Rights of parents and child in cases of “wrongful conception/life/birth” in Germany and France

Stefanie Samland, ERASMUS student
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1. Introduction / Definitions

1. 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. Introduction

Scenarios:

- Parents do not want a child
  Unsuccessful abortion or sterilization
  Birth of a healthy child

- Parents generally want a child
  Failure of doctor to diagnose risks of injuries
  no abortion
  Birth of a handicapped child

1. Introduction

- Wrongful life claim:
  Action by the handicapped child, especially for pain and suffering and extraordinary medical expenses
- Wrongful birth claim:
  Action by the parents of a handicapped child for emotional harm and medical expenses, but most of all for the cost of bringing up the child
- Wrongful conception claim:
  Action by the parents for the birth of a (usually) healthy but unplanned child

1. Introduction

- Legal issues of damage
  philosophical /
  ethical /
  moral issues

- Contract law
  Tort law

- Germany
  France
2. Wrongful conception

Germany
- judgment of Bundesgerichtshof, 28th March 1995
  - unsuccessful abortion
  - parents claiming compensation for maintenance of their unwanted child
  - decision: only a small amount was granted, but in general no compensation

Germany
- reasoning
  - constitutional discussion about the damage of maintenance costs for a child – infringement of Art. 11 GG (human dignity of the child)?
  - BGH: no
  - but: abortion need not only be legally permitted but also justified – only in cases of medical indication or difficult situation for mother (reference to BVerfG, 28th May 1993)

2. Wrongful conception

Germany
- judgment of Bundesgerichtshof, 27th June 1995
  - unsuccessful sterilization of husband
  - mother claiming compensation for maintenance of their sixth child and for pain
  - based on own rights and transferred rights of husband
  - decision: both damages recognized

Germany
- reasoning
  - negligence of doctor – mal-information
  - purpose of the contract: prevention of birth of another child, financial security for family
  - breach of contract by doctor’s behaviour
  - also mother included in the protective effect of the contract
  - unwanted pregnancy is bodily injury

2. Wrongful conception

Germany - Conclusions
- cases of unsuccessful sterilization or abortion
- breach of contract with purpose of preventing a family from the birth of a child and the financial consequences
- compensation is granted for maintenance of the child, based on contract law
- compensation for pain and suffering of the mother, based on contract law and/or tort law
- no compensation for lost earnings of the mother

Germany - Conclusions
- exception:
  - abortion not justified
- constitutional discussion:
  - controversial decisions of two senates of the Bundesverfassungsgericht
  - What constitutes the damage?
  - pure existence of the child – human dignity
  - financial obligation to maintain the child
2. Wrongful conception

France
- Judgment of Cour de Cassation, 25th June 1991
  - unsuccessful abortion
  - mother claiming compensation for maintenance of her child
- decision: no compensation granted

France
- reasoning
  - “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.”
  - mother did not prove burden beyond birth or bad perspective for her child

2. Wrongful conception

SUMMARY

Germany
- compensation granted for maintenance
- pain and suffering
- exception: unjustified abortion

France
- no compensation granted
- exception: moral of financial damage beyond normal birth

3. Wrongful life / birth

Germany
- judgment of Bundesgerichtshof, 18th January 1983
  - disabled child because of mother's rubella during pregnancy
  - not diagnosed by doctor, therefore no abortion which had otherwise been wished by mother
  - child and parents are claiming damages for "all the damage which they have suffered or will suffer in the future as a result of the [mother’s] infection with German measles during her pregnancy"

Germany
- reasoning
  - as to the child's claim:
    - no violation of protected interest
    - no causation (abortion = decision of mother)
    - no violation of a rule protecting the child
    - contract protects mother's interests of being informed about risks during her pregnancy

3. Wrongful life / birth

Germany
- decisions:
  - first instance: rejection of child's claim, but declared the doctor liable towards the parents
  - appeal court: rejection of both claims
  - BGH: claim of child (-), claim of parents (+)
  - compensation for additional maintenance costs caused by the child's handicap
  - court did not have to decide about normal maintenance costs
3. Wrongful life / birth

Germany
- reasoning
  - as to the parents’ claim:
    - contract included careful analysis of risks for the child resulting from mother’s rubella
    - abortions in those cases justified
    - negligent non-performance of contract

France
- decision: ruling in favour of the child
- reasoning
  - as to parents: breach of contract by doctor and laboratory, damages based on contract law and tort law
  - as to child: causation is given because mother would have chosen for a termination of the pregnancy

4. Moral / ethical issues

"What would have been the alternative to avoid damage to this child? Termination. [...] The person who is standing up for the child in court is saying, 'This child should be dead.'"
4. Moral / ethical issues

- value of life and health
- claim for not to be born - no right to be aborted
- pure existence as damage
- consequences for doctors

5. Discussion

(1) Damage question:
   - Can a healthy child or its maintenance costs be seen as a damage?

(2) Financial question:
   - Should damages also be granted to the handicapped child to ensure its well-being also in cases of death of its parents?

(3) Doctor’s liability question:
   - What do you think of the statement that doctors feel pressure by the "wrongful birth" cases to order abortions already when there is the slightest doubt of occurring disabilities?