

## Rights of parents and child in cases of "wrongful conception/life/birth" in Germany and France

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3. "Wrongful birth and life"
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Rights of the parents / Rights of the child
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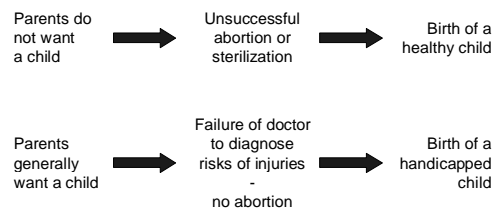
### 1. Introduction

"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

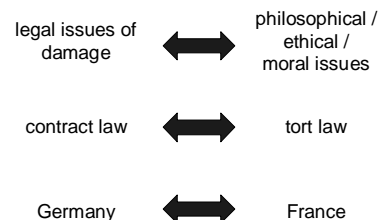
#### Scenarios:



### 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



## 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

## 2. Wrongful conception

### Germany

- reasoning
  - constitutional discussion about the damage of maintenance costs for a child – infringement of Art. 1 I 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

## 2. Wrongful conception

### 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

## 2. Wrongful conception

### 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

## 2. Wrongful conception

### 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 or 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"

## 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 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

- 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

### 3. Wrongful life / birth

#### France

- Judgment of Cour de Cassation, 17th Nov 2000 (L'affair Perruche)
  - disabled child because of mother's rubella during pregnancy
  - not diagnosed by doctor, therefore no abortion which had otherwise been wished by mother
  - maintenance costs granted by appeal court
  - now claim in the name of the child

### 3. Wrongful life / birth

#### 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

### 3. Wrongful life / birth

#### France

- further development after Perruche
  - on-going case-law in 2001
  - criticism in the public – moral arguments
  - 4th March 2002: new law
    - "Nobody can claim to have been harmed simply by being born."
    - but still space left for interpretation

### 3. Wrongful life / birth

#### SUMMARY

##### **Germany**

- compensation granted to parents for
  - maintenance and additional costs
  - pain and suffering
- no claim of the child

##### **France**

- case-law: compensation (parents and child) for
  - maintenance and additional costs
  - pain and suffering
  - living with handicaps
- new legislation
  - no claim for existence

### 4. Moral / ethical issues

"That's like telling that poor girl, 'You should never have been born.'"

"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?

#### 5. Discussion

(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?