

Of wrongful birth, wrongful life, comparative law and the politics of tort law systems*

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SAMENVATTING

Over wrongful birth, wrongful life, rechtsvergelijking en de rechtspolitiek binnen het aansprakelijkheidsrecht

Bij de bespreking van “wrongful birth” en “wrongful life” zaken wordt veel rechtsvergelijkend materiaal gebruikt. Dit artikel onderzoekt deze vorderingen in het licht van de Nederlandse *Kelly* zaak en de recente Zuid-Afrikaanse beslissing in *Stewart v Botha*. Ik betoog dat het recht op zelfbeschikking en de sanctionering van een inbreuk daarop in het geding zijn en dat deze overwegingen aanleiding zouden moeten zijn om dit soort claims toe te staan. Ook wordt echter betoogd dat het niet zozeer de via de rechtsvergelijking gevonden uitkomsten en argumenten zijn die de doorslag geven in dit soort veelbesproken zaken. In plaats daarvan zijn het de culturele achtergrond, de rechtspolitieke keuzes binnen het aansprakelijkheidsrecht, die de beslissing dicteren, onafhankelijk van hoe men de juridische rechtsvergelijkende argumenten weegt.

1 INTRODUCTION

In 1993, a South African boy named Brian Stewart was born, severely handicapped. He suffers from *spina bifida*, a congenital defect to the lower spine, which negatively affects the nerve supply to the lower limbs, bladder and bowel. He suffers from a brain defect as well.¹

In 1994, a Dutch girl named Kelly Molenaar was born, severely handicapped. By the time she was two-and-half-years old she was diagnosed as retarded, autistic, not fully grown, not able to walk or talk, suffering from heart disease, bad hearing and bad eyesight and she was not able then to recognise her parents. She had been admitted to the hospital nine times due to unstoppable crying, believed to be caused by pain.²

Both Brian and Kelly were not supposed to have been born. Brian’s mother would have undergone a termination of her pregnancy had the obstetrician and

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1 See *Stewart v Botha* 2007 6 SA 247 (C). An earlier decision (denying a claim) was *Friedman v Glickson* 1996 1 SA 1134 (W).

2 See HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*).

gynaecologist she consulted detected any abnormalities in the foetus and advised her thereof. Kelly's mother had asked the obstetrician she engaged to do some tests regarding possible hereditary diseases and genetic defects, because she had decided to terminate the pregnancy if the tests on the foetus would show severe disabilities. She did so because there was a history of chromosome defects in her husbands' family and she herself already had two miscarriages previously.

2 THE TOPIC AT HAND: WHY WRONGFUL LIFE IN A COMPARATIVE FASHION?

Described above are two cases on "wrongful life", a highly debated topic within the law of delict or tort law (in European terms)³ and the topic of this paper was chosen for that very reason: it is highly debated all over the world. It leads to differences of opinion and outcomes, our legal notions, our moral standings and our beliefs, in either the ethical or religious sense of the word.⁴ Furthermore, it is a theme that is topical in South Africa because the Supreme Court of Appeal handed down a decision on this matter recently, on 3 June 2008, not recognising this sort of claim,⁵ while for instance the Dutch legal system is one of the few legal systems that does allow such a claim. This raises the question what is different between those two systems. Why are views diverging on this theme and can these be reconciled in any way? What has comparative law to offer in this respect? Can and will it bring us closer together? These are the sort of questions I would like to try to answer in this article.

Hereafter, I will first explain what is meant by a wrongful life claim, as well as the adjoining wrongful birth claim since these two types of action go together quite often. Furthermore, I will try to show how some of the legal systems in the world deal with these issues. I will lay bare the issues involved and some of the important arguments used. The core question then becomes how we decide what type of argument is, first, valid, and second, convincing. In doing so, I will argue that the use of comparative law, albeit very useful and intellectually challenging, is not capable of providing an answer to that question, at least not in tort law issues of the magnitude of wrongful birth and life claims. It is instead the weight a certain argument receives in a certain *cultural setting or background* that decides the matter. Hence, it is the *politics of a tort law system* that governs the outcomes and the solutions reached in these sorts of cases. My final aim is thus to relate this debated part of tort law to a wider characteristic of the law of torts: its political nature. But before we go into that, let us focus first on what wrongful birth and life claims are actually all about, both as regards terminology and the key questions that arise.

3 There is a wealth of (mostly also comparative) literature available on the topics of wrongful birth and wrongful life, too much to mention in fact. The sources cited hereafter will provide further references. See however, on both issues in a comparative fashion: Kortmann and Hamel (eds) *Wrongful birth en wrongful life* (2004).

4 See Chürr "A delictual claim based on 'wrongful life': Is it possible?" 2009 *THRHR* 168 172.

5 See *Stewart v Botha* (340/2007) [2008] ZASCA 84 (3 June 2008).

3 A NOTE ON DEFINITIONS AND TERMINOLOGY⁶

The topic of this article encompasses two types of causes of action for damages against medical practitioners.⁷ First, a so-called *wrongful birth* claim involves a claim for damages *by the parents* of a child for, most importantly, the costs of bringing up the child. The claim is filed because the parents did not want any (more) children, for whatever reason, or did not want the child in question to be born (because of a genetic disability detected during pregnancy), but became parents (again) anyway because of the fault of a third person, that is, the doctor, by not preventing the conception from occurring (also known as wrongful conception: failing to implant a contraceptive in the right manner, not warning about risks of getting pregnant anyway, etcetera), by not terminating the pregnancy correctly after it has come about (failed abortion) or by not correctly performing the necessary genetic tests. An example is of course the situation in which a birth control operation was performed but turned out to be unsuccessful because of a fault of the doctor. In the cases we are dealing with here the child being born can thus either be a healthy or a disabled child. This is in principle of no consequence to the possibilities of a wrongful birth action⁸ although in some legal systems this fact is considered relevant (see below). The most important heads of damages are the cost of raising the child (which is considered to be pure economic loss⁹) and non-pecuniary losses (in principle for both the mother and the father for interference with family life).

A *wrongful life* claim on the other hand is a claim *by a child*, and this will always be a disabled child, issued by its representatives, that is, most notably the parents, against a doctor or obstetrician for having to live a life full of suffering because of a handicap while the child was not supposed to have been born at all but is born anyway because of a negligent act by the doctor or assistant. For instance, if one fails to order or correctly perform prenatal research (for example, a chromosome test) as to the state of health of the foetus (wrongful genetic counselling) a handicapped child might be born where otherwise, had the testing been done correctly, the pregnancy would have been terminated by the parents. Had the testing indeed been performed correctly, they would have known the child would be born severely disabled and then they would have chosen an abortion to

6 On the terminology used, see eg also Van Dam *European tort law* (2006) 156 161 (distinguishing cases of prenatal harm) and 162. Since there are as many definitions around as there are commentators, or so it seems, I decided to use my own descriptions (see also fn 8).

7 A claim can be grounded in either contract or tort, but with regard to the essentials of the wrongful birth and life claims that is not material.

8 Although one could call the action in case of a healthy child being born a case of “wrongful conception” and label the birth of a disabled child as a (true) wrongful birth claim. Cf Cleaver “Wrongful birth – The dawning of a new action” 1991 *SALJ* 47 fn 2. For me, the main difference between the possible causes of actions in wrongful birth and life cases lies not in the possible heads of damages (they may differ, even within the category of wrongful birth cases) but in who is actually suing: the parents or the child itself.

9 Cf Murphy *Street on torts* (2005) 227; Neethling *et al Law of delict* (2006) 275 fn 185. However, Roederer “Wrongly conceiving wrongful conception: Distributive vs corrective justice” 2001 *SALJ* 347 350 challenges this because the actual harm is in his view the infringement of the right to choose. This is in my view indeed the case (see below para 9) but even then the loss suffered from that infringement is (also) pure economic in nature (as Roederer also seems to indicate).

end the pregnancy.¹⁰ Due to the doctor's fault, however, they never got round to making or being able to make that decision. Damages in these cases consist of the cost of living for the child (which, arguably, seem to be purely economical in nature¹¹), that is, the cost of rearing the child for the person taking that task upon himself, including the extra costs related to the disability, and possibly also non-pecuniary loss for the child.¹²

4 THE KEY QUESTIONS

The key questions when dealing with the issues at hand are legal and moral in nature. "Legal" in the sense that both wrongful birth and wrongful life claims seem to cut right through the legal categories that we usually work from. They are about contract law and/or tort law (Can both apply?), about wrongfulness and fault (Is there a duty? Is it breached?), about damages (What is the damage here? How do you assess it? Can you do that at all?), and about factual causation (Who caused the damage if there is a natural handicap?).

Moral questions arise because these claims touch upon the way we think about life in general, about new-born life specifically, about the possibilities of modern medicine but also upon religious or ethical aspects (Is all life sacred?). More specifically for the issue of wrongful birth the major moral issue is: can a child ever be considered a source of damage (and not a blessing)?¹³ And for wrongful life claims, the question becomes twofold. First, can a disabled child after its birth sue the mother and claim the mother should have had an abortion? Second, is handicapped life of less value?¹⁴ And if it is not, which is of course the only sensible answer, is that not the message that these claims are still sending out to the world? Or, as Snyders AJA said in *Stewart v Botha*:¹⁵

"At the core of cases of the kind that is now before us is a different and deeply existential question: was it preferable – from the perspective of the child – not to have been born at all? If the claim of the child is to succeed it will require a court to evaluate the existence of the child against his or her non-existence and find that the latter was preferable."

10 In fact, it is crucial that they would indeed have made that choice; otherwise the claim fails on grounds of lack of causation. See below for details.

11 As to the nature of the losses (are they pure economic or not?) related to the upbringing of the child, the question is whether these costs are *unrelated* to the injuries the child suffers. Since the child's disabilities are not injuries inflicted upon it by the doctor, in the same way these injuries would be inflicted on someone in, eg, a motor car collision, but rather caused by a genetic defect these costs are in my view purely economical. However, one could also argue that the doctor did not prevent the injuries from occurring and thus he "caused" the injuries. Had he conducted proper prenatal research, the disabilities would have been discovered, and an abortion would have been performed. In that sense, the losses incurred here are not *pure* economic in character. The first reasoning appears to be more plausible, however.

12 Remember also that a wrongful life claim of the child can be joined by a wrongful birth claim of its parents. Of course, the cost of bringing up the child can be claimed only once.

13 Van Dam 157. A variation on this issue is that compensation would be contrary to the dignity of the child.

14 Van Dam 163 165; Chürr 2009 *THRHR* 174.

15 [2008] ZASCA 84 para 11. See also Chürr 2009 *THRHR* 174. On the attempt to integrate moral and legal perspectives in this regard, see Loth *Limits of private law* (2007).

5 THE STATE OF THE LAW: SOME CASE LAW FROM ACROSS THE GLOBE ON WRONGFUL BIRTH

What is the current state of the law in this regard? Focusing first on wrongful birth claims and paying attention only to the cost of maintaining the child and non-pecuniary damages as the most important heads of damages for the parents suing the doctor or hospital, the following picture emerges.

In the Netherlands wrongful birth claims have been allowed since the 1997 case of the so-called *Missing IUD* in which the Dutch Supreme Court (the *Hoge Raad*) awarded the maintenance costs for raising the child as well as non-pecuniary losses to the mother.¹⁶ The case concerned a family that had specifically decided not to have any more children because of their troublesome financial state of affairs. The sterilisation operation failed, by negligence on the doctor's part, and a fourth (healthy) child was born. The Supreme Court approached the case as a matter of applying Dutch law of damages to a certain pattern of facts in a technical manner. In doing so, they avoided the moral and political issues.¹⁷

In England claims for wrongful birth have been rejected to a large extent in the case of *MacFarlane v Tayside Health Board*.¹⁸ The House of Lords decided – in essence – that there was no duty of care for a doctor towards the parents, since we are dealing here with an instance of pure economic loss and accepting a duty in this case would not be fair, just and reasonable.¹⁹ Since these are in fact pure economic loss cases, the well-known Common Law reluctance in that regard comes into play as well.²⁰ But non-pecuniary losses are being awarded to the mother for pain and suffering related to having to give birth to the child.²¹ In *Rees v Darlington Memorial Hospital*,²² however, a conventional award (and not a compensatory one) was granted to the mother in question who had sought to prevent having any children because she felt she could not take care properly of a child due to her own blindness. Her sterilisation failed and a healthy son was born. The reason for granting the sum of £15,000 was to recognise the fact that she had suffered a legal wrong. According to Van Dam this award indicates that the outcome reached previously in the *MacFarlane* was not considered completely satisfactory. I agree. The *Rees* case might actually be a first step towards

16 See HR 21 February 1997, 1999 *Nederlandse Jurisprudentie* 145 nt CJHB (*Missing IUD*). From the many comments on this case, see eg “Who’s afraid of wrongful birth” 1997 *WPNR* 191ff and the (Belgian, Greek and Italian) case notes in 1999 *European Review of Private Law* 241–256.

17 The *Kelly* case introduced above (para 1) confirmed the outcome of this *Missing IUD* case and added that the father might be awarded non-pecuniary losses as well, see HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*).

18 [1999] 4 All ER 963.

19 As is required by the *Caparo Industries Plc v Dickman* standard for accepting a duty of care in such cases. See *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

20 See eg Powell and Stewart (eds) *Jackson and Powell on professional negligence* (2002) paras 2-036ff on the adoption of the incremental approach.

21 *MacFarlane v Tayside Health Board* *supra*.

22 [2003] UKHL 52, [2004] 1 AC 309. On the English situation, see also Jackson and Powell paras 12-289ff, and Rogers *Winfield and Jolowicz on tort* (2006) 24-15, both discussing whether the parents could sue for the extra costs related to having a disabled child, which is undecided as yet. Cf also Murphy 226–228.

granting some form of relief with regard to maintenance costs (again, because English law had awarded damages before *MacFarlane*).²³

The situation in Germany is rather difficult when it comes to maintenance loss (non-pecuniary losses are awarded for the mother²⁴). There is a strong divide of opinion: The German *Bundesgerichtshof* is in favour of allowing a wrongful birth claim, awarding the costs of raising the child under certain conditions, but the Second Chamber of the constitutional court, the *Bundesverfassungsgericht*, is against this, considering these damages to be contrary to the dignity of the child. The *Bundesgerichtshof* has remained true to its opinion, however, so these costs are generally compensated.²⁵

In France, a wrongful birth claim is only possible to some extent, that is only in so far as there is a special loss that exceeds the normal burdens of motherhood. So, when a healthy child is born there is in principal no valid claim to be launched. A claim for maintenance costs is possible, however, if the child is born handicapped (in that case non-pecuniary loss is granted as well), if the mother is in bad financial condition or if she suffers mental problems as a result of the birth.²⁶

So, at the European front, the claim for compensation for wrongful birth has been acknowledged by most jurisdictions, at least to some extent.²⁷ The same is true for (most of) the United States of America.²⁸ The Australian highest court has done the same in *Cattanach v Melchior*²⁹ but some Australian federal legislators have reversed that decision.³⁰ Under South African law, filing suit in a wrongful birth action will stand up in court with regard to the costs of maintenance of the child, but not for non-pecuniary losses, as was decided in *Administrator, Natal v Edouard* and in *Mukheiber v Raath*.³¹

23 See Van Dam 161 and on the earlier cases 160, with references, as well as Rogers 24-15. He calls this a “curious” decision.

24 See BGH 27 June 1995, 1995 WPNR 2407; Van Dam 159.

25 Van Dam 157-159 with further references. Another chamber (the first) of the *Bundesverfassungsgericht* agrees with the *Bundesgerichtshof*. On this German “intra-judicial” discussion, see Van Gerven *et al Tort law. Common law of Europe casebooks* (2000) 82-83.

26 See Viney and Jourdain *Traité de droit civil. Les conditions de la responsabilité* (2006) para 249-2, with references to case law; Van Dam 159.

27 See Koch “Comparative overview” in Koziol and Steininger (eds) *European tort law 2005* (2006) para 26, referring to Austria, Germany, Italy, Poland, Portugal, Switzerland and, with some reluctance, Spain. See also Van Gerven 82-83 90ff 114ff 133ff (dealing with Germany, England, France and the Netherlands).

28 See Keeton (ed) *Prosser and Keeton on the law of torts* (2002) 371.

29 [2003] HCA 38, (2003) 215 CLR 1. On that decision, see Vranken “Damages for wrongful birth: Where to after Cattanach” 2004 *Adelaide LR* 2004 (available at <http://ssrn.com/abstract=583601>); Stewart and Stuhmcke *Australian principles of tort law* (2005) 273-275.

30 See Stewart and Stuhmcke *ibid* who refer to New South Wales, Queensland and South Australia.

31 See the Appellate Division decisions in *Administrator, Natal v Edouard* 1990 3 SA 581 (A) and *Mukheiber v Raath* 1999 3 SA 1065 (A). See on those cases Cleaver 1991 *SALJ* 47; Neethling and Potgieter “Deliktuele aanspreeklikheid weens bevrugting as gevolg van ’n nalatige wanvoorstelling: Die funksies van onregmatigheid, nalatigheid en juridiese kousaliteit onder die loep” 2000 *THRHR* 162; Roederer 347ff, and Neethling *et al* 255 fn 14.

6 THE STATE OF THE LAW: SOME CASE LAW FROM ACROSS THE GLOBE ON WRONGFUL LIFE

How are wrongful life claims resolved? In the Netherlands not only a wrongful birth claim is possible, but the same goes for wrongful life claims. This was decided in 2005 by the Dutch Supreme Court in the *Kelly* case. The court granted her the cost of living (that is, her upbringing), as well as the extra costs related to her handicaps and non-pecuniary losses for her suffering.³² The Dutch legislator did not intervene afterwards, not even when asked specifically to think about doing so, basically stating that this Supreme Court decision seemed to be handed down in accordance with the rules of private law in the Netherlands and that there was no apparent reason for the legislator to decide otherwise.³³

The German legal system denied the possibility of issuing a wrongful life claim in a *Bundesgerichtshof* case of a foetus being exposed to the Rubella disease contracted by the mother. The reason is that there is no direct duty to prevent the birth of a foreseeable handicapped child because human life might appear valueless if such a duty would be accepted.³⁴

In England section 1 of the Congenital Disabilities (Civil Liability) Act 1976 does allow a prenatal harm claim for a child if it is born alive and disabled if the defendant was liable to either parent for the act which led to the disability.³⁵ This wording however excludes cases of *naturally* caused handicaps, such as a genetic defect not detected because it was not properly tested for. The legislator thus stepped in to prohibit (future) wrongful life claims.³⁶ The courts agree with this position. In *McKay v Essex Area Health Authority*,³⁷ a case of an undetected Rubella disease again, the wrongful life claim was rejected on public policy grounds: There is no duty to abort a disabled child, accepting such a duty would be a violation of the sanctity of human life, and the assessment of damages (comparing the situation of a disabled child with that of a “not born foetus”) is impossible.

The French *Cour de cassation* made room for a wrongful life claim for the costs of the handicap in the famous *Perruche* case. Nicolas Perruche was born

32 See HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*). The comments on the decision (as well as the lower courts' decisions) have been numerous; see eg Buijssen “In overeenstemming met de aard van de schade?” 2005 *Nederlands Juristenblad* 835ff; Hartlief “Hollandse toestanden: De Hoge Raad over ‘wrongful life’” 2005/6 *Nederlands Tijdschrift voor Burgerlijk Recht* 232ff; Sieburgh “Schadevergoeding en leven – Compositie met rood, geel en blauw” 2005 *WPNR* 755ff; Van Kooten en Wattendorff “Het belang niet geboren te worden” in Van Kooten *et al* (ed) *Hartkampvarianties* (2006) 41ff; Hondius “The *Kelly* case – Compensation for undue damage for wrongful treatment” in Gevers *et al* (eds) *Health law, human rights and the Biomedicine Convention. Essays in honour of Henriette Roscam Abbing* (2005) 105ff; and Mukheibir “Wrongful life claims in the Netherlands – The *Hoge Raad* decides” 2005 *Obiter* 753ff (from a South African perspective).

33 See *Kamerstukken II* (Parliamentary Proceedings) 2004–2005 29 323 nr 11. The Dutch government had already issued a preliminary, not final, opinion on the matter after the Court of Appeal but before the Supreme Court ruled in the *Kelly* case; see *Kamerstukken II* (Parliamentary Proceedings) 2003–2004 29 200 VI, nr 61.

34 BGH 18 January 1983, 86 *Entscheidungen des Bundesgerichtshof in Zivilsachen* 240.

35 Van Dam 162.

36 See Rogers 1041 para 24-14.

37 [1982] All ER 771 (CA). See also Jackson and Powell 12-302; Rogers 1040 para 24-14; and Murphy 217.

severely handicapped because his mother contracted the rubella disease thinking – because her physician told her so – that she was immunised against the disease.³⁸ After the decision was handed down the French legislator stepped in by enacting that nobody can be indemnified for his birth, even if handicapped. This so-called “Loi Anti Perruche” from 2002 thus overruled the *Cour de cassation*.³⁹

The French legislators’ decision is in line with what is commonly decided across continental Europe.⁴⁰ Canadian⁴¹ and (most) American⁴² courts also turned down this cause of action. In Australia⁴³ the case of *Harriton v Stephens* was (again) about a doctor who failed to diagnose the mother’s rubella infection during pregnancy and who failed to warn the mother of the risk of serious disability as a consequence of that infection. The High Court of Australia decided by a majority that the wrongful life claim should be denied.

In *Friedman v Glicksman*,⁴⁴ Goldblatt J in the Witwatersrand Local Division upheld the wrongful birth claim for South African law, in line with the state of South African law mentioned earlier, but he denied the admissibility of the wrongful life claim initiated by the mother in that case on behalf of her child.

38 CdC Ass Plén 17 November 2000, *Dalloz* 2001, 332 nt Mazeaud & Jourdain; Viney/Jourdain 2006, no 249-6.

39 See the Loi no 2002-303 du 04 mars 2002 relative aux droits des malades et à la qualité du système de santé, and Viney/Jourdain 2006, no 249-7. The European Court of Human Rights has considered this French Act to constitute a deprivation of property under a 1 First Protocol to the European Convention on Human Rights (protection of property/ownership) because the Act has retroactively taken away the possibility of issuing civil liability claims which are considered to be property. See *Maurice v France* ECtHR 6 October 2005, 2006 *Nederlandse Jurisprudentie* 464 nt PJ Boon. This in turn has inspired the *Cour de cassation* to still allow wrongful life claims based on facts that occurred prior to the entry into force of the Act. See CdC 1re Civ, 24 January 2006, Arrêts 136, 195, 196 and CdC 1re Civ, 8 July 2008, Arrêt n°796. (http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/); Viney/Jourdain 2006, no 249-7, 29.

40 See Koch para 27, naming Poland and Portugal as other countries rejecting the claim. He mentions the Netherlands and Hungary as the two “runaway jurisdictions” in this respect. See also Van Gerven 82–83 90ff 114ff. Van Kooten and Wattendorff 47 and Mukheibir 2005 *Obiter* 756 mention an Israeli majority decision allowing a wrongful life claim.

41 See the decision of the Manitoba Court of Appeal in *Lacroix (Litigation Guardian of) v Dominique* (2000) 202 DLR (4th) 121 para 31, considered in *Bovingdon v Hergott* 2008 ONCA 2, a recent Court of Appeal of Ontario decision of 7 January 2008.

42 See Keeton 370–371; Mukheibir 2005 *Obiter* 756–757. The account of American law in *Stewart v Botha* 2007 6 SA 247 (C) para 14, does not seem to be completely accurate. In the Australian case of *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52, (2006) 226 ALR 391, (2006) 80 ALJR 791 (9 May 2006) paras 232–234 the state of the law in the USA (denying claims) is also described.

43 See *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52, (2006) 226 ALR 391, (2006) 80 ALJR 791 (9 May 2006). See, however, also the eloquent (and to my mind convincing) dissenting opinion by Kirby J. The state of the law previous to this decision is described in *Stewart and Stuhmcke* 275–279.

44 On that case, see Blackbeard “Actions for wrongful birth and wrongful life” 1996 *THRHR* 711ff; Pearson “Liability for so-called wrongful pregnancy, wrongful birth and wrongful life” 1997 *SALJ* 91 105ff; Mukheibir 2005 *Obiter* 759ff; Neethling *et al* 255 fn 14. As to the state of the law in South Africa (also with regard to wrongful birth) before the decisions referred to in this paragraph were handed down, see Claassen and Verschoor *Medical negligence in South Africa* (1992) 79ff.

The same solution, a denial of the wrongful life claim – on public policy grounds – was handed down by the Supreme Court of Appeal in *Stewart v Botha*.⁴⁵

7 LEGAL PROBLEMS AND SOME TENTATIVE ANSWERS

After this survey of the law it is imperative to go deeper into the heart of the matter and to find some (tentative) answers to the key questions I raised before. I will briefly sketch the legal questions, especially with those surrounding wrongful life cases, together with my own answers to them. In doing so, attention is devoted especially to the way the Dutch Supreme Court handled these issues in its *Kelly* decision, allowing a claim.⁴⁶

A first issue that needs resolution is a question of factual causation. In a wrongful birth suit conclusive evidence is needed that the parents of the child did not want a(nother) child (any more), for whatever reason (be it financial difficulties or other reasons). In case of a claim for wrongful birth, proof is needed that an abortion would indeed have followed if the handicap(s) of the child had been known from the start. This is in itself already a very difficult issue to cope with. How can one prove that he or she was sure about the decision not to have any (more) children? How can one decide, with reasonable certainty, what a parent would have done if the right genetic information had been known in time? It might well be that the pregnancy as such would have led someone to take a different decision than imagined before the situation arose. In any event, these are issues of (the burden of) proof which are difficult but which are actually not specific to the actions dealt with here. They arise in other instances of (professional) liability as well, so I will not dwell on those issues here.⁴⁷

For wrongful life actions, one of the biggest reasons for controversy is raised by the question what is actually the cause of the suffering and disabilities of the child. At first glance, the answer is obvious: the genetic defect, the “flaw” in the development of the child due to a bad chromosome is the cause. Of course that is true, but at the same time Brian’s or Kelly’s or another child’s suffering has also been caused by the doctors’ or obstetrician’s fault. Without that fault the genetic information sought after would have been acquired and that information would then have led – of course this has to be proved⁴⁸ – to the mother having an abortion instead of giving birth to the child. In that event, there would not have been a child to feed and clothe and thus there would have been no cost of maintenance. The *condicio sine qua non* test as regards factual causation is then fulfilled

45 2007 6 SA 247 (C). This contribution is in no way intended to be an overall comment or case note to *Stewart v Botha*, if only because I, as a Dutch academic, would not be able to do so due to a lack of knowledge of South African delict law and constitutional law (s 11 of the South African Constitution, 1996 is eg considered in this case). See in this respect, next to the other writings mentioned, Chürr 2009 *THRHR* 168–169 who points out that there is (or was, at least) discussion in South African literature on this topic (173) and who agrees with the outcome reached in *Stewart*.

46 Mukheibir 2005 *Obiter* 761 notes that the court “circumvented” the potential ethical and legal criticisms. I would say the court chose to deal with the matter in a rather “technical” manner, but it did so without neglecting the moral issues raised.

47 Cf Giesen *Bewijslastverdeling bij beroepsaansprakelijkheid* (1999).

48 Cf Pearson 107.

by the doctor's fault as well, no matter what some courts and commentators might say.⁴⁹

Another major topic of discussion is the issue of damages. Can we say there is any damage in a wrongful life case, and if so, how can we assess that? Is the usual method of comparison to assess damages workable? What should then be compared with what? The "non-existence" or "not being" of a child cannot be materialised in money, so a true comparison of "non-existence" on the one hand and "life with certain disabilities" on the other hand is not possible.⁵⁰ However, as the Dutch Supreme Court has made clear, this reasoning is flawed.⁵¹ One can and must compare the cost of raising the child, given the fact that the child is born as it is, with the hypothetical situation that would have ensued if no fault had been committed. That would of course have been a situation in which these costs would not have been made. This means a comparison is possible.⁵² If need be, the exact amount of damages can be determined by taking an "educated guess", which of course happens more often and is usually allowed.⁵³

A further pivotal issue concerns the question whether allowing wrongful life claims would also entail that claims of children born disabled against their mother would become possible. Instead of suing the doctor for being born the child would then sue its mother for not having an abortion, if she decided not to undergo one while being aware of the genetic defect before giving birth. As elsewhere, this argument has been forcefully rejected by the Dutch Supreme Court.⁵⁴ The court stated, basically, that abortion is a right for the mother if certain requirements posed by law are fulfilled, but it is not a duty for her and thus it cannot be a "right" for the child on which a claim can be grounded. Thus, the "omission" to abort will never amount to negligence because there is no duty towards the child to (positively) act in such a manner. Snyders AJA reasoned along the same lines in *Stewart v Botha*.⁵⁵

The following argument raised in the discussion is that obstetricians, doctors and hospitals owe a duty of care towards the foetus, and not only the mother (and

49 Again a complete listing of each court and author that dealt with this issue would be next to impossible but see Viney and Jourdain 25 para 249-6. Note also that Louw J used this causation requirement to turn down the possibility of a South African wrongful life suit (at first instance) in *Stewart v Botha* 2007 6 SA 247 (C), where he was otherwise much more sympathetic towards allowing the action. See also Chürr 2009 *THRHR* 173. Cf also para 16 of Snyders AJA's judgment in *Stewart v Botha* [2008] ZASCA 84.

50 For most courts denying the possibilities of a claim, this is a very important argument, cf *Stewart v Botha* 2007 6 SA 247 (C) para 17; *Friedman v Glickson* 1996 1 SA 1134 (W) 1143(B-C); and Pearson 105.

51 See HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*) nr 4.15. For Louw J the issue was not so much about the comparison being impossible but about the question whether there was damage at all; see *Stewart v Botha* 2007 6 SA 247 (C) 261F.

52 See also Viney and Jourdain 25 para 249-6; Hartlief 243; Pearson 106; and Van Kooten and Wattendorff 50 (who rightly point to the fact that the comparison to be made in assessing damages is *always* related to a hypothetical situation).

53 See eg a 6:97 Dutch Civil Code for the Netherlands; cf Mukheibir 2005 *Obiter* 758.

54 HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*) nr 4.13.

55 [2008] ZASCA 84 para 19. See also Viney and Jourdain 26 para 249-6. However, the issue was debated in *Friedman v Glickson* 1996 1 SA 1134 (W) 1142, but waived in *Stewart v Botha* 2007 6 SA 247 (C) para 23. See also Chürr 2009 *THRHR* 172 on the state of the law regarding abortions in South Africa.

father), if one accepts wrongful life claims. This is the duty to perform prenatal research if needed according to medical opinion and to do so correctly according to medical standards. That duty is of course breached if such research is not done while it should have been done. The concern becomes whether this will lead to a form of *defensive medicine*: in this case: doing too many tests just to be sure and advising abortions on too many occasions for the same reason.⁵⁶ The difficulty with this argument is that these kinds of fears are never actually empirically proven or refuted so it is hard to value its merits. To my mind, one should not attach too much weight to it, because for any form of liability at least fault of some sort is needed. From that requirement it also follows that as long as people act and behave as reasonable persons, there is nothing to fear in this respect because there will be no liability.⁵⁷

The last issue dealt with here is whether it is possible to accept wrongful birth claims without also accepting wrongful life claims. Of course this has indeed happened around the globe, so the easy answer is that such would be a possibility. But taking a closer look one can truly ask: If you give the parents a claim in case of a handicapped child being born how can you then not provide the child itself with a claim? Isn't it the child that in the end suffers most? The same argument is basically put forward by Louw J in his first instance decision in *Stewart v Botha*. He asks, principally: how can it be that the sanctity of life argument does not preclude a wrongful birth claim but would preclude a wrongful life claim?⁵⁸ Of course, by posing the question in such a manner, we are entering the realm of morality.

8 SOME TENTATIVE ANSWERS TO THE MORAL QUESTIONS

Of course, no single author will be able to solve the moral questions raised before, if only because his or her "moral judgment" isn't the same as someone else's. But for the wrongful birth question of whether a child can ever be considered to be damage, I do think a solid negative can be supplied. It basically states that the child, once born, is not seen as damage by the proponents of wrongful birth. Rather, the unplanned birth and the interference with one's family life (deciding on the set-up and the extent of one's family) is the damage that is done and which materialises in maintenance costs and non-pecuniary loss. The argument that allowing a claim would be seen by the child, once born, that it was not wanted at first, can and should be countered by the argument that not wanting a(nother) pregnancy is not equal to not wanting the child if and when such a pregnancy arises anyway.

The most important moral issue in wrongful life cases – that is, is handicapped life of less value? – can be answered as far as I am concerned by stating the

56 See eg Chürr 2009 *THRHR* 173–174.

57 In the *Kelly* case (HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV nr 4.17), the Dutch Supreme Court reasoned in a similar vein. In *Stewart v Botha* [2008] ZASCA 84 para 20 Snyders AJA seems to agree. See also Cleaver 1991 *SALJ* 66, and on the validity of this sort of reasoning in a somewhat different context, Giesen "Regulating regulators through liability: The case for applying normal tort rules on supervisors", June 2006 *Utrecht LR* 22–24, as well as (but much more in favour of allowing empirical arguments to be used) Stapleton "Benefits of comparative tort reasoning: Lost in translation" 2007 (1)3 *Journal of Tort Law* 10–12.

58 See *Stewart v Botha* 2007 6 SA 247 (C) para. 20. In the same vein also Viney and Jourdain 25–26 para 249-6.

obvious: Of course not, and the damages awarded do not even imply this. Instead, what allowing a claim for the child will do is give it a (better) chance at building a life, given the condition it is born in. Allowing a claim will help disabled children to grow up as comfortably as possible because certain needs can be fulfilled.⁵⁹

The other moral issue raised before, that is, that an abortion might become a duty for the mother, has been turned down so many times (and again by the Dutch Supreme Court, see above) that I would not consider this to be a real issue any longer. What is important though is that this goes to show that even moral issues can be resolved on a global scale.

9 INTERMEDIATE CONCLUSION: PROVIDING A SANCTION FOR THE RIGHT TO SELF-DETERMINATION

The Dutch obstetrician of Kelly's mother decided, negligently according to medical standards, against testing for genetic abnormalities, even though the mother specifically asked for such testing. To my mind, this goes to the core of what is at stake here. In my opinion both wrongful birth and wrongful life claims, in Europe but also elsewhere, are in essence about the *right to self-determination*, especially of the mother, but also of the father.⁶⁰ It is this fundamental right – in wrongful life cases exercised by the parents on behalf of the child⁶¹ – that is breached by the doctors' or the obstetricians' fault. This right to self-determination, the right to decide for oneself how many children, if any at all, one wants and to decide on what sort of life one would want or specifically not want for one's offspring, is undermined.

Those who value this right highly will conclude that the breach involved actually affects the whole family (mother, father, and other children if present) and will conclude that such a breach deserves to be sanctioned properly. Wrongful life and birth claims in fact do so; they put a sanction on the breach of this fundamental right.⁶² This is, in my opinion, essential because without such a sanction the right itself would be without sufficient protection. A right without a decent form of sanction attached to it is not a proper right, but merely something

59 See HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*) nr 4.15; Van Dam 165; and critically Loth 28–30. If we would only compensate for the extra costs related to the handicap, which is also a solution that has been defended and used (cf Fleming *The law of torts* (1998) 184; the *Perruche* case, CdC Ass Plén 17 November 2000, *Daloz* 2001 332 nt Mazeaud and Jourdain; Van Dam 158 165), but which was turned down in the *Kelly* case (nrs 4.5 and 4.6, the parents' claim), and rightly so, I think, the perceived problem of not being able to determine the amount of damages is gone because we can compare the cost of raising a healthy child with those of a disabled child. However, here a causation problem arises because allowing the claim presupposes that there would have been an abortion and if that is the case, the comparison mentioned cannot be made because there would not have been a child at all.

60 See Van Dam 157 161; Roederer 350 363, as well as HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606 nt JBMV (*Kelly*) nrs 4.8–4.9. Cf also *Rees v Darlington Memorial Hospital* [2003] UKHL 52, [2004] 1 AC 309 (on which Rogers 1042 para 24-15 and Harpwood *Modern tort law* (2006) 432); Fleming 185; and Verheij *Vergoeding van immateriële schade wegens aantasting van de persoon* (PhD thesis VU Amsterdam 2002) 509.

61 Cf Sieburgh 759.

62 Cf also Roederer 350–351 (there is no uncomplicated remedy available when the right to choose is invaded).

one could strive for, and tort law provides such a sanction by opening the possibility of awarding damages.⁶³ In my view, one of the basic functions of tort law, that is, *guaranteeing or vindicating rights*, is strengthened this way. So, if one values a right and wants this to be lived up to, one should institute a sanction for a breach of that right as well, since otherwise the impairment of the right would be without consequences and thus “empty”. As Lord Hope of Craighead stated in *Chester v Afshar*:⁶⁴

“The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content.”

This reasoning is related to the somewhat more familiar function of tort law providing a deterrent, a (financial) incentive, not to act without taking due care. Wrongful life and birth claims indeed provide such incentives to the medical community, which for me is another reason to be in favour of allowing such claims. Or, as Kirby J concluded in his dissenting opinion in the Australian case of *Harriton v Stephens*:⁶⁵

“Denying the existence of wrongful life actions erects an immunity around health care providers whose negligence results in a child who would not otherwise have existed, being born into a life of suffering. Here, that suffering is profound, substantial and apparently lifelong. The immunity would be accorded regardless of the gravity of the acts and omissions of negligence that could be proved. The law should not approve a course which would afford such an immunity and which would offer no legal deterrent to professional carelessness or even professional irresponsibility.”

Herein thus lay the principal reasons for me to be in favour of allowing wrongful birth as well as wrongful life claims.

10 ARGUMENTS FOR AND AGAINST CERTAIN SOLUTIONS: WHAT IS DECISIVE IN THE END?

So far I have mainly given my personal view on the arguments raised in the discussion. Others, however, will value things differently. For example, for those that attach less weight to the right to self-determination, a sanctioning mechanism provided by tort law in the form of an award in damages is much less necessary. Does this mean then that we should deal with all the arguments used in the legal debate across the globe by all participants in order to get to a final say on what is “right” or “wrong” here?

63 See on this line of reasoning (the so-called “*rechtshandhavingsfunctie*” in Dutch terminology) most notably Verheij 445ff 507ff (for awarding non-pecuniary losses in wrongful birth cases; for wrongful life cases he declines to use the same reasoning, but fails to notice, in my view, that the right to self-determination is at stake there as well); Giesen *Bewijs en aansprakelijkheid* (PhD thesis Tilburg 2001) 449ff 495ff, as well as Akkermans *Proportionele aansprakelijkheid bij onzeker causaal verband* (PhD thesis Tilburg 1997) 402ff. According to Hartlief 240, the Dutch decision in *Kelly* (most notably nr 4.10) is in line with this reasoning.

64 [2004] 4 All ER 587 para 87, [2005] 1 AC 134 162–163. The judge uses this reasoning to reach a “narrow modification” of traditional causation principles.

65 [2006] HCA 15, (2006) 226 CLR 52, (2006) 226 ALR 391, (2006) 80 ALJR 791 (9 May 2006) para 153.

Apart from the fact that such an endeavour would be impossible, doing so would also be useless. That is the case because, as I have already stated,⁶⁶ comparative law is in my view not able to provide *the* answer to the question which arguments are valid and (most) convincing, and thus neither to the question whether wrongful life claims should be allowed or not.⁶⁷ This is due to the fact that, although the arguments for and against all possible solutions are as such the same everywhere, it is *the legal culture* in a certain place and at a certain time that determines how a legal system interprets and values those arguments and thus decides the debate on the topic at hand.⁶⁸ In our case, if the decision maker in a certain legal system, be it a court or legislator, values the right to self-determination less highly than I do, there is room for another solution than the one I have reached. The main point is thus that legal culture – or more neutral maybe the *legal politics within a tort law system* – decides on how the answers to the moral questions involved will sound. Comparative law can provide the basic arguments pro and contra certain solutions and is extremely useful at that,⁶⁹ but it can do no more. The final decision is always one of a political nature.⁷⁰ In its essence this is of course not a lesson never taught before,⁷¹ but it still is an important lesson to learn. A legal system cannot just copy comparative notions and rules even if the arguments to do so seem sound; if it does, mistakes will be made.

11 A SOUTH AFRICAN ILLUSTRATION

My main point can be illustrated by using the South African wrongful life decision in *Stewart v Botha*. Snyders AJA said towards the end of her unanimously followed judgment two things that are rather striking to me. First she said:⁷²

“In those jurisdictions where these claims have been allowed the debate has not been resolved, but an answer has simply been favoured on selected policy considerations without striking a balance that takes all the relevant norms and demands of justice into account and without resolving the impossible comparison between life with disabilities and non-existence . . . Making that choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child, but involves an arbitrary, subjective preference for some policy considerations and the denial of others.”

With all due respect, these words are misleading. First, because in the Netherlands (where these claims have been allowed) the issue as such as well as the

66 See para 2 above.

67 See the stark observations in this respect by Stapleton 44–45.

68 See eg Fleming 185; Stapleton 2 12–13 15–17 and Van Gerven 136, stating that the wrongful birth issue is approached within Europe from the same legal, *cultural and ethical* background (my emphasis), while still reaching opposite results.

69 See Stapleton 2 (and 44), who is very cautious about using comparative law, for instance because of the *cultural context*, but who does see value in comparing systems (within the common law) in order to find *arguments*. On the use of comparative law (to achieve harmonisation in European tort law systems), see also (less cautiously) Koziol “Comparative law – A must in the European Union: Demonstrated by tort law as an example” 2007 *Journal of Tort Law* Vol 1 Issue 3 Article 5.

70 Cf for South Africa specifically Van der Walt and Midgley *Principles of delict* (2005) 69 (with further references).

71 Most notably of course Watson *Legal transplants: An approach to comparative law* (1993). Cf also, more recently, Stapleton (fn 57 *supra*).

72 *Stewart v Botha* [2008] ZASCA 84 para 27.

“impossible comparison” mentioned have been resolved by allowing the claim; the debate is basically over.⁷³ And second because the Dutch Supreme Court certainly did not simply favour some selected policy considerations but indeed tried to do justice to the debate by extensively dealing with all the (moral) arguments raised.⁷⁴ And they did not disregard the sanctity of human life but in fact addressed that issue explicitly.⁷⁵ Of course, in the end there was a subjective preference for some considerations which led to the decision to be taken as it was. But Snyders AJA herself does exactly what she accuses her “opponents” of, that is, subjectively preferring some policies above others. She apparently just values other considerations higher.⁷⁶

But all that is not my main concern here. What the foregoing shows is that the debate has suddenly moved away from arguments into rhetoric. In my view, the reason for that is, as stated, that arguments in the end do not decide these hard cases; it is the policy decisions based on culturally determined basic notions underlying a legal system that do. These include more or less progressive ways of dealing with life and death issues, like abortion; the general scope of protection of tort law and the law of damages; etcetera.⁷⁷ The statement quoted above clearly points to a political decision being taken, and not to one based on comparative law notions, weighing the pros and cons of all the arguments. In fact, the weight of the arguments is without relevance because the predominant political view will win anyway. Even more so, because Snyders AJA holds a different political view on this matter than the Dutch Supreme Court, the justices in the Dutch court could never have balanced the policy considerations correctly according to her (South African) standards and still have reached their own (Dutch) solution.

A second quote from the same judgment further illustrates the point made:⁷⁸

“I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer . . . is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law.”

Again with respect, I must wholeheartedly disagree. Snyders AJA here in fact denies, in my view, the essence of the law. Law, and tort law in particular, is

73 As stated before, the legislator decided not to intervene. In legal literature there have of course been criticisms but in essence most authors feel the decision is justified or at least defensible and the reasoning is considered to be not all that bad given the difficulties that had to be faced.

74 The court was backed up by a very extensive and comparative preliminary advice to the court, written by *Procureur-Generaal* Hartkam. See *Kelly* HR 18 March 2005, 2006 *Nederlandse Jurisprudentie* 606.

75 Cf Hartlief 247. Of course, I am inclined to say, those parts of the judgment are being criticised: see Loth 28–30; Hartlief 248.

76 Cf also Chürr 2009 *THRHR* 168, who states that a claim for wrongful life “cannot be allowed”. Of course, that language (used to get to a desired result) is too strong, because in principle a claim *can* be accepted if one wanted to do so and decide to, even under South African law.

77 The statement by Van Dam 160 that, whenever the House of Lords uses public policy arguments, they dismiss a claim, supports the foregoing since the basic notion underlying English tort law is to extend tort law only incrementally, if at all, because doing otherwise would impair the notion of individual freedom too much.

78 *Stewart v Botha* [2008] ZASCA 84 para 28.

about people, their choices, human conduct and about regulating that human conduct. This is by no means different if it involves solving difficult problems. Not providing an answer because the law should not deal with certain questions equals a denial of doing justice once such a question is raised. From the moment a certain issue, however difficult it may be, has been brought up, the law (and the judges) must do what it does best, that is, decide highly controversial societal issues. It must do so without exception, and therefore also in wrongful life claims, in order to keep the members of society from taking the law into their own hands.⁷⁹

Why would an experienced and skilled jurist like Snyders AJA come to a statement like this? It might be that a phrase like this is rhetorically beautiful and (thus) compelling, as well as (and more importantly) in line with the politically motivated decision not to allow these claims. Whatever the answer might be, what is undoubtedly clear from this quote is that the validity and strength of the legal arguments used in the debate is no longer at stake. They have been brushed out of the political arena. Instead, an appeal is made to notions of morality.

12 CONCLUSION

What can be concluded from all this? Choosing solutions to “hard cases” is in the end a political issue and not one of comparative law. The choices to be made are no longer wholly legal, but at least partly also *sociological* and *political* in nature in the sense that each society and system of law gets the legal – I should say, political – decision it “deserves”, that is, the one it attracts by being at the stage it is at a certain point in time.

English law, wary as it is of tort law extending too dramatically, gets an incremental approach in this respect; it has slowly progressed into accepting a sort of “miniature” wrongful birth claim (the conventional award in *Rees*), denying all other options in this area of the law. The Netherlands, progressive as it is made out to be,⁸⁰ has developed much further by granting damages to parents and the disabled child. South African law stands on middle ground – which would fit neatly from a historical point of view – by allowing wrongful birth but dismissing wrongful life claims. It was not to be expected that a South African wrongful life claim would succeed, if only because an extension of the rules of delict in pure economic loss cases can only be accepted if there is a positive policy consideration justifying it.⁸¹ This of course squares better with the incremental approach as developed by the English courts⁸² than with the Dutch alternative, and so does the denial of the wrongful life claim. That is not a bad thing of course. South African law could have incorporated the Dutch solution but that would not have fitted well. The denial of the wrongful life claim is what the

⁷⁹ However, deciding, as Snyders AJA did in *Stewart*, *not to decide* a certain topic and *not to regulate* a certain issue (by denying a claim) is also a form of regulation because without recognition of the claim, there is no claim in law and thus no right to damages for the damaged party.

⁸⁰ See eg Mukheibir 2005 *Obiter* 753.

⁸¹ See *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) para 13, also referred to in *Stewart v Botha*, and in general Van der Walt and Midgley 70–71.

⁸² This means that the issue also hinges on the amount of space a (supreme) court will grant itself or be granted with respect to its law-making powers. When looking at tort law in the Netherlands, the *Hoge Raad* seems to be in charge, and the *Kelly* case is proof thereof.

South African legal system at this point in time can and should accept, even if the *legal arguments* from a comparative law angle might tell us differently, as I personally think they do.⁸³

⁸³ I am referring here of course to my personal subjective opinion only, taking duly note, I hope, of the warning issued by Stapleton 44–45 (that there cannot be one correct conclusion about what policy to adopt in tort law, based on comparative arguments, something which, as she states, continental comparative lawyers seem to arrive at rather often).