

Wrongful Birth and Wrongful Life Actions (The Experience in Portugal as a Continental Civil Law Country)

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Abstract

This article presents a brief overview of how medical liability for wrongful birth and wrongful life issues is addressed under continental civil law in Portugal. It analyses the requisites for tort liability (wrongfulness, culpability, causation and damage), then explores how these elements operate in wrongful birth and life lawsuits. This is done to determine whether they can be applied as they would be in any other medical liability situation, or whether they require adaption. In addition, this article examines other circumstances that can affect the outcome of these legal procedures, namely standing to file a lawsuit, the judicial consideration of hypothetical events and the legal regulation of abortion. In addition to analysing the particularities of continental civil law within the domain of wrongful birth and life suits, this article will provide some suggestions for improving the current law and caselaw and some insights regarding the development of these legal proceedings for the near future.

I. Juridical Contextualisation of Wrongful Birth and Wrongful Life Actions

Wrongful birth actions arise when a child is born with a disease or a malformation and his or her parents (the claimants) want to hold responsible those who professionally advised on the pregnancy without providing complete information on it. The potentially culpable parties include the hospital, the medical team and/or any external laboratory that performed the prenatal diagnostic exam (the defendants), even if they have not caused the birth defect directly.¹

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¹ About wrongful birth actions see: K. Carey, 'Wrongful Life and Wrongful Birth: Legal Aspects of Failed Genetic Testing in Oocyte Donation' 1 *Penn Bioethics Journal*, 1 (2005); W. Hensel, 'The Disabling Impact of Wrongful Birth and Wrongful Life Actions' 40 *Harvard Civil Rights-Civil Liberties Law Review*, 141 (2005); P.M. Pinto, 'Indemnização em caso de "Nascimento Indevido" e de "Vida Indevida" ("Wrongful Birth" e "Wrongful Life")' 4(7) *Lex Medicinæ*, 5 (2007); V.L. Raposo, 'As Wrong Actions no Início da Vida (Wrongful Conception, Wrongful Birth e Wrongful Life) e a Responsabilidade Médica' 21 *Revista Portuguesa do Dano Corporal*, 61 (2010); D. Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' 10(1) *Deakin Law Review*, 319 (2005).

Wrongful life actions occur under similar conditions, the difference being that the lawsuit is brought by the child (or by someone else on his or her behalf, as minors lack the legal capacity to sue) against the doctors, the hospital and even the child's parents. The latter is the most controversial modality of this action, and it is not referred to in this article unless it is relevant to understanding a wrongful life action.²

Both wrongful birth and wrongful life actions have arisen precisely because of advances in technology and science, which have raised the odds of having a healthy child closer to a certainty than a possibility. This new certainty may have created a belief among parents that they should not settle for less than a healthy child.

The idea has been reinforced by the progressive liberalisation of abortion schemes. By following the legislative evolution of continental civil law, one can see that in the beginning abortion was an exception; afterwards, it became a right; an eventual dimension of the right to not reproduce. Now, we may be transforming abortion into a parental duty in the sense that there may be a legal responsibility imposed on parents to have considered the option of abortion in the context of potential wrongful life actions filed on behalf of their child.

Nevertheless, wrongful birth and wrongful life actions face two major difficulties. First, they involve very personal ethical and sometimes religious dimensions. Second, in legal terms, the technical obstacles that must be overcome to assign responsibility to each of the various agents are tremendously complex. This article will address both these difficulties.

A further difficulty is the dearth of existing case law within this domain. Only in recent years have wrongful birth and wrongful life actions achieved some success in the continental civil law courts, although this has applied more to the former type of action than the latter.

In the US the scenario is not that different. Although a few states allow limited recovery in wrongful life lawsuits, to cover special expenses, these claims are commonly unsuccessful, mostly due to the problematic qualification of life as an 'injury'.³ Wrongful birth claims are more commonly accepted, though they

² About wrongful life actions see K. Carey, n 1 above, 1; P. Coppens, 'Du Préjudice d'Être Né?', in N. Schiffino and F. Varone eds, *Procréation Médicalement Assistée: Régulation Publique et Enjeux Bioéthique* (Bruxelles: Bruylant, 2003), 68-96; W. Hensel, n 1 above, 141; A. Guarneri, 'Nascita del figlio malformato, errore diagnostico del medico e regola di responsabilità civile' *Rivista di Diritto Civile*, 849 (2002); A. Morris and S. Saintier, 'To Be or Not to Be: Is That the Question? Wrongful Life and Misconceptions' 11 *Medical Law Review*, 167 (2003); W. Neville and B. Lokuge, 'Wrongful Life Claims: Dignity, Disability and A Line in the Sand' 185(10) *The Medical Journal of Australia*, 558 (2006); P.M. Pinto, n 1 above, 5; V.L. Raposo, n 1 above, 61; Id, *O Direito à Imortalidade (O Exercício de Direitos Reprodutivos Mediante Técnicas de Reprodução Assistida e o Estatuto Jurídico do Embrião in Vitro)* (Coimbra: Almedina, 2014), 579, 948; R. Simone, 'Procreazione e danno: dalla nascita indesiderata al diritto alla scelta' *Il Diritto di Famiglia e delle Persone*, 1148 (2003); D. Stretton, n 1 above, 319; M.N. Vicente, 'Algumas Reflexões sobre as Acções de Wrongful Life: A Jurisprudência Perruche' 6(11) *Lex Medicinæ*, 117 (2009).

³ For an overview of recent trends in US case law and legislation regarding wrongful life

are banned in some states.⁴

In the United Kingdom, compensation has been awarded in wrongful birth cases based on the reasoning in *Parkinson v St James*.⁵ In that case a handicapped child was born after a failed sterilisation, and parents were awarded compensation to cover the costs of raising a child with a disability, since the cost of raising a child with such severe conditions are higher than the ones of raising a child without those conditions.⁶ Conversely, wrongful life claims are usually rejected, mostly due to the Congenital Disability Act of 1976.⁷

In continental Europe, case law on wrongful birth actions has been influenced by the 1997 Netherlands Supreme Court decision in the Hoge Raad case,⁸ in which compensation was awarded to cover the costs of raising the child. But the most striking part of this decision is the compensation awarded to the child and that no objections were raised arguing that the decision would violate the child's dignity.

As for wrongful life actions, in continental Europe these issues have been invariably marked by the Perruche case (France) and the Molenaar case (The Netherlands).⁹

The Perruche case is a leading case in French jurisprudence in which both wrongful birth and wrongful life claims were presented. The first judgment in that case¹⁰ awarded compensation to the parents in the wrongful birth action, but not to the child because the court rejected the wrongful life action. However, subsequently the Court of Cassation awarded compensation to the parents for having been deprived of the right to choose between having an abortion or continuing with the pregnancy, and compensation was also awarded to the child for the injuries resulting from his existence.¹¹ This result caused a great

actions, see W. Ryan Schuster, 'Rights Gone Wrong: A Case Against Wrongful Life' 57 *William & Mary Law Review*, 2329 (2016).

⁴ In 2012, it was banned in nine US states. See C. Harris, 'Statutory Prohibitions on Wrongful Birth Claims & Their Dangerous Effects on Parents' 34 *Boston College Journal of Law & Social Justice*, 365, 383 (2014).

⁵ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] EWCA Civ 530.

⁶ *McFarlane and another v Tayside Health Board*, [1999] All ER (D) 1325 is sometimes referred as an opposite decision from English courts, in which the wrongful birth claim was dismissed. However, this was actually a wrongful conception case, because although the child was not desired, it was born healthy, so the court's reasoning was different.

⁷ For comment regarding the situation in the United Kingdom, see S. Farg, 'Recovering Damages in Wrongful Life Cases' *Personal Injury Law Journal*, 4 (2014).

⁸ Hoge Raad, 21 February 1997, *Nederlandse Jurisprudentie*, 145 (1999). A comment on this decision can be found in F. Keuleneer et al, 'Notes to Hoge Raad, 21.2.1997 (Wrongful Birth)' 7 *European Review of Private Law*, 241 (1999).

⁹ See I. Giesen, 'Of Wrongful Birth, Wrongful Life, Comparative Law and the Politics of Tort Law Systems' 72 *Tydskrif vir Heedendaagse Romeins-Hollandse Reg*, 257 (2009).

¹⁰ Cour d'Appel d'Orléans 5 February 1999, RTD civ. 2000.80.

¹¹ Cour de Cassation (assemblée plénière) 11 November 2000, 99-13701, *Bulletin* 2000, Ass. plén., no 9, also at <https://tinyurl.com/y75oq5pj> (last visited 25 November 2017). See A. Muller, 'L'Affaire Perruche (débat sur les dérives vers un eugénisme libéral)' 12 (2002-2003),

deal of commotion and compelled lawmakers to intervene. A short time later the Loi Kouchner¹² was issued, limiting medical liability in cases of this nature. In Art 1 the law provided that '*nul ne peut if prévaloir d'un seul fait du préjudice sa naissance*', meaning that birth cannot be seen as a compensable injury. The law permitted the recovery of compensation only for damages caused directly by medical acts; when the medical procedure itself caused the injury, or the appropriate measures to prevent it were barred. Although the law allowed parents to seek compensation for damages suffered from the birth of a child whose disability was undetected during pregnancy, it excluded special expenses, which fell under the purview of the French National Solidarity Fund for Autonomy. This provision was later revoked by Loi 11 February 2005 no 2005-102,¹³ which modified the *Code de l'action sociale et des familles* (French Code of Social Welfare), in particular Art L.114-5. However, Art L.114-5 of the French Code of Social Welfare has substantially the same content as former Loi Kouchner. Due to these events, wrongful life claims are effectively banned in the French legal system and wrongful birth actions are now compensated outside the framework of tort liability.

In the case of Kelly Molenaar – a Dutch girl born with multiple mental and physical disabilities – the Dutch Supreme Court awarded all the costs of Kelly's education and care, as well as moral damages, both to the parents (including the costs of psychiatric treatment for the mother after delivery) and to the child.¹⁴

For many years there were no decisions from European higher courts accepting wrongful life actions, until in 2012 the Italian *Corte di Cassazione* issued a now famous decision in this matter.¹⁵ In that case, the gynaecologist failed to perform relevant pre-natal diagnosis (PND) and therefore, to provide accurate information about the unborn child's health status, even though he was expressly informed about the parent's desire to interrupt pregnancy if foetal malformations were detected. The child was born with Down syndrome and the parents applied to the Court for compensation for being deprived of relevant information to decide whether or not to interrupt pregnancy. The Court accepted their wrongful birth action. An interesting aspect of this case is that

available at <https://tinyurl.com/ycr2e68a> (last visited 25 November 2017); M. Spriggs and J. Savulescu, 'The Perruche Judgment and the "Right not to Be Born"' 28 *Journal of Medical Ethics*, 63 (2002).

¹² Loi 4 March 2002 no 2002-303, *relative aux droits des malades et à la qualité du système de santé* (on the rights of sick people and on the quality of the health service).

¹³ Loi 11 February 2005 no 2005-102 *pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées* (for the equity of rights and opportunities, the participation and the citizenship of handicapped people).

¹⁴ See HR 18 March 2005, 2006 Nederlandse Jurisprudentie 606 nt JBMV (Kelly).

¹⁵ Corte di Cassazione 2 October 2012 no 16754, *Responsabilità civile e previdenza*, 124 (2013). Comments to this case in P. Frati et al, 'The Physician's Breach of the Duty to Inform the Parent of Deformities and Abnormalities in the Foetus: "Wrongful Life" Actions, a New Frontier of Medical Responsibility' 27(11) *The Journal of Maternal-Fetal & Neonatal Medicine*, 1113 (2014).

the child's siblings were also awarded compensation, on the basis that having a child with a disability in the family deprived the other siblings of a 'regular' family life, because the parents would be less available to take care of them. But the most defining characteristic of this decision is the recognition of the wrongful life action, by awarding the child compensation. This was not grounded on a hypothetical right to be born healthy, but on her right to health. According to the Court, if the doctor had properly diagnosed the malformation, the child would not have been born, thereby would have been spared to pain and suffering, and therefore the child's right to health would not have been violated.

However, more recently the *Corte di Cassazione* changed its prior understanding and *en banc* refused a wrongful life claim.¹⁶ In a case concerning a child born with Down syndrome which was not detected during gestation, the Court considered the damage of not being born to be greater damage than to be born unhealthy. Moreover, the Court stated that the legal system does not recognise a right to non-life, the acceptance of which might imply a parallel maternal obligation to abort. So, unless there is a further development, wrongful life claims are for now excluded in Italy.

Currently, both types of proceedings – wrongful birth and wrongful life – remain blurred and controversial in Europe. Even the European Court of Human Rights (ECtHR) refrained from accepting such a case when petitioned. In *A.K. v Latvia*,¹⁷ the plaintiff alleged that she was denied adequate prenatal care and relevant information about the health status of her foetus (the child was born with Down syndrome), and if properly informed she would have chosen to abort. In this wrongful birth claim the ECtHR considered that access to the information necessary to decide to terminate a pregnancy was a matter of private life (Art 8 of the European Convention of Human Rights (ECHR)). In light of the subsidiarity principle, the ECtHR decided it was up to domestic courts to evaluate the necessary degree of information to be provided. The Court found a violation of the procedural aspect of Art 8 of the ECHR, but remained silent about the relevant substantive issues. In *M.P. and Others v Romania*,¹⁸ the plaintiffs were parents of a child born without a tibia after a procedure of artificial insemination. They claimed that the child's right to life (Art 2 of the ECHR) was infringed (wrongful life) and that their right to private life (Art 8 of the ECHR) was also violated by not having all necessary information to make a decision about abortion (wrongful birth). Once again, the ECtHR abstained from substantial

¹⁶ Corte di Cassazione-Sezioni unite 22 December 2015 no 25767, *Giurisprudenza costituzionale*, 1568 (2016). A comment to this case in G. Montanari et al, 'The Italian Supreme Court Has Dismissed Wrongful Life Claims' 30(1) *The Journal of Maternal-Fetal & Neonatal Medicine*, 60 (2017).

¹⁷ Eur. Court H.R., *A.K. v Latvia*, Judgment of 24 June 2014, available at <https://tinyurl.com/yc3rd43h> (last visited 25 November 2017).

¹⁸ Eur. Court H.R., *M.P. and Others v Romania*, Judgment of 16 June 2010, available at <https://tinyurl.com/ya9cespd> (last visited 25 November 2017).

considerations about both claims.

This article will now focus mainly on wrongful life and wrongful birth proceedings in Portugal, while also noting some of the other legal orders belonging to continental civil law. In this regard, it provides a brief overview of the main legal and jurisprudential trends in continental civil law.

II. Medical Obligations in the Context of Prenatal Diagnosis

In the specific domain of PND and according to the applicable medical *leges artis*, physicians are required to respect some basic rules of behaviour.¹⁹ First, they are required to prescribe all tests deemed appropriate to the specific circumstances, during pregnancy and even beforehand (the so-called ‘preconception diagnosis’). Secondly, they must perform exams according to the relevant guidelines and protocols. Thirdly, they must interpret the exams in the correct way, respecting the applicable scientific norms and underlying technical limits affecting their reliability. Finally, physicians must report the results of these exams in full to the parents, accompanied by explanations, so they can make a free and informed decision on whether to continue or terminate the pregnancy.

When a doctor miss any of his or her avowed *leges artis* obligations (wrongfulness) and his or her conduct falls short of the performance expected of a reasonable doctor under the same circumstances (culpability), he or she risks exposure to a lawsuit for civil liability (and criminal liability; though this issue is not addressed in this article).

When the alleged medical fault is based on ineffective communication, the case is treated as one of deficient informed consent. This means that the acceptability of the doctor’s actions depends, to a large extent, on the scope of the obligations imposed to the doctor and on the information available to him. It depends especially on whether or not the doctor is required to inform the patient of all existing risks, even rare ones if they are sufficiently serious, or if such an obligation is imposed only for the most common risks. The majority of continental civil law scholars²⁰ agree that the general medical obligation to provide information also includes rare but serious risks,²¹ and therefore the same should apply in this situation.

¹⁹ On the doctor’s conduct in prenatal diagnosis, see A. Emaldi Ciri3n, *El Consejo Gen3tico y sus Implicaciones Jur3dicas* (Bilbao-Granada: Editorial Comares, 2001); K.L. Lawson and R.A. Pierson, ‘Maternal Decisions Regarding Prenatal Diagnosis: Rational Choices or Sensible Decisions?’ 29(3) *Journal of obstetrics and gynaecology Canada*, 240 (2007).

²⁰ See M. Parzeller et al, ‘Patient Information and Informed Consent Before and After Medical Intervention’ 104(9) *Dtsch Arztebl*, A576 (2007).

²¹ Regarding the duty of information in this particular domain, M.N. Pacheco-Jim3nez, ‘Acciones Wrongful Birth y Wrongful Life: Una Controvertida Vía de Responsabilidad Civil M3dica’ *Semin3rio Permanente de Ciencias Sociales*, 9 (2011), available at <https://tinyurl.com/yanjgtew> (last visited 25 November 2017).

III. Wrongful Birth and Wrongful Life Are Not Regular Medical Malpractice Cases

Wrongful birth and wrongful life actions should not be confused with proceedings in which the doctor has caused damage to a child who would otherwise be healthy (for instance, by a poorly performed amniocentesis or a drug that should not have been prescribed for a given medical condition). Nor can these cases be mistaken for others in which the unborn child could have been successfully treated in utero, but because the doctor did not perform a recommended treatment the child was born with a severe malady. In such cases, there are strong bases for the doctors' civil liability; however, they do not amount to a wrongful birth or a wrongful life action,²² because the child could indeed have been born healthy if not for the doctors' conduct.

Nevertheless, in the context of wrongful birth and wrongful life proceedings, there is no chance whatsoever for the child to be born healthy, an issue that makes these cases particularly complex. Furthermore, and unlike what happens in regular medical malpractice, it is not the doctor who causes the child to be born with infirmities. Therefore, wrongful birth and wrongful life lawsuits do not constitute typical medical malpractice cases.

IV. Pre-Requisites to Civil Liability in Continental European Law

Civil liability requires establishing the following cumulative prerequisites:²³

- i. Unlawfulness, ie, the violation of *leges artis*;²⁴
- ii. Culpability, which can be defined as a violation of the duty of care, namely a failure to meet the 'reasonable doctor' standard;²⁵
- iii. Causation;²⁶ and
- iv. Damage.²⁷

²² A. Macía Morillo, 'La Responsabilidad Civil Médica. Las Llamadas Acciones de Wrongful Birth y Wrongful Life' 27 *Revista de Derecho*, 3, 20 (2007).

²³ We refer to the requisites of civil liability as they are understood within the model of continental civil law. More details in D. Bello Janeiro, 'La Prueba de la Responsabilidad Civil Médica', in D. Bello Janeiro ed, *Régimen Jurídico de la Responsabilidad Sanitaria* (Madrid: Reus Editorial, 2013), 153, 233; M. Castellano Arroyo and S. Davide Ferrara, 'La Responsabilidad Profesional Médica en Europa' 40(4) *Revista Española de Medicina Legal*, 161 (2014); J. César Galán Cortés, *Responsabilidad Civil Médica* (Cizur Menor, Navarra: Civitas, 2014); A. Dias Pereira, *Direitos dos Pacientes e Responsabilidade Médica* (Coimbra: Coimbra Editora, 2015); V.L. Raposo, *Do Ato Médico ao Problema Jurídico* (Coimbra: Almedina, 2013).

²⁴ M. Gómez Jara, *La Responsabilidad Profesional Sanitaria* (Barcelona: Atelier Jurídico, 2007), 57 and V.L. Raposo, *Do Ato Médico ao Problema Jurídico* n 23 above, 45.

²⁵ G. Iadecola and M. Bona, *La Responsabilità dei medici e delle strutture sanitarie (profili penali e civili)* (Milano: Giuffrè Editore, 2009), 81-82 and V. L. Raposo, *Do Ato Médico ao Problema Jurídico* n 23 above, 80.

²⁶ C. Hernández-Cueto, 'Imputabilidad Médica' 2(4) *Revista Portuguesa do Dano Corporal*, 33 (1994) and V.L. Raposo, *Do Ato Médico ao Problema Jurídico* n 23 above, 49.

²⁷ See C. Rogel Vide, 'Daños Determinantes de Responsabilidad Médica', in D. Bello ed,

1. Rebutting Wrongfulness and Culpability

To defend against the alleged wrongfulness and culpability of his or her conduct, a doctor could make several arguments. For instance, the doctor could argue that technical limitations did not allow him or her to detect the health condition of the unborn child, nor did it raise relevant doubts regarding the presence of any medical condition. It is an established fact that although scientific knowledge has grown immensely, there are still limitations and deficiencies that render test results fallible. Therefore, a correct result may not be obtained due to these inadequacies.

Another argument may be that an exam that could have detected a health condition was not medically recommended for the situation. For example, an exam might not have been performed because it was a standard pregnancy, without any apparent complications that would impose a special duty of vigilance or even alert a doctor of the need to conduct that particular exam. Indeed, not all possible exams should be performed during a pregnancy because some are quite dangerous, both to the mother and the unborn child. Regarding riskier exams, the doctor must weigh the dangers against the benefits expected from performing the exam, and then decide not only about the utility of the exam, but also – and perhaps more importantly – whether it is really necessary. Good medical practice does not require that all pregnant women be prescribed the vast array of current pre-natal exams. On the contrary, prescribing all medical exams is not advised, and sometimes conducting an exam may be contrary to *leges artis*. In addition, there are economic considerations that cannot be forgotten. Indeed, it would be financially impossible for most people to pay for all of the potential exams (which are usually very expensive) in all situations. The assessment of necessity or even utility, versus the safety of a certain exam, depends on the evaluation of several factors. For this reason, it is necessary to consider the woman's age, current health status and medical history in addition to those of the child's father, the woman's exposure to teratogenic agents (such as chemicals or infectious diseases), her respective family history, any of her previous pregnancies and any incidents that may have occurred during those pregnancies.

It may also be claimed that a child's health condition could not have been detected before the end of the period legally allowed for interrupting the pregnancy. However, such an argument will depend on the jurisdiction in which the case was brought and the circumstances justifying any decision to abort, since regulation on abortion differs from one jurisdiction to another. Furthermore, although this legal prohibition may prevent a successful termination of a pregnancy, information awareness may emotionally prepare parents for their child's situation. Thus, the omission of specific information may be relevant and indeed give rise to a claim for moral damages, even when the foetus could not be aborted

anymore due to legally imposed prohibitions.

The defendant may still invoke deficiencies in the information provided by the parents, arguing that such deficiencies have prevented a correct analysis of the necessity for an exam. This may occur, for example, when parents have not informed their medical team that they are carriers of a rare hereditary disease (one not usually screened for in prenatal diagnoses) or that they belong to an ethnic group in which a given health condition is especially common. Unaware of that specific information, the doctor does not have all necessary data for a proper assessment and may disregard exams that he would have recommended if fully informed.

Not all erroneous PND can be attributed to incompetence, negligence or any other medical misconduct. Instead, some are due to technical limitations, thus should be legally irrelevant.²⁸ If modern techniques do not allow for the detection of certain maladies, a doctor cannot be held responsible for inaccurate results. However, in the event of ambiguous or unreliable results, the doctor should proceed with additional tests, or at least inform the parents of the uncertainty of the results. If the medical condition of an embryo/foetus has not been detected due to scientific limitations of which the doctor was aware, but he or she did not include a reference to such limitations in the report that accompanied the exam, a wrongful birth or a wrongful life action may be appropriate.

A different scenario results when the malady could have been effectively detected in the abstract, but not in that specific hospital due to the inadequacy of the equipment used. In our opinion, under such circumstances, liability should remain, not with the doctor but with the institution with the power to decide which equipment to purchase. The situation is more complex when the apparatus and methods capable of identifying a disease or malformation exist, but only in very advanced high-tech centres. Given the cost, the absence of such technology would not be chargeable to the doctor or institution. However, if the parents were not informed that the hospital lacked the appropriate equipment, but another hospital could perform more effective exams, it may still be possible to sue for damages related to the lack of informed consent if that information were crucial to the decision whether to perform the exam at that medical centre or a more sophisticated one. Nevertheless, none of these cases can be categorised as wrongful birth or wrongful life situations.

In Portugal, the judicial experience and strong jurisprudence deemed necessary to rule on this matter are still lacking. In contrast, Spanish case law has several actions of this nature, although they have resulted in contradictory rulings. On some occasions, the Spanish Supreme Court has held that if there is nothing to raise suspicion that a possible abnormality exists in an unborn child,

²⁸ See R. Teixeira Pedro, *A Responsabilidade Civil do Médico* (Coimbra: Coimbra Editora, 2008), 98, 102.

the physician should not be held liable.²⁹ However, in a similar case, a doctor was charged for not performing a triple screening that could have identified Down syndrome in a thirty-one year-old pregnant woman with one standard pregnancy and for whom the test was not recommended. The doctor was held responsible.³⁰ Therefore, the confusion remains.

2. Damages

a) Parental Damages

Parents who file a wrongful birth action can claim patrimonial and moral damages. In the first instance, they must argue that they will incur additional costs in raising the child³¹ (ie, the unexpected and very high expenses required to raise that child compared with the expense of raising a typical child).³²

To claim moral damages, parents must invoke the pain and suffering they have experienced because of the child's situation. Furthermore, to be awarded moral damages, another dimension should be included because it is likely to be raised in court: the violation of reproductive rights. This is, actually, the core note of these actions.

Reproductive rights are fourth generation fundamental rights,³³ intended to reflect the liberty of a person to decide whether or not to have a child, in addition to when and under what conditions to do so. The freedom to decide whether to have a child, the so-called 'right to reproduce', is generally discussed in the context of access to reproductive techniques and the fight against forced sterilisation. Conversely, the freedom to decide not to have a child (known as the 'right not to reproduce') mainly concerns the use of contraceptives and abortion services.³⁴ In our scenario, we are dealing with the right not to reproduce, by

²⁹ Tribunal Supremo 19 June 2007, and Tribunal Supremo 17 November 2008, as quoted by A. Macía Morillo, 'Negligencia Médica en el Seguimiento del Embarazo y Responsabilidad por Wrongful Birth. Comentario a la STS (Sala 1.^a) de 24 de Octubre de 2008' 18 *Revista Jurídica de la Universidad Autónoma de Madrid*, 189, 195 (2008).

³⁰ Tribunal Supremo 6 July 2007, as quoted by A. Macía Morillo, 'Negligencia Médica' n 29 above, 204.

³¹ Comparing the costs of raising a healthy child and an unhealthy child, M. Brazier, *Medicine, Patients and the Law* (Harmondsworth: Penguin, 1987), 172.

³² The adjective 'typical' does not intend to add any moral or ethical connotation, but simply refers to a child that does not suffer of any severe disease or impairment.

³³ Cf V.L. Raposo, *O Direito à Imortalidade* n 2 above; J. Robertson, 'Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction' 59(5) *Southern California Law Review*, 939 (1986); J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1996).

³⁴ It is important to note that the classification of abortion as a right (common in the US) is very controversial in our setting. For the purposes of this article, we only accept its classification as a fundamental right in the cases traditionally described in Criminal Codes as legitimate reasons to abort, such as danger to the mother's life or health, the child's malformation or a pregnancy that results from a sex crime. As we cannot discuss this issue in the present article, we emphasise that in wrongful birth and wrongful life actions we are dealing with abortions motivated by the

using abortion as a mechanism to avoid giving birth to an unhealthy child.

The unique aspect of this kind of damage is that to have their action recognised the plaintiffs do not need to demonstrate that they have been effectively prevented from choosing an abortion. In other words, it does not matter whether or not the parents would have terminated the pregnancy if they had known of the unborn child's condition. Damages do not accrue from the parents being prevented from abortion, but from eliminating their right to choose whether or not to have an abortion (or the choice of which embryos would be transferred in the case of in vitro fertilisation), as we develop *infra*.³⁵

b) The Child's Damages

In a wrongful life action a child can invoke, through a legal representative, patrimonial and moral damages. Patrimonial damages are very simple to understand, as they reflect that the child cannot provide for his or herself. Moral damages are far more complex and involve convoluted juridical and ethical considerations. They refer to the living conditions of the child, on the assumption that certain conditions of existence, not existence itself, should be considered damaging, because they would be considered an injury deserving compensation had they occurred later in the child's life.

The concept of moral damage in wrongful life actions has been misunderstood, because some authors writing on continental civil law have alternatively argued that the damage is the child itself or that the damage is human life.³⁶ Under these conditions, both positions converge to reject wrongful life actions, arguing that the alleged damage is juridically illogical and contradictory considering the profound respect the legal order has for human life. However, there are some important considerations to keep in mind when evaluating this specific form of damages, in which legal and ethical considerations converge.

First, it is not true that life is always a benefit; this depends on living conditions. Life is not taken as an absolute value anymore. The growing recognition of abortion based on severe malformations and the legal admission of several forms of euthanasia has demonstrated that, around the world, courts and lawmakers have been paying more attention to the quality of human life rather than just its

health condition of the unborn child. In that context, we do not contest its qualification as a reproductive right.

³⁵ A. Macía Morillo, 'Negligencia Médica' n 29 above, 205.

³⁶ M.C. Frada, 'A Própria Vida como Dano? Dimensões Cíveis e Constitucionais de uma Questão-Limite' 68(1) *Revista da Ordem dos Advogados*, 215, 217 (2008); J. Goffi, 'La Notion de Vie Préjudiciable et l'Eugénisme', in J.N. Missa and C. Susanne eds, *De l'Eugénisme d'État à l'Eugénisme Privé* (Paris: De Boeck Supérieur, 1999), 73; A.P. Monteiro, 'STJ, Acórdão de 19 de Junho de 2001, Direito a Não Nascer?' 134 *Revista de Legislação e Jurisprudência*, 377, 382 (2002); Id, 'Portuguese Case Note' 11(2) *European Review of Private Law*, 220 (2003). For detail about the damage claimed in wrongful life actions see V.L. Raposo, 'Are Wrongful Life Actions Threatening the Value of Human Life?' *Journal of Bioethical Inquiry*, 1-7 (2017).

quantity. In other words, to simply exist, or to exist for a longer time, is not as important as existing with the proper living conditions. That includes living a dignified life with no excessive pain and suffering and having a minimum degree of autonomy. If we accept that some human existence should never happen, as demonstrated by the increased legitimacy of embryopathic/fetopathic abortion, and that some patients' wish to stop living may be satisfied by doctors, as seen in the legal support for euthanasia, we are actually accepting that in some cases not being alive may be preferable to being alive. The specific definition of which cases fit those standards remains to be delineated. However, the final answer can only come from an *ad hoc* evaluation of each specific situation.³⁷

A second important note to consider is that the damages are in fact the conditions to which a given life is subjected, not life itself. The court must compare those conditions with 'regular' living conditions (ie, those experienced by the majority of people) to identify the damage.³⁸ In our case, the value of the compensation must be calculated by comparing the particular living conditions of a given child with the living conditions of a healthy child, even knowing that in this case the child could never have been born healthy, because the only alternative would have been to not be born at all. It is important to remember that wrongful life actions do not imply unworthy lives but instead that some living conditions are too cruel and inhuman to be imposed on people knowingly.³⁹

Third, we cannot agree with the opinions suggesting that the rights claimed by the plaintiff (the child) do not exist.⁴⁰ The authors who argue this point posit that what the child is claiming is both a violation of a supposed right not to be born and a hypothetical right to be born healthy. If the child were claiming those rights the claim would collapse because the referenced rights do not exist. Nevertheless, these are not the rights that justify a wrongful life action.

None of those rights could ever be claimed because they are prenatal rights and human beings are not afforded any rights before birth.⁴¹ Accordingly, these supposed rights are contradictory given that, if admitted, they would pertain to entities that were not juridically entitled to rights. Actually, the right disputed as the object of the violation is the right to physical integrity claimed after birth by

³⁷ Further developments in V.L. Raposo, 'Aqueles que Nasceram (Breve Excurso Sobre o Enquadramento Penal das Lesões Pré-Natais)', in M.C. Andrade et al eds, *Livro de Homenagem ao Professor Peter Hunerfeld* (Coimbra: Coimbra Editora, 2013); E. Ramón Ribas, *El Delito de Lesiones al Feto – Incidencia en el Sistema de Tutela Penal de la Vida y de la Salud* (Granada: Comares, 2002).

³⁸ See S.V. Shiffrin, 'Wrongful Life, Procreative Responsibility, and the Significance of Harm' 5 *Legal Theory*, 117, 137 (1995).

³⁹ Of course, the quantification of this damage does carry some complex problems, but this occurs with every kind of moral damage.

⁴⁰ M.C. Frada, n 36 above, 217; A.P. Monteiro, 'STJ, Acórdão' n 36 above, 377.

⁴¹ Indeed, unborn people are only granted objective protection, a minor protection compared to the subjective protection afforded by the entitlement to fundamental rights. In detail, V.L. Raposo, *O Direito à Imortalidade* n 2 above, 547, 558.

an already born person, fully entitled to the subjective protection offered through his or her fundamental rights. Although the cause of the damage might have occurred before birth, the violated right is claimed after birth. Indeed, the person can claim compensation for being born with severe pathologies caused by an event occurring before he or she became a person, just as was recognised in the famous Thalidomide cases. Therefore, there is no contradiction in this claim.

It is a fact that abortion destroys a human life and historically the value of human life has surpassed the value of physical integrity and health. However, even if we accept this hierarchy of values, the hierarchy is not valid when we compare the value of an unborn life with the value of the physical integrity and/or health of born human beings, ie, individuals. Unborn beings can only aspire to objective protection from the legal order, whereas a person who has been born is entitled to both objective and subjective protection. Thus, the destruction (abortion) of an unborn life is legitimate if its purpose is to prevent severe injury to both the health and physical integrity of a born person, that is, one whom otherwise would have been born with a severe health condition.

Another possible obstacle to claiming moral damages concerns the process of measuring damages. At first it seems to involve a comparison (virtually impossible) between life and non-life, which jeopardises the recognition and appraisal of the sought-after damages.⁴²

Conversely, in cases of prenatal injuries directly caused by a third party or even by the mother, the comparison (for the purpose of calculating compensation) operates as between the situation in which the child was actually born (birth with damage) and the one in which the child would exist but for the injury (birth without damage). Thus, a negative value is assigned to the life that follows a birth with damage and a positive value is assigned to the healthy existence the child could have had if the damage had not occurred. This judicial reasoning is regularly evidenced in cases in which life passes from healthy to unhealthy due to the act of a third party.⁴³

There is a huge difference between the situations: in the latter case (regular malpractice cases), the person would have had a healthy life but for the damage, whereas in the former (wrongful life actions), the person would not have been born at all.

However, as already emphasised, non-existence may be preferable to existence in some scenarios.⁴⁴ This is not to advocate in favour of, for example,

⁴² About the comparison between existence and non-existence, W. Glannon, 'The Morality of Selective Termination', in J.M. Humber and R.F. Almeder eds, *Reproduction, Technology and Rights* (Totowa, New Jersey: Humana Press, 1996), 99; J. Goffi, n 36 above, 81, 86; D. Heyd, *Genetics: Moral Issues in the Creation of People* (Berkeley: University of California Press, 1992) 21.

⁴³ In contrast, in wrongful life cases, the positive value seems to be attributed to the absence of life, as sustained by J. Goffi, n 36 above, 81.

⁴⁴ For a detailed explanation of this reasoning, see V.L. Raposo, 'Aqueles que Nasceram' n 37 above.

making euthanasia available as some form of 'restitution'. Instead, we are defending a monetary award of patrimonial and moral damages to the person due to his or her living conditions. To arrive at this conclusion, it is crucial to evaluate human life within the multiple aspects it embraces and to proceed to the delicate task of separating life itself from certain living conditions.⁴⁵

3. Causation

Even if damages are allowed, causation may still be a problem. In civil continental law, causation is measured pursuant to the theory of adequate causation, requiring a proximate cause of effect (*conditio sine qua non* or 'but-for' cause) and an evaluation, made in abstract, that the agent's conduct caused that damage (adequate causation).⁴⁶

When a doctor injures an initially healthy embryo/foetus while conducting a prenatal diagnosis, it is easy to conclude that without his or her intervention the child would have been born unharmed. Thus, the doctor's medical conduct was the cause of this damage. Conversely, in the kind of cases we are discussing, without the doctor's intervention, the unborn child would simply not have been born. This conclusion seems to preclude causation. However, as we will demonstrate, causation does exist.

a) Causation in Wrongful Birth Actions

In wrongful birth actions the doctor breaches his or her duty to the patient while performing a preconception or pre-natal exam, or in the consequent report of the health status of the embryo/foetus. Because of the doctor's misconduct, the mother is deprived of the reproductive possibilities legally guaranteed to her (and as we see below, only to her). In addition, both parents may suffer a deep emotional shock when faced with a newborn child with a serious health condition when they were expecting a healthy one. Due to this event, every day they are confronted with the child's suffering and may worry about the uncertainty of the child's future. All of these circumstances amount to moral damages that are likely to be compensated. Added to this are the huge costs inseparable from the child's existence, which may include prostheses, drugs, hospital treatments and fees for health professionals specialising in taking care of people with disabilities. There are also patrimonial damages that deserve to be compensated.

However, some have argued that the only damage to be compensated should be the elimination of the parents' ability to decide, as it is only in relation to this specific damage that a causal connection can be made to the medical conduct.⁴⁷

⁴⁵ Also sustaining this thesis, V.L. Raposo, 'Responsabilidade Médica em sede de Diagnóstico Pré-Natal (Wrongful Life e Wrongful Birth)' 132 *Revista do Ministério Público*, 98 (2012).

⁴⁶ See P. Cordeiro da Costa, *Causalidade, Dano e Prova: A Incerteza na Responsabilidade Civil* (Coimbra: Almedina, 2016).

⁴⁷ A. Macia Morillo, 'La Responsabilidad Civil Médica' n 22 above, 22-23. Although the author

The argument justifying this kind of reasoning is that any damage subsequent to the birth of the child (such as the parents' suffering when faced with the health of the child or the additional costs it entails) cannot be attributed to the doctor in terms of cause and effect. However, if we accept that any subsequent damage has the same cause as the initial damage, the doctor's conduct is indeed the cause of the consequential damages.

Other authors have accepted the causal connection between the doctor's conduct and the entire range of damages, but have argued that causation could be destroyed by demonstrating what the mother's decision would have been if she had been properly informed. Hence, if the court concludes that the woman would have decided to continue the pregnancy, even knowing the health status of the unborn child, the physician's responsibility would be terminated according to the theory of alternative lawful conduct (or the equivalent juridical theory in each nation's legal system), which would essentially interrupt causation. According to this theory, liability is excluded provided that, had the agent had acted in a lawful way, the damage would have occurred anyway.⁴⁸ However, in continental civil law, this argument has applied only to criminal liability; in civil liability it does not exist. There is another similar theory, the so-called 'virtual causation theory'. Although it resembles alternative lawful conduct in its assumptions, it has different consequences. Virtual causation affects only the perpetrator's culpability by excluding it in specific situations that are legally defined. Hence, it is not possible to resort to the theory of alternative lawful conduct to exclude causation in wrongful birth and wrongful life actions because the alternative conduct of the doctor terminates causation only in criminal proceedings, not in civil ones. Neither can the reasoning of virtual causation be used to exclude culpability, as the exclusion of culpability based on virtual causation operates only within the restricted scenarios described in the Civil Code and wrongful birth actions are not included in these scenarios.⁴⁹

But the most important note is that the hypothetical decision of a mother is irrelevant to success in these actions, because the damage is not related to her final decision but with the annulment of the possibility to decide.

b) Causation in Wrongful Life Actions

In terms of causation, equal perplexities are raised by wrongful life actions. One recognised position is that the damage suffered by the child would not have

recognises other kinds of damages, they accept causation only in relation to these damages.

⁴⁸ For more details on this theory, see J. Curado Neves, *Comportamento Lícito Alternativo e Concurso de Riscos: Contributo para uma Teoria da Imputação Objectiva em Direito Penal* (Lisboa: AAFDL, 1989).

⁴⁹ Regarding the relevance of this reasoning for civil liability, see H. Antunes, *Responsabilidade Civil dos Obrigados à Vigilância de Pessoa Naturalmente Incapaz* (Lisboa: Universidade Católica Editora, 2000), 284-285 and J. Calvão da Silva, *Responsabilidade Civil do Produtor* (Coimbra: Almedina, 1990), 366-368.

occurred if the physician had acted diligently.

The obstacle here is that traditionally the duty of the physician has been to the mother, not to the embryo or foetus. This would preclude any causal link between the doctor's conduct and the child's damage. However, it can be accepted that the doctor-mother relationship is intended also to benefit a third party's interests,⁵⁰ the embryo/foetus. If this is the case, and a medical obligation to the unborn child can be established, it is possible to draw a causal link between the doctor's conduct and the damage suffered by the newborn child.⁵¹ This conclusion is reinforced by the fact that in continental civil law, a failure to establish direct causation does not prevent the recognition of indirect causation.⁵² Therefore, even if we accept that the doctor did not directly cause the damage to the unborn child,⁵³ we can award compensation because causation can nonetheless be established, at least indirectly.

Another argument that also eliminates liability in wrongful life actions by extinguishing causation alleges that the norms allowing abortion, including abortion based on embryonic malformations, are exclusively intended to protect the mother and not the unborn child. This would be one of the most relevant obstacles to establishing a causal link, given that in continental civil law causation must account for the scope of protection intended by the legal norm, which in this case does not cover the position of the unborn child.⁵⁴ However, limitations to causality based on the norm's scope of protection are more typical in cases of criminal rather than civil liability, which is the relevant type of liability for the purposes of this article. Nonetheless, both kinds of protection can be envisaged in criminally prosecuted abortion cases based on the health of the unborn child. Although the law seeks to protect the woman's reproductive freedom and physical integrity, when an abortion is based on the health condition of an unborn child (severe malformation or serious disease), there is also an intention to protect a future person (physical and moral integrity) from experiencing degrading living conditions once born.⁵⁵ This legal interpretation is based on the understanding that the physical integrity of a born person outweighs the value of life before birth. In other words, it is better to not be born at all than to be born with malformations and illnesses that are so severe they completely degrade the quality of life legally granted to every human being.⁵⁶

⁵⁰ Unborn human beings do not have interests of their own simply because they are not subjective entities, and neither do they have a juridical personality.

⁵¹ In this same sense, P.M. Pinto, n 1 above, 5.

⁵² See F. Pires de Lima and J. de Matos Antunes Varela, *Código Civil Anotado* (Coimbra: Coimbra Editora, 1987), 579.

⁵³ Rejecting compensation based on a lack of causation, M.C. Frada, n 36 above, 216.

⁵⁴ A. Macía Morillo, 'La Responsabilidad Civil Médica' n 22 above, 25-28 and Id, 'Negligencia Médica' n 29 above, 197.

⁵⁵ This thesis was argued in V.L. Raposo, 'Aqueles que Nasceram' n 37 above, 1067.

⁵⁶ Of course, this is only valid in cases in which the unborn child has a severe health condition, not something simple such as a missing finger, a treatable disease or a non-treatable

V. Factors that Can Condition the Success of These Actions

1. Standing

a) Standing in Wrongful Birth Actions

Complex problems are raised in terms of procedural standing. Injuries resulting from the violation of reproductive freedom, that is, the decision whether or not to abort, are applicable only to the mother. All known norms allowing abortion have been very clear that this decision applies solely to a woman, with no need to ask for the father's consent or even require that he be notified of the matter. Therefore, only the mother has the standing to invoke the specific harm resulting from violations of her reproductive rights, that is, she is the only one entitled to raise it.⁵⁷

We are primarily referring to the right to choose whether or not to terminate a pregnancy where an unborn child has serious health problems, which is a mother's decision under Portuguese law, and under all other European continental law. Where uterine embryos are concerned, any decision regarding the pregnancy, including abortion, resides solely with the mother.⁵⁸ These situations are distinguished from cases of extra-uterine (in vitro) embryos, where the decision over the embryo's destiny resides equally with both beneficiaries of the reproductive techniques, regardless of whether they were the ones to provide the gametes.⁵⁹

If this decision belongs exclusively to the mother, then from a strict perspective, standing in court should belong only to the woman.⁶⁰ Nevertheless, the majority of judicial decisions on this matter have recognised the standing of both parents, and in the end, have granted equal compensation to the mother and father without differentiating their positions.

Besides the damage resulting from the violation of reproductive rights, only belonging to the mother, there are also residual damages that can be claimed by the father, such as the suffering and anguish caused by the child's condition, anxiety over the future and expenses related to the child's education and treatment. However, the amount of compensation should not be the same for both parents; it must be lesser for the father precisely because there is a portion of damages

disease that does not seriously affect the person's existence. See. V.L. Raposo, *O Direito à Imortalidade* n 2 above, 594-601.

⁵⁷ Arguing this position, see A. Macía Morillo, 'Negligencia Médica' n 29 above, 198-199, although the author accepts the father's entitlement to a specific range of damages.

⁵⁸ Art 142 of the Portuguese Criminal Code only refers to the consent of the pregnant woman.

⁵⁹ Resulting from Lei no 32/2006, de 26 de Julho (Portuguese law on assisted reproduction) and from the several laws that in each country regulate this matter.

⁶⁰ Curiously, in *X v The United Kingdom* (Eur. Court H.R., *X v The United Kingdom*, Judgment of 13 May 1980, *Reports of Judgments and Decisions* 18416/79) the European Commission of Human Rights recognized the right of a father of an aborted foetus to present an action against the British government, in consideration of the British legislature's responsibility for allowing the woman to abort.

for which the father cannot claim. These are consequential damages (that is, the consequence of violating the female's reproductive rights). Therefore, the man can only claim this range of damages, even in his own name, if the woman had previously claimed a violation of her reproductive rights.

Additional questions may arise when parents take different positions on the decision, particularly if the father claims he would have terminated the pregnancy if the decision were up to him, but the mother (being the person legally entitled to decide) opposed it. Therefore, even if properly informed of the health of the unborn child, the father could never legally compel the mother to have an abortion against her will. In these cases, it may be questioned whether the standing of the father to seek damages should be refused because he did not truly suffer any damage, to the extent that the power to decide was never his. It seems that in the absence of a concurrent claim from the mother over the violation of her reproductive self-determination, the consequential damages resulting from this circumstance would fall away, except for the damage incurred from being surprised by the birth of a severely impaired child. Nevertheless, and although such damages can be invoked in a wrongful birth claim, taken in isolation (ie, outside the context of a wrongful birth action) they probably would not constitute a cause of action, at least in a civil law court.

A possible theory to preserve the father's standing, independent of the mother's position, is to consider that the physician's duty also includes a duty to the father.⁶¹ However, even this legal construction is unable to sustain an independent wrongful birth claim in the father's name, because even if the doctor had informed the father of the condition of the unborn child, the father could not have terminated the pregnancy against the mother's wishes.

However, in the case of in vitro embryos and the corresponding pre-implantation genetic diagnosis (PGD), another solution might be suitable. In this scenario, both parents may bring a wrongful birth action together or independently because the decision belongs to the two of them in equal measure. As a result, the father is not only entitled to full compensation, but also may actually prosecute the case individually. Most of the known laws on reproductive techniques demand the consent of both parties as a couple to transfer the embryo (or for any other decision regarding the embryo) without giving any kind of privilege to the female's position.

It may even be questioned whether standing can be extended to other relatives, not so much because of the accrued expenses (and obviously not because of any violation of reproductive rights), but based on the sorrow and grief they feel when they see what the child is experiencing. The Spanish Supreme

⁶¹ R. Bogoroch and R. Urman, 'Recent Developments in Obstetric Negligence Law: Wrongful Pregnancy, Wrongful Birth, Wrongful Continuation of Pregnancy and Wrongful Death', available at <https://tinyurl.com/ybq7htrz> (last visited 25 November 2017), refers to a figure they called 'derived duty of care', inspired by a decision from Canadian case law, *Tremblay v Daigle*, [1989], 62 D.L.R. (4th) 634 at 665 (S.C.C.).

Court awarded compensation to the sister of a child that was born disabled as part of a claim brought by the parents on their own behalf, on behalf of the disabled child and, interestingly, on behalf of their other daughter, who was awarded compensation for moral damages in the amount of thirty thousand euros.⁶² Some years later, the Italian Supreme Court also recognised the losses suffered by the siblings of a handicapped child for being deprived of attention and care from their parents due to the demands of the new family member.⁶³ Interestingly, the Court concluded that the relationship between the doctor and the pregnant woman also extended to protecting the remaining children in the family, as if there were also a medical duty of care towards them. At first blush, this appeared to be a type of consequential damage, insofar as there was also a claim from the mother invoking the infringement of her reproductive rights. Nevertheless, we consider that this category should be limited only to damages suffered by the other parent, not by the remaining family members.

b) Standing in Wrongful Life Actions

Even more complex is the question of standing in wrongful life actions. In fact, the child cannot file the lawsuit because, being a minor, the child has no legal capacity to sue. If this were the only argument against this possibility, the case could be very easily presented once the child reached the age of majority. The precise reason that the person born in these circumstances is prevented from presenting the lawsuit himself or herself is his/her permanent incapacity to do so. The severity of the disability often affects the person's ability to evaluate any decision to make a claim, thereby precluding any possibility for autonomously litigating later in life.

Thus, the parents, who are the child's legal representatives, are usually the ones to bring a wrongful life action. In this situation, they do not make a claim for their own damages (even though they can submit a parallel claim for their damages by way of a wrongful birth action), but for the damages suffered by the child.

The problem is whether the parents (or other legal representatives) can substitute the child and claim compensation for the child's damaged life, which may not be considered as such by the injured person. The representatives may be superimposing their own assessment on the injured person's assessment of a very intimate matter. Therefore, some authors have argued that the extremely personal and subjective nature of these damages should exclude any kind of procedural representation.

It is true that the legal system accommodates multiple types of actions

⁶² Tribunal Supremo, 18 May 2006, as quoted in M. Casals Miquel and S. F. Josep, 'Comentario a la Sentencia del TS de 18 de mayo de 2006' 73 *Cuadernos Civitas de Jurisprudencia Civil*, 527 (2007).

⁶³ Corte di Cassazione 2 October 2012 no 16754, *Corriere giuridico*, 45 (2013).

brought by legal representatives on behalf of minors and people unable to take legal action. However, the law also exempts purely personal acts that exclude representation.

Nevertheless, in this case, the major damage is the fact that the child is unable to evaluate the damage himself or herself, precisely due to his or her severe condition. It is often impossible for such a child, even as an adult, to litigate by himself or herself, because he or she is so mentally impaired that he or she is unfit to evaluate the case and make decisions. The child's inability to understand his or her own condition is one of the main features of this kind of damage. Consequently, if representation were not allowed, this could result in serious prejudice to the individual that is especially burdensome. The absolute inability to appraise the situation reveals the grievous nature of the harm.

To overcome the absence of a subjective evaluation of the harm, we can objectively assess the damage. It is a fact that some people, despite their very limited and physically painful existence, end up living happy and fulfilled lives. However, the use of an objective assessment is justified precisely because the person is unable to provide his or her own evaluation. Therefore, it is exactly this kind of disability that establishes the damage and justifies an action being brought by another person.

A further obstacle to a child's standing to sue relates to his or her capacity to hold rights and obligations. Within the Portuguese legal system, and in most of the legal systems based on continental civil law, an unborn child cannot have rights or make a claim for compensation, because at the time the injury occurred, he or she did not exist as a person under the law. This is true whether a wrongful life action is filed by the child itself or through its representative. The question is whether such a plaintiff (directly or through a representative) can, after birth, make a plea for compensation regarding an incident that occurred prior to his or her birth. We believe there is no impediment to this hypothesis if the unborn child has actually been born and thereby has become a person, even if he or she is legally represented due to lack of capacity. After birth, regardless of how serious the child's mental incapacity, according to the law there is a person in whom the right to file suit has vested, even if the injuries occurred before the status of legal personhood was achieved.⁶⁴

A final argument against the standing of the child arises based on the allegation of unnecessary compensation. If an indemnity has been granted to the parents in a wrongful birth action because it is their responsibility to provide for the child's sustenance, that money renders it unnecessary to provide further compensation to the child. There are various aspects to be analysed in this argument. First, it is not certain that the parents will spend the specific amount they have claimed to care for the child. Secondly, the potential death of the parents always raises difficulties because they may have other children

⁶⁴ See V.L. Raposo, 'As Wrong Actions no Início da Vida' n 1 above, 74-77.

poised to inherit their money, including that obtained from the indemnity. Finally, even if the parents were to actually act on behalf of the child and leave a monetary fund to provide for his or her livelihood, this would only affect the existing patrimonial damage, leaving aside the child's moral damage.

2. The Hypothetical Decision of the Mother in Wrongful Birth Actions

a) The Problem Under Analysis

As already stated, there are difficulties with wrongful birth actions. For example, should an award of compensation depend on whether the mother would have had an abortion if she had been properly informed, assuming effective damages can be recovered only in her case?

European continental scholars have taken different positions on this issue. Some have advocated that when the court finds that the mother would have carried on with the pregnancy anyway, compensation should be refused.⁶⁵

Others have argued that compensation should be awarded in any case, but should be restricted to special damages where it is impossible to prove the mother would have had an abortion. In this scenario the normal costs of raising a child would be excluded, but damages would cover the extra costs the child's condition would bring to the family. Conversely, if it could be proven that the mother would have had an abortion, damages would cover all of the plaintiffs' expenses resulting from the birth and upbringing of the child.⁶⁶

Our position is close to the one stated previously in the sense that we accept the award of compensation in any case. However, we are not entirely in agreement. The previous conjecture based the amount of damages solely on the difference related to patrimonial damages, whereas our position also applies to the difference related to moral damages. We sustain that if it can be demonstrated that the mother would have had an abortion if she had been fully informed, the violation of reproductive freedom is more severe, as the person would have been deprived of not only the right to make the decision, but also the ultimate result of that decision. In other words, the effective result would have been the opposite of the chosen result.

We recognise that even if the mother had been properly informed, it is uncertain whether all of these damages would have been avoided, as she could have decided to carry on with the pregnancy anyway. However, the decision would have at least been hers to make, fully aware of all of the relevant aspects. Furthermore, if the mother had decided to proceed with the pregnancy under those conditions, the family would have had time to prepare for the outcome.

Thus, we contend that the actual decision of the mother is not determinative

⁶⁵ See M.N. Pacheco-Jiménez, n 21 above, 11-12.

⁶⁶ This seems to be the position of M.N. Vicente, n 2 above, 120.

of whether or not to award the compensation claimed, as damages do not accrue from impeding an abortion. Rather, damages are based on abrogating the freedom to make an informed decision. The real damage is that the woman has been deprived of the right to make a relevant personal and intimate choice related to her reproductive autonomy. The decision she might have made is irrelevant to the issue of the damages. In other words, the crucial fact is not that she was prevented from obtaining an abortion (or from taking a contraceptive, or from destroying the in vitro embryo), but that she was deprived of the right to evaluate the situation by being properly informed. That is, she was prevented from deciding how to exercise her reproductive rights. The substance of that decision influences only the amount of the compensation granted.

b) The Problem with Evidence

If the mother's decision affects the amount of compensation awarded, the substance of that decision must be proven in a court of law. However, proving hypothetical events, namely those resulting from someone's state of mind, presents a massive difficulty for the court. In any given case, it is virtually impossible to know precisely what the mother's options would have been, given the complexity of the situation.

To override this difficulty, some courts (especially in Germany) employ the 'reasonable person' standard and assume that the mother would have acted as a moderately sensible and reasonable person would under the circumstances presented.

In other jurisdictions (visible in Spain), there is a presumption that the mother would have elected to terminate the pregnancy if legally possible. To overcome the presumption, it must be proved that the mother would have proceeded with the pregnancy.⁶⁷

Of course, it is impossible to know for sure what her choice would have been. However, some evidence can help the court make its decision. For example, the court may look at the previous behaviour of the mother, such as whether she had other early abortions under the same or similar circumstances, or whether she had submitted herself to a PGD to learn the embryo's condition, which would suggest that the possibility of abortion had been considered. Nevertheless, a desire that may be deduced in the abstract, or manifested *a priori* or *a posteriori*, may differ from the desire expressed in the actual situation. Previous behaviour is instructive but does not determine with absolute certainty one's behaviour in any other situation.

c) Wrongful Birth and Abortion Regulations

⁶⁷ The same applies, with the necessary corrections, to the decision to use contraceptives or to proceed to the uterine transference of in vitro embryos, with the difference being that in those scenarios generally both parents make the decision.

The admission of wrongful birth and wrongful life actions pertaining to uterine embryos/foetuses is only possible where the legal system in question allows the termination of pregnancy in those circumstances. Specifically, such actions are allowed (a) if the relevant legal system permits abortion on the grounds of disease or malformation of the unborn child (usually also requiring severity and the incurable nature of the disease or malformation) and (b) the possibility of claiming those damages was still possible at the time the medical condition is detected or could scientifically be detected. *Contrario sensu*, these actions are not admissible in jurisdictions that completely ban abortions based on illness or malformation. Conversely, the issue is easily resolved in jurisdictions that allow abortion on request until a certain stage in the pregnancy, if the damage is identified during that specific period.

However, even if abortion is not possible, some damages may still be claimed in wrongful birth actions. We employ the Portuguese solution as a case study to test this hypothesis.

According to Art 142/1/e of the Portuguese Criminal Code, a prospective mother can freely terminate her pregnancy during the first ten weeks of gestation (a similar regime can be found in most of the European Criminal Codes, and sometimes the gestation time is extended). Thus, she is not required to invoke the unborn child's health condition if she wishes to terminate the pregnancy during that period.

Much broader is the deadline for abortions based on the unborn child's health condition, which are allowed in Portugal until the twenty-fourth week of pregnancy (Art 142/1/c of the Portuguese Criminal Code). However, in such cases, there are additional requirements imposed on the termination of a pregnancy. First, there must be a disease or abnormality; and second, the disease or abnormality must be severe and incurable.

As Portugal does not maintain a list of serious illnesses or congenital malformations, it is up to each hospital's ethics committee to assess whether the disease in question meets the government criteria. Consequently, in lawsuits of this kind it is for the judge, after listening to several ethical committees and medical experts, to rule on whether the foetal condition is serious enough to justify aborting it under the standards imposed by the criminal law. Obviously, the conclusions may vary widely according to each *decidenda* entity.

Despite the refusal to allow wrongful birth actions in jurisdictions where abortion cannot be legally performed, there is a specific injury that still can be claimed in this scenario. We are referring to the moral damage suffered by the parents, astounded by the birth of a sick child instead of the healthy child they were expecting based on the doctor's information. In this situation, having an abortion would not have been a legal possibility because it was forbidden in the specific case or on general terms. Therefore, there would have been no violation of reproductive rights. Nevertheless, if properly informed, the parents might

have had the chance to prepare themselves for this situation. The frustration of expectations also constitutes damage. This damage alone, however, would not be constituted as a wrongful birth action, and we doubt that any court would be receptive to awarding any compensation at all in such a case.

In another situation, a medical condition may fulfil the severity prerequisite; however, due to scientific limitations, it might not have been identified before the end of the period in which abortion is legally allowed. When that happens, the exam would only have taken place (and effectively did take place) later on in the pregnancy, where any result would have been legally useless in terms of justifying an abortion request. Therefore, it could not have been used to argue a violation of reproductive rights, as the time limit to terminate the pregnancy would have been exceeded. Nevertheless, just as it was in the last scenario, at least the parents would have been prepared for the birth of that child. Accordingly, all considerations from the previous example also apply here.

In other cases, either there was no malformation or, if one existed, it was not considered sufficiently serious. Therefore, an abortion based on the health condition of the unborn child would be prohibited. Nevertheless, if abortion was allowed upon request and the request was made during the period in which it was legally permitted, the mother could have an abortion regardless. In other words, if the situation was not sufficiently serious to allow an abortion based on the condition of the unborn child, but the mother was still within the time window allowed for abortion on request, the severity requisite would be waived and no such cause of action would be required.

In sum, when abortion is not permitted (either because the national law does not allow it under the circumstances or because the specific condition of the unborn child could only be detected after the period legally allowed to have an abortion), the only remaining claim for damages is based on the shock the parents suffer over the birth of their child, frustrating the expectation of an healthy offspring. These kinds of damages also deserve legal protection, at least when they are presented in the context of a reproductive rights violation. However, pursuant to our hypothesis, the violation of reproductive rights is absent, and a wrongful birth action cannot be based on these specific damages alone. While those damages can certainly be claimed, they cannot be claimed under a wrongful birth action.

Suppose, however, that the delay in diagnosis was attributable to medical negligence, as under *leges artis* the prenatal exam should have been conducted earlier. In this case, we return to the possibility of a wrongful birth action. The issue is more complex when the *legis artis* does not require the physician to perform a prenatal exam in a timelier manner. Nevertheless, what if it could have been conducted earlier? This conjecture that 'it should have/could have been done' makes the outcome of this kind of litigation uncertain, and it depends to a great extent on the particular circumstances of the case.

In the previous scenarios, the unborn child was actually born and survived birth. Suppose now that we are talking about an unviable foetus, a stillborn child or a child that dies immediately after birth. Under Portuguese law, when the unborn child is not viable, an abortion can be performed at any time during gestation. In such cases, we can discuss whether a wrongful birth action can be brought, because it can be assumed that the aforementioned actions make sense only when there is a real possibility to exercise reproductive rights (continuing the pregnancy or terminating it), whereas here the very idea of choice is meaningless. What is at stake is no longer being deprived of the opportunity to decide, but being deprived of the right to have an abortion.

When the child dies, another difference from regular wrongful birth actions is the impossibility of claiming moral damages for the suffering a parent goes through seeing the child grow up with onerous limitations and pain (which does not exist here). Nor can a parent claim patrimonial damages related to the economic burden of providing for the child. None of these remedies exist because the child dies immediately.

However, even if the child cannot survive, failing to provide a correct prenatal diagnosis may still give rise to a legal proceeding. Basically, in this case, the compensation awarded takes into account a different range of damages. Parents cannot claim they were deprived of the possibility of considering abortion or continuing with the pregnancy, since the condition of the unborn child prevents the second hypothesis, so there is no real choice. Nor can they ask for pecuniary damages for raising the child because they won't raise the child. Still, the shock and trauma experienced by the parents is compensable when they finally realise their child's situation, thereby frustrating their (legitimate) expectations for a healthy offspring. It is also conceivable that compensation for patrimonial damage can be awarded for the cost of any medical treatments provided to the mother during gestation, if it can be proved that the pregnancy would have been terminated earlier. However, if there is no claim based on a violation of reproductive rights, an eventual lawsuit cannot qualify as a wrongful birth action, and in the civil law courts its success is quite unlikely.

In conclusion, there are cases in which abortion may not be possible, or conversely, in which it's the only option. In such cases, we cannot speak of an effective choice. However, even in those cases, a specific injury exists, manifested in the shock suffered by the parents upon the birth of a child in an unexpected condition (ie, the child was expected, but its health conditions were not). Despite such egregious circumstances, those cases should not qualify as wrongful birth actions.

VI. Portuguese Case Law

According to our knowledge, the first time the Portuguese courts were

faced with one of these actions was at the beginning of 2001.⁶⁸ The case involved an action brought by the parents in the child's name. Therefore, the cause of action was for wrongful life. The child was born with very serious abnormalities that had not been detected during pregnancy by the private clinic that monitored the pregnancy. Thus, the plaintiffs argued the mother was prevented from opting for an abortion, and for this reason the child was entitled to compensation.

The application was refused essentially based on three arguments. First, the court identified an inconsistency between the request and the line of argument. The claimants had presented a wrongful life action, but had asked for damages based on a wrongful birth action, ie, the violation of reproductive rights. Secondly, the court found that the child could not claim compensation for damages based on the mother being deprived of the right to choose an abortion, because the so-called embryopathic/foetopathic abortion was primarily intended to benefit the mother, not the child. Furthermore, the Court stated that even if the claim had been grounded in the damage suffered by the child, such a claim would have to be presented by the child itself and not by the parents or other representatives. The Court found that since this was such an eminently personal claim, it did not lend itself to representation. Finally, the Court held that even if the previous requirements had all been fulfilled, the action would probably fail, because a wrongful life action always implied the recognition of a hypothetical right not to be born, which had no place in the legal system.

After more than a decade without judicial proclamations by a higher court, at the beginning of 2012, the parents of a child born with serious health problems filed a lawsuit seeking compensation pursuant to two different causes of action: one in their own name (wrongful birth) and one on behalf of their daughter (wrongful life). The wrongful life action was refused, following the tendencies of other civil law countries. However, the Lisbon High Court,⁶⁹ in the context of a wrongful birth action, awarded compensation to each of the parents in the amount of seven thousand and five hundred euros for moral damages (violation of the right not to reproduce), recognising that by failing to inform the parents of the exact condition of the child, the doctor had deprived them of the possibility of opting for an abortion. The Court also stated it would have recognised compensation for patrimonial damages had it been asked, but the parents did not present such a request on appeal.

In this case, the defendant doctor argued what the consequences would have been had he fulfilled his obligations. According to him, even if the parents had decided to terminate the pregnancy, this possibility would not have been available to them. Some members of the hospital's ethics committees considered

⁶⁸ Supremo Tribunal de Justiça, 19 June 2001, no 1008/01, available at <https://tinyurl.com/yqb6eqyb> (last visited 25 November 2017). A comment on this decision is in A.P. Monteiro, 'STJ, Acórdão' n 36 above, 371 and Id, 'Portuguese' n 36 above, 220.

⁶⁹ Tribunal da Relação de Lisboa, 10 January 2012, no 1585/06.3TCSNT.L1-1, available at <https://tinyurl.com/y7s7vv7x> (last visited 25 November 2017).

the condition of the unborn child, although incurable, as not being serious enough to merit an abortion. As previously noted, there is no list indicating the illnesses or malformations that legally justify abortion in Portugal. It is up to each hospital and its respective ethics committees to evaluate a given situation. These entities vary in how conservative they are in assessing the severity required for a legal abortion. However, as the Court very well stated, these organisations cannot substitute their particular and subjective considerations for the legal justification in the Criminal Code. In other words, entities with the legal right to evaluate an abortion request cannot override the legislature's decisions and make their own decisions that are contrary to the text and spirit of the law due to their own personal convictions. That is, they cannot restrict a right or faculty provided by the law, nor can they insert additional requirements that have not been shaped by the law. From the moment the law allowed abortion, the decision has been the prerogative of the parents (*rectius*, the mother), not the ethics committees, and much less the court. In the present case, the discussion involved the qualifying adjective 'serious'. As mentioned before, the legislature did not provide any further explanation of this concept, nor did they provide a list of conditions that defined the degree of severity legally imposed. Neither the National Medical Association nor any other entity accredited for this purpose presented a clarification of the concept. The Lisbon High Court disregarded the view expressed by the ethics committee, which claimed that the case did not meet the requirements for terminating the pregnancy. Rather, the Court concluded that the ethics committee interpreted the legal provisions more restrictively than the content and intent of the law. Thus, the Court held that the abortion would have been legally permissible, and it upheld the conviction of the first instance court.

Similarly, a few months later, the Oporto High Court⁷⁰ awarded parental compensation of two-hundred thousand euros (approximately four times the compensation that can be awarded for death in Portugal) in a wrongful birth action that included patrimonial and moral damages. Once again, the wrongful life action was rejected, based on the argument that upholding it would have implied the consideration of life as an injury, in violation of the principle of human dignity.

In this case, although the child was born with polymalformative syndrome, the radiologist who performed the scans had assured the parents it was a healthy foetus. Apparently, this radiologist had even pointed out the limbs of the unborn child on the monitor, even though the child was born without limbs. The report accompanying the ultrasound said conclusively that 'the baby was perfectly normal'.

The defendants (the clinic where the prenatal exams were conducted and the respective clinical director) advanced the following arguments in their defence.

⁷⁰ Tribunal da Relação do Porto, 1 March 2012, no 9434/06.6TBMTS.P1, available at <https://tinyurl.com/yc27xrhe> (last visited 25 November 2017).

First, they said the scan result could not be considered absolutely reliable. In addition, they contended, the outcome was the result of subsequently missed exams, especially an ultrasound scheduled to be held between the twenty-eighth and thirty-second weeks of gestation. The defendants argued that they were not responsible for this omission. The first argument was immediately dismissed by the Oporto High Court based on the advice of experts who advised the Court that any deficiency of a similar severity would certainly have been identifiable in the performed scans. Regarding the second argument, the Court found it to be inconsistent. The ultrasound that was the subject of discussion had been recommended, both by the National Health Service and the National Medical Association, and could indeed have discovered the unborn child's condition. However, missing the remaining exams did not excuse the defendants, as those subsequent exams would only have searched for previously detected anomalies. Therefore, the correctness of their results would have depended on the assumption that the previous exams had been performed and interpreted correctly, which in this case did not happen. Accordingly, the omitted exams would have been useless.

The Portuguese Supreme Court upheld this decision in 2013 without adding any new arguments to the debate.⁷¹ However, this last decision presented a particularity: the dissenting judgment of one of the judges opened the door to recognising future cases of wrongful life with moral damages for the child.⁷² Despite this, we have been unable to find any decisions accepting such an action within Portuguese case law, although it has been recognised, in *obiter dicta*, that damages in these actions are not based on the child's life, but the child's disease or abnormality.⁷³

As for wrongful birth cases, restricting our analysis to the higher courts, there has been one decision awarding compensation,⁷⁴ and another denying it.⁷⁵ *Prima facie*, the former decision appears not to object to wrongful birth actions. However, after analysing the court's reasoning, we must conclude that the court would only grant compensation in very specific and restricted cases.

In 2015, the Portuguese Supreme Court, hearing an appeal, gave its support once again to wrongful birth actions.⁷⁶ The Court issued two very important

⁷¹ Supremo Tribunal de Justiça, 17 January 2013, no 9434/06.6TBMTS.P1.S1., available at <https://tinyurl.com/y72n3s4c> (last visited 25 November 2017).

⁷² Dissenting vote of Judge Pires da Rosa, Juiz-Conselheiro of the Portuguese Supreme Court.

⁷³ Tribunal da Relação de Lisboa 30 April 2015 no 2101-11.0TVLSB.L1-8 (although this decision was about a wrongful birth case), available at <https://tinyurl.com/ybhunu3t> (last visited 25 November 2017).

⁷⁴ For instance, Tribunal da Relação de Lisboa 30 April 2015 no 2101-11.0TVLSB.L1-8, available at <https://tinyurl.com/ybhunu3t> (last visited 25 November 2017).

⁷⁵ Tribunal da Relação de Lisboa 29 April 2014 no 57/11.9TVLSB.L1-7, available at <https://tinyurl.com/yahjbmam> (last visited 25 November 2017).

⁷⁶ Supremo Tribunal de Justiça 12 March 2015 no 1212/08.4TBBCL.G2.S1, available at <https://tinyurl.com/y85d9pb8> (last visited 25 November 2017).

statements for the success of these actions that, although not new in Portuguese case law, appeared to consolidate matters related to wrongful birth actions.

First, it found that the content of the medical obligation of a doctor making a prenatal diagnosis included accurate results. That is, the doctor is obliged to achieve a certain result, namely an accurate result, as opposed to an obligation to simply follow the most correct procedures, regardless of outcome. Therefore, in a PND, the standard of care requires the doctor to deliver a correct interpretation, not just to try to do so. The major consequence of this classification is that if the obligation is to achieve results, when the desired outcome is not fulfilled, the court may presume that the doctor acted in a negligent way, leaving the doctor with the heavy burden of overcoming the presumption of responsibility. This is a very controversial conclusion, as the obligation to present results cannot be imposed on every single exam. Perhaps such a high level of performance can be demanded from the doctor when it involves a blood or urine exam, but not for a PND, where the margin for failure is much greater.

Second, the Court stated that the damages sought by the parents were not intended to compensate them for being prevented from an abortion, but from being prevented from deciding whether or not to have an abortion. In other words, they were not required to demonstrate what their decision would have been, a conclusion with which we completely agree.

Both of these statements were powerful enough to affirm case law supportive of wrongful birth actions, and these actions will most probably continue to gain support in the Portuguese courts. Conversely, wrongful life actions have been unsuccessful, but in our view the arguments invoked to reject them have been very weak, especially regarding the erroneous identification of the damage.

VII. The Future of Wrongful Birth and Wrongful Life Actions in Continental Civil Law

Society is increasingly requiring more from science and especially from doctors. We demand no less than perfection. Once science makes it possible to bring a healthy child into the world and avoid the birth of a non-healthy one, and insofar this claim is allowed by the legal system, doctors will no longer be excused from legal liability if the child is eventually born with a severe malformation, undetected or uncommunicated to the parents during pregnancy. Consequently, as science advances, doctors' responsibility will increase, including through wrongful birth and wrongful life actions.

As we demonstrate, these proceedings are particularly complex from a juridical perspective due to the difficulty of analysing the prerequisites of liability and specifically damages and causation. However, those matters are also quite complex from an ethical perspective because they invoke very personal, moral and religious convictions.

Everything suggests that the number of these kinds of actions will increase in the future and that their success will expand within continental civil law, in terms of not only wrongful birth proceedings but also wrongful life actions. Consequently, it is expected that a new and substantially more demanding pattern of conduct for doctors will emerge. This will most likely increase the amount of litigation and the number of adverse findings, aggravating the legal position of physicians and health care management agents. The reason is primarily a scientific one. Every day advances are made in medical and technical knowledge. We promote the idea that every physical imperfection can be corrected and that perfection is achievable. However, there is also a juridical motivation related to the new understanding of human existence as not only a quantitative but also a qualitative concept. This is seen in the new legal regimes regarding advance directives, which allow patients to refuse life-saving treatments.

Given the recent legal developments, we have every reason to believe that in the near future wrongful birth actions will be more widely accepted in our courts, in terms of both patrimonial and moral damages. The same will probably happen with wrongful life actions, as the current opposition comes predominantly from an erroneous understanding of their nature.