THE RIGHTS OF THE EMBRYO AND THE FOETUS UNDER DUTCH LAW

Veelke Derckx* and Ewoud Hondius**

1 Introduction

In June 2001 the Dutch abortion ship belonging to the pressure group Women On Waves set sail for Ireland. The intention was to carry out abortions off the Irish coast. During the same (Northern Hemisphere) summer there were heated discussions taking place in many countries concerning the status of the embryo and of gametes (reproductive cells). As a result President Bush decided to finance research into stem cells, but only under strict restrictions. In the US a human embryo was cloned for the first time in November 2001. The subject of the embryo is occupying the minds of, among others, many politicians, lawyers, ethicists and medical scientists on a worldwide basis. The great strides being made in the development of medical science and technology brings with it increased possibilities, but also many dilemmas. How has the Dutch legislator dealt with these dilemmas, also considering the international regulations on this point? In this paper we will provide a brief overview of the status and the protection of the embryo in the Netherlands whereby consideration will be given to, among other things, abortion, cloning, control and scientific research. The Embryos Bill plays a large role in all of this. We will, furthermore, look at the possibilities for obtaining damages in connection with prenatal errors.

2 General remarks on the status of the embryo

It should first of all be stated that where in this article we speak of the embryo, what we mean is the human embryonic offspring, regardless of in which development stage it may be in or whether or not it is within the body of a pregnant woman. An embryo can exist within the human body, in vivo, as well as outside the human body in vitro. The explosive growth in the various possibilities in the field of reproductive medicine has given rise to questions concerning the use of embryos. The status

* Lecturer in Health Law, University of Utrecht.
** Professor of Civil Law, University of Utrecht.
1. Ireland has the most stringent abortion legislation in Europe. In the Netherlands abortion is available subject to legally determined conditions (see section 9).
3. By means of in-vitro fertilization (in-vitro meaning within glass). In the case of in-vitro fertilisation spermatozoa are brought into contact with the oocytes in a glass dish so that the oocytes can thereby be fertilized. In this way embryos can come into being which may then be implanted into the woman’s uterus. In the Netherlands there are some 12,000 IVF treatments each year and with the aid of IVF some 1800 children are born on a yearly basis (source: Ministry of Health, Welfare and Sports).
4. In this paper the legal status of the embryo is discussed, not its moral status. Although it is indeed true that moral and legal status are interconnected, here they should be differentiated. If a certain moral status is attributed to an embryo, this still does not mean that it has a legal status, Leenen/Gevers, 2000, p. 130.
of the embryo is controversial; the various stances adopted concerning the position of the embryo range from comprehensive and all-embracing protection (from the moment of conception) to very weak protection. Many (Western) European countries already have legislation in place dealing with activities connected with gametes and embryos or have tabled bills to this effect. The most restrained legislation in this field may be found in Austria, France, Germany, Norway and Spain. The broadest legislation is that of the UK. Denmark, Finland and Sweden lie somewhere in between whilst Italy and Luxembourg have tabled bills on this subject.\(^9\)

In The Netherlands, the Lower House of Parliament \(\square\) after two previous attempts \(\square\) ratified a bill with regard to the creation and use of embryos as well as control as far as gametes and embryos are concerned (the Embryos Bill).\(^8\) Contrary to what the title \(\square\)Embryos Bill\(\square\) implies, the bill is not only concerned with embryos but also with various aspects of the ordinary use of fertilization techniques and the consequences thereof.\(^7\) The need for legal regulation was linked to the signing of the Council of Europe\(\square\)s Convention for the protection of human rights and the dignity of the human being with regard to the application of biology and medicine (Bioethics Treaty).\(^6\) Although the Netherlands has signed this convention, it has still not yet been ratified. If the Netherlands were to ratify this Convention without reservation, then it would be directly bound by its provisions.\(^9\) The status and protection of the human embryo in vivo and in vitro is discussed below.

3 Is an embryo a legal subject?

The question whether an embryo is a legal subject\(^10\) is of importance for its legal protection. If this question could be answered in the positive, this would certainly mean that an embryo would deserve protection. In the Netherlands, however, the

---

5. For an overview see Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 60 et seq.
7. A specific choice has been made for one integral bill considering the inextricable connection between these subjects, Explanatory Memorandum, 2000/01, 27 423, no. 3. Embryos and gametes are in fact bodily material. In the Netherlands there is also an Act in the making concerning control over bodily materials. However, because of the ability to change into an embryo and subsequently into a human being, gametes and embryos have, according to the legislator, a different character and are more emotionally charged than other bodily material. They are therefore excluded from the ambit of the Bodily Materials Act (Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 13).
9. Although, in Germany for example, the courts can test the applicability of a treaty against the provisions of the Constitution, in the Netherlands it is specifically laid down in the Constitution (Art. 94) that treaties occupy a position over and above the law. The provisions in this Convention would thereby have to be directly applied by the Dutch courts.
10. A legal subject is a bearer of rights and obligations.
learned opinion is that an embryo is not a legal subject. This is derived from, amongst other things, Art. 1:2 of the Dutch Civil Code where the rule ἐνασκετήρος πρὸ ἀιῶνα ἡμετέρῳ is laid down, which means that the child with which the woman is pregnant is considered as having already been born if its interests thereby so require. If the child is not born alive, then this respect will never have existed in the first place. As soon as one is born one therefore enters the legal community as the bearer of subjective rights. A recent Dutch interpretative declaration which was made upon signing the Bio-ethics Treaty and which concerned the prohibition on cloning (protein formation of human individuals), confirms the view that an embryo is not considered to be a legal subject in the Netherlands. In this interpretative declaration the Netherlands has stated that the notion of ἡ human being is understood to mean ἡ a human being who has already been born.  

4 The status of the embryo: the theory of progressive legal protection

In health law the doctrinal status of the human embryo has developed, which is the theory of progressive legal protection. The human embryo has its own legal protection, it is neither a legal subject, nor a legal object. This status is linked to the embryo’s different stages of development. These transitional stages are the blastogenesis, the first stage from the moment of conception to the implantation or nidation after around 14 days. Secondly, the stage following on from nidation until the moment when the foetus has a viable independent existence, and finally the stage from viable independent existence until the actual birth. These stages have certain consequences under the law: after nidation there is a foetus with which the woman is pregnant; an abortion can no longer be carried out if the foetus can be considered to have attained a viable independent existence. These legal components together provide an impression of the protection, or lack of, accorded to the dignity of unborn life during the various stages of development.

After the completion of the implantation one speaks of status potentialis: if a number of conditions are fulfilled, then the embryo has the potential to grow into a person. The protection of the embryo’s dignity is somewhat limited during this stage. After the implantation up until the time of birth one can speak of status nascendi: the foetus on the road to being born. By the process of implantation there

12. A woman is pregnant as soon as the embryo becomes implanted in the uterus, Leenen/Gevers, 2000, p. 132.
13. Also when the child has only lived for a few minutes, it is still recognised that it has been a legal subject. This also applies to a child with serious abnormalities and to monstra, anencephalies etc.
14. Letter of 22 April 1999 from the Minister of Health, Welfare and Sports, CSZ/ME-994626. The Protocol leaves the interpretation of the notion of ἡ human being to the Member States. For the underlying reasons for this declaration see section 6.2.
15. Among others, see Leenen/Gevers, 2000. For disagreement with this theory see Van der Burg, 1994.
17. See supra.
exists a foetus with which the woman is pregnant. The embryo will be able to realise its potential, unless further development will be interrupted (for example by the pregnancy being terminated). The progressive protection of dignity entails that, according to the development stage in which the human foetus is in, an ascending level of legal protection is already granted. In the status nascendi, for example, there is a greater degree of protection than during the preceding stage, but it is more limited than that of a child which has already been born. The protection of the human embryo rests on the intrinsic value of the embryo, regardless of whether it is an in-vivo or in-vitro embryo.

5 The embryo in international human rights treaties

In connection with abortus provocatus in particular, the question has arisen in The Netherlands as to whether an embryo falls within the ambit of the human rights treaties, namely the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the European Convention on Human Rights and Fundamental Freedoms (ECHR). Art. 3 of the Declaration determines: everyone has the right to life, liberty and security of person. Art. 6 of the International Covenant states: every human being has the inherent right to life. Leenen has deduced, among other things from the intentions of the drafters, the system of the treaties and the fact that a number of the included rights hardly relate to people who have just been born, that the embryo cannot fall within the ambit of these treaties.

Art. 2 ECHR determines that everyone’s right to life shall be protected by law and this provision is not only advanced in the abortion (and euthanasia) debates, but also gives rise to questions in the case of modern medical reproduction techniques with regard to the interpretation of this particular article. Important in this respect is also Art. 3 which states that no one may be subjected to torture or to inhuman or degrading treatment or punishment. The European Commission of Human Rights has in the meantime on numerous occasions considered the admissibility of abortus provocatus and thereby also the question of whether the embryo falls within the ambit of the ECHR. From the cases of X v. UK and Hercz v. Norway it can be deduced that the embryo does not in principle fall within the protection of the ECHR and that abortion provocatus is allowed. It is possible that

18. Sutorius, 1994, p. 236 thinks otherwise. According to him the status nascendi must be limited up until the stage of viable independent existence.
24. Leenen, 1994, Leenen/Gevers, 2000, p. 143. See also De Bruijn-Lückers who indeed recognises that the decisions of the European Commission do not provide a clear answer to the question of whether and when the foetus can derive rights from the ECHR, but who nevertheless finds points of departure, namely in the Hercz case, for the proposition that the foetus can derive rights from the ECHR (1994, p. 141).
in an exceptional case an exception can be made for a foetus which has passed the initial stage and which can satisfy the exception under Art. 2. However, no definitive conclusion can be derived from the Strasbourg case law as to whether the unborn foetus can fall within the ambit of Art. 2 ECHR.25

Art. 1 of the Bio-ethics Treaty couples the terms dignity and identity to human being and the notion of integrity to the term everyone. It is largely fruitless to define the term everyone considering the various interpretations of this concept in the Member States.26 The Protocol on cloning also leaves the interpretation of the notion of human being to the Member States. According to Kits Nieuwenkamp human being applies to human life from the moment of conception and the term everyone relates to life which has been born. Thereby, according to her, there appears to be a conflict between the convention and the abortion legislation in some Member States.27

According to Leenen, in the minds of the drafters of the convention the embryo’s dignity is the subject of a certain degree of protection during all the development stages. From the fact that, according to Art. 18, scientific research into the embryo in-vitro is in principle allowed, it would seem that there is no absolute protection during this stage.28

6 The Embryos Bill

6.1 Objective and points of departure

The Embryos Bill sets limits on the use of gametes and embryos. A number of activities are considered to be ethically impermissible and are prohibited; examples thereof are clonings, the choosing of a baby’s gender for non-medical reasons and combining cells from human and animal embryos (Arts. 24 and 25 Embryos Bill). Before addressing a number of specific details of the Embryos Bill, the aim and starting point of the bill will be discussed as well as the definition of the term embryo as mentioned in the bill. The legislator’s general point of departure is human dignity and the principle of respect for human life in general.29 Any violation of this principle of respect for human life is justified if other values, such as the welfare of the future child, the treatment of patients or the promotion of their health and the welfare of infertile couples, are considered to be of greater importance.

There is no specific mention of the progressive protection of dignity. From the fact that it is forbidden to allow an embryo to develop outside the human body for longer than 14 days a limit on which for ethical reasons an overall international consensus exists it can possibly be concluded that the theory of the progressive

29. See supra.
protection of dignity has made itself felt in the Embryos Bill.

According to the Embryos Bill the embryo is a cell or a connected aggregate of cells with the capacity to develop into a human being (Art. 1 sub. c Embryos Bill). This definition is connected to the fact that an embryo, with the current stage of scientific development, can come into existence in various ways and the protection of dignity does not depend on the way in which it has come into being. The legislator wanted to include all the ways in which an embryo can come into being within the definition. By also including the cell within this definition, the stage immediately following the fusion of the ovum and the sperm cell is also included. Crucial in this respect is the presence of a potential to grow into a person. In our opinion the definition of an embryo does create confusion now that it does not follow the biological reality. Since, according to the definition, a sex cell is already an embryo in itself, as it is after all a cell with the capacity to develop into a human being.

A foetus is an embryo which is to be found in the human body (Art. 1 sub. d Embryos Bill). The notion of an embryo is more comprehensive: a foetus is also an embryo. All the development stages of the embryo up until the actual birth fall within the scope of the definition and thereby also under the Embryos Bill.

6.2 Cloning

The Embryos Bill lays down the boundaries with respect to cloning. There is a difference between reproductive and therapeutic cloning. Reproductive cloning is the making of genetically identical individuals. From an international point of view there is large-scale agreement as to the unacceptability of this technique. The Dutch legislator also considers reproductive cloning to be in conflict with human dignity, although it does wish to leave room for non-reproductive (therapeutic)

32. In the first place by fertilizing an ovum whereby an ovum and a sperm cell are fused together. This can take place within the human body in vivo, or outside the human body in vitro. Another method is by way of splitting one or more of the embryôls totipotent cells (these are cells which have the possibility independently to grow into a new embryo). It is also possible to create an embryo by making use of cells from an embryonic stem-cell line. A combination is then made of cells which have originated from two different embryos (chimera). Finally, it is in principle also possible to apply the technique already used in the case of animals: the nucleus of an animalâ€™s body cell is transplanted into an animalâ€™s female gamete with the original nucleus being removed. If this would occur then there is the potential to grow into a person, Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 49.

33. The ovum and the sperm cell will fuse together if, after the successful penetration of the ovum wall by the sperm cell, the cell membranes of the two sex cells fuse. Although immediately after this event two independent cell nuclei can in fact be differentiated, it is the case that there is already an embryo in the sense of the Bill, Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 49.

34. Alongside the Council of Europe (Supplementary Protocol to the Bio-ethics Treaty), international organisations such as the World Health Organisation and UNESCO have made declarations to the effect that the cloning of persons is not admissible as it is contrary to human dignity and is immoral. There is also a European Commission resolution which calls upon Member States to prohibit therapeutic cloning and consumptive embryo research.
cloning techniques. With the aid of these techniques (for example, cell transplantation) cells and tissue can be developed which will be of great value for transplantation purposes. By means of the interpretative declaration to the Supplementary Protocol on Cloning the Netherlands wished to leave this possibility open. The Embryo Act therefore contains a prohibition on both types of cloning, although the ban on therapeutic cloning will expire after 5 years (Art. 24 sub. a Embryos Bill). Thereafter, therapeutic cloning will become possible, although subject to strict conditions.35

6.3 Control over embryos

Persons of full age who are legally competent can offer so-called residue embryos36 for the benefit of a limited list of purposes: the pregnancy of another (donation), the cultivation of embryonic cells for those purposes referred to in the Bill, and for carrying out medical research (Art. 8 para. 1 Embryos Bill). This should take place in writing and there should be no payment involved (the non-commercial principle). If there should be a difference of opinion among those involved (the couple on behalf of whom the embryos have been created) then this procedure will not take place (Art. 8 para. 2 Embryos Bill). The donor will have no control over the possible subsequent destination for research purposes, considering the fact that these persons are aware beforehand that this situation can arise and that they could have relinquished this possibility if they had not been in agreement.37

6.4 Scientific research using in-vitro embryos

The Embryos Bill regulates scientific research using embryos in vitro as well as in vivo. A differentiation should be made between scientific research using residue embryos and embryos especially created for scientific research. The Bio-ethics Treaty determines in its Art. 18 para. 1 that "where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo." Scientific research is therefore allowed and the legislator thereby has a broad freedom as regards policy as it has not been exactly determined which form of protection should be offered. Art. 18 para. 2 forbids the special cultivation of embryos for scientific research: "the creation of human embryos for research purposes is prohibited."38

The Dutch legislator considers that by taking respect for human life as a point of departure, it should in principle be cautious as to the use of embryos for scientific purposes. Scientific research using embryos may only take place if this corresponds to a Research Protocol that has been ratified by a central commission established

35. The creation of embryos for the purpose of cultivating embryonic cells will be limited to situations where transplants can only take place if such cells are cultivated for this purpose, Art. 9 para. 1 Embryos Bill.
36. These are the embryos which remain after IVF treatment has taken place.
37. Parl. Docs. II, 2000/01, 27-423, no. 3, p. 53. According to Te Braake it is unjust that the donor has no say in the matter, 2001, p. 34.
38. These provisions have given rise to discussions in a number of Member States as to whether or not there should be restrictions attached, Te Braake, 2001, p. 52.
under the Medical Research Act. The most important condition for approval is that it must be reasonably likely that the research will lead to the establishment of new insights in the field of medical science and that such new insights cannot be achieved through forms or methods of scientific research other than with research using embryos or through research of a less radical nature (Art. 10 Embryos Bill). The central commission should decide on a case by case basis whether the scientific research, and thereby a violation of the principle of human life, is justified.

The Embryos Bill contains a ban on scientific research using embryos which have been especially created for this purpose. Considering the fact that the objective of such activities is not to create a person, but rather to broaden knowledge, this would mean a greater violation of the respect for human life than when residue embryos would be used for this purpose. It is for this reason, and because of the reserved societal and international views on this point, that the ban has been adopted in the Embryos Bill (Art. 24 sub. a). It cannot be excluded, however, that within a few years there will be broader support for this special cultivation of embryos. The Embryos Bill also anticipates the lifting of this ban and it already regulates the limitations and conditions for scientific research after the lifting of the prohibition.

In ratifying the Bio-ethics Treaty the Netherlands will also have to make a reservation.

Health lawyers, however, do not exclude the special cultivation of embryos for scientific research. They do not differentiate between protecting the dignity of the embryo in vivo or in vitro; the objective of the creation is irrelevant as far as status is concerned. Alongside this, socially it has been completely accepted that additional embryos are cultivated for IVF purposes whereby it is known for certain beforehand that they become lost. It may be anticipated that in the long term not only in the Netherlands, but also in other countries, it will be accepted that embryos can be specially cultivated for scientific research where the interests of patients are involved. One could otherwise ask whether balancing the relevant interests is not by definition an arbitrary process. From the perspective of the embryo it really makes no difference which interest has been chosen.

In regulating scientific research using embryos in vitro the legislator has sought to link this issue with the Medical Research Act (26 February 1998, Stb. 1998, No. 161). The central commission referred to in the Embryos Bill is the same commission as the one which already exists under the Medical Research Act and which decides on research protocols in the field of medical research on human beings. The legislator is of the opinion that the wide experience and expertise present in the commission would be an added guarantee for careful decision-making. Explanatory Memorandum, 2000/01, 27 423, no. 3, pp. 23-24. The central commission issues a yearly report by the Minister of Health, Welfare and Sport on the application of the Embryos Bill, whereby attention is namely devoted to new developments concerning activities in relation to sex cells and embryos, Art. 4 para. 1 Embryos Bill.

Explanatory Memorandum II, 2000/01, 27 423, no. 3, p. 28.

Part a of Art. 24 will expire after 5 years, Art. 33 para. 2 Embryos Bill. The scientific research should lead to the establishment of new insights in the field of infertility, artificial reproduction techniques, hereditary congenital disorders or transplantation medicine which can only be obtained by making use of embryos especially cultivated for this purpose, Art. 11 Embryos Bill.

6.5 Scientific research using in-vitro embryos which have been implanted and using foetuses

In the case of pre-implantation diagnostics research is carried out on embryos in vitro to discover whether there is the presence of (hereditary) disorders so that only an embryo with no such disorder will be placed (returned) to the uterus. When this concerns the health of the future child the requirements are different to the case whereby embryos are lost.\textsuperscript{43} Here also the central commission established under the Medical Research Act should approve a research protocol wherein an important criterion is that it is reasonably likely that the interest at stake in the research is proportionally related to the drawbacks and the risks involved for the future child and the woman (Art. 16 Embryos Bill). The woman as well as her husband or partner should give their written consent in this matter (Art. 17 Embryos Bill).

Prenatal research is only allowed if it is therapeutic, that is to say if it can prevent serious disorders in the foetus concerned and that it cannot be postponed until after the birth (Art. 20 Embryos Bill). Therapeutic prenatal research is only permissible if the central commission has positively approved a research protocol whereby it must be reasonably likely that the interest involved in the research is proportionately related to the drawbacks and the risks involved for the foetus and the pregnant woman in question and such research must be with the written permission of the pregnant woman.\textsuperscript{44} Furthermore, the research should lead to the establishment of new insights in the field of medicine concerning unborn or newborn children or in connection with the full course of pregnancies and these objectives cannot be attained by means of other forms or methods of scientific research (Art. 19 Embryos Bill). Non-therapeutic research carried out on the foetus (thus research which is only of importance for medical science) is not permitted.\textsuperscript{45}

7 Posthumous reproduction/law of succession

The Embryos Bill renders posthumous reproduction possible. The main rule is that if the sperm donor or one of the persons involved in the frozen embryos has died, the sperm or, as the case may be, the embryo will no longer be kept. However, if during the lifetime of the person concerned a written declaration has been made concerning the use of the sperm or embryo in question, then that sperm or embryo may be kept (Art. 7 Embryos Bill). In Australia and the US (the Rios Case 1984) the question arose whether a frozen embryo - whereby both providers of the gametes had died \textsuperscript{1} had succession rights. Under Dutch law there would be no succession rights, the legal fiction occurring under Art. 1:2 of the Dutch Civil Code only being applicable

\textsuperscript{43} Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 37.

\textsuperscript{44} Strangely enough, not the written permission of her husband or partner, who would also have an interest in the health of the future child, according to Te Braake, 2001. The legislator has made this choice because of the stress of the research for the pregnant woman and her direct involvement in her pregnancy, Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 40.

\textsuperscript{45} Explanatory Memorandum, 2000/01, 27 423, no. 3, p. 39.
if the woman were pregnant.  

8 Conflicts between the embryo and the mother

In the literature there has been a great deal of discussion concerning the question of whether the mother has legal obligations in relation to the embryo, for example in the case where the mother refuses necessary research on the embryo. Some are of the opinion that an embryo has its own right to life and a right to be born healthy or believe that the woman, after the termination of the period during which an abortion can be carried out, has given up the right to refuse treatment for the foetus. Those who adhere to this view are of the opinion that there must be a child protection provision during pregnancy. The prevailing view in health law, however, is that the law does not provide any legal grounds for infringing the woman's fundamental rights (physical integrity, privacy). The woman only has moral - not legal - obligations. According to Leenen she is a so-called "childminder". The Embryos Bill does not provide for the appointment of a legal representative for the embryo if the mother does not give permission for research to be carried out on the foetus.

9 Abortus provocatus

In The Netherlands a woman may terminate her pregnancy subject to the conditions laid down in the Termination of Pregnancy Act. The Termination of Pregnancy Act does not lay down a maximum pregnancy term within which terminations are permitted. A criterion is laid down for this purpose in a criminal law provision - Art. 82a of the Criminal Code - which determines that it is a punishable offence to kill a foetus which has a viable independent existence. The legislator has expressly not set a limit in the Termination of Pregnancy Act due to the fact that developing science may be able to further reduce the viability boundary. At the time of the enactment of the Criminal Code a foetus of less than 24 weeks was not considered to have a viable independent existence. As a limit a maximum of 22 weeks has been adhered to. From the time of viable independent existence the woman loses the authority to have the pregnancy terminated. Abortion is not a criminal offence if it is carried out by a doctor in a hospital or in an abortion clinic licensed for this purpose. The necessary criteria for the termination of a pregnancy are the existence of an emergency situation as far as the woman is concerned and the fact that there has been a period of deliberation. The decision as to whether there is a case of an emergency situation will be that of a doctor. A doctor is not obliged to carry out an abortion (an abortion does not amount to normal medical treatment), but if the doctor has objections as a matter of principle, then he/she should refer the patient to another

---

47. Among others Sluyters, De Bruijn-Luckers.
49. In 2000 there were 8 abortions per 1000 women in the 15-44 age group in The Netherlands, Annual Report of the Health Care Inspectorate 2000, p. 102. The number of abortions is connected to, among other things, the availability of birth control devices.
50. According to Leenen/Gevers 2000, p. 161, these criteria seem to exclude one another.
The Cabinet has adopted a standpoint concerning the termination of late pregnancies. This concerns unborn babies who do not, or hardly have, a viable independent existence and during the course of the pregnancy it is considered that postnatal life-prolonging actions would be medically pointless. The termination of late pregnancies is allowed in certain situations, subject to the condition that the requirements of due care are adhered to in the taking and the implementation of the decision. For example doctors will be compelled to report cases and their treatment will be examined by a commission.

10 Wrongful birth and wrongful life

On January 9, 2002, the French Parliament adopted a bill curtailing the right to compensation in cases of wrongful life. The bill was the direct consequence of a number of spectacular awards handed down by the French Cour de cassation. In the Netherlands, actions for wrongful birth and wrongful life have not generated the same commotion, yet have managed to occupy the minds of lawyers and specialists of ethics for some time. It all started in the early 1990s, when lower courts began allowing compensation for failed sterilisations. This had been prepared by legal doctrine, which advocated the allowance of such compensation, although sometimes not unequivocally. Thus, one author suggested that compensation should not be allowed if the only motive for sterilisation had been a couple’s fear of congenital diseases and the subsequently born baby proved to be perfectly healthy. This restriction has been rejected almost uniformly because of its infringement upon the privacy of those asking for sterilisation.

The question was finally brought before the Dutch Supreme Court, the Hoge Raad, which in a landmark decision allowed compensation. The Hoge Raad expressed the opinion that the award of compensation for expenses to raise the child - born normal and healthy - was not in conflict with the human dignity of the child, or with its right to life:

51. Letter from the Minister of Health, Welfare and Sport and from the Minister of Justice of 6 September 1999, Parl. Docs. II 26 717, no. 1.
52. These requirements are derived from case law whereby the interpretations of careful treatment such as this have developed within the medical profession and are considered to be of great importance, Parl. Docs. II 26 717, no. 1, p. 6. Zie nader over dit onderwerp Te Braake, 2000.
3.7 (...) The damage for which compensation is asked here consists of expenses which, by their very amount, must be deemed to influence in principle the financial situation of the family until the child comes of age. Such expenses are indisputably material damage (...). Contrary to what the court of appeal thought, that is not inconsistent with the legal duty of parents to take care of and educate the child; rather it follows therefrom that the expenses incurred have necessarily to be made, and therefore constitute a financial inconvenience and so material damage.

3.8 It must be examined further whether there are other objections against awarding in principle compensation for damage consisting in the expenses incurred in the care and education of the child. Such objections have been raised in the Netherlands as in other countries. To state it briefly, it has been alleged that the award of compensation for such expenses in a case as the present one, which concerns a normal and healthy child, can only be based on the conception that the child itself must be regarded as damage or a damage factor, and that in any event such an award is contrary to the human dignity of the child, since its right to exist is thereby negated.

The Hoge Raad does not regard these objections to be convincing. The line of argument developed above (...) takes as a point of departure that the parents, having accepted the child and the new situation, are asking compensation for the impact it has on the family income (...). This line of thinking does not necessarily entail the conception that the child itself is seen as damage or a damage factor (...). Nor can this line of thinking be said to be inconsistent with the human dignity of the child or to negate its right of existence. For indeed, it is also in the child’s interest that the parent should not be refused the possibility of compensation on behalf of the whole family, including the new child.56

Nor does the Hoge Raad regard convincing the argument that an award may result in the child being confronted later in life with the impression that it was not wanted by its parents:

3.9 (...) In the first place, the argument interferes with the relationship between parent and child on a point which must, in principle, be left to be decided by the parents themselves. In the second place, to prevent an enlargement of the family is a wholly different matter than the issue of acceptance of a child once it becomes an individual. The claim for compensation relates exclusively to the first, and not to the second point. Such expenses therefore have no link with the acceptance of the child as a human being. In the third place, it may be assumed that parents are in general able to make it clear to the child that such an impression of rejection is incorrect, even apart from the fact that they themselves may contradict such an impression by raising the child with loving care.

56. This and the following quotations have been taken from Walter Van Gerven, Jeremy Lever, Pierre Larouche, Tort Law, Oxford: Hart, 2000, p. 133-136.
Apart from expenses for raising the child, the Dutch court also acknowledged the possibility of compensation for loss of income for the mother:

3.13 (...) To answer the question of whether the plaintiff is entitled to compensation for loss of income suffered as the consequence of her pregnancy and the child's birth, it must be determined whether her decision not to work temporarily can be deemed reasonable under the circumstances. In view of this, one must attach weight, on the one hand, to the liberty of the plaintiff to organize her life, in the interests of the child, as she pleases, and keep in mind, on the other hand, that she must limit the damage she suffers as far as possible, and as much as can be reasonably expected (...). In the assessment of whether the plaintiff's aforementioned decision is reasonable, specific family conditions may play a role, such as the number and age of other children, the employment position of the husband and the financial means of the family.

In line with the general rules on compensation,57 no non-material damages were awarded, however:

3.14 With respect to the circumstances invoked in the plaintiff's claim for compensation of non-material harm, the court of appeal has judged that, although it is not to be excluded that those circumstances may have resulted in a degree of psychological discomfort, they have not resulted in mental harm upon which a successful claim for compensation of non-material damage could be based. This judgment, involving a factual assessment does not imply an incorrect legal assessment, nor is it incomprehensible or need to be further substantiated. This claim is therefore unfounded.

This restriction has been criticised by Dutch authors, who compare the rejection with its acceptance in the Scottish case McFarlane v. Tayside Health Board.58

This case has had some influence in other European jurisdictions, among others owing to the fact that it has been translated into other languages. The fact that it is one of very few Dutch cases dealt with in the first volume of Van Gerven's Ius commune casebooks for the common law of Europe,59 may have contributed to its influence on Norwegian and Scottish law.60 The Dutch decision has in its reasoning - not in the outcome - in turn been influenced by German law, witness the Conclusion

60. McFarlane v Tayside Health Board (1999) 4 All ER 963. Here, comparative law also plays a role, although the House of Lords in the end opts against the German-Dutch approach.
of Advocate-General Vranken, who in his dissenting conclusion does repeatedly refer to an essay by Hans Stoll.\textsuperscript{61}

Dutch law has so far only had to deal with cases of failed sterilisation. In many cases, a spontaneous re-canalisation results in renewed fertility without any wrongdoing by the surgeon. What may sometimes be reproached is that the surgeon often fails to warn the patient of this possible complication.

As for wrongful life, Dutch legal writers are in favour of such actions.\textsuperscript{62} The Hoge Raad has not yet had an occasion to pronounce itself on the issue. It did have the occasion to hand down a decision in a case involving medical liability, where not the injured child but its parents had claimed compensation of their loss. After the District Court allowed the claim, both the Court of Appeal and the Hoge Raad rejected it.\textsuperscript{63} Correctly so under existing law. \textit{De lege ferenda} a different system is to be preferred, however. This is not wishful thinking. The Dutch government is preparing a bill to allow fixed immaterial damages to the relatives of the injured person.

11 Conclusion

The status and the protection of dignity of the embryo can be considered to be dynamic along with progress in medical science and knowlegde and will always be dependent upon social opinions. That which is today considered to be impermissible will possibly be admissible in the near future and vice versa. The Embryo Act is a typical example of the so-called consultation model (\textit{poldermodel}).\textsuperscript{64} Because of

\begin{itemize}
\item[63.] Hoge Raad 8 September 2000, \textit{Nederlandse Jurisprudentie} 2000, 734 (note by A.R. Bloembergen) (Baby Joost).
\item[64.] In the Netherlands the notion of the consultation model is used in decision-making whereby, after a great deal of consultation with the various interest groups, a compromise is often reached.
\end{itemize}
the Act\textsuperscript{405} is fairly vague points of departure the embryo has indeed not been outlawed, but the results of future balancing of interests do not allow one to make any predictions beforehand. The evaluation of the Embryos Bill (within 4 years of its entry into force) will demonstrate whether the embryo will be adequately protected in the Netherlands and/or whether the legislator\textsuperscript{405} justifications for having opted for certain choices will have been consistent.

Bibliography


Th.A.M. te Braake, Experimenten met embryo\textsuperscript{405}: een gezondheidsrechtelijke benadering, TvGR 1989, pp. 86-94.

Th.A.M. te Braake, De juridische status van het embryo; een stevig aangemeerde leer, TvGR 1995, p. 80-84.


W. van der Burg, De juridische \textsuperscript{406}status\textsuperscript{407} van het embryo: een op drift geraakte

The legislator attaches great importance to broad support within society with regard to a certain choice which has to be made and this is why various social organisations are consulted. Explanatory Memorandum, 2000/01, 27 423, no. 3, pp. 63-64. According to some, the legislator pays too much attention to the views of social organisations and has too little personal responsibility with regard to the obvious choices which have to be made. An example is the Council of State which has found the legislator\textsuperscript{405} grounds somewhat too concise as far as explanations for the points of departure and arguments for taking certain decisions are concerned, Parl. Docs. II, 2000/01, 27 423, A, p. 2. Te Braake, 2001, p. 49, agrees, as does Hulst, 2001, according to whom the Embryos Bill is still in an embryonic state.


H.J.J. Leenen, Artikel 2, in: *J. Gevers e.a., o.c.*


J.B.M. Vranken, *WPNR*.