VRIJE UNIVERSITEIT BRUSSEL

Thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws in de rechten

A change of direction in the jurisprudence on wrongful birth claims

Graciela Pardo Burbano

0566552

Academic year 2023-2024

Promotor: Elisabeth Alofs

Jury: Nishat Hyder-Rahman

Law & Criminology

Foreword:

This master's thesis was written with the purpose of obtaining a master's degree in law. Throughout my studies my primary interest has always been family law. I had planned to choose a topic within that branch, when at the moment of registration, I came across a topic I had never heard about: wrongful birth claims. Intrigued, I decided to choose this topic, without fully knowing what to expect. Over the past year and a half, my research on wrongful birth claims has revealed gaps in Belgian legislation, reinforcing the need for regulation. This thesis aims to address those gaps and contribute to the ongoing debate on this topic. I hope that my analysis and recommendations will be valuable to this discussion.

I would like to express my sincere gratitude to my promotor, Prof. Dr. Elisabeth Alofs, and my co-promotor, Dr. Nishat Hyder-Rahman, for their guidance and support. Having Dr. Hyder-Rahman as my co-promotor has been an amazing experience. I am incredibly grateful for her prompt and thorough feedback. Her guidance was instrumental in enabling me to produce a work that I am proud of. Additionally, I would like to thank Prof. Opgenhaffen for his lessons on Health Law, which inspired some of the writing, especially the section on medical liability. His lessons also introduced me to the case of Stanev v Bulgaria. This case played a role in shaping my argument in favour of wrongful life and wrongful pregnancy claims.

Finally, I would like to thank my parents and sister for their unwavering support throughout this journey. My sister has been a great help as a second reader, providing me with precious feedback. Without the support of my family, this thesis would have been far more difficult to complete.

Graciela Pardo Burbano – 8/05/2024

Table of contents

1. Introduction

1. The term 'wrongful birth claim' is not well-known among the general population; however, upon explaining its meaning and implications, a reaction ensues.

Wrongful birth claims are claims made by parents of a child with disabilities. In these cases, the doctor can be held responsible for not discovering a disability or not informing the parents of it.[1] Wrongful life claims are similar, except they can be initiated by the parents in name of their child or by the child in question, once they are of age.[2] Lastly, there are wrongful pregnancy claims. These claims are made by parents because of the birth of an unplanned but otherwise healthy child.[3] Classic examples of this are children born after a failed sterilization or a failed abortion.[4]

2. In the context of this thesis, the term 'reproductive liability claims' is employed to collectively refer to these claims. This hyponym emphasizes the wider range of reproductive decision-making and its legal ramifications within the context of medical responsibility.

1.1 Relevance

3. Reproductive liability claims, like many other claims for liability in Belgium, are brought on the basis of the articles 1382-1384 of the Old Civil Code. These articles are rather general and do not delve into the complexity of reproductive liability claims. Inthis thesis, I will discuss the ongoing debates, so that readers can better understand whysuch claims are complex to regulate.

Reproductive liability claims have been the subject of enduring debate within various European nations. It is continuously discussed by individuals well-informed about its nature and implications. While some believe one should receive compensation for all damages, others believe the opposite.[5] Since in a wrongful pregnancy claim, parents can receive compensation for the birth of a healthy child[6], it raises questions on the morality of such claims. I will discuss the ethical debates on this topic in sub-section 2.2.

These claims not only pose an ethical problem, but also a legal one. As mentioned above, there is no specific liability regime on wrongful birth claims. These claims rely entirely on three articles of the Old Civil Code, which pertain to liability in general.[7] General articles leave ample room for interpretation, such as qualifying the birth of a healthy child as a

---

[1] See F. DE MEYER en C. DE MULDER, "De vergoeding van materiële schade wegens ongewenste gezinsuitbreiding na foutieve embryo-implantatie", *T.Gez.* 2021-22, afl. 2, 112-119.

[2] See T. BALTHAZAR, "Wrongful birth, wrongful life", *Juristenkrant* 2010, afl. 220, 7; G. GENICOT, "Nouvelle confirmation du rejet de l'action en 'wrongful life'", *T.Gez.* 2016-17, afl. 5, 316-317; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, (212) 229; J. TER HEERDT, "'Wrongful life' en 'Wrongful Birth', een 'never ending story': twee arresten die de controverse rond vorderingen tot schadevergoeding voor de geboorte van een ongewenst of gehandicapt kind weer volop in de schijnwerper plaatsen", *T.Gez.* 2001-02, afl. 5, 250-255.

[3] See Bergen (6e k.) 28 oktober 2011, *T.Gez.* 2012-13, afl. 3, 234; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

[4] See V. SCHOLLAERT, "Wrongful-birth- en wrongful-life-vorderingen overwogen vanuit de inbreuk op een recht als fout", *T.Gez.* 2021-22, afl. 5, 369-375.

[5] See Antwerpen 8 september 2003, *NJW* 2004, afl. 70, 558-560; Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551; Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229.

[6] See Bergen (6e k.) 28 oktober 2011, *T.Gez.* 2012-13, afl. 3, 234.

[7] Art. 1382-1384 Oud BW.

wrongful 'family expansion' rather than a wrongful birth to receive compensation for material damages. In addition to that, it creates legal uncertainty, potentially leading to an increasing practice of defensive medicine.[8]

A lot has changed during the last two decades with the coming of modern technologies and laws to regulate them. Society's values have changed. This can be seen with the passing of laws on abortion[9] or laws regarding patient's rights[10]. All of this underscores the need to bring our law up to date. Legislators have already begun this process, think for example about the reform of the Civil Code.[11]

4. While other countries have regulated wrongful birth claims[12], in Belgium these claims are still left to the decision of the judge, who bases his decision upon general principles set out in the Old Civil Code.[13] Multiple attempts have been made at regulating wrongful birth claims, but none have come to fruition.[14] These attempts will be further discussed in section five of this thesis.

5. Legislators face a challenging task: balancing the interests of claimants to receive appropriate compensation with the interests of doctors to be protected from a liability regime with an overly broad scope. Developing specific legislation on this matter would not only ensure more legal certainty, but also help define the scope of liability for medical practitioners in these situations. This is especially true now with new developments happening in Belgian law, which will be discussed in section 3.3.

1.2 Course of the research

6. This thesis starts by looking into the legal landscape surrounding reproductive liability claims, with a specific focus on the Belgian context in comparison to the United Kingdom and France. Despite facing the same issue, both the United Kingdom and France have enacted legislation addressing this matter, while Belgium has not yet done so. The aim is to compare the common law and civil law approaches to reproductive liability claims, while examining the complex aspects of legislative developments, ethical debates, and practical consequences in each jurisdiction. By doing a comparison with other jurisdictions, this thesis aims to identify gaps in Belgian law, highlighting possible ways for legislative improvement.

---

[8] Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108-111.

[9] Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

[10] Wet van 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719.

[11] Wet van 13 april 2019 tot invoering van een Burgerlijk Wetboek en tot invoeging van boek 8 "Bewijs" in dat Wetboek, *BS* 14 mei 2019, 46.353.

[12] See Congenital Disabilities (Civil Liability) Act 1976 (UK); Art. L114-5 of the Social Action and Family Code (Fr).

[13] Art. 1382-1384 Oud BW.

[14] Wet 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorg, *BS* 6 juli 2007 (ed. 1), 37.151; Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913; Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1; Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. 538/1-95/96; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2003, nr. 51 0090/001; Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Senaat 2010-11, nr. 5 - 845/1; Wetsvoorstel tot invoeging in het Burgerlijk Wetboek van een artikel 1383bis waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55 0531/001.

Section two offers an insight into the subject matter, distinguishing reproductive liability claims from other related claims. The discussion focuses on the definition provided by Belgian law, accompanied by a study of the ethical debates that surround this topic.

The third section scrutinizes the current legal landscape in Belgium, encompassing legislation, jurisprudence, and doctrinal perspectives on reproductive liability claims. A detailed analysis aims to unveil the shortcomings in Belgian law, by identifying the gaps, discussing recent developments, and analysing the consequences of them. The main developments that will be discussed are the potential impact of the reform of the Belgian Civil code on wrongful birth claims and a recent wrongful birth case involving a 'saviour' baby.

In the fourth section, a comparative study unfolds, comparing Belgium, the United Kingdom, and France in terms of their legislative responses to the subject matter. The analysis seeks to identify successful strategies employed by those jurisdictions that may serve as a blueprint for Belgian legislators.

Section five delves into an in-depth examination of previous legislative proposals. This section aims to offer insights into potential pitfalls and strategies to prevent future shortcomings.

The sum of all these sections will provide an answer to the central question: Can legislative reform ensure better regulation on wrongful birth claims in Belgium?

7. Once this question has been answered, I will go a step further and attempt to give legislators a thorough and well-written recommendation for their next attempt at regulating wrongful birth claims.

2. Conceptualization of reproductive liability claims

2.1 The difference between reproductive liability and related claims

8. Medical negligence can give rise to several different claims. One of those being that of reproductive liability. To understand what a reproductive liability claim is, it is important to know what differentiates it from other types of claims.

The definitions and explanations provided in this section are based on a Belgian law perspective. Later, when analysing reproductive liability claims in other jurisdictions, I will clarify the legal principles behind these claims in each jurisdiction. The ethical debates surrounding wrongful birth, wrongful life and wrongful pregnancy cases will be discussed later in this section.

Belgian law differentiates between three types of claims related to medical liability for damages resulting from the birth of a healthy child or a child with disabilities. To better understand the differences between each of these claims, I will illustrate them hereafter.

2.1.1 Wrongful birth

9. Firstly, there are wrongful birth claims. These claims are initiated by the parents of a child with disabilities.[15] The situation preceding this goes as follows: a baby is born with a disability or an illness. That disability or illness was, or could have been found, by the medical practitioner. Because the medical practitioner did not discover the illness (in time) or did not inform the parents of it, the parents 'lost the opportunity' to proceed with a termination of the pregnancy. The doctor is therefore liable for the damage causedto the parents.[16] The aforementioned example is only theoretical; it may differ in practicedue to the complexity of such cases. The delimitation of the damage depends on each country's legislation. This will be explained in further sections.

10. There is no definition of wrongful birth in Belgian law, but it has been described by Belgian literature. HUYGENS describes it as: *"The action for damages brought by the parents of the child with disabilities (...), because the birth of their child could not be prevented."*[17] Others, like SCHOLLAERT, define it as: *"(…) the situation in which the mother of a child based on the articles 1382-1383 of the Old Civil Code claims damages from a doctor, because he did not correctly inform her of the child's problematic medical condition before it was born. If the mother had been informed of her child's medical condition, she would have requested an abortion."*[18]

11. A wrongful birth/life/pregnancy can take place pre-conception, during conception or post-conception. [19] In this thesis I will be focusing on pre- and post-conception reproductive liability claims since they are linked to medical liability while wrongful birth

---

[15] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[16] M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

[17] A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[18] V. SCHOLLAERT, "Wrongful-birth- en wrongful-life-vorderingen overwogen vanuit de inbreuk op een recht als fout", *T.Gez.* 2021-22, afl. 5, 369-375.

[19] R. KRUITHOF, "Schadevergoeding wegens geboorte van een ongewenst kind", *RW* 1986-87, 2737-2752; K. SCHETS, *Aansprakelijkheid en vergoeding voor schade bij wrongful birth en wrongful life* , masterproef UGent, 2011-12, 129 p., https://libstore.ugent.be/fulltxt/RUG01/001/892/015/RUG01-001892015_2012_0001_AC.pdf.

claims for a mistake made during conception are often associated with criminal liability.[20] An example of a post-conception wrongful birth case is a faulty prenatal diagnosis where the gynaecologist did not see an abnormality in the foetus.[21] This means that the mistake that led to the damage occurred after the child was conceived. Pre-conception wrongful births are due to a mistake made before the child was conceived, such as a failed sterilization.[22]

2.1.2 Wrongful life

12. Following this, imagine the next situation: instead of the parents demanding compensation for the damage they suffered, the child initiates a claim for the damage caused by the disability to them personally. This constitutes a wrongful life claim.[23] Here, the child is asking for compensation because they were born with a disability.[24] These kinds of cases are controversial since people believe they relate to the value of human life.[25]

In Belgian literature this claim is described by DE KEZEL as: " *(…) cases in which it concerns a pregnancy from which a child was born physically disabled or mentally or socially disabled due to a birth defect, and in which the claim is brought by the child in court."*[26] It is also described as: " *(…) the claim (…) brought (through a representative)by the child who was born with a disability after a preconception or prenatal mistake (…)."*[27]

13. In practice such cases are similar to wrongful birth cases, the main difference being the party asking for compensation. In wrongful birth claims the parents ask for compensation for the damage caused to them, in wrongful life claims the claimant can be either the parents on behalf of their child, or the child itself who is now of age.[28] In some cases, an ad hoc guardian can be appointed to represent the child. However, this is

---

[20] See Gent 4 april 1950, R.C.J.B. 1953, 194; Luik 13 november 1950, R.C.J.B. 1953, 198; Brussel 8 mei 1985, JT 1986, 252; I. DELBROUCK, "Niet-consensuele seksuele misdrijven – Bijzondere strafrechtelijke en strafprocesrechtelijke aspecten" in A. VANDEPLAS, P. ARNOU, S. VAN OVERBEKE en S. VANDROMME, *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, losbl., 158-159; F. DE MEYER en C. DE MULDER, "De vergoeding van materiële schade wegens ongewenste gezinsuitbreiding na foutieve embryo-implantatie", *T.Gez.* 2021-22, afl. 2, 112-119; K. SCHETS, *Aansprakelijkheid en vergoeding voor schade bij wrongful birth en wrongful life*, masterproef UGent, 2011-12, 129 p., https://libstore.ugent.be/fulltxt/RUG01/001/892/015/RUG01-001892015_2012_0001_AC.pdf; A. VAN GYSEL, « La responsabilité du violeur pour les frais d'entretien et d'éducation de l'enfant né de son crime », *JT* 1986, 254-256.

[21] Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[22] Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551.

[23] See T. BALTHAZAR, "Wrongful birth, wrongful life", *Juristenkrant* 2010, afl. 220, 7; G. GENICOT, "Nouvelle confirmation du rejet de l'action en 'wrongful life'", *T.Gez.* 2016-17, afl. 5, 316-317; J. TER HEERDT, "'Wrongful life' en 'Wrongful Birth', een 'never ending story': twee arresten die de controverse rond vorderingen tot schadevergoeding voor de geboorte van een ongewenst of gehandicapt kind weer volop in de schijnwerper plaatsen", *T.Gez.* 2001-02, afl. 5, 250-255.

[24] N. VAN DE SYPE, "Geen vergoeding voor wrongful life", *RW* 2014-15, afl. 41, 1617-1622.

[25] J. PIRET, "'Wrongful life' en de zaak Rukiyé", *NJW* 2011, afl. 243, 354-365; J. DE WIT, *Het recht om niet geboren te worden*, 2010, www.qva.be/cnt/aid998778.

[26] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[27] T. BALTHAZAR, "Wrongful birth, wrongful life", *Juristenkrant* 2010, afl. 220, 7.

[28] Rb. Luik (afd. Luik) (4e k.) 16 september 2019, *RGAR* 2019, afl. 9, 15616; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.

uncommon since most courts agree that there is no conflict of interests between the parents and their child.[29]

14. To illustrate wrongful life claims, I will discuss a Belgian case involving a child suffering from an illness called Sanfilippo B. Before it was born, the parents asked for an antenatal screening to detect whether the unborn child had the illness. The test conducted at the hospital, turned out to be a false negative, leading to the child being born with Sanfilippo B. Subsequently, the parents asked for compensation on behalf of their child.[30] The court awarded compensation for moral damages and aesthetic prejudiceresulting from the disability of the child.[31]

2.1.3 Wrongful pregnancy

15. Lastly, there are wrongful pregnancy claims. These are often referred to as "wrongful conception" claims.[32] For the purpose of this thesis, I will only refer to these claims as wrongful pregnancy claims. A definition of what a wrongful pregnancy is, cannot be found in Belgian legislation but it can be described as: *"(…) the unwanted birthof a healthy child."*[33]

16. The distinction with wrongful birth cases can be made in whether the pregnancy or the continuation of it, was desired or not. In wrongful birth cases, the child was desired, but not their disability, whereas in wrongful pregnancy cases, it is the actualbirth of the child that is not desired regardless of their health situation.[34] In fact, the parents tried to prevent it with either a termination of the pregnancy[35], a sterilization[36] ora vasectomy[37].

It is worth noting though, that not all authors agree with this distinction. According to some, whether the child itself was desired is not relevant to the distinction between wrongful birth and wrongful pregnancy cases. It is the extent of the damage that serves

---

[29] See Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; Y.-H. LELEU, « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285; contra N. COLETTE-BASECQZ, "Een zaak 'Perruche' in België tien jaar later!", *T.Gez.* 2010-11, afl. 5, 380-381.

[30] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; N. ESTIENNE, « Enfant handicapé à la suite d'un diagnostic anténatal inexact ayant conduit à la poursuite de la grossesse », *R.G.A.R.* 2010, afl. 8, nr. 14675.

[31] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; N. COLETTE-BASECQZ, "Een zaak 'Perruche' in België tien jaar later!", *T.Gez.* 2010-11, afl. 5, 380-381.

[32] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551; N. VAN DE SYPE, "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622.

[33] A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[34] E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93 ; N. VAN DE SYPE, "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622.

[35] Luik (20e k.) 22 januari 2009, *T.Gez.* 2009-10, afl. 4, 215-216; S. PANIS, "L'action en grossesse préjudiciable (wrongful pregnancy)", *T.Gez.* 2009-10, n° 4, 217-226.

[36] Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; *ibid*; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

[37] T. VANSWEEVELT, "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegens de geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240; G. GENICOT, « Dommage moral en cas de naissance d'un enfant non désiré après l'échec d'une vasectomie », *JLMB* 2012, afl. 23, 1097-1100.

as a point of comparison between the two.[38] In a wrongful birth case the child is often born with a disability, while in wrongful pregnancy cases the child is born healthy. The material damage is therefore arguably bigger in wrongful birth cases since it is visibleand quantifiable. For instance, parents of a child with disabilities will have higher medical bills and many other expenses than those of parents with a healthy child.[39]

I tend to agree with the first view. In my opinion, the most relevant difference between wrongful birth and wrongful pregnancy claims lies in the parents' desire to have a child or not. In wrongful birth claims, parents typically make deliberate plans to conceive a child, thereby equipping themselves mentally and financially for the responsibilities associated with parenthood. Conversely, in wrongful pregnancy claims, parents find themselves unexpectedly faced with the prospect of bringing a child into their lives without prior preparation. In differentiating them by the health situation of the child, we would be ignoring the particularly important fact that in a wrongful pregnancy case the parents did not want a child at all. Considering that Belgian law imposes an obligation on parents to care for their child[40], and that often the only damages compensated in these cases are the medical expenses[41], it is unreasonable to differentiate them that way.

2.1.4 Prenatal injury

17. Another similar type of claim is the prenatal injury claim. These claims are made due to acquired injuries to the baby caused by a mistake that was committed by a third-party before birth.[42] This thesis will not delve further into this type of claim, however, I will provide an explanation to clarify the distinction between a prenatal injury claim and reproductive liability claims. The distinction between reproductive liability claims and prenatal injury claims lies in the fact that in the latter, the mistake is characterized by causing the child's disability, whereas in the former, the mistake relates to the act of 'allowing' the child to be born with a congenital disability.[43]

18. A very well-known case in Belgium is that of the *Desdochters*. DES was ahormone prescribed to pregnant women who were at risk of miscarriage or premature birth. As a result of the use of these medicines during pregnancy, their babies were born with congenital malformations. In this case, different pharmaceutical companies were sued for damages.[44] The Belgian government reacted only decades later by providing a lump sum to the victims who applied for it.[45]

---

[38] K. SCHETS, *Aansprakelijkheid en vergoeding voor schade bij wrongful birth en wrongful life*, masterproef UGent, 2011-12, 129 p., https://libstore.ugent.be/fulltxt/RUG01/001/892/015/RUG01- 001892015_2012_0001_AC.pdf.

[39] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; PIRET, J., "'Wrongful life' en de zaak Rukiyé", *NJW* 2011, afl. 243, 354-365.

[40] Art. 203 Oud BW.

[41] G. GENICOT, *Droit médical et biomédical*, III/1, *La naissance contrôlée*, 2e édition, Bruxelles, Larcier, 2016, 655-694.

[42] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551; C. DE MULDER, "Behandelingsweigering tijdens zwangerschap en bevalling: geïnformeerde toestemming versus bescherming van ongeboren leven?", *T.Gez.* 2022-23, afl. 2, 107-126.

[43] M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

[44] Wet van 5 mei 2019 betreffende de toekenning van een forfaitair bedrag aan de personen die lijden aan aangeboren misvormingen die het gevolg zijn van het innemen van geneesmiddelen met thalidomide door de moeder tijdens de zwangerschap, *BS* 16 mei 2019, 47.026; Rb. Brussel (22e k.) 5 oktober 2010, nr.2008/7891/A, *T.Gez.* 2013-14, afl. 5, 168-172; Rb. Brussel (22e k.) 5 oktober 2010, nr. 2008/7893/A, *T.Gez.* 2013-14, afl. 3, 173-177; A. VANDERHAEGHEN, "Rechtbank van eerste aanleg bevoegd voor softenonzaken [en

More classic examples of prenatal injury encompass instances where infants are born with disabilities due to maternal exposure to a virus prior to conception[46], or as a resultof accidents involving the pregnant woman.[47] In practice, such a claim occurs as follows: an unborn child suffers damage as a result of the injuries inflicted on its mother. Afterwards, they begin a procedure, through their parents, to claim compensation for thedamage they suffered personally.[48]

19. To summarize: prenatal injury indicates that the child has suffered an injury, and that the injury itself was caused by a third party before the birth of the child. This is not the case for reproductive liability claims, where the disability is congenital.

2.2 Ethical debates

20. This topic is controversial since it relates to the value of life and reproductive autonomy. Naturally, there are different opinions.

21. Wrongful life claims, for instance, present heightened controversy compared to other related claims, given that the plaintiff seeks compensation for their own life. This controversy extends across various nations. In this thesis, I will concentrate on the discussions occurring in Belgium, France, and the United Kingdom. France and the United Kingdom have addressed the same issue and have developed legislation on this matter, rendering a comparison with their legal frameworks instructive.

22. Starting in Belgium, scholars and judges have approached reproductive liability claims in various ways. Section three will provide an in-depth exploration of the ongoing controversy within Belgian law, as it holds the potential to drive new developments.

HAARSCHER, a Belgian philosopher, wrote a remarkably interesting piece on this, backing his opinion on the writings of different philosophers. The first philosopher he mentions, John Rawls, makes a distinction between 'public reasons' and 'private reasons'.He believes that private reasons are not able to convince those that hold different beliefs,while public reasons can be understood and accepted by many. [49] According to HAARSCHER, a public reason to be against wrongful birth claims, could be that of refusing eugenics. People could see the argument of the parents; that they 'lost' the chance to proceed with an abortion had they known the child would have a disability, asa form of eugenics. HAARSCHER's stance is clear. He believes one should consider the suffering of the parents and of the child. He also questions whether the Court should be telling a mother what is favourable, when according to the law such a choice belongs to the mother. This statement he made, best captures his opinion: *"To repair only the damage caused to the parents would constitute a fundamental attack on the dignity of this child, for whom no public reason dictates that he risks being abandoned, in any case without sufficient compensation the day his parents decide to have it adopted, or if they*

---

dus niet de arbeidsrechtbank]", (noot onder GwH 1 december 2022, nr. 157/2022), *NJW* 2023, afl. 475, 88; D. VERHOEVEN, "Het kunstmatig vrouwelijke hormoon diëthylstilbestrol] De DES-slachtoffers en het Belgische aansprakelijkheidsrecht. Een confrontatie met verjaring, het foutbegrip, onzekere toekomstige schade en alternatieve causaliteit", *T.Gez.* 2013-14, afl. 5, 140-167.

[45] Wet van 5 mei 2019 betreffende de toekenning van een forfaitair bedrag aan de personen die lijden aan aangeboren misvormingen die het gevolg zijn van het innemen van geneesmiddelen met thalidomide door de moeder tijdens de zwangerschap, *BS* 16 mei 2019, 47.026.

[46] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[47] N. VAN DE SYPE, "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622.

[48] Corr. Nijvel 25 oktober 1990, *RGAR* 1993, nr. 12.207.

[49] J. RAWLS, *Political Liberalism: Expanded Edition* (2nd ed.), Columbia University Press, 2005, 576 p.; G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384.

disappear." [50] One intriguing question he poses is whether, in the context of the child's potential suffering, the decision to proceed with the birth, despite the anticipated severe disability, is more altruistic than making every effort to prevent such unnecessary and profound suffering.[51] This question is intriguing because it explores the ethical aspects of deciding to have a child when a severe disability is anticipated. It makes us think about the balance between valuing life, potential suffering, and the moral duty of individuals when facing significant decisions.

23. The discussions on this topic are not confined to the insights of Belgian scholars alone; it encompasses a broader international dialogue. Scholars from different countries provide valuable contributions, offering a global perspective on the issues surrounding reproductive liability claims.

Judges from the United Kingdom have commented on this multiple times, acknowledging the ethical issues that underlie the legal questions. Some argue that: *"(…) the benefits of parenthood transcend any patrimonial loss."* [52] Lord Millet concluded in *McFarlane* that: *"It is morally offensive to regard a normal, healthy child as more trouble and expense than it is worth."* [53] Others believe that compensation is payable for all the consequences of a wrongfully caused pregnancy.[54] However, judges are not the only ones commenting on this. Given its close relevance to the medical profession, it is only natural for medical practitioners to offer their perspectives on the matter as well. Dr. Swati Jha, a consultant obstetrician and gynaecologist, brings up another point in this regard. In her opinion, compensating for the birth of a child with disabilities, but not for a healthy one, may inadvertently imply value judgments about the blessings associated with each life. [55]

24. To gain a deeper understanding of the complexity associated with wrongful birth claims, it is important to delve into the underlying philosophical debates. These claims raise questions into the limits of reproductive autonomy and the worth of a life with disabilities. Several philosophers have commented on this.

25. ARCHARD, a British moral philosopher, wrote a piece on wrongful life in which he argues that it is ethically objectionable to bring into existence an individual whose life is anticipated to be very poor.[56] His argumentation starts by nuancing the 'birthright claim': *"the claim to a right that any possible child has, not to be intentionally and knowingly conceived with the reasonable prospect of not enjoying a life above a certain threshold."* Deliberately conceiving a child who will suffer a dreadful disability, would thus beviolating that child's birthright.[57] It is worth noting that ARCHARD limits himself to cases where conception is deliberate, to avoid the controversy around the termination of a pregnancy. His point of view is therefore only applicable to pre-conception cases.

26. PARFIT responds to this by explaining what he calls 'Jane's choice'[58]: Jane has a hereditary disease that will pass to any offspring she has. This disease will cause the

[50] J. RAWLS, *Political Liberalism: Expanded Edition* (2nd ed.), Columbia University Press, 2005, 576 p.; G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384.

[51] *Ibid.*

[52] Lord Gill in *McFarlane v Tayside Health Board (Outer House*) [1997] SLT 211.

[53] Lord Millet in *Macfarlane and Another v. Tayside Health Board (Scotland)* [1999] UKHL 50.

[54] Hale LJ in *Parkinson v St James and Seacroft NHS Trust* [2001] EWCA Civ 530.

[55] S. JHA, "'Wrongful Birth' following failed sterilisation", *BJOG* 2016, vol. 123(10), 1683.

[56] D. ARCHARD, "Wrongful life", *Philosophy* 2004, 79(3), 403-420.

[57] D. ARCHARD, "Wrongful life", *Philosophy* 2004, 79(3), 403-420.

[58] D. PARFIT, *Reasons and Persons*, IV, *Future Generations*, Oxford, Oxford University Press, 1984, 351-377.

person to die a painless death at forty years old. Before that, the disease remains dormant, exhibiting no symptoms. Jane has no other option to have children as there arenone she can adopt, and no one who would have them for her. Ultimately, she decides tohave a child.

As a response to the 'rights' argument he says: *"Suppose we believe that each personhas a right to live a full life. Jane knows that, if she has a child, his right to a full life could not possibly be fulfilled. It could be said: 'It is wrong to cause someone to exist with a right that cannot be fulfilled. This is why Jane acts wrongly.' If I was Jane's child (…) I would regret the fact that I shall die young. But, since my life is worth living, I would not regret that my mother caused me to exist. And I would deny that her act was wrong because of what it did to me. If I was told that it was wrong, because it caused meto exist with a right that cannot be fulfilled, I would waive this right. If Jane's child waives his right, this undermines this objection to her choice."*[59]

27. His argument is influenced by a 'hindsight bias'. While it may seem preferable to exist now that we are born and conscious beings, this perspective does not apply to those who do not yet exist. If I had never been born, I would not possess the consciousness to evaluate the desirability of existence. Therefore, this question does not need to be asked. I argue that it is preferable to prevent a child from being born with a disability, regardless of whether that child (and I) would later still be content with the choice of having had them. The possibility that one of us would be unhappy with that choice is enough for me to want to prevent such a situation.

28. In his article, PARFIT also presents the scenario of a pregnant 14-year-old girl.[60] The girl is advised by her parents to delay having children until later in life, supposedly to benefit her child. PARFIT argues that this advice is flawed because if the girl postpones childbirth, the child she would have had at the age of fourteen would not be born. Instead, another child would be born in the future. Therefore, the first child would not be better off by waiting, as they would simply not exist. It is the hypothetical other child who would potentially benefit from the delay.[61] From this perspective, I deduce that if thegirl decides not to wait and proceeds with the pregnancy, it would not be worse for the child in question. If we apply PARFIT's line of thinking to wrongful life cases, it will lead tounfair results. It would mean that the child does not have a right to compensation since the conditions for damage in Belgian law, namely that the person is worse off, would not be met.[62] We would be denying compensation simply because we do not perceive what happened to them as damage.

To better explain my argument, I will discuss a case that appeared in front of the European Court of Human Rights (hereafter: "the ECHR"). [63] In this case, a woman claimed compensation because she suffered from gynaecological complications after a medical mistake. The Portuguese Supreme Administrative Court chose to reduce the compensation because they believed that the sexuality of a 50-year-old mother was not as important as that of a younger, childless one. The ECHR found this to be discriminatory.[64] In this case, the Portuguese court applied their own principles of what

[59] *Ibid.*

[60] D. PARFIT, *Reasons and Persons*, IV, *Future Generations*, Oxford, Oxford University Press, 1984, 351-377.

[61] *Ibid.*

[62] G. GENICOT, *Droit médical et biomédical*, II/4, *La consistance du dommage et la certitude du lien causal*, 2e édition, Bruxelles, Larcier, 2016, 551-587.

[63] ECHR 25 July 2017, no. 17484/15, Morais/Portugal.

[64] *Ibid.*

damage is. Although this case is quite different from a wrongful life case, in both cases, external parties are applying their own interpretations of what constitutes damage. I argue that what is most important is not what one believes constitutes damage, but whatthe person claiming damage believes. This does not automatically mean that anythingcan be considered damage, but that we should broaden our perspective of what damage means.

Belgian law allows a woman to undergo a late-term abortion when the child will suffer an incurable grave condition.[65] Here, the question of whether the child in question would not be worse off by being born is not asked, as the decision to abort is left to the woman. In wrongful life cases, why is the decision of whether the child's life is 'worth living' not left to the child themselves? Do we fear that this would be taken as a rule? Does the fact that a woman prefers to undergo an abortion because her child has a disability mean that all children with disabilities should have been aborted or that their lives are not worth living? In that same sense, because a woman decides to remain childless, does that mean that children are not worth having? When a child claims compensation for being born with a disability, they are not asserting that others should do the same; they are simply stating what they believe applies to their own life.

29. Other philosophers take things a step further and go as far as to argue that one should select children that are expected to have the best life. This is the case of SAVULESCU who calls this principle 'procreative beneficence'. He goes on to argue that the objective of selection is to mitigate disability, while maintaining a neutral stance devoid of any judgment regarding the value of individuals with disabilities.[66]

30. SCOTT, a Professor of Medical Law and Ethics has commented multiple times on the topic of reproductive autonomy. It is her understanding that reproductive autonomy includes an *"interest in shaping what kind of reproductive experience that will be."*[67] In a recent article, she examines wrongful life claims in England, specifically noting their allowance in the ART context but not in other circumstances. She argues that this distinction is inequitable and advocates for a reconsideration of this aspect in theCongenital Disabilities (Civil Liability) Act 1976.[68] This is interesting since in Belgian law such claims are similarly not allowed.[69]

31. French authors are also a part of this debate. The infamous *Perruche* case[70], for example, has been commented on many times. In this case the child was compensated for being born with a disability, making it a case on wrongful life. IACUB defends the caseby stating that the judges ensured a 'relative autonomy' for people with disabilities,

---

[65] art. 2, 5° wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

[66] J. SAVULESCU, "Procreative Beneficence: Why We Should Select the Best Children", *Bioethics* 2001, vol. 15, no. 5-6, 413-426; cf. M.J. BARKER and R.A. WILSON, "Well-being, Disability, and Choosing Children", *Mind* 2019, vol. 15, no. 5-6, 305-328.

[67] R. SCOTT, "Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth", *Medical Law Review* 2003, vol. 11, no. 3, 265–325.

[68] R. SCOTT, "Reconsidering "Wrongful Life" in England after Thirty Years: Legislative Mistakes and Unjustifiable Anomalies", *The Cambridge Law Journal* 2013, 72, no. 1, 115–154.

[69] *Supra* 26-27, nr. 61.

[70] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

"without questioning for a moment the absolute value of their life."[71] Other scholars saw in this case a 'right to not be born'[72] and go as far as to mention the word 'eugenics'.[73]

32. The different viewpoints expressed by scholars, jurists, and medical practitioners emphasize the challenges in establishing legislation on this matter. Balancing the interests of victims while navigating opposing views requires a nuanced approach. Therefore, if Belgian legislators intend to draft a bill addressing reproductive liability claims, they must adopt a clear stance. Despite moral opposition from a part of the population, legislators historically have taken positions on contentious matters, as exemplified by the legalization of abortion. The aim of regulating wrongful birth claims is not necessarily to stifle the ongoing debate on this topic but rather to establish a liability regime tailored to the complexity of such claims. This initiative seeks to provide greater legal certainty for both claimants seeking compensation and medical practitioners involved in such cases.

[71] M. IACUB, *Penser les droits de la naissance*, PUF 2014, XV-XXVIII.

[72] Concl. J. SAINTE-ROSE in Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[73] *Hand.* Senat comm. des lois (Fr) 2001-02, 18 décembre 2001.

3. Current legal landscape in Belgium

3.1 Legislation

3.1.1 Conditions for a liability claim

33. There are three conditions that need to be fulfilled to be liable for a wrongful birth: a mistake, a damage and a causal link.[74]

3.1.1.1 Mistake

34. The mistake attributable to the doctor can be due to multiple things. It can be the result of either a failure to provide information, an incorrect diagnosis, or a mistake during the procedure itself.

35. Belgian law gives the patient a right to information about all the necessary information relating to them.[75] Medical practitioners thus have an information obligation and can be held liable for disregarding it. This is what happened in a 2012 case of the Court of Appeal of Mons in which the gynaecologist failed to inform the mother that the unborn child was suffering from spina bifida. Had the mother known of this disease, she would have chosen to abort the baby.[76] Another example is when the doctor fails to notify their patient in a timely manner of the failure of an abortion, so that a second one could be undergone within the legal period. [77] A gynaecologist can also fail in their information obligation when they do not sufficiently point out the risks of a sterilization technique with a higher risk of failure than other techniques and the possibility of becoming pregnant by not taking additional measures.[78] Even if the doctor does inform their patient of additional measures to take after, for example, a vasectomy, thisinformation should be backed by a medical prescription or a report to the attending physician so that a spermogram can be done at the appropriate time. [79] More controversial, is the fact that a gynaecologist is obliged to inform their patient of the possibility of an abortion.[80]

36. The second situation in which a doctor can make a mistake is during the evaluation of a prenatal test or during other examinations done on the unborn child or onthe mother.[81] An example of this is when a gynaecologist does not recognize congenital disorders during a prenatal ultrasound examination.[82] This deprives the mother of the opportunity to end her pregnancy. What counts as professional misconduct is not the misdiagnosis itself, but rather the negligence on the doctor's part. This means that if the doctor had acted with the required care, he would not have misdiagnosed his patient,

---

[74] J. TER HEERDT, "'Wrongful life' en 'Wrongful Birth', een 'never ending story': twee arresten die de controverse rond vorderingen tot schadevergoeding voor de geboorte van een ongewenst of gehandicapt kind weer volop in de schijnwerper plaatsen", *T.Gez*. 2001-02, afl. 5, 250-255.

[75] Art. 7 wet 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719.

[76] Bergen (6e k.) 12 oktober 2012, *T.Gez.* 2014-15, afl. 3, 172-176.

[77] Luik (20e k.) 22 januari 2009, *T.Gez.* 2009-10, afl. 4, 215-216.

[78] Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113.

[79] Bergen (6e k.) 28 oktober 2011, *T.Gez.* 2012-13, afl. 3, 234-237, noot T. VANSWEEVELT; T. VANSWEEVELT, "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegens de geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240.

[80] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[81] Luik 24 juni 2002, *T.Gez.* 2007-08, afl. 3, 242-248; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[82] Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674.

therefore preventing the damage from being caused. In this instance, the doctor's actions will be compared to those of a normal, prudent, and diligent doctor, placed in the same situation. Only if it is found that the doctor failed to comply with the rules inherent in monitoring a pregnancy, will their misdiagnosis lead to liability.[83]

An error in the diagnosis can also coincide with a failure to comply with the information obligation mentioned above. This is for example the case when the gynaecologist identified growth retardation at several points in time, but they did not take that into account as a sign of an anomaly. The unborn child could therefore not be diagnosed with spina bifida. Furthermore, the gynaecologist did not communicate with the parents the increased risk of spina bifida indicated in the prenatal test.[84]

37. The last situation I will discuss is when the medical practitioner commits a mistake during the procedure itself. This can happen in distinct types of procedures which will be illustrated by two Belgian cases:

During a sterilization procedure, clips of the brand Hulka were placed by a doctor on his patient. The procedure did not work, and the patient became pregnant.[85] Even though a sterilization procedure is often qualified as an obligation of means because of the small risk of pregnancy[86], the doctor must do everything possible to prevent a pregnancy. This involves taking all circumstances into account when choosing the sterilization technique.[87] In some cases, a doctor can enter an obligation of result by telling their patient before a procedure that they have not experienced any failures.[88] This applies both to sterilization procedures and to vasectomies.[89]

Another example of a failed procedure that can lead to a wrongful birth is that of a failed abortion. This, like the previous two procedures, is often linked with a failure to comply with the information obligation of a medical practitioner.[90] In a Belgian case, a patient that went through an abortion discovered she was still pregnant after the expiration ofthe legal period allowed for an abortion. This indicated a failure of the abortion procedure. During the legal proceedings it was revealed that the laboratory that conducted a pathological analysis had not found any foetal tissue. Even though they informed the gynaecological department of one of the doctors, no one informed the plaintiff.[91]

---

[83] Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380.

[84] Rb. Luik (afd. Luik) (4e k.) 16 september 2019, *RGAR* 2019, afl. 9, 15616.

[85] Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551.

[86] Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; Gent (1e k.) 27 september 2007, *T.Gez*. 2008-09, afl. 5, 404-406; H. NYS, "Overzicht van rechtspraak. Medisch recht 2005-2010", *TPR* 2011, afl. 3, 851-920.

[87] Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113.

[88] Cass. (1e k.) 15 januari 2010, AR C.09.0138.F, *T.Gez.* 2011-12, afl. 3, 230-231; S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez.* 2011-12, afl. 3, 232-237.

[89] Bergen (6e k.) 28 oktober 2011, *T.Gez.* 2012-13, afl. 3, 234-237, noot T. VANSWEEVELT; G. GENICOT, « Dommage moral en cas de naissance d'un enfant non désiré après l'échec d'une vasectomie », *JLMB* 2012, afl. 23, 1097-1100; T. VANSWEEVELT, "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegens de geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240.

[90] Art. 7 wet 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719.

[91] Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299-304.

3.1.1.2 Damage

38. The second condition which must be met before we can speak of liability is that of damage. In Belgian law, damage is currently assessed by comparing the situation as it is now, with the situation the person would have been in if the mistake had not occurred. If the claimant finds itself in a less favourable situation than before, then there is damage.[92] What the damage is depends on whether the claim is one of wrongful birth, of wrongful life or of wrongful pregnancy.

39. The reimbursable loss in cases of wrongful birth include the consequences arising from the undesired birth, and the presence of the child.[93] Here, the mistake is clear. Had it not been for the mistake of the medical practitioner, the child would not have been born with a disability.

40. The damage claimed by the plaintiff in wrongful life claims is the moral damage suffered by them and the additional expenses caused by the disability.[94] It is not the disability itself that is compensated, but rather the fact of being born with a disability.[95] When it comes to wrongful life claims, it gets more difficult to recognize the existence of damage. As mentioned above, the damage is assessed by comparing the situation as it is now with the situation the person would have been in had the mistake not occurred. The Belgian Court of Cassation now refuses to make this comparison in wrongful life claimsby reason that one cannot compare existence with non-existence.[96] This vision is not shared by all Belgian courts. The Court of Appeal has previously stated that: *"(…) the factthat a comparison must be made with a state of non-existence does not prevent it from being established that certain moral damage suffered by the child, as well as the additional expenses incurred as a result of his disability, constitute compensable damage."*[97] Other types of damage, such as aesthetic damage, are not always eligible for reimbursement as it is argued that the medical practitioner is not responsible for causing the disability. In essence, if the mistake had not occurred, the child would still have hada disability.[98]

41. Plaintiffs in wrongful pregnancy claims can also seek various forms of damages. DE KEZEL claims that the reimbursable loss consists of: *"The financial burdens and psychological concerns associated with the unexpected birth of the child (…)."*[99] Belgian courts do not always agree with this. Some believe that the 'benefits' of having a child compensate for moral damage.[100] This will be further explained in section 3.2.3.

---

[92] G. GENICOT, *Droit médical et biomédical*, II/4, *La consistance du dommage et la certitude du lien causal*, 2e édition, Bruxelles, Larcier, 2016, 551-587.

[93] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[94] Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[95] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.

[96] Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1.

[97] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.

[98] Contra Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; See Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.

[99] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[100] See Antwerpen 8 september 2003, *NJW* 2004, afl. 70, 558-560; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551.

3.1.1.3 Causal link

42. The last condition that needs to be met is establishing a causal link between the mistake and the resulting damage. [101] When assessing the presence of a causal link, judges must consider all contributing factors equally. Referred to as the 'theory of equivalence of conditions', this principle is arguably unique to Belgium.[102] A causal link is established when the damage would not have occurred in the absence of the mistake, irrespective of other contributing factors.[103] Any necessary cause can thereby render an individual liable.[104] In the case of wrongful birth claims, the child would not have been born were it not for the mistake of the medical practitioner.

The following case of the Court of Appeal of Mons will serve as an illustration of the causal link: In this particular case, the gynaecologist did not identify an anomaly that would indicate an increased risk of neural tube malformation. The test, conducted hastily and incompletely, compromised its accuracy, leading to the birth of a child with spina bifida.[105] A causal link was established between the harm suffered by the parents and themedical mistake, as there were substantial suspicions that the mother would have opted for an abortion had she been informed of the disease. However, no causal link was identified between the medical mistake and the harm suffered by the child, as the disease was congenital and not attributable to the actions of the doctor. The damage concerning the child was therefore deemed ineligible for compensation.[106]

3.1.1.3.1 Loss of an opportunity

43. Wrongful birth claims in Belgium are based on the doctrine of the loss of an opportunity. This doctrine is part of the causation element of liability. It makes it possible to receive compensation for damages when there is uncertainty about a causal link between the fault and the damage, if there is a real chance that the damage would not have occurred had the concerned party acted correctly.[107] Since Belgian law allows for the termination of a pregnancy under a few conditions[108], not being able to go through one because of the mistake of a third party, is considered a damage. This will be further explained in section 3.2.1.

The doctrine of the loss of an opportunity has been applied on a variety of cases, ranging from a case where the amputation of a finger could have been prevented[109] to a case involving the preventable death of a horse[110]. This doctrine also applies to wrongful birth and wrongful pregnancy claims since the claimant's reproach is the fact that the medical practitioner did not prevent the birth or pregnancy.

---

[101] Cass. (1e k.) 5 juni 2008, AR C.07.0199.N, *T.Verz.* 2008, afl. 4, 418; M. VAN QUICKENBORNE, "Het bewijs van een oorzakelijk verband", *TPR* 2010, afl. 1, 313-330.

[102] C. JOISTEN, « Causalité, incertitude et perte de chance : de nouvelles perspectives », *TBBR* 2023, afl. 10, 458-481.

[103] H. BOCKEN, "Het verlies van een kans: vergoedbare schade? Het arrest van het Hof van Cassatie van 5 juni 2008", *T.Verz.* 2008, afl. 4, 421-424.

[104]T. VANSWEEVELT en B. WEYTS, « Hoofdstuk II - De equivalentieleer » in Handboek Buitencontractueel Aansprakelijkheidsrecht, 1e editie, Brussel, Intersentia 2009, 775-800.

[105] Bergen (6e k.) 12 oktober 2012, *T.Gez.* 2014-15, afl. 3, 172-176.

[106] *Ibid.*

[107] R. MARCHETTI, E. MONTERO et A. PUTZ, « La naissance handicapée par suite d'une erreur de diagnostic: un préjudice réparable? La perte d'une chance de ne pas naître? », *R.G.D.C.* 2006, liv. 2, 117-132.

[108] Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

[109] Antwerpen 26 april 1995, *T.Gez.* 1998-99, 230.

[110] Cass. (1e k.) 5 juni 2008, AR C.07.0199.N, *Arr.Cass.* 2008, afl. 6-7-8, 1462.

44. It is worth noting that the bill on non-contractual liability, in book six of the New Civil Code, means to replace this doctrine by a doctrine on proportional liability.[111] This development in Belgian law will be discussed in section 3.3.2.

3.1.2 The different liability regimes

Contractual or non-contractual liability

45. Belgian law knows two systems for liability claims. If there is a contract between both parties, the claim will be based on contractual liability. When there is no contract, the claim will be based on non-contractual liability.[112]

46. Wrongful birth and wrongful pregnancy claims can be brought on the basis of contractual liability. This is possible because when a patient is treated by a doctor, a contract of treatment is created between both parties.[113] When the doctor breaches the contract, a liability claim can be filed. [114] In these cases, the mother or father had a contract with the doctor to either perform a test[115] or perform a procedure[116] on them. Because of a mistake of the medical practitioner, the woman got pregnant.

47. Whereas the first two claims pertain to contractual liability, a wrongful life claim does not. In these cases where the child is the plaintiff, it is generally agreed that there is no contract between the child and their mother's doctor. [117] Wrongful life claims therefore fall under the articles 1382-1384 of the Old Civil Code.

48. Following the establishment of a liability regime, the subsequent question pertains to the identification of the party accountable for the liability claim.

Liability for own fault

49. This liability regime is applicable to either the medical practitioner or the hospital when they are deemed responsible for a mistake of their own making.[118] Whether liability can be established depends on whether the doctor's obligation is qualified as an obligation of means or as an obligation of result.[119]

50. An obligation of means implies that the medical practitioner will exert their utmost effort to attain the intended end result, but they are not obliged to guarantee its accomplishment.[120] Generally speaking, medical procedures are qualified as obligations of

---

[111] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[112] See art. 1382-1384 Oud BW.

[113] E. VERJANS, "Hoofdstuk I - Aard van de aansprakelijkheid" in *Het recht op informatie en toestemming van de patiënt*, 1e ed., Brussel, Intersentia 2019, 679-706.

[114] T. VANSWEEVELT, "De geneeskundige behandelingsovereenkomst" in X, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, losbl., 35-110; T. VANSWEEVELT, « Hoofdstuk II - De aansprakelijkheid van de arts en het ziekenhuis voor eigen gedrag » in *Handboek gezondheidsrecht Volume I (tweede editie)*, 2e editie, Brussel, Intersentia 2022, 1219-1356.

[115] Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674.

[116] Bergen (6e k.) 28 oktober 2011, *T.Gez*. 2012-13, afl. 3, 234-237.

[117] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.

[118] See Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.

[119] See Art. 5.72 Oud BW.

[120] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.; G.G noot onder Gent (1e k.) 27 september 2007, *T.Gez.* 2012-13, afl. 1, 45-48; J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244; S.

means due to the unpredictable character of medicine.[121] This is exemplified in situations such as when a gynaecologist conducts a sterilization procedure. Given that this procedure may not always be effective, doctors are not obligated to guarantee its infallibility. [122] However, they are expected to select a sterilization technique most appropriate for their patient.[123] The scenario would differ if the doctor were to assert that this procedure has never been unsuccessful, as this would imply assuming an obligationof results.[124] To prove that a doctor breached their obligation of means, one has to prove that they did not act as a normal and careful doctor, placed in the same situation.[125] Courts frequently designate court experts to examine this, although their recommendations are non-binding.[126]

The following case serves as an illustration: During a sterilization procedure, the doctor neglected to properly position the sterilization clip on the fallopian tube, leading to the procedure's failure. The court concluded that, in this instance, the doctor deviated from the standard of a reasonable and cautious doctor confronted with the same situation. In essence, a different doctor would not have committed the same mistake. This breach of his obligation of means established the doctor's liability for the mistake.[127] If one wants to hold a doctor responsible for an incorrect diagnosis, one needs to prove that they did a mistake when performing the test or when analysing it.[128]

51. In some cases, doctors may be under an obligation of results, meaning they are required to achieve a specific outcome.[129] This obligation arises, for instance, when the parties explicitly or implicitly agree to it. An example of this occurs when a gynaecologist claims no failures in a procedure and therefore does not advise any contraception afterward.[130] This was confirmed multiple times by different courts and authors, who

---

PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez.* 2011-12, afl. 3, 232-237.

[121] S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez.* 2011-12, afl. 3, 232-237; J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatieen vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244.

[122] See Antwerpen 8 april 2002, *NJW* 2002, afl. 7, 246-247; Antwerpen 8 september 2003, *NJW* 2004, afl. 70, 558-560; Gent (1e k.) 27 september 2007, *T.Gez.* 2008-09, afl. 5, 404-406; Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229.

[123] See Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113.

[124] Cass. (1e k.) 15 januari 2010, AR C.09.0138.F, *T.Gez*. 2011-12, afl. 3, 230-231; S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez*. 2011-12, afl. 3, 232-237.

[125] Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380.

[126] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Luik (afd. Luik) (4e k.) 16 september 2019, *RGAR* 2019, afl. 9, 15616; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229; A. HUYGENS, "Wrongful-life-vordering overleeft cassatietoets niet", *T.Gez.* 2014-15, afl. 3, 195- 201.

[127] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.

[128] Luik 24 juni 2002, *T.Gez.* 2007-08, afl. 3, 242-248; Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674; Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244.

[129] J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244; S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez.* 2011-12, afl. 3, 232-237.

[130] Cass. (1e k.) 15 januari 2010, AR C.09.0138.F, *T.Gez.* 2011-12, afl. 3, 230-231; Luik (20e k.) 17 april 2008, *RGAR* 2009, afl. 1, nr. 14460; G.G noot onder Gent (1e k.) 27 september 2007, *T.Gez.* 2012-13, afl. 1, 45-48; Q. VAN ENIS, « Obligation de moyens ou de résultat en matière médicale: quand le juge doit sonder les cœurs et les reins des parties», *RRD* 2008, afl. 126, 38-48.

agreed that in such cases the doctor was under an obligation of results. [131] Another scenario leading to an obligation of results is when a doctor violates the law or disregardsa legal duty, such as breaching doctor-patient confidentiality. [132] Alternatively, an obligation of results may arise from performing a procedure lacking the inherent uncertainty of most medical procedures. [133] In such instances, the judge assesses whether the intended outcome can be reasonably achieved through the standard use of available resources. This assessment alone suffices to classify the obligation as one of results.[134]

Liability for someone else's fault

52. Hospitals are often liable for mistakes done by their employees, or for objects kept under their custody.[135] For instance, if a hospital's laboratory employs a substrate[136]in an antenatal test that does not allow a reliable diagnosis to be made, the hospital bears liability. This responsibility arises as the guardians of the flawed product, irrespective of their awareness of its defects. In this particular instance, the hospital was held accountable for its own mistake as well, as they used the product in a manner prohibited by the manufacturer. A prior thorough inspection of the product would have revealed its ineffectiveness.[137]

In a recent case, the hospital's liability was determined due to a mistake committed by a laboratory technician employed by them. The technician mistakenly chose an embryo that was incompatible with the intended purpose of aiding a sick sibling.[138] This case, which pertains to a 'saviour baby', will be examined in section 3.3.3.

3.1.3 Medical Accidents Act 2010

53. In 2010, the Medical Accidents Act established a Medical Accidents Fund (hereafter: "the Fund") to facilitate compensation for plaintiffs. Victims of medical accidents now have two avenues for seeking compensation: through filing a claim in court or applying for compensation from the Fund.[139] However, a notable exclusion withinthis legal framework was the omission of reproductive liability claims. Previously, the Medical Damages Act contained an article stating: *"No one can claim compensation just*

---

[131] See Cass. (1e k.) 15 januari 2010, AR C.09.0138.F, *T.Gez.* 2011-12, afl. 3, 230-231; Luik (20e k.) 17 april 2008, *RRD* 2008, afl. 126, 34; Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551; G. GENICOT, « Obligation de moyens ou de résultat en matière de stérilisation: une occasion manquée de clarification? », *JLMB* 2010, afl. 16, 731-734; J. KIRKPATRICK, « Réflexions sur la charge de la preuve en matière deresponsabilité médicale et sur la distinction entre obligations de résultat et obligations de moyens », *RCJB*2010, afl. 4, 513-529; S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez*. 2011-12, afl. 3, 232-237.

[132] S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez*. 2011-12, afl. 3, 232-237.

[133] Luik (20e k.) 17 april 2008, *RRD* 2008, afl. 126, 34.

[134] S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez*. 2011-12, afl. 3, 232-237.

[135] See Rb. Leuven 6 maart 2013, *T.Gez.* 2017-18, afl. 2, 108-113.

[136] A substrate is a molecule or substance upon which an enzyme or catalyst acts to facilitate a chemical reaction, see A. HASINI, *What is the Difference Between Substrate and Reagent*, https://pediaa.com/what-is- the-difference-between-substrate-and-reagent/.

[137] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.

[138] Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108; F. DE MEYER en C. DE MULDER, "De vergoeding van materiële schade wegens ongewenste gezinsuitbreiding na foutieve embryo- implantatie", *T.Gez.* 2021-22, afl. 2, 112-119; L. OPLINUS, "Kind van de rekening", *RW* 2021-22, afl. 20, 770.

[139] Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913.

because of the fact that he was born," but this provision did not carry over into the revised act.[140]

54. The rationale behind the omission of this provision from the new law was elucidated during a 2011 meeting of the Committee on Social Affairs. [141] Laurette Onkelinx, Deputy Premier and Minister of Social Affairs and Public Health, clarified that this decision was made because the provision amended an element of medical liability which rendered it incompatible with the objective of the new law.[142] She explained that while the provision had drawn inspiration from French law, its inclusion was deemed unnecessary due to the absence of relevant case law in Belgium at the time.[143] This clarification offered by ONKELINX was clouded by a statement she made just one year prior. In that statement, she claimed the Fund could potentially intervene in reproductive liability claims if specific conditions outlined by the law were met.[144]

55. A 2011 article by FAGNART addressed the absence of the provision in the Medical Accidents Act. In this article he articulated his belief that damages resulting fromwrongful birth should fall within the scope of the Medical Accidents Fund. This indicates the ongoing debate and lack of consensus regarding the eligibility of reproductive liability claims for compensation from the Fund.[145]

56. The Royal Academy for Medicine of Belgium (hereafter: "The Academy") issued advice on the Medical Accidents Act of 2010, expressing dissatisfaction with the legislator's choice not to regulate reproductive liability claims.[146] They argue that this decision has resulted in the Medical Accidents Fund having to adopt a stance based on divided case law. To rectify this, they strongly recommended legislative measures to provide clear legal guidelines for such claims.[147]

3.2 Analysis of legal framework, jurisprudence and doctrine

3.2.1 Wrongful birth

57. Wrongful birth claims are the least contentious claims out of the three claims on reproductive liability.[148] This is so because the three conditions of liability are more easily met. The damage in wrongful birth cases is arguably clear, parents have much higher medical bills than they would have if their child was born healthy.[149] The damages the parents suffered personally are therefore often awarded, this includes material as well as

---

[140] Art. 5, § 2 Wet 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorg, *BS* 6 juli 2007 (ed. 1), 37.151.

[141] *Hand.* Senaat comm. voor de Sociale Aangelegenheden 2010-11, 8 februari 2011, nr. 5-31COM, 24; *Vr. en Antw.* Senaat comm. voor de Sociale Aangelegenheden, Vr. nr. 5-319, 8 februari 2011 (E. SLEURS).

[142] *Ibid.*

[143] *Hand.* Senaat comm. voor de Sociale Aangelegenheden 2010-11, 8 februari 2011, nr. 5-31COM, 24; *Vr. en Antw.* Senaat comm. voor de Sociale Aangelegenheden, Vr. nr. 5-319, 8 februari 2011 (E. SLEURS).

[144] Verslag over het wetsontwerp betreffende de vergoeding van schade als gevolg van gezondheidszorg (I) , *Parl.St.* Kamer 2009-2010, nr. 2240/006, 105-106; T. VANSWEEVELT, "De Wet Medische Ongevallen", *T.Gez.* 2010-11, afl. 2, 98-100.

[145] J.-L. FAGNART, "Principes fondamentaux de la loi sur les accidents médicaux", *Con.M.* 2011, afl. 2, 73-84.

[146] X, *Advies over de Wet Medische Ongevallen van 31 maart 2010** , www.academiegeneeskunde.be/sites/default/files/2022-04/Wet%20medische%20ongevallen%202012.pdf.

[147] *Ibid.*

[148] See M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

[149] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.

moral damages.[150] The establishment of the causal link is straightforward, as without the doctor's mistake, the mother would have opted to terminate the pregnancy. [151] Some have argued that since the doctor did not cause the child's disability, there is no causal link. This argument does not work here since Belgian law follows the principle of *conditio sine qua non*, which entails that there would be no damage without the doctor's mistake.[152] Judicial certainty regarding this matter is not necessary; it is enough that the opportunity to choose whether to terminate the pregnancy was deprived for a lost opportunity to arise.[153]

The controversy here revolves around whether doctors should be obligated to inform patients about the option of abortion.[154] This is controversial due to the doctor's right to conscientious objection regarding abortion.[155] While a doctor may decline to perform such a procedure, they are still required to refer the patient to a practitioner who will.[156] Legal scholars as well as courts debate this matter extensively. Some argue that a doctor cannot be compelled to do so and cite conscientious objection or the fact that the requestfor termination of pregnancy must come from the woman.[157] Others invoke the Patient Rights Act, arguing that it imposes an obligation on doctors to provide all relevant information to their patients. [158] I align with the latter perspective. As previously mentioned, the decision to undergo an abortion is a personal decision of the woman, as intended by the legislator.[159] Thus, it is not the doctor's choice to dictate whether a

---

[150] *Ibid.*; Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198.

[151] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198.

[152] S. SOMERS, "Titel II - Het oorzakelijk verband" in *Aansprakelijkheidsrecht en mensenrechten*, 1e ed., Brussel, *Intersentia* 2016, 383-422; E. VERJANS, "Hoofdstuk IV - Bewijs van schade en van een oorzakelijk verband tussen fout en schade" in *Het recht op informatie en toestemming van de patiënt*, 1e ed., Brussel, *Intersentia* 2019, 949-1152.

[153] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[154] See Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; contra Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198; contra Rb. Leuven 6 maart 2013, *T.Gez.* 2017-18, afl. 2, 108-113; X, noot onder Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 58-59.

[155] Art. 2, 7° Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140; T. VANSWEEVELT, "Gewetensbezwaar arts, verpleegkundige en paramedisch personeel" in X, *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium 2022, 132-136.

[156] Art. 2, 7° Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229; T. VANSWEEVELT, "Abortus" in P. ARNOU, J. DE HERDT, S. VANDROMME en S. VAN OVERBEKE, *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, afl. 99, 15-118; T. VANSWEEVELT, "Gewetensbezwaar arts, verpleegkundige en paramedisch personeel" in X, *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium 2022, 132-136.

[157] See Rb. Leuven 6 maart 2013, *T.Gez.* 2017-18, afl. 2, 108-113.

[158] Art. 7 wet 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[159] Art. 2 Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140; G. GENICOT, « Comparaison sans raison n'est pas solution », *JLMB* 2015, afl. 6, 269-278; T. VANSWEEVELT, "Abortus" in P. ARNOU, J. DE HERDT, S. VANDROMME en S. VAN OVERBEKE, *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, afl. 99, 15-118.

woman should make such a decision. While a doctor is not expected to advocate for abortion, they are obligated, in accordance with their information obligation, to inform their patients of the option.[160] This sentiment is also echoed by HUYGENS in her article on the subject, where she argues that relying on a doctor's conscientious objection does not absolve them of the obligation to provide information.[161]

58. The topic becomes even more contentious concerning late-term abortions, which occur after twelve weeks of conception. [162] There is no unanimous consensus on this matter either.[163] This is so because it not clear until what period a late abortion is allowedsince the legislators have not put a time limit on it.[164] In an article discussing this debate,VAN ASSCHE examines two perspectives.[165] The first viewpoint stems from a definitionof abortion articulated during parliamentary discussions.[166] The second viewpoint assertsthat the law should be interpreted strictly and prevails any stance articulated during parliamentary discussions.[167] I align with the latter perspective. I believe that the law is clear; there is no time limit for abortion after thirteen weeks, provided that strict conditions are satisfied. Moreover, it is not to the doctors to determine the existence of a time limit. Their responsibility lies solely in ensuring compliance with the strict conditions.It appears to me that their reluctance to inform their patients of this possibility is not grounded in legal rationale but rather in their personal convictions.

59. Another point of discussion that is quickly addressed is whether parents are entitled to seek compensation for the expenses related to their child's education.[168] Some

---

[160] Art. 7 wet 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[161] A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[162] Art. 2, 5° Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

[163] K. VAN ASSCHE, "Geoorloofdheid van en informatieplicht over late zwangerschapsafbreking", *T.Gez.* 2017-18, afl. 2, 114-121.

[164] Oud art. 350 Sw.; Art. 2, 5° Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140; Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198; Rb. Leuven 6 maart 2013, *T.Gez.* 2017-18, afl. 2, 108-113.
[165] K. VAN ASSCHE, "Geoorloofdheid van en informatieplicht over late zwangerschapsafbreking", *T.Gez.* 2017-18, afl. 2, 114-121.

[166] N. COLETTE-BASECQZ en N. BLAISE, "L'avortement" in *Les infractions. Vol. III*, Brussel, Larcier 2011, (23) 27; K. DE KEYSER en S. DE MEUTER, "Juridische aspecten van de Wet Zwangerschapsafbreking" in M. SCHEYS (ed.), *Abortus*, Brussel, VUBPress, 1993, 179-210; A. DE KOEKELAERE, "Geneeskunde, bio-ethiek en recht", *RW* 1993-94, 481-505; A. DELANNAY, "Les homicides et lésions corporelles volontaires" in X, *Les infractions. Vol. II*, Brussel, Larcier, 2010, (86) 203; A. DE NAUW, *Inleiding tot het bijzonder strafrecht*, Mechelen, Kluwer, 2010, 471 p.; K. VAN ASSCHE, "Geoorloofdheid van en informatieplicht over late zwangerschapsafbreking", *T.Gez.* 2017-18, afl. 2, 114-121; W. VAN GERVEN, "Ontluikend leven, groeiend recht" in X, *Recht en medisch begeleide bevruchting*, Antwerpen, Kluwer, 1991, (161) 179.

[167] G. GENICOT, *Droit médical et biomédical*, III/1, *La naissance contrôlée*, 2e édition, Bruxelles, Larcier, 2016, 655-694; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 216-217; Y.-H. LELEU en E. LANGENAKEN, "Quel statut pour l'embryon et le foetus dans le champ juridique belge?", *JT* 2002, afl. 6068, 657-666; Y.-H. LELEU, "Le droit à la libre disposition du corps à l'épreuve de la jurisprudence 'Perruche'", *RGAR* 2002, nr. 13466, 1-9; H. NYS, *Geneeskunde. Recht en medisch handelen*, Wolters Kluwer Belgium, Mechelen, 2016, 669 p.; G. SMAERS, "Gedeeltelijke depenalisering van abortus", *RW* 1990-91, (827) 828; T. VANSWEEVELT, "Abortus" in T. VANSWEEVELT en F. DEWALLENS, *Handboek gezondheidsrecht. Vol. II*, Antwerpen, Intersentia, 2014, (189) 268; K. VAN ASSCHE, "Geoorloofdheid van en informatieplicht over late zwangerschapsafbreking", *T.Gez.* 2017-18, afl. 2, 114-121.

[168] M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

have argued that because article 203 of the Old Civil Code imposes an obligation on parents to support their children, they cannot claim reimbursement for such expenses.[169] However, this argument has been consistently dismissed by courts.[170]

3.2.2 Wrongful life

60. As mentioned in the first section of this thesis, wrongful life claims are very controversial.[171] This is due to the nature of the claim, namely that a child is asking compensation for their own life.

In prior cases pertaining to this claim, the courts displayed less reluctance in granting compensation for wrongful birth, although recognizing different doctrinal trends. The court of first instance of Brussels, for example, pronounced in 2001 that a child could seek damages by asserting an interest in avoiding life with a severe and incurable disability.[172] Another court of first instance in 2006 pursued this line of reasoning. [173] Their statement, which I find compelling, asserts that legislators allowing termination of apregnancy after twelve weeks in cases of severe illness suggests a preference for non- existence over a life with disabilities.[174] They further argue that this rationale finds even stronger acceptance from legislators with the enactment of euthanasia laws.[175] Since the legislators accept a legitimate interest not to live with a severe and incurable disability, the court sees no reason to declare that interest unlawful.[176] The Court of Appeal further reinforced this tendency five years later by affirming that: *"The fact that in order to determine the damage a comparison must be made with a state of non-existence, does not prevent certain non-material damage to the child and the additional expenditure due to the disability from being compensated."*[177]The same court remained consistent in its stance by subsequently granting another wrongful life claim.[178]

61. However, the acceptance of wrongful life claims ceased in 2014 with a ruling by the Court of Cassation.[179] The Court of Cassation has reiterated on several occasions that: *"There is no reimbursable loss (…) when the comparison must be made betweenthe state of a person's disabled existence and his non-existence."*[180] Their reasoning

---

[169] Art. 203 Oud BW; Luik (11e k.) 10 mei 2001, *T.Gez.* 2001-02, afl. 5, 247-255.

[170] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[171] A. GOSSERIES, « Causalité, dommage et vie préjudiciable », *RGAR* 2011, afl. 3, nr. 14722.

[172] Rb. Brussel (burg. k.) (72e k.) 21 april 2001, *TBBR* 2006, afl. 2, 108-116.

[173] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[174] See Old art. 350, 4° Sw.; art. 2, 5° wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen , *BS* 29 oktober 2018, 82.140; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; T. BALTHAZAR, "Wrongful birth, wrongful life", *Juristenkrant* 2010, afl. 220, 7.

[175] Wet van 28 mei 2002 betreffende de euthanasie, *BS* 22 juni 2002, 28.515; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[176] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[177] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.
[178] Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113.

[179] See Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1.

[180] See Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1; Cass. (1e k.) 21 april 2016, AR C.15.0286.N, *T.Gez.* 2016-17, afl. 2, 107-108; Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299.

suggests that the individual affected by the wrongful act must demonstrate being in a less advantageous position than before to establish damages. [181] This arrest was commented many times by numerous authors.

GENICOT agrees with the court's ruling, asserting that the child lacks standing to invoke a violation of a legitimate interest in being aborted as this prerogative resides with the mother.[182] Additionally, GENICOT argues that by refraining from comparing existence with non-existence, the Court of Cassation is preventing the emergence of a 'right to not be born'.[183]

62. In opposition to this perspective are LELEU and DUBUISSON. LELEU, for example, argues that the comparison the Court of Cassation declines to undertake has previously been conducted.[184] He also raises a question regarding why the legitimacy of the child's interest is scrutinized while that of the father's interest is not.[185] DUBUISSON elaborates on this by comparing the father's interest to that of the child. He argues that both the father and the child are 'victims by ricochet' of the violation of the mother's prerogative to terminate her pregnancy.[186] This implies that an individual sustains personal injury as a consequence of the violation of a freedom pertaining to the direct victim, namely the mother.[187] DUBUISSON also raises doubts regarding the characterization of the prejudice suffered by the child as an illegitimate interest, considering it derives from the violation of the mother's prerogative to choose whether she wants to proceed with an abortion. Because that right was infringed upon, the child was born. [188] Both LELEU and DUBUISSON prioritize the interest of the child in their arguments. DUBUISSON, for example, argues that the information obligation of a medical practitioner[189] entails that the interests of any person who may be affected by that information must be ensured. This means that the interests of the child should likewise be taken into consideration. LELEU states: *"Denying the representation of the child in the exercise of his right would undermine the very principle of the protection of the disabled and deny the existence of the child as a subject of rights." [190]* He is not the only one to reason this way, as mentioned in section two, IACUB defends wrongful life claims with a similar argument.[191]

---

[181] Cass. (1e k.) 21 april 2016, AR C.15.0286.N, *T.Gez.* 2016-17, afl. 2, 107-108; L. OPLINUS, "Te oud voor ouderschap? Analyse van de maximale leeftijd als toegangsbeperking in de context van medische hulp bij de voortplanting", *Rechtskundig Weekblad* 2022-23, nr. 32, 1243-1255.

[182] G. GENICOT, « Comparaison sans raison n'est pas solution », *JLMB* 2015, afl. 6, 269-278.

[183] See Concl. J. SAINTE-ROSE in Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr; G. GENICOT, « Comparaison sans raison n'est pas solution », *JLMB* 2015, afl. 6, 269-278.

[184] Y.-H. LELEU, « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285.

[185] *Ibid.*

[186] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[187] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[188] *Ibid.*

[189] See Art. 7 wet 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719; Luik 24 juni 2002, *T.Gez.* 2007-08, afl. 3, 242-248; Luik (20e k.) 22 januari 2009, *T.Gez.* 2009-10, afl. 4, 215-216; Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674; Bergen (6e k.) 28 oktober 2011, *T.Gez.* 2012-13, afl. 3, 234-237, noot T. VANSWEEVELT; Bergen (6e k.) 12 oktober 2012, *T.Gez.* 2014-15, afl. 3, 172-176; Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; T. VANSWEEVELT, "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegens de geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240.

[190] Y.-H. LELEU, « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285.

[191] M. IACUB, *Penser les droits de la naissance*, PUF 2014, XV-XXVIII.

LELEU further argues that in cases of wrongful life, no assertion of a 'right to not be born' is made. Instead, he suggests that this notion, which lacks legal basis, is employed to undermine the legal validity of the plaintiffs' arguments.[192]

In his article DUBUISSON attempted to refute the opposing arguments by presenting counterevidence based on principles of Belgian law. His first argument pertains to the belief that the acceptance of wrongful life claims would make it possible for children to bring their parents before court. He explains that this is not possible since the decision toterminate a pregnancy is left exclusively to the mother by Belgian law, making a decision not to terminate her pregnancy not a fault on her part.[193] I too believe that exercising a right given to one by law, in a way that does not amount to an abuse of rights, cannot begrounds for legal action.[194] DUBUISSON proceeds to address the concern of 'prenatal eugenics'. While recognizing that there is a small risk for abuse, he maintains that this concern does not warrant the rejection of wrongful life claims.[195]

63. I agree with the notion that rather than outright dismissing these claims, legislators should establish regulations to prevent potential misuse. It is worth noting, that proving the conditions of the three conditions for liability can prove difficult. This is especially true in reproductive liability claims where factors like the causal link are frequently contested. [196] Furthermore, courts commonly enlist experts to examine cases[197], and mere diagnostic errors do not necessarily incur liability.[198] It could thereforebe argued that abusing such claims is challenging.

64. Before concluding this subsection, I would like to examine another argument put forth by DUBUISSON, which I find persuasive. He argues that it is unjustifiable to burden the population with the costs associated with repairing damage when the conditions for liability are fulfilled and another party is responsible. Summarizing his opinion, he states: "*Leaving the issue to social security is to make the public community bear a disability which, without the fault of the responsible third party, would only have led to the cost of a therapeutic abortion."*[199]

---

[192] Y.-H. LELEU, « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285.

[193] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[194] See Art. 2, 5° wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140; B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[195] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[196] Cass. (1e k.) 5 juni 2008, AR C.07.0199.N, *T.Verz.* 2008, afl. 4, 418; Liège (11e ch.) 10 mai 2001, *Rev. dr. santé* 2001-02, liv. 5, 247-255; Bergen (6e k.) 12 oktober 2012, *T.Gez.* 2014-15, afl. 3, 172-176; H. BOCKEN, "Het verlies van een kans: vergoedbare schade? Het arrest van het Hof van Cassatie van 5 juni 2008", *T.Verz.* 2008, afl. 4, 421-424; M. VAN QUICKENBORNE, "Het bewijs van een oorzakelijk verband", *TPR* 2010, afl. 1, 313-330.

[197] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Luik (afd. Luik) (4e k.) 16 september 2019, *RGAR* 2019, afl. 9, 15616; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229; A. HUYGENS, "Wrongful-life-vordering overleeft cassatietoets niet", *T.Gez.* 2014-15, afl. 3, 195- 201.

[198] Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674; Rb. Brussel (72e k.) 21 april 2004, *T.Gez*. 2004-05, afl. 5, 380; J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e ed., Brussel, *Intersentia* 2020, 143-244.

[199] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

65. The arguments presented by LELEU and DUBUISSON have persuaded other scholars in the field. HAARSCHER, for instance, referenced both in his study on wrongful life claims.[200] He suggested two potential remedies for obtaining compensation in casesof wrongful life. The first approach aligns with the stance advocated by LELEU and DUBUISSON[201], which involves expanding the scope of liability. The second option would be to guarantee compensation for the plaintiffs of wrongful life claims through legislation, or even through constitutional measures.[202] In subsection 3.3.2, I will discuss the reform of the Civil Code which addresses the first approach outlined in this discussion. The second option, previously attempted by legislators without success, will be addressed in section five.

3.2.3 Wrongful pregnancy

66. The debate surrounding wrongful pregnancy claims focuses not on their admissibility in court but rather on the nature and extent of the damages involved.[203] Courts have taken varied approaches to compensating for such damages, as evidenced by the divergent rulings of the Court of Appeal of Liège on this matter.

Starting in 2001, a legal case was initiated involving a failed abortion. The defendant did not deem a secondary verification, such as an in-utero control, necessary, thereby failing to detect the procedure's inefficacy. However, the court determined that since theplaintiff 'chose' to raise the child, she was not entitled to claim compensation for the costs of upbringing.[204]

Eight years later, another wrongful pregnancy case was presented before the same court. The fault in this instance also lay in postoperative monitoring. Although the laboratory noted the absence of foetal tissue in the samples provided, neither the attending physician nor the patient were informed of this. Consequently, the woman gave birth to ahealthy but unwanted baby. The court, echoing its previous judgment, declined to award compensation for the moral damages arising from the birth of the child.[205]

Later that year, the court of first instance of Antwerp, handling a wrongful pregnancy case, concluded that it would be a violation of the woman's physical and psychological integrity to reduce her damage by going through an abortion or by giving the child up foradoption.[206] It is only in 2020 that the Court of Appeal of Liège changed their stance, explicitly stating that: *"(…) the victim has no general obligation to limit her damage at all costs, (…) she commits no fault in choosing to carry her pregnancy to term."* [207] However, this does not imply that any moral or material damage occurring after birth will be eligible for

---

[200] G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384.

[201] See E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93; B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219; G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384; Y.-H. LELEU, « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285.

[202] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[203] E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93.

[204] Liège (11e ch.) 10 mai 2001, *Rev. dr. santé* 2001-02, liv. 5, 247-255.

[205] Liège (20e ch.) 22 janvier 2009, *Rev. dr. santé* 2009-10, liv. 4, 215-216.

[206] Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229.

[207] Luik (20e k.) 3 december 2020, *T. Verz.* 2021, afl. 4, 547.

compensation. The rationale employed to reject compensation for such damages is grounded in the perception that the birth of a (healthy) child is a joyful event, and any harm resulting from their birth is already offset by the overall 'benefits' of parenthood. This line of reasoning is exemplified in a 2016 case from The Court of Cassation, where the mother was granted damages for enduring pregnancy. Nevertheless, damages suffered due to the birth of the child did not meet the criteria for compensation.[208]

67. Plaintiffs and their legal representatives therefore encounter two obstacles in seeking compensation for the costs of upbringing:

68. The first impediment arises from the perceived failure on the part of the plaintiff to mitigate damages. PANIS is of the opinion that an obligation to reduce damage should not lead to the obligation to either give the child up to adoption or proceed with an abortion.[209] She argues that once a baby is born, the parents naturally form a bond with them. They would therefore feel guilty if they had to give the child up for adoption. Abortion is, in her opinion, not a reasonable measure to limit the damage since such a decision has great psychological consequences.[210]

69. I agree with PANIS' opinion. I do not think it justifiable to force someone to do something that feels morally wrong to them when they did not ask to be put in that position in the first place. Saying that parents would have to give the baby up for adoption, so they can be properly compensated, is putting all the responsibility on them for something that happened against their will. I would argue that having to go through aprocedure which not only has an impact on the woman's body but also on her morale, causes more damage to her than it would limit it. The damage caused by the medical practitioner would be restricted; however, is it worth going through such a procedure to minimize the financial restitution owed by the liable party? Similar to HAARSCHER, I argue that this constitutes a personal decision, that only concerns the pregnant woman.It is not the prerogative of the courts to decide on the worthiness of such decisions.[211]

70. The second obstacle is grounded on the assumption that the birth of a child is always a happy occurrence.[212] Some judges believe that the affection and friendship given by a child to their parents compensate for the need for a career break.[213] The rationale behind their conclusion remains unclear to me, considering the substantial economic implications associated with a career break. [214] GENICOT clarifies that the justification for only reimbursing medical expenses is none other than a moral one. In thesame book, he states that *"(…) In certain hypotheses (…), the birth of a healthy child following either a failed sterilization or an abortion that does not achieve its goal (…), is not necessarily experienced as a happy event by those who, not having foreseen or*

---

[208] Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299.

[209] S. PANIS, "L'action en grossesse préjudiciable (wrongful pregnancy)", *T.Gez.* 2009-10, n° 4, 217-226.

[210] *Ibid.*

[211] See G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384.

[212] E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93.

[213] Antwerpen 8 september 2003, *NJW* 2004, afl. 70, 558-560.

[214] A. BIČÁKOVÁ and K. KALÍŠKOVÁ, "Career-Breaks and Maternal Employment in CEE Countries" in J.A. MOLINA (ed.), *Mothers in the Labor Market*, Springer Cham 2022, 269p.; L.M. BROWN, "The relationship between motherhood and professional advancement: Perceptions versus reality", *Employee Relations* 2010, vol.32, no. 5, 470-494; T. CARNEY, "The Employment Disadvantage of Mothers: Evidence for Systemic Discrimination", *Journal of Industrial Relations* 2009, vol. 51, no. 1, 113-130.

desired it, had the possibility of avoiding it."[215] I agree with his perspective, as it aligns with existing research on the effects of the undesired birth of a child.[216]

71. In judging cases of this nature, judges inevitably hold personal beliefs. This raises a question regarding the appropriateness of applying these personal beliefs to the lives of others. According to GENICOT, the decriminalization of abortion and the approval of sterilization imply a woman's right to refuse procreation. [217] Therefore, if a woman deliberately chooses to undergo sterilization or abortion, she is explicitly exercising that right. When judges decide that she should still find contentment in having a child despite her explicit opposition to procreation, could that not be construed as an infringement on her right not to procreate and, consequently, on her reproductive autonomy? The line of reasoning asserting that the birth of a child is always a joyous occurrence appears, in my opinion, paternalistic in nature.

3.3 Gaps and developments in the law

3.3.1 Lack of legislation

72. The biggest gap regarding reproductive liability claims is arguably the lack of specific legislation, which has led to a lot of confusion. Courts and authors have different ideas about what counts as a reproductive liability, as well as how much compensation should be awarded for each.[218] This has caused uncertainty, not just for lawyers, but alsofor doctors, their insurance companies, and people who have been harmed by medical mistakes.[219]

73. Doctors are now feeling pressured to be extra cautious, which can sometimes lead to a practice of defensive medicine. This implies that physicians may prescribe tests that are medically unnecessary for their patients, primarily to avoid potential liability. [220] Individuals impacted by reproductive liability claims face uncertainty regarding the likelihood of receiving compensation and whether such compensation will adequately

---

[215] G. GENICOT, *Droit médical et biomédical*, III/1, *La naissance contrôlée*, 2e édition, Bruxelles, Larcier, 2016, 655-694.

[216] See N. BAYDAR, "Consequences for Children of Their Birth Planning Status.", *Family Planning Perspectives* 1995, vol. 27, no. 6, pp. 228–45; J.S. BARBER, W.G. AXINN and A. THORNTON, "Unwanted Childbearing, Health, and Mother-Child Relationships.", *Journal of Health and Social Behavior* 1999, vol. 40, no. 3, pp. 231– 57; *Contra* P. RANTAKALLIO and A. MYHRMAN, "The Child and Family Eight Years after Undesired Conception: The Child and Family after Undesired Conception.", *Scandinavian Journal of Social Medicine* 1980, vol. 8, no. 3, 81-87.

[217] See F. KÉFER, « La naissance d'un enfant après l'échec d'un avortement est-elle constitutive d'un préjudice ? », *JT* 1990, 644-646; G. GENICOT, *Droit médical et biomédical*, III/1, *La naissance contrôlée*, 2e édition, Bruxelles, Larcier, 2016, 655-694; E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93.

[218] Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1; Liège (20e ch.) 22 janvier 2009, *Rev. dr. santé* 2009-10, liv. 4, 215-216; Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Bergen (6e k.) 12 oktober 2012, *T.Gez.* 2014-15, afl. 3, 172-176; Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113; Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551; Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108-111; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[219] See also S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez*. 2011-12, afl. 3, 232-237.

[220] Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108-111; E.D. KATZ, "Defensive Medicine: A Case and Review of Its Status and Possible Solutions.", *Clin Pract Cases Emerg Med.* 2019, vol. 3, no. 4, 329-332.

cover the unforeseen additional costs with which they are now faced.[221] Additionally, the legislature's silence regarding the admissibility of these claims under the Medical Accidents Fund has created challenges for individuals seeking compensation from the Fund. This has also placed the burden on the Fund to independently determine the admissibility of such claims.[222]

74. Given these challenges, there is a compelling argument for creating clear rules about wrongful birth claims. This would make things easier for everyone involved,ensuring fair treatment for victims, and helping doctors understand their responsibilities better. It would also bring more transparency to the legal system, which benefits society.

3.3.2 Reform of the Civil Code

75. The most significant development in Belgian law revolves around the reform of the Old Civil Code. Recently, a proposal has been prepared to reform non-contractual liability.[223] This proposal means to replace the articles 1382-1384 of the Old Civil Code with a more comprehensive set of articles addressing liability.[224] As previously discussed, liability requires the fulfilment of three conditions: a mistake, damage, and a causal link.[225] However, these conditions are not explicitly detailed in the law, leaving them tobe shaped by case law.[226] This results in unpredictability for the general population.[227] To enhance clarity, legislators have expanded the set of articles related to liability, including specific definitions for a mistake, damage, and a causal link. Although article 1382 of the Old Civil Code will be replaced by article 6.66 of the Civil Code, its content remains unchanged. Article 1383 of the Old Civil Code, which was specific to mistakes due to negligence or carelessness, has not been reinstated in the New Civil Code. This omission is justified by the understanding that even the slightest mistake is now sufficient to be required to repair the entire damage.[228] Given the ongoing debate in case law concerningreproductive liability claims, it is regrettable that legislators did not seize the opportunity during this reform to introduce a dedicated liability regime for such claims.

76. This new law entails more than just the alteration mentioned earlier. As previously discussed, the existing doctrine of loss of an opportunity will be replaced by a doctrine on proportional liability. Under this framework, compensation for the actual damage suffered will be determined based on the likelihood that the operative event caused this damage. According to the legislators, this would lead to the same practical results as before. This change aims to rule out the possibility of compensation for both the loss of opportunity

---

[221] J.-L. FAGNART, "Principes fondamentaux de la loi sur les accidents médicaux", *Con.M.* 2011, afl. 2, 73-84.

[222] X, *Advies over de Wet Medische Ongevallen van 31 maart 2010**, www.academiegeneeskunde.be/sites/default/files/2022-04/Wet%20medische%20ongevallen%202012.pdf.

[223] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[224] *Ibid.*

[225] See E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551; T. VANSWEEVELT en B. WEYTS, « Hoofdstuk II - De equivalentieleer » in *Handboek Buitencontractueel Aansprakelijkheidsrecht*, 1e editie, Brussel, Intersentia 2009, 775-800.

[226] C. BORUCKI en I. SAMOY, "Anticipatie op de hervorming van het Burgerlijk Wetboek. Mogelijkheden en grenzen inzake het buitencontractuele aansprakelijkheidsrecht", *TPR* 2021, afl. 1, 425-468; R. FELTKAMP en L. CORNELIS, "SOS voor een democratisch aansprakelijkheidsrecht", *Juristenkrant* 2023, afl. 469, 12-13.

[227] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[228] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001; T. VANSWEEVELT en B. WEYTS, « Inleiding » *in Handboek Buitencontractueel Aansprakelijkheidsrecht*, 1e editie, Brussel, Intersentia 2009, 775-800.

and for the damage itself. The doctrine of the loss of an opportunity, moreover, is not known in social security law. Replacing this doctrine with another basis means that an adjustment of social security legislation is unnecessary.[229] The provisions concerning loss of an opportunity will be delineated in article 6.23 of the Civil Code.[230]

77. Another noteworthy amendment to discuss pertains to the introduction of article 6.33, § 1, of the Civil Code. This article addresses the 'rule of negative outcome', which entails that the damage is determined by comparing the injured party's condition after the incident, with the condition they would have been in, had the incident not occurred.[231] In the bill, it is clarified that, *"This is a method that makes it possible to measure the extent of the damage and to obtain full compensation, but it does not allow to refuse compensation just because it would be difficult or even impossible to put the injured party back into the hypothetical state he would have been in if the fact leading to liability would not have occurred."*[232] This statement alludes to the argument employedby the courts to reject compensation for wrongful life claims, namely that the comparisonbetween existence and non-existence renders the assessment of damage unfeasible.[233] Itis their understanding that it is paradoxical to maintain that the legal interests of parents are safeguarded while those of the child are not.[234] Whether this will impact upcoming judgments regarding the admissibility of wrongful life claims remains to be seen. DUBUISSON had talked about this prior, stating that: *"(…) the Court of Cassationtransforms a rule intended to assess the damage into a condition of existence of this damage (…)."* He further explains that this leads to a narrowing of the definition of damage which he finds to be contrary to Belgian law principles.[235]

78. As is customary with changes to the law, the opinions of those who study it emerge. In his article addressing this matter, SCHOLLAERT emphasized that the previousstatement by legislators concerning wrongful life claims does not change the fact that a difference in situation has to be proved for there to be damage.[236] However, I argue that this is not a problem; it simply depends on whether the courts choose to compare the lifeof a healthy child with that of the child in question, rather than comparing existence with non-existence.[237] This comparison, however, cannot be a general rule. The aim is not to assess the value of the lives of individuals with disabilities, but rather to compensate victims of medical mistakes.

79. The reform of the Civil Code is unlikely to impact reproductive liability claims, as the amendments involve an expansion rather than an alteration of the existing articles on liability. While the legislators' remarks regarding the rule of negative outcome may carry

---

[229] *Ibid.*

[230] Art. 6.23 Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[231] Art. 6.33, § 1 Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[232] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[233] Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1.

[234] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[235] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[236] V. SCHOLLAERT, "Het nieuwe buitencontractueel aansprakelijkheidsrecht. Een verkennende analyse", *NJW* 2023, afl. 482, 374-381.

[237] Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1; G. GENICOT, « Comparaison sans raison n'est pas solution », *JLMB* 2015, afl. 6, 269-278.

some influence on judicial interpretation, the pattern of dismissing wrongful life claims observed since 2014 suggests that its impact may be limited. A more effective approach for legislators would be to translate their parliamentary statements into concrete legal provisions.

3.3.3 Wrongful 'family expansion'

80. The last development that will be discussed is that of a 2021 case where, for the first time in Belgium, a couple was awarded damages for the birth of a healthy child.[238] The case preceding this goes as follows:

A couple with a son afflicted by a blood disorder approached the University Hospital Brussels, a hospital, seeking assistance in conceiving a baby through in-vitro fertilization. Their objective was to have a child who could potentially serve as a bone marrow donor to their sick son. This is commonly known as a 'saviour sibling'.[239] Unfortunately, during the selection of healthy embryos, a laboratory technician inadvertently chose an embryo incompatible with the sick brother. This mistake became known only after the birth of the twin sisters. Consequently, the mother had to undergo another round of IVF to give birth to a baby capable of serving as a donor to the sick child. In their claim, the parents sought both moral and material damages, not for the birth of the healthy children, but for the additional costs suffered due to the expansion of the family. [240] The Court ultimately granted compensation to the parents for the unplanned baby and acknowledged that the expenses suffered in adapting to the arrival of the baby constituted a compensable loss.[241]

81. This ruling is unique because it contradicts the Court of Cassation's previous rulings on this matter.[242] In 2016, they asserted that: *"The birth of a child (…) cannot, onitself, constitute a prejudice for the mother."*[243]

82. A pertinent question in this context is whether this case pertains to a wrongful birth or a wrongful pregnancy. It is crucial to recall that a wrongful birth pertains to the birth of a child with disabilities, whereas a wrongful pregnancy involves the birth of an undesired but healthy child. [244] However, as previously explained, the distinguishingfactor lies in the (lack of) desire to have a child.[245] In this case, although the child was desired, they were not compatible with their brother. Consequently, the case falls under the category of wrongful birth. DE KEZEL also characterized this as a wrongful birth case

---

[238] Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108; F. DE MEYER en C. DE MULDER, "De vergoeding van materiële schade wegens ongewenste gezinsuitbreiding na foutieve embryo- implantatie", *T.Gez.* 2021-22, afl. 2, 112-119.

[239] L. OPLINUS, "Kind van de rekening", *RW* 2021-22, afl. 20, 770.

[240] E. DE KEZEL, "Rechtbank kent Spaans koppel schadevergoeding toe voor 'wrongful birth'", *Juristenkrant* 2022, afl. 441, 2-3; L. OPLINUS, "Kind van de rekening", *RW* 2021-22, afl. 20, 770.

[241] Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108; L. OPLINUS, "Kind van de rekening", *RW* 2021-22, afl. 20, 770.

[242] Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299.

[243] *Ibid.*

[244] E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93 ; N. VAN DE SYPE, "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622.

[245] *Ibid.*

in his article on the matter.[246] Others, such as OPLINUS, perceive this as a distinct type of claim and categorize it as a wrongful 'family expansion' claim.[247]

83. Given that this case diverges from previous rulings and grants compensation for a healthy child, it has understandably elicited criticism from some scholars. DE MEYER and DE MULDER articulated their concerns, suggesting that *"compensation for damages due to the birth of a saviour baby, indicate an acceptance of an increasingly instrumentalization of human life."*[248] In response to this case, the University Hospital Brussels has reinforced their procedure for the purposes of preimplantation genetic testing.[249] This case is interesting as it may have an influence on future legal decisions relating to wrongful birth and wrongful pregnancy claims, potentially shaping the landscape of reproductive liability claims.

[246] E. DE KEZEL, "Rechtbank kent Spaans koppel schadevergoeding toe voor 'wrongful birth'", *Juristenkrant* 2022, afl. 441, 2-3.

[247] L. OPLINUS, "Kind van de rekening", *RW* 2021-22, afl. 20, 770.

[248] F. DE MEYER en C. DE MULDER, "De vergoeding van materiële schade wegens ongewenste gezinsuitbreiding na foutieve embryo-implantatie", *T.Gez.* 2021-22, afl. 2, 112-119.

[249] X, *Renforcement des procédures pour le traitement PGT*, www.uzbrussel.be/fr/web/guest/home/-/asset_publisher/8YmW6ErOnrxi/content/aanscherpen-procedures-pgt-behandeling/maximized.

4. Comparison with other jurisdictions

84. In this section, a comparative analysis of two jurisdictions will be conducted, concerning their approach to reproductive liability claims. This will be compared with Belgium's way of addressing these claims. Through this comparative examination, the aim is to identify potential strategies that could enhance the handling of these cases within the Belgian legal framework.

4.1 The United Kingdom

85. The United Kingdom is no stranger to reproductive liability claims. Their courts have been handling these cases for years, debating the legitimacy of such claims. Reproductive liability claims in the United Kingdom are based on the principle of the duty of care and the tort of negligence. The NHS Constitution for England defines this as the *"(…) duty to take reasonable care and skill in the provision of treatment or other healthcare"*.[250] Determining whether something falls within the scope of a doctor's duty ofcare is done using what is commonly known as the '*Bolam* test'.[251] A similar approach is taken in Belgium, where a doctor's actions are evaluated against those of another doctor in similar circumstances to determine whether they met the appropriate standard of care.[252]

86. Depending on the type of reproductive liability claim, different case law and regulations apply. Further exploration of this topic will be provided in subsections dedicated to each specific claim. For the purpose of this thesis, I will only be focusing on the jurisdiction of England and Wales.

4.1.1 Wrongful birth

87. Wrongful birth cases in England and Wales are due to a breach of the doctor's duty of care. This breach is the direct cause of the parent's damage.[253] These claims are generally accepted by the courts.[254]

88. The first case to be discussed is *Deriche v Ealing Hospital NHS Trust*.[255] In this case, the woman contracted chickenpox during her pregnancy. After her general practitioner recommended terminating the pregnancy, she sought a second opinion from another doctor. This second doctor assured her that termination was unnecessary.However, the child was born with severe disabilities, leading the mother to file a claim.[256]The central issue in this case was that the second doctor, relying on the notes from the general practitioner, assumed that the patient was aware of the risks involved, which she

---

[250] NHS Constitution for England.

[251] See Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.

[252] See Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.; Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; G.G noot onder Gent (1e k.) 27 september 2007, *T.Gez.* 2012-13, afl. 1, 45-48; A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613; J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244; S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez*. 2011-12, afl. 3, 232-237.

[253] See G. DEMME et R. LORENTZ, « Responsabilité civile et naissance d'un enfant. Aperçu comparatif », *Revue internationale de droit comparé* 2005, vol. 57, n° 1, 103-139.

[254] See McFarlane v Tayside Health Board [2000] 2 AC 59; Khan v Meadows [2021] UKSC 21.

[255] Deriche v Ealing Hospital NHS Trust [2003] EWHC 3104 (QB).

[256] *Ibid.*

was not. Mr. Justice Buckley noted that *"part of the doctor's duty of care to his patient is to protect her from events that may cause medical injury, so far as he can."*[257]

89. Another important case to consider is *Lee v Taunton and Somerset NHS Trust* in which a woman who was taking medication for her epilepsy, underwent a high-resolution ultrasound scan to check for various conditions, including spina bifida, in her unborn child. [258] The radiologist failed to report any abnormalities, despite the scan clearlyindicating signs of spina bifida. This negligence prevented the mother from making an informed decision about whether to terminate the pregnancy. Consequently, the mother filed a claim.[259] Toulson J, the presiding judge, determined that this case was different from *McFarlane*, which involved the birth of a healthy child, whereas *Lee* involved a child with a disability. Because of this difference, the court ruled that the plaintiff was entitled to *"substantial damages."*[260]

90. Since the case of *Khan v Meadows*, it has been established that the doctor's duty of care is limited to the specific condition for which the plaintiff sought testing. If the child is born with disabilities other than those tested for by the doctor, they are not held liable for failing to detect them.[261]

91. Having briefly discussed some wrongful birth claims in England and Wales, the next step is to compare them with the corresponding legal framework in Belgium.

92. A significant similarity lies in the recognition that women may derive a right from the Abortion Act 1967 in the United Kingdom[262], similar to Belgian authors' assertions.[263] In failing to adequately inform their patients, doctors may infringe upon this right, potentially leading to liability. [264] Another similarity lies in their respective documents outlining patient rights. Both jurisdictions have written documents that grant rights to patients. [265] One of these rights, pertinent to wrongful birth claims, is the right to information. Both texts convey a similar message, stating that the information provided should be understood by the patient.[266] This aspect previously sparked debate in England and Wales, as some argued that ensuring the patient understood the information exceeded the scope of the doctor's duty of care.[267]

---

[257] Deriche v Ealing Hospital NHS Trust [2003] EWHC 3104 (QB).

[258] Lee v Taunton and Somerset NHS Trust [2001] 1 FLR 419.

[259] *Ibid.*

[260] Lee v Taunton and Somerset NHS Trust [2001] 1 FLR 419; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[261] Khan v Meadows [2021] UKSC 21.

[262] See J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[263] See B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[264] See B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219; J.K. MASON, The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction, *Cambridge University Press* 2007, 317 p.

[265] Wet van 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719; NHS Constitution for England.

[266] Art. 7, § 2 Wet van 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719; NHS Constitution for England.

[267] See J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

93. The 2015 case of *Montgomery v Lanarkshire* established a precedent for what constitutes informed consent.[268] In this case, a doctor failed to inform a diabetic patient about the risk of shoulder dystocia to her baby, believing that discussing this risk would likely lead the patient to choose a caesarean section, which the doctor deemed 'not in the maternal interest'. [269] The court's ruling adopted a patient-centred perspective, emphasizing *"patient autonomy over medical paternalism."* [270] They believe that the *Bolam* test should no longer be applied to determine *"the extent to which a doctor may be inclined to discuss risks with a patient"* as it could result in *"sanctioning of differences in practice."*[271] An article analysing the impact of this case highlighted several points of clarification. The authors argue that the *Montgomery* case has clarified consent law, bringing it in line with General Medical Council guidance. They further assert that this hasnot altered the process of consent but has instead granted *"recognition to patients as decision-makers."*[272] Later that year, the case of *Mrs A v East Kent Hospitals University NHS Foundation Trust* offered a nuanced interpretation of the '*Montgomery* test'. According to the same article, this nuance indicates that *"doctors are not liable for every omission of disclosure to which a patient later objects."* [273]

94. Recoverable losses include the additional costs associated with raising a child with disabilities, a principle established by *Parkinson v St James and Seacroft University Hospital NHS Trust* and upheld in subsequent cases.[274] In Belgium, such damages are similarly awarded to the parents.[275] Regarding the duration for which damages are to be paid, there is debate over whether they should cease at the age of eighteen.[276] MASON adds nuance to this argument by pointing out that due to the permanent nature of most disabilities, parents may be required to provide care for their child until their death.[277] In Belgium, plaintiffs occasionally ask for compensation for the aid of third parties until theirchild is eighteen.[278]

95. The prevailing approach among English courts about the amount of compensation that should be awarded aligns with the precedent set by *Rand*.[279] In the case of *Hardman v Amin*, the court diverged from the *Rand* decision and determined that compensation for a child's special needs should be in accordance with the severity of the disability rather

---

[268] Montgomery v Lanarkshire Health Board [2015] UKSC 11.

[269] Montgomery v Lanarkshire Health Board [2015] UKSC 11.

[270] S.W. CHAN, E. TULLOCH, E.S. COOPER, A. SMITH, W. WOJCIK and J.E. NORMAN, "Montgomery andinformed consent: where are we now?", *BMJ* 2017, vol. 357, https://doi.org/10.1136/bmj.j2224.

[271] Montgomery v Lanarkshire Health Board [2015] UKSC 11.

[272] S.W. CHAN, E. TULLOCH, E.S. COOPER, A. SMITH, W. WOJCIK and J.E. NORMAN, "Montgomery and informed consent: where are we now?", *BMJ* 2017, vol. 357, https://doi.org/10.1136/bmj.j2224.

[273] *Ibid.*

[274] McLelland v Greater Glasgow Health Board [1999] SC 305; Parkinson v St James and Seacroft NHS Trust [2001] EWCA Civ 530.

[275] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[276] T. CARVER, T. COCKBURN and B. MADDEN, "Wrongful birth children and assessing damages for costs of care: Australian and British jurisprudence compared", *Monash University Law Review* 2018, vol. 44, no. 1, 198- 233; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[277] *Ibid.*

[278] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[279] Rand v East Dorset Health Authority [2000] EWHC J0225-12.

than the parents' financial means.[280] In this respect, this ruling aligns with the criteria considered by Belgian courts when determining the amount of compensation.[281]

96. Despite the similarities, it is important to analyse the differences between both frameworks as it is within these differences that potential inspiration for future Belgian legislation on reproductive liability claims may lie. Interestingly, Belgian jurisprudence appears to be slightly more advanced in the principles underlying these claims compared to its English counterpart. While plaintiffs in wrongful birth cases in England and Wales are constrained by the scope of the duty of care, which can sometimes limit their compensation, Belgian plaintiffs have a broader foundation for their claims.[282]

97. One such foundation, which in Belgian law forms the basis for reproductive liability claims, is the doctrine of loss of an opportunity.[283] This doctrine is absent in England and Wales. It is worth noting, that the Scottish notion of 'damnum' shares similarities with the doctrine of loss of an opportunity.[284] This concept suggests that a legal interest has been deprived from an individual. In the context of plaintiffs in wrongful birth cases, this refers to being denied the opportunity to terminate their pregnancy. Unfortunately, there is no equivalent concept in English law.[285] Belgian law thus offers a more multifaceted basis for wrongful birth claims.

98. A notable distinction between both jurisdictions lies in the burden of proof required of plaintiffs. In England and Wales, plaintiffs must demonstrate that they would have opted for abortion had they been aware of their child's illness.[286] Failure to establishthe causal link can result in the dismissal of their case. [287] MASON criticizes this requirement, arguing that it *"turns judges into psychologists rather than impartial arbiters of fact."* However, according to MASON, the Chester case introduces a new tort which awards full compensation when a patient is denied the right to choose or reject treatment.[288] Conversely, Belgian courts have long recognized that in such cases, there isno need for judicial certainty regarding the plaintiff's decision to undergo abortion. What matters is solely that the plaintiff was deprived of the opportunity to make this choice, thereby constituting a lost opportunity.[289] The burden of proof concerning this matter is therefore comparatively lighter in Belgium than in England and Wales.

99. A consensus shared by both Belgian and English judges is that in cases of wrongful birth, the act of undergoing pregnancy is often not considered a compensable

---

[280] Hardman v Amin (2000) 59 BMLR 58; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[281] E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

[282] Khan v Meadows [2021] UKSC 21; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[283] *Infra* 19, nr. 43.

[284] J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[285] *Ibid.*

[286] J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[287] See Deriche v Ealing Hospital NHS Trust [2003] EWHC 3104 (QB).

[288] J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[289] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

loss.[290] MASON discusses this in his article, arguing that since pregnancy in wrongful birth claims is voluntary, no compensation should be awarded for the inconvenience of childbirth.[291] Comparatively, some Belgian courts are inclined to award compensation for this type of damage, but it is not a general rule.[292]

4.1.2 Wrongful life

100. One of the leading cases in England and Wales regarding wrongful life claims is the case of *McKay v Essex Area Health Authority*.[293] In this case, the child was born witha disability transmitted from the mother, who was unaware of her rubella infection. Her misconception stemmed from the assurance provided by her doctor, falsely indicating her the absence of the illness.[294] The plaintiff in this case was the mother representing the affected child. The court dismissed the appeal on the grounds that no legal duty was owed to prevent its birth.[295]

101. In an article discussing wrongful life, JACKSON argues against the refusal of these claims.[296] He presents compelling counterarguments to each argument raised against wrongful life claims. According to him, these claims stem from a negligent act where the doctor failed to fulfil their duty adequately. Specifically, doctors are obligated to inform the mother about *"any risks to the foetus,"* a duty the doctor in question failed to fulfil despite the mother's explicit request.[297] JACKSON explains that recognizing the doctor's duty to inform would eliminate the idea of doctors resorting to defensive medicine. Once doctors provide information to the mother regarding any risks to the foetus, theymitigate their liability, thus negating the need for defensive medical practices.[298] In the same article JACKSON addresses the paradoxical argument presented by the courts, wherein they claim that life is preferable to non-existence while simultaneously rejecting wrongful life claims because they *"cannot compare existence with non-existence."*[299] He observes that by assigning value to life, they are implicitly making such a comparison. JACKSON further asks the courts to assess the damage of the child by offsetting the benefits of life with the burdens of the child's disability.[300] He believes that *"this solution*

---

[290] Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198; E. DE KEZEL, "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[291] J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[292] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[293] McKay v Essex Area Health Authority [1982] 2 All ER 771; L. OPLINUS, "Te oud voor ouderschap? Analyse van de maximale leeftijd als toegangsbeperking in de context van medische hulp bij de voortplanting", *Rechtskundig Weekblad* 2022-23, nr. 32, 1243-1255.

[294] McKay v Essex Area Health Authority [1982] 2 All ER 771.

[295] McKay v Essex Area Health Authority [1982] 2 All ER 771; A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.; L. OPLINUS, "Te oud voor ouderschap? Analyse van de maximale leeftijd als toegangsbeperking in de context van medische hulp bij de voortplanting", *Rechtskundig Weekblad* 2022-23, nr. 32, 1243-1255.

[296] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

[297] *Ibid.*

[298] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

[299] *Ibid.*

[300] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

ensures that a child will be able to seek recovery only in cases of exceptionally severe disabilities."[301]

102. MASON also wrote on this topic, interestingly he observes the same thing I mention later in this thesis, namely that *"the child seeks compensation for being born with a disability, rather than solely for existing or for having a disability."*[302] He argues that the plaintiff's claim pertains to the prejudice of being alive and suffering because of another's negligence. He further states that *"it is a widespread failure to appreciate this unity that has led to much of the confusion."*[303]

103. Plaintiffs wanting to receive compensation for a wrongful life only have one option: they can base their claim on the Congenital (Civil Liability) Disabilities Act 1976 (hereafter: "Act"). This Act makes it possible for claimants with disabilities to recover damages, in their own right, if they fall under section 1(2)(a) or section 1(2)(b). [304] Wrongful life claims are therefore allowed, but under strict conditions.[305] Wrongful life claims that do not fall under this section, will not succeed in court.

104. A few years ago, a wrongful life case was successfully litigated under the Act. The plaintiff, Eevie Toombes, was born with spina bifida, a condition attributed to improper advice provided by her mother's general practitioner regarding the intake of folic acid.[306] As the mistake occurred prior to conception and resulted in the daughter's disability, section 1(2)(a) of the Act applied.[307] This case sparked controversy, with some voicing concerns that it might foster defensive medical practices. [308] I am sceptical about the anticipated impact of this case on medical liability, as it is highly specific in its circumstances, coincidentally falling within the scope of the Act. Other authors believe that the key takeaway for doctors from this case is the importance of maintaining detailed notes of each consultation. [309] This case is intriguing in that it has been characterized as a wrongful pregnancy scenario, as proper advice to the mother would have led to a delay in conception, resulting in the birth of another child.[310] However, in my view, it better fits the definition of a wrongful life case, given that the plaintiff's mother intended to conceive and have the child, but without the disability.[311] Wrongful pregnancy cases typically involve pregnancies or births that were not desired.[312] I would thus classify this as a pre-conception wrongful life case.

---

[301] *Ibid.*

[302] *Supra* 46, nr. 120.

[303] J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[304] Section 1(2)(a)-1(2)(b) Congenital Disabilities (Civil Liability) Act 1976.

[305] Congenital Disabilities (Civil Liability) Act 1976.

[306] Toombes v Mitchell [2020] EWHC 3506 (QB).

[307] Congenital Disabilities (Civil Liability) Act 1976.

[308] A. PAPANIKITAS, J. SPICER and B. HAYHOE, "'Wrongful conception' ruling against UK general practitioner.", *BMJ* 2022; 376o79; E. WELCH, J. VAUGHAN, K.R. CRANFIELD and R. MEHDIAN, "What implications does the Toombes vs Mitchell case have for other healthcare professionals?", *BMJ* 2022;376:o162.

[309] X, "Case of Note: Evie Toombes v. Dr. Mitchell (High Court 21 December 2020 – Lambert J. and 1 December 2021 – Judge Coe QC)", *NHS Resolution*, https://resolution.nhs.uk/2022/03/31/case-of-note-evie-toombes-v-dr-mitchell-high-court-21-december-2020-lambert-j-and-1-december-2021-judge-coe-qc/.

[310] A. PAPANIKITAS, J. SPICER and B. HAYHOE, "'Wrongful conception' ruling against UK general practitioner.", *BMJ* 2022; 376o79.

[311] *Infra* 8, nr. 12.

[312] *Infra* 9-10, nr. 16.

4.1.3 Wrongful pregnancy

105. A leading authority regarding this type of reproductive liability claim is the case of *McFarlane v. Tayside Health Board*.[313] Even though this case was qualified as a wrongful birth case, it better fits the criteria of a wrongful pregnancy case.[314] Before this case plaintiffs in wrongful pregnancy cases would see their expenses reimbursed.[315] The facts preceding this are explained here: The father of the child underwent a vasectomy to prevent the possibility of conceiving children. His doctor then assured him that his sperm count was negative. However, this turned out to be inaccurate, as his wife became pregnant.[316] Despite the failed vasectomy, a healthy child was born. In response, the parents initiated legal action against the doctor for their alleged negligence.[317] The House of Lords ultimately determined that the birth of a child, even following a failed vasectomy, does not constitute a compensable harm.[318] Lord Gill's rationale is based on the notion that *"the benefits of parenthood transcend any patrimonial loss."* [319] This decision demonstrates the recurring theme observed across different jurisdictions, where judges cite moral considerations to deny compensation. [320] It makes us reconsider whether it is appropriate to apply this rationale to all cases, overlooking the practical consequences for the parents involved.

106. Another significant wrongful pregnancy case is *Parkinson v St James and Seacroft NHS Trust*, which differentiated itself from *McFarlane* due to the health situation of the child.[321] While parents could not claim compensation for the costs associated with raising a healthy child, this restriction did not apply to children with disabilities.[322] In these cases, parents are entitled to compensation for the extra costs arising from the child's disability.[323]

107. In *Rees v Darlington*, the mother of a healthy baby born after a failed sterilization procedure, was denied compensation for the costs of upbringing.[324] Instead, she received a conventional sum. By granting this 'award', the judge acknowledged that *"she was owed a duty of care in the carrying out of the operation."*[325] This contrasts to the

---

[313] MacFarlane v Tayside Health Board [1999] UKHL 50.

[314] *Infra* 9-10, nr. 16.

[315] S. JHAVERI, "Judicial Strategies in Recognising New Areas for Recovery in Negligence – Lessons Learned from Wrongful Conception Cases", *Tort Law Review* 2013, vol. 21, no. 2, 63-86; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[316] MacFarlane v Tayside Health Board [1999] UKHL 50.

[317] *Ibid.*

[318] MacFarlane v Tayside Health Board [1999] UKHL 50.

[319] See Jupp J in *Udale v Bloomsbury Area Health Authority [1983] 3 All ER 522*; Lord Gill in McFarlane v Tayside Health Board (Outer House) [1997] SLT 211; MacFarlane v Tayside Health Board [1999] UKHL 50; McFarlane v Tayside Health Board [2000] 2 AC 59; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

[320] *Supra* 48-49, nr. 128.

[321] McFarlane v Tayside Health Board [2000] 2 AC 59; Parkinson v St James and Seacroft NHS Trust [2001] EWCA Civ 530.

[322] MacFarlane v Tayside Health Board [1999] UKHL 50; McFarlane v Tayside Health Board [2000] 2 AC 59; Parkinson v St James and Seacroft NHS Trust [2001] EWCA Civ 530.

[323] Parkinson v St James and Seacroft NHS Trust [2001] EWCA Civ 530.

[324] Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52.

[325] See Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52; Lord Millet in *Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52*.

compensation plaintiffs get in Belgium for similar cases. Belgian courts are inclined to compensate for the damage occurred due to the unwanted pregnancy.[326]

108. The position of English judges is thus clear: the birth of a healthy child is not a compensable harm. [327] Regrettably, this stance places the plaintiffs in the position of caring for a child they neither wanted to conceive nor wanted give birth to.

4.1.4 Findings

109. While the English courts have regulated reproductive liability claims, their Act limits this to wrongful life claims where the doctor's mistake occurred pre-conception.[328] Perhaps Belgian legislators could pass a similar law, limiting wrongful life claims to specific conditions, rather than banning them entirely. This approach seems like a suitable compromise, however, controversy continues to arise even when claims are made in accordance with the law. This is exemplified by the case of *Toombes v Mitchell* where some perceived this case as a potential threat.[329] Consequently, if Belgium intendsto follow a similar path to the United Kingdom, it should ensure that any regulation clarifies when doctors could be liable and clearly delineates the scope of their liability. An example of such a limitation on wrongful life claims could be what JACKSON proposed, namely that when offsetting the benefits of life with the burdens of a child's disability, only children with severe disabilities could claim compensation. [330] This might address concerns about initiating claims for individuals who merely 'deviate from the norm'.[331]

110. JACKSON's reasoning has convinced me that the argument suggesting that existence cannot be compared with non-existence should be abandoned, given that judges already make this comparison when stating that life is preferable to non- existence.[332] This argument should therefore not be used as a justification for denying compensation in cases of wrongful life.

111. Regarding wrongful pregnancy claims, I argue against Belgian courts adopting the approach taken by English courts. [333] It is crucial to continue awarding damages to parents whose personal autonomy has been compromised.

4.2 France

4.2.1 Wrongful birth

112. Wrongful birth claims are the only type of reproductive liability claim recognized under French law.[334] Similar to Belgian law, these claims rely on the doctrine of loss of

---

[326] See Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299.

[327] McFarlane v Tayside Health Board [2000] 2 AC 59.

[328] Section 1(2)(a)-1(2)(b) Congenital Disabilities (Civil Liability) Act 1976.

[329] See Toombes v Mitchell [2020] EWHC 3506 (QB); A. PAPANIKITAS, J. SPICER and B. HAYHOE, "'Wrongful conception' ruling against UK general practitioner.", *BMJ* 2022; 376o79; E. WELCH, J. VAUGHAN, K.R. CRANFIELD and R. MEHDIAN, "What implications does the Toombes vs Mitchell case have for other healthcare professionals?", *BMJ* 2022;376:o162.

[330] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

[331] *Supra* 54, nr. 144.

[332] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

[333] *Infra* 42, nr. 105.

[334] Cass. Civ. 1ère (FR) 26 mars 1996, n° 94-11.791, www.legifrance.gouv.fr; Cass. Civ. 1ère (FR) 26 mars 1996, n° 94-14.158, www.legifrance.gouv.fr.

opportunity.[335] French courts agree that because of the doctor's mistake, the parents were not able to make an informed choice.[336]

113. Before 2001, it was customary to award parents compensation for the additional costs associated with raising a child with disabilities. [337] However, in Belgium, compensation is often requested for the costs of upbringing until the child reaches eighteen. [338] Following the enactment of a law in 2001, which will be discussed insubsection 4.2.2, parental compensation has significantly decreased, with parents no longer receiving support for their child's upkeep.[339] Legislators justified this change by asserting that *"(...) the compensation of the latter is a matter of national solidarity."*[340] Incontrast, Belgian law lacks a similar provision, and courts are inclined to grant compensation for this aspect.[341]

114. In both Belgium and France, to establish liability, one must demonstrate that the doctor failed to act as a prudent and diligent doctor under similar circumstances.[342] A court-appointed expert assesses whether the doctor's actions were consistent with the state of medical knowledge at the time the incident occurred. If it is determined that the doctor acted in accordance with medical standards, they cannot be held liable for failingto detect the child's illness.[343]

4.2.2 Wrongful life

115. The most significant case concerning wrongful life in France is the infamous *Perruche* case.[344] This case lead to alterations in French law, garnering attention from the European Court of Human Rights.

To understand the controversy, it is essential to outline the factual background: Nicolas Perruche was born to a mother who had contracted rubella, which she subsequently transmitted to him. [345] Before the child was born, the mother consulted a doctor to determine whether she had contracted this illness. The doctor reassured her that she was immune to rubella. Relying on this information, she chose to proceed with the pregnancy.

---

[335] T. VANSWEEVELT, *Préface - La responsabilité contractuelle et extracontractuelle du médecin et de l'hôpital pour leur fait propre* in *La responsabilité des professionnels de la santé*, Waterloo, Wolters Kluwer Belgium 2015, 218 p.

[336] Cass. (FR) 5 avril 2012, n° 11-14.856, www.legifrance.gouv.fr; Bourges 29 novembre 2007, n° 07/00196, www.legifrance.gouv.fr; G. DEMME et R. LORENTZ, « Responsabilité civile et naissance d'un enfant. Aperçu comparatif », *Revue internationale de droit comparé* 2005, vol. 57, n° 1, 103-139.

[337] Conseil d'Etat (FR) 14 février 1997, n° 133238, www.legifrance.gouv.fr.

[338] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez*. 2012-13, afl. 1, 49-58.

[339] Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr.

[340] Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr.

[341] Gent (1e k.) 3 november 2011, *T.Gez*. 2011-12, afl. 3, 205-211; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez*. 2012-13, afl. 1, 49-58.

[342] Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; Lyon 7 décembre 2006, n° 05/01211, www.legifrance.gouv.fr.

[343] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380 ; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Luik (afd. Luik) (4e k.) 16 september 2019, *RGAR* 2019, afl. 9, 15616; Lyon 7 décembre 2006, n° 05/01211, www.legifrance.gouv.fr; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229; A. HUYGENS, "Wrongful-life-vordering overleeft cassatietoets niet", *T.Gez.* 2014-15, afl. 3, 195-201.

[344] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[345] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

However, upon the birth of the child, it was discovered that he carried the illness. The mother then initiated legal action against the doctor, arguing that the wrong diagnosis deprived her of the opportunity to terminate the pregnancy.[346]

The main issue lies in her dual claim for compensation; seeking compensation for both her own damages and those suffered by the child. Regarding the claim made on behalf ofher son, the first court found that there was no causal link between the child's illness andthe doctor's mistake since he had contracted this illness from his mother.[347] It was only when the French Court of Cassation met for a plenary session that her case succeeded, and that the child was awarded compensation for his suffering. The court decided that without the mistake committed by the doctor, the mother could have avoided to birth a child with a disability. The child could therefore be compensated for the damage resultingfrom his disability.[348] This ruling is commonly referred to as the *Perruche case*.[349]

116. What makes this case particularly intriguing is the contrast with a similar case in the United Kingdom, where the outcome differed.[350] While the French Court of Cassation implicitly acknowledged the existence of a duty of care towards the child, the judges in *McKay* disputed this notion.[351]

117. The *Perruche* case was followed by a series of accusations and statements made by legal scholars, doctors and organisations for people with disabilities.[352] Some argued that this case created a 'right to not be born'.[353] This scandal lead to the creation of an 'anti-*Perruche* law', also referred to as the *Kouchner* law.[354] The first article of this law states: *"No one can claim damage solely by reason of his birth."*[355]This has since been codified in the articles L114-5 of the Social Action and Family Code.[356] By adding this article, the legislators meant to prohibit wrongful life claims.

---

[346] *Ibid.*

[347] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[348] *Ibid.*

[349] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[350] See McKay v Essex Area Health Authority [1982] 2 All ER 771; L. OPLINUS, "Te oud voor ouderschap? Analyse van de maximale leeftijd als toegangsbeperking in de context van medische hulp bij de voortplanting", *Rechtskundig Weekblad* 2022-23, nr. 32, 1243-1255.

[351] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr; McKay v Essex Area Health Authority [1982] 2 All ER 771; A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613; J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.; L. OPLINUS, "Te oud voor ouderschap? Analyse van de maximale leeftijd als toegangsbeperking in de context van medische hulp bij de voortplanting", *Rechtskundig Weekblad* 2022-23, nr. 32, 1243-1255.

[352] See J.-P. AMANN, « L'arrêt Perruche et nos contradictions face à la situation des personnes handicapées », *Revue française des affaires sociale*s 2002, vol. 3, 125-138; S. BAUZON, « 7. Du droit et de la loi dans l'affaire Perruche » in S. BAUZON, *La personne biojuridique*, Presses Universitaires de France, 2006, 95-102; J.-C. DEVERRE, « Un an après l'arrêt Perruche. Laisser naître : un risque », *Laennec* 2002/2, t. 50, 4-5; D. MOYSE et N. DIEDERICH, « L'échographie prénatale après l'arrêt Perruche. Une modification des pratiques ? », *Études* 2005/4, t. 402, 483-493.

[353] Concl. J. SAINTE-ROSE in Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[354] Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr; Loi n° 2005-102 (Fr) 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées (1), *JO* 12 février 2005, www.legifrance.gouv.fr.

[355] Art. 1 Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr.

[356] Art. L114-5 Social Action and Family Code.

118. However, this law did not go as intended. The Court of Cassation reacted by, in three other decisions, confirming their ruling, even stating that the child had the right to full reparation of their prejudice.[357] The *Kouchner* law encountered another problem: the legislators had opted to give this law a retroactive character, meaning that it applied to both ongoing cases and events preceding its enactment.[358] This was sanctioned by the European Court of Human Rights in two separate cases. [359] In a 2011 case, it was determined that the *Kouchner* Law does not extend to births that occurred prior to March 7th, 2002, even if the legal action was initiated afterwards.[360] Wrongful life claims thus remain admissible if the child's birth occurred before the implementation of the law. The ECHR reaffirmed this position once more in 2022.[361]

119. The law was innovative since it created the right to compensation for medical accidents without the caregiver's fault. [362] Comparatively, Belgian law also introduced faultless liability in the Medical Accidents Act.[363] However, unlike French legislation, there is no provision specifically addressing wrongful life within Belgian legislation.[364] Although Belgium attempted to incorporate a similar article in its legal framework, it never came into effect.[365]

120. One aspect that is problematic is the judicial approach in these cases, wherein judges seem to differentiate between awarding compensation for the fact of being born versus compensation for the presence of a disability.[366] If the prejudice is being born, some would argue that *"there is no prejudice simply for the fact of being born."*[367] If the prejudice is the presence of a disability, the argument would be that since the doctor did not cause the child's disability, the causal link has been broken. [368] However, the consideration should be that the child seeks compensation for being born with a disability, rather than solely for existing or for having a disability.[369] In this manner it becomes clear who is responsible for this outcome, namely the doctor who, due to their mistake, failed to prevent the birth of the child with a disability.

---

[357] Cass. (FR) 13 juillet 2001, n° 97-17.359, www.legifrance.gouv.fr; Cass. (FR) 28 novembre 2001, n° 00-14.248, www.legifrance.gouv.fr.

[358] Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr.

[359] ECHR 6 October 2005, no. 11810/03, Maurice/France; ECHR 21 June 2006, no. 1513/03, Draon/France.

[360] Cass. (FR) 15 décembre 2011, n° 10-27.473, www.legifrance.gouv.fr; See Cass. (FR) 14 novembre 2013, n° 12-21.576, www.legifrance.gouv.fr.

[361] See ECHR 3 February 2022, no. 66328/14, N.M. et al./France.

[362] H. CARDIN, « La loi du 4 mars 2002 dite "loi Kouchner" », *Les Tribunes de la santé* 2014, vol. 1, n° 42, 27-33.

[363] Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913.

[364] See *Hand.* Senaat comm. voor de Sociale Aangelegenheden 2010-11, 8 februari 2011, nr. 5-31COM, 24; *Vr. en Antw.* Senaat comm. voor de Sociale Aangelegenheden, Vr. nr. 5-319, 8 februari 2011 (E. SLEURS).

[365] Wet 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorg, *BS* 6 juli 2007 (ed. 1), 37.151.

[366] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr; Concl. J. SAINTE-ROSE in Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[367] Concl. J. SAINTE-ROSE in Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[368] See Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[369] See J.K. MASON, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

121. In an article discussing the *Perruche* case, LE GOFF interprets the recognition of wrongful life claims by the French Court of Cassation as a recognition of the child's victimization as a 'victim by ricochet'. [370] This recalls the argument presented by DUBUISSON advocating for the acceptance of wrongful life claims in Belgium.[371]

4.2.3 Wrongful pregnancy

122. Interestingly, this type of reproductive liability claim has been unsuccessful in France.[372] It is worth revisiting the circumstances leading to these claims in practice. They typically arise following unsuccessful procedures of sterilization, vasectomy, or abortion, wherein the individual has explicitly expressed their intention not to conceive children.[373] Upon discovering that the procedure failed and that they were not adequately informed by their doctor, a claim is initiated.[374]

123. In France, not only is the emotional damage of undergoing an unintended pregnancy not recoverable, but also the financial burden of raising a child, which the plaintiffs had taken active steps to prevent. [375] This stands in contrast to Belgian jurisprudence, where such claims are recognized but compensation is limited to the emotional distress associated with pregnancy and eventual complications.[376]

The argument used by French courts to deny compensation for a wrongful pregnancy is that *"the existence of the child (…) cannot, on its own, constitute a legally reparable*

---

[370] Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr; R.-M. LE GOFF, *« Responsabilité médicale, pathologie et handicap. « De l'affaire Perruche » ou « Quand le diagnostic prénatal rend urgente et nécessaire la réflexion épistémologique » »*, *Cités* 2001, vol. 3, n° 7, 139-143.

[371] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[372] See Nancy (3ème chambre) 30 avril 1997, n° 94NC00922, www.legifrance.gouv.fr; Bordeaux (2ème chambre) 06 octobre 2015, n° 13BX03265, www.legifrance.gouv.fr.

[373] Luik (20e k.) 22 januari 2009, *T.Gez.* 2009-10, afl. 4, 215-216; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; G. GENICOT, « Dommage moral en cas de naissance d'un enfant non désiré après l'échec d'une vasectomie », *JLMB* 2012, afl. 23, 1097-1100; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229; S. PANIS, "L'action en grossesse préjudiciable (wrongful pregnancy)", *T.Gez.* 2009-10, n° 4, 217-226; N. VAN DE SYPE, "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622; T. VANSWEEVELT, "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegensde geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240.

[374] Luik (20e k.) 22 januari 2009, *T.Gez.* 2009-10, afl. 4, 215-216; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389; G. GENICOT, « Dommage moral en cas de naissance d'un enfant non désiré après l'échec d'une vasectomie », *JLMB* 2012, afl. 23, 1097-1100; A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229; S. PANIS, "L'action en grossesse préjudiciable (wrongful pregnancy)", *T.Gez.* 2009-10, n° 4, 217-226; N. VAN DE SYPE, "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622; T. VANSWEEVELT, "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegensde geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240.

[375] See Nancy (3ème chambre) 30 avril 1997, n° 94NC00922, www.legifrance.gouv.fr; Bordeaux (2ème chambre) 06 octobre 2015, n° 13BX03265, www.legifrance.gouv.fr; G. DEMME et R. LORENTZ, « Responsabilitécivile et naissance d'un enfant. Aperçu comparatif », *Revue internationale de droit comparé* 2005, vol. 57, n° 1,103-139.

[376] Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229.

prejudice to the mother (…).” This same statement is made in Belgium to deny compensation for other types of damages following the birth of a child.[377]

124. DEMME and LORENTZ offer insights into the denial of wrongful pregnancy claims by explaining that French courts neglected to assess the doctor's liability, which could have been established by examining other conditions for liability.[378] They suggest that judges avoided the legal dimension, basing their stance on ethical considerations.[379] I agree with this perspective, as a similar argument is employed in Belgium to withhold compensation from individuals who never desired children but are now obligated to care for them.[380]

4.2.4 Findings

125. While Belgian law is often analogous to French law, some distinctions existbetween the two legal systems. Three such differences have been discussed above: the duration for which compensation is awarded, the legislation regarding wrongful life, and the rejection of wrongful pregnancy claims.

126. The first difference stems from the belief of French legislators that their national solidarity will mitigate the financial burdens associated with a child's disability. [381] Although the accuracy of this assertion requires further examination, it is important to recall a point brought forward by DUBUISSON. He argues that it is unjustifiable to burdenthe population with the costs associated with repairing damage when the conditions for liability are fulfilled and another party is responsible.[382] I agree with the notion that in such cases, it is important for the courts to ensure that the doctor is held accountable fortheir actions.

127. Regarding the *Kouchner* law, it is my belief that comparable legislation is unlikely to be enacted in Belgium. As previously mentioned, Belgian legislators tried to introduce an article pertaining to wrongful life, mirroring the provision in French law.[383] However, this proposal failed to progress beyond the legislative stage.[384] I argue that adopting legislation mirroring the *Kouchner* law would be undesirable, as it could lead to inequitable results. If legislators are determined to prohibit these claims, they should at the very least, offer some form of compensation to acknowledge the harm done to the child.

128. Regarding the refusal of wrongful pregnancy claims, while this is not exclusive to France, as the United Kingdom also rejects such claims, I advocate for Belgian law to

---

[377] Antwerpen 8 september 2003, *NJW* 2004, afl. 70, 558-560; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551; E. DE KEZEL, “Wrongful birth en wrongful life. Een stand van zaken”, *NJW* 2004, afl. 70, 546-551.

[378] G. DEMME et R. LORENTZ, « Responsabilité civile et naissance d’un enfant. Aperçu comparatif », *Revue internationale de droit comparé* 2005, vol. 57, n° 1, 103-139.

[379] *Ibid.*

[380] G. GENICOT, « Naissance et (absence de) préjudice », *Rev. dr. santé* 2016-17, liv. 5, 305-310.

[381] Art. L114-5 Social Action and Family Code; Art. 1 Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), JO 5 mars 2002, www.legifrance.gouv.fr.

[382] B. DUBUISSON, « L’arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L’être ou le néant: l’alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[383] Wet 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorg, *BS* 6 juli 2007 (ed. 1), 37.151.

[384] *Ibid.*

continue accepting them.[385] Beyond moral considerations, there exists no legal reason to reject these claims once liability has been established.[386]

129. Lastly, it is important for Belgian legislators to recognize that in legislating on these matters, they must refrain from applying retroactive measures, as doing so may expose them to judgments from the European Court of Human Rights.[387]

[385] See Nancy (3ème chambre) 30 avril 1997, n° 94NC00922, www.legifrance.gouv.fr; Bordeaux (2ème chambre) 06 octobre 2015, n° 13BX03265, www.legifrance.gouv.fr; MacFarlane v Tayside Health Board [1999] UKHL 50; McFarlane v Tayside Health Board [2000] 2 AC 59.

[386] See G. GENICOT, *Droit médical et biomédical*, III/1, *La naissance contrôlée*, 2e édition, Bruxelles, Larcier, 2016, 655-694.

[387] ECHR 6 October 2005, no. 11810/03, Maurice/France; ECHR 21 June 2006, no. 1513/03, Draon/France.

5. Evaluation of past legislative proposals

5.1 Legislative proposal supplementing article 350, paragraph 2, 6°, of the Criminal Code

130. This legislative proposal was presented twice before the Belgian Senate, first in 1996 by Johan Weyts and again in 1999 by Alexandra Colen.[388] The proposed article stated the following: *"(...) a birth resulting from a failed procedure to terminate the pregnancy can never give rise to any compensation."*[389] Here, the senators articulated their concerns regarding the potential psychological impact of wrongful life claims on the affected child. They argued that such claims could undermine the trust within the familial structure. [390] In my view, this concern could be settled through open communication between the parents and the child. It is crucial to clarify that seeking compensation for additional costs does not reflect a lack of love for the child. It is a means of addressing financial burdens that could have been avoided had the responsible party fulfilled their duties correctly.[391] The parents' love for their child remains unaffected by their pursuit of compensation. However, it is essential to acknowledge that love alone cannot alleviate financial responsibilities. Therefore, it is only fair that those responsible for the negligence cover the resulting expenses.

131. Interpreted literally, this article appears to relate only to failed abortion procedures, thereby excluding wrongful life, wrongful birth, and wrongful pregnancy claims following failed sterilization or vasectomy procedures.[392] In cases of wrongful life or birth, where the mother did not have the opportunity to choose abortion due to a negligent act, the article is not applicable. [393] Similarly, in wrongful pregnancy cases resulting from failed sterilization or vasectomy procedures, the child's birth stems from the failure of these procedures rather than from a failed abortion attempt.[394] It appears that this article would not have addressed the majority of reproductive liability claims, thus contributing little to resolving the legal uncertainty.

132. This legislative proposal did not progress beyond discussions, as deliberations were stopped following the dissolution of the Chamber of Representatives.[395]

---

[388] Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1; Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1999, nr. 50-0225/001.

[389] Art. 1 Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1; Art. 1 Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1999, nr. 50-0225/001.

[390] Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1; Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1999, nr. 50-0225/001.

[391] See also B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[392] Art. 1 Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1; Art. 1 Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1999, nr. 50-0225/001.

[393] *Ibid.*

[394] Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1; Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1999, nr. 50-0225/001.

[395] X, *Dossierfiche. Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek*, https://senaat.be/www/?MIval=dossier&LEG=1&NR=299&LANG=nl.

5.2 Legislative proposal for the regulation of compensation awarded in the event of liability for the existence and survival of human life

133. The Senate and the Chamber discussed this proposal on multiple occasions throughout the years. This proposal was quite ambitious as it tried to implement five articles on reproductive liability claims, which unlike the previous proposal, were not limited to a specific type of reproductive liability.[396] The second article begins by stating that *"(…) the mere existence or survival of human life does not count as damage and therefore cannot be the subject of compensation."*[397]

134. Thus, the starting point of the proposal is that life should be seen as something that is always positive.[398] While this notion has been extensively addressed in this thesis, I will briefly outline the counterargument raised by certain Belgian courts: They argue that legislators allowing termination of a pregnancy after twelve weeks in cases of severeillness suggests a preference for non-existence over a life with disabilities. [399] This rationale finds even stronger acceptance from legislators in light of the enactment of euthanasia laws.[400] Since the legislators accept a legitimate interest not to live with a severe and incurable disability, the court saw no reason to declare that interest unlawful. [401] By affording individuals the agency to determine whether they wish to continue living when faced with a severe disability or illness, we acknowledge their abilityto weigh the value of life against its adversities.[402] In this regard, we implicitly recognize that life may not always be regarded as something positive.

135. The proposal also highlights the potential risk of doctors recommending abortion excessively to mitigate their liability.[403] That is precisely why the obligation of doctors to provide accurate information is crucial in this regard. Once they have adequately informed their patients of all risks, they are no longer liable for the patient's decision based on that information.[404] Doctors are only held accountable for negligent acts, and

---

[396] Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1-95/96; Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1999, nr. 50-0220/001.

[397] Art. 2 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1-95/96;

[398] *Ibid.*

[399] See Old art. 350, 4° Sw.; art. 2, 5° wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; T. BALTHAZAR, "Wrongful birth, wrongful life", *Juristenkrant* 2010, afl. 220, 7.

[400] Wet van 28 mei 2002 betreffende de euthanasie, *BS* 22 juni 2002, 28.515; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[401] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[402] Wet van 28 mei 2002 betreffende de euthanasie, *BS* 22 juni 2002, 28.515; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

[403] Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1-95/96; Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1999, nr. 50-0220/001.

[404] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

liability arises only when it is established that they did not act as prudent and diligent doctors in a similar situation.[405]

136. Article three of the proposal allows wrongful birth claims, wherein the wrongful act occurred during conception.[406] This provision would apply in cases where a woman is impregnated because of rape. However, such claims are restricted to instances where the child is born out of wedlock.[407] The rationale behind this limitation is unclear to me. What perplexes me is the fact that this article appears to contradict the principle of non-discrimination based on birth status, as set out in the European Convention on Human Rights.[408] The distinction between children being born out of wedlock is unjustified, as in both cases they are the result of rape. This article seems to perpetuate the notion that marital rape is less severe than rape committed by another.

137. The fourth article of the proposal excludes wrongful birth plaintiffs from seeking compensation. According to this provision, liability is only attributed to the doctor if their mistake directly caused the child's disability.[409] This exclusion is perplexing, considering that courts have consistently accepted wrongful birth claims. [410] The rationale behind legislators' decision to exclude these claims, especially considering their relatively lower controversy and clearer delineation of damages, is therefore unconvincing.[411]

138. Only wrongful pregnancy claims are allowed under this proposal, but compensation is limited to additional costs resulting from the sterilization or abortion procedure.[412] The damage caused because of the birth of the child are not a recoverable loss.[413]

139. The revised proposal put forth by the Chamber in 2011 introduced an additional article.[414] Article 6 of the proposal sought to exclude wrongful life and wrongful birth claims from the Medical Accidents Fund.[415] Interestingly, a similar provision seeking to exclude reproductive liability claims from the Fund had been previously attempted in the

---

[405] *Infra* 44, nr. 114.

[406] Art. 3 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1-95/96; Art. 3 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1999, nr. 50-0220/001.

[407] *Ibid.*

[408] Art. 8 and 14 ECHR.

[409] Art. 4 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1-95/96; Art. 4 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1999, nr. 50-0220/001.

[410] *Infra* 23-25, nr. 57.

[411] *Ibid.*

[412]Art. 5 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1-95/96; Art. 5 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1999, nr. 50-0220/001.

[413] *Ibid.*

[414] Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 2011, nr. 53-1117/001; Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Senaat 2010-11, nr. 5-845/1.

[415] Art. 6 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 2011, nr. 53-1117/001; Art. 6 Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven,

Medical Accidents Act of 2007.[416] However, this provision was ultimately omitted from the subsequent legislation due to concerns regarding its substantial impact on medical liability.[417]

140. Once again, the dissolution of the Chamber halted the discussions on this proposal.[418]

5.3 Legislative proposal to amend article 1382 of the Civil Code in order to include the inadmissibility of the claim for compensation for the fact of being born

141. Wrongful life claims were the main topic of this proposal. The senators wanted to add a paragraph to article 1382 of the Old Civil Code stating that: *"No one can claim compensation for the fact of being born. When a disability is the direct result of a mistake, he is entitled to compensation in accordance with the first paragraph."*[419]

142. The terminology employed in discussions surrounding these claims carries significant weight. The drafters of this legislative proposal portray the *Perruche* case in a manner that, in my opinion, misrepresents its essence. They state that French judges acknowledged a *"right to compensation solely for being born with a disability."* [420] Characterizing these claims like that implies an obligation to prevent the child's birth. In reality, the accusation against the doctor relates to their failure to fulfil their professional duties, thereby depriving the mother of the opportunity to make an informed decision regarding her pregnancy.[421] The doctor's duty is not to actively prevent the child's birth, as such decisions rightfully belong to the mother. Instead, the focus is on the doctor's obligation to provide accurate information about the risks associated with the pregnancy.[422]

143. For those expressing concerns about imposing too much pressure on doctors and medical practitioners, it is also important to consider the potential ramifications on patient trust in the medical profession. If patients perceive that they will not receive justice in cases of medical negligence, it could undermine the doctor-patient relationship. It is also important to emphasize that doctors are not held accountable in cases where they have diligently performed their duties, yet the child is born with a disability. Claims are only successful when there is evidence of negligence on the part of the doctor, and

---

Parl.St. Senaat 2010-11, nr. 5-845/1.

[416] Art. 5, § 2 Wet 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorg, *BS* 6 juli 2007 (ed. 1), 37.151.

[417] Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913; *Hand.* Senaat comm. voor de Sociale Aangelegenheden 2010-11, 8 februari 2011, nr. 5-31COM, 24; *Vr. en Antw.* Senaat comm. voor de Sociale Aangelegenheden, Vr. nr. 5-319, 8 februari 2011 (E. SLEURS).

[418] X, *Dossierfiche. Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven*, https://senaat.be/www/?MIval=dossier&LEG=5&NR=845&LANG=nl.

[419] Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet -ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2001-02, nr. 2-1013-1; Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2003-04, nr. 3-839/1.

[420] *Ibid.*

[421] *Infra* 19, nr. 43.

[422] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

the resulting disability is severe.[423] In conclusion, doctors should not be concerned with this as they are simply expected to fulfil their professional obligations correctly.

144. Another concern raised by the senators is the potential emergence of discussions regarding individuals who 'deviate from the norm'.[424] I find this concern to be somewhat exaggerated. Individuals are not advocating for the birth of 'perfect' children. Parents simply desire to spare their child from unnecessary suffering in life. The risk of these claims expanding to claims against the parents/mother for negligence is also unfounded as one can argue that parents are free to choose whether they want to keep the child. When parents choose to keep the child, they are simply exercising a freedom given tothe mother by law.[425]

145. In contrast to the previous proposal, the senators have opted to allow wrongful birth claims in cases where a child is born with a disability as a result of a misdiagnosis or incorrect information provided by a doctor. [426] This indicates a lack of clarity among legislators regarding which claims should be permissible.

5.4 Legislative proposal to insert an article 1383bis into the Civil Code, which states that a person's birth cannot in itself be regarded as damage

146. After several unsuccessful attempts by others, Daniel Bacquelaine and his colleagues presented this proposal to the Chamber on five occasions, spanning from 2002 to 2019.[427] Their article regarding wrongful life is shorter compared to previous proposals, stating simply: "*A person's birth cannot in itself be regarded as damage.*"[428]

---

[423] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.; Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380; G.G noot onder Gent (1e k.) 27 september 2007, *T.Gez.* 2012-13, afl. 1, 45-48; A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613; J. MATTHYS, "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244; S. PANIS, "De resultaatsverbintenis van de arts bij sterilisatie: de impliciete wil van de partijen", *T.Gez.* 2011-12, afl. 3, 232-237.

[424] Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2001-02, nr. 2-1013-1; Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2003-04, nr. 3-839/1.

[425] *Infra* 27-28, nr. 62.

[426] Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2001-02, nr. 2-1013-1; Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2003-04, nr. 3-839/1.

[427] Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2002, nr. 50-1596/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2003, nr. 51-0090/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2012, nr. 53-2032/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2014, nr. 54-0398/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55-0531/001.

[428] Art. 2 Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55-0531/001.

147. The legislators explain that the objective of reparation of damage is to place the victim in the situation they would have been in, had the mistake not happened. [429] Curious enough, they overlook this principle when addressing compensation in wrongful pregnancy claims. In such instances, if the doctor had not made a mistake, the mother would not have birthed a child. Thus, to truly restore her to her prior state, one would need to address the full extent of the damage suffered. Courts often decline to do so, refraining from awarding compensation for the costs associated with raising the child andeven for moral damages, on the premise that the birth of a child is always a happy occurrence.[430] While legislators apply the rule of negative outcome to dismiss claims of wrongful life, they seem to neglect that, by the same principle, the plaintiff in a wrongful pregnancy case is in an objectively worse situation than they were before and therefore owed restitution.[431]

148. According to the legislators, Belgian jurisprudence's acceptance of wrongful life claims contradicts the principle of equality, suggesting that the life of a person with a disability holds less value than that of others. They further assert that life is a fundamental good for all. [432] In response, it must be clarified that advocating for compensation in wrongful life claims does not imply that a life with disabilities lacks value. Individuals have the autonomy to determine the worth of their own lives, particularly when they endure significant suffering due to a disability. This autonomy is highlighted by Belgium's authorization of late-term abortions and euthanasia for individuals who no longer want to live under their current circumstances.[433] Just as the euthanasia law does not imply an insult to individuals with a disability or dictate that theyshould pursue euthanasia, the pursuit of compensation in wrongful life claims does not establish a universal rule. Each individual's perception of their life's value is subjective

---

[429] See Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2002, nr. 50-1596/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55-0531/001; G. GENICOT, *Droit médical et biomédical*, II/4, *La consistance du dommage et la certitude du lien causal*, 2e édition, Bruxelles, Larcier, 2016, 551-587.

[430] *Infra* 30-31, nr. 70.

[431]See J.S. BARBER, W.G. AXINN and A. THORNTON, "Unwanted Childbearing, Health, and Mother-Child Relationships.", *Journal of Health and Social Behavior* 1999, vol. 40, no. 3, pp. 231–57; N. BAYDAR, "Consequences for Children of Their Birth Planning Status.", *Family Planning Perspectives* 1995, vol. 27, no. 6, pp. 228–45; A. BIČÁKOVÁ and K. KALÍŠKOVÁ, "Career-Breaks and Maternal Employment in CEE Countries" in J.A. MOLINA, (ed.), *Mothers in the Labor Market*, Springer Cham 2022, 269p; L.M. BROWN, "The relationship between motherhood and professional advancement: Perceptions versus reality", *Employee Relations* 2010, vol. 32, no. 5, 470-494; T. CARNEY, "The Employment Disadvantage of Mothers: Evidence for Systemic Discrimination", *Journal of Industrial Relations* 2009, vol. 51, no. 1, 113-130; P. RANTAKALLIO and A. MYHRMAN, "The Child and Family Eight Years after Undesired Conception: The Child and Family after Undesired Conception.", *Scandinavian Journal of Social Medicine* 1980, vol. 8, no. 3, 81-87.

[432] Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2002, nr. 50-1596/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2003, nr. 51-0090/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2012, nr. 53-2032/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2014, nr. 54-0398/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55-0531/001; G. GENICOT, *Droit médical et biomédical*, II/4, *La consistance du dommage et la certitude du lien causal*, 2e édition, Bruxelles, Larcier, 2016, 551-587.

[433] Wet van 28 mei 2002 betreffende de euthanasie, *BS* 22 juni 2002, 28.515; Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

and personal. Therefore, attributing a broader implication to an individual's claim is an exaggeration and distortion of the issue.

149. The proposal also specifies that while a disability may constitute a form ofdamage, life itself cannot be considered as such.[434] Despite this, the financial burden of medical expenses related to childbirth can be regarded as a form of damage. [435] The acceptance of damages for wrongful pregnancy thus implicitly acknowledges that the child's birth, or more broadly, their life, has resulted in harm.

150. The latest update dates back to 2020, when another member of the Chamber was included in the proposal.[436] Since then, no further developments have been reported. I am uncertain whether they are awaiting the dissolution of the Chamber, or the factors hindering progress on this matter.

5.5 Findings

5.5.1 Outcome of proposals

151. The majority of proposals concerning reproductive liability claims have failed to progress beyond initial discussions. Four of these proposals were abandoned following the dissolution of the Chamber, while the one remaining has shown no progress in the past four years. Even in instances where articles addressing wrongful life have successfully passed parliamentary discussions, they have ultimately been omitted from the final enacted laws.[437] This recurring trend may stem from the challenge legislators face in crafting regulations that align with principles of responsibility and full compensation for damages, without generating further controversy.[438] Additionally, there has been a lack of consensus on how to regulate these claims, with some proposals excluding wrongful birth claims while others do not. The only consensus among legislators appears to be the exclusion of wrongful life claims from compensation.

152. The lack of progress may be attributed to the full schedules of the Chamber and Senate. This is evidenced by the way almost all of these proposals have ended, namely years later, due to the dissolution of the Chamber. Additionally, a lack of prioritization in regulating these claims might be a factor, although this remains speculative. This speculation is based on the fact that during the reform of the New Civil Code, legislators opted not to regulate certain matters, such as compensation for ecological damage, due to its complexity. It is therefore unsurprising that they also chose not to regulate reproductive liability claims.

---

[434] Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2012, nr. 53-2032/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2014, nr. 54-0398/001; Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55-0531/001.

[435] Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

[436] Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2020, nr. 55-0531/002.

[437] *Infra* 24-25, nr. 53-55.

[438] See also *Hand.* Senaat comm. voor de Sociale Aangelegenheden 2010-11, 8 februari 2011, nr. 5-31COM, 24; *Vr. en Antw.* Senaat comm. voor de Sociale Aangelegenheden, Vr. nr. 5-319, 8 februari 2011 (E. SLEURS).

5.5.2 Points of criticism

5.5.2.1 Distortion of the issue

153. A common misconception surrounding wrongful life claims is the notion that parents who pursue such claims are seeking a 'perfect' child rather than a 'defective' one.[439] This belief is flawed because it stems from unfounded assumptions rather than something the parents have said. Parents do not file these claims because they do not want their child. They file a claim because their child endures unnecessary suffering and to cover additional medical expenses, which could have been avoided had the doctor fulfilled his duty.[440] There is nothing inherently wrong with wanting their child to be healthy, portraying this as a desire for a 'perfect child' is both misleading and unjust. Correcting this misconception ensures that the focus remains at the real issue at hand, namely medical negligence and its consequences on individuals. This is important as the foundation of liability law is the right of an individual to seek compensation when they have suffered harm due to another individual's actions. Article 1382 of the Old Civil Code, which serves as the basis for responsibility, states: *"Every act of man, causing damage toanother, obliges the person whose fault caused the damage to make good".* [441] Furthermore, its revised gender-neutral iteration within the New Civil Code bases liability on the same principle.[442]

5.5.2.2 Contradictions

154. Legislators present various arguments to deny compensation for wrongful life claims. One such arguments is that since they cannot compare existence with non-existence, they cannot compensate the child. Concurrently, they argue that life should be regarded as inherently positive. This paradox has also been observed in English judges by JACKSON. He stated that by declaring life as something positive, judges are implicitly making the comparison between existence and non-existence. It appears that legislators and judges use this argument selectively to support their position. If the decision to undergo an abortion or to be euthanized, thereby determining the value of life, is left to the individual, it should similarly be left to the plaintiff to decide whether life has caused them harm.

155. I consider myself to be pro-reproductive liability claims. In my view, these claims do not concern the sanctity of life but rather revolve around the personal decisions of individuals regarding their own lives.

156. Let us discuss the case of *Stanev v Bulgaria* before the European Court of Human Rights. In this case, an individual who was diagnosed with schizophrenia was involved in an incident in his village. Subsequently, he came under the supervision of a Bulgarian social service agency which decided to place him in a facility for people with disabilities.[443] This decision was made in his best interests, which means that at least

[439] See Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet - ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2001-02, nr. 2-1013-1; Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2003-04, nr. 3-839/1.

[440] See McLelland v Greater Glasgow Health Board [1999] SC 305; Parkinson v St James and Seacroft NHS Trust [2001] EWCA Civ 530; *Infra* 52, nr. 130.

[441] See art. 1382-1384 Oud BW; B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[442] Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

[443] ECHR 17 January 2012, no. 36760/06, Stanev/Bulgaria.

objectively, he may not have been in a bad situation. Stanev however, consistently resisted this arrangement, implicitly indicating his dissatisfaction. His persistent resistance was taken into consideration by the Court when determining whether therehad been a deprivation of liberty.[444] In such instances, the individual's will is essential.His implicit will might be executed, irrespective of his current inability to consent or his objective well-being within the institution.

157. The importance of personal autonomy is widely acknowledged; therefore, why should it be disregarded in cases of reproductive liability claims? Why is the explicit desire of the woman to abstain from childbirth overlooked, under the assumption thatshe should derive happiness from a child she never wished to conceive? Judges assert that under no circumstance can the birth of a child constitute harm, neglecting the unequivocal will of the woman involved. She did not consent to undergo such anexperience. Why then is her consent and freedom of choice disregarded in these instances? This applies to wrongful life claims too, where the plaintiff has chosen to declare that they are dissatisfied with their life as it is now.

158. Consider another example: certain religious beliefs prohibit blood transfusions. When treating a patient adhering to such beliefs, medical practitioners seek alternative treatments, such as cell salvage.[445] In most cases, efforts are made to accommodate the patient's wishes, emphasizing the importance of their autonomy and freedom of choice.[446] Despite the potential benefits of a blood transfusion, the patient's preference renders it an unsuitable option for them. In both scenarios, the objective circumstances may appear favourable; however, it is acknowledged that, in specific contexts, these situations may cause the individual damage, whether material or moral. Thus, seemingly beneficial circumstances may, in certain contexts, result in damage for the individual involved.

159. In instances where one desires to have a child, the birth is regarded as a happy occurrence, whereas if one does not desire it, it does not bring happiness. Understanding the concept of personal autonomy is not overly complex. What is important is that the individual did not desire the child; therefore, it constitutes an infringement upon their autonomy as a human being to not only compel them to have a child but also to deny them compensation and suggest that they should find happiness in this situation. It is unreasonable to expect someone to find contentment in a circumstance they were forced into. It is easy for external observers to suggest alternatives such as abortion or adoption without considering the profound impact and repercussions, not only on the child but also on the mother. [447] Undergoing an abortion or giving a child up for abortion is an immensely distressing experience, one that some women oppose.[448] For some women,

---

[444] ECHR 17 January 2012, no. 36760/06, Stanev/Bulgaria.

[445] G. EFFA-HEAP, "Blood transfusion: implications of treating a Jehovah's Witness patient", *British Journal of Nursing* 2009, vol. 18, no. 3, 174-177.

[446] *Ibid.*

[447] See E.M. ASTBURY-WARD, "Emotional and psychological impact of abortion: a critique", *J Fam Plann Reprod Health Care* 2008, vol. 34, no. 3, 181-184; P.K. COLEMAN and D. GARRATT, "From birth mothers to first mothers: toward a compassionate understanding of the life-long act of adoption placement", *Issues Law Med* 2016, vol. 31, no. 2, 139-163; K. KIMPORT, K. FOSTER and T.A. WEITZ, "Social sources of women's emotional difficulty after abortion: lessons from women's abortion narratives", *Perspect Sex Reprod Health* 2011, vol. 43, no. 2, 103-109.

[448] See E.M. ASTBURY-WARD, "Emotional and psychological impact of abortion: a critique", *J Fam Plann Reprod Health Care* 2008, vol. 34, no. 3, 181-184; P.K. COLEMAN and D. GARRATT, "From birth mothers to first mothers: toward a compassionate understanding of the life-long act of adoption placement", *Issues Law Med* 2016, vol. 31, no. 2, 139-163; K. KIMPORT, K. FOSTER and T.A. WEITZ, "Social sources of women's emotional

abortion may not even be an option, leaving them with no choice but to carry the child to term.[449]

160. Hale LJ argued something similar in her article on wrongful birth. She argues that *"the invasion of the mother's personal autonomy does not stop once her body and mind have returned to their pre-pregnancy state."* This is so since the responsibilities put on her by law cannot be simply rid of.[450] She further argues that the costs of upbringing are a result of the invasion of personal autonomy involved in pregnancy. [451] Therefore, I contend that these costs should not be left aside when evaluating the scope of compensation in wrongful pregnancy claims. SCOTT agrees that having to endure pregnancy constitutes a breach of one's personal autonomy.[452]

161. In reproductive liability cases, merely removing the individual from the situation, as in the first case where the patient was relocated from the institution[453], or finding an alternative, as in the second case[454], is not feasible. The proposed solutions of abortion or adoption may not be viable options for individuals morally opposed to them. There exists no genuine alternative; there is no 'restoration to the previous situation'. The child is present and will remain so. At the very least, provide compensation for the individuals in question.

difficulty after abortion: lessons from women's abortion narratives", *Perspect Sex Reprod Health* 2011, vol. 43, no. 2, 103-109.

[449] *Ibid.*

[450] HALE, "The Value of Life and the Cost of Living – Damages for Wrongful Birth (Staple Inn Reading 2001)", *British Actuarial Journal* 2001, vol. 7, no. 5, 747–763.

[451] *Ibid.*

[452] R. SCOTT, "Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth", *Medical Law Review* 2003, vol. 11, no. 3, 265–325.

[453] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Updated Action Plan*, 6 November 2014, nr. DH-DD(2014)1335, https://rm.coe.int/09000016804a7fec.

[454] G. EFFA-HEAP, "Blood transfusion: implications of treating a Jehovah's Witness patient", *British Journal of Nursing* 2009, vol. 18, no. 3, 174-177.

6. The way to an effective legislative framework

162. In the second to last section of the thesis, I reach the conclusion of my research into the necessity and potential framework for regulating reproductive liability claims. The aim has been to determine whether these claims require regulation and, if so, to propose an effective approach. To do this, I explored the different types of reproductive liability claims, the legal outcomes that resulted from them, and their real-world implications. I also compared how these claims are treated across three different jurisdictions, two of which have established laws in this area. Throughout this analysis, I have considered the arguments from both proponents and opponents of these claims andhave indicated my own position on the matter. My recommendation, therefore, reflects the stance I have taken. To be clear, I advocate for the acceptance of all reproductive liability claims, including wrongful life claims, with certain limitations. As mentioned earlier, legislators inevitably take a stance on contentious issues. Abortion laws have been successfully implemented despite strong opposition from part of the population. Theeffectiveness of these laws, in my view, lies in the distinction between public and private interests, allowing individuals the freedom to choose whether to have an abortion.[455] The right to abort exists, but it is not mandatory; individuals can decide whether their pregnancy is undesired. Similarly, individuals should have the freedom to determine whether the birth of a child, regardless of their health status, is desired. This choice should extend to a child born with a disability who claims that their birth has caused them harm, particularly if this harm could have been avoided through proper medical care. DUBUISSON also supports this argument, asserting that the child is a 'victim by ricochet'. In wrongful birth/wrongful life claims this would imply that the deprivation of a right belonging to the mother caused harm to the child. In other words, the mother's inability to exercise her right to an abortion directly caused harm to the child.[456]

6.1 Proposals

6.1.1 Legislative reform

163. Throughout the analysis of Belgian, English and French law a recurring theme has been observed: the denial of wrongful life claims.[457] The arguments raised against these claims pertain to concerns around the broadening of the scope of liability, the perception of individuals with disabilities and difficulties in assessing the associated damages.[458]

164. I see four potential paths to consider for regulating these claims:

1. Ban wrongful life claims, as seen in the *Kouchner* law.[459]
2. Allow wrongful life claims under certain conditions, as seen in the Congenital Disabilities (Civil Liability) Act 1976.[460]
3. Create a specific liability regime in the New Civil Code.[461]

---

[455] G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 153.

[456] B. DUBUISSON, « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

[457] See Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1; McKay v Essex Area Health Authority [1982] 2 All ER 771; Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

[458] *Infra* 13-17, nr. 20-32.

[459] Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr; Loi n° 2005-102 (Fr) 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées (1), *JO* 12 février 2005, www.legifrance.gouv.fr.

[460] Section 1(2)(a)-1(2)(b) Congenital Disabilities (Civil Liability) Act 1976.

4. Amend the Medical Accidents Act to include wrongful life claims under the scope of compensation.[462]

The first option has been attempted in Belgium, without success.[463] Banning these claims would leave people with disabilities with no recourse to address medical negligence. In my opinion, fostering a strong patient-doctor relation is important. This depends on the fulfilment of the doctor's information obligation and the quality of care provided.[464] When this trust is broken, patients rely on the possibility to recover their damages through liability law. Banning these claims is not the solution, which leads me to discard this option.

Options two to four seem like suitable options. These three can be combined into one option: creating a specific liability regime in the New Civil Code, which allows wrongful life plaintiffs to get compensation from the Medical Accidents Fund, under certain conditions.

6.1.1.1 Specific liability regime for wrongful life claims in the New Civil Code: compensation from the Medical Accidents Fund

165. This could be achieved by inserting an article under chapter seven of book six of the New Civil Code, wherein wrongful life plaintiffs can claim compensation through the fund, and not through the courts. This would ensure that victims of medical negligence get compensated, while not putting a heavy burden on doctors and their insurances.

166. Since wrongful life claims are not permitted in court, plaintiffs should be allowedto apply for compensation from the Medical Accidents Fund. All the articles of the Medical Accidents Act would be applicable in such instances. For instance, the Fund can propose a definitive amount of compensation once the damage has been quantified.[465] In contrary, the compensation may be provisional if the damage cannot be fully quantified.[466]

6.1.1.2 Conditions for compensation

167. Article five of the Medical Accidents act determines the degree of severity needed to receive compensation from the Fund. The degree is established at twenty-five percent.[467] If court experts determine that the plaintiff's disability has reached that degree, there is no reason for their claim to be excluded from the Fund. In evaluating theextent of damage, judges could do as JACKSON said: "offsetting the benefits of life with the burdens associated with the child's disability."[468] This would in turn limit recovery to cases of severe disabilities.[469] Wrongful life claims in which the child's disability falls

---

[461] See also G. HAARSCHER, « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384; Y.-H. LELEU, « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285.

[462] X, *Advies over de Wet Medische Ongevallen van 31 maart 2010** , www.academiegeneeskunde.be/sites/default/files/2022-04/Wet%20medische%20ongevallen%202012.pdf.

[463] *Infra* 22-23, nr. 53-55.

[464] See also A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

[465] Art. 25, § 2 Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913.

[466] Art. 25, § 3 Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913.

[467] Art. 5 Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913.

[468] A. JACKSON, "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

[469] *Ibid.*

below the twenty-five percent threshold may be awarded a lump sum based on the specific circumstances of the case. This decision is at the discretion of the court.

Naturally, doctors would only be liable once all the conditions of liability are established.

6.1.1.3 Liability regime for wrongful birth and wrongful pregnancy claims

168. Wrongful birth and wrongful pregnancy claims can also be regulated in a specific liability regime, here the problem lies not on their admissibility but rather on the scope of compensation.[470]

169. For wrongful birth claims, a specific liability regime should be created that allows parents to recover moral and material damages due to their child's disability, this may include emotional distress. Codifying the current practice of the courts to accept these claims would lead to more consistency for all parties involved.[471]

170. Given that Belgian courts acknowledge wrongful pregnancy claims[472], they should be regulated too so it is clear what counts as a compensable loss. An article in section seven of book six of the Civil Code should be introduced stating that the only compensable loss in wrongful pregnancy claims are the moral and material damages resulting from the pregnancy and the birth of the child. The reason for this is that, havingsomeone endure pregnancy and the pain of childbirth, constitutes a breach of their personal autonomy.[473] Whether other types of damage, such as aesthetic damage, canbe compensated, should be left to the discretion of the courts.

171. Cases in which the conception was not desired, but the mother underwent an abortion resulting in the child not being born, do not qualify as wrongful pregnancy cases. To qualify as such, the child must have been born.[474] The parents may, of course, still seek compensation based on articles 1382-1384 of the Old Civil Code.

6.1.1.4 Liability regime for similar claims

172. The New Civil Code should include an article indicating that the list of reproductive liability claims is exhaustive. It must be emphasized that these articles only apply to cases where a child has a severe disability, or cases in which their birth was undesired. Ifliability is established, other types of claims might be eligible for compensation from the Fund or they could receive a lump sum.

173. Inserting this article would be a direct response to the wrongful 'family expansion' case. This case seems contradictory as for the hospital to approve a request for a 'saviour baby', the parents have to demonstrate that their desire to have a child is independent of their need for a donor. Thus, when they seek compensation because the child is not a suitable donor, it raises questions about their actual motivation. Does this

---

[470] See E. DE SAINT MOULIN, « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93; M. DILLEN en F. DEWALLENS, "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

[471] Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189; Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211; Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58; Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198.

[472] Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299; Luik (20e k.) 3 december 2020, *T. Verz.* 2021, afl. 4, 547; Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229; S. PANIS, "L'action en grossesse préjudiciable (wrongful pregnancy)", *T.Gez.* 2009-10, n° 4, 217-226.

[473] See also R. SCOTT, "Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth", *Medical Law Review* 2003, vol. 11, no. 3, 265–325.

[474] *Infra* 47, nr. 122.

not suggest that the main reason for having the child was its compatibility with their sick sibling, rather than the desire to have another child? This case might be explained by the 'doctrine of double effect', wherein an action that would initially be impermissible is recharacterized to become permissible.[475] This doctrine is observed in contexts such as euthanasia or abortion and is similarly applied in the creation of a saviour baby.[476]

174. Given the wrong in the wrongful 'family expansion' case, the parents should receive some form of compensation. However, the facts of the case evoke concerns about eugenics and the creation of so-called 'designer-babies'.[477] In this case, the child did not meet the specific requirements desired by the parents. As this was attributed to amistake, the parents received compensation under the guise of 'family expansion'. I argue that compensation should be limited to the costs related to undergoing another pregnancy to conceive the saviour baby. Other costs, such as costs of upbringing, should not be considered compensable losses. This is so, because the conception and birth of the child were desired.

6.1.1.5 Tables

175. Thus, compensation for the costs of upbringing or for medical expenses should be limited to two situations:

1. The birth of the child was undesired.
2. The birth of the child was desired but not the additional expenses related to their disability.

These situations align with classic reproductive liability cases and exclude other similar claims. Wrongful 'family expansion' claims will not be explicitly addressed in this article. This omission ensures that future claims related to medical negligence involving the birth of a child, which may not precisely fit the wrongful 'family expansion' claim, can still be included under this article and thus not be eligible for compensation for the costs of upbringing.

176. In essence, the liability regime for reproductive liability claims would look like this:

Action	**Conditions of claim**	**Compensation**
Wrongful birth	- Conditions for liability are met - Birth of the child is desired - Child is born with a disability (evaluation done by court experts) - Resulting from medical negligence	- Moral damages due to thechild's disability (e.g. emotional distress) - Material damages due to the child's disability (e.g. additional medical costs) - Costs of upbringing for a child with a disability (e.g. costs related to the assistance of third parties)
Wrongful life	- Conditions for liability are met	- Determined by the Medical

[475] See H. FARIS, B. DEWAR, C. DYASON, D.-G. DICK, A. MATTHEWSON, S. LAMB and M.-C. F. SHAMY, « Goods, causes and intentions: problems with applying the doctrine of double effect to palliative sedation", *BMC Med Ethics* 2021, vol. 22, no. 141, 1-8.

[476] See R v Dr Bodkins Adams [1957] Crim LR 365; R v Cox [1992] 12 BMLR 38; R. WHEELER, "Doctrine of double effect", *The Bulletin of the Royal College of Surgeons of England* 2016, vol. 98, no. 5, 184-223.

[477] Designer babies are either created from an embryo selected by preimplantation genetic diagnosis (PGD) or genetically modified in order to influence the traits of the resulting children, see R.-T.K. PANG, "Designer babies", *Obstetrics, Gynaecology & Reproductive Medicine* 2016, vol. 26, no. 2, 59-60.

	- Child is born with a disability (evaluation done by court experts) - Resulting from medical negligence	Accidents Fund (if the condition to apply are met) - Lump sum (decided by the court)
Wrongful pregnancy	- Conditions for liability are met - Birth of the child is undesired - Resulting from medical negligence	- Material damages due to the failed procedure, the pregnancy and birth (e.g. medical bills) - Moral damages due to thefailed procedure, the pregnancy and birth (e.g. emotionaldistress) - Costs of upbringing or lump sum (decided by the court)
Other reproductive liability claims	- Conditions for liability are met - Medical negligence involving the birth of a child	- Material damages (e.g. medical bills) - Moral damages (e.g. emotional distress) - For other types of damage: lump sum (decided by thecourt) - Determined by the Medical Accidents Fund (if the condition to apply are met)

In wrongful birth claims, medical expenses related to the pregnancy and birth are not considered a compensable loss, as the birth was desired.

The reason for not making the desire for the child's birth a condition for wrongful life claims is to ensure that cases where parents did not desire the child, as in wrongful pregnancy cases, but where the child was also born with a disability, are not excluded.

Wrongful birth and wrongful life claims can be filed concurrently by the same individuals, as they pertain to the same facts but seek compensation for different parties involved.

In wrongful pregnancy cases, if the child is also born with a disability, the plaintiff can seek compensation for the additional medical expenses due to the child's disability. The costs of upbringing may be reimbursed by the court, or they may choose to award a lump sum in the thousands of euros, depending on the specific facts of the case. As mentioned above other types of damages in wrongful pregnancy should be left to the discretion of the court. Courts could, similarly to some judges in the United Kingdom[478], award a lump sum to acknowledge the unforeseen financial burden put on the parents.

6.1.2 Professional guidelines

177. In addition to making laws, it is equally important to prevent these situations by developing professional guidelines. These guidelines would highlight the significance of doctors fulfilling their information obligation, thereby mitigating their liability once they have met their obligation.

178. Given the existence of different professional guidelines addressing this matter, what is required is emphasizing their significance.

[478] See Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52; Lord Millet in *Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52*.

179. The Advisory Committee on Bioethics has issued advice regarding prenatal testing emphasizing the importance of pre-test counselling.[479] This includes understanding the type of genetic information that will be provided, the implications of any disability the child might have and the available options for the parents. This information is important for informed consent, enabling parents to make the best decisions for them. [480] To accomplish this, the Committee suggests that both medical practitioners and future parents receive a goal-oriented education on the topic. They also advise for more staff and more education to ensure that every parent has equal access to better information about prenatal tests.[481] Lastly, the Committee advises against including mild or highly variable conditions as part of the standard prenatal screening. This would ensure that doctors are not held liable for conditions that are inherently difficult to detect.[482]

180. A prudent guideline for doctors after a preimplantation genetic diagnosis is to advise their patients to undergo prenatal testing upon conception to be certain that the child does not have any genetic disorders.[483] It would be wise for doctors to follow this advice as it would help address any misdiagnosis they may have provided to their patients, thereby mitigating their own liability.

181. In another advice, the Committee declares that the doctor's right to conscientious objection does not exempt them from the obligation to inform their patient about the possibility of abortion. [484] This is in accordance with the argument articulated by HUYGENS on this matter.[485]

182. To prevent wrongful pregnancy cases, doctors should adhere to the guideline of informing their patients about the necessity of using an alternative form of contraception, even for procedures that are generally deemed effective.[486]

183. As observed in the case of Eevie Toombes, it is important for doctors to keep detailed notes of each consultation[487], including any concerns or questions asked by the patient and the doctor's corresponding response.

---

[479] X, "Advies nr. 76 van 30 april 2021 over de wenselijkheid van het meedelen van numerieke afwijkingen van de geslachtschromosomen (Sex Chromosomal Aneuploidies, SCA's) gedetecteerd door niet-invasieve prenatale tests (NIPT)", *Raadgevend Comité voor Bio-ethiek* 2021, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/210430_nipt_sca_advies_def.pdf.

[480] X, "Advies nr. 76 van 30 april 2021 over de wenselijkheid van het meedelen van numerieke afwijkingen van de geslachtschromosomen (Sex Chromosomal Aneuploidies, SCA's) gedetecteerd door niet-invasieve prenatale tests (NIPT)", *Raadgevend Comité voor Bio-ethiek* 2021, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/210430_nipt_sca_advies_def.pdf.

[481] *Ibid.*

[482] X, "Advies nr. 76 van 30 april 2021 over de wenselijkheid van het meedelen van numerieke afwijkingen van de geslachtschromosomen (Sex Chromosomal Aneuploidies, SCA's) gedetecteerd door niet-invasieve prenatale tests (NIPT)", *Raadgevend Comité voor Bio-ethiek* 2021, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/210430_nipt_sca_advies_def.pdf.

[483] X, *Diagnostic génétique préimplantatoire*, https://www.brusselsivf.be/fr/traitement/dpi/.

[484] X, "Advies nr. 66 van 9 mei 2016 betreffende de ethische uitdagingen gesteld door de niet -invasieve prenatale diagnostiek voor trisomie 21, 13 en 18", Raadgevend Comité voor Bio-ethiek 2016, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/advies_66_nipt_nl.pdf .

[485] A. HUYGENS, "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

[486] X, *Sterilisatie*, Duodecim Publishing Company Ltd 2022, https://ebpnet.be/nl/ebsources/6036?searchTerm=sterilisatie&check_logged_in=1.

[487] Toombes v Mitchell [2020] EWHC 3506 (QB); X, "Case of Note: Evie Toombes v. Dr. Mitchell (High Court 21 December 2020 – Lambert J. and 1 December 2021 – Judge Coe QC)", *NHS Resolution*,

184. Specific guidelines on reproductive liability claims are necessary to prevent these claims and to empower doctors to perform their duty more effectively. These guidelines should be established by two authorities: the Order of Doctors and the hospitals or medical centres involved in all stages of pregnancy. The Order of Doctors regularly publishes advice on appropriate medical practices. Medical practitioners frequently operate within hospitals or medical centres. Therefore, it is logical that these two authorities should develop guidelines for medical practitioners. These guidelines should be applicable to all medical practitioner involved in the care of pregnant women.

185. Other healthcare workers, such as nurses or laboratory technicians, should adhere to parallel guidelines.

The University Hospital Brussels, for example, reinforced its protocols for preimplantation genetic testing after they were sued in a wrongful 'family expansion' case.[488] In that case, a laboratory technician selected an embryo incompatible with the sick brother, resulting in the parents having to undergo another pregnancy to conceive the 'saviour baby'. Therefore, an appropriate guideline for laboratory technicians would be to document the test processes and results, as well as any deviation observed during the tests. Laboratory technicians should also be well-informed about the specific reason for requesting preimplantation genetic testing or other prenatal tests. This knowledge enabled them to focus on relevant aspects and provide more accurate results.

Another important aspect is interdisciplinary collaboration. Medical practitioners involved in the care of pregnant patients should discuss cases together and clearly explain the test results to each other. This approach ensures that patients are fully informed about the risks, enabling them to make well-informed decisions.

https://resolution.nhs.uk/2022/03/31/case-of-note-evie-toombes-v-dr-mitchell-high-court-21-december-2020-lambert-j-and-1-december-2021-judge-coe-qc/.

[488] X, *Renforcement des procédures pour le traitement PGT*, www.uzbrussel.be/fr/web/guest/home/-/asset_publisher/8YmW6ErOnrxi/content/aanscherpen-procedures-pgt-behandeling/maximized.

7. Conclusion

186. This thesis has explored the complex and contentious issues surrounding reproductive liability claims in Belgium, with a focus on the lack of legislation addressing these claims. The primary objective was to understand the reasons behind the absence of such laws. To achieve this, I began by analysing the nature of the claim and the reason for its contentiousness. In the ethical debates section of this thesis, I discussed the diverging opinions on the matter, presenting my own perspective based on my research.

187. The complexity of these claims lies in the very foundation of the claim: seeking compensation for damages caused by the circumstances of the child's conception or birth, or due to the child's condition at birth. Initially, this thesis analysed three distinct types of reproductive liability claims: wrongful birth, wrongful life and wrongful pregnancy claims. Each of these claims face unique challenges in securing compensation. Among these, wrongful life claims are the most contentious. Some authors view these cases as an affront to lives with a disability, suggesting that they imply a right not to be born. Proponents of these claims, including myself, argue that this provides a means for individuals with disabilities to recover damages for the harm inflicted upon them, without establishing a general rule.

188. After providing a general overview of reproductive liability claims, this thesis analysed their application in Belgian law. The analysis revealed the impediments that these claims face concerning the conditions of liability. Even when a wrongful life claim fulfils all the conditions for liability, compensation is often denied on the grounds that judges cannot compare life to non-existence. The jurisprudence on reproductive liability claims demonstrated a division among courts regarding the admissibility and scope of compensation for these claims. The creation of the Medical Accidents Fund, which could have alleviated concerns about placing too much burden on medical liability, has not resolved this legal uncertainty due to the lack of clear guidelines on whether the Fund can accept these claims. As a result, decisions on admissibility for compensation are made based on divided jurisprudence. The reform of the Civil Code and the subsequent expansion of the articles on liability, presented a good moment to introduce specific provisions for reproductive liability claims. However, legislators used that occasion to simply state that judges could not prohibit wrongful life claims based on the rule of negative outcome. No concrete rules on the matter were established. The lack of legislation on these claims has proven disadvantageous for plaintiffs and the medical community. It has led to the expansion of claims to include recovery of damages for the birth of a healthy and planned child, simply because the child could not serve as a donor for their sick brother.

189. In comparing Belgian law to other jurisdictions, a common theme of denying wrongful life claims was observed. France and the United Kingdom have enacted laws on this matter, with France imposing a full ban and the United Kingdom allowing claims under specific conditions. The French law on wrongful life was sanctioned by the European Court of Human Rights for its retroactive character. Its total ban on wrongful life claims makes it an undesirable model to follow. The United Kingdom's approach in comparison, aligns more closely with my standpoint, confining these claims to specific circumstances. The comparative study also highlighted the denial of wrongful pregnancy claims, contrary with the Belgian approach. There, I argued that beyond moral considerations, there exists no legal reason to reject these claims once liability has been established.

190. Following the comparative analysis, this thesis examined previous legislative proposals on reproductive liability claims in Belgium. The proposals varied significantly, and none succeeded. I critiqued their distortion of the issue, arguing that these claims

are grounded in the right to seek compensation when wronged, rather than being part of a eugenics discourse. No other meaning should be given to these claims. I discussed statements by legislators which are contrary to the principles of Belgian law and referenced the findings of JACKSON, who noted that by assigning value to life, judges implicitly compare life and non-existence. This contradicts the argument that they cannotestablish damages in wrongful life cases because they cannot make such a comparison. Another contradiction is the respect for personal autonomy in other cases but its disregard in reproductive liability claims. This thesis highlighted instances where personalautonomy is upheld and argued for its consistent application in reproductive liability claims.

191. In conclusion, this thesis offered recommendation for legislators to regulate reproductive liability claims. I proposed that a specific liability regime should be created for these claims to ensure legal certainty. Based on the comparative study and the consensus on the admissibility of wrongful life claims, I advise limiting these claims. JACKSON suggested that compensation should be available only for children with severe disabilities, offsetting the benefits of life with the burdens of a child's disability. Iproposed a similar provision, allowing compensation for wrongful life only when thechild's disability is severe, with compensation provided by the Medical Accidents Fund to avoid further burdening medical liability. For wrongful birth claims an article would be introduced allowing compensation for moral and material damages due to the child's disability. The article on wrongful pregnancy claims would allow compensation for both material and moral damages resulting from the failed procedure, the pregnancy and the birth of the child. Additionally, judges may decide to compensate for the costs of upbringing or award a lump sum for the breach of personal autonomy. Lastly, for other similar claims, besides the standard compensation for material and moral damages, othertypes of damages could be compensated through a lump sum if deemed appropriate by the court. Plaintiffs in similar cases should also be allowed to seek compensation from theMedical Accidents Fund if their case meets all the requisite conditions.

8. Bibliography

8.1 Legislation

8.1.1 Europe

Art. 8 ECHR.

Art. 14 ECHR.

8.1.2 Belgium

Old art. 350, 4° Sw.

Art. 203 Oud BW.

Art. 1382 Oud BW.

Art. 1383 Oud BW.

Art. 1384 Oud BW.

Art. 5.72 Oud BW.

Wet van 28 mei 2002 betreffende de euthanasie, *BS* 22 juni 2002, 28.515.

Wet van 22 augustus 2002 betreffende de rechten van de patiënt, *BS* 26 september 2002 (ed. 2), 43.719.

Wet 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorg, *BS* 6 juli 2007 (ed. 1), 37.151.

Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg (1), *BS* 2 april 2010, 19.913.

Art. 2, 5° wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen, *BS* 29 oktober 2018, 82.140.

Art. 2, 7° Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen,*BS* 29 oktober 2018, 82.140.

Wet van 15 oktober 2018 betreffende de vrijwillige zwangerschapsafbreking, tot opheffing van de artikelen 350 en 351 van het Strafwetboek, tot wijziging van de artikelen 352 en 383 van hetzelfde Wetboek en tot wijziging van diverse wetsbepalingen,*BS* 29 oktober 2018, 82.140.

Wet van 13 april 2019 tot invoering van een Burgerlijk Wetboek en tot invoeging van boek 8 "Bewijs" in dat Wetboek, *BS* 14 mei 2019, 46.353.

Wet van 5 mei 2019 betreffende de toekenning van een forfaitair bedrag aan de personen die lijden aan aangeboren misvormingen die het gevolg zijn van het innemen van geneesmiddelen met thalidomide door de moeder tijdens de zwangerschap, *BS* 16 mei 2019, 47.026.

Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1995-96, nr. 1-299/1.

Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek, *Parl.St.* Senaat 1999, nr. 50-0225/001.

Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1995-96, nr. -538/1- 95/96.

Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 1999, nr. 50-0220/001.

Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2001-02, nr. 2-1013-1.

Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2002, nr. 50-1596/001.

Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2003, nr. 51-0090/001.

Wetsvoorstel tot wijziging van artikel 1382 van het Burgerlijk Wetboek teneinde er de niet-ontvankelijkheid van de vordering tot schadevergoeding wegens het feit van geboren te zijn, in op te nemen, *Parl.St.* Senaat 2003-04, nr. 3-839/1.

Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Kamer 2011, nr. 53-1117/001.

Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven, *Parl.St.* Senaat 2010-11, nr. 5-845/1.

Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2012, nr. 53-2032/001.

Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2014, nr. 54-0398/001.

Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer BZ 2019, nr. 55-0531/001.

Wetsvoorstel tot invoeging van een artikel 1383bis in het Burgerlijk Wetboek, waarin wordt gepreciseerd dat iemands geboorte op zich niet als schade kan worden aangemerkt, *Parl.St.* Kamer 2020, nr. 55-0531/002.

Wetsvoorstel (K. GEENS e.a.) houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, *Parl.St.* Kamer 2022-23, nr. 3213/001.

Verslag over het wetsontwerp betreffende de vergoeding van schade als gevolg van gezondheidszorg (I), *Parl.St.* Kamer 2009-2010, nr. 2240/006, 105-106.

Hand. Senaat comm. voor de Sociale Aangelegenheden 2010-11, 8 februari 2011, nr. 5-31COM, 24.

Vr. en Antw. Senaat comm. voor de Sociale Aangelegenheden, Vr. nr. 5-319, 8 februari 2011 (E. SLEURS).

8.1.3 The United Kingdom

Congenital Disabilities (Civil Liability) Act 1976.

8.1.4 France

Art. L114-5 of the Social Action and Family Code.

Loi n° 2002-303 (Fr) 4 mars 2002 relative aux droits des malades et à la qualité du système de santé (1), *JO* 5 mars 2002, www.legifrance.gouv.fr.

Loi n° 2005-102 (Fr) 11 février 2005 pour l'égalité des droits et des chances, laparticipation et la citoyenneté des personnes handicapées (1), *JO* 12 février 2005, www.legifrance.gouv.fr.

Hand. Senat comm. des lois (Fr) 2001-02, 18 décembre 2001.

8.2 Jurisprudence

8.2.1 Europe

ECHR 6 October 2005, no. 11810/03, Maurice/France.

ECHR 21 June 2006, no. 1513/03, Draon/France.

ECHR 17 January 2012, no. 36760/06, Stanev/Bulgaria.

ECHR 25 July 2017, no. 17484/15, Morais/Portugal.

ECHR 3 February 2022, no. 66328/14, N.M. et al./France.

8.2.2 Belgium

Cass. (1e k.) 5 juni 2008, AR C.07.0199.N, *T.Verz.* 2008, afl. 4, 418.

Cass. (1e k.) 5 juni 2008, AR C.07.0199.N, *Arr.Cass.* 2008, afl. 6-7-8, 1462.

Cass. (1e k.) 15 januari 2010, AR C.09.0138.F, *T.Gez.* 2011-12, afl. 3, 230-231.

Cass. 14 november 2014, AR C.13.0441.N, ECLI:BE:CASS:2014:ARR.20141114.1.

Cass. (3e k.) 17 oktober 2016, *T.Gez.* 2016-17, afl. 5, 299-304.

Gent 4 april 1950, *R.C.J.B.* 1953, 194.

Luik 13 november 1950, *R.C.J.B.* 1953, 198.

Brussel 8 mei 1985, *JT* 1986, 252.

Antwerpen 26 april 1995, *T.Gez.* 1998-99, 230.

Liège (11e ch.) 10 mai 2001, *Rev. dr. santé* 2001-02, liv. 5, 247-255.

Antwerpen 8 april 2002, *NJW* 2002, afl. 7, 246-247.

Luik 24 juni 2002, *T.Gez.* 2007-08, afl. 3, 242-248.

Antwerpen 8 september 2003, *NJW* 2004, afl. 70, 558-560.

Gent (1e k.) 27 september 2007, *T.Gez.* 2008-09, afl. 5, 404-406.

Luik (20e k.) 17 april 2008, *RGAR* 2009, afl. 1, nr. 14460.

Liège (20e ch.) 22 janvier 2009, *Rev. dr. santé* 2009-10, liv. 4, 215-216.

Brussel (4e k.) 25 mei 2010, *RGAR* 2010, afl. 8, nr. 14674.

Brussel (4e k.) 21 september 2010, *T.Gez.* 2011-12, afl. 3, 183-189.

Bergen (6e k.) 28 oktober 2011, *T.Gez.* 2012-13, afl. 3, 234-237.

Gent (1e k.) 3 november 2011, *T.Gez.* 2011-12, afl. 3, 205-211.

Bergen (6e k.) 12 oktober 2012, *T.Gez.* 2014-15, afl. 3, 172-176.

Gent (1e k.) 13 november 2014, *T.Gez.* 2016-17, afl. 2, 109-113.

Luik (20e k.) 3 december 2020, *T.Verz.* 2021, afl. 4, 547-551.

Rb. Brussel (72e k.) 21 april 2004, *T.Gez.* 2004-05, afl. 5, 380.

Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 49-58.

Rb. Antwerpen (8B k.) 23 april 2009, *T.Gez.* 2009-10, afl. 4, 227-229.

Rb. Kortrijk (1e k.) 18 februari 2010, *T.Gez.* 2011-12, afl. 3, 198.

Rb. Brussel (22e k.) 5 oktober 2010, nr. 2008/7891/A, *T.Gez.* 2013-14, afl. 5, 168-172.

Rb. Brussel (22e k.) 5 oktober 2010, nr. 2008/7893/A, *T.Gez.* 2013-14, afl. 3, 173-177.

Rb. Luik (afd. Luik) (4e k.) 16 september 2019, *RGAR* 2019, afl. 9, 15616.

Rb. Brussel (Fr.) (burg.) (11e k.) 30 maart 2021, *T.Gez.* 2021-22, afl. 2, 108-111.

Corr. Nijvel 25 oktober 1990, *RGAR* 1993, nr. 12.207.

8.2.3 The United Kingdom

McLelland v Greater Glasgow Health Board [1999] SC 305.

Montgomery v Lanarkshire Health Board [2015] UKSC 11.

Khan v Meadows [2021] UKSC 21.

MacFarlane v Tayside Health Board [1999] UKHL 50.

Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52.

McKay v. Essex Area Health Authority [1982] 2 All ER 771.

McFarlane v Tayside Health Board [2000] 2 AC 59.

Parkinson v St James and Seacroft NHS Trust [2001] EWCA Civ 530.

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.

R v Dr Bodkins Adams [1957] Crim LR 365.

R v Cox [1992] 12 BMLR 38.

Lee v Taunton and Somerset NHS Trust [2001] 1 FLR 419.

Deriche v Ealing Hospital NHS Trust [2003] EWHC 3104 (QB).

Mrs A v East Kent Hospitals University NHS Foundation Trust [2015] EWHC 1038 (QB).

Toombes v Mitchell [2020] EWHC 3506 (QB).

Jupp J in *Udale v Bloomsbury Area Health Authority [1983] 3 All ER 522*.

Lord Gill in *McFarlane v Tayside Health Board (Outer House*) [1997] SLT 211.

Lord Millet in *Macfarlane and Another v. Tayside Health Board (Scotland)* [1999] UKHL 50.

Hale LJ in *Parkinson v St James and Seacroft NHS Trust* [2001] EWCA Civ 530.

Lord Millet in *Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52*.

8.2.4 France

Conseil d'Etat (FR) 14 février 1997, n° 133238, www.legifrance.gouv.fr.

Cass. Civ. 1ère (FR) 26 mars 1996, n° 94-11.791, www.legifrance.gouv.fr.

Cass. Civ. 1ère (FR) 26 mars 1996, n° 94-14.158, www.legifrance.gouv.fr.

Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr.

Cass. (FR) 13 juillet 2001, n° 97-17.359, www.legifrance.gouv.fr.

Cass. (FR) 28 novembre 2001, n° 00-14.248, www.legifrance.gouv.fr.

Cass. (FR) 15 décembre 2011, n° 10-27.473, www.legifrance.gouv.fr.

Cass. (FR) 5 avril 2012, n° 11-14.856, www.legifrance.gouv.fr.

Cass. (FR) 14 novembre 2013, n° 12-21.576, www.legifrance.gouv.fr.

Nancy (3ème chambre) 30 avril 1997, n° 94NC00922, www.legifrance.gouv.fr.

Bourges 29 novembre 2007, n° 07/00196, www.legifrance.gouv.fr;

Bordeaux (2ème chambre) 06 octobre 2015, n° 13BX03265, www.legifrance.gouv.fr.

8.3 Doctrine

8.3.1 Belgium

BALTHAZAR, T., "Wrongful birth, wrongful life", *Juristenkrant* 2010, afl. 220, 7.

BAUZON, S., « 7. Du droit et de la loi dans l'affaire Perruche » in S. BAUZON, *La personne biojuridique*, Presses Universitaires de France, 2006, 95-102.

BOCKEN, H., "Het verlies van een kans: vergoedbare schade? Het arrest van het Hof van Cassatie van 5 juni 2008", *T.Verz.* 2008, afl. 4, 421-424.

BORUCKI, C. en SAMOY, I., "Anticipatie op de hervorming van het Burgerlijk Wetboek. Mogelijkheden en grenzen inzake het buitencontractuele aansprakelijkheidsrecht", *TPR* 2021, afl. 1, 425-468.

COLETTE-BASECQZ, N., "Een zaak 'Perruche' in België tien jaar later!", *T.Gez.* 2010-11, afl. 5, 380-381.

COLETTE-BASECQZ, N. en BLAISE, N., "L'avortement" in *Les infractions. Vol. III*, Brussel, Larcier 2011, (23) 27.

DE KEYSER, K. en DE MEUTER, S., "Juridische aspecten van de Wet Zwangerschapsafbreking" in M. SCHEYS (ed.), *Abortus*, Brussel, VUBPress, 1993, 179-210.

DE KEZEL, E., "Wrongful birth en wrongful life. Een stand van zaken", *NJW* 2004, afl. 70, 546-551.

DE KEZEL, E., "Rechtbank kent Spaans koppel schadevergoeding toe voor 'wrongful birth'", *Juristenkrant* 2022, afl. 441, 2-3.

DE KOEKELAERE, A., "Geneeskunde, bio-ethiek en recht", *RW* 1993-94, 481-505.

DELANNAY, A., "Les homicides et lésions corporelles volontaires" in X, *Les infractions. Vol. II*, Brussel, Larcier, 2010, (86) 203.

DELBROUCK, I., "Niet-consensuele seksuele misdrijven – Bijzondere strafrechtelijke en strafprocesrechtelijke aspecten" in VANDEPLAS, A., ARNOU, P., VAN OVERBEKE, S. en VANDROMME, S., *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, losbl., 158-159.

DE MEYER, F. en DE MULDER, C., "De vergoeding van materiële schade wegens ongewenste gezinsuitbreiding na foutieve embryo-implantatie", *T.Gez.* 2021-22, afl. 2, 429.

DE MULDER, C., "Behandelingsweigering tijdens zwangerschap en bevalling: geïnformeerde toestemming versus bescherming van ongeboren leven?", *T.Gez.* 2022- 23, afl. 2, 107-126.

DE NAUW, A., *Inleiding tot het bijzonder strafrecht*, Mechelen, Kluwer, 2010, 471 p.

DE SAINT MOULIN, E., « Les actions en grossesse et vie préjudiciables. État des lieux critique au regard de la jurisprudence récente de la Cour de cassation », *JT* 2019/5, n° 6759, 81-93.

DEVERRE, J.-C., « Un an après l'arrêt Perruche. Laisser naître : un risque », *Laennec* 2002/2, t. 50, 4-5.

DILLEN, M. en DEWALLENS, F., "Wrongful life made in Belgium: geboren worden kan uw gezondheid schaden", *T.Gez.* 2011-12, afl. 3, 389.

DUBUISSON, B., « L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime », *JT* 2015, afl. 6595, 209-219.

ESTIENNE, N., « Enfant handicapé à la suite d'un diagnostic anténatal inexact ayant conduit à la poursuite de la grossesse », *R.G.A.R.* 2010, afl. 8, nr. 14675.

FAGNART, J.-L., "Principes fondamentaux de la loi sur les accidents médicaux", *Con.M.* 2011, afl. 2, 73-84.

FELTKAMP, R. en CORNELIS, L., "SOS voor een democratisch aansprakelijkheidsrecht", *Juristenkrant* 2023, afl. 469, 12-13.

G, G., noot onder Gent (1e k.) 27 september 2007, *T.Gez.* 2012-13, afl. 1, 45-48.

GENICOT, G., « Obligation de moyens ou de résultat en matière de stérilisation: une occasion manquée de clarification? », *JLMB* 2010, afl. 16, 731-734.

GENICOT, G., « Dommage moral en cas de naissance d'un enfant non désiré après l'échec d'une vasectomie », *JLMB* 2012, afl. 23, 1097-1100.

GENICOT, G., « Comparaison sans raison n'est pas solution », *JLMB* 2015, afl. 6, 269-278.

GENICOT, G., *Droit médical et biomédical*, II/4, *La consistance du dommage et la certitude du lien causal*, 2e édition, Bruxelles, Larcier, 2016, 551-587.

GENICOT, G., *Droit médical et biomédical*, III/1, *La naissance contrôlée*, 2e édition, Bruxelles, Larcier, 2016, 655-694.

GENICOT, G., "Nouvelle confirmation du rejet de l'action en 'wrongful life'", *T.Gez.* 2016-17, afl. 5, 316-317.

GOSSERIES, A., « Causalité, dommage et vie préjudiciable », *RGAR* 2011, afl. 3, nr. 14722.

HAARSCHER, G., « Le casse-tête de la wrongful life », *RGAR* 2017, afl. 5, nr. 15384.

HUYGENS, A., "Late zwangerschapsafbreking en aansprakelijkheid voor ongewenst bestaan", *T.Gez.* 2011-12, afl. 3, 212-229.

HUYGENS, A., "Wrongful-life-vordering overleeft cassatietoets niet", *T.Gez.* 2014-15, afl. 3, 195-201.

JOISTEN, C., « Causalité, incertitude et perte de chance : de nouvelles perspectives », *TBBR* 2023, afl. 10, 458-481.

KÉFER, F., « La naissance d'un enfant après l'échec d'un avortement est-elle constitutive d'un préjudice ? », *JT* 1990, 644-646.

KIRKPATRICK, J., « Réflexions sur la charge de la preuve en matière de responsabilité médicale et sur la distinction entre obligations de résultat et obligations de moyens », *RCJB* 2010, afl. 4, 513-529.

KRUITHOF, R., "Schadevergoeding wegens geboorte van een ongewenst kind", *RW* 1986-87, 2737-2752.

LELEU, Y.-H. en LANGENAKEN, E., "Quel statut pour l'embryon et le foetus dans le champ juridique belge?", *JT* 2002, afl. 6068, 657-666.

LELEU, Y.-H., "Le droit à la libre disposition du corps à l'épreuve de la jurisprudence 'Perruche'", *RGAR* 2002, nr. 13466, 1-9.

LELEU, Y.-H., « Refuser de comparer pour exonérer? », *JLMB* 2015, afl. 6, 278-285.

MARCHETTI, R., MONTERO, E. et PUTZ, A., « La naissance handicapée par suite d'une erreur de diagnostic: un préjudice réparable? La perte d'une chance de ne pas naître? », *R.G.D.C.* 2006, liv. 2, 117-132.

MATTHYS, J., "Hoofdstuk 6 - De medische fout en het medisch ongeval" in *Evaluatie en vergoeding van lichamelijke schade*, 3e editie, Brussel, Intersentia 2020, 143-244.

MOYSE, D. et DIEDERICH, N., « L'échographie prénatale après l'arrêt Perruche. Une modification des pratiques ? », *Études* 2005/4, t. 402, 483-493.

NYS, H., "Overzicht van rechtspraak. Medisch recht 2005-2010", *TPR* 2011, afl. 3, 851-920.

NYS, H., *Geneeskunde. Recht en medisch handelen*, Wolters Kluwer Belgium, Mechelen, 2016, 669 p.

OPLINUS, L., "Kind van de rekening", *RW* 2021-22, afl. 20, 770.

OPLINUS, L., "Te oud voor ouderschap? Analyse van de maximale leeftijd als toegangsbeperking in de context van medische hulp bij de voortplanting", *Rechtskundig Weekblad* 2022-23, nr. 32, 1243-1255.

PANIS, S., "L'action en grossesse préjudiciable (wrongful pregnancy)", *T.Gez.* 2009-10, n° 4, 217-226.

PIRET, J., "'Wrongful life' en de zaak Rukiyé", *NJW* 2011, afl. 243, 354-365.

VAN QUICKENBORNE, M., "Het bewijs van een oorzakelijk verband", TPR 2010, afl. 1, 313-330.

SCHETS, K., *Aansprakelijkheid en vergoeding voor schade bij wrongful birth en wrongful life*, masterproef UGent, 2011-12, 129 p., https://libstore.ugent.be/fulltxt/RUG01/001/892/015/RUG01-001892015_2012_0001_AC.pdf.

SCHOLLAERT, V., "Wrongful-birth- en wrongful-life-vorderingen overwogen vanuit de inbreuk op een recht als fout", *T.Gez.* 2021-22, afl. 5, 429.

SCHOLLAERT, V., "Het nieuwe buitencontractueel aansprakelijkheidsrecht. Een verkennende analyse", *NJW* 2023, afl. 482, 374-381.

SOMERS, S., "Titel II - Het oorzakelijk verband" in *Aansprakelijkheidsrecht en mensenrechten*, 1e ed., Brussel, Intersentia 2016, 383-422.

SMAERS, G., "Gedeeltelijke depenalisering van abortus", *RW* 1990-91, (827) 828.

TER HEERDT, J., "'Wrongful life' en 'Wrongful Birth', een 'never ending story': twee arresten die de controverse rond vorderingen tot schadevergoeding voor de geboorte van een ongewenst of gehandicapt kind weer volop in de schijnwerper plaatsen", *T.Gez.* 2001-02, afl. 5, 250-255.

VAN ASSCHE, K., "Geoorloofdheid van en informatieplicht over late zwangerschapsafbreking", *T.Gez.* 2017-18, afl. 2, 114-121.

VANDERHAEGHEN, A., "Rechtbank van eerste aanleg bevoegd voor softenonzaken [en dus niet de arbeidsrechtbank]", (noot onder GwH 1 december 2022, nr. 157/2022), *NJW* 2023, afl. 475, 88.

VAN DE SYPE, N., "Onrechtmatige daad - Schade en schadeloosstelling - Wrongful life - Vergoedbare schade", *RWE* 2014-15, nr. 41, 1611-1622.

VAN DE SYPE, N., "Geen vergoeding voor wrongful life", *RW* 2014-15, afl. 41, 1617- 1622.

VAN GYSEL, A., « La responsabilité du violeur pour les frais d'entretien et d'éducation de l'enfant né de son crime », *JT* 1986, 254-256.

VANSWEEVELT, T. en WEYTS, B., « Hoofdstuk II - De equivalentieleer » in *Handboek Buitencontractueel Aansprakelijkheidsrecht*, 1e editie, Brussel, Intersentia 2009, 775- 800.

VANSWEEVELT, T., "De Wet Medische Ongevallen", *T.Gez.* 2010-11, afl. 2, 98-100.

VANSWEEVELT, T., "Het belang van adequate informatie over nazorg en de beperking tot morele schade wegens de geboorte van een ongewenst, gezond kind (de zaak Chloé)", *T.Gez.* 2012-13, afl. 3, 238-240.

VANSWEEVELT, T., "Abortus" in VANSWEEVELT T., en DEWALLENS, F., *Handboek gezondheidsrecht. Vol. II*, Antwerpen, Intersentia, 2014, (189) 268.

VANSWEEVELT, T., "Abortus" in ARNOU, P., DE HERDT, J., VANDROMME, S. en VAN OVERBEKE, S., *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, afl. 99, 15-118.

VANSWEEVELT, T., "De geneeskundige behandelingsovereenkomst" in X, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer Belgium, losbl., 35-110.

VANSWEEVELT, T., "Gewetensbezwaar arts, verpleegkundige en paramedisch personeel" in X, *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Mechelen, Wolters Kluwer Belgium 2022, 132-136.

VANSWEEVELT, T., « Hoofdstuk II - De aansprakelijkheid van de arts en het ziekenhuis voor eigen gedrag » in *Handboek gezondheidsrecht Volume I (tweede editie)*, 2e editie, Brussel, Intersentia 2022, 1219-1356.

VAN GERVEN, W., "Ontluikend leven, groeiend recht" in X, *Recht en medisch begeleide bevruchting*, Antwerpen, Kluwer, 1991, (161) 179.

VERHOEVEN, D., "Het kunstmatig vrouwelijke hormoon diëthylstilbestrol] De DES-slachtoffers en het Belgische aansprakelijkheidsrecht. Een confrontatie met verjaring, het foutbegrip, onzekere toekomstige schade en alternatieve causaliteit", *T.Gez.* 2013-14, afl. 5, 140-167.

VERJANS, E., "Hoofdstuk I - Aard van de aansprakelijkheid" in *Het recht op informatie en toestemming van de patiënt*, 1e ed., Brussel, Intersentia 2019, 679-706.

VERJANS, E., "Hoofdstuk IV - Bewijs van schade en van een oorzakelijk verband tussen fout en schade" in *Het recht op informatie en toestemming van de patiënt*, 1e ed., Brussel, *Intersentia* 2019, 949-1152.

X, noot onder Rb. Hasselt (5e k.) 16 oktober 2006, *T.Gez.* 2012-13, afl. 1, 58-59.

8.3.2 The United Kingdom

CARVER, T., COCKBURN, T. and MADDEN, B., "Wrongful birth children and assessing damages for costs of care: Australian and British jurisprudence compared", *Monash University Law Review* 2018, vol. 44, no. 1, 198-233.

HALE, "The Value of Life and the Cost of Living – Damages for Wrongful Birth (Staple Inn Reading 2001)", *British Actuarial Journal* 2001, vol. 7, no. 5, 747–763.

JACKSON, A., "Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England", *Loyola of Los Angeles International and Comparative Law Journal* 1995, vol. 17, no. 3, 535-613.

JHAVERI, S., "Judicial Strategies in Recognising New Areas for Recovery in Negligence – Lessons Learned from Wrongful Conception Cases", *Tort Law Review* 2013, vol. 21, no. 2, 63-86.

MASON, J.K., *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*, Cambridge University Press 2007, 317 p.

SCOTT, R., "Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth", *Medical Law Review* 2003, vol. 11, no. 3, 265–325.

SCOTT, R., "Reconsidering "Wrongful Life" in England after Thirty Years: Legislative Mistakes and Unjustifiable Anomalies", *The Cambridge Law Journal* 2013, 72, no. 1, 115–154.

8.3.3 France

DEMME, G. et LORENTZ, R., « Responsabilité civile et naissance d'un enfant. Aperçu comparatif », *Revue internationale de droit comparé* 2005, vol. 57, n° 1, 103-139.

IACUB, M., *Penser les droits de la naissance*, PUF 2014, 224.

Concl. SAINTE-ROSE, J., in Cass. (FR) 17 novembre 2000, n° 99-13.701, www.legifrance.gouv.fr

8.4 Other

8.4.1 Europe

COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Updated Action Plan*, 6 November 2014, nr. DH-DD(2014)1335, https://rm.coe.int/09000016804a7fec.

8.4.2 Belgium

DE WIT, J., *Het recht om niet geboren te worden*, 2010, www.gva.be/cnt/aid998778.

X, *Advies over de Wet Medische Ongevallen van 31 maart 2010**, www.academiegeneeskunde.be/sites/default/files/2022-04/Wet%20medische%20ongevallen%202012.pdf.

X, *Diagnostic génétique préimplantatoire*, https://www.brusselsivf.be/fr/traitement/dpi/.

X, *Dossierfiche. Wetsvoorstel tot aanvulling van artikel 350, tweede lid, 6°, van het Strafwetboek*, https://senaat.be/www/?MIval=dossier&LEG=1&NR=299&LANG=nl.

X, *Dossierfiche. Wetsvoorstel tot regeling van schadevergoeding toegekend bij aansprakelijkheid voor het ontstaan en voortbestaan van menselijk leven*, https://senaat.be/www/?MIval=dossier&LEG=5&NR=845&LANG=nl.

X, *Renforcement des procédures pour le traitement PGT*, www.uzbrussel.be/fr/web/guest/home/-/asset_publisher/8YmW6ErOnrxi/content/aanscherpen-procedures-pgt-behandeling/maximized.

X, *Sterilisatie*, Duodecim Publishing Company Ltd 2022, https://ebpnet.be/nl/ebsources/6036?searchTerm=sterilisatie&check_logged_in=1.

8.4.3 The United Kingdom

ARCHARD, D., "Wrongful life", *Philosophy* 2004, 79(3), 403-420.

ASTBURY-WARD, E.M., "Emotional and psychological impact of abortion: a critique", *J Fam Plann Reprod Health Care* 2008, vol. 34, no. 3, 181-184.

BARKER, M.J. and WILSON, R.A., "Well-being, Disability, and Choosing Children", *Mind* 2019, vol. 128(510), 305-328.

CHAN, S.W., TULLOCH, E., COOPER, E.S., SMITH, A., WOJCIK, W. and NORMAN, J.E., "Montgomery and informed consent: where are we now?", *BMJ* 2017, vol. 357, https://doi.org/10.1136/bmj.j2224.

EFFA-HEAP, G., "Blood transfusion: implications of treating a Jehovah's Witness patient", *British Journal of Nursing* 2009, vol. 18, no. 3, 174-177.

FARIS, H., DEWAR, B., DYASON, C., DICK, D.-G., MATTHEWSON, A., LAMB, S., and SHAMY, M.-C.F., « Goods, causes and intentions: problems with applying the doctrine of double effect to palliative sedation", *BMC Med Ethics* 2021, vol. 22, no. 141, 1-8.

JHA, S., "'Wrongful Birth' following failed sterilisation", *BJOG* 2016, vol. 123(10), 1683.

KATZ, E.D., "Defensive Medicine: A Case and Review of Its Status and Possible Solutions.", *Clin Pract Cases Emerg Med.* 2019, vol. 3, no. 4, 329-332.

PANG, R.-T.K., "Designer babies", *Obstetrics, Gynaecology & Reproductive Medicine* 2016, vol. 26, no. 2, 59-60.

PAPANIKITAS, A., SPICER, J. and HAYHOE, B., "'Wrongful conception' ruling against UK general practitioner.", *BMJ* 2022; 376o79.

PARFIT, D., *Reasons and Persons*, IV, *Future Generations*, Oxford, Oxford University Press, 1984, 351-377.

WHEELER, R., "Doctrine of double effect", *The Bulletin of the Royal College of Surgeons of England* 2016, vol. 98, no. 5, 184-223.

WELCH, E., VAUGHAN, J., CRANFIELD, K.R. and MEHDIAN, R., "What implications does the Toombes vs Mitchell case have for other healthcare professionals?", *BMJ* 2022;376:o162.

X, *Case of Note: Evie Toombes v. Dr. Mitchell (High Court 21 December 2020 – Lambert J. and 1 December 2021 – Judge Coe QC)*, NHS Resolution, https://resolution.nhs.uk/2022/03/31/case-of-note-evie-toombes-v-dr-mitchell-high-court-21-december-2020-lambert-j-and-1-december-2021-judge-coe-qc/.

8.4.4 France

AMANN, J.-P., « L'arrêt Perruche et nos contradictions face à la situation des personnes handicapées », *Revue française des affaires sociales* 2002, vol. 3, 125-138.

CARDIN, H., « La loi du 4 mars 2002 dite "loi Kouchner" », *Les Tribunes de la santé* 2014, vol. 1, n° 42, 27-33.

LE GOFF, R.-M., *« Responsabilité médicale, pathologie et handicap. « De l'affaire Perruche » ou « Quand le diagnostic prénatal rend urgente et nécessaire la réflexion épistémologique » »*, *Cités* 2001, vol. 3, n° 7, 139-143.

8.4.5 Other countries

BARBER, J.S., AXINN, W.G. and THORNTON, A., "Unwanted Childbearing, Health, and Mother-Child Relationships.", *Journal of Health and Social Behavior* 1999, vol. 40, no. 3, pp. 231–57.

BAYDAR, N., "Consequences for Children of Their Birth Planning Status.", *Family Planning Perspectives* 1995, vol. 27, no. 6, pp. 228–45.

BIČÁKOVÁ, A. and KALÍŠKOVÁ, K., "Career-Breaks and Maternal Employment in CEE Countries" in MOLINA, J.A., (ed.), *Mothers in the Labor Market*, Springer Cham 2022, 269p.

BROWN, L.M., "The relationship between motherhood and professional advancement: Perceptions versus reality", *Employee Relations* 2010, vol. 32, no. 5, 470-494.

CARNEY, T., "The Employment Disadvantage of Mothers: Evidence for Systemic Discrimination", *Journal of Industrial Relations* 2009, vol. 51, no. 1, 113-130.

COLEMAN, P.K. and GARRATT, D., "From birth mothers to first mothers: toward a compassionate understanding of the life-long act of adoption placement", *Issues Law Med* 2016, vol. 31, no. 2, 139-163.

HASINI, A., *What is the Difference Between Substrate and Reagent*, https://pediaa.com/what-is-the-difference-between-substrate-and-reagent/.

KIMPORT, K., FOSTER, K. and WEITZ, T.A., "Social sources of women's emotionaldifficulty after abortion: lessons from women's abortion narratives", *Perspect Sex Reprod Health* 2011, vol. 43, no. 2, 103-109.

RANTAKALLIO, P. and MYHRMAN, A., "The Child and Family Eight Years after Undesired Conception: The Child and Family after Undesired Conception.", *Scandinavian Journal of Social Medicine* 1980, vol. 8, no. 3, 81-87.

RAWLS, J., *Political Liberalism: Expanded Edition* (2nd ed.), Columbia University Press, 2005, 576 p.

SAVULESCU, J., "Procreative Beneficence: Why We Should Select the Best Children", *Bioethics* 2001, vol. 15, no. 5-6, 413-426.