

Katholieke Universiteit Leuven
Academic Year 2002/03
Second Semester

“Contracts and Torts in a Comparative Perspective”

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“Rights of parents and child in cases of ‘wrongful conception/life/birth’ in contract and tort law”

Comparative view on Germany and France

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I. Introduction

“It is an attack on human dignity to regard the simple fact of living as detrimental... This is making a distinction between lives that merit living and those which don’t... that’s a slippery slope.”¹

This statement made by Didier le Prado, attorney for a French doctor who was sued by a couple because he did not tell them that their son might be born with disabilities, after a judgment of the Cour de Cassation that granted compensation to the couple and their son, already shows how controversial the issue of lawsuits within the scope of the so-called “wrongful life” (and several other terms as explained below) can be seen.

Those cases raise philosophical questions as well as evaluation of damages² questions; liability questions in contract law as well as in tort law and finally are decided differently by courts of different countries.

That is why the topic of “wrongful life” is so attractive for comparative law research, not only because there are different views all over the world but also because there are recent changes in legislation which also effect case law, some of them shall be mentioned in the following to show this diversity.

1. Recent cases and legislation

On 31st of December 2002, the Supreme Court of Utah rejected a claim of parents who were not well informed about the health status of their child during pregnancy and now sued the doctor for not being able to have had an abortion. This decision was based on the Wrongful Life Act from 1993 that prohibits such lawsuits at all. The controversy of the issue is underlined by the 19-page dissent of Chief Justice Christine M. Durham who wrote: “Here, the purpose of Utah’s Wrongful Life Act is to discourage and burden a woman’s choice to obtain an abortion; the act serves to interfere with the provision of accurate and correct information regarding the health of a fetus”.³

In contrary to this judgment the German Bundesgerichtshof allows “wrongful birth” claims. On 18th of June 2002 it granted compensation to the parents of a handicapped child based on the fact that they were malinformed about the risks of the handicap during the pregnancy and therefore could not choose for an abortion.⁴

Also in 2002, the French legislator changed the even more generous system of French law in this matter by a new law concerning “wrongful life” lawsuits.⁵

2. Definitions and case groups

The terminology in this field of law is not applied commonly. But in general, one distinguishes pre-natal and pre-conception injuries, “wrongful life and wrongful birth” as well as “wrongful conception” cases.⁶

A more detailed overview of terminology gives the following table⁷:

¹ <http://www.inclusiondaily.com/news/advocacy/wrongfulbirths.htm>.

² The German Law of Torts, p. 48.

³ <http://www.sltrib.com/2003/Jan/01012003/utah/16415.asp>.

⁴ BGH, 18th of June 2002, VI ZR 136/01, NJW 2002, 2636.

⁵ See part IV.2.c).

⁶ The German Law of Torts, p. 46.

⁷ Extracted from The German Law of Torts, p. 186.

- 1) Wrongful conception (or pregnancy) claim
Brought by parents for the birth of a (usually) healthy but unplanned child.
- 2) Wrongful birth claim
Brought by the parents in the above-mentioned situation and includes claims for emotional harm and medical expenses. The cost of bringing up the child tends to be the major item of such claims.
- 3) Wrongful life claim
Action brought by the handicapped child; it includes, among other things, a claim for pain and suffering and for extraordinary expenses.
- 4) Foetal injuries claims
Typically to be made by a foetus once born alive. Jurisdictions which do not require “live birth”, but content themselves with “viability” at the time of the injury, may allow these claims to be brought by the estate.
- 5) Pre-conception claims
Claims made by a child for an injurious act (e. g. defective blood transfusion) to the mother prior to conception.

Although those terms are mostly used when talking about those cases there is also criticism. An American court once considered that: “Any ‘wrongfulness’ lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician. The harm, if any, is not the birth itself but the effect of the defendant’s negligence on the [parents] resulting from the denial to the parents of their right... to decide whether to bear a child or whether to bear a child with a genetic or other defect”.⁸

Nevertheless, as they are so familiar, some of those terms shall be applied in this work. They are meant as following⁹:

- “Wrongful conception”
A healthy but unwanted child is born because of malpractice in the field of abortion or sterilisation.
- “Wrongful birth”
A child that has actually been wished by the parents in the beginning but is born with severe injuries. If the parents had known this they would have asked for a legal abortion. Mostly those cases concern compensation claims that are based on a doctor’s failure to recognize risks of disability for the child during pregnancy.
- “Wrongful life”
The aforementioned situation but concerning the rights of the child.

3. Focus of this paper

As the topic in issue is so controversial and broad one could write several books about it what can also be seen by the huge amount of literature and websites about this issue. This paper should therefore concentrate on the most important questions and examine the three case groups of “wrongful conception”, “wrongful birth” and “wrongful life”. The approach is a comparative one taking into ac-

⁸ The German Law of Torts, p. 179.

⁹ Going along with the distinction of case groups at
<http://www.jura.uni-erlangen.de/Lehrstuehle/rohe/Examinatorium-KindAlsSchaden.html>.

count the legal systems and case law of Germany and France, in each part starting from a case dealing with the relevant situation. After having dealt with the legal aspects ethical and human rights questions shall also be considered.

4. General aspects of German and French legal systems on liability

But first of all, there should be a very short introduction in the German and French systems of liability as they are quite different from each other.

Liability of a doctor is possible under contract law on the one hand and tort law on the other hand in both legal systems.¹⁰ In Germany contracts for medical treatment are examined under §§ 611 ff. BGB, tort liability under §§ 823 ff. BGB. Under French law contractual liability in this case is provided for by Art. 1146 ff. C. Civ., tortious liability by Art. 1382 and 1383 C. Civ.

German courts often concentrate on contractual liability first¹¹, but rights which derive from tort law are also enforceable besides those deriving from contract law. In France, the “non cumule” rule forbids a combination of the two rights. As it comes to liability in tort law, the French system is granting a much broader compensation than the restrictive German system. The aim of the French law of damages is just “to compensate the victim for the loss he suffered as the result of the defendant’s wrong”.¹² There is no restriction of protected rights and persons, a person demanding for compensation only has to prove fault, damage and causation,¹³ while the German system is restricted to certain protected interests enumerated in § 823 I BGB and specific conditions under §§ 823 II and 826 BGB.

II. “Wrongful conception” – Rights of the parents

1. Germany

In Germany the “wrongful conception” cases lead to a huge discussion about the question whether a child can be considered as a damage to the mother or the parents in civil and constitutional case law as well as in literature. Therefore the following approach should be to mention first a case example of an unsuccessful sterilisation, then reflect the differences which are considered as to abortion cases and later on to refer also to the discussions in the constitutional court.

a) Case – Unsuccessful sterilisation

As first example the case decided by the Bundesgerichtshof on 27th of June 1995¹⁴ shall be taken.

As to the facts

On 29th of January 1990 the husband of the claimant went to the hospital of the defendant for a sterilisation which was performed by a doctor of this hospital. Nevertheless, the claimant became pregnant again because her husband was still able of procreation. As a result, their son was born as their sixth child on 15th of January 1991. The mother sued the hospital in her own name and based on transferred rights of her husband for unsufficient information about the sterilisation and the fact that they were not informed that the success of the sterilisation could only be estimated four weeks after the

¹⁰ Tort Law, p. 31, for French law.

¹¹ The German Law of Torts, p. 178.

¹² Unification of Tort Law: Damages, p. 77.

¹³ Tort Law, pp. 31 f.

¹⁴ BGH, 27th of June 1995, VI ZR 32/94, NJW 1995, 2407.

operation. She claimed compensation for the maintenance of her son and for her pains during the pregnancy.

Decision of the Bundesgerichtshof

The highest German civil court ruled that the doctor was at fault and the hospital was liable for his faults. The mother was granted compensation both for the maintenance of her son and for her pains.

Reasoning

It was held clear that the doctor did not inform the husband properly about the necessity of the test four weeks after the sterilisation to be sure about the success. The patient could have thought that this test is only routine and therefore did not take this information serious enough. But it was the duty of the doctor to be sure that his patient understood his medical explanations in its full amount, and this duty was negligently not fulfilled.

The sterilisation was aimed at the prevention of getting more children and at securing the financial situation of the family. These purposes were infringed by the doctor's fault what leads to a contractual liability for the financial damage that occurs to the family.

The BGH also held that the fact that it was the husband who was subject of the sterilisation does not exclude the claimant from claims. In the eyes of the court an unwanted pregnancy constitutes an interference in the physical integrity of a woman, and the causation of the doctor's fault of mal-information and the pregnancy of the woman is not interrupted because of the act of sexual intercourse between the claimant and her husband.

The court did not consider the claim for compensations for the pain of the claimant during her pregnancy any more because this was already granted by the previous instances and just confirmed.

b) Unsuccessful abortion

In general, the courts decide unsuccessful abortion cases in the same way as the sterilisation cases and rely on a contractual breach and a right to compensation of the mother for pain and suffering. But in a judgment of the Bundesgerichtshof on 28th of March 1995¹⁵ the court did also reflect on another argument. Referring to a judgment of the Bundesverfassungsgericht¹⁶ it pointed out that abortions, even if medically indicated and allowed under criminal law, can only be justified if the burden for the pregnant woman is so high that she has to sacrifice her own quality of life in such a way that a duty to give birth to the child cannot be expected of her. Therefore the civil courts are more restrictive concerning the liability of doctors for unsuccessful abortions than for unsuccessful sterilisations, albeit without much dogmatic explanation.¹⁷ In the above mentioned case of March 1995 the court did not find that there was such a situation so no compensation was granted.

c) Constitutional discussion about the “damage” of a child

In the discussion of the reform of the abortion law in Germany the constitutional court also considered the question of liability of doctors in performing an abortion. Within this framework the Bundesverfassungsgericht absolutely rejected the idea of seeing a child as a legally enforceable damage: “...as a result of Article 1 I GG, the child's existence cannot legally be classified as damage. The duty of all

¹⁵ BGH, 28th of March 1995, VI ZR 356/93, NJW 1995, 1609.

¹⁶ BVerfG, 28th of May 1993, 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, NJW 1993, 1751.

¹⁷ Roth, NJW 1995, 2399.

public bodies to respect every human being for its own sake, prohibits maintenance for a child to be classified as damage.”¹⁸

Five years later, the constitutional court again had to decide about this issue. But there was no such clear statement anymore as the two concerned senates expressed different opinions on that matter. The second senate, which was already concerned in this issue in 1993, followed its previous judgment and again pointed out that the guarantee of human dignity in Art. 1 I of the German constitution forbids to determine a child as a damage.¹⁹

In opposition, the first senate followed another view and confirmed the case law of the civil courts.²⁰ It pointed out that the Bundesgerichtshof refers to the material damage of the maintenance costs of a child and not to immaterial damage combined with the existence of that child. Therefore the first senate did not see a violation of Art. 1 I of the constitution.

As the Bundesgerichtshof always referred to the material damage of the maintenance costs, this is not connected to the pure existence of a child. Very often, sterilisations and abortions have an economic motivation, therefore the contracts are aimed at preventing economic burdens from the family. Thus one should distinguish between the material damage of the maintenance costs and the immaterial “damage” of having a child as it was done by the first senate.²¹ Concerning the compensation of maintenance costs I do not see a constitutional problem as this is a clear contractual breach concerning material damage. As to the immaterial “damage” of being “burdened” with a child living at the same place and obliged to care for it I agree with the constitutional courts that such a classification is against human dignity.

d) Conclusions as to the liability of doctors

To conclude, the highest civil court in Germany was always reluctant in following the 1993 decision of the constitutional court with regard to the “damage” question.²² The Bundesgerichtshof accepts a liability for medical malpractice in cases of sterilisations and abortions.

Although the courts often do not refer to the specific norms for each part of compensation the damages granted by the Bundesgerichtshof can be divided as follows. There is a contractual liability based on §§ 611, 280 I, 241 II BGB for the maintenance costs of the child because the prevention of these costs were the aim of the contract which was violated by the doctors.²³ An action in tort is not possible here because pure economic losses are not protected by § 823 I BGB.²⁴ The second part concerns compensation for pain and suffering of the mother.²⁵ An unwanted pregnancy caused by a fault of a

¹⁸ BVerfG, op. cit. (16), NJW 1993, 1751 (1764).

¹⁹ BVerfG, 22th of October 1997, Stellungnahme zum Verfahren des Ersten Senats – 1 BvR 479/92, 1 BvR 307/94, NJW 1998, 523.

²⁰ BVerfG, 12th of November 1997, 1 BvR 479/92, 1 BvR 307/94, NJW 1998, 519.

²¹ Palandt, Vorb. v. § 249, Rn. 47; against this opinion argues Roth, NJW 1995, 2399 (2400), and rejects the possibility to separate existence and maintenance costs.

²² Tort Law, p. 89. This was possible because the explanations about the “damage” of a child in the constitutional case were only obiter dictum.

²³ But this must be expressed as aim in the contract, cf. BGH, 15th of February 2000, VI ZR 135/99, NJW 2000, 1782 (1783).

²⁴ Staudinger, § 823, Rn. B 14.

²⁵ Unification of Tort Law: Damages, p. 101.

doctor is seen as bodily injury to a woman, even if the contract was existing between the doctor and her husband.²⁶ Here, a liability under tort law based on §§ 823 I, 847 BGB (for cases before 2002) or based on either contract law or tort law (for cases after 1st of October 2002²⁷) is accepted and concerns the pregnancy itself²⁸ and further pain the mother has to feel during pregnancy or birth. Lost earnings of the mother are not recoverable. Restrictions are made for abortions that do not constitute a special burden that cannot be expected of the mother.

2. France

a) Case

As an example, the case decided by the Cour de Cassation on 25th of June 1991²⁹ shall be examined.

As to the facts

Ms X went to a private surgeon for a termination of her pregnancy on 5th of June 1987. One month later, medical tests were done with Ms X where it was found out that the abortion was not successful and the pregnancy continued. As a result, on 13th of January 1988 Ms X gave birth to a healthy girl. She claimed damages for the maintaining of her child.

Decision by the Cour de Cassation

The claim was rejected, no compensation was granted to Ms X.

Reasoning

The court held that the pure existence of the girl could not be seen as a recoverable damage and that there have to be special damages that can be compensated. Ms X did not prove that she suffered from moral or financial damage beyond normal birth or that her daughter had no good future perspectives.

b) Conclusions

Opposite to the German numerous case law and literature in the field of “wrongful conception” the French courts are very strict in this area and do not grant any compensation to parents of an unwanted, but healthy child. The French Cour de Cassation held in the above mentioned judgment that there can be no claim for parents because “The existence of a child... cannot in itself constitute for the mother a legally reparable loss even if the birth occurred after an unsuccessful abortion attempt.”

The French approach consequently does not see the costs for maintaining a child and the existence of this child separately.³⁰ Therefore it does not accept the birth of a healthy child with all side effects as a damage. Therefore, only non-expected damages such as a “special damage..., in addition to the normal burdens of motherhood” can be compensated. This can be the case if the mother is suffering se-

²⁶ BGH, op. cit. (14).

²⁷ The reform of the law of damages entered into force on 1st of October 2002 and allows claims for pain and suffering also under contract law: Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften vom 19.07.2002, BGBl. I, 2674.

²⁸ BGH, op. cit. (14); contrary Staudinger, § 823 Rn. B 15: only pain beyond normal pregnancy/birth.

²⁹ Cour de Cassation, 25th of June 1991, Bulletin Cour de Cassation, Chambre Civiles, 1991 I, Première Partie, No 213, pp. 139-140; translations in: Tort Law, p. 123.

³⁰ Unification of Tort Law: Damages, p. 205.

vere psychological trouble because of the birth or if the doctor, being at fault in not performing the abortion correctly, hurts the child so that it is not born healthy but with injuries.³¹

An exception from this general rule is mentioned by one author³² who says that damages can be granted if the mother giving birth to her unwanted child is in a very difficult financial position which is caused by the birth. The Cour de Cassation in its judgment of 25th of June 1991 ruled that Ms X would have had to prove that she was in severe financial troubles and that her daughter therefore had no positive future perspective, so the court probably accepts in specific circumstances financial problems as basis for a claim for compensation if reasonably proven.

3. Comparing conclusion as to both legal systems

From the dogmatic point of view the German and French systems deal the “wrongful conception” cases totally different. Whereas German courts in general accept those claims and grant compensation for maintenance costs and pain and suffering, the French courts categorically reject them. But with regard to the exceptions made, it can be concluded that both systems come closer together in the results. German courts do not allow claims when an abortion is not justified in the eyes of the civil courts, the French courts allow claims if the mother suffers from special burdens which go beyond normal birth. Summing up, it can be said that the German approach is more open for a liability of doctors in this field, but in practice the most obvious difference between both systems is the burden of proof. In Germany the defendant (doctor) has to prove that e. g. an abortion was not justified, in France it is up to the claimant (mother or parents) to prove special damages.

III. “Wrongful birth” – Rights of the parents

The “wrongful birth” and “wrongful life” cases concern the liability of doctors in the case of the birth of a handicapped child that could not be aborted by the mother because of a failure of the doctors to examine the risk of injuries and inform the mother during her pregnancy. The rights of the parents as well as those of the child should be compared under German and French law. The cases are introduced in the “wrongful birth” part and referred to again in the “wrongful life” part.

1. Germany

a) Case

The basic case in Germany that is most often cited in this matter is the case decided by the Bundesgerichtshof on 18th of January 1983³³.

As to the facts

The first claimant was born on 24th of February 1977 with severe injuries due to the fact that her mother, the second claimant, was infected with rubella (German measles) during her pregnancy. As the doctor did not recognize that this infection could cause serious injuries to the child and therefore did not inform the second claimant properly about the risks to give birth to a handicapped child, a termination of pregnancy was not performed although the second claimant would have decided for an abortion if she knew about those risks. The child and the parents claim for a declaratory judgment that the defendant is liable “to pay compensation in respect of all the damage which they have suffered or

³¹ Conseil d'État, 27th of September 1989, see Tort Law, pp. 123 f.

³² Unification of Tort Law: Damages, pp. 84/85.

³³ BGH, 18th of January 1983, VI ZR 114/81, BGHZ 86, 240.

will suffer in the future as a result of the second plaintiff’s infection with German measles during her pregnancy”.

Decision of the Bundesgerichtshof

As to the claim of the parents the court found the doctor liable to compensate the additional costs to maintain a handicapped child (the normal maintenance costs were not asked for by the parents) and to pay damages for the pain the mother had to suffer which exceeded the inflictions which accompany a birth without complications.

Reasoning

The court started with the rights of the second plaintiff, the mother. She expressly asked the doctor to examine the risks for her child because of her rubella in the contract. It was clear for the court that the doctor was in breach of that contract and an abortion would have been legally justified. As later said by the constitutional court³⁴ the BGH already in 1983 pointed out that the birth of a handicapped child is a burden that cannot be expected of the mother and justifies an abortion. Therefore the liability claim against the doctor was accepted. Consequently the court considered the additional costs occurring for maintaining a handicapped child to be recoverable.

The father was, according to the judges, also included in the protective effect of the contract between the mother and the doctor so that the father had the same rights. Furthermore an action in tort was held possible because the mother had to undergo a Caesarian operation and suffered from more pain than she would have suffered within a normal birth.

b) Conclusions

The mentioned judgment was the first time that judges in Germany allowed for a claim for parents of a handicapped child and granted damages to them for the maintenance of their child. This time, only additional costs were compensated because that was what the plaintiffs asked for, but in the following the Bundesgerichtshof did also hold in favour of the claimants when they asked for the normal maintenance costs.³⁵

As in the “wrongful conception” cases, maintenance costs are subject to a contractual claim under §§ 611, 280 I, 249 ff. BGB. This is based on the fact that the doctor was in negligent breach of the contract in not fulfilling his duties of diagnosis and information. Therefore the mother could not choose for a legally justified abortion.³⁶ German case law and literature accepts the full compensation of maintenance costs but is reluctant to compensation of lost earnings, similar to the conception cases.³⁷ But, if the time for a legal abortion has already passed, there is no causation between the doctor’s mal-information and the maintenance costs of the child anymore.³⁸ In contrast to the conception cases the mother generally wanted a child so that the pregnancy in itself does not constitute a bodily harm in this case. Compensation for additional pain and suffering is given under tort law, §§ 823 I, 847 BGB³⁹, but the courts can also consider that the mother did not have to undergo an abortion that can also be ac-

³⁴ BVerfG, op. cit. (16).

³⁵ See BGH, op. cit. (4), NJW 2002, 2636 (2637) with references.

³⁶ The German Law of Torts, p. 158.

³⁷ Erman, § 249, Rn. 64 f.; Palandt, Vorb v § 249, Rn. 48c.

³⁸ The Common European Law of Torts, Rn. 443.

³⁹ Or, following the new law, also under contract law, see (27).

accompanied by problems and pain.⁴⁰ Immaterial damages for being burdened with a handicapped child are not recoverable under German law.

2. France

a) Case

The leading case in France was the case of Nicolas Perruche which was decided by the French Cour de Cassation on 17th of November 2000.⁴¹

As to the facts

During the pregnancy of Josette Perruche in 1983 her doctor and the responsible laboratory failed to realize that she was infected with rubella. As a result, her son Nicolas was born with several handicaps. He was blind, deaf and had developmental disabilities. The Cour d'Appel already granted compensation for his handicaps to the parents. In the appeal to the Cour de Cassation they claimed damages in the name of her son for the fact that he had been born and stated that they would have chosen for a termination of the pregnancy if they had been informed properly about Mrs Perruche's rubella and the possible consequences for her child.⁴²

Decision of the Cour de Cassation

The last-instance court upheld the judgment of the Cour d'Appel insofar as the compensation granted to the parents is concerned.

Reasoning

The Cour de Cassation followed the Cour d'Appel in its decision that the fact that the doctor and the laboratory did not realize Mrs Perruche's rubella and therefore did not inform her about the risks for her child to be born with severe injuries, amounts to a breach of the medical contract. Both the doctor and the laboratory are declared liable in contract law as well as in tort law under Art. 1165 and 1382 Code civil and had to pay damages to the parents for the handicaps of their child.

b) Conclusions

As to the rights of the parents to claim for damages for the “wrongful birth” of their child this judgment confirms the French case law.⁴³ The French courts accept the faults of doctors and laboratories not to realize serious infections of the mother that can have affects to the health of her unborn child as a breach of the contract between the mother and the doctor or laboratory and therefore as basis of a contractual claim based on Art. 1165 Code civil. Moreover, also the conditions of Art. 1382 Code civil are fulfilled by the negligent failure of doctor or laboratory to recognize the mother's disease and therefore by preventing her from choosing for a legal abortion. Summing up, the parents can claim for an action in contract law or in tort, as seen in the judgment of 17th of November 2000 the courts do not consider this separately.

⁴⁰ BGH, op. cit. (33), BGHZ 86, 240 (248 f.).

⁴¹ Cour de Cassation, 17th of November 2000, 99-13.701, http://jc.henin.chez.tiscali.fr/arret17novembre2000_1.htm.

⁴² <http://www.inclusiondaily.com/news/advocacy/wrongfulbirths.htm>.

⁴³ Cour de Cassation, 28th of November 2001, <http://news.bbc.co.uk/1/hi/world/europe/1681041.stm>; Conseil d'État, 14th of February 1997, http://www.ucl.ac.uk/laws/global_law/cases/french/etat/cases/ce_14feb1997.html; Cour de Cassation, 26th of March 1996, see Tort Law, p. 124.

Concerning the scope of compensation, financial (esp. maintenance costs) and moral losses are recoverable under French law.⁴⁴

3. Comparing conclusion as to both legal systems

Concerning the “wrongful birth” case law both systems are already much more similar to each other than in the conception cases. Both approaches provide for compensation of maintenance costs under contract law and for pain and suffering under tort law. The French system is more generous in also granting compensation for moral damages which is not done in Germany.

IV. “Wrongful life” – Rights of the child

1. Germany

a) Case

It should be referred to the case mentioned above, decided by the Bundesgerichtshof on 18th of January 1983.⁴⁵

Decision of the Bundesgerichtshof

As to the claim of the child the Bundesgerichtshof ruled that there is no liability of the doctor with regard to the handicapped child.

Reasoning

In opposition to the maintenance costs of the mother, the handicap of the child could not have been prevented by another behaviour of the doctor. Therefore, it is only the existence of the child that resulted from the doctor’s failure to inform the mother rather than the handicap itself. The court found that there is no duty to prevent the birth of a child that will probably be born with handicaps. By doing this this life of this child might appear as “valueless”. The right to life is a right of supreme value and cannot be judged by a third person. A contractual duty of the doctor towards the child being protected in the contract between the mother and the doctor was also rejected, especially because the right of the mother to an abortion is only accepted as a right in her own interest and not as a right in the interest of the child. The court does not misjudge that this decision causes economic problems to the children in the case of the death of its parents but states that this has to be accepted as destiny like in cases where a mother can not decide for an abortion for other reasons.

b) Conclusions

There is no claim of the child at all under German case law. The reasons are seen in the lack of a contractual duty that the doctor had towards the child on the one hand and the lack of a protected interest (there is no protection to avoid life, only to rescue life) under tort law provisions on the other hand. Some voices in literature hold a different opinion, mainly based on the economic argument that was also dealt with in the BGH judgment. Those representatives support the idea that the additional maintenance costs resulting from the handicap have to be seen as an effect of the bodily injury of the child so that it does not stay alone in case of the death of its parents.⁴⁶ This discussion is especially rele-

⁴⁴ Conseil d’État, op. cit. (43); Unification of Tort Law: Damages, p. 85.

⁴⁵ BGH, op. cit. (33).

⁴⁶ Erman, § 823, Rn. 22; Staudinger, § 823, Rn. B 51.

vant in cases in which the parents give the child in care or get annuities (and not a lump sum) and die.⁴⁷ With regard to that discussion, one should not only consider the economic aspects but also the dogmatic requirements of contract and tort law provisions. Following this, the child has no right not to exist and therefore cannot claim damages under tort law.⁴⁸ But also as to contract law the decision of the Bundesgerichtshof should be followed because the contract did only include a protection of the parents. Furthermore the doctor did not cause the handicap of the child which is misjudged by the representatives of the economic argument. In cases of economic problems of the child the German security system should take this role of financial security instead of “creating” a liability of the doctor.

2. France

a) Case

It should be referred to the case of Nicolas Perruche, decided by the Cour de Cassation on 17th of November 2000.⁴⁹

Decision of the Cour de Cassation

In opposition to the lower court, the Cour de Cassation held in favour of Nicolas Perruche that he had an own right to be compensated for being born with severe handicaps.

Reasoning

The Cour d'Appel had ruled that the omissions of the doctor and laboratory were only causal for the non-information of the mother about possible consequences but not for the consequences itself, namely the injuries suffered from by Nicolas. These injuries do rather follow from the infection of the mother. Therefore the Cour d'Appel did not grant compensation to the child for the fact that he has been born.

The Cour de Cassation overruled the lower court in this respect. It relied on the fact that Mrs Perruche would have decided for an abortion if she had known about her infection in order to prevent her unborn child from being born with handicaps. Consequently, the Cour de Cassation held that Nicolas Perruche can demand compensation for the damage resulting from living with severe handicaps.

b) French case law

French case law differs in the case of “wrongful life”. While the Conseil d'État⁵⁰ and lower courts⁵¹ did not accept a claim of the handicapped child, the Cour de Cassation decided in favour of the children several times⁵². The reason for rejecting a claim is seen in a lack of causation between the fault of the doctor and the handicap of the child by the lower courts. In opposition, the Cour de Cassation refers to the causation between the non-information of the mother and the birth of the handicapped child. In fact, this means that the Cour de Cassation uses the birth and the existence of the child as basis for

⁴⁷ See discussion issues in The German Law of Torts, pp. 184/185.

⁴⁸ Palandt, Vorb v § 249, Rn. 89; Staudinger, op. cit. (46).

⁴⁹ Cour de Cassation, op. cit. (41).

⁵⁰ Conseil d'État, op. cit. (43).

⁵¹ Cour d'Appel in the Nicolas Perruche case, op. cit. (41).

⁵² Cour de Cassation, 28th of November 2001, op. cit. (43); Cour de Cassation, July 2001, <http://www.inclusiondaily.com/news/advocacy/wrongfulbirths.htm>; Cour de Cassation, op. cit. (41); Cour de Cassation, 26th of March 1996, op. cit. (43).

the claim. That is why this line of case law is much criticized.⁵³ Especially doctors have very much complained about the decisions of the Cour de Cassation. They argued that they felt to be under pressure to advise women whose pregnancy includes the slightest risk for the children to become born with a handicap to end their pregnancy in order to avoid being involved in a lawsuit. Insurance companies have also severely increased the premiums for doctors in those cases.⁵⁴

c) French legislation

As reaction to the criticism in literature, medical profession and population the French legislator has developed a new law⁵⁵ which entered into force on 4th of March 2002. Article 1 of this law provides: “Nul ne peut se prévaloir d'un préjudice du seul fait de sa naissance.” (“Nobody can claim to have been harmed simply by being born.”) This should in general exclude such claims as in the Nicolas Perruche case, based on the pure existence of the handicapped child. But in the following sentence there are exceptions from this general rule mentioned. Liability of doctors towards children born with handicaps are possible if the fault of the doctor directly caused or aggravated the handicap or if the doctor failed in taking appropriate measures in order to avoid the handicap. This caused again criticism, it can, for example, be said that the law is not determined enough and that it is again up to the courts to decide what is meant by “failure in taking appropriate measures in order to avoid the handicap”. Furthermore that law grants financial support for handicapped people by the social security system.

3. Comparing conclusion as to both legal systems

In comparing the German case law and the French case law of the Conseil d'État and the lower courts in this category, the reasoning is very similar. “Wrongful life” claims are rejected because of a lack of causation between the doctor's fault not to inform the mother and the handicap of the child. This is also supported by the argument that the child did never have the chance to be medically treated and born healthy, the alternatives were only not to be born or to be born handicapped. That is why the German approach and that of the lower French courts is more favourable. The deviating case law of the Cour de Cassation shall now be prevented by the new French legislation. The future will show whether the Cour de Cassation will change its opinion and also put a stop to claims of handicapped children.

V. Human rights, ethical and moral aspects

In the last part of this paper ethical and moral aspects as well as human rights issues which have already discussed shall be referred to in a summarizing approach.

1. Pure existence of a child as a damage

The question whether a child can at all be seen as a damage is not only discussed by constitutional courts. There are discussion groups of private persons on the internet⁵⁶, but especially activists for handicapped people complain about judgments that grant compensation for the fact that a child is

⁵³ The issues of that criticism are dealt with in part V. of this paper.

⁵⁴ <http://www.inclusiondaily.com/news/advocacy/wrongfulbirths.htm>.

⁵⁵ Loi relative aux droits des malades et à la qualité du système de santé, 2002-303, <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MESX0100092L>.

⁵⁶ As an example: http://www-hsc.usc.edu/~mbernste/ethics.wrongful_life.html.

born with injuries. “The truth is, this is not about the rights of the handicapped. This is about society wishing to establish a right – by any means necessary – not to be burdened with caring for them.”, Rod Dreher wrote in the Sunday’s New York Post.⁵⁷

Thus, is there a right not to have a handicapped child? Obviously, such an argumentation would infringe the principle of human dignity, laid down in Art. 1 I of the German constitution, for example. The question which was sometimes discussed, is whether a handicapped child has a right not to be born. “Certain judges in the high court of appeal still think it is better to be dead than handicapped,”⁵⁸ said activist Xavier Mirabel. This point of view comes up when courts, like the Cour de Cassation in France, decide in favour of a claim of handicapped children. The European Court on Human Rights in Strasbourg did not yet consider this question, but comparing this to the fact that this court hesitated to deal with the permission of abortions from a human rights perspective and to the fact that the European Court on Human Rights refused a right to determine the end of one’s own life⁵⁹ it will probably not decide to allow a right not to be born. Here, one should go along with the reasoning of the German constitutional court that there is only a duty to save life but not to end life.⁶⁰ Otherwise one creates also the possibility of claims of handicapped children against their parents. As to damages concerning the birth of a healthy but unwanted child those principles should also be reflected. In conclusion, the existence of a child, from a human rights and ethical view, should not allow a claim for compensation, only material damages, such as maintenance costs should be granted.

2. Ethical questions in the medical profession

After the Nicolas Perruche case⁶¹ a French geneticist said: “This will push my colleagues to decide more often to terminate pregnancies when they are unsure about the health status of the child. And this is a very common situation.”⁶² Especially after the decisions of the Cour de Cassation granting damages also to the child, doctors complained about being conflicted with high compensation claims. The questions which arise here are: “To which extent do doctors have to discover risks for unborn children?” and “Who sets the standards?”.

With new technologies doctors have more and more possibilities to predict the health of a foetus. The effect of this development is that parents also want to be informed about the slightest doubts of disabilities of their children already during the pregnancy. Nevertheless one should not inflict all the risk to the doctors. If the doctors fulfil their duties of diagnosis and information of the patient the risk should move to the parents as there is always a remaining uncertainty in health issues. Therefore the courts should very carefully examine a negligent behaviour of a doctor. In assuming that they do so, there is no need for doctors to decide for abortions more often than already done. If the medical profession acted in the proposed way – also under the pressure of insurance companies that increase their premiums – it would be the medical profession deciding about standards of information duties. But this should be left to the courts.

⁵⁷ <http://www.inclusiondaily.com/news/advocacy/wrongfulbirths.htm>.

⁵⁸ Op. cit. (57).

⁵⁹ ECHR, 29th of April 2002, Pretty v. United Kingdom.

⁶⁰ BVerfG, op. cit. (16).

⁶¹ Cour de Cassation, op. cit. (41).

⁶² http://news.bbc.co.uk/hi/english/world/europe/newsid_1028000/1028648.stm.