have recognized the wrongful birth cause of action, but comments that the damages recoverable vary tremendously among jurisdictions. She reports that the negligent act or omission by the physician precluded an informed parental decision either to prevent conception or to terminate the pregnancy. It is further reported that the bulk of the courts find that the failure to provide adequate genetic counselling, falls within the existing frameworks of a traditional negligence action or the doctrine of informed consent.

Bey-Berkson⁸⁴ makes a fundamental distinction between those courts that treat wrongful birth litigation as a cause of action for negligence; and those courts that explicitly view this type of litigation as a *separate cause of action* for wrongful birth or wrongful life.⁸⁵

⁷⁸ see Faircloth's criticism of the incorrect application of the traditional tort framework in wrongful birth actions *infra*.

⁷⁹ see ch 4 where medical negligence is discussed in more detail.

⁸⁰ see ch 2 where the South African elements of delict are discussed.

⁸¹ **Hartke v McKelway** *supra* - see ch 2 where breach of contract and warranty is discussed further.

⁸² Anon. 1987, *op cit* p 2018.

⁸³ 1988. Wrongful Life, Wrongful Birth: A Pathfinder for a Legal and Moral Dilemma. **Legal Reference Services Quarterly** (8:1), 63.

⁸⁴ *ibid*.

⁸⁵ *ie* there are basically two schools of thought: one believes that novel actions could be founded in the traditional tort framework, the other argues that unique causes of action should be introduced to cater for new types of litigation.

3.2 Historic development of cases

The first wrongful birth action was instituted in New Jersey in 1967. In **Gleitman v Cosgrove**⁸⁶ the court denied the action of the plaintiff on grounds of public policy, as anti-abortion legislation was still in place at that time.⁸⁷ The court reasoned that because public sentiment concerning abortions was so negative, no cause of action was proven by the plaintiff.⁸⁸ An additional obstacle was another public policy viewpoint, namely that of "the impossibility to measure damages in being the mother and father of a defective child".⁸⁹

In casu the basis of the claim was the birth of a seriously handicapped infant⁹⁰ brought about by the defendant-physician who negligently failed to inform the plaintiff of the high probability of such impairments occurring as a result of the plaintiff's contraction of German measles⁹¹ during her pregnancy.⁹²

Grobe⁹³ explains that there are basically two reasons why wrongful birth actions could not succeed prior to **Roe**. Firstly because the plaintiffs could not claim that the physician's failure to inform them *caused* the birth defect and secondly the parents could not prove that such information would have prevented the impaired child since eugenic abortions were illegal in most states at that time.

A definite shift in public policy concerning the issue of abortion was established in 1973 by the landmark case of **Roe v Wade**.⁹⁴ As the right to prevent the birth of a potentially handicapped

⁸⁶ 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

⁸⁷ see fn 3 *supra*.

⁸⁸ therefore, even if the physician had fulfilled his duty to inform and had warned them in time, it would make no difference - the court stated that "the right of the child to live is greater than and precludes the parents' right not to endure emotional and financial injury".

⁸⁹ *ibid* at 29-30, 227 A. 2d 693, the court was unable "to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."

⁹⁰ the infant was born deaf, blind and mentally retarded.

⁹¹ see ch 11 where the detrimental effects of *Rubella syndrome* is further discussed.

⁹² see ch 5 where a physician's duty to inform is discussed in detail.

⁹³ *op cit* p 718.

⁹⁴ 410 U.S. 113 (1973) - refer to ch 3 for a more detailed historical record on the acknowledgement of woman's right to self determination and abortion.

child was now recognized by law, the basis of wrongful birth actions was in effect endorsed and divergent judgments decided on similar *pre Roe* facts, soon followed. By 1990, 17 states in America have recognized a cause of action for wrongful birth.⁹⁵

In *Jacobs v Theimer*,⁹⁶ for example, the Texas Supreme Court allowed damages for the medical expenses in a successful wrongful birth action. In the case of *Becker v Schwartz*⁹⁷ a wrongful birth action also succeeded and pecuniary damages were recovered for the institutional care of a child born with *Down's syndrome*, following the negligent failure of the defendant-physician to inform of and advise an amniocentesis in such a case of advanced age for pregnancy.⁹⁸ Satisfaction for emotional pain and suffering was, however, denied. The court stated that such recovery could only be allowed if it were specifically authorized by legislation.⁹⁹ In contrast to this refusal of non-patrimonial damages, the New York Supreme Court in

⁹⁵ (According to Berenson *op cit* p 899.) These states are:
Alabama - *Robak v United States* 658 F.2d 471 7th Cir. (1981);
California - *Andalon v Superior Court* 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984);
District of Columbia - *Haymon v Wilkerson* 535 A.2d 880 D.C. (1987);
Florida - *Moores v Lukas* 405 So. 2d 1022 Fla. Dist. Ct. App. (1981);
Illinois - *Siemieniec v Lutheran Gen. Hosp.* 117 Ill. 2d 230, 512 N.E.2d 691 (1987);
Louisiana - *Pitre* 530 So.2d 1151;
Maine - *Me. Rev. Stat. Ann. Tit. 24, § 2931 Supp.* (1988);
Michigan - *Profitt v Bartolo* 162 Mich. App. 35, 412 N.W.2d 232 (1987);
New Hampshire - *Smith v Cote* 128 N.H. 231, 513 A.2d 341 (1986);
New Jersey - *Procanic v Cillo* 97 N.J. 339, 478 A.2d 755 (1984);
New York - *Becker v Schwartz* 46, N.Y. 2d 401, 386 N.E.2d 807, 413 N.Y.S. 2d 895 (1978);
North Carolina - *Gallagher v Duke Univ.* 638 F.Supp. 979, 852 F.2d 773 4th Cir. (1988);
Pennsylvania - *Speck v Finegold* 497 Pa. 77, 439 A.2d 110 (1981);
South Carolina - *Phillips v United States* 508 F. Supp. 544 D.S.C. (1981);
Texas - *Jacobs v Theimer* 519 S.W.2d 846 Tex. (1975);
Virginia - *Naccash v Burger* 223 Va. 406, 290 S.E.2d 825 (1982);
Washington - *Harbeson v Parke-Davis, Inc.* 98 Wash. 2d 460, 656 P.2d 483 (1983);
West Virginia - *James G. v Caserta* 332, S.E.2d 872 W.Va. (1985); and
Wisconsin - *Dumer v St. Michael's Hosp.* 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

⁹⁶ 519 SW 2d 846 (1975).

⁹⁷ 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

⁹⁸ plaintiff was 37 years old at time of her pregnancy (studies have shown that there is a direct link between the age of a mother and the risk of her baby being affected by *Down's syndrome*) - it is common medical practice to refer a pregnant patient above the age of 30 years for an amniocentesis, see ch 11.

⁹⁹ see ch 10 dealing with wrongful birth statutes and also ch 12 for a proposed legislative solution to the wrongful birth debate.

Karlsons v Guerinot¹⁰⁰ found that claims for pain, suffering as well as mental anguish, were maintainable.¹⁰¹

In the judgment of **Berman v Allen**¹⁰² the supreme court of New Jersey partly reversed their previously held 1967-viewpoint¹⁰³ by allowing satisfaction for the emotional anguish suffered by the plaintiff in a wrongful birth action. An interesting aspect of this case was that the court¹⁰⁴ refused to award damages for the maintenance of the impaired child.¹⁰⁵ In motivating its decision the court stated that such compensation would be disproportionate to the defendant's culpability and was also too speculative.¹⁰⁶

It would seem as if a shift in focus from satisfaction for non-patrimonial damages to special damages, awarded for child-rearing expenses and increased medical costs, occurred in the early 1980's. In **Phillips v United States**¹⁰⁷ a South Carolina court awarded recovery for wrongful birth plaintiffs in such a manner. *In casu* a physician once again failed to warn¹⁰⁸ his pregnant patient of an increased risk of *Down's syndrome* indicated by a history of this disorder in her family and thereby deprived the plaintiff of an opportunity to abort the impaired foetus.

Speck v Finegold¹⁰⁹ is another remarkable example of exceptional medical negligence in spite

¹⁰⁰ 57 App. Div. 2d 73, 394 N.Y.S. 2d 933 (1977).

¹⁰¹ this court, however, did not award child-rearing expenses.

¹⁰² 80 NJ 421, 404 A 2d 8 (1979).

¹⁰³ as expressed in **Gleitman v Cosgrove**, *supra*.

¹⁰⁴ similar to the **Karlsons** decision.

¹⁰⁵ I believe that this reasoning is sound and its result a fair one - since the parents indeed planned to have a child and accordingly were prepared to maintain such a child it is only fair that disgruntled parents be compensated for their emotional suffering - they should, however, also be reimbursed for additional (future) expenses caused by the unplanned condition of handicap or genetic disease - see Gevers, J.M.K. and Leenen, H.J.J. 1986, *op cit* p 64 (*infra*) who similarly supports this line of reasoning.

¹⁰⁶ I respectfully disagree with this argument - accurate financial estimations can readably be made as to the approximate future expenses related to the general maintenance, education and other costs reasonably to be expected for a specific child: such calculations are routinely made and accepted in judgments worldwide.

¹⁰⁷ 508 F Supp. 544 (1981) 575 F Supp. 1309 D.S.C. (1983).

¹⁰⁸ ...and advise of existing genetic test that could be implemented to ascertain possible indications of the disorder.

¹⁰⁹ *supra*.

of modern technology and advanced medical science.¹¹⁰ In this case the wrongful birth plaintiffs not only underwent a negligently performed and subsequently failed sterilization procedure,¹¹¹ but also had to deal with the trauma of a failed abortion attempt¹¹² which resulted in the birth of a seriously impaired child.¹¹³ The Supreme Court of Pennsylvania followed the overwhelming majority of judgments given by that time and recognized the plaintiffs claim.¹¹⁴

In **Naccash v Burger**¹¹⁵ the Virginia Supreme Court compensated the parents of a child suffering from *Tay-Sachs disease*.¹¹⁶ In spite of undergoing genetic tests the plaintiffs conceived an affected child because of the negligence of a laboratory. Another successful wrongful birth action was instituted in **Harbeson v Parke-Davis Inc.**¹¹⁷ Here a physician acted negligently by failing to warn his patient of an increased risk of birth defects due to her use of the drug *Dilatin* during pregnancy. A handicapped child was born and Mrs. Harbeson was compensated for all extraordinary expenses caused by the impairment as well as her mental anguish and emotional stress suffered as a result of the handicapped child.

3.3 A new look at wrongful birth

¹¹⁰ see the case discussed in ch 8 for its concomitant wrongful life relevance.

¹¹¹ a vasectomy was unsuccessfully performed on Mr. Speck, known to be afflicted with the inheritable disease from which their other children also suffered.

¹¹² although Mrs. Speck informed her physician that she believed that she was still pregnant after the abortion procedure, he assured her that the pregnancy was terminated.

¹¹³ the infant suffered from *neurofibromatosis* - see ch 11 for a discussion of this condition.

¹¹⁴ A.H.S. 1983. Torts. **Journal of Family Law** (21:1) reports on p 169 that in the **Finegold** judgment, four varying opinions were expressed: the lead opinion, which permitted a tort cause of action for both the parents and the child (wrongful life action); a concurring opinion which supported the lead opinion's conclusions; a partially concurring opinion which permitted the parents a tort cause of action, but not the child; and a one-man dissent which denied both the parents and the child a tort cause of action. For a detailed discussion on the reaction from the Pennsylvania State Legislator to this judgment, see ch 10 dealing with wrongful birth statutes.

¹¹⁵ 290 SE 2d 825 (1982).

¹¹⁶ since both parents have to be carriers of *Tay-Sachs* for the children to be afflicted, the laboratory only tested the husband (and would test the wife only once they found the husband to be a carrier); his results were unfortunately confused with that of another - see ch 11 for a further review on *Tay-Sachs disease*.

¹¹⁷ 98 Wash. 2d 460, 656 P. 2d 483 (1983).

In the recent Alabama case of **Keel v Banach**¹¹⁸ a wrongful birth action was allowed.¹¹⁹ In spite of the fact that Dr. Banach performed two sonograms during the pregnancy, Justine Keel was born with multiple birth defects.¹²⁰ The plaintiff-parents instituted action based on medical negligence against Dr. Banach and asserted that he was negligent on at least two accounts, namely that he failed to meet the standard of prenatal care by firstly failing to further investigate questionable sonogram findings¹²¹ and secondly by failing to warn his patients of increased genetic risk after their disclosure that Mr. Keel had previously fathered an *anencephalic*¹²² stillborn. Under such circumstances an amniocentesis should¹²³ have been performed. The plaintiffs alleged that they would have aborted the pregnancy, had the defects been discovered in time.

The court followed the "extraordinary expense" view and allowed all costs pertaining to the child's abnormal condition, including hospital and medical cost, costs of medication and costs of education and therapy for the child. The court additionally awarded any medical and hospital expenses already incurred as a result of the physician's negligence, damages for the physical pain suffered by the mother, loss of consortium and satisfaction for the mental and emotional anguish the parents have suffered.¹²⁴

In reaching its decision the court considered various public policy arguments previously advanced in favour of wrongful birth. These arguments include:

- wrongful birth is a necessary extension of tort principles;
- social interest in reducing and preventing birth defects; and

¹¹⁸ 624 So. 2d 1022 Ala. (1993).

¹¹⁹ the trial court granted summary judgment for Dr. Banach, whereas the Alabama Supreme Court allowed the action on appeal.

¹²⁰ *ibid* at 1023 - the child had one to few vessel umbilical cords, a short cord, *ventriculomegaly*, absent right leg, imperforate anus, one testicle, one kidney, a vertebrate anomaly in the lumbar sacral region, *hydrocephaly*, a large fluid-filled sac extending off the right aspect of the sacrum consistent with *meningocele (spina bifida)* and died at age 6.

¹²¹ the plaintiffs alleged that the reasonable physician would have noticed the "lemon sign", which is a condition recognisable in foetuses with an oblong head and with open frontal bones.

¹²² see ch 11 where this condition is discussed in more detail.

¹²³ according to the prevalent medical practice.

¹²⁴ note that no damages were awarded for costs associated with raising a normal, healthy child.

- the notion that refusal to recognize wrongful birth frustrates the principles of compensation, deterrence of negligence and encouragement of due care.¹²⁵

Faircloth¹²⁶ criticises the judgment from his viewpoint that wrongful birth actions should not be allowed. He believes that the problems presented by causation, harm and damages illustrate that wrongful birth is not an extension of existing tort principles but rather "a tort without precedent and at variance with existing precedents both old and new."¹²⁷ Not only does he find that wrongful birth is a matter of "more policy than law",¹²⁸ but he concludes that:

"Finally, because courts must contradict themselves to find a cause related to a compensable harm in order to allow recovery in wrongful birth actions, rejection of the cause of action makes the law more consistent and equitable."¹²⁹

3.4 Damage viewpoints

An important legal principle that should be remembered in consideration of awarding damages, is the fact that parents¹³⁰ have a common law legal responsibility towards their children to provide maintenance and medical expenses. It is therefore submitted that where parents in wrongful birth cases had to incur extraordinary costs in providing and caring for the child, these additional costs should in principle be compensable.

Horowitz¹³¹ reports that the current trend in wrongful birth cases, unlike cases involving healthy children,¹³² appears to be that courts treat the parent's claim as a traditional malpractice action. She explains that if the child's impairment is serious or fatal, courts generally award complete

¹²⁵ *op cit* p 1030-31.

¹²⁶ *op cit* p 555.

¹²⁷ quoted from *Wilson v Kuenzi* 751 S.W. 2d 741 Mo. (1988) at p 745.

¹²⁸ it is my submission that because wrongful birth encompasses several important social issues, it is obvious and plausible that public policy should assist in protecting individuals' interests in this regard - specialised legislation could also be considered as a solution to the many 'wrongful life challenges', see ch 12.

¹²⁹ *ibid.*

¹³⁰ in their role as guardians of the child.

¹³¹ 1983. The Wrongful birth cause of action. *Annual Survey of American Law (Torts II)*, 687.

¹³² wrongful conception actions.

damages,¹³³ whereas if the child's defect is mild, courts usually apply the benefit rule to offset the damages recoverable. She¹³⁴ concludes:

"The apparent victory achieved by the wrongful life plaintiff as result of the Turpin and Harbeson decision may be largely symbolic. Since most courts accept the parents' right to recover the medical expenses incurred in raising an impaired child, the child's separate claim will apply only to expenses incurred after reaching the age of majority. In many cases, however, the child's defective condition is so severe that does not live to majority. The Turpin and Harbeson decisions, therefore, may have little practical effect."

3.4.1 Different approaches

Harrer¹³⁵ attempts to classify the various damage awards-viewpoints pertaining to wrongful birth actions in the United States. There seems to be a variety of different perspectives reflected in the different decisions.

3.4.1.1 Additional expenses

The first notable viewpoint only allows additional expenses to the normal maintenance need of the child. The majority of authorities in the United States permit parents of children born with substantial mental or physical defects to recover damages for the special medical, educational and other necessary expenses associated with the rearing of such children to the age of majority. Here only extraordinary rearing costs are awarded.¹³⁶ Harrer states that these courts are usually also the same jurisdictions that prohibit all compensation for child-rearing expenses incurred by parents of healthy children in wrongful conception actions.¹³⁷

3.4.1.2 Full compensation

¹³³ damages for emotional injury are similarly be balanced against emotional benefits.

¹³⁴ *op cit* p 692.

¹³⁵ *op cit* p 99.

¹³⁶ **Harbeson v Parke-Davis Inc** 98 Wash. 2d 460, 656 P. 2d 483 (1983) and **Jacobs v Theimer** 519 S.W. 2d 846 Tex. (1975); **Gallagher v Duke Univ.** 638 F. Supp. 979 N.C. (1986); **Lininger v Eisenbaum** 764 P. 2d 1202, 1210 n.10 Colo. (1988) and **Viccaro v Milunsky** 406 Mass. 777, 551 N.E. 2d 8 (1990), to name but a few.

¹³⁷ Schoonenberg *op cit* p 64 reports that damages are usually limited to: medical expenses during minority of the child; pregnancy and birth related costs of the mother and also compensation for any immaterial damages suffered.

The second group of courts allow full compensation¹³⁸ of which Harrer notes that most have also authorised compensation for the reasonable child-rearing costs of normal children.¹³⁹ This liberal view is often taken by courts who believe that a full award is necessary since the support obligation of parents for a severely impaired child is likely to last well beyond the age of the child's majority. The parent's award usually takes into consideration the increased possibility of extensive and long term support expenses.

3.4.1.3 Benefit theory application

A third perspective is noted to allow full recovery while at the same time reducing all accruing benefits associated with the child's birth.¹⁴⁰ The offset of benefits of parenthood is done in terms of the **Restatement of Torts**.¹⁴¹ Among jurisdictions that support this concept some courts apply the so-called tort benefit rule¹⁴² and reduce the award for the value of any benefits derived from such child-rearing.

The reality of most wrongful birth children is that their particular impairment will remain with them for the rest of their lives. It is reported¹⁴³ that some courts¹⁴⁴ therefore take into consideration the fact that expenses would be incurred beyond the age of majority and accordingly include the increased potential for these support expenses.

Grobe¹⁴⁵ observes that courts have in application of the "incidental benefit rule"¹⁴⁶ followed a

¹³⁸ *ie* allow the parents of an impaired child total recovery for child-rearing expenses, incl ordinary as well as extraordinary costs - **Robak v United States** 658 F. 2d 471 (1981).

¹³⁹ in wrongful conception actions.

¹⁴⁰ **Ochs v Borrelli** 187 Conn. 253, 445 A. 2d 833 (1982); **Burke v Rivo** 406 Mass. 764, 551 N.E. 2d 1 (1990).

¹⁴¹ (2nd) § 920 (1977): "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that it is equitable." *ibid*.

¹⁴² see ch 2 on the working of the benefit rule.

¹⁴³ Harrer *op cit* p 100.

¹⁴⁴ **Procanic v Cillo** 97 N.J. 339, 478 A. 2d 755 (1984); **Rivera v State of New York** 94 Misc. 2d 157, 163 N.Y.S. 2d 950, 954 (1978).

¹⁴⁵ *op cit* p 735.

¹⁴⁶ or the common "benefit rule".

"markedly different trend" in wrongful birth than in wrongful conception actions.¹⁴⁷ Here, it is submitted, one should keep in mind the fundamental difference in these actions, namely that wrongful birth parents were aware of and were prepared to face the burden of maintenance for a healthy child. A valid point of criticism against the general application of the benefit rule is accordingly that many courts fail to correctly the rule as was intended by the legislator.¹⁴⁸

Andrews¹⁴⁹ writes with regard to the statement that the benefits of having a child should offset any damage award:

"More importantly we would not even consider the theory that the joy of parenthood should offset the damages. Would anyone in their right mind suggest that where a healthy fetus is injured during delivery the joy of parenthood should offset the damages? There is no more joy in an abnormal fetus come to full term than a normal fetus permanently injured at delivery. Both are heartbreaking conditions that demand far more psychological and financial resources than those blessed with normal children can imagine."

3.4.1.4 No compensation

A final group of judgments deny recovery altogether.¹⁵⁰ Some judges completely prohibit recovery of child-rearing expenses, even in the event where a seriously impaired child is born. Many of these rulings are defended by advancing public policy considerations and by emphasizing the difficulty to ascertain damages.¹⁵¹ It is further reported that recent legislation¹⁵² in some states now expressly prohibits actions for wrongful birth.

3.4.2 General discussion

¹⁴⁷ wrongful birth parents have been allowed to recover only additional cost over and above the normal rearing costs of children, instead of being entitled to seek all damages flowing from the defendant's negligence - in both instances the benefits of childbirth is set-off against the damages.

¹⁴⁸ as stated in the *Restatement of Torts* (2nd) § 920 (1977).

¹⁴⁹ 1992. *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*. *Houston Law Review* (29:1), 158.

¹⁵⁰ *Steward v Long Island College Hospital* 58 Misc. 2d 452, 296 N.Y.S. 2d 41 (1968), *mod* 35 A.D. 2d 531 N.Y.S. 2d 502 (1970), *appeal dismissed* 27 N.Y. 2d 804, 264; *Gleitman v Cosgrove* 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

¹⁵¹ see discussion of cases *supra*.

¹⁵² see ch 10 on wrongful birth statutes.

Bodgan¹⁵³ is of the opinion that the major controversy over damage awards in wrongful birth suits concerns the consequences of an afflicted child's birth. He has identified two competing themes in courts' damage policies concerning wrongful birth cases: the first approach stating that public policy requires courts not to award any damages;¹⁵⁴ and the second asserting that the courts are to apply traditional tort doctrine, holding the defendant liable for all harm that directly and foreseeably results from his negligence.¹⁵⁵

Even though abortion in America has been made lawful by the *Roe* decision,¹⁵⁶ the concern has been raised that recognition of wrongful birth would encourage unnecessary abortions. Faircloth¹⁵⁷ explains that there is no real danger, as foreseen by anti-abortion critics of wrongful birth that recognition of these actions will cause an increase in abortions:

"In purely logical terms, if wrongful birth claims increase, the actual abortions should be decreasing, because the wrongful birth plaintiff is seeking recovery for an abortion that never happened. Allowing wrongful birth causes of action might more appropriately be said to validate or sanction the concept of abortion."¹⁵⁸

Bodgan¹⁵⁹ reports that some courts¹⁶⁰ have attempted to reconcile the differing approaches to the allocation of damage awards by permitting plaintiffs to recover damages due to economic and emotional suffering, but reducing the damage award by the amount of benefit plaintiff's receive from being parents.¹⁶¹ This observation coincides with the assessment of Harrer *supra*.

¹⁵³ *op cit* p 135.

¹⁵⁴ in *Gleitman v Cosgrove* public policy was directed against abortion - after *Roe*, courts rejecting wrongful birth on public policy grounds have used arguments such as "windfall to parents" and undue burden on defendant, as in *Berman v Allan* 80 N.J. 421, 404, A. 2d 8 (1979) and *Naccash v Burger* 290 S.E. 2d 825 Va. (1982).

¹⁵⁵ *Speck v Finegold*.

¹⁵⁶ see ch 3.

¹⁵⁷ *op cit* p 545.

¹⁵⁸ *op cit* p 556.

¹⁵⁹ *op cit* p 136.

¹⁶⁰ *Ochs v Borrelli, Eisbrenner v Stanley* 106 Mich. App. 351, 308 N.W. 2d 209 Mich Ct. App. (1981).

¹⁶¹ see ch 2 where the benefit theory is discussed in more detail.

Grobe¹⁶² agrees with the observation that different courts approach the awarding of damages with regards to "recovery for the cost of raising the child beyond those occasioned by the birth defect", in various different manners. He confirms that expenses occasioned by the birth impairments are generally allowed without too many problems. He further maintains¹⁶³ that effect should be given to the primary purpose of tort law, in that an injured party should be compensated for all injuries sustained due to the wrongful conduct of another.¹⁶⁴

Grobe¹⁶⁵ refers to section 901 of the 2nd Restatement of Torts wherein it is stated that the measure of damages is established at the hand of "the purposes of tort actions, which are to give compensation, indemnity or restitution of harms; to determine rights; to punish wrongdoers¹⁶⁶ and deter wrongful conduct and to vindicate parties and deter retaliation or violent and lawful self-help."

Robertson¹⁶⁷ submits that wrongful birth plaintiffs should be compensated for the ordinary costs of raising a healthy child plus any extra cost, such as for medical treatment, involved in raising a severely handicapped child.¹⁶⁸

3.4.3 Patrimonial and non-patrimonial damages

A distinction is made between the courts' approaches towards patrimonial and non-patrimonial damages:¹⁶⁹

3.4.3.1 Patrimonial damages

¹⁶² *op cit* p 732.

¹⁶³ *ibid.*

¹⁶⁴ therefore all damages proximately caused by a wrongdoers negligence.

¹⁶⁵ *op cit* p 733.

¹⁶⁶ note that although the South African compensation theory does have a certain secondary element of retribution or reprisal associated to it, no direct punishment for the wrongdoer is intended by it and such a apprehension of punishment is mostly found in the injured party's subjective response to the damage award - see Visser's discussion on the theories behind compensation in ch 2.

¹⁶⁷ 1982. Wrongful Life. *Modern Law Review* (45), 697.

¹⁶⁸ *ie* full compensation.

¹⁶⁹ Grobe *op cit* p 734.

Many American courts¹⁷⁰ allow compensation for the patrimonial damages occasioned by the handicapped condition of children in wrongful birth litigation. An argument that has been raised against compensation in this fashion is that plaintiffs have the opportunity to mitigate their losses by giving the source of the damage, namely the child itself, away for adoption.¹⁷¹ Since it can only be expected from a plaintiff to take reasonable steps in limiting damages,¹⁷² it has now been pertinently established that it is unreasonable to expect from a parent to place a child up for adoption under these circumstances.¹⁷³

Block¹⁷⁴ reports that the few courts, such as *Ziemba v Sternberg*¹⁷⁵ and *Sorkin v Lee*,¹⁷⁶ that have actually applied the avoidance of consequence doctrine have found as a matter of law that reasonable mitigation includes abortion in cases where the pregnancy is discovered early on¹⁷⁷ and the mother's health is such that an abortion is not too risky.¹⁷⁸ It is submitted that South African courts will not expect a plaintiff to go to such lengths to mitigate damages, as only reasonable steps could be required from such a plaintiff.

Block¹⁷⁹ states, however, that the vast majority of courts have rejected the avoidance of consequences doctrine, holding as a matter of law that no plaintiff should be required to abort the foetus or place the child for adoption in order to mitigate damages.

¹⁷⁰ *Dumer v St Michael's Hospital* 69 Wis. 2d 766, 233 NW 2d 372 (1976); *Harbeson v Parke-Davis Inc* 98 Wash. 2d 460, 656 P. 2d 483 (1983); *Jacobs v Theimer* 519 S.W. 2d 846 Tex. (1975); *Becker v Schwartz* 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978); *Turpin v Sortini* 182 Cal. Rptr. 337 (1982); and *Gildiner v Thomas Jefferson University Hospital* 451 F. Supp. 692 Pa. (1978).

¹⁷¹ the adoption issue is considered in ch 3.

¹⁷² in South African law it is clear that only reasonable steps are expected in mitigation of loss: *Hazis v Transvaal & Delagoa Bay Investment Co Ltd* 1939 AD 372; *Swart v Provincial Insurance Co Ltd* 1963 (2) SA 630 (A); *Modimogale v Zweni & another* 1990 (4) SA 122 (B).

¹⁷³ *Schork v Huber* 648 S.W. 2d 861, Ky. (1983) and *Troppi v Scarf* 31 Mich. App. 240, 187 N.W. 2d 511 (1971) - a wrongdoer must "take his victim as he finds him", indicating that a defendant cannot complain if the plaintiff does not have the mental and/ or emotional strength to place a child for adoption.

¹⁷⁴ 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. *Fordham Law Review* (53:4), 1107.

¹⁷⁵ 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

¹⁷⁶ 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980).

¹⁷⁷ (in the first trimester).

¹⁷⁸ *op cit* p 115.

¹⁷⁹ *op cit* p 116.

A suggested¹⁸⁰ solution to tackle the mitigation question in American law¹⁸¹ is:

"A better approach, and the one intended in the Restatement (Second) of Torts, is to leave the issue of mitigation to the jury. The test is whether a reasonable person in the plaintiff's circumstances would have either had an abortion upon discovery of the pregnancy or placed the child for adoption upon its birth. The jury would consider several circumstances: the religious, moral and ethical beliefs of the parents, the point at which the pregnancy was discovered, the health of the mother, the parents' prior history of abortion or adoption placement, the reasons the parents sought to prevent the pregnancy in the first place, and the parents' reason for not wanting to place the child for adoption."

3.4.3.2 *Non-patrimonial damages*

Grobe¹⁸² reports on certain courts¹⁸³ that have recognized damages for emotional pain and suffering while at the same time applying the benefit rule. In so-doing these courts have decreased the plaintiffs' compensation with the emotional benefits derived from parenthood.¹⁸⁴

Other courts¹⁸⁵ have rejected this notion, doubting whether wrongful birth parents have any pleasure in watching their children suffer each day.¹⁸⁶

"We cannot offset the well recognized, foreseeable expenses of child rearing with the joy we can only hope for. We cannot disregard the parents' claim that they expect distress from the disruption of their careful family planning, but allow the tortfeasor an

¹⁸⁰ Block *op cit* p 1119.

¹⁸¹ South Africa no longer has a jury system - it is submitted, however, that the presiding judge could similarly apply the principles suggested by Block with a jury in mind.

¹⁸² *op cit* p 736.

¹⁸³ **Becker v Schwartz** 46 N.Y. 2d 401, 386 N.E. 2d 807 N.Y.S. 2d 895 (1978).

¹⁸⁴ I submit that the correct application of the benefit rule as set out in § 920 of the **Restatement of Torts (2nd)** of 1977 is more frequently maintained under these circumstances, when emotional benefits are taken into consideration when calculating damages for emotional losses, than in claims for patrimonial loss - in this way the correct result will suffice, as similar categories of damage are set-off against similar benefits.

¹⁸⁵ **Schroeder v Perkel** 432 A. 2d 834 N.J. (1981), also **Schork v Huber** 648 S.W. 2d 861, Ky. (1983).

¹⁸⁶ depending on the nature and manifestations of the various types of genetic diseases and congenital birth defects.

offset for the bundle of joy he hopes to have contributed to their lives."¹⁸⁷

Some courts¹⁸⁸ apply the so-called "bystander rule"¹⁸⁹ when considering a claim for non-patrimonial damages. In terms of this rule recovery for emotional distress is only possible if the emotional injury was brought about by a shock sustained at childbirth, while other jurisdictions¹⁹⁰ maintain that witnessing the birth of an impaired child is sufficient grounds for emotional trauma.

"The wrongful birth claim involves injuries to physical, emotional, and economic interests, not just to a single interest in avoiding parenthood. The benefit rule provides that a benefit to any of these separate interests offsets the damages only to that interest, no to other interests that are harmed by the same act of negligence."¹⁹¹

4. Concerns for recognition

4.1 Arguments against wrongful birth

Various points of criticism have in the past been raised against wrongful birth litigation. In considering some of these arguments, special reference will be given to problems pertaining to causation, damages and public policy. A recent American case, *Keel v Banach*,¹⁹² will be scrutinised for this purpose as an exemplary judgment.

4.1.1 Causative challenge

Courts¹⁹³ and writers¹⁹⁴ alike have by occasion questioned whether the defendant-physician in wrongful birth is the proximate cause of the defective birth of the child and have accordingly rejected the notion that the failure to warn the parents of an increased risk in the pregnancy is

¹⁸⁷ *Schork v Huber*, p 866.

¹⁸⁸ *Andalon v Superior Court* 208, Cal. Rptr. 899, 901 (1984).

¹⁸⁹ see ch 2 for a discussion on this rule in South African law.

¹⁹⁰ *Blake v Cruz* 698 P. 2d 315, 319 Idaho (1984).

¹⁹¹ A.N.M. 1982. Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant. *Virginia Law Review* (68), 1326.

¹⁹² 624 So. 2d 1022 Ala. (1993).

¹⁹³ *Gleitman v Cosgrove* 49 N.J. 22, 227 A. 2d 689, 22 ALR 3d 1411 (1967).

¹⁹⁴ Andrews.1992, *op cit* p 149.

actionable.¹⁹⁵ The necessary causal link for liability based on tort is therefore disputed.¹⁹⁶

The **Banach** court¹⁹⁷ explained that "...a negligent act need not be the sole cause of the injury complained of in order to be the proximate cause of that injury". Faircloth¹⁹⁸ reports that the court further stated that since the cause of action in wrongful birth is fundamentally based on the defendant's failure to diagnose and inform his patients, the injuries to the foetus and who caused them are really irrelevant in a causation perspective:

"The nature of the tort of wrongful birth has nothing to do with whether a defendant caused the injury or harm to the child, but, rather, with whether the defendant's negligence was the proximate cause of the parents' being deprived of the opinion of avoiding a conception or, in the case of pregnancy, making an informed and meaningful decision either to terminate the pregnancy or to give birth to a potentially defective child."¹⁹⁹

4.1.2 A damage concern

A fundamental misapprehension can arise in wrongful birth damage assessment when the faulty approach is taken that the actual harm complained of is the infant's injury itself. The true grievance lies in the fact that parent's wishes for normal childbirth were shattered. Closely connected hereto are the far reaching consequences of life with disability or congenital anomalies and disease, such as exorbitant medical and educational expenses. Faircloth²⁰⁰ suggests that due to this problem in pinpointing the harm for which the courts would allow recovery, many judgments have been inconsistent. He believes that for this very reason varying and arbitrary damage awards have been given by the courts.²⁰¹

¹⁹⁵ note the point made by Andrews *supra*: "liability for a missed diagnosis in other areas of medicine was, and still is, common even though, in such cases, the physician did not cause the illness." - in my view this is a sound argument.

¹⁹⁶ related questions that arise are: how is it determined which patients are sufficiently at risk?; which tests are sufficiently predictive?; how long is the duration of the duty to warn of genetic risk?; do third parties have a right to know about a patient's genetic risk?

¹⁹⁷ *op cit* p 1022.

¹⁹⁸ *op cit* p 550.

¹⁹⁹ *ibid* p 1029.

²⁰⁰ *op cit* p 552.

²⁰¹ three mainstream approaches are identified, namely full recovery of all costs associated with the raising of the impaired child, the award of only special expenses associated with the child's defect and lastly additional recovery for the parents' emotional distress.

One of the most fierce points of criticism raised by Faircloth²⁰² against the **Banach's** judgment concerning damages, is that the court did not apply the general tort compensation principle that "the plaintiff should be put in the position that he would have been in, absent the defendant's negligence." He argues that by allowing recovery only for extraordinary expenses²⁰³ the court did not restore the plaintiffs to their original position, as this would only be the case if complete child-rearing expenses were also compensated.²⁰⁴

4.1.3 Policy concerns

Many of the policy concerns generally expressed by critics of wrongful life actions are also regularly asserted by wrongful birth critics.²⁰⁵ In the **Banach** case the defendant protested that if the cause of action was accepted, further litigation would follow which could possibly be subject to the risk of fraudulent claims. He argued that wrongful birth liability would furthermore place a heavy burden on obstetricians and gynaecologists which could lead to the increase of abortions.²⁰⁶ The defendant also feared that the plaintiffs' children would be adversely affected by recognition of the action.

An important concern raised, was that wrongful birth would have a negative impact on the disabled community. It is submitted that this might be a real concern, as I am personally also apprehensive that the true basis of wrongful birth might be misunderstood in such a way that the disabled community might feel prejudiced²⁰⁷ by the recognition of wrongful birth.²⁰⁸

After consideration of all the relevant aspects and questions pertaining to wrongful birth, Faircloth²⁰⁹ is not convinced of its virtue:

²⁰² *op cit* p 553.

²⁰³ relating to the child's impairments.

²⁰⁴ this is the only way in which the same result as an abortion, the plaintiffs' alternative, could be obtained. "The crux of the complaint is that the plaintiffs would have aborted absent the doctor's breach of duty. Absent Dr. Banach's negligence, the Keels would never have had Justine. Therefore, the original position is the one without the deformed child." *ibid*.

²⁰⁵ see ch 8 for various grounds of disapproval.

²⁰⁶ unnecessarily performed as preventive medicine.

²⁰⁷ see ch 9 where this plight is further discussed.

²⁰⁸ the court in **Banach** was, however, not impressed by these public policy arguments and rather followed the majority trend of authorities by allowing the action.

²⁰⁹ *op cit* p 558.

"Wrongful birth is a legal misnomer and creates more problems with causation, harm, and damages than could ever be solved. The only thing certain about Alabama's acceptance of wrongful birth is that much litigation is sure to follow."

He is further of the opinion that wrongful birth "forces doctors to facilitate the mother's abortion and forces society to conclude that non-existence is preferable to life with impairment. At the very least, courts should not allow recovery of damages that are connected with an infant's genetic injury."²¹⁰

4.1.4 Conclusion

Critics of wrongful birth actions contend that the relevant medical practitioner or medical institution is not liable, because the foetus²¹¹ suffered from a hereditary disease or other impediment before the defendant's negligence occurred. Physicians should therefore not be held responsible for the child's defects. It is my submission that, this argument, however, misconstrues the true nature of the wrongful birth claim in that the plaintiff does not blame the defendant for causing the handicapped childbirth, but rather seeks justice for the fact that plaintiff was deprived of the right to accept or reject a specific parental relationship.

4.2 A legislative solution?

Bodgan²¹² has an interesting viewpoint on legislative guidance for wrongful birth.²¹³ He is of the opinion that since courts recognize wrongful birth actions as a type of negligence claim, they do not require any explicit legislative sanction.²¹⁴ As reasoning behind this premise he refers to the judgment of **Naccash v Burger**,²¹⁵ where it was stated that no distinction should be made between a wrongful birth action and any other malpractice suit. Another reinforcing judgement is that of **Gildiner v Thomas Jefferson University Hospital**,²¹⁶ where the court pronounced that wrongful birth actions are actions in negligence and that the judiciary is competent to determine the boundaries of common law negligence doctrine.²¹⁷ He reports that numerous courts have in accordance with this view allowed wrongful birth claims and have

²¹⁰ *ibid.*

²¹¹ which is ultimately the reason for the litigation.

²¹² *op cit* p 132.

²¹³ see ch 10 where wrongful birth statutes are further discussed.

²¹⁴ *ie* wrongful birth statutes.

²¹⁵ 290 SE 2d 825 (1982).

²¹⁶ 451 F. Supp. 692 Pa. (1978).

²¹⁷ without legislative assistance.

allowed recovery in one way or another.²¹⁸ Be this as it may, it should be noted that many state legislators have consequently introduced wrongful birth statutes of which some restrict wrongful birth litigation, while many prohibit these actions altogether.²¹⁹

5. Position in Germany

5.1 Background

Harrer²²⁰ writes that while the first pregnancy related action was instituted in the United States of America as early as 1934²²¹ Germany, by contrast, only heard its first wrongful birth case as late as 1968.²²² In spite of their "late start" German courts have over the years independently developed very practical solutions to solve most wrongful life related problems, which approaches differ significantly from the solutions formulated in the United States and much of the rest of the world.

Much uncertainty encompassed the German legal system in recent times with regards to the question of legality of abortions.²²³ In spite of this confusion with regards to one of the most important basis of wrongful birth litigation,²²⁴ it could be concluded that this country principally acknowledges actions for wrongful birth.²²⁵ In a Supreme Court case decided on 22 November 1983²²⁶ the court awarded full maintenance costs²²⁷ to the parents of a child suffering from

²¹⁸ *op cit* p 133.

²¹⁹ see ch 10 where wrongful birth statutes are discussed in more detail.

²²⁰ 1994. Aspects of Failed Family Planning in the United States of America and Germany. *The Journal of Legal Medicine* (15), 89.

²²¹ in the matter of *Christensen v Thornby supra*.

²²² many reasons may be offered to explain this "containment" of new actions in Germany up to this late period.

²²³ see ch 3 where the chronological development of the right to an abortion in Germany is discussed.

²²⁴ many writers believe that if parents would not have been prepared to abort a genetically impaired foetus had they known of its condition, they should therefore not be able to institute a wrongful birth action.

²²⁵ see the following judgments.

²²⁶ BGHZ 89, 95.

²²⁷ courts usually award only additional expenses related to the impairment in wrongful birth actions and not full child-rearing costs.

mongolism.²²⁸

Stoll²²⁹ agrees with such comprehensive award for patrimonial damages and believes that it accomplishes a just result, in that the distressed parents are thereby also *de facto* compensated for their emotional suffering and distress. It should be noted that even though this might be the actual effect or perceived result flowing from a comprehensive award for patrimonial damages, the German Supreme Court²³⁰ emphatically rejected any non-patrimonial damages in these cases.

Giesen,²³¹ however, states that the wrongful birth plaintiff should in principle be able to receive an award for satisfaction in cases where the pregnancy and birth is more painful or uncomfortable than a normal childbirth because of the child's impaired condition. Although the parents sought pregnancy and appeased themselves with the pain and risks inherent with normal childbirth they were still not anticipating such additional suffering.²³²

5.2 Basic principles

Harrer²³³ considers the valuable solutions found in the German legal system and compares them to American approaches. He writes that under German law, birth or human existence as such can never be found to be a legally cognizable injury²³⁴ for the reason that children are highly valued in German society. This notion is supported by their fundamental Christian-humanistic culture and the fact that many protective laws exist to safeguard German

²²⁸ see ch 11 where this condition is discussed.

²²⁹ 1989. A Doctor's liability for the unwanted birth of a child. **Comparative and International Law Journal of South Africa**, 206.

²³⁰ BGH 18 1 1983; BGH 22 11 1983.

²³¹ 1988. **International Medical Malpractice Law** (11-33), 242.

²³² Pearson, F.L. 1997. Liability for so-called wrongful pregnancy, wrongful birth and wrongful life. **South African Law Journal**, 97.

²³³ *op cit* p 91.

²³⁴ it should be remembered that damages and compensation are awarded when there is a destruction or reduction in legal value or worth of any legally protected subjective right.

children.²³⁵ In seeming contrast²³⁶ to these views, expenses related to the birth of a child in wrongful conception²³⁷ and wrongful birth actions are regularly compensated in German courts.

Two contradictory points of view exist under German legal scholars regarding the question of compensation for child-rearing expenses.²³⁸ The first school underwrites the "*principle of unity*" which denies that any damages or even the possibility of compensation arising from childbirth is acceptable.²³⁹ The second school supports a "*principle of separation*" which claims that it is principally possible to distinguish between the benefits of childbirth on the one and detriments associated with the same birth on the other hand. According to these scholars, childbirth under certain circumstances, could be seen as a legally acceptable cause of action.²⁴⁰

5.3 Arguments for and against

It is reported²⁴¹ that opponents of birth related actions argue that litigation arising from childbirth have a detrimental effect on the psyche of the children involved. The German Supreme Court²⁴² rejected this argument and judged that it is highly improbable that any psychological defects would result in a child upon gaining knowledge of such a lawsuit.²⁴³ On the contrary, the courts believe that because an award reduces the financial burdens associated with unwanted childbirth,²⁴⁴ damage awards will improve the parent-child relationship and will necessarily cause the parents to feel more positive towards their child. The reimbursed parents will at the same time be in a better financial position to cope with the inevitable high costs associated with raising a handicapped child.²⁴⁵

²³⁵ *op cit* p 93.

²³⁶ if one considers the true basis of wrongful birth, there is no prejudicial sentiment with regards to children as a whole or handicapped children in particular - it is submitted that recognition of these actions advance, rather than diminish the value of children in society.

²³⁷ see ch 6.

²³⁸ Harrer *op cit* p 91.

²³⁹ therefore obviously against wrongful birth actions.

²⁴⁰ this viewpoint allows the concept that wrongful birth actions could in principle be allowed.

²⁴¹ Harrer *op cit* p 91.

²⁴² BGHZ, 86, 240 1984 JUS 436.

²⁴³ BGH, 1980 JR 368.

²⁴⁴ remember that the parents in wrongful birth actions wanted a healthy, normal child.

²⁴⁵ the compensation of additional costs incurred because of the child's handicapped condition is in line with the suggested approach to wrongful birth.

Another argument raised by critics of wrongful birth actions is that the complex parent-child relationship involves a unity that prohibits diminution of the child's value as a human being by perceiving the child as a cause of action.²⁴⁶ This argument also failed to impress the German Supreme Court²⁴⁷ and they rejected this reasoning as a legally useless argument and an oversimplification of matters. The truth is that the relationship between parents and child is not destroyed by such litigation and the parents remain liable and responsible to support the child afterwards.²⁴⁸

Critics continue to assert that even if damage is measurable, it is still unacceptable to transfer the burden of child-rearing from the parents to the wrongdoer-defendant.²⁴⁹ This concern was also not persuasive to the German courts²⁵⁰ since an award for damages does not destroy the primary duty of parents to support their children, it merely changes the final allocation of the burden.²⁵¹

5.4 Compensable damages: United States of America v Germany

The majority of courts in the United States of America take into account the state of health of children in birth related actions and distinguish between normal and impaired children²⁵² when considering whether compensable damages for child-rearing expenses should be allowed.²⁵³ According to Harrer²⁵⁴ many believe that there is a philosophical difference between the two actions²⁵⁵ and the majority allows remuneration only if the child is physically or psychologically

²⁴⁶ Harrer *ibid*.

²⁴⁷ BGH, 1980 NJW 1451.

²⁴⁸ a similar view was expressed by the South African Appeal Court in the important wrongful conception case of **Administrator, Natal v Edouard** 1990 (3) SA 581 (A) - see ch 6.

²⁴⁹ Harrer *op cit* p 92.

²⁵⁰ Karlsruhe, 1979 NJW 600.

²⁵¹ see previous fn.

²⁵² it should be remembered that the singular fact whether a child is normal or handicapped is not the only consideration that distinguishes wrongful birth and wrongful conception actions - see ch 2 and 6.

²⁵³ in contrast to the legal position in Germany.

²⁵⁴ *op cit* p 93.

²⁵⁵ ie wrongful conception and wrongful birth actions.

impaired.²⁵⁶ He signifies this distinction based on the physical condition of the child in question as a remarkable difference when compared to the German legal system.

Under the German system courts do not differentiate between healthy and impaired newborns when considering whether child-rearing expenses should be allowed or not.²⁵⁷ In *both* instances basic child-rearing costs are awarded in successful cases. Additional²⁵⁸ damages such as lost earnings and medical expenses caused by the wrongful birth cause of action will generally be allowed, although these damages are often limited. The majority of German courts, however, denies recovery for the mental anguish of having an impaired child, thereby refusing to extend traditional tort concepts beyond reasonable bounds.²⁵⁹ Harrer lists other costs that have been allowed by courts in the past, being hospital costs, costs of housekeeping, expenses incurred for additional help or caring for already existing children, loss of earnings, the possible loss that could occur if the changed situation necessitated a transfer to part-time work, as well as an award for pain and suffering.²⁶⁰

Harrer²⁶¹ concludes that under Germany law, therefore, parents²⁶² of both mentally and physically handicapped children are in principle entitled to full compensation for the total burden of maintenance, as well as other costs. Ordinary maintenance or child-rearing expenses are compensated and liability may be even further expanded in the event of any special circumstances.²⁶³ There is generally no age limit²⁶⁴ placed on the expected contribution to maintenance, since the handicapped child's parents will probably be obliged to care for child for its entire life.

²⁵⁶ therefore in a wrongful birth action.

²⁵⁷ it is my respectful submission that this viewpoint is not sound: one must always remember that wrongful birth parents planned to conceive a child and were prepared to carry the cost of child rearing - the only point of concern for them should be that their child has been born disabled and therefore additional expenses (which they did not account for) will be incurred, for which they wish to be compensated.

²⁵⁸ child-rearing costs beside.

²⁵⁹ the court states that calculation hereof is too speculative.

²⁶⁰ *ibid.*

²⁶¹ *op cit* p 99.

²⁶² in a successful wrongful birth action.

²⁶³ where all additional costs are compensated.

²⁶⁴ in wrongful conception actions the award is usually limited to maintenance up to the age of majority of the child, as they are expected to provide for their own maintenance from that time.

5.5 A philosophical reality

It is submitted that comprehensive damage awards bring about true restitution by financially placing the plaintiff in the same position had there been no damage causing event.²⁶⁵ Harter²⁶⁶ reasons from a philosophical perspective that since wrongful birth parents essentially could not have had another child conceived at exactly the same time without a handicap²⁶⁷ and because wrongful birth parents were willing to conceive a healthy child,²⁶⁸ they should not be entitled to normal child-rearing expenses in terms of a wrongful birth action.

Only the additional expenses necessitated by the handicapped condition of the child could be justifiably compensated. The reasoning behind this argument is that the disgruntled parents in wrongful birth actions are compensated for their defeated expectations²⁶⁹ as well as additional rearing expenses necessitated by a handicapped child. They are, however, not entitled to be unfairly benefited through a comprehensive award (including maintenance costs that would be spent on a normal child), since they were well prepared to incur these costs when conceiving the child.²⁷⁰

To summarise, one can argue that because wrongful birth parents knew about and accepted the costs of a normal child, these child-rearing expenses should not be awarded them in a wrongful birth action. Although their wishes did not come true exactly as they anticipated, by bearing a handicapped child with additional expenses,²⁷¹ they still should face the financial and emotional consequences of their actions and follow through with their initial commitment to care for the child.

5.6 Relevance of Abortion to wrongful birth actions

²⁶⁵ eg if a successful abortion had been performed.

²⁶⁶ *op cit* p 99.

²⁶⁷ this is a complex philosophical question without any simple and final answer, discussed in greater detail in ch 9.

In this case one could argue that the parents would not be entitled to child-rearing expenses needed for a healthy child, because a healthy child was never an option for them on that specific time.

²⁶⁸ and therefore knowingly accepted the costs of child-rearing and the other expenses associated with extending the family.

²⁶⁹ of having a healthy child.

²⁷⁰ which was eventually born handicapped.

²⁷¹ such as special medicines, additional medical treatment, special schools and daycare and so forth.

Harrer²⁷² writes that critics of abortion²⁷³ find it unacceptable that plaintiff-parents in these actions seek medical advice to identify severe prenatal aberration in their unborn children with the intention to consequently end the pregnancy. These critics argue that by cringing back from maintenance costs and other child-raising expenses these plaintiffs are trying to avoid their responsibilities as parents.²⁷⁴ This raises another important issue, namely whether eugenic abortions are legally obtainable in Germany.²⁷⁵ It would seem as if abortions are currently legal.

5.7 Legal basis of claim

There are at least two separate independent legal bases for establishing liability for wrongful birth actions under German law, namely on basis of breach of contract and tort. Harrer²⁷⁶ explains that the same principles of compensation basically applies to both claims, but that the contractual basis is more sound.

Contracts to obtain abortions and sterilizations procedures constitute contracts of service.²⁷⁷ Contracting parties usually do not bargain for the successful outcome of the services rendered because physicians do not as a general rule guarantee a successful result.²⁷⁸ Logically, a claim for damages based on contract can only arise if a valid contract exists²⁷⁹ between the parties. With reference to wrongful birth actions, it is argued by some that both sterilization and abortion contracts are void in Germany²⁸⁰ either because these contracts contravene relevant statutory prohibitions or because they are unconscionable. The dominant view, however, is that voluntary sterilization is not punishable under the German Penal Code (St GB)²⁸¹ and that

²⁷² *op cit* p 102.

²⁷³ and therefore inevitably critics of wrongful birth actions.

²⁷⁴ similar arguments have been raised in wrongful conception actions - see ch 6.

²⁷⁵ see ch 3 on abortions in Germany.

²⁷⁶ *op cit* p 101.

²⁷⁷ § 611 BGB.

²⁷⁸ in most cases the patient and doctor enter into a contract of letting and hiring of work, or *locatio conductio operis*.

²⁷⁹ see ch 2 on the basic principles of the law of contract and the requirements for a valid contract.

²⁸⁰ *ie* the former West Germany up and until reunification on October 3, 1990.

²⁸¹ unless it violates public policy.

abortion are principally legal.²⁸²

6. Position in England

6.1 Brief discussion

It would seem as if the wrongful birth action was met with initial success in England. In **Mc Kay v Essex Area Health Authority**²⁸³ an action was instituted by a plaintiff -child born with severe impairments, which condition resulted from the failure of the Essex Health Authority to detect *rubella*²⁸⁴ following blood tests done for this purpose on the child's pregnant mother.²⁸⁵ Although this action for wrongful life was dismissed by the court because no statutory support for such a novel action existed, the court in principle acknowledged that the parents in a correlative wrongful birth action would have succeeded on the facts before them.²⁸⁶ However, the court made no adjudication on such action.

Two years after the **Mc Kay** case the English courts were once again prepared to recognize an action for wrongful birth, although it was actually a wrongful pregnancy action that was instituted in **Emeh v Kensington and Chelsea and Westminster Area Health Authority & others**.²⁸⁷ The court was prepared to award not only special damages, but also general damages for the loss caused by the birth of an unwanted and disabled child resulting from the defendant's failure to advise his patient of the availability of an abortion.²⁸⁸

A final wrongful birth action was recognized in **Scuriaga v Powell**.²⁸⁹ This type of action was, however, never again instituted because of the implementation of the **Congenital Disabilities**

²⁸² Harrer *ibid*.

²⁸³ (1982) QB 1166 (CA), (1982) 2 All ER 771.

²⁸⁴ see ch 11 where this disease and its consequences on foetal development is discussed.

²⁸⁵ see ch 8 where the wrongful life action in **Mc Kay** is discussed.

²⁸⁶ but no wrongful birth action was instituted.

²⁸⁷ (1984) 3 All ER 1044 (CA); (1985) 1 All ER 346 QB.- see further the discussion of the **Emeh** case in ch 6 on its wrongful conception relevance.

²⁸⁸ whilst carrying an impaired foetus.

²⁸⁹

(Civil Liability) Act of 1976,²⁹⁰ specifically prohibiting these actions.

7. Position in the Netherlands

7.1 Brief discussion

Schoonenberg²⁹¹ reports that the basis of wrongful birth is the infringement of the plaintiff's right to self-determination brought about by medical malpractice. This right concerns the individual's prerogative to choose to whether to have children or not, which also entails the decision on abortion. It is noted that although a delictual action is therefore possible on this ground under normal circumstances, specific mention is made in the Dutch Civil Code, section 6.1.9.11 (NBW) that "an injury to a person" entitles such a person to restitution.²⁹² The question is therefore if an infringement of an individual's right to self-determination could be seen as an injury.

It is reported,²⁹³ however, that the wrongful birth cause of action falls within the scope of the "hulpverleningscontract" or medical treatment agreement and would generally be founded on breach of contract.²⁹⁴ Whether liability follows because of improper/ inaccurate conduct²⁹⁵ or because of liability based on the provision of a professional service, it is reported that the foreseeability²⁹⁶ of damage is vital in both instances.

²⁹⁰ sec 1(2)(b).

²⁹¹ Gevers, J.M.K. and Leenen, H.J.J. 1986. *Rechtsvragen rond voortplanting en erfelijkheid* Kluwer - Serie Gezondheidsrecht no.19, 62.

²⁹² *"Het verzuim van de behandelend arts om zijn patiënt(e) voldoende informatie te verschaffen om een weloverwogen keuze omtrent het verwekken van nageslacht te kunnen maken kan worden beschouwd als het maken van een inbreuk op het zelfbeschikkingsrecht van de patiënt omtrent procreatie, hetgeen ik zou willen kwalificeren als aantasting van zijn of haar persoon. In artikel 6.1.9.11 NBW wordt 'aantasting van de persoon' uitdrukkelijk als grond voor aansprakelijkheid genoemd, maar ook het huidige recht kan op de grondslag van aansprakelijkheid uit onrechtmatige daad worden aangenomen."* op cit p 62.

²⁹³ Schoonenberg op cit p 63.

²⁹⁴ a claim based on "onrechtmatige daad" or delict would also be possible in cases where the plaintiff could prove that the defendant's negligence infringed upon his right to self-determination.

²⁹⁵ "onzorgvuldig karakter van de gedraging".

²⁹⁶ in South African law the foreseeability factor is relevant when determining the element of fault: whether a person has acted negligently - see ch 2 and 4.

Schoonenberg²⁹⁷ conveys that in the general wrongful birth cases, the patient(s) specifically consulted with the physician to inquire about genetic risks, in which case there is a clear foreseeability of damage, should incorrect information be given.²⁹⁸ The question is now asked whether this "clear foreseeability" would similarly be the case where a patient was totally ignorant regarding his genetic make-up and was volunteered the important information by a physician. Schoonenberg points out that a physician under these circumstances could not know how a patient would react once a foetal aberration has been detected. It is submitted²⁹⁹ that this uncertainty with regards to the reaction of the parents³⁰⁰ will not alter the position and liability could still follow.³⁰¹

Habets³⁰² gives an interesting comment on the influence of modern media in educating people about genetic risks and informing them of medical procedures. He is of the opinion that future wrongful birth parents might find it difficult to prove that they in fact did not know the basics of common genetic anomalies and statistics, for example that pregnancies after 35 is risky and that sterilization procedure have an immanent chance of failure.³⁰³

It is submitted that there is a common point of interest in Dutch law between wrongful conception and wrongful birth actions concerning failed sterilization.³⁰⁴ In both actions the basic issue revolves around the unwanted birth of a child, for which a civil claim for damages is instituted. Failed sterilization has lead to various court cases in the Netherlands with causes of action ranging from failed information³⁰⁵ to unsuccessful sterilization procedures.³⁰⁶

297 *op cit* p 64.

298 as it clear that these patients do not even consider bearing a handicapped child.

299 *ibid.*

300 whether an abortion would possibly be obtained or not.

301 "*Het is dan voor de arts niet meer met enige zekerheid te voorzien welke weg de patiënt zou hebben ingeslagen, indien hij/ zij voldoende zou zijn ingelicht omtrent waarschijnlijke genetische afwijkingen. Naar mij mening is dit laaste echter geen beletsel om aansprakelijkheid van de arts aan te nemen.*"

302 1995. Schadeclaims naar aanleiding van mislukte sterilisaties: een dossieronderzoek. *Tijdschrift voor Gezondheidsrecht* (5), 270.

303 "Dat patiënte niet zou hebben geweten van de mislukingskans onwaarschijnlijk is nu in allerhande damesbladen op dat risico werd en wordt gewezen." *op cit* p 269.

304 *op cit* p 66.

305 1979 (22 november) Rb. Maastricht - where a patient was not properly informed of the fact that the full effect of a sterilization procedure will take some time.

306 1983 (17 mei) Hertogenbosch - where it was found that a failed sterilization procedure was a legally cognisable injury to the patient.

Focus is drawn on the societal viewpoint in favour of family planning and support for the individual's right to self-determination.³⁰⁷ An infringement of these interests should be compensated and the benefits derived from the unwanted birth do not override or cancel this fact.³⁰⁸

*"Het Hof is van oordeel dat de persoonlijke afweging van de vrouw om zich te laten steriliseren in het huidige cultuurpatroon niet onredelijk is te achten en dat de schade van de moeder ten gevolge van de mislukte sterilisatie niet gecompenseerd wordt door de voordelen van het moederschap."*³⁰⁹

With regard to immaterial damages in wrongful birth, it is said, there is currently no recognition for such compensation in Dutch law. This stance is often criticised, as there seems to be no logical reason why certain heads of damage are³¹⁰ allowed while others are not, although all stem from the same cause of action.³¹¹ This anomalous position may well be changed on account of new statutory guidance given by section 6.1.9.11 NBW³¹² whereby "smartegeld" or compensation for non-patrimonial loss may also be claimed under circumstances of failed sterilization.³¹³

According to Schoonenberg³¹⁴ writes that with regard to wrongful birth actions specifically, non-patrimonial damages would probably be restricted to psychological tension, pain and suffering associated with the pregnancy and birth, as well as redress for the infringement of the plaintiffs' right to self-determination. It is important to note that the said NBW-section expressly excludes compensation for the sorrow the parents experience(d) because of the birth of the seriously handicapped child.

³⁰⁷ this valid observation has also been used in favour of wrongful conception actions - in terms of South African law a successful wrongful conception plaintiff must prove economic reasons for sterilization, which indicates the importance of societal interests.

³⁰⁸ see the discussion on the so-called "benefit rule" *supra*.

³⁰⁹ *ibid*.

³¹⁰ eg loss of income; pregnancy and birth related costs.

³¹¹ it is reported that in terms of Dutch law, the main focus of recovery is on medical expenses incurred because of the hereditary impairment - it is, however, unclear whether the parents have standing to institute action to claim for these losses (see Schoonenberg's viewpoint regarding the child-plaintiff's exclusive legal standing ch 2, 8).

³¹² see *supra*.

³¹³ ie encompassing both wrongful conception and wrongful birth actions.

³¹⁴ *op cit* p 67.

8. The South African Position

8.1 Background

Up to date there have been few wrongful birth actions instituted in South African courts. Since South Africa was traditionally seen to be a relatively conservative community and not as litigious as most other countries, it is not strange that the first authoritative court decision on this matter was made as late as 1990. The judgments that have been made, however, are quite liberal in inclination and it would seem as if our courts principally acknowledge and accept these claims.

8.2 Case law

The legal position regarding wrongful birth actions in South Africa has been made clear through two prominent and recent decisions. In the landmark wrongful conception case of **Edouard**³¹⁵ the Court of Appeal made it clear that these type of actions³¹⁶ would not be *contra bonos mores*, as the South African community deems it important that family planning be successfully executed and that parents' procreative rights be respected.

In **Friedman v Glicksman**³¹⁷ a 'double barrel' wrongful birth-wrongful life action was instituted. The parent-plaintiff claimed firstly in her personal capacity for child-rearing and medical expenses and secondly on behalf of the child, in her capacity as mother and guardian. The court indeed acknowledged the claim for wrongful birth and allowed child-rearing expenses for the disabled child as well as all future medical and hospital treatments and related costs.³¹⁸ *In casu* the facts were that Mrs. Friedman entered into an agreement with Dr. Glicksman to advise her whether she was at greater risk than normal of having an abnormal or disabled child. This information was necessary for her to make an informed decision whether or not to terminate the pregnancy. The defendant wrongly advised his patient and as a result of this

³¹⁵ **Administrator, Natal v Edouard** 1990 (3) SA 581 (A) - see the ch 6 on wrongful conception actions for a full discussion of this important case.

³¹⁶ wrongful conception actions and wrongful birth actions generally.

³¹⁷ *supra*.

³¹⁸ the court rejected the wrongful life claim for general damages and loss of earnings based either in contract or delict - see ch 8.

negligent conduct a disabled child was born. The court held that such a contract³¹⁹ is not only acceptable, but that wrongful birth claims³²⁰ for damage arising from either breach of contract or *ex legis Aquiliae* were not *contra bonos mores*.³²¹

Blackbeard³²² places emphasis on the fact that the plaintiff *in casu* consulted with a specialist gynaecologist³²³ and that the parties specifically agreed that the pregnancy in question would be terminated should there be any risk greater than normal that the unborn child would be abnormal and/ or disabled.

In consideration of possible liability the court effectively dealt with probably the most troublesome aspect pertaining to wrongful birth actions, namely by proving the element of *wrongfulness*. The court stated:

"In my view the contract entered into between the plaintiff and the defendant was sensible, moral and in accordance with modern medical practice. The plaintiff was seeking to enforce a right, which she had, to terminate her pregnancy if there was a serious risk that her child might be seriously disabled."³²⁴

and also at another place,

"Thus the Legislature has recognised, as do most reasonable people, that cases exist where it is in the interests of the parents, family and possibly society that it is better not to allow a foetus to develop into a seriously defective person causing serious financial and emotional problems to those who are responsible for such person's

³¹⁹ whereby a patient seeks a medical opinion on a specific matter such as in the present case.

³²⁰ see ch 8 where the court's reasons for rejecting the wrongful life action are discussed.

³²¹ Although defendant argued that to enforce a contract of this nature would be against public policy since it would encourage abortion and thus be inimical to the right to life enshrined in the constitution, the court noted that: "this argument flies directly in the face of the **Abortion and Sterilisation Act 2 of 1975**" - in terms of which a legal abortion could be procured "were there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will be irreparably seriously handicapped." (Note that this judgment was given even before the enactment of the new and much more liberal **Choice on Termination of Pregnancy Act No. 9 of 1996**) - see ch 3.

³²² 1996. Actions for wrongful birth and wrongful life. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg 711.**

³²³ from whom a higher degree of proficiency is expected in his particular field of expertise - see ch 4.

³²⁴ *op cit* p 1138 H.

maintenance and well being."³²⁵

It was held, therefore, that the mother had a right to decide whether to go through with an abnormal pregnancy or to terminate it - the defendant was specifically employed to prevent the birth of a handicapped child and because of his negligence a disabled child was born.

It is remarkable how accurate the court expressed itself in the use of specialised wrongful life jargon and in analysing the various similar, yet conceptually different issues found in this type of generally confusing litigation. The court found that the cause of action *in casu* is a logical extension of the principle earlier enunciated in the wrongful conception decision of **Edouard**. The court explained the *harm* complained of in wrongful birth.

"(T)he 'wrong' consists not of the unwanted birth as such, but of the prior breach of contract (or delict) which led to the birth of the child and the consequent financial loss. Put somewhat differently,...although an unwanted birth as such cannot constitute a 'legal loss' (ie. a loss recognised by law), the burden of a parents' obligation to maintain the child is indeed a legal loss for which damages may be recovered."³²⁶

In quoting American decisions as support for acceptance of wrongful birth, the court stated that the reasoning followed by these foreign courts is sound and fits comfortably within the Aquilian action instituted in South Africa:

"The requirements for such an action are a wrongful act committed with the fault either negligent or intentional) of the defendant which causes the plaintiff to suffer some harm. A doctor acts wrongly if he either fails to inform his patient or incorrectly informs his patient of such information she should reasonably have in order to make an informed choice of whether or not to proceed with the pregnancy or to legally terminate such pregnancy. The fault element of the delict is to be found in the foreseeability of harm which the doctor-patient relationship gives to the doctor. Once proper disclosure is not made and the patient is deprived of her option, it seems to me that the damages she has suffered by giving birth to a disabled child are clearly caused by the fault of the doctor, provided she would have terminated the pregnancy if the information had been made available to her."³²⁷

³²⁵ *op cit* p 1138 G.

³²⁶ *per* Van Heerden J.A. in **Edouard's** case *supra* at 590 E-F.

³²⁷ *op cit* p 1139-40 G-B.

Blackbeard³²⁸ states that the fault element of the delict was to be found in the foreseeability of harm, which the physician-patient relationship gave the physician.

9. Final conclusion

Although the majority of jurisdictions have recognized the action for wrongful birth once the right of women to abortion has been acknowledged, legislators in many American states and also the English legislator, have barred the cause of action.

In support of legislative guidance, Faircloth³²⁹ reports that the North Carolina Supreme Court in **Azzolino v Dingfelder**,³³⁰ in rejecting wrongful birth, stated that such issues were better left to the legislature, which "can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mould of conventional tort concepts which clearly do not fit".

Bodgan,³³¹ however, believes that because American courts recognize wrongful birth actions as a type of negligence claim,³³² wrongful birth actions arguably do not require explicit legislative sanction. He refers to the case of **Naccash v Burger**³³³ where it was stated that no distinction between a wrongful birth action and any other malpractice action exists. In **Procanic v Cillo**,³³⁴ for example it was held that recovery of medical expenses by either the child or the parents is consistent with the principle that the negligent act affects the whole family and the family should be compensated.³³⁵

"Law is more than an exercise in logic, and logical analysis, ... should not become an instrument of injustice."³³⁶

³²⁸ *op cit* p 172.

³²⁹ *op cit* p 558.

³³⁰ 337 S.E. 2d 528, 537 N.C. (1985).

³³¹ *op cit* p 133.

³³² and therefore, it is submitted, any jurisdiction where a similar basis of liability is used.

³³³ Va. 406, 290 S.E. 2d 825 (1982).

³³⁴ 97 N.J. 339, 478 A. 2d 755 (1984).

³³⁵ in this case, the parents' wrongful birth action was time barred.

³³⁶ at 762.

Irrespective of the wisdom of these prohibitions by means of statutory curtailment, it is suggested that any uncertainty that might still cloud the legal position of wrongful birth could³³⁷ yet be solved by effective and proper legislation.³³⁸ Because of the novel character of these actions and the fact that various levels of human existence are influenced by it, it is often difficult for courts to ascertain what the public sentiment concerning the provision of genetic services in these cases is and also to what extent the government/ legislator is prepared to intervene. The fact that medical science and genetical engineering are rapidly evolving does certainly not simplify matters for the courts. Clear legislative guidance could instantly solve these problems for the judicial bench by clarifying what the actual legal status of these actions is, which would concomitantly ensure that consistent judgments are made.³³⁹

The legislator must first of all decide whether such actions should in principle be allowed or not. Careful consideration should be taken concerning all the relevant aspects and interests pertaining to this complex social conundrum. Abortion on demand³⁴⁰ is the first issue that should be scrutinised, as the wrongful birth claim is principally founded on the premise that plaintiff parents would have preferred to abort their abnormal foetuses.

Another aspect that should be contemplated is the position of the disabled community with regards to actions instituted because of the birth of handicapped children. The rights of physically and mentally challenged people have recently enjoyed much attention and are commonly protected by law.³⁴¹ What legislators should further consider is the interests of

³³⁷ resulting in inconsequent judgments.

³³⁸ see ch 10 on wrongful birth statutes and also ch 12 where the value of legislative solutions are considered - it should be noted, however, that the legal position of wrongful birth actions are much clearer than its wrongful life counterpart.

³³⁹ legal certainty *per se* is greatly beneficial for the public at whole and especially for those unfortunate individuals who are confronted with a wrongful birth matter.

³⁴⁰ in certain jurisdictions abortion on demand are not allowed, although an abortion could be legally performed when there is reason to believe that the child will be born with serious abnormalities, *eg* in terms of South Africa's previous **Abortion and Sterilization Act No.2 of 1975** - see ch 3.

³⁴¹ South Africa's constitution expressly protects the disabled community from any form of discrimination when such discrimination is based on the disability of the individual itself - a positive duty is placed on the national legislator to enact legislation to ensure that this community is sufficiently protected:

Equality

9. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against

plaintiffs in such circumstances. To what extent should liability for medical negligence be allowed and enforced? The community in general surely has vested interests in a high level of medical care.

A final consideration could be that one should be weary of over-extending the arm of the law by holding physicians liable for very remote consequences flowing from their unpredictable science.

anyone on one or more grounds in terms of subsection (3).
National legislation must be enacted to prevent or prohibit unfair
discrimination.