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To Be or Not to Be Born? Civil Liability for Damage Resulting from Birth in a Comparative Context: Recent Polish and Irish Caselaw Concerning Wrongful Birth and Wrongful Conception

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1. Introduction

1.1 Development of Medical Sciences and Related Challenging tasks To be Fulfilled by the Law of Torts

To be or not to be born: that is the question. The above adaptation of the famous citation from Shakespeare's "Hamlet", grotesque as it may sound, has become alarmingly up-to-date over the last few decades. This is because, one the one hand, the progress of medical science in the field of human reproduction has resulted in introducing new methods of foetal examination, such as ultrasound scanning, amniocentesis or fetoscophy, which now allow us to closely observe and supervise the development of a new human being inside its mother's womb. One the other hand, the law of most countries recognizes and protects the individual's right of conscious and voluntary decision in respect of family planning. As a result, prospective parents are entitled not only to determine if or when they desire to conceive a child but also, in the majority of jurisdictions, whether they wish to continue the pregnancy should foetal defects have been diagnosed.[1]

Needless to say, the abovementioned developments also create new challenges for the law of torts, which is now being faced with the "heightened expectations of legal redress" [2] in cases where the abovementioned "reproductive" rights of the individual have been violated by

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[1] See, for example: Jaworek P. (2006) 'Narodziny dziecka jako źródło szkody w polskim prawie cywilnym' in: Safjan M., Warciński M., Zawadkiewicz K. (eds.) *Wybrane zagadnienia prawa cywilnego*, Warszawa: CH Beck, pp. 57-112; pp. 61-65; Kowalski M. (2002) 'Odpowiedzialność odszkodowawcza lekarza z tytułu *wrongful birth* w prawie niemieckim', 11(4) Prawo i Medycyna, pp. 65-73; p. 65; Madden D. (2002) *Medicine, Ethics and the Law in Ireland*, Haywards Heath: Tottel Publishing, pp. 362-363; Mason, J K., Laurie G.T. (eds.) (2006) *Mason & McCall Smith's law and medical ethics*, 7th ed., Oxford: Oxford University Press, p. 120; Nesterowicz M. (2007) 'Odpowiedzialność cywilna lekarza i szpitala za *wrongful conception*, *wrongful birth*, *wrongful life* w orzecznictwie europejskim' (2000-2005), 28(9) Prawo i Medycyna, pp. 19-38; p. 19; Pepłowska Z. (2004) 'Odpowiedzialność cywilna lekarza z tytułu *wrongful life*, *wrongful birth* i *wrongful conception* w prawie USA', Prawo i Medycyna, pp. 100-115; p. 100, Teff H. (1985) 'The action for 'wrongful life' in England and the United States', 34 ICLQ, pp. 423-441, p. 423; Tomkin D., Hanafin P. (1995) *Irish Medical Law*, Dublin: The Round Hall, p. 203.

[2] Teff H., loc. cit., p. 423.

the actions undertaken by the others. Undoubtedly, awarding damages for an unplanned or unwanted child or even, more bizarrely, for the mere fact of being born is, *prima facie*, usually seen as both inappropriate as well as immoral. Firstly, it is because our ethical considerations or religious beliefs commonly urge us to give preference to life rather than to non-existence. Secondly, we might be also dubious as to how the fundamental conditions of tortious liability could be satisfied in the abovementioned cases.

1.2 Aim and Framework of this Paper

This paper will discuss a number of judgments, which were recently delivered by the Polish and Irish courts in three cases, where the damage allegedly suffered by the plaintiffs resulted from the birth of their children. It should be underlined that the proposed choice of jurisdictions is definitely not accidental. Firstly, it is because, as opposed to a number of other countries,[3] including the United States,[4] the United Kingdom,[5] Germany,[6] or France,[7] the foregoing types of actions, commonly referred to as *wrongful conception*, *wrongful birth* and *wrongful life* claims, have not been previously examined by the Polish or Irish jurisprudence. Secondly, it is also because in the two abovementioned countries regulations related to the

[3] See, for example: Kowalski M., loc. cit.; Nesterowicz M., loc. cit.; Pepłowska Z., loc. cit.; and Teff H. loc. cit.
[4] See, for instance judgments in the cases of: *Girdley v. Coats* [825 S.W. 2d 295, Mo. 1992]; *Burke v. Rivo* [406 Mass. 764, 1990]; *Berman v. Allan* [80 N.J. 421, 1979]; *Blake v. Cruz* [698 P.2d 322, Idaho 1984]; *Gleitman v. Cosgrove* [227 A.2d 692, 693, N.J., 1967] or *Turpin v. Sortini* [31 Cal 3d 220, 1982].
As a general rule, it should be observed that the American courts have been awarding compensation arising from *wrongful conception* (but commonly excluding childrearing expenses) and *wrongful birth*, whereas the so-called *wrongful life* claims, have been recognized by the minority of state courts and only in very exceptional situations.
[5] See, for example: judgment in the case of *McFarlane v. Tayside Health Board* [2000] 2 AC 59, in which the House of Lords, having reversed the previous line of reasoning applied in *Emeh v. Kensington Chelsea and Westminster A.H.A.* [1985] QB 1012, [1985] 2 WLR 233; [1984] 3 All ER 1044, decided that the childrearing costs accompanying the claims for *wrongful conception* are pure economic loss, not recoverable in tort. On the other hand, their Lordships were willing to award pecuniary and non-pecuniary damages for the injury resulting from pregnancy and birth. Such reasoning was extended, for example, in the subsequent case of *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2001] QB 266, where the Court of Appeal rejected the ordinary maintenance claim. However, the court considered the fact that the plaintiff's child, who was born subsequently to a failed sterilization procedure, turned out to be impaired and, hence, additional, extraordinary child maintenance damages, resulting from the child's condition were awarded. Wrongful life claims have been explicitly rejected, for instance, in *McKay v. Essex A.H.A.* [1982] QB 1166; 2 W.L.R. 890.
See also: Whitfield A. (2007) 'Actions arising from birth' in: Grubb A (ed.) *Principles of Medical Law*, 2nd ed., Oxford: Oxford University Press, pp. 789-850.
[6] See, for example: the judgments of the German Supreme Court of 4 Dec 2001 [VI ZR 213/00] and 18 Jun 2002 [VI ZR 136/01] both concerning *wrongful birth*. It should be observed that the German courts were willing to award full compensation in cases where the plaintiff had been unlawfully deprived of her right to terminate pregnancy, except for extraordinary circumstances, like in the former case, where the plaintiff who was pregnant with twins wished to abort only the impaired foetus, as the other foetus remained perfectly healthy. The Court decided that the interests of the unborn and especially the fact that a selective abortion could be dangerous to the healthy foetus prevailed over the plaintiff's right to termination. See: Nesterowicz M., loc. cit., p. 27.
[7] See the judgment of the French Cour de Cassation of 17 Nov 2000 in the case of Nicholas Perruche [99-13.701], in which the court admitted a *wrongful life* claim, by stating that a disabled child can demand compensation for damage arising from his condition if the physician had unlawfully prevented his mother from terminating the pregnancy. However, the possibility to demand compensation for the mere fact of being born was subsequently excluded by the 2002 'Patients' Rights and the Quality of the Health System Act' (*Loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé*), which explicitly prohibited instituting *wrongful life* claims. At the same time, however, it was decided that the state should bear the costs of the impaired children's maintenance, which was followed by creation of the Fund of Social Solidarity.

protection of unborn human beings, including, in the first place, conditions permitting lawful termination of pregnancy have been granted a very specific status.

Finally, it must be also explained that the aim of this work is neither to tackle moral, ethical or religious dilemmas, commonly surrounding the present topic, such as, for example, availability of abortion on non-therapeutic grounds,[8] nor to evaluate the attitude of the claimants. It is rather to signal the emergence of a relatively new concept in the area of the law of tort and to describe how the Polish and Irish courts have dealt with it in practice.

Accordingly, the paper will include a number of commonly used definitions, the facts and the law related to the cases in question as well as the arguments provided by the courts, which will be assessed from a comparatist's point of view.

2. Wrongful Birth and Wrongful Conception in a Comparative Context

2.1 General Remarks and Definitions

The doctrine and jurisprudence commonly distinguishes between three separate types of claims, whose common core is linked to the fact of birth. These are:

1. ***Wrongful conception*** (wrongful pregnancy) – a claim brought by a parent (or parents) against a defendant (usually a physician or a health care provider), whose negligent conduct (most commonly – ineffective sterilization on either parent but also neglectfully performed abortion) resulted in conceiving and subsequently giving birth to a child that they did not plan.
2. ***Wrongful birth*** – a claim brought by the parents of a child born with a congenital defect against a defendant whose negligence (for example, preventing the access to prenatal testing or misdiagnosis or preventing the access to abortion) effectively deprived them of the opportunity to terminate the pregnancy.
3. ***Wrongful life*** – a claim brought by or on behalf of a child born with a congenital defect, who alleges that he or she would have never been born but for the defendant's negligence and, accordingly, would have avoided pain and suffering resulting from his or her condition.

It should be underlined at this point that some scholars do not consider *wrongful conception* (*wrongful pregnancy*) an action *sui generis*, arguing that it is a type of a *wrongful birth* claim, the only difference being that the child is born without a defect.[9] According to the author of this work, it is more reasonable to treat these claims as separate, since the *ratio* behind them significantly differs, as a result of which the reasoning applied by the court throughout the civil process should differ as well.

Namely, one could argue that the plaintiffs, who institute a *wrongful conception (pregnancy)* claim argue that but for the defendant's negligence they would have avoided conceiving, and subsequently, having a child, hence, in other words, the mere idea of becoming a parent had been rejected by the plaintiffs *ab initio*. On the other hand, it could be assumed that in the majority of *wrongful birth* cases the plaintiffs initially had considered having a child (or at least had not rejected such possibility) but decided to terminate the

[8] A variety of arguments for and against abortion on grounds of foetal impairment as well as evaluation of the right of access to prenatal counselling can be found, for instance in: Madden D., op. cit., pp. 363-366; Jackson E. (2000) 'Abortion, Autonomy and Prenatal Diagnosis, 9 S & LS 467-494; Sheldon S., Wilkinson S. (2001) 'Termination of pregnancy for reason of foetal disability: are there grounds for a special exception in law', 9(2) MLR 85-109; Steinbock B. and McClamrock R. (1994) 'When is birth unfair to the child?, 24(6) The Hastings Center Report, pp. 15-21; Vehmas S. (2002) 'Parental Responsibility and the Morality of Selective Abortion', 5(4) Ethical Theory and Moral Practice, 463-484.

[9] See: Jaworek P., loc. cit., p. 73.

pregnancy once foetal impairment was diagnosed or the risk of such impairment turned out to be highly probable. Therefore, it should be underlined that the differentiating factor between the two types of claims should not be identified with the existence of the congenital defect but rather with the plaintiffs' willingness (or similarly, their 'acceptance of chance') or lack of willingness to procreate.[10] Accordingly, the fact that the plaintiffs' child turned out to be disabled cannot be seen as a premise automatically rendering the subsequent claim as *wrongful conception*.

Although the fact that the plaintiff gave birth to an 'uncovenanted'[11] healthy child is a separate issue, it might affect, for instance, the process of evaluation of the *quantum* of damages. Namely, in such cases it seems justifiable, to certain extent, to apply the *burden v. benefit* rule,[12] according to which whenever another person's negative conduct causes a burden, any incidental benefit (here: a benefit stemming from the fact of having a healthy child) must be factored into the total award.[13] Conversely, recognition of the abovementioned rule with reference to claims instituted by the parents of impaired children seems to be both unreasonable as well as unethical, as, first of all, the costs of rearing a sick child are usually higher than the costs of rearing a healthy child and, secondly, how much joy can be experienced by a parent, while watching his son or daughter suffering or dying?

Finally, it also has to be explained that in the abovementioned cases the defendant will be liable for the mere fact that the child was born, presuming that its birth led to imposition of a burden on the life of the child and its family. They should not be confused with the cases of the so-called antenatal damages, where the injury, for which the defendant will be liable in tort, was inflicted to the foetus while *in utero.*[14] Those claims, as irrelevant to the present topic, will not be considered here.

2.2 The Relevant Law

As far as the law related to the present topic is concerned, Article 4a § 1 of the Polish Law of 7 January 1993 on family planning, protection of the human foetus and the conditions for abortion admissibility (commonly referred to as the *Family Planning Act*)[15] allows for an abortion to be performed exclusively by a physician and only in three specified cases, *i.e.*:
1. When the pregnancy constitutes a hazard for the life or health of the pregnant woman;
2. When prenatal examinations or any other medical premises indicate a high risk that the foetus will be severely and irreversibly impaired or will be suffering from an incurable, life-threatening disease;
3. When there is justified suspicion that the pregnancy occurred as a result of a criminal act.[16]

[10] Similar views were expressed, *inter alia*, by: Jackson E. (2006) *Medical law. Texts, Cases and Materials,* Oxford: Oxford University Press, pp. 658-659; Mason J.K. and Laurie G.T. in: op. cit., pp. 168-169. See also: Hoyano L. (2002) 'Misconceptions about Wrongful Conception', 65 MLR 883-906.
[11] The term of an *uncovenanted child* was used, *inter alia*, by the authors of *Mason and McCall Smith's Medical Ethics*. They explain that "(…) in Scots law, the word had been used to describe not so much an unexpected happening as one which was not contemplated by the parties concerned. It is, therefore, apt to describe the results of a failed sterilization". See: Mason J.K., Laurie G.T., op. cit., p. 168.
[12] The *burden v. benefit* rule in the area of the law of torts, was introduced, for instance, in American law by Restatement (Second) Torts § 920 (1979).
[13] Additionally, it should be noted that the on the grounds of common law, the benefit and burden are usually to be of the same type in order to allow a set off – *i.e.* a financial benefit can be set off against a financial loss. Non pecuniary benefits are not usually set off against financial losses and vice versa. See, for instance: Keane E. in: 'Ireland' in Koziol H., Steiniger B.C. (eds.) (2008)Tort and Insurance Law Yearbook, European Tort Law 2007, Wien, New York: Springer, fn. 36 and Quill E., *ibid.* at 25.
[14] See: Jaworek P., loc. cit., p. 59.
[15] Official Journal of the Republic of Poland No. 1993.17.78.
[16] E.g., rape, statutory rape or incest.

In Ireland, Art. 40.3.3 of the state Constitution, as well as the relevant caselaw, provides that termination of a pregnancy in the territory of the Republic can be legally performed only where the life of the mother would be threatened, if the pregnancy is allowed to continue. At this point the problems of "the right to travel", which emerged as a result of the case of *Attorney General v. X and Others*,[17] as well as corresponding subsequent judgments will not be discussed.[18]

In addition, it should be underlined that, in contrast to the previously stated Polish regulation, foetal impairment is not, under the Irish law, a precondition allowing for terminating the pregnancy. As a result, the action for *wrongful birth* and, by reasoning *a minori ad maius*, also the action for *wrongful life* are not, as a general rule, available under the Irish law.[19] On the other hand, claims for *wrongful conception* will be admissible on the grounds of an ineffectively performed sterilization procedure.

2.3 Wrongful Conception – Irish and Polish Caselaw

The facts of the two *wrongful conception* cases discussed below are so different that they nearly remain beyond comparison. On the one hand, the plaintiff in the Polish case, commonly referred to as Ms A., was a victim of rape, who was subsequently refused abortion in a public hospital due to some alleged inconsistencies related to the duration of her pregnancy.[20] One the other hand, in the Irish case of *Byrne v. Ryan*,[21] the plaintiff, Mrs Bridget Byrne, being at the time a mother of five children, voluntarily decided to undergo a tubal ligation, as she did not wish to become pregnant again. In the course of the operation, the consultant mistakenly attached the clips to the tissue beside the plaintiff's fallopian tube, as a result of which the sterilization turned out to be ineffective. The only thing that both Ms A. and Mrs Byrne seem to have had in common was the fact that they subsequently gave birth to healthy children that they did not plan or (initially) want, but that they decided to bring up.

The above examination of the facts allows us to formulate an important initial observation. Namely, it is obvious that while *Byrne v. Ryan* remains a 'classic' *wrongful conception* case, it is not equally easy to state whether the Polish case would also fall within the scope of the abovementioned category of claims.[22] Again, what should be examined at this point is the plaintiff's attitude towards possible procreation before the child was conceived. Hence, if the lack of intention to procreate is sufficient in a case of the plaintiff's voluntary sexual activity, then *a fortiori*, all the more it accompanies the situation where the sexual act, which resulted in conceiving the plaintiff's child, was performed against her will. Here, the defendant's negligence consisted in preventing the plaintiff from terminating the pregnancy, which she had neither expected nor wanted.

The author of this work is of the opinion that the premise of the lack of intention to procreate should be always considered while categorizing cases concerning civil liability in reproductive medicine. Otherwise, the process of categorization will be based on the popular but highly misleading presumption, according to which the plaintiff's claim is to be

[17] [1992] I.L.R.M. 401.
[18] For the discussion concerning the evolution of caselaw posterior to the inclusion of art. 40.3.3 into the Irish Constitution see, for example: Hogan G., Whyte G. (eds.) (2002) *J.M. Kelly: The Irish Constitution*, Dublin: Butterworth, pp. 1495-1534.
[19] See, for example: Hogan G., Whyte G., op. cit., p. 1523; Tomkin D., Hanafin P., op. cit., p. 203.
[20] It should be noted that, according to the provisions of the previously cited *Family Planning Act*, abortion in the presence of criminal indications can be performed only until the end of the twelfth week of pregnancy.
[21] [2007] I.E.H.C. 207.
[22] However, the Polish scholars and judges seem to associate the case of Mrs A with *wrongful conception* without any hesitation.

considered a *wrongful conception* claim as long as the uncovenanted child remained healthy at the time of birth.

The demands of both plaintiffs, who sued the respective hospitals' nominees before the courts were, to certain extent, similar. Firstly, both women sought recovery for the cost of medical care and, in the case of Mrs Byrne, also for the cost of repeating the sterilization procedure. Secondly, they additionally sought damages for the pain and suffering resulting from the defendants' wrongdoing, which, on the grounds of Polish law, in compliance with art. 448 of the Civil Code, can be awarded if the defendant's actions constituted a violation of the plaintiff's 'personality rights'.[23] Thirdly, both plaintiffs claimed that they should be entitled to recoupment of the cost of rearing their children – in the case of Ms A. – in the form of monthly annuity, whereas in the case of Mrs Byrne in the form of an agreed lump sum. It should be also explained that in the case of Ms A the claim concerning the childrearing expenses was made subject to a separate, subsequent civil process and the matter was resolved in a resolution delivered by the Polish Supreme Court on 22 February 2006.[24] Finally, the Polish plaintiff also demanded damages for the loss of income for the period of her economic inactivity.

Undoubtedly, the style and the reasoning applied in both judgments, which were delivered by the Polish Supreme Court[25] and the Irish High Court differ, as do the conditions of tortious liability, which had to be assessed in compliance with the rules of the law of obligations in the foregoing countries. The Irish High Court, after establishing that the defendant's conduct satisfied all the legal premises of the tort of negligence, awarded, in the first place, compensation for pain, suffering and inconvenience connected with Mrs Byrne's two pregnancies, which followed the inefficient tubal ligation.[26] It was also decided that the plaintiff is entitled to damages for extra medical expenses and the cost of the additional sterilization procedure. However, following the reasoning from a number of previously cited British cases, including *McFarlane v. Tayside Health Board*,[27] Kelly J rejected the claim for childrearing expenses and declared them as not recoverable. In order to justify such refusal, he invoked both the already mentioned *burden v. benefit rule* ('the benefits of a healthy child outweigh any loss incurred in rearing the child'), as well as the values protected by the Irish Constitution, such as: family, dignity and protection of all human beings, which are, in his view "(...) better served by a decision to deny rather than to allow damages of the type claimed".

On the other hand, in the first of the judgments delivered by the Polish Supreme Court, on 21 November 2003, it was decided that a refusal to terminate pregnancy where it had been caused by rape could give rise to a compensatory claim for damage sustained as a result of such a refusal.[28] It was stated that the scope of the compensation awarded will include both

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[23] For more details concerning the concept of invasion of the right of personality, which has been recognized also by other civilian jurisdictions, see, for example: Wolter A., Ignatowicz J., Stefaniuk K. (2000) *Prawo cywilne. Zarys części ogólnej*, Warszawa: Lexis-Nexis, pp. 182-190; Zweigert K., Kötz H. (1998*) Introduction to Comparative Law*, 3rd ed., Oxford: Clarendon, p. 685 et seq.

[24] III CZP 8/06.

[25] See the Judgment of the Polish Supreme Court of 21 Nov 2003, V CK 16/03, OSP 2004, Nr 10, poz. 125 as well as notes to the judgment by: M. Nesterowicz (*ibid.*); S. Rudnicki (2004), 10 Monitor Prawniczy, pp. 475-476 and T. Justyński (2004), 9 Państwo i Prawo, pp. 122-127. See also: Bagińska E. (2005) 'Poland' in: Koziol H., Steiniger B.C. (eds.) Tort and Insurance Law Yearbook, European Tort Law 2005, Wien, New York: Springer, pp. 457 – 482; pp. 466-468; Jaworek P., loc. cit., pp. 74-80; Nesterowicz M., loc. cit., p. 24.

[26] However, it should be noted that, as the tortious liability was conceded on this issue, Kelly J did not have to reach a conclusive view concerning propriety of the claim as a matter of law (one can only presume that he could have held against the plaintiff).

[27] [2000] 2 A.C. 59.

[28] Jaworek P., loc. cit., pp. 74-75.

expenses connected with pregnancy and childbirth as well as the loss of expected income resulting from the events thereof. In addition to admitting the pecuniary damages, the court also indirectly accepted the availability of compensation for pain and suffering.[29]

However, in comparison with the Irish judgment, the subsequent assessment of the Polish Supreme Court concerning the childrearing expenses went one step further. Namely, in the already mentioned resolution from 22 February 2006[30] it was decided that the subject, who unlawfully prevented a woman from terminating the pregnancy where it had been caused by rape and where the wrongdoer could not be disclosed, will be obliged to bear the childrearing expenses. However, these will be only the costs corresponding with the child's justified needs, which cannot be catered for by his mother, who personally exercises care of the child and bears the financial burden of his upbringing.

It should be mentioned that this decision seemed to have been justified by the fact that Ms A.'s child, as it was subsequently established, required extra medical care due to health problems that emerged after its birth. It seems rather dubious if the same rule would apply in situation where Ms A. was bearing only ordinary costs of upbringing, similarly to other parents catering for the needs of their healthy children. Therefore, one could carefully suggest that the line of reasoning followed by the Polish court resembles, to some extent, the one previously applied in the English case of *Parkinson*.

At the same time, the Polish judges, aware of the controversies surrounding the matter, suggested enactment of certain legislative measures, similar to those already existing in France, by virtue of which the expenses of rearing a child in *wrongful conception* and *wrongful birth* cases could be covered by the state.[31]

2.4 Wrongful Birth – Polish Case

The civil litigation in the precedential Polish case concerning *wrongful birth* was instituted by a married couple, commonly referred to as Mr and Mrs W. In 1997 the plaintiffs' first child (a son) was born with *hypochondroplasia* – a rare genetic developmental disorder resulting in disproportionately short stature, as well as serious deformation of joints and bones. When Mrs W. learnt that she had become pregnant again, relying on point 2 of the previously cited article 4a of the Family Planning Act, she was willing to terminate the pregnancy, as the probability that her second child would be born with the same condition was as high as 25-50%. Despite the existing risk, the consultants of the regional hospital in Łomża that the plaintiff was attending denied her access to prenatal counselling and refused to perform the termination, as a result of which Mrs W. gave birth to her second child (a daughter) in 1999. It soon turned out that the girl suffers from exactly the same disorder as her older sibling.[32] Both children of Mr and Mrs W. require regular physiotherapy and lifelong medical care, including orthopaedic surgeries and the administration of an expensive growth hormone.

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[29] It should be explained that in the case of Ms A. the compensation for pain and suffering could not be awarded because at the time of the alleged violation, the art. 448 of the Polish Civil Code did not envisage that the compensation could be paid to the person whose personality rights were violated. The court did not, however, exclude such a possibility with reference to the future caselaw by stating that forcing a woman to give birth to a child constitues violation of *personal freedom* protected by both the civil law as well as the Polish Constitution.

[30] III CZP 8/06.

[31] See, Nesterowicz M., loc cit., p. 25.

[32] See for example: Bagińska E. (2004) 'Poland' in: Koziol H., Steiniger B.C. (eds.) Tort and Insurance Law Yearbook, European Tort Law 2004, Wien, New York: Springer, 2004, pp. 462-478; p. 475; Jaworek P., loc. cit., p. 78; Nesterowicz M., loc. cit., p. 31; Siedlecka E. 'Sąd nad zlym urodzeniem', Gazeta Wyborcza, 29-30 December 2007; Siedlecka E. 'Źle urodzeni bez odszkodowania', Gazeta Wyborcza, 15 December 2008, p. 3.

The plaintiffs sued the hospital, demanding compensation for the pain and suffering, which led to the loss of income as well as monthly annuity for their second child. Having reversed two previous judgments delivered by the Regional Court of Łomża and the Appeal Court of Białystok[33] and ordering re-examination of the case by the Regional Court, on 13 October 2005 the Polish Supreme Court issued a judgment in which it stated that a refusal of prenatal counselling in the circumstances, where it could be reasonably suspected that a pregnant woman ran a risk of giving birth to a severely and irreversibly impaired child, gave rise to a compensatory claim.[34] While examining the conditions of tortious liability, the Polish court firmly underlined that the damage suffered by the plaintiffs consists of the increased expenses connected with the need of physiotherapy and medical assistance, since a child, itself, can never be regarded as damage. This concept, also known as the theory of separation (*Trennungslehre*), which, for the purpose of *wrongful conception* and *wrongful birth* claims, distinguishes between the fact of having a child and the fact of bearing the costs of its upbringing, has been already applied in the German jurisprudence.[35] The remaining premises of liability in tort, namely: the existence of injurious conduct in which the damage origins and for which the defendant is liable as well as the causal nexus between the conduct and the damage suffered by the plaintiffs were also fulfilled, according to the judges. Finally, the court also decided that under Polish law all parents enjoy the right of conscious and informed decision-making concerning family planning issues.

It should be mentioned that in the most recent judgment, delivered in the case on 9 July 2008, the Białystok Court of Appeal upheld the abovementioned view and confirmed that Mr and Mrs W. should be awarded pecuniary damages for the loss of income, the cost of medical expenses as well as annuity for their daughter.

3. Conclusions

To sum up, it should be observed that *wrongful conception*, *birth* and *life* claims undoubtedly raise serious dilemmas with reference to both their ethical as well as legal aspects.

On the one hand, as some authors argue, it can be established that allowing such claims may bring very negative consequences, such as, for instance: diminution of the universal family values or marginalization of the disabled. Similarly, it has been observed that the threat of litigation leads to development of the so-called ‘defensive medicine’, which in the situations discussed consists of encouragement to terminate pregnancies even in cases of the slightest foetal impairment.[36]

On the other hand, however, progressive development of new biomedical technologies in the field of human reproduction cannot be ignored, either. Moreover, it is an inevitable process imposing new obligations not only on the individuals but also on the state, performance of which should be enforced by the law.

However, it would be difficult to deny that if the law has, as a matter of fact, conferred certain rights upon the individuals and those rights have been violated by the conduct of the others, it is necessary for the state to provide an access to an effective legal remedy, otherwise

[33] It is interesting to mention that both abovementioned courts established in their judgments that the plaintiffs, as parents of an impaired child have not been directly and personally affected by the defendant’s wrongful conduct and, accordingly, the only person entitled to claim damages before the court would be the child, itself, which would, *ipso facto*, confirm the availability of the *wrongful life* claim under Polish civil law. Such reasoning was explicitly rejected by the Supreme Court.

[34] See the judgment of the Polish Supreme Court of 13 October 2005 [IV CK 161/05].

[35] See, for example, Jaworek P., loc. cit., pp. 90-91; Kowalski M., loc. cit., pp. 66-67.

[36] See Konarska I. (2005) ‘Urodzeni bez czepka’, 1192 (09/10/05) Wprost pp. 40-42; p. 41.

it will run foul of the basic human rights, such as those secured, for instance, by the 1950 Convention.[37]

One could add that in all the cases where the diminution of the plaintiff's patrimony has arisen from the fact that a child which she had not wanted or expected was born due to the other's negligence, allowing damages must never be regarded as a corrective measure, aimed, in the first place, at condemning the defendant's conduct, but rather as a way of putting the plaintiff in the position she would have been had the wrong not been committed.[38]

As other scholars have pointed out, legislative solutions and judgements will not replace the social debate about ethical difficulties. Also the 'state morality' will not replace any individual conscience.[39] Whatever our views are, one certain thing is that as a result of the described biomedical revolution, we are likely to be witnessing similar trials in the near future, also in both of the jurisdictions discussed.[40]

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[37] See, for example a recent judgment of 20 March 2007, delivered by the European Court of Human Rights in Strasbourg in the case of *Tysiąc v. Poland*.
The plaintiff, a Polish woman suffering of severe myopia was prevented from legal termination of pregnancy on therapeutic grounds, as a result of which she gave birth to a healthy daughter but her eyesight significantly deteriorated. The Court, awarding damages for pain and suffering resulting from the plaintiff's third pregnancy was not willing to deliberate upon the *ratio* behind the regulations concerning the abortion admissibility that have been included in the Polish Family Planning Act. Instead, it simply acknowledged that Poland failed to put in place a comprehensive legal framework to guarantee the plaintiff's rights that had been already conferred to her by the Act in question, which resulted in violation of the art. 8 of the Convention.

[38] For the arguments supporting recognition of the *restitution in integrum* principle with reference to wrongful pregnancy cases see: Keane E. (2006) 'Rearing an unexpected child: a compensatory matter?' 51 Ir. Jur., pp. 125-134.

[39] Chańska W. (2002) *Tragedia narodzin*, 2 Mam Prawo: Biuletyn Federacji na Rzecz Kobiet i Planowania Rodziny, accessible on the website:
http://www.federa.org.pl/mamprawo.php?page=bulletin&catid2=662&lang=1&catid=176.

[40] Pepłowska Z., loc. cit., p. 115.