



CROSS-COUNTRY COMPARATIVE ANALYSIS OF LEGISLATION AND COURT RULINGS IN WRONGFUL BIRTH ACTIONS

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Abstract. Negligent conduct by health care providers can result in medical malpractice injury sustained by parents denied their right to decide whether and when to have children. In this review of the international medicolegal literature, the authors present a comparative analysis of the law of medical negligence in this context and a discussion of the grounds for compensable injury resulting from medical error. The discussion is focused on the legal provisions for compensable injury awarded to the plaintiff (expectant mother, parents of the born child, and born child) and the types of injury various legal systems recognize in such cases. The aim of this article is to provide medical malpractice investigators and legal professionals with an overview of the birth cases.

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INTRODUCTION

Negligent conduct by health care providers can result in medical malpractice injury sustained by parents denied their right to decide whether and when to have children. Two different legal formulations are distinguished: (1) unintended birth due to failed abortion (wrongful pregnancy) or sterilization (wrongful conception) and (2) planned birth but of a child born with congenital defects or a specific disability, in which case, had the parents been warned, the pregnancy would have been terminated (wrongful birth). Different again is the concept of wrongful life, which refers to the injury sustained by a child born healthy or with congenital defects, due to negligent conduct by a health care provider.

Medical professional liability has been reviewed in a 2015 ruling by the Italian Supreme Court of Cassation that reiterated the characteristics of Italian law concerning wrongful birth actions, delineating the terms for compensation, and wrongful life, excluding its application to the child for the sole fact of its having been born, albeit with severe malformations.¹ The court sentence provided a detailed description of the characteristics of this type of medical professional liability and a basis for comparative analysis of the legal, political, economic, social, and moral aspects of compensation for injury recognized by various legal systems.

I. METHODS

A search for primary legal sources was carried out in relation to several states; additionally, a literature search was conducted in five electronic databases (Medline, Cochrane Library, Scopus, Web of Science, and Science Direct) with the search terms “wrongful birth,” “wrongful life” “medical negligence,” “misdiagnosis in pregnancy,” “malpractice claims,” and “medical errors.” The principal keyword “wrongful birth” was used singly and then associated with each of the other keywords to identify research published between 1973 and 2016.

¹ Court of Cassation, United Chambers, Judgement no. 25767 of December 22, 2015, available at: <http://www.neldiritto.it/appgiurisprudenza.asp?id=12072> (accessed November 22, 2018).

TABLE 1. Papers That Met All Criteria in Materials and Methods.

Selected articles (see notes for full citations)	Electronic databases: Medline, Cochrane Library, Scopus, Web of Science, and Science Direct	Search terms: "wrongful birth," "wrongful life" "medical negligence," "misdiagnosis in pregnancy," "malpractice claims," and "medical errors"
Costich (2006)	Yes	Yes
Evgenia (2012)	Yes	Yes
Faunce and Jefferys (2007)	Yes	Yes
Hassan et al. (2014)	Yes	Yes
Hensel (2005)	Yes	Yes
Howlett et al. (2002)	Yes	Yes
Manaouil et al. (2012)	Yes	Yes
Mondaca Miranda et al. (2012)	Yes	Yes
Pergament and Ilijic (2014)	Yes	Yes
Pioro et al. (2008)	Yes	Yes
Sakaihara (2002)	Yes	Yes
Sôritsa and Lahe (2014)	Yes	Yes
Toews and Caulfield (2014)	Yes	Yes
Whitney (2011)	Yes	Yes

Fourteen of the total of 70 articles retrieved and reviewed were deemed relevant for the purposes of this study (Table 1). Additional website resources used in the literature search process were legal journals not included in the aforesaid electronic databases.

II. RESULTS

A detailed description of the legislative norms and court case rulings for each of the 14 countries is given below. Table 2 presents a summative comparison of countries where compensation for injury (monetary or nonmonetary damages or both) for wrongful life, wrongful pregnancy/conception, and wrongful birth is admissible.

A. Italy

1. *Wrongful Birth and Wrongful Life*

Damages for wrongful life have been delineated by various court decisions. Law 194 admits only therapeutic abortion; after the first 90 days gestation, the law permits abortion only if there is a serious threat to the life or to the mother's physical or mental health, in the latter case,

TABLE 2. Cross-country comparison of admission/rejection of claims for compensation for non-patrimonial and patrimonial damage in wrongful life, wrongful conception, and wrongful birth actions.

Country	Wrongful life	Wrongful conception/pregnancy	Wrongful birth
England	No	Yes (only non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
France	Only in cases before enactment of Law 4, March 2002	_____	Yes (both patrimonial and non-patrimonial damage)
Estonia	No	Yes (both patrimonial and non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Germany	No	Yes (both patrimonial and non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Spain	No	_____	Yes
Austria	No	_____	Yes (both patrimonial and non-patrimonial damage)
Netherlands	Yes (both patrimonial and non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Greece	No	Yes (only non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Italy	No	Yes (only non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Australia	No	Yes (only non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Canada	No	_____	Yes (both patrimonial and non-patrimonial damage)
USA	Only in some states	Yes (both patrimonial and non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)
Chile	No	Yes (both patrimonial and non-patrimonial damage)	No
Japan	No	Yes (both patrimonial and non-patrimonial damage)	Yes (both patrimonial and non-patrimonial damage)

however, only if it is unlikely that the fetus can survive outside the womb.²

In addition, the reader is referred to Article 32 of the Italian Constitution.³ This underlines the fetus's "right to be born."⁴

In Italy, a child born with severe malformations not diagnosed prenatally and/or not communicated to the mother by the physician cannot obtain any compensation because the child has no right to decide between "non-life" and life; hence, the concept of "wrong life damages" does not exist. The child's parents can claim compensatory nonpecuniary damages, however, if they were unable to have the pregnancy terminated because of missed diagnosis of malformations but the requisites of Law 194/1978 regarding the serious threat to life or psychosocial health were satisfied. Compensation of nonpecuniary damage can be awarded; that is, for loss of the right to self-determination of the couple in their choice to have children in a responsible and aware manner. Judges take several factors into consideration when deciding damage awards, including moral suffering due to loss of the opportunity to terminate the pregnancy, anxiety and stress caused by concern about the child's future, and life changes to maintain the disabled child's well-being.⁵ Parents may also be awarded compensation for biological damage, including psychological damage, due to missed termination of pregnancy and the birth of a child with severe malformations. A recent decision by the Italian Court of Cassation included among compensable nonpecuniary damages for wrongful birth damage to the pregnant mother because of "loss of the chance" to know the fetus's real state of health at the time a diagnosis could have been made.⁶ Most court rulings have endorsed the assumption that Law 194/1978 regulating voluntary termination of pregnancy was

² Art. 6. Voluntary termination of pregnancy after the first 90 days' gestation can be performed (a) when pregnancy or delivery poses a serious threat to the mother's life; (b) when there are pathological findings, including severe fetal abnormalities or malformations that pose a serious threat to the mother's physical or mental health. Art 7. When the fetus can survive outside the womb, termination of pregnancy can be performed only when as per Art. 6, letter (a), and the physician performing the intervention must take all reasonable medical efforts "to save the life of the fetus." Law 194 of the Italian Republic, *Gazzetta Ufficiale della Repubblica Italiana*, Part I, May 2, 1978, No. 140, pp. 3642-3646.

³ Art. 32. "The Republic health as a fundamental right of the individual and a collective interest, and guarantees free medical care to the indigent. No one shall be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person." Constitution of the Italian Republic, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed November 24, 2018).

⁴ *Supra* note 1.

⁵ Rossetti M. Il danno da nascita indesiderata (2017), available at [http://www.treccani.it/enciclopedia/il-danno-da-nascita-indesiderata_\(Il-Libro-dell'anno-del-Diritto\)/](http://www.treccani.it/enciclopedia/il-danno-da-nascita-indesiderata_(Il-Libro-dell'anno-del-Diritto)/) (accessed January 2, 2017).

⁶ Section III, January 10, 2017, no. 243.

designed to protect the health and not the patrimony of the woman. Hence, the only compensable injury in cases of injury to the right to abortion are those derived from violation of the property protected under the law; that is, “the costs required to remove the economic difficulties that negatively impact on the woman’s health” (*See generally* Cass., sez. III, 8 luglio 1994, Luglio n. 6464 (It.) in Corr. Guir. 1995, 91).

Recently, another decision of the United Chambers of the Court of Cassation (*See generally* Cass., sez. un., 22 dicembre 2015, n. 25767 (It.)) has confirmed the concept that it is impossible in legal terms to recognize the value of nonexistence.

2. *Wrongful Pregnancy/Conception*

The courts have admitted litigation over medical negligence and award nonpecuniary damage to the mother for experiencing an unwanted pregnancy. The expenses for raising and maintaining an unwanted child have been reimbursed as the direct and immediate consequence of omission by a physician, according to the decisions of the courts of merit.⁷ The Supreme Court decided against these rulings, reasoning that the birth of a child, albeit unwanted, cannot be considered as damage even if the mother is living in precarious economic circumstances.⁸ Such conditions may be considered a cause for termination of pregnancy only if they have a potential influence on the mother’s psychophysical well-being.⁹

B. England

1. *Wrongful Birth, Wrongful Pregnancy/Conception*

In England, the concept of wrongful birth is well delineated. Wrongful birth actions arise when the couple claims that the pregnancy was not terminated due to “clinical negligence” in a medical setting.¹⁰ Wrongful birth results from failed sterilization, leading to the unwanted birth of a healthy child and from failed termination of pregnancy resulting in the birth of a child with congenital defects. In the former case, compensation is awarded to the parents for mental suffering and the distress of pregnancy and delivery, whereas monetary compensation for wrongful birth is rejected; that is, no compensation is awarded for costs associated with maintenance of the child because it is impossible to calculate a sum value of human life and the benefits associated with the existence of a

⁷ Courts of Cagliari, February 23, 1995; Tolmezzo, June 7, 2011, Genoa, September 28, 2002, Venice, September 10, 2002, Milan, March 10, 2014, Reggio Emilia, October 7, 2015.

⁸ Italian Court of Cassation, civil sec. III, July 8, 1994, no. 6464.

⁹ M. Hassan, L. Chitty, and H. Reardon. *Wrongful Birth: Clinical Settings and Legal Implications*, SEMINARS IN FETAL & NEONATAL MEDICINE 19, 312-316 (2014).

¹⁰ *Id.*

healthy child (*MacFarlane and Another v Tayside Health Board* [1999] 2 AC 59 (HL) (appeal taken from Scot.); *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, (HL) (appeal from Eng. & Wales)). In the latter case of failed sterilization or termination of pregnancy resulting in the birth of a disabled child, the parents are awarded compensation for maintenance of the child until it has reached legal age or compensation may also be extended beyond this age limit (*Meadows v Khan* [2017] EWHC 2990 (QB). Compliant citation. Link: <http://medical-negligenceteam.com/public/images/images/1511523230.pdf>).

2. Wrongful Life

No compensation is recognized the born child for the fact of simply having been born, albeit with severe malformations.¹¹

C. Spain

1. Wrongful Birth

Spanish law has only recently recognized the award of compensation for wrongful birth.¹² The right to compensation of the parents for the loss of the chance to terminate pregnancy is recognized for mental suffering, associated with the birth of a disabled child, in relation to moral injury and patrimonial injury associated with the health care costs of the disabilities.

2. Wrongful Life

No compensation is awarded for wrongful life because this concept is believed to contrast with Articles 15 and 10 of the Spanish Constitution that protect the right to life and human dignity.¹³ However, a recent ruling of June 10, 2010 (Supreme Court, appeal no. 4403/2008) awarded compensation to the disabled child, stating that, due to medical error, a person born with disabilities has the right to receive assistance that minimizes pain, suffering, and distress.¹⁴

3. Wrongful Pregnancy/Conception

The literature reviewed here makes no reference to this point.

¹¹ S. Zecchin, *Spunti di Natura Comparatistica in Tema di Danno da "Wrongful" Life*, *JUS-ONLINE* 3, 1-17 (2015).

¹² A. Mondaca Miranda, C. Aedo Barrena, and L. Coleman Vega. *Panorama Comparado del Wrongful Life, Wrongful Birth y Wrongful Conception. Su Posible Aplicación en el Derecho Chileno*, *IUS ET PRAXIS* 1, 19-56 (2015).

¹³ *Supra* note 11.

¹⁴ *Id.*

D. France

1. Wrongful Birth and Wrongful Life

In the noted *Perruche* case, the French Court of Cassation awarded compensation for injury sustained by Nicholas, a child born with severe defects resulting from undiagnosed rubella during the mother's pregnancy. This case led to the enactment of Law of March 4, 2002, subsequently overturned "Article L114-5 of the *Code de l'action sociale et des familles*, www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074069" which established that it was impossible to award compensation for the mere fact of having been born. The law contemplated two different situations: that the disability is congenital but not diagnosed in pregnancy because of medical negligence or that the disability resulted from medical negligence, specifying that the right to decide to terminate the pregnancy is denied in both situations. Nonetheless, only in the second situation can compensation be awarded the child because its disability was caused by medical negligence. In the former situation, only the parents can be compensated for not having been warned, which subsequently did not allow them to terminate the pregnancy.

The particularity of the law, termed "*dispositive antijurisprudence Perruche*,"¹⁵ resides in the fact that it is not retroactive; that is, it is not applicable to cases of children born before its enactment, leaving previous rulings in such cases still active. This is the reason why, in the opinion of the European Court of Human Rights, the Court of Cassation (decision of 8 July 2008), and the Constitutional Council, the position of all persons born before March 4, 2002, must be set equally regardless of the start date of the judicial proceedings.¹⁶ Furthermore, given the extent of injury correlated with wrongful life action, the Constitutional Council was mandated to establish the reason for this law, also in consideration of the need to allow physicians and health care institutions to stipulate professional liability insurance policies at acceptable rates. Recognition of such injury would have placed an enormous economic burden on health care providers and would have created the risk that patients would have lost access to health care. In response to the *affaire Perruche*, gynecologists and radiologists performing prenatal ultrasound examinations carried out work stoppages at their services.¹⁷

¹⁵ C. Manaouil and O. Jarde, *La Jurisprudence Perruche a-t-elle Encore un Avenir?* *Gynécologie Obstétrique & Fertilité* 40, 71-76 (2012).

¹⁶ C. Manaouil, M. Gignon, and O. Jardé, *10 Years of Controversy, Twists and Turns in the Perruche Wrongful Life Claim: Compensation for Children Born with a Disability in France*, *MED. LAW.*, 31, 661-669 (2012).

¹⁷ J. F. Costich, *The Perruche Case and the Issue of Compensation for the Consequences of Medical Error*, *HEALTH POLICY* 78, 8-16 (2006).

2. *Wrongful Pregnancy/Conception*

The literature reviewed here makes no reference to this point.

E. Germany

1. *Wrongful Pregnancy/Conception*

The German Federal Court of Appeals (Bundesgerichtshof, BGH) recognizes both a contractual basis and a noncontractual basis for compensation for injury resulting from medical error. Unwanted pregnancy violates not only the right to family planning but also constitutes a pregnant woman's bodily injury. The BGH has accepted wrongful conception and wrongful pregnancy actions and recognized bodily injury associated with pregnancy and delivery of the child. In its ruling, the Court distinguished between the birth of a healthy child and the costs associated with its maintenance: only such costs are compensable because, given that human dignity is a fundamental right, a child cannot be considered an injury and, hence, human life cannot be converted into monetary terms.

2. *Wrongful Birth*

Parents have the right to compensation for the wrongful birth of a disabled child. In such cases, the costs associated with the child's maintenance are recognized because the physician is held fully liable for the costs associated with the health care costs of the disabled child and for the costs of its maintenance, given that there was a contractual duty to prevent the birth of a disabled child and the associated costs. Also compensable is physical injury or bodily harm following completion of pregnancy and delivery but no compensation is awarded for mental distress associated with taking care of the disabled child.

3. *Wrongful Life*

The German courts reject wrongful life actions because it is believed that the birth of a disabled child cannot be compared to the non-birth of the child. In the opinion of the BGH, such action cannot be legitimized on either the basis of the law of delict or the basis of contract law. Furthermore, there is no contractual duty to prevent the birth of a disabled child, and such an event does not violate the interests protected under the Civil Code (Bundesgesetzblatt § 823, www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html). The duty derived from the

contract between the health care provider and the mother does not extend to protection of the child.¹⁸

F. Austria

1. *Wrongful Birth*

The Austrian Supreme Court recognizes the full economic loss (costs of health care and maintenance of the child) sustained by parents claiming wrongful birth.¹⁹ But like German law, the Austrian courts reject wrongful birth actions, reasoning that it is impossible for the courts to examine such cases, because humans have always accepted the limits of nature and third parties have no right to prevent or destroy it.

2. *Wrongful Life*

The Austrian courts have ruled that, as in wrongful life actions, the physician did not cause the defect but negligently omitted its diagnosis; therefore, absent the physician's legal duty to prevent the birth of a disabled child, there exists no causal nexus between the birth of a disabled child and the physician's conduct.²⁰

3. *Wrongful Pregnancy/Conception*

The Austrian Supreme Court rejected the claim for compensation of expenses sustained by parents for maintenance of an unwanted child. In its decision (Oberster Gerichtshof [OGH][Supreme Court] Sept. 14, 2009, 6 Ob 101/06f (Austria)), the Court reasoned that the birth of a healthy, albeit unwanted child, does not constitute compensable damage.

G. The Netherlands

1. *Wrongful Birth and Wrongful Life*

The Netherlands is the only European country that accepts both wrongful birth actions (brought by parents of a child born with serve disability undiagnosed during pregnancy) and wrongful life actions. In wrongful life actions, economic injury is fully compensated (costs associated with the welfare and health care of the disabled child), as is noneconomic injury (suffering sustained by having a child born with

¹⁸ D. Sõritsa and J. Lahe, *The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life. An Estonian Perspective*, EUROPEAN JOURNAL OF HEALTH LAW 21, 141-160 (2014).

¹⁹ W. Theiss, *Insufficient Insurance Coverage for Wrongful Birth*, available at: <http://www.lexology.com/library/detail.aspx?g=0f84a3b7-fb23-49b7-91b3-3d0e97e7f1a6> (accessed January 31, 2017).

²⁰ A. Osti, *Riflessioni in Prospettiva Comparata Sull'esistenza di un "Diritto a non Nascere" Alla Luce Delle Azioni Legali per Wrongful Life*, in *TEMI E PROBLEMI DI DIRITTO PUBBLICO COMPARATO* (L. Violini, ed., (2014).

disabilities).²¹ In the first case (Kelly case) in which damages for wrongful life were awarded, the Dutch Supreme Court (HR 18 March 2005, 2006 Nederlandse Jurisprudentie 606 nt JBMV) handed down its decision on May 18, 2005 in relation to the birth of a baby girl with severe defects resulting from negligence by a health care provider who, though aware of the father's chromosomal abnormality, did not conduct genetic testing to ensure that the chromosomal abnormality had been not transmitted to the unborn child. The decision was motivated by the consideration that the life of a person with disabilities, though of equal value to a "healthy" person, will be lived with greater difficulty and that adequate compensation could significantly assist in improving the disabled person's quality of life.²²

2. *Wrongful Pregnancy/Conception*

The literature reviewed here makes no reference to this point.

H. Estonia

1. *Wrongful Pregnancy/Conception*

Compensation for wrongful conception is admitted by the law and court decisions.²³ In cases where it is proven that, because of financial or social reasons, the couple does not wish to have other children, the Estonian Supreme Court (Riigikohus Tsiviilkolleegium [Supreme Court Civil Chamber] May 11, 2011, Kohtuasja 3-2-1-31-11, Kohtumäärus (Est.). Decision in case no 3-2-1-31-u of the Civil Chamber of the Supreme Court of May 2011.) considers termination of pregnancy as an extension of the woman's right to self-determination. Because termination of pregnancy affects the woman's psychophysical integrity and is performed by a health care provider, an omission of medical action determines the need to remedy the right to family planning and compensate bodily injury defined as "an intervention into the right of bodily self-determination." Furthermore, the physician's liability is only imputable to omitted diagnosis, which denied the couple's right to termination of pregnancy, because there are no grounds for the right of an unborn child not to be born. The right to monetary compensation is recognized for the costs associated with unwanted pregnancy in wrongful conception actions, as well as compensation for the costs associated with the child's maintenance. In this second case, the courts have leeway to discern

²¹ I. Giesen, *The Use and Influence of Comparative Law in "Wrongful Life" Cases*, *UTRECHT LAW REVIEW* 8, 35-54 (2012).

²² I. Giesen I, *Of Wrongful Birth, Wrongful Life, Comparative Law and the Politics of Tort Law Systems*, *TYDSKRIF VIR HEEDENDAAGSE ROMEINS-HOLLANDSE REG* 72, 257-271 (2009).

²³ *Supra* note 18.

whether injury can be recognized, identifying the principle of unpredictability of injury as breach of contract. Situations are recognized in which compensation can be limited by evaluating the existence of circumstances in which the parents are not held to provide maintenance of the child (adoption, abortion) but were not among these choices (i.e., reduction of the amount of compensation for the injury to the extent that the victim contributed to the injury). Bodily injury is defined as the pain and suffering sustained during delivery of the child, having to accept an unwanted child into the family, and the impact on family planning. Estonian law allows for compensation of nonmonetary injury due to bodily injury. Therefore, if it is assumed that wrongful conception is the cause of injury to the woman's health, then nonmonetary compensation may be contemplated.

2. *Wrongful Birth*

In wrongful birth actions,²⁴ full compensation may be awarded the couple if they can demonstrate that had they been warned of the unborn child's disability, they would have terminated the pregnancy. This, however, may be difficult to prove in court. Full compensation of nonpecuniary damage is awarded the parents of a child born with disabilities; however, such compensation covers only the costs of medical care and not the costs of maintenance of a child whose birth had been planned. Recognition of nonpecuniary injury is subject to evaluation by the justice, who must determine whether the duty to diagnose the malformation is operated in the protection of nonpecuniary interest or not. In such cases, compensation for nonpecuniary injury is based on the ascertainment of the fundamental rights of the couple; that is, the right to plan a family that may be violated by the omitted diagnosis of malformation of the unborn child but not by the parents' distress over such malformations or over the prospects of raising a child with disabilities.

2. *Wrongful Life*

With regard to wrongful life actions, no compensation is awarded the child born with undiagnosed malformations: although the rights of the child are protected under the contract stipulated between the physician and the parents, no injury is recognized as a possible "right not to be born" by the child.²⁵

²⁴ *Supra* note 18.

²⁵ *Id.*

I. Greece

1. *Wrongful Birth*

Wrongful birth action is permitted. Compensation for injury can be nonmonetary for injury to the right to decide whether to terminate the pregnancy or not and for the suffering sustained for the maintenance of a child with disabilities. Monetary compensation may be awarded for the medical costs associated with the pregnancy and with the health care of the disabled child.²⁶

2. *Wrongful Pregnancy/Conception*

Injury resulting from wrongful conception/pregnancy is recognized only as nonmonetary injury resulting from injury to the woman's right to decide whether to terminate pregnancy or not and in relation to the mental suffering derived therefrom. Monetary compensation for the maintenance of the child is not awarded.²⁷

3. *Wrongful Life*

Similar to other European countries, wrongful life action is not permitted because the unborn child is not considered to be a party of the contract stipulated between the mother and the physician or health care institution.²⁸

J. United States

1. *Wrongful Pregnancy/Conception*

The right to compensation is awarded to parents for the birth of a healthy but unwanted child resulting from failed sterilization.²⁹ In such cases, injury to the couple is defined as the suffering related to the failed procedure and the unwanted pregnancy, as well as to associated medical costs. No compensation is awarded for the costs associated with the child's maintenance, except for New Mexico's minority position (*Provencio v. Wenrich*, 261 P.3d 1089, 1096 (N.M. 2011).) that included the costs of raising a child born as a result of a failed sterilization procedure to the age of majority.

²⁶ S. Evgenia, *Wrongful Life and Birth*, MEDICINE AND LAW 31, 97-118 (2012).

²⁷ *Id.*

²⁸ *Id.*

²⁹ D. W. Whitney and K. N. Rosebaum, *Recovery of Damage of Wrongful Birth*, THE JOURNAL OF LEGAL MEDICINE 32, 167-204 (2011).

2. *Wrongful Birth*

Compensation is awarded for the birth of a disabled child because the health care worker's negligent conduct—though not having caused the malformations—resulted in the loss of opportunity to prevent conception or the birth of a child with disabilities. In such cases, nonmonetary injury may also be compensable.

Recently, in *Plowman v. Ft. Madison Community Hospital*,³⁰ the court has authorized wrongful birth action in Iowa, and in *Tillman v. Goodpasture*,³¹ the court has stated that no cause of action exists in Kansas for wrongful birth of a child.

3. *Wrongful Life*

Except for three states (Washington, New Jersey, and California), wrongful life actions are not permitted, based on the assumption that there exists no right “to be born as a whole, functioning human being.”³² In the majority of states, this type of claim for compensation for injury is explicitly prohibited by laws that address this issue, given that it is not possible to evaluate injury by comparing the value of a life without disability and the value of “non-existence.” Furthermore, it is not possible to evaluate the negative consequences of the recognition of such injury for the disabled person or for the public opinion and acceptance of the concept of disability in society.³³

K. Canada

1. *Wrongful Birth*

Wrongful birth action is admitted for the parents of a child born with severe disabilities resulting from omitted or erroneous prenatal diagnostic procedures. Injury is related to the mental suffering of the parents and the economic loss associated with maintaining a child with disabilities.³⁴

³⁰ 896 N.W.2d 393 (2017).

³¹ 424 P.3d 540 (2018).

³² D. Pergament and K. Ilijic, *The Legal Past, Present and Future of Prenatal Genetic Testing: Professional Liability and Other Legal Challenges Affecting Patient Access to Services*, J. CLIN. MED. 3, 1437–1465 (2014).

³³ W. F. Hensel WF, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*. HARV. C.R.-C.L. L. REV. 40, 141 (2005).

³⁴ M. Toews and T. Caulfield, *Physician Liability and Non-Invasive Prenatal Testing*, J. OBSTET. GYNAECOL. CAN. 36, 907-914 (2014).

2. *Wrongful Life*

No compensation is awarded in wrongful life action for the following reasons, among others: (1) public law does not recognize that non-existence is preferable to being born with disabilities, (2) because of the social burden of such recognition in relation to the dignity of living with disability,³⁵ and (3) the difficulty of calculating the injury to a person born with disabilities compared to “not having been born.”³⁶ Another important consideration is the potential conflict that could arise between the right of an unborn child to end its existence and the mother’s right to decide whether to terminate pregnancy or not.

3. *Wrongful Pregnancy/Conception*

The literature reviewed here makes no reference to this point.

L. Chile

Jurisprudence and legal doctrine have been reluctant to decide on who is the injured subject, based on the assumptions that “Un hijo no puede ser nunca concebido como un daño, ni económico ni moral, aunque esté aquejado de una dolencia. ... Si la vida humana es un valor fundamental de todo sistema jurídico civilizado, su conceptualización como daño reparable no puede ser sino un síntoma de barbarie,” which translates as “A child can never be thought of as a damage, neither economical nor moral, even if affected by illness. ... If a civil judicial system holds that human life is of fundamental value, its conceptualization as compensable damage can only be deemed a symptom of barbarism.”³⁷

1. *Wrongful Birth and Wrongful Life*

Because termination of pregnancy is illegal in Chile, the injuries of wrongful birth and wrongful life, which contemplates termination of pregnancy as an alternative to the birth of a child with disabilities, are not recognized.³⁸

2. *Wrongful Pregnancy/Conception*

The courts have permitted claims for injury resulting from wrongful conception based on medical negligence in sterilization. Recovery is

³⁵ M. Pioro, R. Mykitiuk, and J. Niskier, *Wrongful Birth Litigation and Prenatal Screening*, CMAJ. 179, 1027-1030 (2008).

³⁶ M. J. Howlett, D. Avard and B. M. Knoppers, *Physicians and Genetic Malpractice*, MEDICINE AND LAW 21, 661-680 (2002).

³⁷ *Supra* note 12.

³⁸ *Id.*

permitted for both economic and non-economic injury (Corte de Apelaciones de Antofagasta, 2 de mayo 2012, “Currihual Pesche, Sandra c. Castillo Pinto, Jaime,” Rol de la causa: 373-2011, Medical Negligence, R.D.J. (Chile)).

M. Japan

1. Wrongful Birth and Wrongful Life

Since 1979 (*Watanabe v. Fujima*, Tokio District Court, September 18, 1979), the injury of wrongful birth has been recognized for parents of children born with severe disabilities. Compensation is awarded based on the interpretation of Article 14 of the Mother’s Body Protection Act (*Izumi v. Odawara Hospital* (1983) Tokyo District Court, 22 July 1983; *X v. Hoshi* (1992) Tokyo District Court, 8 July 1992; *Suzuki v. Hino* (1992) Maebashi District Court, 15 December 1992), which allows termination of pregnancy up to 22 weeks’ gestation if “the continuation of pregnancy or delivery may significantly damage the person’s physical health due to bodily or economic reasons.” Permitting only therapeutic abortion, the justices have argued that compensation for injury resulting from wrongful birth is to be awarded for the suffering and pain associated with the impossibility of the couple to prepare themselves psychologically for the birth of a disabled child, though no compensation is awarded for the welfare and health care of the child.³⁹

2. Wrongful Pregnancy/Conception

The literature reviewed here makes no reference to this point.

N. Australia

1. Wrongful Birth

With regard to wrongful birth, parents in some states (Victoria, Western Australia, Northern Territory, Tasmania) can file for compensation for suffering and pain associated with pregnancy and delivery, medical expenses for prenatal and postnatal treatment, and future costs associated with maintenance of the child (Harrison, Sarah, *Wrongful birth claims & recovery of damages for the consequential costs of raising a child – the position in Western Australia*, HWL Ebsworth Lawyers (Aug. 3, 2018), <https://hwlebsworth.com.au/wrongful-birth-claims-recovery-of-damages-for-the-consequential-costs-of-raising-a-child-the-position-in-western-australia/>).

³⁹ M. Sakaiharu, *Wrongful Birth Claim in Japan*, MED. SCI. LAW 42, 258-260 (2002).

2. *Wrongful Pregnancy/Conception*

In other states (New South Wales, South Australia, Queensland), the grounds for wrongful conception and wrongful pregnancy are more restricted (*Id.*).

3. *Wrongful Life*

No compensation is awarded a child born with severe disabilities that, had they been duly diagnosed, would have led to termination of the pregnancy. Though much criticized in legal doctrine,⁴⁰ the decision of the High Court (*Harriton v. Stephens* (2006) 226 CLR 52 (Austl.); *Waller v. James and Waller v. Hoolahan* (2004) 226 CLR136 (Austl.)) is based on the principle that it is not possible to attribute to an unborn child the right to self-determination with regard to its death but only a right to being protected against injury during its intrauterine life. That is, “because they cannot prove that their lives of suffering and need amount to damage in the eyes of the law, since it is impossible to compare a life with disabilities to non-existence.”⁴¹

III. DISCUSSION AND CONCLUSIONS

This comparative analysis identified several common similarities, but also specific differences, across countries in the medicolegal assessment of and legal opinion on injury in cases of wrongful birth, wrongful conception/pregnancy, and wrongful life (Table 2).

Common to all three types of legal action is the controversy surrounding them, which makes for difficult interpretation of the legal and ethical principles that the diverse legal systems share.

Most legal systems of the countries reviewed in this study admit the parents’ right to claim compensation for wrongful birth and wrongful conception/pregnancy resulting from medical error. The father of the born child is recognized as the holder of the rights derived from the contract stipulated between the health care provider and the mother. On this contractual basis the rights of third parties are protected. Differences begin to appear with regard to the types of injury that may be compensated: though compensation for bodily injury resulting from suffering and distress associated with pregnancy and delivery is awarded the parents by

⁴⁰ T. Faunce and S. Jefferys, *Abandoning the Common Law: Medical Negligence, Genetic Tests and Wrongful Life in the Australian High Court*, J. LAW MED. 14, 469-477 (2007); D. Hirsch, *Rights and Responsibilities in Wrongful Birth/Wrongful Life Cases*, UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 29, 233-238 (2006).

⁴¹ Hirsch, *supra* note 38.

nearly all legal systems in cases of wrongful conception/pregnancy, systems differ on whether and the extent to which compensation for non-economic injury may be recognized. For example, compensation for the maintenance of a child born healthy is not recognized in England, Italy, Greece, and the United States on the grounds that it is impossible to calculate a single value of human life and the benefits of having a healthy child. In Germany and Estonia, the costs associated with the maintenance of a healthy child may be awarded, though the courts reserve the discretion to decide whether compensation may be reduced or even rejected.

In wrongful birth actions, nearly all legal systems admit compensation for bodily injury and economic injury in cases of the birth of a disabled child. In such cases, Italian and Estonian courts generally recognize compensation of health care costs but not the costs associated with the maintenance of a child whose birth had been planned.

Except for The Netherlands and certain states in the United States, compensation in wrongful life actions is not recognized because the jurisdictions choose not to recognize “right not to be born” and to establish that nonexistence is preferable to having been born with disabilities. Some states have also reasoned their decisions on the grounds that defining such injury is difficult. Other states highlighted the conflicts that may arise between the desire not be born with disabilities and the mother’s choice to terminate the pregnancy. Other states recognized the “right not to be born” as the ethical depreciation of a life lived with handicaps. Some states instead highlight the need to cap compensation awards; otherwise, physicians would be unable to obtain adequate professional liability insurance coverage.

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