

WRONGFUL BIRTH WITH SPECIAL REGARD TO HUNGARY

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Abstract Even though wrongful pregnancy and wrongful life claims are rejected by Hungarian courts, a wrongful birth action is permitted. According to the Curia's uniformity decision 2/2022, damages for wrongful birth are reduced to the costs of raising a disabled child minus the possible costs of rearing a healthy one. The disability rights critique is very strong from the US to the EU. Nevertheless, a violation of the parents' personal right to family planning requires compensation in the EU and in numerous US states. A wrongful birth claim does not discount the disabled child's human dignity.

Keywords

abortion rights,
damages,
human rights,
reproductive rights,
disability rights critique

1 Introduction

The value of human life has always been a pivotal legal question. Legal scholars from centuries ago touched upon this topic in their writings (see, e.g. Montesquieu, 1995, p. 63). In previous centuries, the judiciary developed theories of the value of human life and applied those theories in criminal and civil law cases. The respiritualisation of the eastern part of the European Union brought new ideas into both legislation and judicial practice that largely differ from outdated state socialist reasoning. In Hungary, the human rights to life, health, family etc. were promulgated in the state socialist era; however, the judiciary rarely took them into consideration then. Human rights were merely ornaments of that legal system. The rule of law was also far from reality. At any rate, a variety of new human rights-based personal rights emerged both in legislation (Act IV of 1977 on Amending Act IV of 1959 on the Civil Code of the People's Republic of Hungary) and legal science (Sólyom, 1983). The development of personal rights in the 1970s was a remote cause of the paradigm shift in the late 1980s.

Presently, a wrongful birth stems from diagnostic negligence when the healthcare provider fails to timely recognise the foetus' genetic or teratological impairment, causing the parents to raise an impaired child. Since the child's wrongful life claim was likely to be rejected by United States (hereinafter: US) and United Kingdom (hereinafter: UK) courts as well as by European Union (hereinafter: EU) Member States' courts, a wrongful birth action remained the parents' last resort to obtain compensation for diagnostic negligence in obstetrics. In fact, the child's wrongful life claim represented by a guardian (usually the mother) mostly resulted in double compensation for damage suffered by the parents. In any case, the foetus has no right to be aborted; instead, abortion rights belong to the pregnant woman. Moreover, the child's existence does not constitute damage. These arguments extinguished the admissibility of a disabled child's wrongful life cause of action. The situation is similar in Hungary (see the Supreme Court's civil uniformity decision 1/2008) and in most other EU Member States. Although this kind of legal interpretation originates from the US, it is now an integral part of European legal culture.

In some lawsuits, it is difficult to differentiate wrongful birth from wrongful pregnancy (or wrongful conception). Wrongful pregnancy denotes the conception of a healthy child, while wrongful birth refers to a child with undesired disabilities.

If the conception of a foetus with disabilities is the outcome of a negligent genetic diagnosis of the parents and the child is finally born, the cause of action is a wrongful birth, not a wrongful pregnancy. During the legal history of medical negligence, wrongful pregnancy has also led to compensation. At present, in many countries, this claim is not accepted because a child does not represent damage either legally or ethically.

2 Historical Background

Even though we can find court decisions in the early 20th century that consider the value of an unwanted child's life *obiter dictum* (*Christensen v. Thornby*, 1934), wrongful birth lawsuits emerged from the advanced development of medical diagnostics, as shown by current medical malpractice litigation. When diagnostic options reached a high level of accuracy, the physicians' liability for diagnostic negligence arose. However, it would be many years before lawyers started to plead a lack of genetic diagnosis and until courts began to hold healthcare providers liable based on an act of omission. For many years prior to this time, medical negligence could only stem from a physician's active behaviour. The courts did not recognize a claim for medical negligence premised upon theories of either a misdiagnosis or the complete failure to diagnose until the second half of the 20th century. Indeed, case law on medical negligence has evolved in parallel with advances in medical technology. Presently, the provider's civil liability is highly contingent on the diagnostic data contained in the healthcare documentation. The deficiencies of healthcare documentation can make it difficult, if not impossible, to exculpate the provider. This is the case because, based on the patient's "privileged case of inability to prove", conforming to §265 of Hungary's Code of Civil Procedure, the burden of proof is shifted to the defendant (see, e.g. Curia, 2019a). Döme (2022, p. 20), a Curia judge, held that the rule on the patient's "privileged case of inability to prove" should not automatically apply to all medical malpractice lawsuits.

In Hungary, the Curia (the name of the Supreme Court since 2012) did not begin to develop its practice tied to wrongful birth until the 21st century. The Curia's seminal decisions, legally binding for the entire Hungarian judiciary, consist of its decision of principle EBH 2015.P.11 (see *infra*) and its uniformity decision 2/2022 (see *infra*). Of course, Hungary had already recognized claims for wrongful birth much earlier. In state socialist Hungary in 1954–1956, abortion was completely prohibited by

Decree 1004 of 1953 issued by the Ministerial Council of the People's Republic of Hungary on "the protection of mother and child". From June 1956, abortion was legal under limited circumstances and when performed in public healthcare facilities. The limited circumstances included when the foetus was diagnosed as having probable disabilities, when medically indicated, among others (Tóth, 2022, p. 69). However, Hungary did not recognize wrongful birth lawsuits in those days. Instead, a large number of apparently impaired new-borns' lives were extinguished immediately after birth with or without the parents' knowledge. "Angel-making" was an illegal, though rarely prosecuted practice of infanticide in state socialist Hungary (Balogh, 2023, p. 34). Notwithstanding that the country's leaders were aware of this practice, no tangible countermeasures were taken. The litigation culture in Hungary at the time was doomed to perish, having been labelled as running counter to socialist morality. In such a legal environment, a wrongful birth action was unimaginable.

In the first wrongful birth case in the Federal Republic of Germany, the Landgericht originally recognized the parent's claim for wrongful birth stemming from a child born with disabilities because the mother had suffered from rubella in the first week of gestation, and which a negligent gynaecologist had failed to recognise. While the Oberlandesgericht rejected the parent's claim, in 1983 the Bundesgerichtshof ultimately ruled in favour of the couple (Bundesgerichtshof, 1983).

Schultz (2024, p. 189) states that, in the US, although neither the Constitution nor the Bill of Rights explicitly mentions or regulates abortion, as a result of the American Medical Association's activity, by the late nineteenth century abortion was illegal in most states. In the mid-1960s, a rubella epidemic advanced the cause of abortion in the US and as a result many states eased abortion restrictions (Heller & Ziyirova Abdijalilovna, 2024, p. 4). Arguably, abortion rights are a precondition of reproductive liberty and of derived rights, such as the right to indemnity for loss of the option to abort a foetus with disabilities. In the US, wrongful birth claims date back to the 1960s. At that time, abortion constituted a crime in most US states and could only be accessed if permitted by a therapeutic abortion review committee (Haqq, 2023, p. 303). In *Jacobs v. Theimer* (1975), the Texas Supreme Court held that the parents of a defective child had a cause of action for damages against a physician for alleged negligent failure to inform the mother during pregnancy that she had contracted rubella and therefore might have a defective child, thereby causing her to lose the opportunity to have an abortion. In Wisconsin too, wrongful birth claims

have been permitted since 1975 (*Dumer v. St. Michael's Hospital*, 1975). Both California's Supreme Court in *Turpin v. Sortini* (1982) and California's Second Court of Appeal in *Curlender v. Bio-Science Laboratories* (1980) recognised parents' right to damages for wrongful birth. In *Keel v. Banach* (1993), the Supreme Court of Alabama recognised parents' right to damages for wrongful birth. In *Tomlinson v. Metro. Pediatrics, LLC* (2018), the Oregon Supreme Court awarded damages to parents for wrongful birth. The situation is similar in New York (*B.F. v. Reproductive Medicine Assoc. of N.Y., LLP*, 2015), New Hampshire (*Smith v. Cote*, 1986), New Jersey (*Canesi v. Wilson*, 1999), Michigan (Mich. Comp. Laws Serv. §600.2971[4]), Nevada (*Greco v. United States*, 1995), Maryland (*Reed v. Campagnolo*, 1993), Louisiana (*Pitre v. Opelousas Gen. Hosp.*, 1988), Illinois (*Williams v. Rosner*, 2014), Florida (*Kush v. Lloyd*, 1992), District of Columbia (*Dyson v. Winfield*, 2001), Connecticut (*Chamberland v. Physicians for Women's Health, LLC*, 2006), Colorado (*Lininger v. Eisenbaum*, 1988), Arizona (*Walker by Pizano v. Mart*, 1990), Virginia (*Naccash v. Burger*, 1982), West Virginia (*James G. v. Caserta*, 1985), Washington (*Harbeson v. Parke-Davis, Inc.*, 1983), and Massachusetts (*Yanjun Li v. Davidson*, 2015) as well. In the US, Kiely (1990, p. 427) argued that, in the case of wrongful birth, parents who intended to have a child should only be compensated for the extraordinary costs of rearing a disabled child. In the US, Abrams (2022, p. 159) and in Hungary, Lábady (2006), share this opinion (see Budapest-Capital Regional Court, 2009).

In the UK, according to the Abortion Act 1967, Sec 1(1)(d), abortion may be performed until birth if “there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped”.

3 Legal Attempts to Eliminate Wrongful Birth Claims

A number of legal essays have been published in which the authors advance arguments that wrongful birth claims should be disallowed on religious, ethical and political grounds. For example, in Austria in 2011, the Federal Minister of Justice submitted a bill to parliament to add a second paragraph to Allgemeines Bürgerliches Gesetzbuch, §1293, to stipulate that no one is entitled to compensation as a consequence of the circumstances of a child's birth, except if health damage was caused to the child during pregnancy or delivery (255/ME XXIV. GP – Ministerialentwurf). Ultimately, this amendment failed.

The “dignity” argument is advanced most frequently in support of the contention that parents should be denied the right to a wrongful birth claim. In the US, Valentine (2024, p. 215) contended that “A disabled person’s life is no less dignified or worthy than a non-disabled person’s life”. In Hungary too, we find legal scholars opposing wrongful birth claims. For instance, Zakariás (2010, p. 668) contends that asserting a claim for damages on the basis of an increased burden for rearing a disabled child violates the disabled child’s human right to dignity. Hámori (2018, p. 49-50) maintains that no damage arises from birth, even if the child is disabled and regardless of the extraordinary costs of child rearing; instead, not to be born constitutes damage. Navratyil (2023, p. 64) argues that court practice awarding damages for wrongful birth prioritises the parents’ material interest over the interest of the child as a person with human dignity. The Hungarian Catholic Lexicon (2024) considers the killing of a foetus with disabilities as eugenics, a scientifically inaccurate theory formerly practised under National Socialism. The Lexicon asserts that the value of human life is precious even if the child is disabled. Nevertheless, the Hungarian judiciary still tends to award compensation to parents for wrongful birth (Budapest-Capital Regional Court of Appeal, 2022). Gombos (2012, p. 404–405), a Curia judge, argues that, in the case of wrongful birth, infringement of parents’ personal right to family planning proceeds from the healthcare provider’s omission to recognise the foetus’ disabilities in due time to ensure the right to abortion.

In 2011, Mróz and Drozdowska (2011, p. 141) pointed out that the judiciary in Poland admitted parents’ wrongful birth claims, while the disabled child’s wrongful life claim was rejected. On 27 January 2021, the Constitutional Court of Poland practically eliminated this right when it cancelled the right to abortion on the basis of “a severe and irreversible foetal defect or incurable illness that threatens the foetus’ life”.

Interestingly, in Minnesota, the right to abortion has been upheld since *Dobbs v. Jackson* (2022), but, even so, a wrongful birth cause of action is prohibited by Sec 145.424, Minnesota Statutes (Haqq, 2023, p. 293). In Utah, as early as in 1983, a law was enacted prohibiting actions for wrongful birth *inter alia* (Roper, 2004, p. 894–895). In 2002, in *Wood v. University of Utah Medical Centre* (2002), Utah’s Supreme Court found that the ban on wrongful birth claims (as well as on wrongful life claims) does not violate either the Utah or US Constitutions’ Due Process or Equal Protection Clauses (Villafuerte, 2003). In Idaho, the wrongful birth cause of action

is proscribed by statute.¹ In Oklahoma, the wrongful birth cause of action is prohibited by 63 OK Stat §1-741.12. Missouri does not recognise parents' right to damages for wrongful birth.² The situation is similar in Ohio (*Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 2006), Kentucky (*Grubbs v. Barbourville Family Health Ctr.*, 2003), Georgia (*Etkind v. Suarez*, 1999), Indiana³, and North Carolina (*Azzolino v. Dingfelder*, 1985) as well. Harris (2014, p. 396) contends that "State prohibitions on wrongful birth claims diminish abortion rights and endanger the legal rights of parents to recover costs in a medical malpractice action. Instead of prohibiting wrongful birth claims, states should allow the claims to proceed at common law, permitting the judicial system to decide the merit of each claim." Yakren (2018, p. 584) opines that in wrongful birth lawsuits, the harm to mothers arises as loss of reproductive choice rather than as the birth of a disabled child.

Legal opinions against wrongful life claims show a cross-border tendency. Similar counterarguments have emerged from the US to the EU. However, legal attempts to eliminate wrongful birth claims have been more effective in the US than in the EU. In the US, we find states successfully eliminating wrongful birth actions, while, in EU Member States, the wrongful birth action has been upheld in a curtailed form.

4 Wrongful Birth and CEDAW-Related Human Rights in Hungary

When considering the human rights foundation of the right to a wrongful birth claim, I place the focus on three human rights documents: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (UNO, 1979), the Universal Declaration of Human Rights (UDHR) (UNO, 1948), and the European Convention on Human Rights (ECHR) (Council of Europe, 1950). Human rights, as quoted below, have constitutional and judicial support for wrongful birth claims in the Hungarian legal system. While numerous arguments have arisen in recent times against reproductive liberty in Hungary, both the parliament and the judiciary do not oppose a reduced form of wrongful birth action if adequately controlled by law. Essentially, wrongful birth is a civil law institution that is also reinforced by public law.

¹ Idaho Code Ann. §5-334(1).

² Mo. Rev. Stat. §188.130.

³ Ind. Cod. Ann. §34-12-1-1.

Konnon et al. (2024, p. 70) argue as follows: “Although induced abortion is a worldwide intervention and is performed daily, its liberalisation is a subject of intense controversy.” In countries where abortion is prohibited by law, wrongful birth claims are rejected because of the missing unlawfulness factor. In Hungary, abortion is an option. Consequently, the Hungarian judiciary admits the parents’ claims for damages on wrongful birth grounds.

In Hungary, Act LXXIX of 1992 on the Protection of Foetal Life, §6(1)(b), permits abortion until the twelfth week if the medical probability of the foetus suffering from serious harm arises. In the event of a medical omission, this right is applicable until the eighteenth week. As stated in §6(3) of the law, abortion rights are applicable until the twenty-fourth week of pregnancy if there is at least a 50 percent risk of the foetus suffering from genetic or teratological harm and if the diagnostic procedure lasted longer than expected. Conforming to Act CLIV of 1997 on Health, §17(2)(a), the foetus enjoys protection by the state from the twenty-fourth completed week even if it has disabilities and even against the pregnant woman’s will. If the pregnant woman’s life is in danger, §6(4)(a) of Act LXXIX of 1992, noted above, permits abortion with no time limit. In Hungary, according to the Criminal Code, §163(4), an illegal abortion constitutes a crime, with both the physician and the woman being subject to punishment, although the woman’s punishment is lighter.

Pursuant to §131(5)(a) of Hungary’s Health Act, noted above, an obstetrician is authorised to refuse an abortion of a disabled foetus if this were to run counter to his or her personal morality, conscience or religious beliefs. Then, the objecting obstetrician is legally obliged to advise the pregnant woman to turn to another physician. On balance then, the pregnant woman’s abortion rights are ensured by Hungarian law. If a wrongful birth still occurs as a result of the obstetrician refusing an abortion, the provider is therefore liable.

In line with CEDAW, arts. 12 and 16(1)(e), the right to abortion is considered a human right. Art. 12(1) declares that access to healthcare services, including those related to family planning, is a human right enjoyed by both men and women. Art. 16(1)(e) states that men and women have “the same rights to decide freely and responsibly on the number and spacing of their children”. Wrongful birth claims are not permitted by the legislature or judiciary in all countries. However, as a general proposition, recognition of wrongful birth claims is not necessarily tied to liberal policy. For example, we find conservative governments in the EU, e.g., in Hungary,

that do not take measures against the judiciary accepting parents' wrongful birth claims.

Art II of Hungary's Fundamental Law (Constitution) states that foetal life shall be protected from the moment of conception. The right to damages for wrongful birth is not a constitutional right held by parents *expressis verbis*. It has been developed by the judiciary, in harmony with the Health Act and the Civil Code. The right to damages for wrongful birth is closely related to reproductive liberty, such as family planning, and the constitutional right to the protection of family life (Fundamental Law of Hungary, Art. VI [1]).

Nevertheless, the Fundamental Law, Art. Q(3), declares as follows: "Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in law." CEDAW (UNO, 1979) was promulgated in Hungary in legislative decree (*tvr.*) 10 of 1982. Consequently, it forms part of the Hungarian legal system and is therefore applicable in lawsuits. Even if not unanimously recognised by legal scholars, parents' right to damages for wrongful birth proves to be a human right protected by law in Hungary.

In Hungary, pursuant to the Curia's uniformity decision 2/2022, noted above, damages for wrongful birth are limited to the costs of raising a disabled child minus the possible costs of raising a healthy one. Judicial decisions prior to this were ambiguous. Previously, the Curia's decision of principle EBH 2015.P.11, also noted above, declared that, in the event of wrongful birth, all the costs of rearing a disabled child, including the costs of rearing a healthy one, should be covered by the negligent healthcare provider (Curia, 2015). In a recent case, the Curia (2022) applied its uniformity decision 2/2022 in a judicial review proceeding. This ruling was published as a precedent in 2024 (BH 2024.114.).

In Hungarian judicial practice, the existence of a disabled child, independently, is not considered damage. It is only the extra costs of rearing a disabled child that qualify as damage. As a result, there is no derogation from the child's constitutional right to human dignity in wrongful birth lawsuits. Compensation is technically for the extraordinary costs of child rearing. Indeed, the human rights to life and dignity are interrelated; there is thus no human life without dignity. Ultimately, it is both the

parents' and the state's responsibility to ensure a life with dignity for the disabled child.

The *pro* wrongful birth reasoning is, in substance, based both on human rights and constitutional rights. Although there is a strong legal foundation for claims of wrongful birth in Hungary, emerging counterarguments might in the future eradicate such claims. In my opinion, wrongful birth actions will be maintained until Western European judicial practice is *pro*. The present situation concerning wrongful birth actions in Hungary is the result of a compromise struck between reproductive liberty and protection of foetal life. Importantly, its permissibility is not purely a question of religion. Indeed, in many European countries, reproductive rights have shrunk to a minimum level. I believe this minimum level should be upheld. It ought only to be reshaped with legislative or judicial tools if the wrongful birth action is ultimately eliminated from the European litigation culture.

At present, there is no equality of arms in wrongful birth lawsuits. The healthcare provider and its insurance company are equipped with experienced lawyers and expert witness reports that most parents cannot afford. This kind of difficulty should be overcome both in Hungary and elsewhere. The human rights approach to wrongful birth provides the judiciary with further arguments to protect the weaker party, i.e. the parents, in a medical malpractice lawsuit, as mentioned above: the right to family planning, the right to decide on the number of children etc.

5 Wrongful birth and UDHR-related Human Rights in Hungary

Value pluralism puts various approaches to wrongful birth into relief. I think it is normal to consider centrist as well as extremist opinions, with the just perspective being found somewhere in the middle. Conservative values predominate in Europe today. They are based on law and ethics confirmed by a social contract concluded through parliamentary elections. Laxism has been pushed back somewhat; however, the large number of citizens that vote for conservative values generally do not desire the total abolition of abortion and wrongful birth action. The "benefits rule" arises, although this time not in wrongful conception, but in wrongful birth. That is, compensation awarded to parents should be reduced by the benefits of having a child. Of course, these benefits are related to the existence of the child, while damages are awarded to compensate the purely economic extraordinary costs of rearing a child with disabilities.

In practice, reproductive liberty and laxism go hand in hand. Alghrani and Harris (2006, p. 210) point out that “Law may make financial provision and arbitrate in disputes. It has no role or place in founding families or in determining who is better as a parent.” Even though reproductive liberty is a right of all, its implementation is regulated by legislative tools. In a democratic state, the legislature respects the citizens’ majority opinion, although it never disregards minority views. Further, the balance between the majority society and the dissenting minority is struck by regulatory and adjudicatory bodies, the latter of which are sometimes in conflict with each other. In Hungary, wrongful birth is the last legal institution of the triad of wrongful conception, wrongful life and wrongful birth that is still in effect. The legal and social motives of curtailing reproductive rights are clear. This tendency is legitimised by the social contract. Nonetheless, compensating parents as victims of diagnostic negligence is instrumental in maintaining a just and correct provider–patient relationship because it serves commutative justice on the basis of a contract for treatment. Arguably, maintaining institutional trust is a prerequisite for democracy and the rule of law, and the quality of institutional trust hinges on the national implementation of the human right to family *inter alia* because “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (UDHR, art. 16[3]). Pursuant to art. L (1) of Hungary’s Fundamental Law, “Family ties shall be based on marriage or the relationship between parents and children.” That is, the only extramarital form of family in Hungary is the parent–child relationship. Thus, even if indirectly, parents’ right to a wrongful birth claim is derived from and founded by human rights-based constitutional law.

The European Court of Human Rights argues that the rejection of wrongful birth claims by national courts violates art. 8 of the ECHR because “everyone has the right to respect for their family life” and, for this reason, parents have the right to give birth to a healthy child. The European Court of Human Rights made this argumentation clear e.g. in *Costa and Pavan v. Italy* (2013), *M.P. and others v. Romania* (2014), and *A.K. v. Latvia* (2014). In human rights issues, the Court of Justice of the European Union follows the practice of the European Court of Human Rights. As a consequence, damages should be awarded to parents for wrongful birth in all EU Member States.

As prospective parents, citizens might be exposed to wrongful birth even if they live in an EU Member State with a well-functioning healthcare system. Indeed,

diagnostic techniques are still not sufficiently developed to avoid all misdiagnoses, and the standard level of healthcare sometimes suffers a deficit from healthcare professionals fatigued by work overload. Wrongful birth may arise from both the technical and the human constituents of healthcare provision, and civil wrongs are strongly linked to the financing of healthcare facilities and workers. Certainly, there is a great difference between more and less affluent EU Member States. However, the right to be treated by well-rested healthcare professionals should be a statutory right of all even though this right is far from reality in some Eastern European countries.

6 Wrongful Birth in Tort and in Contract

Wrongful birth is mostly a tort in British and US law. In the EU, it is perceived as a breach of a contract for treatment, even if it was concluded verbally. Roughly half of US states grant parents the right to compensation for wrongful birth.

Wrongful birth is regarded as a breach of a contract for treatment in German and Dutch law because such a contract is incorporated into the *Bürgerliches Gesetzbuch* (*Behandlungsvertrag*) and *Burgerlijk Wetboek* (*behandelingsovereenkomst*), respectively. In many other European countries, the contract for treatment cannot be found in the national Civil Code *expressis verbis*. For instance, in Estonia, it was legal practice that developed the theory of contracts for treatment. As a result, a misdiagnosis leading to wrongful birth constitutes a breach of contract (*E. B. v. SA Põhja-Eesti Regionaalhaigla*, 2011; see Sõritsa, 2016, p. 108). In Hungary, wrongful birth is perceived by the courts as a breach of an atypical contract for treatment which, however, generates an extracontractual liability on the part of the healthcare provider. Hungarian lawmakers did not include a contract for treatment in the new Civil Code of 2013. Nonetheless, the Hungarian judiciary considers the provider–patient relationship a contract for treatment because both parties have rights and obligations with respect to each other based on the Health Act and the Civil Code. This contract is entered into when the patient agrees to the treatment plan offered by the provider. At any rate, in line with a cogent norm of the Health Act (§244[2]), the provider’s liability remains extracontractual, thus leaving more room for exculpation by the provider. This norm was incorporated into the text of the Health Act on the day the new Civil Code went into effect (15 March 2014). This was inevitable because the Civil Code made contractual liability objective, narrowing the provider’s legal chance for exculpation. Lawmakers did not intend to place the

burden of objective liability on healthcare providers who were already in a dire financial situation. At first sight, the question arises: Why is the contract for treatment not in the Hungarian statutes *expressis verbis*? I could enumerate arguments, such as the principle of *non-cumul* borrowed from French civil law and leaving no chance for extracontractual liability when a breach of contract arises.

In the Hungarian judicial practice of wrongful birth, the causality between a diagnostic failure, proven by the healthcare documentation, and the extraordinary costs of bringing up a disabled child is hard to challenge. Whether the physician abided by the professional rules is determined by the court based on expert testimony. Whether there was a lack of due diligence on the part of the physician is determined by the court based on the judge's opinion. In a wrongful birth case, it is unlikely that the provider will be exculpated. In Hungary, if a wrongful birth case is brought to court, it usually ends up with damages awarded to the parents. Certainly, the provider's lawyer normally makes attempts to reduce the sum of the damages. Although the provider's liability typically cannot be successfully challenged, the quantity of the damages awarded may be reduced through appropriate legal reasoning. The provider's lawyer endeavours to have the compensation diminished item by item. For example, they ask: Is a hygiene product or medicine truly tied to the disability of the child? Would the same not also be required for a healthy child? Finally, a list of hygiene products and medicines, each priced, emerges and the judge makes a calculation.

7 Damages for Wrongful Birth

The sums of compensation awarded to parents on the basis of wrongful birth vary from country to country. Both similar and disparate tendencies can be found in the judicial practice of different states. While the highest compensations are to be found in the US, damages have recently also been augmented in Hungary, with awards reaching over Ft 50,000,000 (\$143,000) (Debrecen Regional Court of Appeal, 2024). This may be explained by inflation as well.

In the US, damages for wrongful birth are much higher: e.g. \$14,500,000 in *Plowman v. Fort Madison Community Hospital* (2017) and a little over \$10,000,000 in *Pacheco v. United States* (2022).

Besides material damages, immaterial damages may also be awarded to parents for wrongful birth. In countries where punitive damages (or exemplary damages) are constitutional, this type of damages also arises (e.g. in the UK and US). Baginska (2010, p. 171), a Polish author, specified three main grounds for immaterial damages in wrongful birth cases: personal injury, infringement of personal rights and loss of chance to abort. On 16 May 2023, the Supreme Court of the Czech Republic (2023) declared that immaterial damages should not be awarded to the mother for having to see her disabled child growing up if she had not opted for abortion, e.g. for religious reasons.

According to the Civil Code of Hungary, §2:52(2), the mere fact of infringement of a personal right supports parents' right to "grievance award" for non-material harm. Nevertheless, the Hungarian judiciary sometimes requires proof of concrete harm (see, e.g. Curia, 2019b). Lábady (2016, p. 43), a former judge of the Constitutional Court of Hungary, sides with it. This judicial practice might nuance the Civil Code; however, given respect for the rule of law in Hungary, judge-made law is widely observed. Judges not only apply the law, but also develop it. They likewise interpret the law in a broad sense. The aim of the codifiers of the new Hungarian Civil Code of 2013 was to ensure and fortify this judicial right. At the same time, the Hungarian judiciary refrains from punitive damages in civil law, as punitive (or exemplary) damages run counter to Hungary's *ordre public*.

Compensation for parents is certainly not sufficient to alleviate their suffering. The economic approach to wrongful birth can monetize economic damages, such as the extraordinary costs of raising a child with disabilities; however, the intangible distress can only partly be covered by non-economic damages. Parents' non-economic damages are mostly self-borne in the long run.

Moreover, parents are under obligation to prevent damage. This duty to mitigate means that, for example, if a pregnant woman is informed of her foetus' disabilities and does not have her foetus legally aborted, the damage (the extraordinary costs of child rearing) will rest with the parents.

8 The Legal and Social Risks of Promoting Wrongful Birth Claims

An increasing number of wrongful birth claims is not without risks as they can lead physicians to adopt defensive medicine. Therefore, in diagnostically ambiguous cases, physicians might direct pregnant women towards abortion to avoid a possible wrongful birth lawsuit. Although the objective of abortion is to protect the rights of the prospective parents, abortion would thus protect the provider's interests. As a result, defensive medicine runs counter to the protection of foetal life.

At first sight, judicial practice that favours parents is just and legal in wrongful birth lawsuits because the violation of parents' personal rights by a negligent provider interferes with their daily lives and because they are often disadvantaged by poor legal representation. Nevertheless, this legal practice can reinforce inequality in litigation. Providers might place emphasis on effective legal protection in lieu of a medical approach. Indeed, more money is spent on lawyers than on developing medical skills, which is counterproductive. A judicial remedy should be an *ultima ratio* in the event of medical negligence. Instead, I stress the significance of an extrajudicial dispute settlement (Radolovic, 2023), such as mediation (Julesz, 2014).

The disability rights critique of prenatal genetic testing points out that "selective abortion expresses negative or discriminatory attitudes" and that it signals "an intolerance of diversity not merely in the society but in the family, and ultimately it could harm parental attitudes toward children" *inter alia* (Parens & Asch, 1999, p. S2). Valentine (2024, p. 206) expresses her criticism as follows: "The liberal position reinforces the person pursuing the abortion as an isolated, autonomous individual. It limits the possibilities of a potentially disabled child as anything *but* a burden." In Denmark, a pregnant woman may request an abortion without any specific reason in the first trimester of pregnancy. After the first trimester, abortion committees are authorised to decide to permit an abortion when the danger arises that the foetus has a serious mental or physical disability (Heinsen, 2024, p. 1). Heinsen (2024, p. 2) notes that permission is granted automatically in the case of Down's syndrome, neural tube defects, sex-chromosome anomalies, and many genetic diseases and malformations (e.g. missing or shortened limbs). Still, Heinsen (2024, p. 19) concludes that "it is not eugenics"; rather, abortion committee members do not intend to stand "in the way of prospective parents' autonomous choices". Arguably, disability-selective abortion can pose a genuine risk. However, for a lot of parents, abortion is ethically correct when the foetus' disabilities would truly make the life of

the child and parents unbearable. For a great many parents, their child's slight health impairment, one that does not place a heavy financial, physical or mental burden on the child and parents, does not justify abortion and thus cannot amount to a wrongful birth claim. Overall, I do not think a pregnant woman deciding to have a disabled foetus aborted within the boundaries of the law is indeed tantamount to eugenics. In a democratic state, the law safeguards society from such phenomena. This kind of risk strengthens the need to maintain an abortion regulation supported by checks and balances. The statutory background of and the judicial practice in wrongful birth are supposed to impede the corruption of this civil law institution.

One can easily conceive negative criticisms of the wrongful birth action, although positive law usually provides society with an unequivocal answer. Meanwhile, the "slippery slope" problem remains a philosophical one. In reality, legislation and relevant court rulings normally transcend the social divide. According to the law, autonomous patients are entitled to self-determination in healthcare. Cutting the Gordian knot by prohibiting abortion is certainly not an adequate response to the problem of wrongful birth claims. Moreover, eradicating a healthcare provider's civil liability in this area would be detrimental to both institutional and social trust.

A wrongful birth claim should never serve to unjustly enrich parents. For that reason, compensation must be restricted to the costs that truly derive from a child's disability. All excessive compensations are contrary to the spirit of the legal institution of compensatory damages. Damages awarded to parents should provide them with the wealth and comfort that they would enjoy had their child been born without disabilities. Certainly, a child represents neither pecuniary gain nor pecuniary loss on the part of his or her parents. Indeed, a child has no monetary value.

In most countries, different moral values exist in parallel. These values are largely dependent on religious and political trends there. It would be a mistake to disregard leading trends because they express the will of the people. However, the will of the people is not necessarily identical to the *voluntas aegroti* in specific cases. For instance, it is possible that a pregnant woman wants to abort a foetus whose disabilities came to light too late in legal terms. Being against the law, abortion is not permitted in this case. Nevertheless, parents will be entitled to damages. If we strictly abide by abortion laws, we might cause damage to parents and place a heavy financial burden on a negligent healthcare provider. The question arises whether the law in a particular country may be overwritten by economic, moral or any other kind of

considerations. The answer is certainly no. Wrongful birth must not be prevented by an illegal act. There might be a divide between legal and ethical responses to the same problem. Arguably, the law involves ethical norms. However, a merely ethical consideration should not contradict a legal norm, even if the avoidance of wrongful birth were in the best interest of both contracting parties (i.e. the patient and the provider). The eternal dilemma of “ethics or law” surfaces in wrongful birth cases as well. Certainly, the prevention of wrongful birth is not paramount.

9 Conclusion

The institution of the wrongful birth action forms part of parents’ reproductive liberty. Although it is widely disputed by legal scholars, this institution is upheld in the EU and in a great many US States.

Wrongful birth has been criticised from both legal and ethical perspectives. The human rights arguments for the wrongful birth action are based on the CEDAW, the UDHR, and the ECHR.

Reproductive liberty is not exclusively a liberal value. A large number of conservative governments accept it. However, there is a tendency to reduce the extension of reproductive liberty with legislative and judicial tools in numerous affluent countries.

Presently, wrongful birth claimants may only obtain compensation for the extraordinary costs of rearing a disabled child, that is, the costs of raising a disabled child minus the possible costs of raising a healthy one. A child does not constitute damage, so the negligent provider is only liable for the economic burden caused by misdiagnosis or omission of diagnosis resulting in the lost chance to abort.

If we consider the pros and cons of the wrongful birth claim, the pros prevail. However, the counterarguments should also be taken into consideration.

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Povzetek v slovenskem jeziku

Čeprav so tožbe glede neupravičene nosečnosti in neupravičenega življenja zavrjnene na madžarskih sodiščih, je tožba glede neupravičenega rojstva dovoljena. Skladno z enotno odločitvijo Sodišča EU v zadevi 2/2022, se odškodnina zaradi neupravičenega rojstva zmanjša na stroške vzgoje invalidnega otroka, od česar se odštejejo možni stroški vzgoje zdravega otroka. Kritika pravic invalidov je zelo močna, od ZDA do EU. Kljub temu pa kršitev osebne pravice staršev do načrtovanja družine zahteva odškodnino v EU in številnih zveznih državah ZDA. Tožba zaradi neupravičenega rojstva ne diskreditira dostojnosti invalidnega otroka.