

## *Original Paper*

# Wrongful Birth and Wrongful Life Action: Does Vietnamese Legal System Practice?

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Received: July 20, 2020

Accepted: August 3, 2020

Online Published: September 7, 2020

doi:10.22158/jar.v4n3p98

URL: <http://dx.doi.org/10.22158/jar.v4n3p98>

### ***Abstract***

*Wrongful birth and wrongful life is a complex issue of Tort law the world over. The vast majority of wrongful birth and wrongful life claims for medical malpractice are brought in the tort of negligence. Increasingly, parents have become more knowledgeable about the various reproductive options available, and there has evolved a body of jurisprudence that has defined and defended the exclusive right of individuals to make their own decisions about conception and childbearing. Besides, seeking damages (economic and non-economic damage) are also essential issues. By introducing and comparing the legal principles of some legal systems, the paper clarifies the general picture of wrongful birth and wrongful life action. This work seeks to answer the question, “does the Vietnamese legal system practice wrongful birth and wrongful life action?” To answer the question, the research paper applies the method of analyzing and comparing some tort law systems related to the content.*

### ***Keywords***

*economic damage, non-economic damage, medical malpractice, wrongful birth, wrongful life*

## **1. Introduction**

From the United States to Europe, wrongful birth and wrongful life claims have been presented in law courts for centuries around the world. The tremendous and rapid advances of biotechnology over the years have made it difficult for the law as well as ethics to keep abreast of the continuous changes (Note 1). However, in many Asian countries, the law seems silent. Is Vietnam the same as the other Asian country or is it on par with the United States and Europe?

It is noteworthy that all countries that take wrongful birth and wrongful life systems in different legal perspectives have standard regulations. Wrongful birth and wrongful life are caused by medical malpractice, which is a form of the tort of negligence. Medical Malpractice (MM) occurs where a medical practitioner proceeds in negligent conduct when treating a patient. Wrongful birth and wrongful life occur because of medical malpractice; medical procedures were conducted negligently, and the unwanted child or unhealthy child born. As a result, the plaintiffs suffer damage and claim for compensation as the medical industry finds new and innovative ways to cater to our right to reproductive freedom-the the right to choose whether and when to become parents-the the probability of medical errors and the consequential lawsuit is likely to increase.

In Vietnam, if medical professionals negligently cause damage to someone, they will have to compensate economic and non-economic damage to the patient who got hurt. The regulations are described at extra-contractual liability (also called tort of negligence) under the Civil Code, Law on Examination and Treatment, and other related legal documents. Nevertheless, does Vietnam practice wrongful birth and wrongful life action as other countries? The following analysis and comparison will respond to the question.

## **2. Wrongful Birth and Wrongful Life Action**

### *2.1 Medical Malpractice*

In legal practice today, the majority of tort claims are for negligence (Note 2). Negligence is a cause of action in the offence, whereby a person who has suffered damage of his/her loved one, goods, or financial wealth alone may sue to recover damages from the person who caused the damage (Note 3).

The conceptual structure of negligence is highly flexible and capable of general application. These features have allowed courts to utilise the tort in the context of different claims for compensation. Duty, breach, causation, and damage are the elements that together make up any successful negligence claim. These requirements may be rephrased as a series of questions, each of which must be answered affirmatively if the plaintiff is to win:

- Does the law recognise a liability in this type of situation (duty)?
- Was the defendant careless in the sense of failing to conform to the standard of care set by law (breach)?
- Has the plaintiff suffered a loss (damage) for which the law regards the defendant as responsible either in whole or part (causation)? (Note 4)

The functions of tort law are those purposes that people seek to achieve through tort law (Note 5). The primary functions of tort are compensation (Note 6), deterrence (Note 7), and justice (Note 8).

MM is a form of professional negligence, and such negligence forms part of the law of tort (Note 9). MM occurs when a negligent act, the omission by a doctor or other medical professional results in damage and harm to a patient. MM is behaviour which deviates from the generally accepted standard of care that causes harm to the patient. Negligence by a medical professional can include an error in

diagnosis, treatment, or illness management. If such negligence results in injury to a patient, a legal case for MM can arise against the doctor, the hospital, local state, or federal agencies that operate the medical facility. Wrongful birth and wrongful life are caused by medical negligence, and that is the reason why victims may ask for compensation for their material and non-material damages. If the damage is not caused by negligence, it will be considered for other fields of tort (Note 10).

## 2.2 *Wrongful Birth Action*

### 2.2.1 Definition

Wrongful birth is a malpractice claim brought by the parents of a child born with a congenital disability against a physician or health-care provider whose alleged negligence effectively deprived the parents of the opportunity to make an informed decision whether to avoid or terminate the pregnancy; *also* the birth or injury at issue in such a claim (Note 11). In other words, it is the term for the birth of an unwanted or unplanned child caused by someone's product or another third party. What is wrong in these cases is not the birth of the child but the conduct of a doctor or another third party. The child may be "healthy" (non-disabled) or disabled (Note 12).

The negligence may involve a doctor's failure to warn of the risk that a competently performed sterilization may naturally reverse or otherwise fail; so that the plaintiffs, unaware of that risk, cease using contraception; diagnose or advise of pregnancy, where diagnosis or advice would have led to lawful termination; diagnose a condition in either the parents or the fetus that will cause the child to be disabled, where diagnosis would have led to effective contraception or lawful termination; take reasonable care in performing attempted sterilization or abortion; or take reasonable care in giving advice on, or supplying, contraceptives (Note 13). The negligent act might occur before conception (e.g., negligent failure to offer the mother preconception immunization against rubella), before implantation (e.g., negligent IVF treatment), during gestation (e.g., negligent prescription of drugs to a pregnant woman, or the pregnant woman's negligent use of drugs, such as perhaps tobacco or alcohol), or birth (e.g., negligent delivery) (Note 14).

There are two basic classifications into which the cases in this wrongful birth may be divided: 1) those where the defendant tortuously inflicts a physical injury, through the body of the mother, upon an unborn child; and 2) those where the defendant's tortuous acts or omissions result in the birth of the unwanted child. The first classification has not garnered as much controversy as the logic can be seen when a tortfeasor causes injury to an unborn child. It is worth mentioning, however, that the Courts have been cautious (since 1973) in how they approach the issue of injury to the unborn (Note 15).

### 2.2.2 Compensation

Another issue surrounding wrongful birth is the question of what damages to allow. As with recognition of the cause of action itself, different jurisdictions have taken several approaches to the scope of damages available to a wrongful birth plaintiff. The most liberal jurisdictions allow parents to recover ordinary child-rearing costs, costs of managing and treating the child's disability, as well as emotional distress damages (Note 16).

The damage may include: *pregnancy costs*: the pain, suffering and economic loss associated with pregnancy, including labour pains, medical bills, maternity clothes, loss of income during pregnancy, and (less commonly) the cost of moving or extending the house in anticipation of accommodating an extra member; and *upbringing costs*: the costs of raising the child from birth to maturity or independence, including amounts spent on food, clothes, education, presents, and entertainment; plus loss of income through looking after the child, and (if this occurs after birth) the cost of moving or extending the house to accommodate an extra member (Note 17). However, some courts have rejected such claims either because of a specific statute prohibiting them or based on the court's judgment that the existence of human life, even with severe impairments, cannot constitute a cognizable legal injury, an injury that the law is willing to redress (Note 18). There are some reasons to reject the compensation of damages to parents or children. The impression is felt that the life of the disabled child is a life of lesser quality and validates the principle that the birth of a disabled child in itself is an abnormality and that such an existence is an error that should be eradicated. Such a decision will only lead to increased discrimination against the disabled, as their existence will be regarded by many as unacceptable, based on the premise that their parents should have eliminated them before birth by way of abortion. Inevitably, the parents of disabled children will also become the object of public scorn because of the wrongful birth decision, as they will be regarded as having been "irresponsible" in allowing their child to be born (Note 19).

Wrongful birth and wrongful life concern the capacity of parents of children (whether disabled or not) born as a result of medical negligence to sue for the costs associated with the birth and raising of the children (wrongful birth), as well as the capacity of disabled children. They owe their existence to medical negligence to sue for the costs associated with the disability (wrongful life).

In the case of wrongful birth, the victims who suffered damage can be compensated for the failure of contraceptive advice or the failure of the sterilization procedure. It is irrelevant whether the baby is born perfectly normal or has congenital disabilities. The heads of damage under which compensation have been awarded are prenatal and postnatal medical expenses, pain and suffering during pregnancy and labor, the cost of maintaining the child under the age of majority, and the cost of re-sterilizing the partner who was thought to be already sterile. About the wrong life case, the claims assert that had the medical practitioner diagnosed the particular condition that caused the disability, and then the child would not have been born. The damages sought are for the needs and expenses flowing from the disability that otherwise would not have been incurred. Many legal systems have allowed the first type of claim, but very few have allowed the second type (Note 20).

The German Supreme Court has approved wrongful birth claims since 1980 (The first cases were 76 BGHZ 249 and 76 BGHZ 259, both decided on the same day). Since then, it consistently holds that the birth of a physically or mentally disabled child entitles the parents to full compensation for the total burden of the maintenance of the child. The Supreme Court also holds that under special circumstances, such as prolonged suffering of the child, compensation should not be time-limited, since in these cases, the parents are usually obliged to render services and maintenance for the whole of the disabled child's

life. The restitution has to place the family in the same situation that it would have been in had the wrongful birth not occurred. The extent of protection afforded to the parents covers total maintenance and is not limited to the extra costs of being handicapped. Furthermore, the Supreme Court has ruled that the burden should not be divided between that of a hypothetically healthy child and that of a disabled child.

On the other hand, a reluctant view was expressed by the *Senat* (chamber) of the German Constitutional Court. It considered compensation for costs of maintenance to be contrary to the dignity of the child and thus a violation of Article 1 I Basis Law. Though the German BGH or Federal Court of Justice of Germany) explicitly disagreed with the point of view and principally acknowledged the right to compensation for the cost of maintenance (Note 21).

In the French law system, wrongful birth and wrongful life constitute no reason for compensation when a normal healthy child is born; compensation will be awarded only under specific circumstances, such as when as physician fails to conduct an abortion successfully; as a result of which a child is born with a serious physical handicap, or omits to prescribe blood tests or performs them incorrectly so that the parents cannot make a fully informed decision to abort. The child develops neurological problems after birth. Looking back at the wrongful birth cases, there were some model courts' jurisdictions. For instance, case civ. 1re, 25 June 1991 concerned about a surgeon who performed an abortion on Ms. A. An echography showed that the pregnancy had not been terminated. Mrs. P gave birth to a perfectly healthy child. She sued the surgeon in the amount of FRF 750,000. The court of appeal ruled that there was a direct and certain link between the continuation of the pregnancy and the fault of the surgeon, who had not verified whether the abortion had been carried out successfully. Nonetheless, the court of appeal rejected Ms. P's claim, on the ground that she had not provided evidence that she had suffered any material and non-material damages as a result of the surgeon's fault. *The Cour de cassation* dismissed the appeal for review. Another instance is that of a case (CÉ, 27 September 1989) about a doctor who performed an abortion on the plaintiff in the defendant public hospital. Although performed correctly, the abortion was unsuccessful, and the doctor omitted to examine the plaintiff to verify the result of the operation. As it turned out, the abortion had harmed the fetus, and the plaintiff's child was born with a serious physical handicap. As a result, the defendant hospital was ordered to pay FRF 600,000 to the child and FRF 50,000 to the mother for non-material injury. It was also held liable for FRF 400,000 in medical expenses incurred by the plaintiff's health insurance on her behalf (Note 22).

### 2.3 Wrongful Life Action

#### 2.3.1 Definition

The origin of Wrongful life is similar to Wrongful birth, which appeared first in the United States and later in Europe. In the mid-1960s, an Illinois court held that a child's lawsuit against his father was alleging that based on the injury of being born illegitimately stated, a claim in tort. However, the court noted that allowing damages could be so far-reaching (by allowing all children born in less than ideal circumstances to sue their parents) that court could not award damages in the case absent specific

legislative direction. Nearly two decades later, California became the first state to recognize a wrongful life cause of action (Note 23).

Wrongful life claims most commonly occur when the disabled child sues the negligent doctor in respect of the damage caused by the disability. Wrongful life occurs when a disabled child owes his/her very existence to a doctor's negligent act in diagnoses or advice given to the child's parents before birth. This means that a disabled child was born as such due to medical negligence because had the negligence not occurred, the disabled child would not have been born at all. The medical negligence in these cases comprises negligent diagnoses or advice in pregnancy, sterilisation, contraception, disability, and abortion. In similar cases, children sue for compensation regarding pain, suffering and disability costs. Wrongful life is not only awkward but also confusing since it is not the life that is wrongful, but the conduct of the third party that has caused or has not prevented harm to an unborn child and the child is born handicapped (Note 24). A preferable terminology would be fetal harm. Such harm may be the consequence of an accident suffered by a pregnant woman (actively caused fetal harm). Traditionally, however, wrongful life refers to cases in which a child suffers damage because of illness of the mother during pregnancy, or because the mother has not received proper advice on health risks to her baby for instance as regards the possibility of a hereditary illness or genetic defect (not prevented fetal harm) (Note 25). Commonly, a doctor negligently fails to diagnose rubella, where diagnosis would have led to lawful termination: because the diagnosis is not made, a child is born with severe disabilities caused by rubella. In other cases, the disability is genetic such as Tay-Sachs disease, sickle cell anemia, neurofibromatosis, and Down's syndrome. In these cases, a claim for the child can only arise if it is born alive (Note 26). However, the mother will generally have a claim in her own right for the impairment of her body and health. If the damage is actively caused by the third party, and the child is stillborn alive, all legal system protects the child's right to bodily integrity and health (Note 27). A wrongful life claim is brought by or on behalf of a disabled child against a medical professional based on the medical professional's failure to prevent the child's existence. Hence, the child suffers a life of disability and pain (Note 28). In a wrongful life action, the disabled child sues the negligent doctor in respect of the damage caused by the disability; this would generally include pain, suffering, and "disability costs"—the extra financial costs attributable to the disability, such as the cost of nursing care (these costs are "extra" compared to the costs a non-disabled person would incur) (Note 29).

Usually, a wrongful life claim is conveyed together with a wrongful birth claim. Parents would be alleging that they would have either avoided conception or terminated the pregnancy if the physician/clinic had not been negligent. As a result, they will be claiming for damages as compensation for extra financial and economic costs of having to rear a disabled child (Note 30).

### 2.3.2 Damage and Compensation

Wrongful life claims have always been controversial. Courts in England, the USA, and Australia have generally refused to accept them. Only a small number of states permit wrongful life actions. The many courts that have rejected wrongful life claims have cited two general reasons. First, the courts are reluctant to hold that a plaintiff can recover damages for being alive when the law and civilization, in general, have placed a high value on the presence of human life, not on its absence. Second, the basic rule of tort compensation is that the plaintiff is to be put in the position that she would have been in if the defendant had not been negligent. This is impossible in wrongful life actions because the contention is not that in the absence of negligence by the defendant, the plaintiff would have had a healthy, unimpaired life, but rather that if the defendant had not been negligent, the plaintiff would not have been born. The computation of damages in a wrongful life action is based on the claim that the value of the life of the disabled child is less than the value of never having been born (Note 31).

The courts in Germany reject the wrongful life claims of the child. The general opinion among German courts is that the unhealthy child cannot recover damages for the conditions, and likewise, his parents cannot recover damages on his behalf. In cases of alleged wrongful life, it is the German court's opinion that there can be no measure of damage (Note 32).

In 2000 the *Cour de cassation* also awarded the child's claim for the wrongful life in the *Perruche* decision. Nicolas Perruche's mother contracted rubella during pregnancy though the doctor had told her that she was immunized against it. Subsequently, the child exhibited neurological and sensorial troubles evocative of congenital rubella. The *Cour de cassation* awarded the child's claim for the loss resulting from the handicap, such as psychological, aesthetic, physical, and financial damage. This decision invoked sharp criticism since it was considered to be contrary to the constitutional principle of the dignity of the human person. It was also argued that it suggested that the disabled have no place in society. Furthermore, doctors felt under increasing pressure to advise abortion since the techniques to diagnose handicaps were not 100 percent accurate. This provision, in its turn, was criticized for being the result of a kind of conspiracy between doctors and the legislature to remove the burden of liability to national solidarity (Note 33).

### 3. Does Vietnamese Legal System Practice Wrongful Birth and Wrongful Life Action?

There is neither provision nor definition specifically prescribed in the Civil Code and other law systems for wrongful Birth and Wrongful Life Action. However, this issue can be applied as described: "*Unintentional fault (negligence) is in a case that a person does not foresee his act likely causes damage although he must know that the damage will occur or might be prevented*". Therefore, "*those who infringe upon the life, health, honour, dignity, prestige, property, rights or other legitimate interests of individuals and thereby cause damage shall have to compensate*" (Note 34). Its contents read that a person who did some action negligently caused damage to life, health, reputation, or property to someone; this person has to pay compensation for such damage (Note 35). Based on this principle, parents

deprived the opportunity to make an informed decision whether to avoid or terminate the pregnancy (wrongful birth) or a child, and the parents will sue a doctor or a hospital for failing to provide information about the disability during the pregnancy, or a genetic disposition before the pregnancy. Had the mother been aware of this information, it is argued; she would have had an abortion, or chosen not to conceive at all (wrongful life).

Vietnam does not classify damage to include economic and non-economic damage. Still, it defines the subjects which suffer from damage such as health, life, and dignity under the following: Article 590. *Damage caused by harm to health*, Article 591: *Damage caused by harm to life*, Article 592: *Damage caused by harm to honour, dignity or reputation*.

Vietnam also clarifies damage into two groups: economic damage and non-economic damage

Economic damage consists of the treatment fee, the practical income lost in the period of treatment, health recovery time, and so on. For non-material damage, the court can base on possible damage to calculate the damage/award, but in some cases such as mental harm, it is not easy. This is also a big challenge to other Courts all the world over. In the Vietnamese Civil Code, the amount of moral compensation may be discussed to reach an agreement between the plaintiff and the defendant. If they fail to agree, the compensation will be calculated based on the basic income (Note 36). For example, a person (an accountant or a teacher) who suffers mental damage when his health is harmed may get maximum of 150 euro x 50 months=7500 euro (Note 37). This application restricts the right to commensurate mental damage compensation. The law imposes the maximum compensation based on income calculation regardless of the extent to which the patient suffers from mental damage.

In fact, there is no specific provision mentioned about the damage and recovery in cases of wrongful birth and wrongful life. It means that, even if abortion fails. An unwanted healthy or unhealthy child is born, which deprived the self-determination of the woman leading to damages due to someone's negligence, or depriving the parents the right to decide whether to get a child or not if it was conducted correctly and their child is unhealthy, the victims will not be paid damage. The unwanted or unhealthy child and his parents will not get any financial and mental damage to bring him up or to recover his mental harm.

#### **4. Discussion**

Wrongful birth and wrongful life action are not recognized as other legal systems in Vietnam, but by it follows its way. Theoretically and generally, wrongful birth and wrongful life caused by medical professionals can be adjusted in the Vietnamese legal system. However, in practice, studies have shown that no patient sues a medical practitioner to seek for compensation in such cases. Indeed, the provisions concern the wrongful birth, and wrongful life action should be recognized in detail in the legal system such as Vietnam Civil Law as well Law on Medical Examination and Treatment. This begs the question: Should the Vietnamese law system recognize both wrongful birth and wrongful life action or only wrongful birth? The issue may be studied more based on Vietnamese' specific conditions. It is said that



because wrongful life action has been debated all the world over because it seems to be serious harm to human rights. The law system should also consider the establishment of a compensation system (economic and non-economic damage), particularly all costs of raising the unwanted child until maturity. As a result, the unplanned existence of these children themselves might make them feel like a burden to their families even though they are loved and cared for. Such children are bound to grow with a feeling of being unwanted and unloved, yet that might not be the case. They have to suffer not only physical but also mental pain. It is necessary to consider that they might lack basic needs such as food, clothes, education, and so on because their parents are not in a position to provide for them adequately. The question is when their claims are dismissed, whether their suffering or damages can be deemed to be less or more than if they are allowed to be compensated. We know that taking care of and rear a child takes a lot of time. She properly has the right to compensation in this case. It could also be said that the demission to pay for damages is contrary to the right to physical and mental dignity. Moreover, the negligent person could escape from his responsibility, although the child was healthy. We have the logical reason to believe that the right to the human dignity of a child born healthy and not entitled to the right to compensation yet they do not have a good environment grow up in is affected by the negligence committed. It is not easy to answer, but anyway, the jurisdiction should consider the unique situation of each plaintiff's claim to give a decision appealing/acceptable to reason and sentiment. As for the mother who proves that she has suffered when giving birth to an unwanted child, she also needs to be compensated. Demanding payment of damages in this situation is acceptable because she had to face and solve by herself all the consequences of someone's negligence. She might get stressed or bear other burdens relating to the negligent action.

Much more important than anything else, the pregnant woman has the right to know the exact condition of the unborn child, whether the child is healthy or not. If the doctor treated her negligently, she lost the opportunity to decide whether to keep or abort the child with poor health as well as lost the right of self-determination. It is noteworthy that self-determination is also a fundamental human right. Secondly, the disabled child demands compensation because he feels/thinks that he had the right not to be born. However, this seems contrary to human dignity. Moreover, realistically speaking, the child was born handicapped because the mother did not have the opportunity to abort. The child itself is not damaged, but he has suffered damage such that he cannot have a standard or healthy life. Moreover, this child has to bear the moral pain emanating from the damages he had suffered. Because of these reasons, the negligent defendant should pay compensation for the plaintiff's claim. At the least, compensation could be paid for mental suffering and the essential expenses required to adapt to the first period of life.

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Note 35. Vietnamese Civil Code 2015.

Note 36. Vietnamese Civil Code 2015.

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