

THE NECESSARY ARBITRARINESS IN DRAWING A LINE: SOMETHING MUST BE 'WRONGFUL'

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Abstract: Could the life a disabled person be considered a legal injury? Can the courts compare existence and non-existence and find that in some cases the latter is preferable? Is there an asymmetry between 'a life worth continuing' and 'a life worth bringing about'? In the last decades the so-called 'wrongful life' cases have raised a series of legal and moral problems. This essay attempts to shed light on some of the underlying problems that are specific to these atypical malpractice cases, to present with critical commentary a 'wrongful life' case from Romania, as well as to depict some solutions elaborated by philosophers or legal scholars. Finally, as novelty, in line with Benatar's distinction between present-life and future-life cases, this short paper proposes thresholds for the admissibility of 'wrongful life' cases.

Keywords: 'wrongful life' cases, 'wrongful birth' cases, malpractice, disability, counterfactual test, existence and non-existence.

INTRODUCTION

This paper is part of a more ample study. Considering the formal requirements for this essay, the author is able to discuss only some of the relevant problems raised by the so called 'wrongful life' cases.

Afore I shall explore in depth certain problems surrounding these special types of litigations, a few definitions and clarifications are owed to the reader.

A 'wrongful life' claim is a legal action issued by a [severely] disabled child [through her/his legal representative, usually the parents], against a physician, obstetrician, genetic counsellor, hospital or genetic testing laboratory for damages stemming from a life of suffering, a life brought about by the defendant's professional misconduct [treatment or counselling], that infringed her/his mother's right to choose whether or not have an abortion [or to conceive]. The fundamental claim brought before a court of law is that the claimant would have been better off never having been born. The 'wrongful life' action is usually accompanied by a 'wrongful birth' claim, wherein the mother [or both parents] sues for their own damages incurred as a result of the birth of a disabled child. Damages arising from 'wrongful birth' actions are restricted to the costs of raising a child with a certain degree of disability [specialised education and expensive medical treatment], the mother's pregnancy

medical bills, psychiatric treatment, and the emotional distress caused by bearing a child with unanticipated disability.

As 'wrongful birth' claims are regularly admitted both in common law and civil law countries [2], one could ask if a separate 'wrongful life' claim is still needed. The answer is positive, because the damages sought by the child are often much more substantial, the biological parents might not be involved in the life of their child, or might be dead, the parents might not be able to afford the cost of the litigation, but NGOs promoting children's rights may be willing to support the child's action [3].

The literature rightly pointed out that 'wrongful life' cases purport a series of difficult legal, judicial, and moral problems, for the acceptance of these type of litigations, it is argued, presupposes the recognition of disabled life as legal injury [legally recognised loss], an outcome that may sound inconsistent with the 'sanctity of life' doctrine, may appear to violate human dignity, and devalue the life of disabled persons. In the case of 'wrongful life', but for the tortuous action – had the physician properly informed the parents of the risk of the genetic disorder – they would have prevented the pregnancy or would have opted for an abortion, and thus, the claimant would never have been born. This means that, to approve the existence of the damage claimed by

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the child, pursuant to the general principles of tort law, the court is required to compare the claimant's present impaired condition with the state in which the claimant would be had there been no professional misconduct, and subsequently to establish that non-existence is preferable to life with disabilities. Furthermore, when assessing the amount damages, the court is obliged to have recourse once again to the counterfactual test in question, this time to establish 'how worse off' is the claimant as a result of the negligent act compared to non-existence. The counterfactual test involving the comparison between existence and non-existence has been coined as the 'impossible comparison' [4] or the 'wrongful life paradox' [5].

A 'WRONGFUL LIFE' CASE FROM ROMANIA

After being negligently assured and reassured that there is no risk of her second child being born with tibial agenesis, Mrs. M.P. gave birth to a child affected by the genetic malformation she feared most. Mrs. M.P., her husband, and M.-D.P. [the child] brought legal action against the physicians involved in the medical malpractice, as well as against the hospital, the private clinic, and the Ministry of Health. On behalf of the child, they asked for a lifetime allowance of 530 euro/ month ['wrongful life' action]; in their own name, they requested compensation, for pecuniary and non-pecuniary damage, that ought to cover the costs of frequent medical interventions ['wrongful birth' action]. Although in its reasoning the Bucharest Court of First Instance referred only to the parents, in its conclusions found in favour of the child, and awarded the payment of monthly allowance as requested. The Bucharest County Court reassessed the merits of the case and dismissed the claimants' action. Upon appeal, the Bucharest Court of Appeal rendered its final judgment, allowing the 'wrongful birth' claim, but rejecting the child's complaint. In its 'wrongful life' related reasoning the Romanian court of appeal ascertained that the damage in question consists of the birth of a child with genetic malformation, and stressing that a proper medical procedure would have resulted in abortion, found no causal nexus between the medical malpractice and the alleged damage. The court was of the opinion that, in the light of the importance of the right life, and in particular in view of the fact that the genetic malformation was not capable of substantially affecting the quality of the child's life, it could not be considered that it would have been better for the child not to have been born [6].

At least three conclusions can be drawn from

the decision of the Bucharest Court of Appeal. First, it granted *locus standi* for the claimant child. Second, it deemed the 'impossible comparison' possible. Third, it is self-contradictory: on the one hand the judgment, theoretically, left the door open for 'wrongful life' cases initiated by those children whose life quality would be affected substantially (the scenario in which non-existence is preferable to existence) by a genetic disease, that 'materialised in the claimants' body due to a medical wrongdoing, while on the other hand it stated that, in so far as a faultless medical conduct would have led to abortion, there is no causal link between the torturous action and the alleged damage. In other words, according to the judgment in certain scenarios a 'wrongful life' case might be admissible, but there is no scenario in which a 'wrongful life' claim might be admissible. Moreover, following its own logical flaw, the court should have found that the child suffered no damage, because his actual condition is better off than not having been born at all. Instead, the Romanian court of appeal based its decision on the absence causality. Taking into consideration that, in the court's view, the third element of delictual liability, namely the existence of damage, had not been met, why analysing the fourth? Especially given that, under the system of indivisible unity between cause and causal conditions (in Romanian: sistemului unității indivizibile dintre cauză și condițiile cauzale) [7], there is a direct causal relationship between the breach of professional duty and the alleged injury in question: had the doctors fulfilled their duty towards to mother, she would have chosen not to conceive or would have elected abortion, and consequently the genetic impairment affecting the child's life would not have come into being. A similar erroneous approach can be identified in the Unificatory Resolution of the Hungarian Supreme Court nr. 1/2008: 'The difference in quality of life between a healthy birth and one involving (genetic) birth defects cannot be traced back to medical negligence' [8]. It is true that the abstract existence of a genetic disorder is independent of the physician's conduct. Nevertheless, the concretisation of the disease in an entity that will have become a legally recognised person upon birth is entirely attributable to medical negligence. Moreover, while there is a positive duty incumbent upon the doctor to provide detailed information so a patient can, in full knowledge of the facts, decide to have or not have an abortion, the law does not provide for a justifying cause for the breach of this duty.

After the final judgment of the Bucharest Court of Appeal, the claimants sought remedy at international level, and lodged an application with the European

Court of Human Rights (henceforth ECtHR). On behalf of their child, relying on article 2 (right to life) and 8 (right to respect for private and family life) of the Convention, the applicants complained that M.-D.P.'s right to life was infringed by his birth as a disabled child as a result of medical negligence [6]. The ECtHR found no violation of article 2 of the Convention. It held that the right not to be born cannot be derived from article 2 of the Convention. The Strasbourg-based court offered no reasons to support its findings other than citing from its own case-law: 'article 2 cannot, without distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life' [9].

But this assertion is clearly unsubstantiated, for M.-D.P. did not claim that he would be better off dead than alive with tibial agenesis, but rather invoked the infringement of an interest not to be born with the genetic disability in question. Had the claimant's parents thought that their son's life is not worth continuing, they probably would not have requested compensation consisting of a monthly lifetime allowance, but would have filed a complaint under an alleged right to die, seeking for a European approval of active euthanasia. I do not claim that a right not to be born can be derived from article 2 of the Convention, however, employing in a sardonic fashion the ECtHR's choice of words, the right not to be born cannot, without distortion of language, be interpreted as denoting the right to die.

The ECtHR acknowledged that the alleged right falls under article 8 of the Convention, but deemed unnecessary to deal with the issue because, finding that the decision of the Romanian court of appeal was not arbitrary or manifestly unreasonable, it considered that the applicant was not a victim of the damage claimed. In my opinion the Court's assessment under article 8 of the Convention, in lack of a better word, is superficial at best, given that, in line with its own Practical Guide on Admissibility Criteria the notion of 'victim' is interpreted autonomously and irrespective of domestic rules, and it does not necessarily imply the existence of prejudice ('La Cour rappelle également que la notion de « victime » est une notion autonome qui s'interprète de manière indépendante des règles de droit interne telles que l'intérêt à agir ou la qualité pour agir. La notion de victime n'implique pas nécessairement l'existence d'un préjudice.') [10]. Furthermore, the ECtHR missed the opportunity to scrutinize whether, in the light of conditions in contemporary society, the concept of

'victim' has evolved since last examined [11].

'WRONGFUL LIFE' CASES IN OTHER STATES

In France the Cour de Cassation in its famous Perruche case upheld a 'wrongful life' claim ('Since the faults (of the physician and of the laboratory which analysed the blood samples) in the execution of the contract of care with Mrs. X, denied her the choice to end pregnancy to avoid the birth of a handicapped child, this child can claim for the damages resulting from the handicap and caused by the qualified faults' – excerpts from the Perruche decision) [12]. In the aftermath of the Perruche judgment, the French legislator intervened by enacting the so-called Loi Anti Perruche, which explicitly states that no one can be indemnified for the sole fact of her/his birth [13].

The German Federal Court of Justice (Bundesgerichtshof) denied the possibility of lodging a 'wrongful life' claim on account of the human dignity principle [14].

In the Kelly case the Supreme Court of the Netherlands (Hoge raad der Nederlanden) fully upheld the first 'wrongful life' claim in the country's history, and granted the claimant child, Kelly Molenaar, compensation covering the extra-costs associated with her disease-induced disabilities and non-pecuniary losses for her suffering [13].

Excerpts from the Kelly decision: 'The doctor who failed to conduct the required prenatal diagnosis which would have been required in the given circumstance did not only breach his contractual duty towards the mother, but also acted unlawfully towards the unborn child, even though the child has no right not to exist or to require that the pregnancy be terminated. (...). According to art 6:97 BW, the court has to assess the damage in a manner most appropriate to its nature. In a case as this, due to the nature of the damage, all costs that will be incurred for the upbringing and care of the child, as well as the costs necessary to meet the consequences of her handicap, are to be compensated. Holding the obstetrician and the hospital liable for breaching their duty towards the child does not offend the human dignity of the child. On the contrary, it puts her in a position, as far as money can achieve this, to lead a humanly dignified life (...). The child is, because she is severely handicapped, also entitled to compensation of non-pecuniary loss. The amount of the compensation should not be assessed according to the severity of her handicap. The court has to take into account all the relevant circumstances at the time of its decision, among others, the way the girl has developed

since her birth, the extent to which she is prevented by her handicap from leading a “normal” life and the extent to which she suffers as a consequence thereof. [15].

In the court’s view the legal obligation of a health professional extends to the foetus, thereby the causal nexus between the breach of duty and the damage experienced by the child can be established. The Dutch Supreme Court stated that allowing compensation for damages stemming from medical malpractice cannot be interpreted as a violation of human dignity, and expressly refused to consider the life of the child as damage or a source of suffering [16]. As regards the exact amount of damages, the court held that it can be determined, as in many other cases, by a practical approximation, and thus rejected the “impossible comparison” [17].

In the United States of America only three jurisdictions – namely the Supreme Courts of California, New Jersey, and Washington – acknowledge ‘wrongful life’ claims [18]. The logical course of those courts, which follow the affirmative path, can be summed up by a passage from *Curlander v. Bio-Science Laboratories*:

‘The circumstance that the birth and injury have come in hand in hand has caused other courts to deal with the problem by barring recovery. The reality of the “wrongful life” concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.’ [19].

The other supreme courts refused to recognise ‘wrongful’ life claims as a legitimate cause of action, mostly, on the following grounds: there is no duty owed to the claimant child, for there is no right to be born healthy; there is no injury, for existence is always preferable to non-existence; the damages are unascertainable, for non-existence cannot be valued and compared with being born impaired [20]. For example, the New York Court of Appeals in *Becker vs. Schwartz* held that ‘whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians [...] recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson’s choice of life in an impaired state and nonexistence.’ [21].

Initially I proposed to present ‘wrongful life’ cases

in the Australian [4], [22] and Israeli [23], [24] context as well; Justice Michael Kirby’s dissenting opinion is a true masterpiece. Unfortunately, time and the purview of this essay proved to be an efficient obstacle in this respect. Nevertheless, there is always a next time.

PROPOSED SOLUTIONS

Many authors argued in favour of the affirmative path, *id est* for the admissibility of ‘wrongful life claims’, by ignoring, avoiding or solving the ‘impossible paradox’.

For the lack of time prevented me from setting up a consistent theory, I chose a ‘fragmented way’ to argue that: ‘wrongful life’ claims are in principle admissible; the possibility of partially avoiding the ‘impossible comparison’ is up to the claimant; the severity of the injury caused by the tortious action should not constitute an exclusive criterion; even though Benatar’s [25] asymmetry with regards to the ‘absence of pain – absence of pleasure relation should be rejected as yet unproven -- Benatar’s asymmetrical model of the absence of pain and absence of pleasure has been refuted by Julio Cabrera; in a nutshell, Cabrera highlighted that Benatar ‘uses a different notion of “possible being”, a concept that could be called “empty”, according to which a “possible being” would be the one that simply is not present in the world and neither is counterfactually represented’ [26] --, his asymmetry theory concerning the ‘present-life sense’ – ‘future-life sense’ relation should be upheld as legally substantiated; the threshold of admissibility has to be established arbitrary -- according to Hayden White: ‘Any prose description [including the legal discourse a.n.] of any phenomenon can be shown on analysis to contain at least one move or transition in the sequence of descriptive utterances that violates a canon of logical consistency’ [27] -- but in consonance with the fundamental compensatory principle, that underpins the assessment of damages in both contract and tort law.

Both Allan Hanson [28] and Melinda Jones [3] argued that in ‘wrongful life’ cases the comparison between existence and non-existence can and indeed should be avoided. According to Hanson, the term ‘negligent action is actionable only where it results in injury to another’ should not be interpreted as focusing on the claimant as a person, but as highlighting the injury as a thing in itself. In this way, the counterfactual test would not posit itself in form of the ‘impossible comparison’, but rather it would involve the comparison between the present condition of the impairment and the state in which the impairment would have been in if the medical negligence had not occurred. As to the

assessment of damages, Hanson argues that it would be illogical and unjustifiably exceptional within the field of prenatal injury claims to compare life with non-life. The common solution would be to compare the state of the impaired child with the condition of other children who show similar characteristics with the claimant, but does not suffer from the given genetic disorder. In the same vein, Jones noted that the equitable and legitimate comparison ought to be between the child's actual life and the life she/he would have experienced but for the misconduct that brought about the birth-impairment. 'This is the child that the medical practitioner had led the mother to believe she was carrying' – Jones argued.

Whereas the Hanson-Jonson thesis, apart from some negligible oversights, appears to be a consistent logical-legal rationale, regrettably it shows a lack of general applicability. It should be noted that within the context of any civil litigation, the claimant is the one who determines the subject-matter of the proceedings. Therefore, the 'impossible comparison' is indeed preventable by pleading damages as simply physical suffering and emotional distress directly derived from the breach of professional duty. However, by pleading damages as 'life with disability', a claim that refers to life as a whole, the claimant 'condemns' her/himself to prove that her/his life as a whole is worse off as a result of the alleged professional negligence. In other words, for the court cannot, under the principle according to which the parties delimit the subject-matter of the proceedings, *ex officio* re-qualify the proceeding's subject-matter, whenever the claimant filed a claim for damages as 'life with disability', she/he had already evoked the 'impossible comparison'. M.-D.P committed this very tactical error before the Romanian courts.

Unlike Hanson and Jones, Dean Stretton considered that, even if the pleading refers only to physical suffering and/or emotional distress, the 'impossible comparison' still had to be confronted [4]. After providing evidence that the comparison between existence and non-existence is by no means foreign to judicial thinking, professor Stretton asserted that 'non-existence is nothingness, and so has zero value, whereas life is for the most part good, and so has greater than zero value'. Professor Stretton found that pleading the injury only as physical suffering and/or emotional distress would not require the claimant to demonstrate that her/his whole life is worse than non-existence, but barely to show that a single aspect of her/his life, namely the physical suffering and/or emotional distress, is worse than the alternative non-existence.

Albeit Stretton's logical flaw leads to similar

results compared to the Hanson-Jonson thesis, from my perspective his method is questionable. First, because, within the context of "wrongful life" claims, he stated without reservation that 'non-existence is nothingness, and so has zero value'. As Nick Byrd correctly remarked, it is logically flawed to assign qualitative value to non-existence, therefore nothingness cannot be compared qualitatively with any scenario [29]. Applying the counterfactual test to 'wrongful life' claims does not really mean to compare existence with nothingness, but rather [on this point I agree with professor Feinberg] to compare her/his existence with an alternative hypothetical state of affairs in which she/he does not exist [30]. Whereas it is true that from the claimant's point of view we could assign a qualitative value, in this case zero, to the state of affairs in which due to appropriate medical conduct she/he would not have been born, it is much less clear how one could compare a single aspect of her/his life, namely the physical suffering and/or emotional distress, with a single aspect of zero.

SETTING THRESHOLDS

In his thoughtful work entitled *The Wrong of Wrongful Life*, the author, David Benatar, reached an unprecedented conclusion: the expression 'a life worth living' is ambiguous between 'a life worth continuing' [present-life sense] and 'a life worth bringing about' [future-life sense] [31]. Professor Benatar pointed out that many authors [32] erroneously employed the present-life sense and applied it to future-life cases. For instance, a decision on termination of life of a cancer patient is a present-life case, for the question is whether a person's life, who has a legally recognised interest in existing, is still worth continuing under excruciating pain conditions. By contrast, 'wrongful life' claims are *par excellence* future-life cases, because here the alternative hypothetical condition involves a potential but non-existent being, who is yet to acquire a legally recognised interest in existing. Benatar brought forward moral arguments [25], and I will provide legal ones, to prove that ending of a life requires stronger justification than not starting one.

In European countries, almost without exception, abortion is available upon request during the initial weeks of pregnancy. Even after this period, the termination of pregnancy, in situations where there is a risk that the child will suffer from a [severe] genetic disease, is legally accepted [33]. By contrast, with regards to physician-assisted suicide, passive and active euthanasia, the Europeans legal systems are incomparably much

restrictive [34]. The majority qualifies them as criminal offence, while the minority may deem such acts legal, provided that certain limitative criteria are met [usually unbearable suffering, no hope of recovery or alleviating pain, absence of reasonable alternative] [35].

I may conclude thus, that, in terms of European legislation and in line with Benatar's affirmation, a decision, which states that an impairment is so severe that it makes life not worth continuing, is made at a much higher threshold and needs a stronger justification, than a judgment that considers an impairment sufficiently bad to make life not worth beginning. It follows that, on the one hand, in the context of the same genetic disease, a life could be worth continuing but not worth starting, and on the other, that even in the case of genetic diseases not capable of substantially affecting the quality of the child's life, the being's never coming into existence could be preferable to her/his actual condition of mild suffering.

Examining in contrast the actual circumstances of an individual with an alternative imaginary state of affairs in which she/he does not exist is very well established in contemporary judicial thinking. This comparison is applied to cases involving withdrawal of life sustaining treatment, discontinuation of treatment, and authorised separation surgery on conjoined twins [36]. The same operation may be applied to 'wrongful life' cases as well, albeit, as these actions are centred on future-life problems, employing a much lower threshold. This profound asymmetrical relation in threshold of present- and future-life cases is precisely why I reject Labour's Birth principle, which, on grounds of policy consideration and moral demand, would prohibit to cause the existence only of those people 'whose lives are clearly worse than non-existence' [37]. A Birth principle is unjustifiably exclusionary, for it would restrict the scope of *ratione personae* to those who would better off be dead, and, at the same time, poorly worded, because, whereas liability for prenatal injury focuses on the reprehensible nature of the medical conduct, it highlights the wrongness of life as a whole.

It is aphoristic that, in cases where it is impossible to compensate for the legally recognised loss in a specific form [for example, the 'wrongful life' claimant cannot be restored into a state of affairs in which she/he would not have been born], the fundamental aim of the compensatory principle is to place the claimant, as nearly as money is able, in the position she/he would have been but for the tortuous action. In 'wrongful life' case the claimant does not pursue death, but seeks just compensation for the burdens inflicted upon her/him by a medical negligence.

For all these reasons, in my opinion 'wrongful life' claims should be open not only to those whose impairment is so bad that their life is not worth continuing, but also to those whose life is not worth starting. The threshold of admissibility, for want of a better solution, should be set arbitrary but in full harmony with the fundamental compensatory principle, and should reflect the asymmetry of the termination of pregnancy – termination of life relation.

Thus, I propose the following thresholds:

- in preconception cases, that is when in the absence of medical malpractice the mother would have chosen not to conceive, the child's 'wrongful life' claim is admissible irrespective of the severity of the genetic disorder;

- in prenatal cases, that is in scenarios where in the absence of medical malpractice the mother would have chosen to terminate the pregnancy, if the professional misconduct occurred during the initial period of pregnancy when abortion is legally available upon formal request, the child's 'wrongful life' claim is admissible irrespective of the severity of the genetic disorder;

- in prenatal cases, if the tortuous action occurred after the expiration of the limit for abortion upon formal request, but before the subsequent termination of pregnancy for therapeutic purposes in the interest of the foetus became time-barred, if such statute of limitation is provided by national law, the child's 'wrongful life' claim is admissible, provided that, according to the national legal system, the severity of his physical inability and/or emotional distress would have warranted the termination of pregnancy on genetic grounds.

Finally, I agree with the distinction made in literature between disability and inability [impairment], and I fully upheld that view of the critical disability theory, according to which disability is but a social construction (while society does accommodate for certain impairments, it does not for others). Nevertheless, the recognition of the so-called 'wrongful life' cases does not represent an affront to human dignity, nor does it send a discriminatory message to people suffering of certain socially unaccommodated impairments. Awarding compensation caused by medical misconduct would provide the claimants the possibility of a more dignified life, would ease the financial aspect of the burden, would offer a better a better opportunity to participate in society, would put them on equal footing with any other persons who seeks remedy for other's faults, and ultimately would recognise their right to live as wonderful a life as possible.

The term 'wrongful life' case is inadequate and misleading, for the 'wrongful' must be sought not in the claimant's life, but in the misconduct of the tortfeasor. It would be better to abolish the notion altogether or to rename it for the sake of preventing any possible formal discrimination or confusion.

'The problem of responsibility would have a meaning only if we had been consulted before our birth and had consented to be precisely who we are' [1].

Conflict of interest

The authors declare that they have no conflict of interest.

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