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# **Arguments and Comments Presented during the Discussion of Dina Sõritsa's Doctoral Thesis *The Health-Care Provider's Civil Liability in Cases of Prenatal Damages***

The dissertation of Dina Sõritsa<sup>\*1</sup> was accepted for conferring of the degree Doctor of Philosophy in the field of law on 13 March 2017 by the Council of the University of Tartu School of Law, with the defence, hosted by said faculty, having taken place on 21 June 2017. The following contribution is based on the opinions I presented in my role as designated opponent for the dissertation.

The dissertation consists of four works published earlier by the candidate and a framing discussion written in the English language. Of the four publications, two were written with Sõritsa as the sole author<sup>\*2</sup> and two in collaboration with Janno Lahe<sup>\*3</sup>.

The author defines the main legal research question addressed by the dissertation as the following:

The objective of this dissertation is to ascertain whether and to what extent the health-care provider should be liable for damages under Estonian civil law in cases of wrongful conception, wrongful birth and wrongful life, considering an outcome that seeks to balance the interests of the child, his or her parents and the health-care provider.

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<sup>1</sup> Available at [https://dspace.ut.ee/bitstream/handle/10062/55875/soritsa\\_dina.pdf?sequence=1&isAllowed=y](https://dspace.ut.ee/bitstream/handle/10062/55875/soritsa_dina.pdf?sequence=1&isAllowed=y) (most recently accessed on 11 June 2018).

<sup>2</sup> 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: <https://doi.org/10.12697/ji.2015.23.05>; D. Sõritsa. Damages subject to compensation in cases of wrongful birth: A solution to suit Estonia. – *Juridica International* 2016/24, pp. 105–115. – DOI: <https://doi.org/10.12697/ji.2016.24.11>.

<sup>3</sup> 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: <https://doi.org/10.1163/15718093-12341311>; D. Sõritsa, J. Lahe. The obligation of the health-care provider to compensate for damages in case of wrongful conception: A model to suit Estonian law. – *Journal of Medical Law and Ethics* 4 (2016) / 2, pp. 95–111. – DOI: <https://doi.org/10.7590/221354016x14690151940745>.

The table of contents of the dissertation indicates that this document of 115 pages deals with the following matters: The first is presentation of an 'Analytical Compendium to a Cumulative Dissertation' (page 5 to 44), in which the candidate explains the research problem, the current status of the field of research and position of the research problem therein, the methods applied, and a summary that covers the main conclusions from her research (published already in various journals). Secondly, pages 44 to 63 provide some instrumental contents: references, abbreviations, acknowledgements, summary description, and a CV. Finally, in part III we find the text of the four articles<sup>\*4</sup> previously published: in 2014 in the *European Journal of Health Law*, in 2015 in *Juridica International*, in 2016 in *Journal of Medical Law and Ethics*, and in 2016 again in *Juridica International*. The journals that accepted the articles are peer-reviewed and highly credible in the legal field. All of them are international: the *Journal of Medical Law and Ethics* is based in England, and the *European Journal of Health Law* is based in the Netherlands. *Juridica International* is produced in Estonia, at the University of Tartu, where the candidate is developing her research.

The first observation is that the work presented by the candidate in this compendium has a well-defined issue. She has worked intensively on the same issues for several years: wrongful life, wrongful birth, and wrongful conception. However, we cannot arrive at an obvious impression that the research in 2016 shows a much greater level of development than that in 2014.

Secondly, it must be emphasised that the approach of the dissertant is legal, avoiding philosophical or sociological studies or considerations. The candidate also opted not to delve into medical details, such as which malformations allow eugenic abortion under Estonian law. Such an approach limits the study to a legal perspective but permits more detailed and thorough research into the specifics of tort and contract law.

There are several positive aspects to the dissertation that should be noted, among them the use of up-to-date and relevant literature; the ability to communicate at an international level with academic peers, as proved by the acceptance of the constituent articles for international journals; and, finally, a positive contribution to scientific knowledge coming about by bringing Estonian solutions and personal legal thoughts to the intense debate on the issues presented.

However, a number of issues and ideas remain that could still be discussed – if not in the framework of this compendium, then in future research projects.

For a starting point to the discussion pertaining to case law, it has to be noted that the candidate could have been more ambitious, since the *Yearbook on European Tort Law*, published annually by the European Centre of Tort and Insurance Law (ECTIL), provides access to relevant cases from Spain, Italy, the Netherlands, and several other European countries. That said, one should remember that comparative law has great risks and that one should use only very reliable information and should know enough about the legal systems considered. A (geographically) broader analysis would lead the candidate to apprehend that the French tort law family (encompassing France, Spain, to a certain extent Italy, and also to some extent the Netherlands) are exactly those countries where wrongful-life claims are or have been accepted in case law. Ultimately, the less dogmatic approach or the non-existence of the requisite of wrongfulness may have contributed to these cases in the above-mentioned countries.

Along the same lines, the contribution of Article 24 of the Oviedo Convention could have been considered. For example, Prof. Ewoud Hondius argues in 'The Kelly Case – Compensation for Undue Damage for Wrongful Treatment'<sup>\*5</sup> that Kelly, a child who had been born with a severe handicap, suffered 'unfair' damage, as articulated in Article 24 of that convention<sup>\*6</sup>, which had to be compensated for. In this connection, we have to ask whether the Oviedo Convention applies in cases of this nature and, if so, how best to apply its Article 24.

In her dissertation, the candidate excludes from the scope of her research the problem of wrongful actions against the mother (or the parents). The reasons for this decision cannot to be found in the

<sup>4</sup> See footnotes 2 and 3.

<sup>5</sup> See the details provided in that work: E. Hondius. The Kelly case – compensation for undue damage for wrongful treatment. – Jan K.M. Gevers et al. (eds). *Health Law, Human Rights and the Biomedicine Convention: Essays in Honour of Henriëtte Roscam Abbing*. Martinus Nijhoff 2005, p. 115. See also B.A. Koch (ed.). *Medical Liability in Europe: A Comparison of Selected Jurisdictions*. Walter de Gruyter 2011, p. 398. – DOI: <https://doi.org/10.1515/9783110260168>.

<sup>6</sup> The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Oviedo Convention), of 4.4.1997, Article 24 states: 'The person who has suffered undue damage resulting from an intervention is entitled to fair compensation according to the conditions and procedures prescribed by law.'

compendium. For a doctoral dissertation it would not have been excessive to include such cases and dilemmas in the discussion. Moreover, these are important for their potential to give prominence or leave in the shadows the wrong actions with regard to prenatal damages against doctors and health-care providers.

Furthermore, the candidate argues that 'although the doctor is not party to the contract between the patient and the health-care provider, the doctor is still personally liable for the performance of the contract beside the health-care provider'. In fact, Estonian law puts forth such a solution<sup>\*7</sup> as seems to be an exception to the rule of *inter partes* effect of the contract. On the other hand, some authors advocate the institutionalisation of medical liability, looking instead to the particular doctor or health-care professional<sup>\*8</sup>, and literature addressing medical error supports the conclusion that organisational fault and not individual-level blame is the main source of errors.<sup>\*9</sup> Therefore, the solution of putting so much legal stress on the individual professional may be of debatable merit.

The candidate refers in the 2014 article 'The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life: An Estonian Perspective'<sup>\*10</sup>, in arguing that mitigating damage by terminating the relevant pregnancy would be highly questionable since it would not be in compliance with **the principle of good faith**. The understanding of the principle of good faith with respect to these cases could be elaborated upon more deeply and in line with the research question formulated in the dissertation. Could we invoke the argument of the need to respect the physical and moral integrity of the pregnant woman? Might this be a case of 'hypothetical consent'?

Moreover, in the section of the work about wrongful birth and compensation for deprivation of the chance to make a choice about abortion, the above-mentioned issue of hypothetical consent could be analysed. Who has the burden of proof? The author of the dissertation advocates reading statistics or sociological data related to eugenic abortion. What constitutes the legal foundation for this position is not made clear to the reader. Should we not look for the concrete hypothetical will of the mother (or couple)?

With regard to the discussion about wrongful life, a pragmatic question related to the dominant thesis whereby a wrongful-life claim can be denied might be raised: **What if parents who have received compensation for wrongful birth then abandon the child and move abroad? Could a way to avoid this situation be envisaged?** Some argue that pure compensation of the handicapped child is the task of social-security law and not of tort law. In general, the candidate presents the wrongful-life theory as being advocated by very few authors and courts. That is not an accurate picture. There are many authors, also in Germany, who argue in favour of the concept of wrongful life.<sup>\*11</sup>

In general, the dissertation could have debated in greater depth the influence of the development of prenatal medicine and the new trend of so-called **liberal eugenics, family eugenics, or private eugenics** (Habermas), which is being practised every day and with great social support<sup>\*12</sup>. This is in response to a desire to have children and the interest in having children who are not afflicted with serious diseases, after

<sup>7</sup> See the Estonian Law of Obligations Act, whose §758 (2) states that qualified doctors and dentists, and nurses or midwives providing health-care services independently, who participate in the provision of health-care services and operate on the basis of an employment contract or another, similar contract entered into with a provider of health-care services shall also be liable personally alongside the provider of health-care services for performance of a contract for the provision of health-care services.

<sup>8</sup> R. Cascão. *Prevention and Compensation of Treatment Injury: A Roadmap for Reform*. The Hague, Netherlands: Boom Juridische Uitgevers 2005.

<sup>9</sup> T.A. Brennan et al. Relation between malpractice claims and adverse events due to negligence: Results of the Harvard Medical Practice Study III. – *New England Journal of Medicine* 325(1991), pp. 370–376 (esp. p. 324). – DOI: Relation between malpractice claims and adverse events due to negligence: Results of the Harvard Medical Practice Study III; U.S. Department of Health and Human Services Expert Group, *An Organisation with a Memory: Report of an Expert Group on Learning from Adverse Events in the NHS Chaired by the Chief Medical Officer*, 2000.

<sup>10</sup> See Note 3.

<sup>11</sup> For a single example, see B. Losch, W.C. Radau. "Wrongful birth" und "wrongful life". Probleme der rechtlichen Bewältigung ärztlicher Pflichtverletzung bei der menschlichen Reproduktion. – *Ethik in der Medizin* 12(2000), pp. 30–43. – DOI: <https://doi.org/10.1007/s004810050093>. With regard to a contract for protection of third parties, see E. Deutsch, A. Spickhoff. *Medizinrecht* Springer 2014. – DOI: <https://doi.org/10.1007/978-3-642-38149-2>, esp. comments on p. 220 and p. 223 ff. by G. Schiemann. – *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen* Berlin: Sellier – de Gruyter 2005, §249, no. 209 and §823, no. 51; J. Hager. *Das Recht der unerlaubten Handlungen. – J. v. Staudingers Kommentar zum bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Eckpfeiler des Zivilrechts* Berlin: Sellier – de Gruyter 2005, pp. 819–876, 827–828.

<sup>12</sup> Here I would like to point to the 2015 article in *Juridica International*, 'The Health-Care Provider's Civil Liability in Cases of Wrongful Life: An Estonian Perspective'. See Note 3.

prenatal diagnosis and abortion<sup>\*13</sup> or after pre-implantation genetic diagnosis and selection of embryos or even selection of an embryo that could provide material to save a relative's life.

In the *Journal of Medical Law and Ethics* article published in 2016, 'The Health Care Provider to Compensate for Damages in Case of Wrongful Conception: A Model to Suit Estonian Law', it is stated that the damage lies not in having a child as such but in the obligation to bear that child's upbringing and expenses. In relation to this issue, one could conduct further research into seeking compensation for **unwanted parenthood** (when someone becomes a parent without consenting to this'. For example, Cees van Dam argues in *European Tort Law 2012*<sup>\*14</sup> that there is a right to non-pecuniary damages in cases wherein the man engaged in sexual relations without the intent of conception.

In conclusion, the thesis provides us with an advancement of knowledge, since the candidate explores legal solutions for Estonian law, considering comparative law and establishing a fruitful dialogue with important sources (literature and case law). Secondly, the doctoral studies have allowed the candidate to tackle and overcome the difficulties of international publication and to enter into a scientific dialogue in the arena of international science.<sup>\*15</sup> The author's efforts in that domain could have gone further, though, as the scope of the research might have been more ambitious had she not avoided both the thorny bioethics-related and tricky philosophical issues of prenatal damage, along with the medico-legal details of these cases. Finally, it must be noted that the critical observations presented should be taken as inviting discussion only. There are no doubts that the quality of the work submitted proves the author's ability to provide independent academic argumentation and to apply advanced comparative methods.<sup>\*16</sup>

<sup>13</sup> Article 142 of the Portuguese Penal Code regulates abortion. It is not punishable (or, as some authors put it, not wrongful) if i) it was envisaged as saving the life or health of the mother, at any time; ii) there is a risk to the health of the mother (up to 12 weeks); iii) the conception was caused by a crime against sexual freedom or self-determination (up to 16 weeks); iv) the embryo has a serious disease or serious genetic malformation (up to 24 weeks or, if the embryo is not viable, with no time limits); or v) the pregnant woman wants to choose it, until 10 weeks of pregnancy.

A 'right' to abortion exists 'by option of the woman, within the first ten weeks of pregnancy'. Women who seek an abortion must undergo mandatory counselling, and also a three-day mandatory waiting period has been established.

<sup>14</sup> *European Tort Law 2013*. Oxford University Press 2014. – DOI: <https://doi.org/10.1093/acprof:oso/9780199672264.001.0001>.

<sup>15</sup> However, four years of research could have been more expressive of the evolution in the issues and the literature used by the author, thereby itself representing evolution. This leads to the suggestion that such development should be seriously taken into account in future dissertations that are based largely on articles published over several years.

<sup>16</sup> 'The core component of doctoral training is the advancement of knowledge through original research. At the same time it is recognised that doctoral training must increasingly meet the needs of an employment market that is wider than academia,' state the Salzburg Principles, 2005. For more information about the Salzburg Principles, see <http://www.ehea.info/cid102053/doctoral-degree-salzburg-2005.html> (most recently accessed on 11 June 2018).