



Dina Sõritsa

Doctoral student  
University of Tartu

# Damages Subject to Compensation in Cases of Wrongful Birth

A Solution to Suit Estonia

## 1. Introduction

The scientific and medical advances of recent times have enhanced the possibilities offered by prenatal testing. This has increased parental expectations as to abilities of a health-care provider<sup>\*1</sup> to detect foetal defects. Therefore, parents can avoid the enormous financial burden and frustration that could otherwise follow the birth of a disabled child.

This article analyses whether the health-care provider should be held liable under Estonian law for a disabled child's expenses and compensate for the non-pecuniary damage if the child was born as a result of misdiagnosis and the consequent loss of opportunity of the mother to terminate the pregnancy in a timely manner. These cases are known as cases of **wrongful birth**.<sup>\*2</sup>

In Estonia, there is no case law on this topic. It has been proposed that compensation in these cases in Estonia would be conceivable if the damage were to arise from a breach of contract for provision of health-care services.<sup>\*3</sup> However, the damage subject to compensation under the Estonian Law of Obligations Act (LOA) has not yet been analysed. It could be alleged that the main object of discussion in wrongful-birth cases is the question of whether and to what extent the child's maintenance costs are subject to

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<sup>1</sup> Generally, a health-care provider is a legal person who runs a hospital or a physician. Under Estonian law, a qualified doctor, dentist, nurse, or midwife providing health-care services independently who participates in the provision of health-care services and operates on the basis of an employment contract or other, similar contract entered into with a provider of health-care services shall also be personally liable (under *võlaõigusseadus*, RT I 2001, 81, 487, RT I, 11.03.2016, 2, §758 (2)). The Law of Obligations Act and other, more important Estonian legal acts are available also in English, via <http://www.riigiteataja.ee/>. 'Health-care provider' is the general term used here to refer to the subject liable for the damage.

<sup>2</sup> The birth of a disabled child also gives rise to a controversial claim of wrongful life issued by the disabled child. In the case of an unplanned pregnancy and birth of a healthy child, the parents may have a claim of wrongful conception, under which the health-care provider's negligence lies in failure to prevent or terminate the pregnancy. About these cases and the possibility of the health-care provider's liability in these cases under the Estonian Law of Obligations Act, see also D. Sõritsa, J. Lahe. The possibility of compensation for damages in cases of wrongful conception, wrongful birth and wrongful life: An Estonian perspective. – *European Journal of Health Law* 21 (2014) / 2, pp. 141–160, – DOI: <http://dx.doi.org/10.1163/15718093-12341311 D>; Sõritsa. The health-care provider's civil liability in cases of wrongful life: An Estonian perspective. – *Juridica International* 2015 (23), pp. 43–51. – DOI: <http://dx.doi.org/10.12697/JI.2015.23.05>.

<sup>3</sup> B. Winiger *et al.* *Digest of European Tort Law, Volume 2: Essential Cases on Damages*. Berlin & Boston: Walter de Gruyter GmbH & Co. KG 2011, p. 954. – DOI: <http://dx.doi.org/10.1515/9783110248494>.

compensation. Another question is whether the parents are entitled to non-pecuniary damages as compensation for the psychological harm of having to raise a disabled child.

The courts in the US and Germany are not uniform as to whether wrongful-birth claims should be allowed and what kinds of damages should be awarded. Although the majority of US states recognise the wrongful-birth cause of action, several states have statutorily barred these claims.<sup>\*4</sup>

The aim with this article is to propose a reasoned solution for Estonian law on the question of recoverable damages in cases of wrongful birth. The article is based on a comparative analysis: the Estonian law is compared to German and US law. German law has been chosen for comparative material because the German legal system, including German law (and also the standpoints established in case law and theoretical sources), has set an important example for the creation of Estonian civil law.<sup>\*5</sup> United States law was selected in expectation of finding discussions of universal character – i.e., applicable, *inter alia*, in Estonian case law.<sup>\*6</sup>

## 2. The legal basis for a claim of wrongful birth and the health-care provider's liability

### 2.1. The facts underlying the claim of wrongful birth

In a case of wrongful birth, the parents seek compensation for any damage related to birth of the disabled child, a situation that would have been prevented had the parents been correctly informed. It is necessary to emphasise that in these cases the health-care provider does not cause the disability.

There exist various invasive and non-invasive methods of prenatal testing for the detection of possible foetal defects.<sup>\*7</sup> Although prenatal genetic testing is considered highly accurate, the potential for errors still exists.<sup>\*8</sup> Thus it should be clear that the health-care provider cannot always prevent the birth of a disabled child even when the testing is performed 100% correctly. Accordingly, the health-care provider's negligence should be clearly shown in order for there to be a successful claim of wrongful birth.

According to the LOA's §762, the health-care provider's performance is evaluated in accordance with the general level of medical science at the time of provision of the services and the general duty of care expected from a health-care provider. Hence, the above-mentioned medical errors may also give rise to claims against the health-care provider under the Estonian LOA.

### 2.2. The ethical dilemma of avoiding the birth of a disabled child

In cases of wrongful birth, the major ethics-related tension is over the value to be attached to the autonomous decision of those who have been deprived of the opportunity to avoid having a child with particular traits.<sup>\*9</sup> On one hand, the parents definitely have the right to make an informed decision on whether or not to abort a child with potential birth defects. On the other hand, the possibility of choosing and selecting the genetic make-up of a child implies the distasteful potential to create 'designer babies' and for discrimination against disabled people.<sup>\*10</sup>

<sup>4</sup> J.K. Mason *et al.* *Law and Medical Ethics*. 8th ed. Oxford University Press 2011, p. 353.

<sup>5</sup> See P. Varul *et al.* *Tsiviilõiguse üldosa* (General Part of Civil Law). Juura 2012, p. 25 (in Estonian).

<sup>6</sup> According to German case law, wrongful-birth claims are allowed only with contract-based grounds. In the US case law, wrongful birth is generally regarded as medical malpractice tort, with the following prerequisites: 1) a duty, 2) a breach of duty, and 3) an injury 4) proximately caused by the breach. See, e.g., *Keel v. Banach*, 624 So.2d 1022 (1993). However, in *Grubbs ex rel. Grubbs v. Barbourville Family Health Center*, the breach-of-contract cause of action was recognised with the statement that a physician who contracts and charges for a service, such as a prenatal ultrasound scan and consequent opinion as to the results of that scan, is liable for any breach of contract in this regard. See *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d (2003).

<sup>7</sup> On the possibilities and risks of prenatal testing methods, see J.K. Mason *et al.* (see Note 4), pp. 215–216; D.W. Whitney, K.N. Rosenbaum. Recovery of damages for wrongful birth. – *The Journal of Legal Medicine* 32 (2011) / 2, pp. 167–204, on pp. 168–169; – DOI: <http://dx.doi.org/10.1080/01947648.2011.576616> P.L. Barber. Prenatal diagnosis: An ethical and regulatory dilemma. – *Houston Journal of Health Law & Policy* 13 (2013) / 2, pp. 329–351, on pp. 330–332, 345.

<sup>8</sup> For more information, see D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 170.

<sup>9</sup> S.D. Pattinson. *Medical Law and Ethics*. 2nd ed. Thomson Reuters (Legal) Limited 2009, p. 333.

<sup>10</sup> P.L. Barber (see Note 7), pp. 347, 349.

The ethical dilemma linked to avoiding the birth of a disabled child arises also in the process of establishing the causation. In a wrongful-birth case, the plaintiff must, *inter alia*, prove that the child would have been aborted if the plaintiff had been made aware of the foetus's deformities.<sup>\*11</sup> The difficulty of establishing causation has justified dismissal of wrongful-birth action in several cases in the US.<sup>\*12</sup> Aside from the problem of causation, moral concerns as to the status of foetal life remain, alongside the fact that in absolute terms pregnancy has been actually sought in the cases at issue.<sup>\*13</sup> Nevertheless, the majority of courts both in Germany and in the US have affirmed the existence of a claim of wrongful birth.

It has been stated that claims of wrongful birth should be permitted irrespective of apparent eugenic implications emerging. The parents have a well-recognised right to choose whether or not to terminate the pregnancy, and it would be unjust to leave the parents with the heavy burden of pecuniary and non-pecuniary damage incurred through deprivation of their right to choose due to the health-care provider's negligence.<sup>\*14</sup> However, it should be clear that a wrongful-birth claim should not be allowable in consequence of every birth defect, no matter its significance.

The question of what conditions are 'medically relevant' and could accordingly give rise to a wrongful-birth cause of action is also complicated. P.L. Barber and W.F. Hensel agree that, at some point, a line will have to be drawn with regard to what conditions are actionable, in consideration of the child's functional limitations and the extent of his or her suffering.<sup>\*15</sup>

In Estonia, the set of 'medically relevant' traits that give rise to a wrongful-birth cause of action should at least include those traits that would justify late-term abortion under the Estonian Termination of Pregnancy and Sterilisation Act (TPSA)<sup>\*16</sup>, §6 (2) 2) – i.e., traits with which the unborn child may have severe mental or physical damage to health.<sup>\*17</sup> The gravity of the child's disability should be evaluated on a case-by-case basis.

### 2.3. Grounds for the health-care provider's contractual liability

Under the LOA's §759, the existence of a contract for provision of health-care services is presumed if the health-care provider has provided health-care services. This means that if an expectant mother undergoes prenatal testing in order to avoid the birth of a disabled child and, in consequence of that health-care provider's negligently performed testing, a disabled child is born, the health-care provider's liability could primarily be contractual in nature.<sup>\*18</sup> The main prerequisite for contractual liability is breach of obligation. The following general prerequisites for a health-care provider's contractual liability exist under the LOA: 1) breach of obligation by the health-care provider, 2) damage caused to the patient, 3) a causal link between the breach of obligation and the damage, and 4) the health-care provider's fault.<sup>\*19</sup>

The health-care provider's failure to diagnose or disclose actual or potential birth defects during the pregnancy deprives the parents of the opportunity to abort a genetically defective child.<sup>\*20</sup> Therefore, the

<sup>11</sup> *Reed v. Campagnolo*, 630 A.2d 1145 (Md. 1993); *McKenney v. Jersey City Medical Center*, 771 A.2d 1153 (2001).

<sup>12</sup> E.g., *Wilson v. Kuenzi*, 751 S.W.2d 741 (1988). Ivo Giesen finds it doubtful that the parents could prove that, had they known about the child's disability, they would have decided to terminate the pregnancy. See I. Giesen. Of wrongful birth, wrongful life, comparative law and the politics of tort law systems. – *Utrecht Law Review* 72 (2009), pp. 257–273.

<sup>13</sup> J.K. Mason *et al.* (see Note 4), p. 353.

<sup>14</sup> For more information about the parents' right to procreative autonomy, see J.T. Stein. Backdoor eugenics: The troubling implications of certain damages awards in wrongful birth and wrongful life claims. – *Seton Hall Law Review*, 40 (2010), pp. 1117–1168, on pp. 1120–1128.

<sup>15</sup> W.F. Hensel. The disabling impact of wrongful birth and wrongful life actions. – *Harvard Civil Rights – Civil Liberties Law Review* 40 (2005), pp. 141–195, on pp. 181–190; P.L. Barber (see Note 7), pp. 347–350.

<sup>16</sup> Raseduse katkestamise ja steriliseerimise seadus, RT I 1998, 107, 1766, RT I, 20.02.2015, 11.

<sup>17</sup> According to the TPSA's §6 (2) 2, it is permissible to terminate the pregnancy even in the 12th to 22nd weeks in the event of risk of physical or mental abnormality of the foetus.

<sup>18</sup> German law too allows wrongful-birth claims only on a contractual basis. BGH NJW 1997, 1638, 1640; BGH NJW 2002, 886; NJW 2002, 2636, 2637; NJW 2005, 891, 892. See also BGB §823, Schadensersatzpflicht ['Liability for damages']; H.-G. Bamberger, H. Roth. *Beck'scher Online-Kommentar BGB*, 37th ed. 2013, p. 756.

<sup>19</sup> For details about the legal grounds for the health-care provider's contractual liability under the Estonian LOA, see also D. Sõritsa, J. Lahe (see Note 2).

<sup>20</sup> It should be noted that the author presumes that both parents have a claim for wrongful birth. Under Estonian law, the question of whether the parent who is not a party to the contract is entitled to compensation for the damages depends foremost on whether the health-care provider had to recognise that the contract was directed also at the protection of the third party's (the second parent's) interests and rights (LOA's §81, on contracts with protective effect for a third party). In the author's opinion, if the patient informs the doctor of said patient's and the partner's wish to prevent the birth of a disabled child and

health-care provider's liability may lie in misdiagnosis or the (mostly consequent) breach of obligation to inform the patient.<sup>\*21</sup> The LOA, in §766 (1), explicitly prescribes that the health-care provider shall inform the patient of the results of the examination of the patient, the state of his or her health, etc.

The Estonian Supreme Court has explained that giving an incorrect diagnosis can be regarded as a breach of obligation arising from the contract for provision of health-care services. Consequently, the health-care provider must compensate for the damage that has evolved as a result of misdiagnosis if correct diagnosis was possible when the general level of medical science and the general duty of care at the time are taken into account.<sup>\*22</sup>

If the prerequisites stated above for contractual liability are met, nothing stands in the way of the health-care provider's liability in wrongful-birth cases under the Estonian LOA. In every case, the central question is whether the health-care provider has breached the contractual obligation.

## 2.4. The possibility of the health-care provider's delictual liability

According to Estonian law, making a claim on a contractual basis does not exclude delictual liability. In principle, the patient could issue a claim on alternative grounds if the prerequisites stipulated in the LOA's §1044 (2) are met.<sup>\*23</sup>

In cases of misdiagnosis, the Estonian Supreme Court has affirmed, in principle, the patient's claim against the health-care provider also on the basis of the law of delict.<sup>\*24</sup> However, Estonian courts have not appraised whether misdiagnosis constitutes a delict. In the author's opinion, failing to diagnose a child's disability cannot constitute an unlawful act in the meaning of the law of delict, because there is no protective provision that entails an obligation on the part of a health-care provider to diagnose a child's disability.<sup>\*25</sup>

As the health-care provider is not the cause of the child's disability, it is not possible to rely exclusively on the LOA's §1045 (1) 2), according to which the infliction of damage is unlawful if the damage stems from causing of bodily injury or damage to the health of the victim. Also, the Estonian Supreme Court has stated that, according to the LOA's §130 (1), only the aggrieved person (and no other person) can claim damages arising from health damage or bodily injury.<sup>\*26</sup> Therefore, the parents cannot rely on the LOA's §1045 (1) 2) when stating that they have suffered damage due to their child's health condition.

The objective behind the obligation to inform the patient is not to prevent harm to the patient's life or health but primarily to prevent violation of personality rights.<sup>\*27</sup> In principle, the health-care provider's

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enters into the contract, it can be alleged that the health-care provider should have recognised the interests of the patient's partner and the aim of the patient to protect said partner's interests.

<sup>21</sup> E.g., *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 17 (Minn. 1986); *Reed v. Campagnolo* (see Note 11). In *Smith v. Cote*, the court stated that the relevant standard of obligation for informing the patient does not require a physician to identify every possible birth defect without regard for the significance (*Smith v. Cote*, 128 N.H. 231 [1986]).

<sup>22</sup> CCSCd 3-2-1-171-10, para. 14, 8.4.2011, *E. B. v. SA Põhja-Eesti Regionaalhaigla* (in Estonian).

<sup>23</sup> According to the LOA's §1044 (2), compensation for damage arising from the violation of contractual obligations shall not be claimed on the basis of unlawful causing of damage unless otherwise provided by law. Compensation for damage arising from the violation of contractual obligations may be claimed on the basis of unlawful causing of damage if the objective of the violated contractual obligation was other than to prevent the damage for which compensation is claimed.

<sup>24</sup> *E. B. v. SA Põhja-Eesti Regionaalhaigla* (see Note 22).

<sup>25</sup> According to the LOA's §1045 (1), the causing of damage is unlawful if, above all, the damage is caused by 1) causing of the death of the victim; 2) causing of bodily injury to or harm to the health of the victim; 3) deprivation of the victim of his or her liberty; 4) violation of a personality right of the victim; 5) violation of the right of ownership or a similar right, or a right of possession, of the victim; 6) interference with a person's economic or professional activities; 7) behaviour that violates a duty arising from the law; or 8) intentional behaviour contrary to good morals. In the LOA's §1045 (1) 1)–5), the unlawfulness of the act is defined in terms of consequences of the tortfeasor's act or inaction. The grounds for unlawfulness under §1045 (1) 6)–8), necessitate the evaluation of the tortfeasor's act or inaction and not the consequence. For more details, see P. Varul *et al. Võlaõigusseadus III. 8. ja 10. osa (§-d 619–916 ja 1005–1067) Kommenteeritud väljaanne* [Law of Obligations Act III, Parts 8 and 10 (§§ 619–916 and 1005–1067: A Commentary)]. Tallinn: Juura 2009, p. 641 (in Estonian). About the legal grounds for the health-care provider's delictual liability under Estonia's LOA, see also D. Sõritsa, J. Lahe (see Note 2), pp. 147–148.

<sup>26</sup> CCSCd 3-2-1-174-10, para. 12, 9.3.2011, *Nikolai Bedritski v. Osaiühing KLAVESTI* (in Estonian).

<sup>27</sup> P. Varul *et al.* (see Note 25), p. 293. Violation of personality rights in the meaning of the Estonian Obligations Act may lie in, e.g., unlawful depriving a person of liberty, defamation, unjustified use of the person's name or image of the person, the breaching the inviolability of the private life, right to free self-realisation etc. P. Varul *et al. Võlaõigusseadus I. Üldosa (§§1–207) Kommenteeritud väljaanne* [Law of Obligations Act I, General Part (§§ 1–207: A Commentary)]. Tallinn: Juura 2006, pp. 463–464 (in Estonian).

delictual liability could follow from breach of the parents' personality right(s). However, such liability is possible only if the unlawful act results from breach of protective provisions, because the failure to inform the patient as such should not be considered unlawful according to the LOA's §1045.

In addition, relying on intervention in family planning as violation of personality rights (see the LOA's §1045 (1) 4) should not bring about delictual liability under Estonian law, because in such a case the existence of a contract supersedes the delictual liability. Besides intervention in family planning, the birth of a disabled child could, in principle, entail breach of other personality rights of the parents, as in loss of consortium.<sup>\*28</sup> The applicability of delictual liability in these cases depends on the interpretation given to the second sentence of § 1044 (2)<sup>\*29</sup> and evaluation as to which kind of damage the breached contractual obligation was an attempt to prevent.

In the author's opinion, the health-care provider's delictual liability does not follow in cases of wrongful birth.

### 3. Defining damages subject to compensation in cases of wrongful birth

#### 3.1. Kinds of damages in cases of wrongful birth in Germany and the US

The birth of a disabled child may cause both pecuniary and non-pecuniary damage. Pecuniary damage may include medical expenses associated with pregnancy and delivery, unexpected maintenance costs due to the child's disability (i.e., costs associated with the infant's and adult's case-specific care and treatment requirements), and loss of income. Non-pecuniary loss may lie in the pain caused to the mother in the course of pregnancy and birth, the interference with one's family planning, and the mental suffering due to having to care for a disabled child.<sup>\*30</sup> Courts in the US and Germany have not taken a uniform stance as to what kinds of damages should be awarded in cases of wrongful birth if the claim as such is allowed.

In Germany, the child's maintenance costs may be compensated for fully in cases of wrongful birth. The health-care provider is responsible not only for the additional expenses connected to the child's disability but also for the child's maintenance costs in full. Hence, maintenance costs are awarded irrespective of the state of the child.<sup>\*31</sup> The Federal Court of Justice of Germany has stated that the health-care provider who advises a woman about the possibility of amniocentesis and dangers to the child is held liable for the subsequent maintenance costs if, for reason of lack of information, that woman gives birth to a disabled child.<sup>\*32</sup>

In contrast, in the United States, claims by the parents for recovery of ordinary child-raising costs are rarely successful.<sup>\*33</sup> Most jurisdictions in the US accept the recovery of extraordinary expenses, including hospital and medical costs, that are necessary for treating the birth defect, along with additional medical or educational costs attributable to the birth defect. However, the lifetime expense of caring for a disabled individual depends on the birth defect and its development, thereby making preparation of a lifetime care plan both complex and challenging.<sup>\*34</sup>

<sup>28</sup> A claim for loss of consortium arises from the loss of society, affection, assistance, and conjugal fellowship suffered by the marital unit as a result of the physical injury to one spouse through the tortious conduct of a third party. For an example, see *Oaks v. Connors*, 339 Md. 24 (1995). See also D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 196. In the Estonian LOA, an indicative list of personality rights is presented in §1046 (1), according to which the defamation of a person, *inter alia*, by passing undue value judgement, through the unjustified use of the name or image of a person, or by breaching the inviolability of the private life or another personality right of a person is unlawful unless the law provides otherwise. See also P. Varul *et al.* (see Note 25), pp. 646–647.

<sup>29</sup> The second sentence of the LOA's §1044 (2) states that compensation for the damage arising from the violation of contractual obligations may be claimed on a delictual basis if the objective for the violated contractual obligation was other than to prevent the damage for which compensation is claimed.

<sup>30</sup> B.C. Steininger. Wrongful birth and wrongful life: Basic questions. – *Journal of European Tort Law* 1 (2010) / 2, pp 125–155, on p. 128. – DOI: <http://dx.doi.org/10.1515/JETL.2010.125>.

<sup>31</sup> BGHZ 89, 95, 105; BGHZ 124, 128, 145. See also N.M. Priaulx. Conceptualising harm in the case of the unwanted child. – *European Journal of Health Law* 9 (2002) / 4, pp. 337–359, on p. 349. – DOI: <http://dx.doi.org/10.1163/157180902773123969>.

<sup>32</sup> BGHZ 89, 95 2923; NJW 1997, pp. 1638, 1640. Amniocentesis is a medical procedure that is regarded as the 'gold standard' in prenatal testing, with accuracy approaching 100%. It is performed through the maternal abdomen. See also D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 168.

<sup>33</sup> D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 176.

<sup>34</sup> *Ibid.*, p. 174.

In German law, the mother can recover non-pecuniary damages for pain and suffering attendant on childbirth only if that pain and suffering ‘exceeds the inflictions which accompany a birth without complications’.<sup>\*35</sup> Those US courts that refuse to allow the recovery of emotional distress damages have typically relied on the assertion that emotional trauma has not been accompanied by physical injury or that the recovery of such damages is too speculative.<sup>\*36</sup>

It has been pointed out that damages for parents’ loss of the child’s services and companionship are not recoverable, and neither are damages for maternal pain and suffering due to childbirth.<sup>\*37</sup> The US courts have awarded damages for spousal loss of consortium.<sup>\*38</sup>

### 3.2. The legal frames for compensation for the damage in Estonia

According to the Estonian LOA, the aim for compensation for damage is to place the aggrieved person in a situation as near as possible to that in which he or she would have been if the circumstances that are the basis for the compensation obligation had not arisen; see the LOA’s §127 (1). The purpose of the breached obligation or the protective provision should be taken into account, according to §127 (2), irrespective of the legal basis for compensation for the damage. If the claim is issued on a contractual basis, the damage should also be foreseeable, under the LOA’s §127 (3).

In the author’s opinion, a contract for provision of health-care services that is aimed at detecting potential birth defects protects both pecuniary and non-pecuniary interests.

Under the LOA’s §130 (1), compensating for the pecuniary damage associated with the patient’s own health should apparently not be problematic. In the case of misdiagnosis and consequent breach of the obligation to inform the patient, the cost of unsuccessful procedures could be compensated for.<sup>\*39</sup> Hence, the expenses for the unsuccessful prenatal testing should be compensated for, as should the medical expenses associated with pregnancy and delivery. Loss of income during pregnancy and after the birth of a disabled child that arises from the need to take care of the child could also be subject to compensation.

The LOA’s §134 (1) states that compensation for non-pecuniary damage arising from non-performance of a contractual obligation may be claimed only if the purpose of the obligation was to pursue a non-pecuniary interest and, under the circumstances related to entry into the contract or to the non-performance, the obligor was aware or should have been aware that non-performance could cause non-pecuniary damage.

As is stated above, the purpose of the health-care provider’s obligation in these cases is also to pursue a non-pecuniary interest. Therefore, under the LOA’s §134 (2), claiming non-pecuniary damage due to the breach of personality rights is possible also. However, issuing the claim for non-pecuniary damages on grounds of breach of contractual obligation is considerably limited according to Estonian case law.<sup>\*40</sup>

With regard to interference with the parents’ personality rights, the success of a claim for non-pecuniary damages in Estonia depends on whether deciding to terminate the pregnancy, if there is a possibility of the child’s disability, according to the TPSA’s §6 (2) 2, should be affirmed as person’s right of self-determination.<sup>\*41</sup> Regarding the right to family planning or procreation as a personality right presumes alleging that the possibility of aborting the pregnancy within the 12th–22nd week if the unborn child may suffer severe mental or physical harm to its health<sup>\*42</sup> is aimed at protecting the above-mentioned interests. In the author’s opinion, deciding to terminate the pregnancy if there is a possibility of the child being born with a disability should be affirmed as a personal right of self-determination. Consequently, there should be compensation for the non-pecuniary damage arising from the interference with family planning.

<sup>35</sup> BGH decision of 18 January 1983, BGHZ 86, 240 = NJW 1983, 1371 = JZ 1983, 447; N.M. Prialux (see Note 31), p. 349.

<sup>36</sup> D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 191.

<sup>37</sup> *Ibid.*, p. 195.

<sup>38</sup> The compensation covers the loss of society, affection, assistance, and conjugal fellowship, encompassing more than the loss or impairment of sexual relations. See, e.g., *Deems v. Western Maryland Ry.*, 247 Md. 95, 231 A.2d 514 (1967); *Exxon Corp. v. Schoene*, 67 Md. App. 412, 423, 508 A.2d 142 (1986).

<sup>39</sup> Such a standpoint has already been adopted in Estonian case law in cases of medical error. See the decision in case No. 2-09-15036, 15.2.2010, of Harju County Court.

<sup>40</sup> Decision in case No. 3-2-1-71-14 of the Supreme Court *en banc*, 15.12.2015, para. 131.

<sup>41</sup> Awarding compensation for interference with reproductive autonomy presupposes that the latter is classified as an interest protected by the legal order. B.C. Steinger (see Note 30), p. 150.

<sup>42</sup> See the TPSA’s §6 (2) 2). For example, US courts have held that deciding to terminate the pregnancy falls within the mother’s right of self-determination (*Canesi v. Wilson*, 730 A.2d 805 [1999]).

The Estonian Supreme Court has generally allowed compensation for non-pecuniary damage arising from physical and mental pain and suffering due to misdiagnosis or medical error by the health-care provider.<sup>\*43</sup> Accordingly, in the event of misdiagnosis of a child's disability, if the parents' emotional distress results in remarkable damage to their health, non-pecuniary damages too could be awarded. Compensation for non-pecuniary damage due to disappointment and frustration arising from the situation of unexpectedly becoming a parent of a disabled child, however, would be highly debatable in Estonian courts.

However, there are other grounds for non-pecuniary damage-compensation claims, that are not based on the parents' disappointment with having to raise a disabled child. According to J.T. Stein, compensation for non-pecuniary damage is possible on the grounds that the parents have to watch their child die. This is the case if the genetic disease suffered by the child causes him or her to die at a very young age and the parents suffer emotional distress as witnesses to this.<sup>\*44</sup> The LOA's §134 (3) stipulates that in the case of an obligation to compensate for damage arising from the death of a person or serious bodily injury or health damage caused to that person, the persons closest to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances.

The condition of exceptional circumstances in the sense of the LOA's §134 (3) is not met merely by the abstract fact of death and consequent grief and loss. The Estonian Supreme Court has explained that these exceptional circumstances are affirmed in the event of the plaintiff's spatial proximity to the deceased or severely injured close person at the time of or after the accident.<sup>\*45</sup> Compensation under §134 (3) would, therefore, be justified only if the parents were to witness the child's death (i.e., be in spatial proximity during it) or, for example, experience emotional distress as a result of seeing their child suffer.

However, awarding pecuniary and non-pecuniary damages is not automatically justifiable in full. The Estonian LOA stipulates several possible limits to the compensation and the extent of the damages. Below, the main problematics and *pro* and *contra* arguments connected with compensation for a disabled child's maintenance costs and non-pecuniary damage are analysed.

## 4. Compensation for the disabled child's maintenance costs and non-pecuniary damage: *Pro* and *contra*

### 4.1. The child's maintenance costs: The problematic causal link

There seems to be consensus in Europe that in cases of wrongful birth, at least the additional costs of care attributable to the disability should be claimable as pecuniary damages. However, the question of whether the costs of child care should be claimable in full is still debatable.<sup>\*46</sup>

As is emphasised above, in cases of wrongful birth there could be a presumption that the parents were ready to bear at least the maintenance costs of the expected healthy child and, hence, that only non-recoverability of the extra costs associated with disability could harm the interests of the child.<sup>\*47</sup> However, this approach does not take into account the possibility that the parents, had they been informed in a timely manner of the child's disability, might not have decided to keep the child and so would not have had to bear the child's maintenance costs at all.<sup>\*48</sup> It could therefore be alleged, according to the *conditio sine qua non*

<sup>43</sup> *E. B. v. SA Põhja-Eesti Regionaalhaigla* (see Note 22), para. 15.

<sup>44</sup> J.T. Stein (see Note 14), p. 1161.

<sup>45</sup> CCSCd 3-2-1-19-08, 9.4.2008, *H. V v. AS Taisto Liinid*, paras 16–17 (in Estonian).

<sup>46</sup> Confirmed in BGH, 2000, NJW 1782; see also M. Hogg, Damages for pecuniary loss in cases of wrongful birth. – *Journal of European Tort Law* 1 (2010) / 2, pp. 156–170, on p. 169. – DOI: <http://dx.doi.org/10.1515/JETL.2010.156>.

<sup>47</sup> W.T. Nuninga, Wrongful testing and its lively consequences. – *European Journal of Law Reform* 16 (2014), pp. 181–206, on p. 204. Nevertheless, as shown above, the parents' readiness to bear the maintenance costs of an expected healthy child have not precluded the German courts from awarding the parents damages for the full amount of the child's maintenance costs (i.e., not only the extra costs associated with disability).

<sup>48</sup> B.A. Koch, Comparative report. – B. Winiger *et al. Digest of European Tort Law, Volume 2: Essential Cases on Damages*. Berlin: Walter de Gruyter GmbH & Co. KG 2011, p. 960. – DOI: <http://dx.doi.org/10.1515/9783110248494>. The compensation for depriving the parents of the possibility to choose is similar to compensation under the principle of loss of chance. For discussion of compensation for lost chance in various European countries, see B. Winiger *et al. Digest of European Tort Law, Volume 1: Essential Cases on Natural Causation*. Mörlenbach, Germany: Springer-Verlag / Wien 2007, pp. 545–592.

rule, that were it not for the health-care provider's negligence, the child in question would not have been born at all and the parents would have avoided the expenses attendant to the birth of a child.

Nevertheless, there are several *contra* arguments with regard to the causal link, under the *conditio sine qua non* rule, between the health-care provider's negligence and the disabled child's maintenance costs. As M. Hogg has noted, notwithstanding the existence of a causal link it is generally stated that the creation of the parent's maintenance obligation as a fundamental value as a result of the third party's negligence is not sufficient for the maintenance obligation to transfer to the third party.<sup>\*49</sup> In contrast, B.C. Steininger has pointed out that the origin of the obligation to pay maintenance under family law does not preclude a compensation claim.<sup>\*50</sup>

Another argument *contra* awarding the child's maintenance costs is the attachment of a negative value judgement to the child and infliction of psychological harm on the child if he or she learns about the parents' claim against the health-care provider.<sup>\*51</sup> At the same time, though, satisfying the claim for the disabled child's maintenance costs could be in the interests of the child him- or herself and the whole family.<sup>\*52</sup>

According to the Estonian Family Law Act (FLA)<sup>\*53</sup>, §97 3), a descendant or ascendant who needs assistance and is unable to maintain him- or herself is also entitled to receive maintenance. In the author's opinion, the possible negative value judgement concurrent with the compensation for maintenance costs is outweighed by the benefits to the child. Awarding damages to the parents would only help them provide the necessary care to their child; hence, it would be favourable for the disabled child.

In principle, therefore, the disabled child's maintenance costs (i.e., both the expected costs of raising a healthy child and the additional expenses due to disability) could be compensated for under the Estonian Law of Obligations Act. The question of the limits to the compensation for damage is analysed below.

## 4.2. The possibility of offsetting benefits in compensation for non-pecuniary damage

In cases of wrongful birth, the issue of the possibility of benefit offset raises another intriguing question. According to the LOA's §127 (5), any gain received by the injured party shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation. The prerequisites for benefits offset under the LOA's §127 (5) are, firstly, a causal link between the benefits and the infliction of damage and, secondly, that the offset is not contrary to the purpose of the compensation.

In the United States, according to Restatement (Second) of Torts, Section 920, also the value of the benefit conferred is generally considered in mitigation of damages. The US courts have applied the benefit offset rule in some cases by comparing the economic expenses of rearing a disabled child with those for a healthy child and awarded the excess to the parents as damages. However, this approach has been criticised, because the comparison should be between a disabled child and, after abortion, having no child at all.<sup>\*54</sup> Benefit offset has been applied in Germany also. However, it has been emphasised that offset is only possible with respect to damages of the same kind: because the 'benefit' of raising a child is non-pecuniary, primarily offsetting of non-pecuniary damage could be discussed.<sup>\*55</sup>

W.F. Hensel has pointed out that, while the courts emphasise the inherent benefits of rearing a healthy child, many courts ignore these benefits if a child is born with a genetic defect.<sup>\*56</sup> However, in the author's

<sup>49</sup> M. Hogg (see Note 46), pp. 156–170.

<sup>50</sup> B.C. Steininger (see Note 30), p. 134.

<sup>51</sup> For more information on this, see B.C. Steininger (*ibid.*), pp. 129–130.

<sup>52</sup> *Ibid.*

<sup>53</sup> Perekonnaseadus, RT I 2009, 60, 395, RT I, 12.03.2015, 99.

<sup>54</sup> C.W. Leightman. *Robak v. United States: A precedent-setting damage formula for wrongful birth.* – *Chicago–Kent Law Review* 58/3 (June 1982), pp. 725–764, on p. 747.

<sup>55</sup> B.C. Steininger (see Note 30), p. 137. On receiving a child as a non-pecuniary benefit, see also N. Priaulx. Health, disability & parental interests: Adopting a contextual approach in reproductive torts. – *European Journal of Health Law* 12 (2005), pp. 213–244, on p. 218. It should be noted that, in principle, the child's possible obligation to support his or her parents in future (see the FLA's §§ 96–97) could be regarded as a pecuniary benefit against which some of the damages could be offset. However, in the case of a disabled child, the child's own obligation to provide support is questionable, when that child's health condition is taken into account.

<sup>56</sup> W.F. Hensel (see Note 15), p. 154. About the case law and for analysis of application of the benefit rule, see K.C. Vikingstad. The use and abuse of the tort benefit rule in wrongful parentage cases. – *Chicago–Kent Law Review* 82 (2007) / 8, p. 1087.



opinion, the grave consequences of having to raise a disabled child cannot be diminished by the fact that the parents still obtained a child (though not the child they expected). D.W. Whitney and K.N. Rosenbaum too find that the benefit offset theory should not be applicable in wrongful-birth cases.<sup>\*57</sup> The present article argues that it is disputable whether the joy of a healthy child can be cast in parallel with the consequences of raising and caring for a disabled child. Hence, it is complicated to presume that the birth of a disabled child is accompanied by the benefits that could be offset under the LOA's §127 (5).

### 4.3. Reduction of the amount of compensation due to the parents' part in causing damage

According to the LOA's §139 (1), if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that said circumstances or risk contributed to the damage. The question of mitigation of damages has often been analysed in the context of wrongful-birth claims. One of the controversial arguments against awarding damages or for reducing the amount of damages is that the parents could have avoided the damages by terminating the pregnancy (if this course of action was still a possibility) or putting the child up for adoption.<sup>\*58</sup>

The aggrieved person's opportunities to avoid or reduce the damage and their effect on the compensation for the damages are generally recognised in both German and US law. However, in cases of wrongful birth, German case law rejects the idea that refusal to opt for abortion or adoption should cause the claim to fail.<sup>\*59</sup> The principle of mitigation of damages on the above-mentioned grounds in wrongful-birth cases has also not been applied by the US courts.<sup>\*60</sup>

The controversy over the argument lies in the fact that, on one hand, it is stated that the child is unwanted and the child-rearing expenses should be allowable yet, on the other hand, the parents have chosen to keep their child.<sup>\*61</sup> B.C. Steininger explains that the fact that the child was unplanned does not prejudice the parents' relationship to the child once it is born.<sup>\*62</sup>

In consideration of the possibility of aborting the child, it could be stated that the existence of grounds to terminate the pregnancy does not create an obligation to undertake abortion. Affirming such an obligation (through reduction of damages in cases of wrongful birth) would constitute an enormous invasion of privacy.<sup>\*63</sup> On a similar account, it would be highly unreasonable to state that damages could be mitigated by putting the child up for adoption.<sup>\*64</sup>

In the author's opinion, it would be contrary to the principle of good faith (LOA's §6) to rely on the existence of parental opportunity to avoid damage in a case of wrongful birth by terminating the pregnancy or putting the child up for adoption. Therefore, the damages cannot be denied or reduced on these grounds.

## 5. Grounded scope of compensation in cases of wrongful birth

As is stated above, under the Estonian LOA, claims of wrongful birth could be successful primarily on a contractual basis. In the author's opinion, the contract for provision of health-care services that is aimed at detecting potential birth defects protects both pecuniary and non-pecuniary interests.

<sup>57</sup> D.W. Whitney, K.N. Rosenbaum (see Note 7), pp. 178–179.

<sup>58</sup> E.g., *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514 (1974) 219 N.W.2d 242.

<sup>59</sup> H. Oetker, Art und Umfang des Schadenersatzes [‘The nature and the extent of damages’]. – F.J. Säcker, R. Rixecker (eds). *Münchener Kommentar. Bürgerliches Gesetzbuch. Schuldrecht. Allgemeiner Teil. 5. Auflage* [‘München Commentary on the German Civil Code: Law of Obligations, General Part, 5th Edition’]. Munich: Verlag C. H. Beck 2007, p. 302.

<sup>60</sup> See, e.g., *Cockrum v. Baumgartner*, 95 Ill.2d 193 (1983) 447 N.E.2d 385.

<sup>61</sup> A. Jackson. Wrongful life and wrongful birth. – *Journal of Legal Medicine* 17 (1996), pp. 349–381, on p. 377. – DOI: <http://dx.doi.org/10.1080/01947649609511013>.

<sup>62</sup> B.C. Steininger (see Note 30), p. 133.

<sup>63</sup> See also *Rivera v. State of New York*, 404 N.Y.S.2d (1978).

<sup>64</sup> See, e.g., *Troppi v. Scarf*, 187 N.W.2d 511 (Mich. App. 1971).

In cases of wrongful birth, it is reasonable under the Estonian LOA to compensate for pecuniary damage arising from the birth of a disabled child. The financial damages in question may encompass the parents' loss of income along with medical expenses (e.g., the costs of the unsuccessful prenatal testing procedure).

With regard to the disabled child's maintenance costs, in principle, that child's maintenance costs (i.e., both the expected costs of a healthy child and the additional expenses due to disability) could be compensated for under the Estonian LOA. Compensation for these expenses is not precluded by the origin of the maintenance costs in the realm of family law.

In establishment of the recoverable damages, the child's life expectancy is taken into account. Therefore, the additional expenses connected to the child's disability are recoverable beyond the age of majority if the child remains dependent on the parents for support.<sup>\*65</sup> In German law too, the claim is not limited by the age of the child.<sup>\*66</sup>

Compensation for the non-pecuniary damage also is possible. Firstly, the damage to the mother due to the pain and inconvenience suffered during pregnancy and childbirth is subject to compensation.<sup>\*67</sup>

B.C. Steininger has stated that awarding compensation for non-pecuniary loss resulting from the violation of parental freedom of procreation does not entail denigration of the child and should not be in conflict with the origins of duties towards the child in the field of family law.<sup>\*68</sup>

In this author's opinion, the possibility of terminating the pregnancy under the TPSA's §6 (2) 2), is a personal right of self-determination. Therefore, a non-pecuniary damage claim based on interference with family planning is also subject to compensation if, under the LOA's §134 (1), the aim behind the breached obligation was, *inter alia*, the protection of a non-pecuniary interest (the right to family planning).

In exceptional circumstances, compensation for non-pecuniary damage could be possible under the LOA's §134 (3) on the grounds that parents have to watch their children die. Compensation for non-pecuniary damages on this foundation would be justified only if the parents were to witness the child's death or experience emotional distress as a result of seeing their child suffer.<sup>\*69</sup>

In Estonia, in cases of wrongful birth, the parents could, in principle, be entitled to pecuniary damages (costs of the unsuccessful medical procedure, medical expenses associated with pregnancy and delivery, loss of income, and the child's maintenance costs) along with non-pecuniary damages (emotional distress, intervention in family planning, and witnessing the child's suffering and consequent death), if the prerequisites listed above are met.

The calculation of damages recoverable in cases of wrongful birth has posed another obstacle for some courts. For example, in the cases *Gleitman v. Cosgrove* and *Terrell v. Garcia*, the court denied the claim for damages because calculating the expenses for a disabled child was impossible.<sup>\*70</sup> However, it can be stated that similar calculations are performed in connection with other medical malpractice claims, and, therefore, the problems of calculation of damage should not preclude awarding damages in cases of wrongful birth.

## 6. Conclusions

Irrespective of the need to make moral judgements and to solve ethical dilemmas that is involved in wrongful-birth cases, it can be alleged that the parents should be allowed to file a wrongful-birth claim against a health-care provider if the health-care provider negligently failed to inform the parents in a timely manner of their future child's severe health condition. As long as the law protects the right to choose to have an abortion if the future child could potentially be born disabled, a wrongful-birth claim should be deemed justified.

However, the issue of recoverable damages in these cases remains contested by legal practitioners in various countries. When the foregoing analysis is generalised, it can be posited that in Germany the courts award the parents the child's maintenance costs in full, whereas US courts tend to award compensation

<sup>65</sup> D.W. Whitney, K.N. Rosenbaum (see Note 7), p. 182.

<sup>66</sup> BGHZ 89, 95, 105; BGHZ 124, 128, 145.

<sup>67</sup> BGH, NJW 1995, 2407; see also B.C. Steininger (see Note 30), p. 147; J.K. Mason *et al.* (see Note 7), p. 352.

<sup>68</sup> B.C. Steininger (see Note 24), pp. 149–150. In several European countries, the damages associated with intervention in family planning are subject to compensation. For more details, see B.A. Koch (see Note 48), p. 903.

<sup>69</sup> See 3.2 of this article.

<sup>70</sup> *Gleitman v. Cosgrove*, 49 N.J. 22 (1967) 227 A.2d 689; *Terrell v. Garcia*, 496 S.W.2d 124 (1973).

of only the additional costs arising from the disability. The kinds of non-pecuniary damages awarded also differ between these courts.

The Estonian courts have relatively broad discretion in specifying the recoverable damages, as well as in determining the limits of this compensation. The author concludes that it is reasonable to compensate for pecuniary damage arising from the birth of a disabled child – e.g., the parents' loss of income, along with medical expenses. The maintenance costs (both the expected costs of a healthy child and the additional expenses due to the disability) could also be compensated for under the Estonian Law of Obligations Act. A value attributable to the benefit of the birth of a child may in principle be subtracted from the amount of recoverable damages.

In principle, compensation for non-pecuniary damage is possible too. The non-pecuniary damage to the mother arising from the pain and inconvenience suffered during pregnancy and childbirth, interference with family planning – primarily under the LOA's §134 (1) – and witnessing the child's suffering and consequent death could be subject to compensation.

In this author's opinion, the courts would have the option of reducing the amount of compensation in consideration of the parents' part in causing the damage. However, it should be noted that reducing the damages on grounds of the existence of the possibility to terminate the pregnancy or put the child up for adoption would be contrary to the principle of good faith.