"WRONGFUL BIRTH", LIABILITY AND INDEMNIFICATION : AN UNEASY FIT

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1. Both the Netherlands' Hoge Raad ("HR") and Germany's Bundesverfassungsgericht ("BVerfG") (Erster Senat) rendered in 1997 judgments concerning "wrongful birth" claims. In the Dutch case, a physician, at the occasion of a surgery, had removed a contraceptive implant and, without advising his patient, had not replaced it. In the first case before the BVerfG, a failed sterilization procedure carried out by a medical doctor who had been family planning counselor to the husband of plaintiff, was followed by a pregnancy; again, the doctor had neglected to inform his patient of the failure. In both these cases, the "resulting" child turned out to be "normal" and healthy. This was different in the second German case. The parents of a disabled daughter, fearing a genetic predisposition, had chosen to undergo a medical examination in a specialized institution in order to find out whether indeed such a condition existed and could lead to the re-occurrence of the same disabilities should they have another child. They were assured, in a written document, that a genetically transmissible defect was very unlikely, and that therefore no reason existed to avoid a subsequent pregnancy. Nonetheless, the second daughter of the couple was born with the same disabilities as their first child.

2. The reasoning of the two courts was similar in the three cases brought before them. A physician who enters into a lawful contract with his patient and commits a fault in the

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performance of the contract, is liable to pay damages for the harm caused by his fault. Damages include compensation for economic liabilities or losses, such as costs and charges for the upbringing and education of the child, loss of income, and even, under certain conditions, intangible or moral harm which can be the result of pain and suffering. For the HR, this line of reasoning fits within "the system of the law" in which no basis can be found to reject such a damage claim in principle. For the Erster Senat of the BVerfG, this reasoning is not unconstitutional; the Zweiter Senat however, in conformity with its 1993 judgment on the constitutionality of the abortion legislation\(^3\), has reconfirmed in no unclear terms its principled opposition to the opinion of the Erster Senat, and requests a joint deliberation.

3. The principal argument which is dismissed in the three cases at hand, states that there can be no liability to pay damages since having a child should not be considered as suffering harm or injury! According to the Zweiter Senat, Article 1 I of the Basic Law of the Federal Republic of Germany leaves no room for a different conclusion. On a level below that of the constitution, some authors, such as E. Picker\(^4\), argue that an obligation to pay damages is meant to restore a previous condition, to repair something of value, to bring a person back in a situation as if the damaging event had not occurred. But in cases like these, so goes Picker's argument, restoring the previous condition is impossible, because in the interval a child is born. In between fault and damage stands the birth of a human person.\(^5\) This presence of a human person cannot be undone. Claiming damages for raising the child boils down to an attempt to

\(^3\) BVerfG (Zweiter Senat), May 28, 1993, Neue Juristische Wochenschrift, 1993, 1751.


\(^5\) It has been argued under Belgian law that the obligation to answer for the cost of bringing up a child finds its basis in the law, and that because of this "interposition of a legal cause", the causal link between fault and harm required by liability rules, is interrupted. As a result, the injurer should not be held liable for the cost of this legal obligation. To my knowledge, this position has not found support in case law.
restore the (economic) situation which existed before the child was there; it attempts to "think away" the child or to see it exclusively in cost/benefit terms. All such endeavours, according to these authors, violate the dignity of a human person.

4. According to the HR and the BVerfG (Erster Senat) a distinction must be made between the position that the existence of a human being can be harmful, which both courts reject, and the position that a person who is at fault, should alleviate, by paying damages, the economic burden which is the result of that person's intentional or negligent behavior. Human dignity, so it is argued, is not diminished by establishing a link between the existence of a person and a liability to pay damages. The BVerfG points out that sometimes, the presence of an unborn child in a car accident can give rise to insurance claims by its mother. An alleviation of the economic burden of the mother by the insurance payment, would not diminish the value of that child after its birth. Hence, the mere fact of paying damages is neutral with respect to the dignity of the human being. The HR even states that the possibility for the parents to claim damages will benefit the entire family, the newborn child included.

5. Could it however not be argued that the plaintiff in each of these cases had an obligation to mitigate damages, and that therefore, she should at least have considered an abortion? The HR explicitly states that no such obligation exists, and the BVerfG refers to the identical position taken by the Bundesgerichtshof. But why, so one may ask. Why would abortion not have to be considered in certain circumstances as a reasonable way to mitigate damages, the way a reasonable person is required to act? If courts tend to simply apply the principles of contract or tort law, why then should the refusal to choose for a legal abortion not enter into consideration when judging on the validity of plaintiff's damage claim? Advocate General Mr. Vranken asked the same question, but could not come up with an answer fitting

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6  Even in the absence of a generalized obligation of an injured party to mitigate damages, such an obligation could still be introduced through the requirement of reasonable behavior. See also the discussion in R. KRUITHOFF, Schadevergoeding wegens de geboorte van een ongewenst kind?, Rechtskundig Weekblad, 1986–1987, 2770.

in the theoretical framework of indemnification. If legal abortion is available, if one is free to choose, should one then not be responsible for the economic consequences of that choice?

6. One possible answer hereto could be that damages can never be mitigated by lessening or even annihilating the position of a subject of law.\(^8\) A child is a legal person ("sujet de droit" as opposed to "objet de droit"), a holder of rights, for whom the parents are answerable with their assets. A "sujet de droit" cannot be compelled to cease to exist. If a legal person (e.g. a corporate entity) is harmed through a third party's fault or negligence, there can never be an obligation to dissolve the legal person in order to mitigate damages. Now, the weakness of this reply lies in the fact that in our legal systems an unborn child is increasingly not considered as a fully fledged "sujet de droit"; otherwise, abortion would not be legally available. If abortion is legally available, it is precisely because either a "sujet de droit" does not yet exist, or because it can still be made to disappear without violating the law.

7. Would it be reasonable to state a priori that abortion will never be considered the "reasonable choice"? The BVerfG dismisses out of hand the concern that physicians might try to pressure their patients into abortion because of potential liabilities or an increased insurance cost in the event of a professional fault. Why not? Will that not depend on individual ethics, according to which abortion might actually not be ethically problematic at all? Moreover, would it be considered illegal or improper for patients to accept, in a contract with their physician or with the organization providing or insuring health care, an obligation to accept in advance "all reasonable procedures" to mitigate damages? It is not clear how, based on the principles of contract or tort law, such a contract could be held against public policy or otherwise illicit.

8. We may start to see some of the consequences of the availability of legal abortion (i.e. the technical means to prevent or terminate life, depending on one's philosophical convictions)

\(^8\) This thesis is developed in B. VAN ROERMUND, De rekening van het kind: aansprakelijk voor "wrongful birth", Rechtskundig Weekblad, 1996-1997, p. 1313.
combined with the recognition of "wrongful birth" claims. First of all, the abovementioned distinction which allows some to argue that it is not the human existence itself which is harmful but indeed the liabilities, costs and expenses that result from giving life to a human being, becomes blurred very quickly. Indeed: no child, no cost. In view of the specific purpose of the contract with the physician, and given the fact that the proper execution of that contract would in all likelihood have resulted in the absence of human life, the very presence of human life constitutes the harmful event, which is translated into and expressed in terms of economic liabilities. In other words, the child is the harm, unlike the child in the previous example of the car accident (see nr. 4 above), where the absence of the accident (i.e. the situation provoking the harm) would of course not have resulted in the child not being born (i.e. no child). Could one not be required to mitigate damages by using all "reasonable" means, including legal ways to prevent or terminate life, to approach as closely as possible the conditions which would exist if the contract had been properly executed? At the very least, such a requirement would not appear to be an unreasonable provision in a contract between a health care consumer and a health care provider, or between a health care provider and an insurance company.

9. If the above is true, then inevitably the very application of liability rules and principles, although perhaps legally unquestionable, leads to a more fundamental question: does society consider the foreseeable and likely consequences of applying such liability rules and principles right and proper? Should such rules and principles be applied to the situations at hand, or to situations which are, or can be construed to become, comparable? Does the resolution of this issue belong in the private or rather in the public sphere? And in either case, by which set of principles should the issue be addressed? Such decisions are in their very nature political, not legal.

10. So, although it is probably correct that indemnification law, dealing with contractual liability and torts, offers a coherent legal framework for "wrongful birth" claims, society should consider whether it is willing to accept all its consequences. One of the consequences
could very well be that in some situations human life itself would be considered as harmful, and would reasonably have to be prevented or terminated based on the principles of indemnification law. *(No abortion, no claim.)* Should those principles drive such decisions?

11. Why not solve the question by simply putting forward unambiguously that abortion can never be required to mitigate damages. This does not seem to be a satisfactory solution. The problematic concept that life can be harmful would stand. Abortion could turn out to be only one of the possible techniques. What about fetal experiments? And why grant a preferential treatment to the belief that abortion is somehow immoral? Why not give a preferential treatment to the opposite belief?

12. True enough, nobody is *obliged* to claim damages, and a person who does not intend to claim compensation for damages has no obligation to act reasonably to mitigate the damage. However, would a "reasonable" person forsake a damage claim? In the logic of contractual liability and indemnification, a right to indemnification exists, based on the wrongdoing in the performance of the contract and on the occurrence of damage. A rational expectation to be compensated for the wrongdoing is created, but only the acceptance of abortion would safeguard one's right and thus materialize one's expectation. If society adopts such a framework, nobody should be surprised that people will be seen to act according to its logic.

13. If one is of the opinion that somehow this logic does not seem right, what is there to do? The *answer* lies in asking more fundamental *questions*. What should be the proper role for liability in matters like these? Is indemnification law the only tool available to effectively help a person who brings a wrongful birth claim to cope with economic hardship that results from the birth of a healthy or disabled child? Is the obligation to pay damages the only tool available to sanction wrongdoing and malpractice by physicians? In both cases is the answer: of course not. Liability law is no doctor-cures-all. In social security systems, child allowances exist which are meant to financially support parents. They could be increased. First party insurance and mutual assistance schemes are available as well. Considering indemnification
law the only available tool to right a wrong could be considered a very ideological approach, one in line with extremely fragmented "societies" where "transfer of wealth" and "redistribution" can only be the result of "liability". And a society where paying damages is the only way to sanction wrongdoing and malpractice by doctors has abandoned the idea that doctors belong to an organized and self-regulating profession, with professional bodies to uphold standards and the power to sanction those not meeting the standards. If all else has disappeared, the monetary sanction may indeed very well be the only tool left!

14. May be, there are good reasons after all to be uneasy about the unrestricted application of the rules on liability and indemnification to diagnose and remedy situations where the birth of a child is somehow caused by a fault in the performance of a medical contract. But how does one square such an uneasiness with the requirement of coherence? Indeed, why should the medical profession, as an exceptional category, be exempted from the obligation to accept the risk of professional liability in accidents such as those at hand, thereby arguably enjoying a preferential treatment in the legal system. It seems that the most appropriate and effective guarantee of coherence would be for the legislator to formally declare that human life shall not be considered as harmful. *No harm, no damages.* As such, there is also no question of preferential treatment for the medical profession. Of course would a doctor remain liable at any time for wrongfully causing harm to the child's integrity. If through a professional fault, a child would be born disabled, the injurer would be held liable for the damage resulting from the comparison between the actual condition of the child and the condition which would have existed without fault (as opposed to the difference between the actual condition and the absence of the child). Based on the respect for all human life, the degree of which does not vary with the absence or presence of disabilities, the legislator could exclude or limit the payment of emotional and other non-material damages.

15. This approach would also not prevent the legislator from providing that in cases different from fault in the context of a medical contract, e.g. in the event of rape or extra-marital paternity, the obligation exists for the perpetrator or the person at fault to contribute to
costs and expenses for raising the child. Situations such as those differ from the medical cases in that the injurer personally took part in the conception of the child. By this very fact, the mother would certainly be entitled to claim child support contributions, and to the extent applicable, damages for bodily harm.

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