This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker

# Wrongful Testing and Its Lively Consequences*

*W.Th. Nuninga***

## Abstract

*In this article a consecutive comparison will be made between the approaches taken towards wrongful birth and wrongful life cases in the Netherlands and in England and Wales. The systems will be evaluated in the light of the best interests of the child, the balance struck between all moral convictions involved, and legal fairness. It will be argued that the approach taken in the Netherlands is more favourable in most respects, but could improve the balance between all moral convictions involved and could enhance legal fairness by limiting the claim for material damages to costs associated with the disability of the child.*

**Keywords:** wrongful life, wrongful birth, comparative law, best interests of the child, balancing convictions.

## A. Introduction

The subject of this article will be the claims that may arise from a situation in which a child is born with a congenital disease – that is, a situation where a child has a disease or disability that is either present at birth or for which the seeds are present at birth[1] – which was discoverable during the pregnancy, but was either negligently not discovered or negligently not mentioned to the mother. These claims are often described as 'wrongful birth' or 'wrongful life' or both. These terms do, however, indicate slightly different situations, and it is important to keep them distinct. A wrongful birth case is a case in which the parents seek compensation for any damage related to the birth of a disabled child that would have been prevented had they been correctly informed or tested. A wrongful life case

* This publication is based on a paper written by the present author, Imke Kalisvaart, and Nandi Kruijswijk in October 2012 as part of the comparative law methodology course of their bachelor's degree at Utrecht University. The course was taught by Prof. Dr. K. Boele-Woelki, whom the author would like to thank for her support in writing this publication. Special thanks go to Imke Kalisvaart, whose invaluable research was the basis for the analysis of the approach in the Netherlands. The current text on the Netherlands is an adaptation of her draft.

** W.Th. Nuninga is a Legal Research Master's student at Utrecht University.

1 J.K. Mason, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction,* CUP, Cambridge, 2007, p. 59.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



arises from the same facts but concerns the case where the child itself seeks compensation for the alleged wrong.[2]

The aim of this article is to reflect on what approaches are desirable concerning what types of damages should be recoverable in these situations, by whom they should be recoverable and what reasons could be offered for awarding certain types. Towards this end a comparative approach is used. In deciding on what systems ought to be compared, the following has been decisive. Dutch law is very progressive in that it is one of the few systems to allow a claim for wrongful life.[3] English law, on the other hand, struck out such a claim many years ago.[4] The same progressive/conservative dichotomy can be seen in the award of damages in the wrongful birth cases. Where the Netherlands appear to have a more liberal approach to this point,[5] England and Wales appear not so lenient.[6]

The considerations displayed above beg the question as to why and how these jurisdictions differ in awarding damages in wrongful birth and wrongful life cases. What grounds for bringing legal action are available to them? If a ground exists, what types of damage are recoverable by them? And to what extent are these types of damage recoverable? The approaches in both systems will be described consecutively. The description of both legal systems will be followed by a comparison and an evaluation of both systems. In the evaluation, it will be discussed which solution is to be preferred in in the light of (i) the best interests of the child, (ii) the balance struck between all moral convictions involved – *i.e.* those of the parties and third parties – and (iii) legal fairness. Conclusions follow.

## B. England and Wales

### *I. Legal Actions Available to Those Involved*

#### *1. The Tort of Negligence*

A potential basis for an action in a wrongful birth case is found in the tort of negligence. The tort of negligence is actionable where there is: (i) a duty of care, (ii) a breach of duty of care, (iii) a causal link between the breach and the damage, and (iv) damage.[7] Although it is true that no action for negligence can be brought if there is no demonstrable damage[8] and that a duty of care exists only to prevent a

2 Another term used in academic literature is 'wrongful pregnancy'. This covers the situation where the parents claim compensation for the occurrence of a pregnancy despite medical contraception procedures. The approach to wrongful pregnancy cases as such falls outside the scope of this article and will not be discussed. *See also*: Mason, 2007, at 4-5.

3 I. Giesen, 'The Use and Influence of Comparative Law in "Wrongful Life" Cases', (2012) 8 *ULR* 2 p. 36.

4 *McKay v. Essex Area Health Authority* [1982] 1 *QB* 1166.

5 Dutch Supreme Court (DSC) 18 March 2005, *LJN* AR5213.

6 *McFarlane v. Tayside HB* [2000] 2 *AC* 59.

7 M.A. Jones & A.M. Dugdale (eds.), *Clerk & Lindsell on Torts*, London, Sweet & Maxwell/Thomson Reuters, 2010 (hereinafter: Clerk & Lindsell, 2010), p. 415.

8 Clerk & Lindsell, 2010, pp. 52, 415.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



certain type of damage,[9] for the sake of functional analysis this paragraph will aim to disregard the existence of actual damage and merely assess whether any act in a wrongful birth situation can be qualified as wrongful. Of the four requirements of the tort of negligence, the duty of care determines whether a certain person may owe a duty to care to another. A duty of care arises if a particular harm is reasonably foreseeable, if there is proximity between the parties and whether it would be fair, just and reasonable to impose such a duty.[10] The content of this duty – and thus whether there has been a breach of it – is then determined by setting a standard of care.[11]

a) The Mother

For the mother, the duty of care could be construed as follows. First, it would seem apparent that the birth of an unwanted child is the foreseeable consequence of negligent conduct or advice. Second, it would seem difficult to picture a person with whom the doctor would be in a more proximate relationship than his patient (the mother). That it is fair, just and reasonable to place a doctor under a duty of care towards his patient would also seem quite self-evident.[12] As for the content of this duty – or the standard of care – the following must be noted. In *Sidaway v. Bethlem Royal Hospital*, Lord Templeman clarified the *Bolam* test[13] for the situation of negligent medical advice, by stating that standard of care of the medical care provider is one to inform the patient in a way that he, the patient, can make a balanced judgment.[14] This can be extrapolated to wrongful birth cases where the patient is deprived of the opportunity to make this judgment because she was not informed properly. It requires no further clarification that a negligent failure to discover the congenital disease would, likewise, deprive the patient of that same opportunity. In any case, that behaviour would at least fall short of the standard of care to be expected from a medical care provider. In the wrongful birth case *Salih*,[15] Buttler-Sloss LJ made it very clear that negligent advice concerning the health of the unborn child is, without doubt, a breach of the duty imposed on the medical professional by *Bolam* and *Sidaway* and that any damage arising from such negligent advice should be recoverable.[16] On the question of

9 *Ibid*., pp. 517-518.

10 Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 *AC* 605, at 617.

11 Clerk & Lindsell, 2010, pp. 52, 517-518.

12 A. Jackson, ‘Wrongful Life and Wrongful Birth – The English Conception’, 17 *J Leg Med,* 1996, p. 349, at 351.

13 *Bolam v. Friern Hospital Management Committee* [1957] 2 *All ER* 118. In which the standard of care of a medical professional towards his patients is determined as that of a “reasonable professional.”

14 *Sidaway v. The Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] *AC* 871, at 904.

15 *Salih v. Enfield Health Authority* [1990] 1 *Med L R* 333.

16 In the subsequent sections of this article it will be assumed that the medical care provider has in fact informed his patient negligently, and that the mother would in fact have terminated the pregnancy had she been correctly informed. Note, however, that it is of vital importance to the claim that both aspects are proven. For an example where the action failed on this point, see: *Gregory v. Pembrokeshire Health Authority* [1989] 1 *Med LR* 8.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



causation, Buttler-Sloss LJ held that "[t]he child was born as a direct result of the lack of advice which, if given, would have resulted in a termination of pregnancy".[17] Additionally, it would appear that the mother (and the father) can bring a claim for loss of autonomy if the facts give rise to it.[18]

The consideration that a child should in general be seen as a blessing is addressed when assessing whether there is some form of damage and whether it is recoverable.[19]

b) The Father

The father often has a different position when it comes to the basis of his action in tort. Since he is not the doctor's patient, the line of reasoning deployed for the mother is unfit to found his action. However, it would appear that the loss of autonomy claim could be brought by him too. It must be submitted that if the requirements of proximity and foreseeability are satisfied, liability towards the father for the consequences of the birth of his handicapped child may arise as well.[20] It is submitted that if the duty owed to the father can be construed in this manner, the duty owed to the father will hardly differ from that owed to the mother. There is no clear authority on this point, but the issue has been raised obiter by Lady Justice Hale, who tentatively notes that "if there is a sufficient relationship of proximity between the tortfeasor and the father who not only has but meets his parental responsibility to care for the child, then the father too should have a claim".[21] This view has been cited[22] but never applied as no such case has come up. It is submitted, however, that Hale LJ's argument appears correct. The mirror image of her reasoning is applied in *McFarlane*, where it was held that the mother could claim for the unnecessary pain and suffering from childbirth, even though the negligence lay in the performance of the father's vasectomy.[23]

c) The Child

When envisioning a duty of care towards an unborn child two main objections come to mind: (i) the child is not born when the negligent action occurs, and (ii) if a duty of care exists, would this mean that the doctor owes the child a duty to prevent the child's own life? In regard to the first objection it must be noted that although it may appear slightly problematic that the doctor's negligent act takes place before the child is born, it has been held in *Burton v. Islington Health Authority*[24] that a doctor can in fact owe a duty of care to an unborn child. The real prob-

17 *CES v. Superclinics (Australia) Pty Ltd* [1991] 7 BMLR 1, at 4.

18 *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309, at para. 123; *Chester v Afshar* [2004] UKHL 41; [2005] AC 134, at para. 18.

19 *See* the approach in *McFarlane v Tayside* [2000] 2 AC 59.

20 Liability towards someone other than the patients is deemed possible, *see:* Clerk & Lindsell, 2010, p. 640; cited there: *Evans v Liverpool Corp* [1906] 1 *KB* 160.

21 *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] *QB* 266, Hale LJ at 294.

22 *Hibbert Pownall & Newton v Whitehead & McLeish* [2008] *EWCA Civ* 285, Laws LJ at para. 48.

23 *McFarlane v Tayside HB* [2000] 2 *AC* 59.

24 *Burton v. Islington Health Authority* [1992] 3 *All E.R.* 833.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



lem lies with the second objection. Ackner LJ held in *McKay v. Essex Area Health Authority*[25] that the fact that the child is essentially claiming that the non-termination of its own life was a legal wrong was a hurdle that could not be overcome. Ackner LJ found that a "duty of care to a person can [not involve] the legal obligation to that person, whether or not in utero, to terminate his existence. Such a proposition runs wholly contrary to the sanctity of human life."[26] In other words, the sanctity of human life demands that no one can ever owe a duty to another to end that other person's life. The consequence is simple: the wrongfully alive child cannot bring an action in tort for the negligent treatment or advice of the doctor.

*2. Contract*

In most wrongful birth cases the action was brought in tort.[27] The main reason for this would appear to be the fact that it has been held that there would be no reason to distinguish between the two actions.[28] Two reasons can be given. First, the two bases will result in the same duty.[29] In addition, the subsequent questions of what damages and to what extent damages should be recoverable are subject to the same policy considerations.[30] Even though this renders the basis redundant in practice, a brief discussion will be given below.

a) The Mother

Apart from being very unfruitful, bringing an action for breach of contract would appear difficult for the mother for two additional reasons. First, a contractual claim would seem possible only if the patient has received private treatment.[31] If not, there is no actionable contract. Secondly, bringing a claim for breach of contract would have a limited effect, as the doctor generally does not warrant a cure.[32] A failure to discover congenital disabilities in the child would thus not be a breach of contract. It is submitted that it could be argued that the doctor does warrant to inform properly, but it is emphasised that this would only sort effect in the cases where the information rather than the treatment was negligent and that the duty thus found would be no broader than the tortious duty under Salih.

b) The Father

If a claim for breach of contract is a rather unlikely course of action in wrongful birth cases for the mother, it is an even more unlikely course of action for the father. Even if a contract is concluded between the patient and the mother, con-

25 *McKay v. Essex Area Health Authority* [1982] 1 *QB* 1166.

26 *Ibid.*, p. 1188.

27 *e.g. Mckay And Another v. Essex Area Health Authority And Another* [1982] 1 *QB* 1166; *Emeh v. Kensington And Chelsea And Westminster Area Health Authority And Others* [1985] *QB* 1012; *Faraj v. NHS Trust* [2006] *EWHC* 1228.

28 *Emeh v. Kensington And Chelsea And Westminster Area Health Authority And Others* [1985] *QB* 1012, Purchas LJ at 1028.

29 Compare *Thake v Maurice* [1986] *QB* 644 and *Salih v. Enfield Health Authority* [1990] 1 *Med L R* 333.

30 Jackson, 1996, at 372.

31 Jackson, 1996, at 372, n. 96.

32 *Thake v. Maurice* [1986] *QB* 644.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



strued to include a warranty to inform properly, and found to have been breached by the failure to inform, the father still remains a third party to the contract. As a third party he cannot, due to the common law rule of privity in *Tweddle v. Atkinson*, [33] bring an action for breach of it.[34] Thus, his position is doctrinally different from that of the mother. Unlike the father, she might - albeit under limited circumstances - be able to claim for breach of contract. However, as the actions in tort and contract are highly likely to lead to the same damages, it is submitted that the father's position is, in practice, not very different from that of the mother.

c) The Child

It should be noted that an action for breach of contract is not very likely to help the child's case. The child is a third party to the contract between the mother and the medical care provider, and due to the common law rule in *Tweddle v. Atkinson*, the child cannot, as a third party, bring an action for breach of it. It is submitted that Section 1(1) of the Contracts (Rights of Third Parties) Act 1999 offers no solution either. The child cannot be a purported beneficiary of the medical contract. After all, its 'benefit' would be its right to non-existence. It is precisely this alleged right that was not recognised to be a right under English Law in *McKay*.

*II. Recoverable Damages*

Having identified the possible legal wrongs – being actions in both contract and tort – focus will now be laid on what damages are recoverable. It is necessary to emphasise, once again, that whether the action is brought in tort or contract is irrelevant as the principles applicable to what damages are recoverable are identical.[35] At the outset it should therefore be noted that no distinction between the two bases of action will be made in this paragraph. The structure of this paragraph is as follows. First, the possible heads of damage – *i.e.* costs that parties might consider damage consequent upon the birth of a disabled child – will be identified. Next, the position of the mother will be outlined. Finally, based on decisions from earlier cases, a suggestion will be made as to what damages the father is likely to recover.

For the sake of functional analysis, the present author has conceptualised five types of damage that are potentially recoverable. These five types are not found anywhere in English law, but were developed by the author to give a clear, functional overview of both legal systems. Note that this is also not a mode of comparing: it is the factual and functional display of types of damages, stripped of their domestic labels and classifications. The types are: (i) the costs of raising a child; (ii) additional costs associated with the disability of the child; (iii) material damages as compensation for any medical and/or psychological treatment the

33 *Tweddle v Atkinson* [1861] 1 *B&S* 393.

34 It is submitted that Section 1(1) of the Contracts (Rights of Third Parties) Act 1999 offers no solution either. It would seem unlikely that the father is considered a purported beneficiary of the medical contract.

35 Jackson, 1996, at 372.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



parents may need; (iv) moral damages as compensation for psychological harm as a result of the pain, suffering, and other discomfort resulting from childbirth and pregnancy; and (v) moral damages as compensation for the psychological harm of having to raise a disabled child.

*1. The Mother*

For many years English law allowed the mother to recover the costs of bringing up a child, regardless of whether it was healthy or disabled.[36] This meant that, as far as economic losses go, the mother could recover damages for both costs arising from raising a (healthy) child and additional costs arising from raising a disabled child. Type (i) damages or types (i) & (ii) damages together were, thus, recoverable. This was put to an end by the decision in *McFarlane v. Tayside,* where the House of Lords held that the costs of raising a healthy child were not recoverable.[37] This decision is one on wrongful pregnancy, rather than wrongful birth, but it nevertheless led the Court of Appeal in *Parkinson v. St James Hospital*[38] to the conclusion that English law can offer relief only in wrongful birth cases for the additional costs of raising a disabled child, provided the source of the disability is genetic.[39] In *Rees v. Darlington*[40] the House of Lords again stressed that English law does not allow compensation for the birth of a child. Instead, it awarded a conventional sum of £15,000 to reflect the wrong done to the parents. The question as to whether *Parkinson* was correct was left open by the Law Lords.[41] It is submitted that on the basis of these authorities only type (ii) damages appear recoverable. Type (i) damages are not considered 'damages', though a conventional sum could be awarded to reflect the wrong done. Whether this is a valid approach depends on what reasons are adopted for justifying *McFarlane*. Unfortunately, the Law Lords provided several very divergent explanations and justifications for their decision, leaving the reader with very little feeling for what the ratio decidendi of the case was.[42] Guidance must thus be found elsewhere. Jesse Elvin concludes from subsequent case law that the 'deemed equilibrium' theory – in which it is said that the benefits of having a

36 *Thake v. Maurice* [1986] 2 *QB* 84; *Emeh v. Kensington & Chelsea & Westminster Area Health Authority* [1985] *QB* 1012. These cases concerned the mother, but it can be assumed that in this respect no difference between the father and the mother should be made. After all, if the father's action succeeds, it will be precisely because he too will bear theses costs or because of his loss of autonomy. Compare, in this respect, Lady Justice Hale in *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] QB 266, at 294.

37 *McFarlane v Tayside HB* [2000] 2 *AC* 59.

38 *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] *QB* 266.

39 *Groom v. Selby* [2001] *EWCA Civ* 1522.

40 *Rees v. Darlington Memorial Hospital NHS Trust* [2003] *UKHL* 52; [2004] 1 *AC* 309.

41 Clerk & Lindsell, 2010, p. 664, n. 490: "On the basis of the three dissentients in Rees (Lords Steyn, Hope and Hutton) regarded Parkinson as correct. Of the majority, Lords Bingham and Nicholls thought no claim should lie. But Lord Millett left the point open, as did Lord Scott: though the latter thought a distinction might have to be drawn between cases where the failed sterilization was with a view to preventing the birth of a disabled child and those where it was not."

42 *McFarlane v. Tayside* [2000] 2 AC 59; Lord Slynn at 66; Lord Steyn at 76; Lord Clyde at 97; Lord Hope at 84; Lord Millet at 106.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



child outweigh the costs of raising it – cannot have been the ratio decidendi of the case, but that in fact distributive justice arguments ("fairness") have led to the award of type (ii) damages in later judgments.[43] The present author would agree that the predominant argument for the decision in *McFarlane* and its successors is one of distributive justice. That makes *Parkinson* the more comprehensive: while distributive justice perhaps demands, as it did in *McFarlane*, that the mother of a healthy child in a wrongful pregnancy case should not be 'compensated' for this – the reason for this being that another woman perhaps desperately longs for the birth of a healthy child but is denied it – the same is not true of a disabled child in a wrongful birth case. Continuing with this line of thought, an argument could be made that the Law Lords in *Rees* were also guided by distributive justice in awarding a conventional award. Though awarding type (i) damages would seem unfair to other parents, a wrong in these cases is done and wrongs must at least be responded to by the law. It is submitted, however, that even though this would be a way of aligning these apparently diverging judgments, it is not a very strong one.

As for type (iii) damages, it should be noted that these are recoverable under English law. Their Lordships were not particularly equivocal in their reasoning in *McFarlane*, but it would seem they all agreed that medical expenses due to the pregnancy, and potentially the costs of psychiatric treatment the mother would need, were recoverable.[44]

Type (iv) damages appear to be recoverable for the mother. In *McFarlane*, where the child was born healthy, the pain, suffering and loss of amenity associated with pregnancy and childbirth were held to be recoverable. In *Parkinson*, the key case for wrongful birth specifically, these damages were quickly awarded too. These damages can be regarded as compensation for the pain and suffering of pregnancy and childbirth.

Type (v) damages – *i.e.* the psychological effects of knowing that one has to give birth to a disabled child and raise him or her – are not recoverable *per se*.[45] However, Hale LJ adds an asterisk to this rule in *Parkinson* by stating that "[although] psychological harm falling short of psychiatric injury would not attract compensation in itself, [...] the overall impact upon the claimant of her injuries may be reflected in the quantum of damages for pain, suffering, and loss of amenity."[46]

### *2. The Father*

As it is not beyond any doubt that the father has a claim in situations as the ones presently discussed, it is highly contentious to speculate on what types the father might possibly claim. It should be emphasised that no conclusions are drawn in this respect. Nevertheless, in this sub-paragraph some suggestions on his position are made.

43 J. Elvin, 'Are Healthy Children Always a Blessing?', (2002) 61 *CLJ* 3, pp. 516-519, p. 518.

44 *McFarlane v. Tayside HB* [2000] 2 AC 59, at 74, 84 and 89.

45 *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] *QB* 266.

46 *Ibid*., Hale LJ at 288.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



In displaying the position of the father, potentially recoverable damages will be classified according to the same types as has been done above for the mother. It is clear that the father and the mother will have slightly different positions in respect of some of these types, but the overall impact on them is sufficiently similar to allow for this identical assessment. It is obvious, of course, that type (iv) damages for the pain and suffering resulting from pregnancy and childbirth will never be suffered by the father, and it requires no explanation that no further mention of this head of damage will be made.

As for the economic losses the father may bear, an interesting guidance can be derived from Lord Steyn's comment in *McFarlane*, who notes that "in respect of the claim for the costs of bringing up the unwanted child, it would be absurd to distinguish between the claims of the father and the mother".[47] It is submitted that it would be absurd to distinguish between the two since the only basis for the father's claim can be the fact that he is in practically the same position as the mother when it comes to raising the child. In this article these losses qualify as type (i) and (ii) damages. Both parents[48] suffer these losses, and accordingly both should be able to receive compensation. As it is clear from *McFarlane* that the mother can in this respect only recover type (ii) damages, the same will be true for the father. It requires no explanation that the father cannot recover costs that have already been recovered by the mother: double recovery is not permitted.

Whether the father should be able to recover type (iii) material damages for psychiatric harm he may suffer is not clear. It would seem that, when assessing the mother's claim in *McFarlane*, their Lordships had in mind the situation where psychiatric harm results from the pregnancy and childbirth of an unwanted child. As the father undergoes neither, it could be submitted that he cannot recover these damages. Furthermore, it should be added that when Lord Steyn commented that it would be absurd to distinguish between the father and the mother, he had in mind a duty to prevent economic loss – not one to prevent psychiatric harm. Nevertheless, the duty owed by a medical professional towards someone other than the patient can include a duty to prevent diagnosable psychiatric (*i.e.* material) illness.[49] The present author would therefore suggest that type (iii) damages are potentially recoverable by the father.

As for type (iv) damages, it has already been noted that these cannot be recovered by the father as he does not suffer them. The result of this is that he has no head of damage in which the 'overall impact' upon him can be reflected.[50] As type (v) damages are not recoverable *per se* for the mother, it is submitted that they are not likely to be recoverable for the father at all.

47 *McFarlane v. Tayside HB* [2000] 2 AC 59, Lord Steyn at 79.

48 For argument's sake it is assumed that the parents raise the child together. If the father is not involved, it is very unlikely his claim will succeed in the first place.

49 *Cf. Farell v. Avon Health Authority* [2001] *Lloyd's Rep. Med*. 458.

50 *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] QB 266, Hale LJ at 288.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



### *III. Extent of Recoverable Damages*

Having identified the different types of damages that can be recovered by the parents and the child, the extent to which these damages can be recoverable will now be discussed.

#### *1. The Mother*

There is no clear English authority on the extent to which type (ii) damages should be recoverable. *Urch v. Hammersmith Hospital*[51] concerned this point, as the defendants denied they were liable for the child's costs of living beyond its age of majority. This case was – fortunately for the parties but unfortunately for medical lawyers – never decided as it was settled before it went to court. Counsel for the claimants, Robert Glancy QC, provides an interesting overview of common law on this point. He cites US and Canadian case law, in which it is indicated that no obligation to compensate for costs of living should be owed to the parents after the child reaches the age of majority. He contends, however, that the real reason for denying liability on this point was that, since the State will act as care provider from the moment the child reaches the age of majority until its death, the parent's legal obligation to provide for the costs of living of the child will cease to exist.[52] Glancy then argues that careful analysis of the Canadian cases indicates that, had the State not been the caregiver after the child reaches majority, such a recovery would in fact be possible. Furthermore, he draws a parallel with the voluntary care provider and his/her rights to damages. Since it is unlikely that the mother will completely terminate her care at the child's eighteenth birthday, he suggests that these damages should be awarded.[53] Despite these views being very interesting and the suggested outcome very recommendable, there is no direct English authority to support the statement that damages for the costs of living beyond the point where the child reaches majority are recoverable. It is submitted, therefore, that here is a slim possibility that the parents can claim damages beyond the child's legal majority.

Type (iii) damages too have no 'cap': they are indefinite as long as they serve to compensate the medical expenses relating to psychiatric damage. This does, of course, bring with it a question of causation. Generally, English law deploys a 'but for' test, which implies that all damages that would not have occurred but for the negligence are recoverable.[54] According to, among others, Lord Hoffmann, [55] this must be a common sense test. Deciding to what extent these damages are recoverable will therefore be a very factual assessment.

As for the extent of the damages recoverable solely by the mother, the following can be noted. The moral damages related to childbirth (type (iv) damages) take the form of a lump sum awarded by the court. The court has discretion in

51 Not published, not decided. But *see* R. Glancy, 'Damages for Wrongful Birth – Where Do They End?', (2006) *JPI Law* 3, pp. 271-279, at 272.

52 Glancy, 2006, at 272.

53 *Ibid*., at 273.

54 J. Steele, *Tort Law. Text, Cases, and Materials,* OUP, Oxford, 2009, p. 178.

55 *Environment Agency v. Empress Car Co. Ltd.* [1998] 2 WLR 350.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



deciding on the extent of these damages.[56] This discretion – as has been mentioned above – does allow type (v) damages to be reflected in a sense. There is no clear 'cap' on this award, but it is not likely to be very high.

*2. The Father*

As the father can recover only type (ii) damages by means of equating his position with that of the mother, it is submitted that it is quite unlikely that there will be a distinction between the father and the mother in this respect. Double recovery is prohibited. Type (iii) damages will, if recoverable, be recoverable to the extent that they are caused 'but for' the negligence of the medical care provider. This factual link of causality is deployed for the mother too. Any award made to the mother on this head of damage will not harm the father's claim, as these damages are suffered independently. It would seem quite obvious that the English courts will aim to achieve consistency between the awards made to the mother and those made to the father, as the duty owed to the father exists only by virtue of this consistency.

## C. The Netherlands[57]

### *I. Legal Actions Available to Those Involved*

*1. Tortious Act*

A tortious act consists of four elements under Dutch law. First, a tortious act must have occurred. A tortious act is defined in the Dutch Civil Code ("DCC") as "a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct".[58] Secondly, this tortious act must be attributable to the alleged tortfeasor. Thirdly, damage must have occurred. And fourthly, a causal link between the unlawful act and the damage must be established.[59] This paragraph will focus solely on the first element: the question whether any act in a wrongful birth situation might be qualified as a tortious act.

a) The Mother

In a relationship between a patient and a care provider, the latter is bound by a contract of service.[60] As will be seen below, the failure to detect genetic disabilities the child suffers from will constitute a breach of that contract. The mother will therefore normally have to bring her claim for breach of contract, unless tor-

56 *E.g.* Lady Justice Hale in *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] *QB* 266, at 288 (74).

57 The current text of this paragraph is an adaptation of an earlier draft by Imke Kalisvaart.

58 Art. 6:162(2) Dutch Civil Code ("DCC").

59 A.S. Hartkamp & C.H. Sieburgh, *Asser 6-II De verbintenis in het algemeen, tweede gedeelte*, Kluwer, Deventer, 2013, p. 47 (Asser/Hartkamp & Sieburgh 6-II 2013).

60 Art. 7:446 DCC.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



tious liability would offer more.[61] As the standard of care under a medical treatment agreement is mandatory law[62] and quite broad, as will be seen below, it cannot be envisaged when this would be the case.

b) The Father

In a wrongful birth case, the father will not be considered a patient in relation to the care provider, and therefore has a slightly different position from that of the mother. Nevertheless, in *Baby Kelly*, the Dutch Supreme Court decided that a father should have, at least in some circumstances, a legal action in tort as well. The Dutch Supreme Court stated that the fault of a care provider may also be a tortious act against the father if and when his right to self-determination has been violated. Although the final decision of ending a pregnancy comes to the mother, the interests of the father are closely related. As a result of the care provider's fault, his opportunity to choose whether he wants the pregnancy to be ended or not also has been limited. Moreover, the birth of a child brings along the responsibility for both the father and the mother to raise and care for the child. Failing to carry out the necessary prenatal tests may therefore also be seen as a violation of a duty of what according to law has to be regarded as proper social conduct towards the father and is thus a tortious act against him.[63] As will be seen below, the father thus has a position that is quite similar to that of the mother in respect of the claim for moral damages.

c) The Child

Although the standards of prudent care of the care provider under art. 7:453 DCC are primarily directed at the mother, these standards also provide obligations of good care towards the unborn child.[64] Part of this principle of good care is the protection of a child against the pain and harm resulting from genetic disabilities.[65] In *Baby Kelly* the Dutch Supreme Court stressed that a child does not have a right to non-existence and/or a right to abortion of the pregnancy. It did, however, add that the child does have, somewhat confusingly, a right to proper treatment of his or her mother.[66] In other words: a care provider acts in violation of a duty of what, according to law, has to be regarded as proper social conduct towards the child if he does not also comply with his obligations towards the mother.[67] Furthermore, the Dutch Supreme Court held that it would be fair

61 C.E. Du Perron, *Overeenkomst en derden : een analyse van de relativiteit van de contractswerking*, Kluwer, Deventer, 1999, p. 254.

62 Art. 7:469 DCC.

63 DSC 18 March 2005, *NJ* 2006, 606, para 4.2.

64 *Ibid.,* para. 4.13.

65 C.H. Sieburgh, 'Schadevergoeding en leven – Compositie met rood, geel en blauw', (2005) *WPNR* 6637 (Sieburgh 2005), p. 755 et seq.

66 DSC 18 March 2005, NJ 2006, 606, para. 4.16; Sieburgh, 2005, p. 755 et seq; E. Hondius, 'The Kelly Case. Compensation for Undue Damage for Wrongful Treatment', in J.K.M. Gevers et al. (eds.), *Health Law, Human Rights and the Biomedicine Convention: Essays in Honour of Henriette Roscam Abbing*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 105 et seq.; M. Buijsen (red.), *Onrechtmatig leven? Opstellen naar aanleiding van Baby Kelly*, Valkhof Pers, Nijmegen, 2006, p. 19.

67 *Cf.* Art. 6:162(2) DCC.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



to award damages to the child independently, so that when the parents perish, the child does not run the risk of being left uncompensated.[68] Thus, a care provider's failure to observe the standards of prudent care by not carrying out the necessary prenatal tests gives a child a legal action in tort.[69]

*2. Contract*

Breach of contract is defined in Dutch law as the non-performance of an obligation of the debtor, who can be held liable for his act towards the creditor.[70]

a) The Mother

The moment a care provider engages herself in the course of his medical practice towards a person (the patient) to perform medical actions that directly affect this person, a medical treatment agreement comes into existence.[71] In the performance of the medical agreement the medical care provider must observe the standards of a prudent care provider.[72] In *Speeckaert/Gradener* the Dutch Supreme Court further clarified that the standard of prudent care is the standard that can be expected from a reasonably competent and reasonably acting care provider.[73]

As is shown by the Supreme Court judgment in *Baby Kelly*, not carrying out the necessary prenatal tests falls short of the expected standards of prudent care and can thus give rise to contractual liability.[74]Thus, as a patient and party to the medical treatment agreement, the mother can bring a legal action on the basis of breach of contract against a non-performing care provider. It must be emphasised that this will be her main claim.

In *Baby Kelly* the Dutch Supreme Court furthermore held that the care provider's failure to carry out prenatal tests and failure to discover possible genetic disabilities of the unborn child led to a violation of the woman's right to self-determination.[75] This right to self-determination allows any person to live his or her life in accordance with his or her own concept of life, regardless of other people's norms and values.[76] The fact that this right was infringed allowed the mother to bring an action for moral damages on the basis of article 6:106(1) DCC too. Although it can be doubted whether this liability is contractual or tortious, it should be submitted that the fact that it is part of the general rules on damages implies that this is an extension of the existing liability, which in this case is contractual.

68 DSC 18 March 2005, *NJ* 2006, 606, para 4.20.
69 Sieburgh, 2005, pp. 755 et seq.; Hondius, 2005, pp. 105 et seq.; Buijsen, 2006, p. 19; DSC 18 March 2005, NJ 2006, 606, para. 4.13.
70 Art. 6:74 DCC.
71 Art. 7:446(1) DCC.
72 Art. 7:453 DCC.
73 DSC 9 November 1990, *NJ* 1991, 26, para. 3.7.
74 DSC 18 March 2005, *NJ* 2006, 606, paras. 3.2 and 4.1.
75 *Ibid.*, para. 4.8.
76 H.J.J. Leenen, J.K.M. Gevers & J. Legemaate, *Handboek Gezondheidsrecht*, BJU, The Hague, 2011, p. 38.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



b) The Father

Although the father might have an own interest in the good performance of the treatment by the care provider, an interest alone is not sufficient to be a party to the agreement.[77] Kottenhagen's analysis of case law on this point correctly shows that the father cannot – unless explicitly agreed otherwise by contract – be seen as a party to the medical treatment agreement.[78] This shows that a father's claim for breach of contract is, unlike the mother's, not likely to succeed.

c) The Child

By entering into a medical treatment agreement the mother has the possibility to represent the child. The fact that the child is still unborn is irrelevant since art. 1:2 DCC states that "[a] child of which a woman is pregnant is regarded to have been born already, as often as its interests require so".[79] However, when representation does not evidentially occur, the unborn child is not considered to be a party to the medical treatment agreement, even if this would be desirable for the child's interests.[80] It should be submitted that such evidential representation will be extremely rare, if not non-existent. Owing to lack of representation no obligation towards the child arises from the contract.[81]

Of course, the agreement, which aims to direct the pregnancy with prudent care, is also concluded to ensure that necessary care is taken of the unborn child. Indeed, the agreement between the care provider and the mother also implies a duty of care on the part of the care provider to serve the best interests of the unborn child.[82] It should be noted, however, that that will be a tortious claim, not a contractual claim.

*II. Recoverable Damages*[83]

It must be noted that it is immaterial whether the action is brought in tort or contract. After all, the principles applicable to what damages are recoverable are identical.[84] No distinction between the bases of action will be made in this paragraph.

In the overview of English law, five types of damages that were potentially recoverable have been conceptualised. The types were: (i) costs of raising a child;

77 DSC 8 September 2000, *NJ* 2000, 734, para. 3.5; DC Arnhem 11 June 2003, *NJ* 2003, 86, para. 9.

78 Kottenhagen, 'En vader dan? De civielrechtelijke positie van de vader in si-tuaties van zwangerschaps-en geboorteschade', (2008) *NTBR* 2, pp. 2-16, 4; DSC 8 September 2000, *NJ* 2000, 734, para. 3.5; DC Arnhem 11 June 2003, *NJ* 2003, 86; DC Zwolle 6 June 2001, *LJN* AB 2389; CA The Hague 14 October 2004, *NJF*, 2004, 537.

79 Art. 1:2 DCC.

80 DSC 18 March 2005, *NJ* 2006, 606, para. 4.12.

81 Art. 6:72 DCC.

82 DSC 18 March 2005, *NJ* 2006, 606, para. 4.13.

83 It should be recalled that damage is the third constitutional element of a successful action in tort (Art. 6:162 DCC). No special mention of the criteria of causality and attribution to the wrongdoer will be made as these questions are often highly fact-driven. Where causality between existing damage and the fault may appear controversial (in case law or literature), this will be mentioned briefly.

84 Section 6.1.10 DCC governs both contractual and tortious claims.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



(ii) additional costs associated with the disability of the child; (iii) material damages as compensation for any medical and/or psychological treatment the parents may need, (iv) moral damages as compensation for psychological harm as a result of the pain, suffering and other discomforts resulting from childbirth and pregnancy; and (v) moral damages as compensation for the psychological harm of having to raise a disabled child. Type (iv) damages will, of course, never be suffered by the father. Again, it must be emphasised that at this point no comparison is made: these factually jurisdiction-independent types are merely used for ease of display.

*1. The Mother*

The fault of the care provider and, as a result of that, the birth of a disabled child, cause both material and moral damage to the mother. Although the disabled child might have been unwanted, under Dutch law its existence does not in itself form damage. Only the financial consequences of the existence of the disabled child are considered to be damage.[85]

According to the Dutch Supreme Court, it would be fair to bring the mother to the same economic position she would have been in had the medical care provided acted correctly.[86] The question arose whether the mother should be awarded all of the costs of upbringing and life sustenance recovered or just the additional cost of the upbringing and life sustenance of a disabled child. On this point the Dutch Supreme Court held that the Court of Appeal of The Hague was correct in holding that if no tortious act had occurred, the child would not have existed. Furthermore, the Dutch Supreme Court added that there is no reason to make a scission between the child and its disabilities, as this would be artificial.[87] Since the mother's right to self-determination was infringed, remuneration for all of the costs – *i.e.* the usual costs of upbringing and the additional costs associated with the disability – should be recoverable. The award of all costs of upbringing and sustenance of the child was thus upheld. Type (i) and type (ii) damages are therefore recoverable.

As for the psychiatric harm the mother may suffer, the Dutch Supreme Court considered that a mother's confrontation with the suffering of her disabled child justifies the recovery of the costs spent on psychiatric help.[88] Type (iii) damages are therefore recoverable.

With regard to the moral damage, the Dutch Supreme Court noted that the mistake of the medical care provider caused an infringement of one of the fundamental rights of the mother – *i.e.* the right to self-determination. It then held that since, as a result, the mother is harmed in 'her person', as required for the recovery of moral damages under article 6:106(1)(b), a remuneration for the loss of amenity should be available. In making this decision, the Dutch Supreme Court

85 S.D. Lindenbergh, 'Blij met de geboorte van… een schadeclaim. Schadevergoeding wegens wrongful birth en wrongful life', (2003) *AA*, pp. 368 *et seq.*, p. 368; DSC 21 February 1997, *NJ* 1999, 145, para. 3.8.

86 DSC 18 March 2005, *NJ* 2006, 606, para. 4.6.

87 *Ibid.*, para. 4.20.

88 *Ibid.,* para. 4.13.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



emphasised that allowing the recovery of moral damage of the mother does not imply that a disabled child is a source of distress.[89] The Supreme Court thus aimed to parry criticisms that any award of moral damages was very unethical.[90] Type (v) damages – *i.e.* the moral damage one suffers owing to the confrontation of the disability of the child – are therefore recoverable.[91] Type (iv) damages – *i.e.* moral damages as compensation for psychological harm as a result of the pain, suffering, and other discomfort resulting from childbirth – were not explicitly discussed by the Dutch Supreme Court as they were not claimed. Although it is not clear whether these damages would be recoverable if claimed, it is submitted that as type (v) damages are recoverable under 6:106 paragraph 1 under b, type (iv) damages can probably be claimed under the same heading. There is no reason why these two types would not both (and together) be regarded as part of the same 'harm in one's person'. It must be noted, however, that there is no clarity on this last point.

*2. The Father*

Although a potential basis for legal action exists, an award of damages should not be assumed. Within the Dutch legal system, damage that has been suffered by someone other than a direct victim does not always qualify for remuneration.[92] This other person will be qualified as a third party suffering damage due to a wrongful act towards the direct victim.[93] As a consequence, in most pregnancy-related cases a mother and a child are often entitled to damages, while a father is left empty-handed for he is not a direct victim.[94] However, the wrongful life cases are different. It should be recalled that the wrongful conduct of the medical care provider is wrongful towards the father too. That is an independent tortious claim. The father must therefore, like the mother, be put in the same economic situation as without the wrongful act. In *Baby Kelly* all costs of having to raise a child and all additional costs of having to raise a disabled child, including the medical costs and the costs of easing the child's suffering of her disability, were recoverable.[95] The father too can claim type (i) and type (ii) damages, though double compensation by both parents is of course not permitted.

In *Baby Kelly*, type (iii) damages were not explicitly claimed by the father. However, the Dutch Supreme Court held that the rest of the costs the family would have to incur owing to the disability of the child should be recoverable.[96] It therefore seems very plausible that type (iii) damages can be recovered by the father as well. This is also supported by Dutch district court decisions. In a similar case – one of wrongful sterilisation – the District Court of The Hague did award

89 *Ibid.,* para. 4.10
90 Lindenbergh, 2003, p. 368.
91 DSC 18 March 2005, *NJ* 2006, 606, paras. 4.8 and 4.10.
92 Kottenhagen, 2008, p. 3.
93 R. Rijnhout, *Schadevergoeding voor derden in personenschadezaken,* Boom Juridische Uitgevers, The Hague, 2012, p. 41.
94 Court of Appeal (CA) The Hague 29 September 2009, *RAV* 2010, 7.
95 DSC 18 March 2005, *NJ* 2006, 606, para. 4.9.
96 *Ibid.,* para. 3.3.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



all material damages to both the father and the mother.[97] In a less similar yet related case in which a child died as a result of a fault of a gynaecologist, the District Court of Rotterdam awarded all material damages to both parents too.[98]

The recoverability of moral damage suffered by a father is limited by article 6:106 DCC. This can only be based on the ground that a father is "harmed otherwise in person" – as required by Article 6:106(1)(b) DCC.[99] The Dutch Supreme Court has decided that violation of a fundamental right, for example rights concerning dignity, integrity, identity and autonomy of the human being, might be considered to fall under the scope of article 6:10(1)(b) DCC, even though the claimant does not suffer mental illness.[100] The right to self-determination forms one of the aforementioned fundamental rights. A violation of that right thus makes moral damage flowing from it recoverable.[101] Not being able to be involved in the choice of ending the pregnancy and taking away his possibility to expand/plan his family together with his wife by cause of wrongful sterilisation both led to the violation of the right to self-determination of the father.[102] This right is not always infringed. In a case in which a child died as a result of a fault of a gynaecologist, the District Court of Maastricht held that although the death of an unborn child is considered to be very sorrowful, there was no question of any of the grounds as stated in article 6:106 DCC.[103] The father was not, contrary to the father in *Baby Kelly*, "otherwise harmed in person".[104] It should thus be emphasised that although the father is much less likely to be awarded moral damages, in wrongful birth cases it would appear that type (v) damages are recoverable for the father. Again, it could be submitted that as type (v) damages are recoverable under article 6:106(1)(b) DCC, type (iv) damages can probably be classified under this same article. However, this would, again, be mere speculation.

### 3. *The Child*

Now that it has been established that the mother of a disabled child can claim damages for the damage that she has suffered as a result of a care provider's fault, does this mean a child has an equal right? Is there any damage at all? These questions are highly debated in the world, and even in the Netherlands these debates have not found their rest in the judgment of the Dutch Supreme Court in *Baby Kelly*.[105]

97 District Court (DC) The Hague 28 June 2006, *L&S* 2006, 2, pp. 26-28.
98 DC The Hague 28 June 2006, *L&S* 2006, 2, pp. 26-28; DC Rotterdam 8 February 2006, *JA* 2006, 52, para. 5.3.
99 Art. 6:106 DCC.
100 S.D. Lindenbergh, 'De positie en de handhaving van persoonlijkheidsrechten in het Nederlandse privaatrecht', *TPR* 1999, p. 1669; DSC 9 July 2004, *NJ* 2005, 391, as cited by Wenk in annotation of CA The Hague, 29 sept 2009, *RAV* 2010, 7.
101 T.B.H. Nguyen, 'Voorwaarden voor smartengeld bij schending fundamentele rechten zonder letsel', (2009) *NJB* 1409, p. 1812 et seq.
102 DSC 18 March 2005, *NJ* 2006, 606, paras. 4.2 and 4.8.
103 DC Maastricht 22 March 2006, *JA* 2006, 67, para. 3.6.1.
104 *Ibid*.
105 Giesen, 2012, p. 36.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



In determining the damage suffered by *Baby Kelly*, the Dutch Supreme Court agreed that the damage was not as indisputable as required by article 6:95 DCC.[106] It was up to the Dutch Supreme Court to "estimate the damage in a way that is most consistent with the nature of the damage caused".[107] It would appear that in estimating the damage a comparison should be made between the actual situation and the hypothetical situation that would have existed in the absence of the care provider's fault. However, the Dutch Supreme Court held that such a comparison cannot be made as this would lead to a comparison between the existence and the non-existence of the child. The Dutch Supreme Court held that it was unacceptable to hold that the situation of non-existence would be more (financially) worthy than the situation of existence with a genetic disability.[108] It therefore concluded that a determination of damage should be made by strictly observing the tortious act against the child. As this tortious act is the maltreatment of the mother, all damages awarded to the mother in relation to the upbringing and life sustenance of the child should thus be recoverable by the child too. It is self-evident that double recovery is impossible.[109] The Dutch Supreme Court deemed this more reasonable than depriving the child of any damages at all. Shapira mentions that "[t]he impaired child brings a suit for his or her handicapped condition, not for being brought into existence. The law can and should provide an impaired newborn with the right to be compensated by a negligent counsellor for the damage inherent to his or her hopeless, agony-dominated state as compared to healthy life".[110] It would appear the Dutch Supreme Court agreed. Material damages were awarded. The material damage consisted of the costs of raising the child and the additional costs of her genetic disabilities.

Furthermore, the Dutch Supreme Court acknowledged that Kelly had suffered moral damage too.[111] The moral damage consisted of the physical and psychological harm that Kelly was suffering from her birth and further on in the future resulting from her genetic disability.[112]

The Dutch Supreme Court stated that causality existed between the damage suffered by the child and the fault of the care provider.[113] Although the genetic disability was not caused by the care provider herself, the Dutch Supreme Court held that if she had not failed in taking prenatal tests the genetic disability would have been discovered and the mother would have had the possibility to choose to end the pregnancy and prevent the birth of a disabled child.[114]

106 Art. 6:95 DCC.

107 Art. 6:97 DCC.

108 DSC 18 March 2005, *NJ* 2006, 606, para. 4.15.

109 *Ibid.*, para. 4.20.

110 A. Shapira, '"Wrongful life" Lawsuits for Faulty Genetic Counselling: Should the Impaired Newborn be Entitled to Sue?' (1998) *Law/Technology* 3, pp. 1-20.

111 Arts. 6:96 and 6:106(1)(b) DCC.

112 *Ibid.,* para. 4.18.

113 Arts. 6:98, 6:162, and 6:74 DCC.

114 Sieburgh, 2005, pp. 755 et seq.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



### *III. The Extent of Recoverability of Damages*

#### *1. The Mother*

The extent of recoverability of types (i), (ii) and (iii) damages appears easily determined. All costs made for the upbringing and sustenance of this particular child, and for the medical care of the mother, are recoverable. This is largely, if not completely, determined by the question of factual causality. Of course, where the parties concerned claim for the same damage, these damages will only be awarded once.

With regard to the type (v) damage, it should be noted that it is ultimately to the discretion of the judge to make a proper estimate of what it deems appropriate in accordance with article 6:97 DCC, which reads: "Where the extent of the damage cannot be assessed exactly, it shall be estimated."[115] This provision allows the courts a large discretion in determining the actual amount of the sum.

#### *2. The Father*

The extent of recoverability of types (i), (ii), (iii) by the father is likely to be identical to the recoverability by the mother: the extent is determined by a question of factual recoverability. As double recovery is impossible, it seems very likely that material damages are recovered to the parents on joint account. As for type (v) damages, it can be noted, again, that the ultimate award will be estimated by the judge. One commentator has noted that this award is likely to be lower than the award made to the mother, though there is insufficient case law publicly available to assess this statement. [116]

#### *3. The Child*

As the child's claim is inherent to that of the mother, it was deemed inherent to this claim that the award made to the parents and the child should be identical too. For this reason the Dutch Supreme Court allowed the claim for compensation of all costs of life sustenance that would include costs related to the life sustenance of the child after it reached the age of legal majority. It was held that this would be the only way to adequately compensate the damage caused by the tortious act of the care provider: after all, these costs would still need to be incurred after the child had reached majority.[117]

With regard to the moral damage, the Dutch Supreme Court stated that the amount of damages depended not only on the nature and gravity of the damage but also on the totality of circumstances such as the extent of her development, to what extent her disability hinders her from living a 'normal life' and to what extent she suffers from her disability. In that particular case the Dutch Supreme Court granted the costs of the non-pecuniary losses as well.[118]

115 Art. 6:97 DCC.
116 DSC 18 March 2005, *NJ* 2006, 606, para. 4.20.
117 *Ibid.*, paras. 4.18-4.20.
118 *Ibid.*, para. 4.18.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



## D. The Comparison

### *I. Legal actions available to those involved*

In the descriptive part of this article, the actions brought for breach of contract and the actions brought for a tortious act have been discussed separately. This has been done for the sake of achieving a clear description. As the ultimate goal of this article is to compare the positions of those involved, rather than to compare the essentials of contract law and tort law, no such separate discussion appears necessary here.

#### *1. The Mother*

It is clear that both in the Netherlands and in England and Wales the mother can claim to have been confronted with a legal wrong. This duty is drenched in similarities (if not identities). In both jurisdictions this duty can be said to have been derived from the duty, of a reasonable medical care provider to inform his patients in a way that they are able to make a clear and balanced judgment. In finding a potential basis for liability, neither system chooses to formulate a duty to prevent the child's life, but both formulate one that focuses on the failure to inform (properly). This failure can be either a breach of contract or a tortious act. Although both jurisdictions allow the mother to bring a claim in contract, this is relatively uncommon in England and Wales, whereas it is the preferred action in the Netherlands. A claim in tort is possible in both jurisdictions, though in the Netherlands this can be done only in the exceptional circumstance that the tortious duty goes beyond the contractual claim.

#### *2. The Father*

Dutch law allows the father to bring a legal action for the wrongful birth of his (disabled) child in tort. English law appears to allow the same, though there is no conclusive authority to support this. The tort, if it arises, is considered to be an independent claim. There is, in other words, a duty towards the father too. It would seem that the reason for this is that neither jurisdiction would deem it reasonable to distinguish between the position of the father and that of the mother in respect of raising the child. After all, even though the mother bears and births the child, both will (often) raise it and provide for it. Under both Dutch and English law, the duty towards the father is construed mainly around his own right to self-determination. Neither jurisdiction allows the father to claim for breach of contract, as he is no party to it.

#### *3. The Child*

The reviewed jurisdictions have a rather different approach to this question. Interestingly, they both find consistency with other legal rules to be a great virtue. However, there is a difference in respect of what rules they aim to be consistent with. The English courts aim to achieve consistency with the rule that there can be no duty to terminate another's life. The argument runs as follows. As one's own life is sacred, it would be inconsistent to ever hold that another has a duty to terminate it. If there can be no duty to terminate one's life, it would be inconsis-

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



tent with both that duty and the sanctity of life to hold that there is a duty to prevent one's life. The Dutch courts, on the other hand, aim to achieve consistency with the duty owed to the mother. This argument runs as follows. The doctor owes a duty to the mother to allow her the choice to terminate the unborn life that will, inevitably, become a so-called 'wrongful life', once the child is born. It is said that, inherent to this duty to take care of the mother, a duty of good care is owed to the child. As can be seen, both jurisdictions have a typically Western, technical approach[119] up to a certain point and then choose different paths. The Dutch judiciary appears unable to overcome one question: how can something be wrongful against one of those involved, but not to another? On the other hand, the English judiciary appears to be unable to overcome another: how can failing to prevent something that is legally recognised to be sacred, namely life, be wrongful?

The child cannot bring claims in contract in either jurisdiction. In the Netherlands it is possible that the child becomes a party to the medical agreement if the mother explicitly represents the child at the conclusion of the contract. This appears, however, to be a mere theoretical possibility. In England and Wales such a construction appears impossible, as the child would again be considered to be claiming a right to its non-existence.

### *II. Types of Recoverable Damages*

#### *1. The Mother*

In the previous sections on recoverable damages, five types of damage have been conceptualised; when reading this comparison, this classification should be kept in mind. As has been mentioned – somewhat prematurely – in the introduction, the Dutch jurisdiction is much more lenient in regard to recoverability of damage. Contrary to the law of England and Wales, Dutch law allows recoverability of all costs of upbringing – being type (i) and (ii) together –, rather than just the additional costs of a disabled child – being type (ii) alone. English courts may award the parents a conventional sum for 'the wrong done', but this award cannot qualify as type (i) damages as they cannot be considered to reflect just this type. Both jurisdictions allow claims for type (iii) damages, the costs of medical and psychiatric treatments the parents may need. Neither system appears to demand more than a factual test of causality on this point. Type (iv) damages are, interestingly, recoverable in England and Wales, whereas they appear not to be recoverable in the Netherlands. The opposite can be said for type (v) damages. So even though both systems appear to be willing to award moral damages, they do not choose the same heads of moral damage. It could be suggested that this is caused by the way the wrongful life (the claim by the child) is decided. Where England and Wales disallow such a claim, courts refuse to take into account the distress arising out of the existence of the child, whereas in the Netherlands, where such a claim is allowed, distress arising out of that situation is not problematic.

119 U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal System,' 45 *American Journal of Comparative Law*, 1997, p. 14.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



*2. The Father*

The father can (probably) recover type (ii) and (iii) damages in both jurisdictions. The reasons for this are largely identical. The former are recoverable by the mother in both jurisdictions, and both jurisdictions consider it unreasonable to distinguish between the positions of the parents. The latter are caused by the tortious conduct of the doctor and are recoverable as personal material damage. Type (i) damages can be recovered only under Dutch law. English courts may award the parents a conventional sum for 'the wrong done', but this award cannot qualify as type (i) damages as they cannot be considered to reflect just this type. Although this is a clear difference between the jurisdictions, the reasons for awarding or not awarding this type are identical. In both jurisdictions, the duty owed to the one parent is the same as that owed to the other. As the mother cannot recover type (i) damages under English law, there is no reason to allow the father to recover them. The contrary can be said of Dutch law. A clear difference appears when assessing the moral type (v) damages for psychological harm due to the birth of the child. As Dutch law allows the father's claim because the doctor will have infringed his right to self-determination, it follows that any moral damages can be awarded independently of any other claim. Although the duty owed to the father under English law will arguably also be one to have regard for his right to self-determination, this is not very likely to convince the English judiciary to allow him to recover type (v) damages. The right to self-determination does not, after all, allow for per se recovery of type (v) damages: the mother can also not recover these damages as an independent award. Although both jurisdictions appear to have regard for the right to self-determination of the father – the one more prominently than the other – the different approach towards moral damages in general appears to dictate a different outcome in this respect. When considered closely, however, it appears that this is not in all respects a difference. The main concern of the judges appears to be, in both jurisdictions, to achieve consistency between the awards made to both parents. Only where the mother is able to claim for certain damages can the father, provided he suffers them, claim for them too.

*3. The Child*

As regards the recoverability of damages suffered by a child a comparison between the Netherlands and England and Wales can barely be made since the legal system of England and Wales does not acknowledge damages in case of a wrongful life. There, a child with a so-called 'wrongful life' has no rights to have his/her damages recovered, as the 'existence' of the child cannot be considered to be damage in the light of the sanctity of life.

In the Netherlands, on the other hand, a child that has a so-called wrongful life is said to suffer material and moral damages that have to be estimated by the court in a way that is most consistent with the nature of the damage caused. The determination of these damages is based not on a comparison between the situation with a legal wrong (existence) and a hypothetical situation without the legal wrong (non-existence) but on an observation of the legal wrong against the child.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



## *III. Extent of Recoverability of Damages*

### *1. The Mother*

Type (i) damages are not recoverable in the law of England and Wales, and therefore no comparison can be made regarding the extent of these damages. The extent of type (i) is capped by the age of legal majority. With regard to the extent of damages of types (ii) that can be recovered in the law of England and Wales as well as in the law of the Netherlands, a slight distinction can be made. In England the type (ii) damage can probably be recovered after the child reaches majority, while in the Netherlands this type of damage cannot be recovered past the age of legal majority. An interesting explanation for this, again, could be that the law of England and Wales allows no action for wrongful life, whereas the law of the Netherlands does. A similarity, however, is that both jurisdictions attempt to allow the child to be compensated throughout its entire life.

As for type (iii) damages in England and Wales and the Netherlands, it may be noted that they are both determined by a factual link of causality. Type (iv) damages are recoverable under English but not under Dutch law, and type (v) damages are recoverable under Dutch law but not under English law. Interestingly, however, the 'extent' of both is similar. Both types serve not to compensate but to acknowledge a legal wrong, and both jurisdictions leave this award to the discretion of the courts. So as regards moral damages, it can be said that, though different in type, they are similar (if not identical) in extent.

### *2. The Father*

As for type (ii) damages in England and Wales, and types (i) and (ii) damages in the Netherlands, it can be submitted that both jurisdictions allow the father to recover these in so far as they have not already been awarded to the mother. As for type (iii) damages, it can be noted, as it could be for the mother, that these are estimated by a factual link of causality. The awards made for material damage to the Dutch and English fathers are, though different in type, identical in extent. Type (v) damages cannot be recovered by the father in England and Wales, but it is submitted that the award in the Netherlands can amount to only a small conventional sum. The factual outcome, therefore, will not be vastly different in this respect.

### *3. The Child*

With regard to the extent of damages, the Dutch legal system allows the claim for compensation of all costs of raising the child and the additional costs of his/her genetic disabilities that would remain after his/her 21st birthday as well as the non-pecuniary losses, for as far as they are not recovered to the parents; whereas, once again, the legal system of England and Wales does not acknowledge damages at all.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



## E. The Evaluation

As has been noted in the introduction, it is interesting to have compared a rather progressive jurisdiction and a rather conservative jurisdiction on this point. In determining which approach is to be preferred, three criteria have drawn our attention: the best interests of the child, the respect for the conflicting moral convictions involved, and legal fairness.

### *I. The Best Interests of the Child*

It should be noted that although in the Netherlands the costs of the entire upbringing – including the cost that any parent would have – are recoverable, this does not necessarily further the interests of the child. The very presumption of a wrongful birth case is, after all, that the parents wanted a child and can thus be deemed financially capable of raising it. So only non-recoverability of those extra costs associated with disabilities could harm the interests of the child. In both jurisdictions the mother receives compensation for the (medical) treatment and other facilities the child may need owing to the child's disability.

The major difference between the systems lies not with the parents but with the child. This affects the mode of compensation: in England and Wales the costs will always be compensated through the parents, whereas in the Netherlands the child may claim in its own right. This allows for two considerable benefits. First, the child has the possibility to arrange its own medical care directly after it reaches majority. Since in England and Wales the parents are required to continue their care even after this point, the child remains dependent on them. The enlarged self-determination that the independent claim thus brings with it is in the interests of the child. Secondly, the Dutch approach is beneficial to the child if the parents perish. From this point onwards there is no legal rule on which the English disabled child can claim any compensation, whereas the Dutch disabled child can. It should of course be added that the child will receive care from the NHS if the parents perish, but this, again, implies a certain dependency the Dutch child will not (necessarily) have. Although these differences are explicable, the Dutch system appears to be preferable from the perspective of the child.

### *II. Balancing Moral Convictions*

It is submitted that a decision in a wrongful birth case or a wrongful life case necessarily involves a moral choice. The aim of this section is to decide not whether any jurisdiction has a morally superior solution, but whether the approach deployed takes due account of all moral convictions.

It could perhaps be suggested that in awarding all claims for all involved the Dutch judiciary appears to favour the right to self-determination above all other moral claims, whereas the English judiciary appears to allow different moral claims to determine each particular award. However, that is too blunt. The Dutch Supreme Court has stressed that the fact that both the child and the parents can claim the damages for the entire upbringing (and for the child: beyond that) of the child does not imply that the life or the birth of the child is 'wrongful' or 'tortious.' In other words, the Dutch Supreme Court simply argues that its decision

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



does *not* recognise a claim for wrongful life or wrongful birth, it only allows a claim for the limitation of the right to self-determination. This appears to show that indeed a balance has been struck, but is of course open to the critique that it is mere rhetoric.

The fact that the parents (and with them the child) may claim the entire costs of upbringing in the Netherlands appears to show less respect for the conviction that the birth of any child is a blessing. What is more, there is no apparent reason for awarding these costs on the basis of the limitation of the parents' self-determination. The parents are not limited in their choice of having a child but are merely limited in the choice of whether or not they will have a disabled child. In the typical wrongful birth case, the parents already made the choice to have a child and thus should be ready to bear at least those costs. Admittedly, it could be argued that it is impossible to divide the disabled child into a disabled part and a healthy part, but it requires no further explanation that such an argument is not particularly sensitive to the way many regard the birth of any child a blessing. On this point, therefore, it is submitted that the English approach of awarding compensation for costs associated with the disability only shows more respect for the conviction that any child is a blessing. The balance thus struck between the right to self-determination and the right to have legal wrongs compensated is slightly more favourable than the Dutch approach.

*III. Legal Fairness*

Three aspects of distribution of losses and responsibilities must be assessed. First, the approach where the child can claim in its own right after it has reached legal majority. This approach not only enhances its independence, it also allows the mother to stop caring for the child and leave the arrangement of care to the child completely. This is not necessarily preferable for every child, and it is most certainly not a likely outcome in every case, but it does strike a balance between the responsibility of the parents and that of the child and leaves the parties with considerable liberty and self-determination. This approach, found in the Netherlands, achieves high legal fairness at this point and is to be applauded.

Secondly, however, it should be noted that a system that allows for compensation for the costs of the entire upbringing places a greater burden on the tortfeasor than legal fairness requires. As has been noted before, in the typical wrongful birth or typical wrongful life case, the parents have already made the choice to raise a child. There is no apparent reason to allow for the recovery of these costs before the child reaches majority. After the child reaches majority, it would perhaps be desirable to assess to what extent the child can provide for his- or herself. Legal fairness, it appears, would only demand the compensation of costs and lack of income due to the disability.

Finally, it must be noted that the award of moral damages under Dutch law is more principled than the award under English law. In both jurisdictions, awards are at the discretion of the courts, but the award in England and Wales is less certain and only available to the mother as it is tied to her claim for loss of amenity. As the Dutch award has a solid legal basis in the Dutch Civil Code, this approach appears somewhat more favourable.

This article from European Journal of Law Reform is published by Eleven international publishing and made available to anonieme bezoeker



## F. Conclusion

In one way or another, the parents in a wrongful birth case can recover damages both in the Netherlands and in England and Wales. In the Netherlands more damages can be awarded, both in terms of types of damages and in terms of the extent of recoverable damages. Additionally, in the Netherlands damages can be awarded to the child as well.

Having assessed the best interests of the child, the respect for the sentiments involved, and the achievement of legal fairness, it must be concluded the Dutch approach appears to be somewhat more favourable overall. It must be submitted, however, that the scission between the costs any parent would make to bring up the child and the costs associated with the disability, as introduced by the English judiciary in McFarlane, achieves a better balance between the moral convictions involved and a improves legal fairness in on respect. If the Dutch judiciary were to add this nuance to their approach, theirs would be the more admirable approach in every regard. Phrased the other way around, if the English judiciary were to allow claims by the child and develop a more principled approach to the award of moral damages, theirs would the more admirable approach in every regard.