



# An analysis of wrongful conception, birth, and life claims from a Belgian and comparative perspective

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# Wrongful conception/pregnancy

- legal claim by parents for alleged negligence of healthcare provider resulting in unplanned pregnancy or unplanned continuation of pregnancy leading to birth of healthy child
  1. failed sterilisation: Court of Appeal Antwerp, 8 September 2003
  2. failed vasectomy: Court of Appeal Antwerp, 26 February 1992
  3. failed contraception: failure to reinsert intrauterine device after intervention [Netherlands: HR, 21 February 1997]
  4. rape: Court of Appeal Brussels, 8 May 1985
  5. IVF procedure where more embryos than planned were transferred (press)
  6. failed abortion: Court of Appeal Liège, 22 January 2009
  7. [insemination with wrong sperm: Court of Appeal Ghent, 22 December 2022]

# Wrongful birth

- legal claim brought by parents for alleged negligence of healthcare provider that deprived parents of choice to avoid or terminate pregnancy that results in disabled child
  1. failure to diagnose genetic condition (e.g., Down Syndrome): Court of Appeal Brussels, 21 September 2010
  2. misinterpretation of ultrasound or other prenatal test results (e.g., spina bifida): Court of Appeal Ghent, 3 November 2011
  3. failure to report ultrasound or other prenatal test results (e.g., spina bifida): Court of Appeal Mons, 12 October 2012
  4. inaccurate genetic counselling
  5. laboratory errors (e.g., mishandling samples or incorrect reporting)
  6. + wrongful conception/pregnancy resulting in child with disabilities: Court of Appeal Ghent, 13 November 2014

# Wrongful life

- legal claim brought by child with disabilities for alleged negligence of healthcare provider that deprived parents of choice to avoid or terminate pregnancy that resulted in its birth
  1. failure to diagnose genetic condition (e.g., Down Syndrome): Court of Appeal Brussels, 21 September 2010
  2. misinterpretation of ultrasound or other prenatal test results (e.g., spina bifida): Court of Appeal Ghent, 3 November 2011
  3. failure to report ultrasound or other prenatal test results (e.g., spina bifida): Court of Appeal Mons, 12 October 2012
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# Wrongful conception, birth & life: legal basis

- legal basis: Article 1382 Civil Code (Article 6.101 new Civil Code)

“Every act of person that causes damage to another person obligates the one whose fault caused the damage to compensate for it.”

1. fault: act or omission that breaches duty or standard of care
2. damage: actual harm suffered (physical, material, or moral)
3. causal link: damage is caused by fault
  - equivalence theory of causation: if damage would not have occurred but for fault, that action is cause of damage
  - foreseeability: reasonable person should have been able to foresee that damage would result from his/her action
  - uninterrupted chain of causation: causal chain should not be interrupted by external factor

# Wrongful conception + wrongful birth: legitimacy

- legitimacy of these types of claims is generally accepted:
  - growing societal recognition of reproductive rights as fundamental to individual autonomy
    - right to family planning: individual cannot be obliged to bring unwanted child into the world if birth is due to fault of somebody else
    - profound impact of reproductive decisions on individuals' lives
  - failure in duty of care of medical professionals

# Wrongful conception + wrongful birth: compensation

- discussion about **what kind of damages** should be compensated

Physical damages (physical): physical injury, costs of medical treatment

Material damages (financial): tangible losses that can be quantified financially

Moral damages (psychological/emotional): suffering that cannot be quantified financially (e.g., pain and suffering, emotional distress, loss of quality of life)

# Wrongful conception + wrongful birth: compensation

- discussion about **amount to be compensated**
  1. full compensation
  2. compensation reduced by benefits parents receive (“theory of benefit allocation”):
    - a) material damages: total amount reduced by tax reductions, child benefits, construction grants, scholarships, etc. to be expected
    - b) moral damages:
      - total amount reduced by moral benefits that child (friendship, love) will provide
      - IMPORTANT: sometimes no compensation if moral damage is expected to be completely compensated by joy for birth of new child and future love



# Wrongful conception + wrongful birth: compensation

## 1. Material damages

- a) Costs related to intervention, pregnancy, and birth
  - medical costs made for the intervention that failed as result of fault
  - medical costs to be made for new intervention
  - medical costs related to unwanted pregnancy
  - medical costs related to unwanted birth
  - other costs associated with pregnancy and birth, such as maternity clothing, expenses for birth announcements, festivities to celebrate birth

# Wrongful conception + wrongful birth: compensation

## 1. Material damages

b) costs related to loss of income and expenses for upbringing, education, and renovation or relocation

- temporary incapacity to work during pregnancy and birth
- loss of income due to childbirth and upbringing of new child (minus savings on household help and childcare costs for other children)
- loss of income due to fixed-term employment contract not being renewed
- loss of opportunity to find new job as result of CV that is not very good as result of time off during childbirth and upbringing (compensable for certain period)

# Wrongful conception + wrongful birth: compensation

## 1. Material damages

b) costs related to loss of income and expenses for upbringing, education, and renovation or relocation

- upbringing and educational costs → difficult to calculate, therefore recourse to equity is made to award lump sum compensation
- wrongful birth (= unplanned child is disabled):
  - medical costs of current and future interventions
  - other necessary assistance by third persons
  - necessary assistance provided by parents which exceeds normal care for non-disabled child
- enlarging the house; expenses of moving to larger house; purchase of larger car (sometimes compensated)

# Wrongful conception + wrongful birth: compensation

## 2. Moral damages

- diversity in case law on whether compensation for moral damages should be awarded:
  - no compensation
  - partial compensation
  - full compensation

# Wrongful conception

# Wrongful conception: No compensation!

## 1. Court of Appeal Liège, 10 May 2001

- failed abortion
- woman learns that she still is pregnant after time for abortion expired
- healthy boy was born
- claim for compensation for costs associated with birth and upbringing
- claim rejected: [only compensation for expenses in relation to (failed) termination of pregnancy: 223€]
- reasoning: chain of causation interrupted: legal obligation of parents to support upbringing of child (Art. 203 Civil Code) breaks causal link between fault and damage so no liability for costs related to birth and upbringing
- <-> Cass. 19 February 2001: parental obligation to support child does not break causal link

# Wrongful conception: No compensation!

## 1. Court of Appeal Liège, 10 May 2001

- duty to mitigate/avoid damages by adoption?
  - Court of Appeal Liège: woman could have chosen to put child up for adoption and then there would be no damage
  - Cass. 14 November 2014: choice not to put unwanted child up for adoption is discretionary and cannot amount to fault
- duty to mitigate damages by abortion?
  - if there would still be time for elective abortion (healthy foetus) or for abortion on medical grounds (foetus with disabilities), does woman have obligation to abortion in order to mitigate/avoid damages?
  - Court of Appeal Ghent, 13 November 2014: abortion can never be mandatory because serious violation of right to physical integrity → not having abortion is not breach of duty to mitigate damages

# Wrongful conception: compensation only for unwanted pregnancy

## 2. Court of Appeal Liège, 22 January 2009

- failed abortion
- woman learns that she still is pregnant after time for abortion expired
- healthy boy was born
- claim for compensation for costs associated with birth and upbringing
- claim rejected: [only compensation for material and moral costs of having to carry foetus to term: 10.000€]
- reasoning: “Even after an attempt at voluntary termination of pregnancy, the birth of a normal and healthy child does not in itself cause damage that gives rise to a right to compensation for the mother. [...] the mother is not entitled to claim compensation for maintenance, care, and equipment costs, nor compensation for moral damage following the birth of her child”



# Wrongful conception: compensation only for unwanted pregnancy

## 2. Court of Appeal Liège, 22 January 2009

- Cass. 17 October 2016:
  - “Since the birth of a child conceived by the mother cannot, in itself, cause her any harm, even if the birth occurred after a failed procedure aimed at terminating the pregnancy, the court of appeal [...] could deduce from this finding that the financial burdens, the foreseeable relational difficulties, and the increased efforts due to that birth did not place her in a less favourable situation than the one she was in before the wrongful act was committed.”
  - appeal in cassation rejected
  - = overriding benefit-rule: healthy child brings so much joy and blessings that maintenance and psychological costs are more than offset by them

# Wrongful conception: compensation only for range of material damages

## 3. Court of First Instance Kortrijk, 3 January 1989

- woman became pregnant after failed sterilisation: healthy child was born
- gynaecologist held liable for material damages: 15.417€
  - ❖ compensation for medical expenses, baby necessities, upbringing costs, loss of family income, with deduction due to benefit allocation
- there are **no moral damages**:
  - “there can be no question of moral damage as this could suggest that the child is seen as a burden, while it can be assumed that parents feel joy when a child is born”

# Wrongful conception: compensation only for range of material damages

## 4. Court of Appeal Antwerp, 8 September 2003

- woman became pregnant after failed sterilisation: healthy child was born
- gynaecologist held liable for material damages: 36.856€
  - ❖ compensation for medical expenses, baby necessities, upbringing costs, loss of family income, with deduction due to benefit allocation
- there are **moral damages**
  - ❖ family planning of parents disrupted
  - ❖ fear of genetic anomalies
  - ❖ displeasure over the pregnancy
- **but no compensation** “because moral damages are compensated by the joy of the birth of a normal and healthy child and with the love, affection, and friendship that the parents receive from that child”

# Wrongful conception: compensation both for material and moral damages

## 5. Court of First Instance Brussels, 30 March 2021

- applicants are parents of child born in 2010 with bèta thalassaemia
- couple decides to conceive child through genetic pre-implantation diagnosis that is healthy and has identical HLA tissue type
- in 2014 three healthy embryos developed, but only one HLA-compatible
- mistake by hospital: healthiest instead of compatible embryo is implanted
- pregnancy results in birth of healthy twins in 2016, neither of whom can be donor
- couple transfers only healthy and compatible embryo to Madrid → successful implantation and fourth child is born in 2018

# Wrongful conception: compensation both for material and moral damages

## 5. Court of First Instance Brussels, 30 March 2021

- material and moral damages?
  - [Cass. 17 October 2016: “birth of healthy child cannot, in itself, cause mother any harm. [...] financial burdens, relational difficulties, and increased efforts due to birth did not place her in less favourable situation than the one she was in before wrongful act was committed.”]
  - heavy criticism:
    - *in abstracto* rule is unacceptable
    - damages should always be determined *in concreto*: damages such as moral damage and upbringing costs may not always be fully compensated by joy for child
    - Court of First Instance: ruling by Cassation should not be followed

# Wrongful conception: compensation both for material and moral damages

## 5. Court of First Instance Brussels, 30 March 2021

- material damages:
  - cost of transferring embryo to Madrid: 1.025€
  - cost of adapting their lifestyle due to presence of fourth child: difference in rent, moving expenses, vehicle costs, maintenance, and education
    - Court: material impoverishment due to presence of fourth child in family BUT compensation must be limited to actual impoverishment, thus after deducting financial benefits they gain from their new situation (family allowances and tax deductibility)
    - asked 301.328€, awarded provisionally 25.000€

# Wrongful conception: compensation both for material and moral damages

## 5. Court of First Instance Brussels, 30 March 2021

- moral damages:
  - mother & father: shock resulting from announcement of incompatibility of twin daughters; resumption of medical treatment; anxiety generated by new pregnancy, which presented health risks in addition to risk of another twin pregnancy; constraints related to third pregnancy; fears about progression of first child's health condition
    - mother: asked 150.000€, awarded 27.375€
    - father: asked 75.000€, awarded 10.950€
  - in name of 5-year-old ill boy: suffered from parental stress caused by birth of incompatible sisters and from constraints related to pregnancy
    - awarded 5.000€

# Wrongful conception: full compensation for moral damages

## 6. Court of Appeal Mons, 28 October 2011 (“Chloë”)

- man had vasectomy after birth of severely disabled child
- his wife quickly became pregnant
- healthy child born (Chloë)
- moral damages: man doubted his wife’s fidelity; couple feared that second child would also be disabled; couple had to organise during and after pregnancy to take care of new child in addition to severely disabled child less than one year old
- Court: full compensation for moral damages (no application of benefit allocation principle), because severe moral damage is not, not even partially, offset by joy of birth of healthy child → awarded 35.000€



# Wrongful birth

# Wrongful birth: compensation both for material and moral damages

## 1. Court of Appeal Brussels, 21 September 2010 (“Rukiyé”)

- couple had two children, one of whom suffered from Sanfilippo B
- pregnant wife underwent prenatal screening in 1999 at University Hospital Brussels to ensure that foetus was not affected
- test falsely negative: daughter born, also suffered from Sanfilippo B
- without inaccurate prenatal diagnosis, termination of pregnancy
- moral damages: distress caused by knowledge that daughter would have difficult life and would die before adulthood; felt powerless to help; communication limited due to mental disability; psychological reports indicated that both parents suffered from anxious-depressive disorders
  - woman: 18.320€
  - husband: 9.160€

# Wrongful birth: compensation both for material and moral damages

## 1. Court of Appeal Brussels, 21 September 2010 (“Rukiyé”)

- material damages:
  - necessary assistance by third persons
    - specialised institution:
      - ❖ active assistance: 2h/day
      - ❖ active surveillance: 6h/day
      - ❖ passive surveillance: 8h/day
    - provisionally from 2001 to 2010: 194.370€ awarded
  - medical costs: expert appointed to assess current and future costs

# Wrongful birth: compensation both for material and moral damages

## 2. Court of Appeal Ghent, 3 November 2011 (“Iliana”)

- in 2002, Iliana is born, suffering from open spine (severe spina bifida)
- gynaecologist failed to recognise and report neural tube defect in alpha-fetoprotein blood test at 16 weeks → only diagnosed at 30 weeks
- judicial expert: fault proven; loss of a change to opt for abortion (estimated to be at 80% <-> couple: “100% sure that we would have aborted”)
- material damages (provisionally until 2011):
  - medical costs: 20.115€
  - travel and administrative costs: 3.500€
  - assistance from third parties: 49.800€

# Wrongful birth: compensation both for material and moral damages

## 2. Court of Appeal Ghent, 3 November 2011 (“Iliana”)

- moral damages:
  - realisation that opportunity was lost to not be confronted with disabled child, with all cares and limitations for one’s own development; having to continually witness serious physical limitations of their child (almost always in wheelchair, incontinent of urine, stool must be removed with finger cot) and mental retardation it has suffered due to brain abscess that was itself consequence of spina bifida
  - claim: 70.000€ each
  - Court: too high: compensation for all damages: 100.000€ (~ 26.500€ moral damages) (80% of costs)

# Wrongful birth: compensation both for material and moral damages

## 3. Court of Appeal Mons, 12 October 2012 (“boy T.”)

- boy born in 2003, suffering from spina bifida and hydrocephalus
- gynaecologist failed to detect from “triple test” increased risk of neural tube malformation, and performed ultrasound of second trimester too rapid
- material damages:
  - renunciation of part of professional activity of mother; expenses related to new car; assistance of third person (attendance at school)
  - costs of medical and paramedical care almost daily + travel expenses
- moral damages: psychological disorders resulting from difficulty of accepting birth of severely handicapped child; feeling of guilt that she should have insisted on wish to undergo abortion in event of disabilities

provisionally: 50.000€

# Wrongful birth: compensation both for material and moral damages

## 3. Court of Appeal Mons, 12 October 2012 (“boy T.”)

- interesting:
  - Court of First Instance: loss of chance to opt for abortion, estimated to be at 75%
  - Court of Appeal: causal link between fault and damage is all or nothing → should be ascertained whether woman would have aborted
    - matter of judicial certainty: from evidence provided, clear that woman would have aborted
    - = compensation for entirety of damage

# Wrongful life



# Wrongful life prior to Cassation 2014: compensation

## 1. Court of Appeal Brussels, 21 September 2010 (“Rukiyé”)

- [couple had two children, one of whom suffered from Sanfilippo B
- pregnant wife underwent prenatal screening in 1999 at University Hospital Brussels to ensure that foetus was not affected
- test falsely negative: daughter born, also suffered from Sanfilippo B
- without inaccurate prenatal diagnosis, termination of pregnancy
- moral damages: woman: 18.320€ / husband: 9.160€
- material damages: provisionally 194.370€]

# Wrongful life prior to Cassation 2014: compensation

## 1. Court of Appeal Brussels, 21 September 2010 (“Rukiyé”)

- compensation also for moral damages of Rukiyé?
  - couple has right to claim compensation for any damage in their capacity as rights holders of their daughter Rukiyé
  - disability is particularly severe and incurable:
    - significant mental and psychomotor retardation; incontinent; put all objects in her mouth; self-harm; walks around in circles; no language but cries; muscle pain; crying tears
    - disability destined to deteriorate further, with loss of walking
    - need for constant surveillance and assistance from third person, necessitating care by specialised institution

# Wrongful life prior to Cassation 2014: compensation

## 1. Court of Appeal Brussels, 21 September 2010 (“Rukiyé”)

- compensation also for moral damages of Rukiyé?
  - “child born disabled in such conditions can claim compensation for their own damage resulting from this situation, in direct causal relation with the diagnostic error, which prevented their mother from abortion”
  - true that diagnostic error did not cause child’s disability
  - however, damage is not disability, but fact of being born with disability
  - not for court to assess whether Rukiyé’s life is worth living or not but to understand point of view of couple in capacity as representatives
  - + child has personal interest to be born without handicap, derived from mother’s interest to have abortion for medical reasons in accordance with Law on Voluntary Termination of Pregnancy

# Wrongful life prior to Cassation 2014: compensation

## 1. Court of Appeal Brussels, 21 September 2010 (“Rukiyé”)

- compensation also for moral damages of Rukiyé?
  - moral damage:
    - expert: 30€/day
      - 14 March 2000 to 13 March 2001: 30% disability
      - 14 March 2001 to 1 January 2004: 60% disability
      - from 1 January 2004: 90% disability
    - Court: (83.169€)
      - 14 March 2000 to 13 March 2001:  $365 \times 30\text{€} \times 30\% = 3.285\text{€}$
      - 14 March 2001 to 1 January 2004:  $1,024 \times 30\text{€} \times 60\% = 18.432\text{€}$
      - 1 January 2004 to 25 March 2010:  $2,276 \times 30\text{€} \times 90\% = 61.452\text{€}$
  - esthetic damage: 5.000€

# Wrongful life prior to Cassation 2014: compensation

## 2. Court of Appeal Ghent, 3 November 2011 (“Iliana”)

- [in 2002, Iliana is born, suffering from open spine (severe spina bifida)]
- gynaecologist failed to recognise and report neural tube defect in alpha-fetoprotein blood test at 16 weeks → only diagnosed at 30 weeks
- compensation for all damages of parents: 100.000€]

# Wrongful life prior to Cassation 2014: compensation

## 2. Court of Appeal Ghent, 3 November 2011 (“Iliana”)

- compensation also for moral damages of Iliana?
  - damage eligible for compensation consists of negative difference between situation after wrongful act and hypothetical situation if wrongful act had not been committed
  - hypothetical situation is that Iliana would then not have been born
  - certain legal doctrines:
    - any comparison between state of disabled existence and state of non-existence is completely impossible → no compensation could be awarded to child
    - Court not in agreement: otherwise parents can claim complete compensation for damages due to disability of child while child cannot

# Wrongful life prior to Cassation 2014: compensation

## 2. Court of Appeal Ghent, 3 November 2011 (“Iliana”)

- compensation also for moral damages of Iliana?
  - Court:
    - “fact that comparison must be made with state of non-existence does not prevent determination that certain moral damage of child and also extra expenses incurred due to its disability, constitute compensable damage”
    - certainly cannot be said that life of I. is not worth living, but at moments when I. must undergo major surgical procedures due to disabilities any joy of life is overshadowed by pain
    - from this perspective, moral compensation can be awarded for periods of hospitalisation and rehabilitation

# Wrongful life prior to Cassation 2014: compensation

## 2. Court of Appeal Ghent, 3 November 2011 (“Iliana”)

- compensation also for moral damages of Iliana?
  - Court:
    - 100 days of hospitalisation x 31€ x 80% (loss of chance)= 2.480€
    - 300 days of rehabilitation x 25€ x 80% = 6.000€ → total: 8.480€
  - damage due to loss of earnings? not compensable because child will never be able to generate income through job (should not be compared with able-bodied person, but with condition if fault had not been committed)



# Wrongful life prior to Cassation 2014: no compensation

## 3. Court of Appeal Mons, 12 October 2012 (“boy T.”)

- [boy born in 2003, suffering from spina bifida and hydrocephalus
- gynaecologist failed to detect from “triple test” increased risk of neural tube malformation, and performed ultrasound of second trimester too rapid
- material and moral damages of parents: provisionally 50,000€]

# Wrongful life prior to Cassation 2014: no compensation

## 3. Court of Appeal Mons, 12 October 2012 (“boy T.”)

- compensation also for moral damages of boy T.? NO
  1. medical fault is not cause of damage as pathology predates fault
  2. although it is not birth of T. that constitutes damage but consequence of disability, T.’s disability is inseparable from his birth and survival
    - T.’s life is direct result of being born, which is result of medical fault
    - birth itself cannot be considered damage in legal sense as it cannot be considered damage in way that is compensable under law, as only alternative (non-existence) is not legally compensable condition
  3. contradiction in being subject of law and at same time ask judge to ascertain that one should not be
  4. repair of damage intended to find oneself in situation where fault had not been committed = but this would be situation of absence of life

# Wrongful life and Court of Cassation: no compensation

Wrongful life: compensation awarded

Court of Appeal Liège, 24 June 2002

Court of First Instance Brussels, 21 April 2004

Court of First Instance Hasselt, 16 October 2006

Court of Appeal Brussels, 25 May 2010

**Court of Appeal Brussels, 21 September 2010**

**Court of Appeal Ghent, 3 November 2011**

Court of First Instance Leuven, 6 March 2013

Court of Appeal Ghent, 13 November 2014

Wrongful life: compensation denied

**Court of Appeal Mons, 12 October 2012**

# Wrongful life and Court of Cassation: no compensation

Wrongful life: compensation awarded

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**Cass. 14 November 2014**

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Wrongful life: compensation awarded

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Wrongful life: compensation denied

**Court of Appeal Mons, 12 October 2012**

**Cass. 14 November 2014**

**Cass. 21 April 2016**

# Wrongful life and Court of Cassation: no compensation

## Wrongful life: compensation awarded

Court of Appeal Liège, 24 June 2002

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## Wrongful life: compensation denied

**Court of Appeal Mons, 12 October 2012**

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# Wrongful life and Court of Cassation: no compensation

## Wrongful life: compensation awarded

Court of Appeal Liège, 24 June 2002

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**Court of Appeal Ghent, 3 November 2011** →

Court of First Instance Leuven, 6 March 2013

**Court of Appeal Ghent, 13 November 2014** →

## Wrongful life: compensation denied

**Court of Appeal Mons, 12 October 2012**



**Cass. 13 April 2018**

**Cass. 17 October 2016**

**Cass. 14 November 2014**

**Cass. 21 April 2016**

# Wrongful life and Court of Cassation: no compensation

## Court of Cassation reasoning:

1. fault must precede damage:
  - here child's handicap is already present before fault of physician → physician's fault is not cause of handicap → **causal link is missing**
2. no legitimate interest of foetus to be born without handicap can be derived from Abortion Act as **this law only concerns pregnant woman**
3. there is **no legal damage** as we cannot compare with non-existence
  - damage is result of comparing current state and hypothetical state where no fault would have occurred → life must be compared to non-life → but living (with limitations) is not comparable to non-existence



# Wrongful life and Court of Cassation: no compensation

## Court of Cassation reasoning + legal doctrine:

4. because in wrongful-life claim child insists that comparison should be made between life and non-existence, **child is placed in absurd situation of denying its own right to exist**
5. important **policy argument**
  - if wrongful-life claim against physician is accepted, it opens door for wrongful-life claim against mother who chose not to terminate pregnancy when she was informed of child's disability

# Wrongful life and Court of Cassation: no compensation

## Legal doctrine:

1. Majority: logical application of classic compensation rules + it is not desirable to change them just for one particular situation
2. Minority: we need abstract concept of damage for equity reasons
  - it is undesirable if parents can file claim and child cannot, as it is harm to child that is subject of claim
  - especially when we consider that child must also survive financially after death of parents

[valid remark but can be resolved by extensive interpretation of damage of parents, which should also include damage to meet needs of child]

# Wrongful life and Court of Cassation: no compensation

## Wrongful life: compensation awarded

Court of Appeal Liège, 24 June 2002

Court of First Instance Brussels, 21 April 2004

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**Court of Appeal Brussels, 21 September 2016** →

**Court of Appeal Ghent, 3 November 2011** →

Court of First Instance Leuven, 6 March 2013

Court of Appeal Ghent, 13 November 2014 →

**Court of First Instance Liège, 16 September 2019**

## Wrongful life: compensation denied

**Court of Appeal Mons, 12 October 2012**



**Cass. 13 April 2018**

**Cass. 17 October 2016**

**Cass. 14 November 2014**

**Cass. 21 April 2016**

# Wrongful life: other countries

# Legal comparison

## 1. Belgium:

- since Cass. 14 November 2014 **wrongful-life claims denied**

## 2. France:

- Court of Cassation (French), 17 November 2000 (“Perruche” case)
  - in 1982, woman not correctly diagnosed with rubella during pregnancy
  - son Nicolas Perruche born with severe neurological disorders, bilateral deafness, blindness in right eye, and heart disease, all caused by rubella
  - claim for wrongful birth and wrongful life against physician and laboratory
  - Court upheld wrongful-life-claim: “whereas faults committed by the physician and laboratory prevented Mrs. Perruche from exercising her choice to terminate pregnancy, the child born with disability can seek compensation for damage resulting from this disability and caused by these faults”

# Legal comparison

## 2. France:

- severe criticism:
  - mere fact of being born with disability is now considered damage
  - disability rights associations: ruling asserts that lives of disabled are not worth living
  - 4 March 2002: “Loi Anti-Perruche” adopted (now Article L. 114-5 of Social Action and Families Code): **wrongful-life claims denied**
    - ❖ “no one can claim compensation for being born with disability”
    - ❖ wrongful birth: parents may claim compensation for their loss alone
    - ❖ not for loss by burdens resulting from disability throughout child’s life  
→ compensation for this disability is matter for national solidarity

# Legal comparison

## 2. France:

➤ European Court of Human Rights:

- Maurice v. France, 6 October 2005
- Draon v. France, 6 October 2005
  - unanimous condemnation for retroactive application (French legislature deprived applicants of pre-existing asset, in violation of Article 1 of Protocol No. 1: “right to respect for one’s possessions”)
  - State’s commitment to cover cost of disabled birth had not been honoured → families who had brought action for compensation had no equivalent compensation as before adoption of the Law

➤ = Court of Cassation (French), 15 December 2011: non-retroactivity of law: cases concerning children born before 7 March 2002, regardless of date of proceedings, were not affected

# Legal comparison

## 3. United Kingdom:

- McKay v. Essex Area HA [1982]2 All ER 771 (Court of Appeal)
    - Mrs McKay had come into contact with rubella when she was pregnant
    - blood samples mislaid, and wrongly informed that she was not affected
    - Mary McKay born seriously disabled
    - Court: **wrongful-life claims denied**
      - physician's negligence has not caused injuries
      - assessing magnitude of damages is impossible → tort damages are intended to put claimant in position she would have been in if tort had not been committed → this could not be done because it would require court to judge relative value of existence and non-existence
- “But how can a court begin to evaluate non-existence, ‘the undiscovered country from whose bourn no traveller returns?’”



# Legal comparison

## 4. Germany

- BGH 18 January 1983 (Bundesgerichtshof)
  - 1976: woman contracts rubella during early weeks of pregnancy
  - gynaecologist failed to diagnose illness
  - 1977: daughter born with severe disability
  - Court: **wrongful-life claims denied**
    - physician's negligence has not caused injuries

# Legal comparison

## 4. Germany

- BGH 18 January 1983 (Bundesgerichtshof)
  - Court: **wrongful-life claims denied**
    - human life is legal good of highest order and absolutely worthy of preservation → no third party is entitled to pass judgement on its value
    - jurisprudence, which has been influenced by experience of National Socialist injustice, for good reason does not permit legally relevant judgement on value of another person's life
    - cannot be evaluated whether life with severe disabilities can be legally classified as damage at all compared to alternative of not living
    - as matter of principle, person must accept life as it has been shaped by nature and has no claim to be born or prevented from being born

# Legal comparison

## 4. Germany

➤ BGH 18 January 1983 (Bundesgerichtshof)

- Court: **wrongful-birth claims granted**



➤ BVerfGE 88, 28 May 1993 (Bundesverfassungsgericht)

- Court: **wrongful-birth claims denied for maintenance costs of child**
  - constitutional duty to respect human dignity of every human being (Article 1, para. 1 Basic Law) prohibits
    - to legally qualify existence of child as source of damage
    - to legally qualify maintenance costs for child as damage

# Legal comparison

## 5. The Netherlands

- Hoge Raad, 21 February 1997 (wrongful-birth claim granted)
- Hoge Raad, 18 March 2005 (“baby Kelly”)
  - 1994: pregnant woman asks midwife in Leiden University Medical Centre whether prenatal diagnostic tests should be performed to exclude chromosomal abnormalities that run in family
  - midwife indicates that there is no need
  - Baby Kelly (Kelly Molenaar) born with severe disabilities
  - Court: **wrongful-life claim granted**

# Legal comparison

## 5. The Netherlands

- Hoge Raad, 18 March 2005 (“baby Kelly”)
  - Court: **wrongful-life claim granted**
    - treatment to mother also aimed at providing necessary care to foetus → midwife also obliged towards foetus to perform prenatal diagnostics
    - non-existence cannot be given economically determinable value
    - this does not mean that damage claimed by Kelly is not eligible for compensation → Art. 6:97 of Dutch Civil Code stipulates that “damage must be estimated in manner that is most in accordance with its nature”
    - nature of damage: all costs made for upbringing and care
    - by imposing duty to compensate, human dignity is not compromised, but it enables Kelly to lead as dignified existence as possible

# Legal comparison

## 6. United States

- **wrongful-life claims allowed** in California, Maine, New Jersey, and Washington
  - cf. *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811(1980) + Supreme Court of California: *Turpin v. Sortini*, 31 Cal. 3d 220 (1982)

“The circumstance that the birth and injury have come hand in hand has caused other courts to deal with the problem by barring recovery. The reality of the “wrongful-life” concept is that **such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life.** We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. **The certainty of genetic impairment is no longer a mystery.**”

- recovery often limited to objectively provable economic damages

# New type of case?

## Court of Appeal Ghent, 22 December 2022

- BM is legal son of BP and VM
- BP had fertility problems, and urologist HD performed three artificial inseminations on VM, from which BM was born
- in 2018, BM conducted DNA test through the site "My Heritage!" to know family tree
  - test revealed significant match (25%) with DNA of another person, indicating that this person could be half-brother
  - BM contacted this person, who stated that his own father had been a sperm donor at the hospital where BM was conceived
  - in 2019, BM and legal father underwent paternity test, which showed that BP was not BM's biological father

# New type of case?

## Court of Appeal Ghent, 22 December 2022

- BM claimed that urologist HD had swapped sperm samples and made mistake by inseminating his mother with sperm other than that of BP
- claim for moral damages (10.000€)
  - Court of First Instance: is wrongful life claim and cannot be awarded
  - Court of Appeal: moral damage does not stem from fact that he was born, but from learning that his legal father is not his biological father
- moral damages: psychological shock; “legal father is not my “real” father”; led to severance of any contact with legal father
- Court: already doubts about paternity + BP provided for maintenance (so not true that he is not “real” father) + no good contact between BP and other children → there is shock but should not be exaggerated: 2.500€